CPCU SOCIETY INSURING YOUR SUCCESS

Claims Quarterly

CQ

Volume 25 Number 3 July 2007

Chairman's Corner

by Robert E. McHenry, CPCU, AIC, AIS

Robert E. McHenry, CPCU, AIC, AIS, is a claims manager with the Westfield Group in Jacksonville, Florida. He earned a bachelor's degree from the University of Akron in 1973, and has served on the Board of Directors of the CPCU Society's Akron-Canton Chapter. He is currently a member of the North Florida Chapter, and in November 2005 began a three-year term as chairman of the Claims Section Committee.

Your Claims Section Committee, soon to be known as Claims Interest Group, had a tough time dealing with the facilities at Shingle Creek Resort and Golf Club in Orlando, Florida. We had to rough it through the new grounds, excellent restaurants, challenging golf course, and pool side reception complete with cheerleaders. This complex is located at the headwaters to the Everglades. Yet somehow we survived. Seriously, the site selection was one of the best ever for the Leadership Summit and National Leadership Institute.

The Sections Strategic Implementation Task Force publicly presented and promoted the new special interest section format and governance proposal. The Society's Board of Governors approved the measure. Sections will become known as interest groups. These interest groups may be combined to give economies of scale, mutual support, and disciplines such as "delivery." Please read the articles by **Kathleen J. Robison, CPCU, CPIW,** in this, and the last, *Claims Quarterly* for more details. The new governance structure will act as a resource center for the interest sections. This resource center will give all CPCUs more leadership opportunities as well as a chance to serve fellow members and our industry. Three members of the Claims Section Committee have already volunteered to serve in the new resource center.

We accomplished a lot at the Claims Section meeting. **John A. Giknis, CPCU,** and **Tony D. Nix, CPCU,** put the final touches on the Annual Meeting and Seminars breakfast. Our speaker will

Continued on page 2

What's In This Issue

Chairman's Corner

Continued from page 1

make a presentation on the unusual risks of handling claims in Hawaii. **James W. Beckley, CPCU,** presented the outline of the seminar titled, "When the Lit Hits the Fan." The seminar will review a claim from the beginning through litigation during all of the changes in information. It was a real case with a lot of interesting twists and turns.

Various members proposed three seminars for the 2008 Annual Meeting and Seminars in Philadelphia, PA. The *Claims Quarterly* editor **Robert M. Kelso, J.D., CPCU,** presented a report on the success of this publication. Circle of Excellence subcommittee members **Barbara Wolf Levine, J.D., CPCU, Eric J. Sieber, CPCU,** and **Ray A. Rose, CPCU,** went over the status of our submission. We are going for the gold again. **Arthur F. Beckman, CPCU,** gave his web site committee report including several changes to the web site. We also began the nomination process for the next section chairman.

Currently, although rumor has it a change is being considered, a committee member may serve three consecutive three-year terms and then must leave the committee for a year. John Giknis has served your Claims Section well during his three terms. He has organized the lunch seminar at every Annual Meeting for quite some time. Giknis is being recruited by the Society and new governance task force to continue to serve us all. John, please don't go too far because we want you back. Mahalo for all of your efforts and for all you have done for us.

Finally, congratulations to the class of 2007 and your conferment in Honolulu, Hawaii this September. Aloha and see you on Waikiki. ■

"Bite off more than you can chew, then chew it. Plan to do more than you can do, then do it."

—Anonymous

Don't Miss Your Claims Section Seminar at the 2007 Annual Meeting and Seminars in Honolulu

A Case Study of a Litigated Liability Claim

Tuesday, September 11 • 10:45 a.m. – 12:45 p.m.

Attendees of this lively program will watch how a case can take a whole new turn as facts and information develop throughout the litigation process. By the end of the seminar, attendees will understand why the claim adjuster and defense attorney must remain flexible during the process in order to make good decisions!

Moderator

Robert E. McHenry, CPCU
Westfield Group

Presenters

Dennis R. Fogarty, Esq.
Davis & Young

Keithley D. Mulvihill, J.D., CPCU
Rawle & Henderson, LLP

Tony D. Nix, CPCU, CIFI
State Farm Insurance

Register today at www.cpcusociety.org.

Sections Strategic Implementation Task Force Report Summary

by Kathleen J. Robison, CPCU, CPIW, ARM, AU

Kathleen J. Robison, CPCU, CPIW, ARM, AU, has more than 30 years of experience with leading claims organizations, and possesses a wide range of commercial and personal insurance coverage knowledge and applicability. K. Robi & Associates, LLC, which she founded in 2004, provides customized consultant services in the property and casualty insurance fields, including expert witness testimony, litigation management, claims and underwriting best practices reviews/audits, coverage analysis, and interim claims management.

She can be reached at (423) 884-3226 or (423) 404-3538; or at info@krobiconsult.com.

A Brief History

At the CPCU Society's 2005 Annual Meeting and Seminars, the Board of Governors created a Sections Strategic Task Force. The task force developed a strategic vision for sections. It was presented to the Board at the 2006 Annual Meeting and Seminars in Nashville, in September.

The Sections Strategic Task Force proposed the sections' strategy should be, "to position sections as a provider of readily available, high-quality, technical content to stakeholders." The level of content and delivery would vary based on the audience. To successfully accomplish the strategy, the task force recommended a series of strategic initiatives aligned with four key perspectives: Organizational Structure (OS), Leadership Development (LD), Membership (M), and Value-Added Services (VA).

The Board of Governors accepted the report and referred it to the Executive Committee to develop detailed recommendations for consideration by the Board at the April 2007 Leadership Summit meeting. The Executive Committee created the Sections Strategic Implementation Task Force to develop the detailed recommendations.

Board Approved

The Sections Strategic Implementation Task Force outlined implementation steps for each of the Sections Strategic Task Force's categories of recommendations. On April 20, 2007, the CPCU Society's Board of Governors approved and accepted the Sections Strategic Implementation Task Force report.

The Board approved the formation of the Interest Group Resource and Governance (IGRC) Task Force to manage the implementation of the various tasks recommended except for OS4—Open Interest Groups to all Society members. The Board requested that the Sections Strategic Implementation Task Force remain in existence to undertake the necessary research on OS4 and present to the Board at the 2008 Leadership Summit meeting.

The Board decided it will announce at the 2007 Annual Meeting and Seminars in Hawaii the timetable for moving from the name sections to interests groups. Until that time the title will remain "sections."

This article summarizes the Sections Strategic Implementation Task Force report and recommendations.

Task Force Members and Structure

W. Thomas Mellor, CPCU, CLU, ChFC, chaired the task force. Members of the task force were: **Karl M. Brondell, CPCU; Nancy S. Cahill, CPCU; Robert Michael Cass, J.D., CPCU; Donald William Cook, CPCU; Todd G. Popham, CPCU, CLU; Kathleen J. Robison, CPCU, CPIW, ARM, AU; Brian P. Savko, CPCU, CLU, ChFC;** and **John J. Kelly, CPCU,** as CPCU Society liaison. Tom Mellor, CPCU; Nancy Cahill, CPCU; and Kathleen Robison, CPCU, served on or consulted to the previous Sections Strategic Task Force.

The original Strategic Sections Task Force distributed its recommendations into four categories: Organization Structure, Leadership Development, Membership, and Value-Added Services. The current task force agreed on a division of work and organization structured around these four categories, and divided themselves into four teams. Each team identified steps to be undertaken in order to implement the recommendations.

Special Note: *The task force understands that the actualization of its recommended implementation process will not be*

Continued on page 4

Sections Strategic Implementation Task Force Report Summary

Continued from page 3

accomplished quickly. It will require the contributions, deliberations, and efforts of a large number of Society volunteers. It will also take time. The task force believes a two- to three-year timetable is realistic.

Organizational Structure

OS1—Re-brand Sections as Society Interest Groups

1. Authorize and implement new interest group names specifically using the words *Interest Group* in the title (e.g. *Claims Interest Group*) and formally identify interest groups collectively as *CPCU Society Interest Groups*.

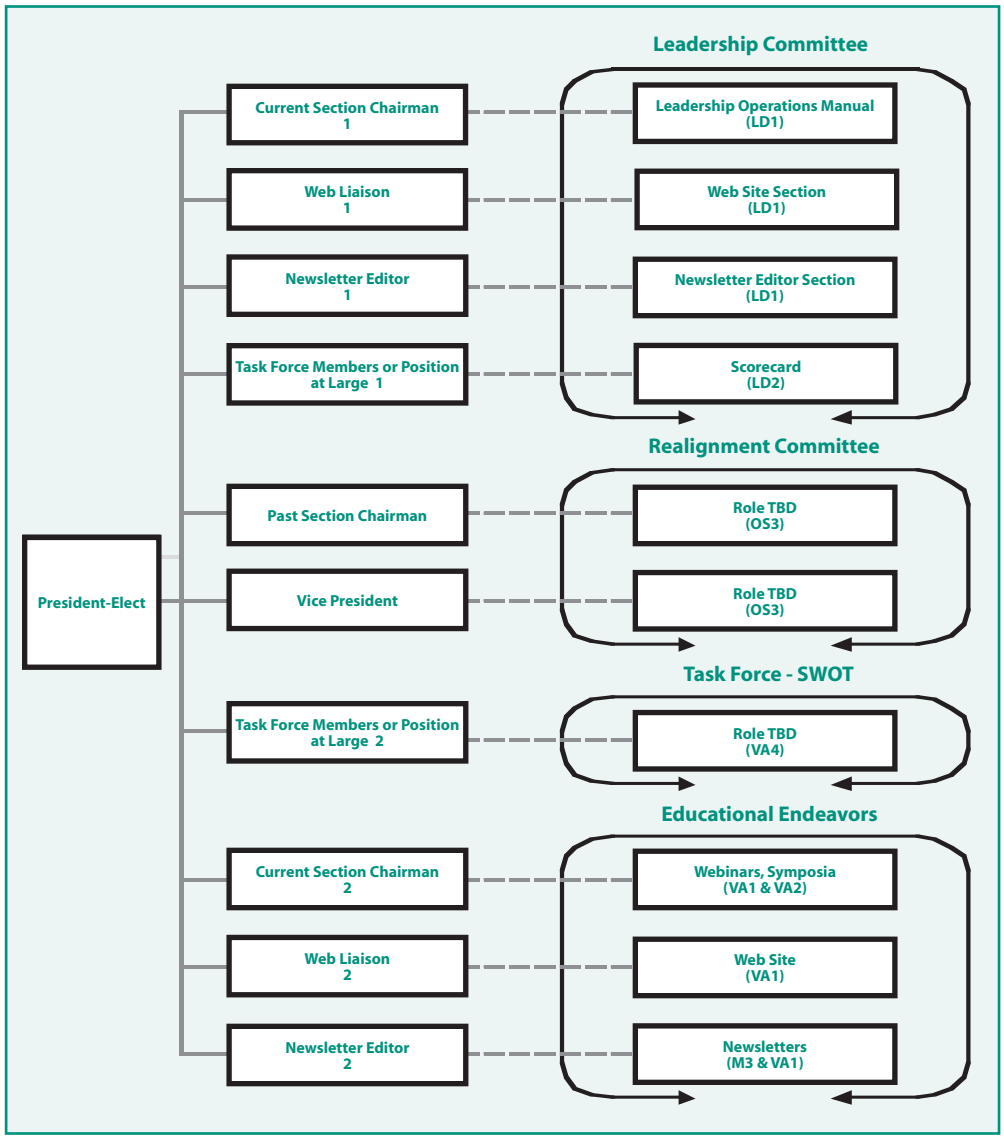
2. Determine appropriate interest groups that should exist by aligning the groups with current industry functions or by roles (such as leadership or project management).

3. Institute changes in verbiage from *Section* to *Interest Group* in all formal Society communications and materials (current sections publications, Society web site, stationery, etc.) to be effective on a specified date.

4. Communicate the changes to Society members, including impacts and rationale, via print and electronic media. This should be done in advance of the change date and also after the change date.

Special Note: *The re-branding of sections as Society Interest Groups will be announced at the 2007 Annual Meeting and Seminars in Hawaii. A timetable will then be established for items 3 and 4.*

Table 1
Proposed Interest Group Resource and Governance (IGRG) Task Force and Sub-Task Forces



OS2—Create CPCU Society Interest Group Resource and Governance (IGRG) Task Force

To manage and direct all of the changes recommended, the task force proposes the formation of the Interest Group Resources and Governance Task Force (IGRG). The IGRG's leadership and direction will provide continuity, consistency, and quality to this crucial transformational project.

The CPCU Society's president-elect will chair the IGRG. Each of the other members will be responsible for chairing a specific subcommittee dedicated to the implementation of a recommended group of tasks. (See Table 1.)

The recommended composition and responsibilities of the IGRG members are as follows:

- Society president-elect—chairman.
- Society vice president—assistant to the committee chairman/realignment.
- Two current section chairmen—leadership operations manual/ educational webinar and symposia.
- One past section chairman—realignment.

- Two current or past web liaisons—leadership operations manual and web liaison section/educational endeavors (web site).
- Two current or past newsletter editors—leadership operations manual and newsletter edition section/educational endeavors (newsletter).
- Two task force members from the 2006–2007 task force or from the 2005–2006 task force. Immediate responsibilities to include Scorecards/SWOT Analysis.

Special Note: *These recommendations encompass both the breadth and depth of sections' organization, products, services, and membership. The Sections Strategic Implementation Task Force quickly realized the enormity and complexity of the undertaking. It requires a large number of section and Society volunteers. If the reader is interested in servicing on this task force please let the Society know by e-mailing your name and e-mail address to Mary Drager at mdrager@cpcusociety.org.*

OS3—Assess Current Sections and Align them with Major Industry Functions

1. Form a representative group of section members to determine the best alignment, including the possibility of combining, broadening, or eliminating current sections, and/or fostering the creation of new groups based upon industry findings. This group should undertake a research effort that focuses on aligning groups with current industry functions. (See Table 1).

OS4—Open Interest Groups to All Society Members

1. Determine the reaction and position of companies and members to this proposed change—especially if section membership dues are incorporated into general membership dues.
2. Determine a dues policy for members who wish to belong to more than one interest group (i.e. should they be surcharged for this?).
3. Determine a dues policy for lifetime retired members who wish to belong to one or more interest groups.
4. Determine the expense impact to the Society that would probably result from a significant increase in the interest groups' collective population.
5. Determine the impact to Society administration from an organizational, staffing need, and technological perspectives that could result from a significant increase in the interest groups' collective population.
6. Examine any potential negative consequences (e.g. possible dilution of perceived value in belonging to an interest group) that might result from including interest group membership within general membership.

Special Note: *The Board requested that the Sections Strategic Implementation Task Force remain in existence to undertake the necessary research on OS4 and present to the Board at the 2008 Leadership Summit meeting. The IGRG will not be responsible for OS4.*

Leadership Development

LD1—Formalize Standard Section Leader Training and Orientation for the Chairman, Newsletter Editor, and Web Liaison. This Training Will Include an Operations Manual and an Updated List of Best Practices.

1. Form a task force to develop an operations manual on leadership requirements for interest group chairmen, web liaisons, and newsletter editors. The task force should establish a formal process for continuously updating the best practices. This should be a how-to manual on how to lead a section. The operations manual should include an overall section on the section leadership responsibilities. Within the operations manual there should be specific sections devoted to the responsibilities, tasks, checklists, timelines, etc. for the chairman, web liaison, and the newsletter editor.
2. Provide leadership training for incoming section chairmen, web liaisons, and newsletter editors. This training should occur before the person assumes his or her section leadership position. This training should occur at Leadership Summit, mid-year meetings, or chapter sponsored Society/NLI courses. Variations in leadership experience among interest group leaders should be taken into consideration when developing the leadership training. Outgoing interest group chairmen should continue to be a resource to the incoming leaders.

   Leadership training for incoming section leadership should consider that those who have no leadership experience will require both basic management training (organizing, planning, controlling, decision making, motivations, and leadership), as well as training in "virtual leading" and/or leading volunteers. Those who have prior on-the-job leadership experience may require leadership techniques for motivating volunteers and/or leading "virtual teams."
3. In addition to leadership training, specific training for incoming web liaison and newsletter editors should be established. Two task forces should be formed, one for

Continued on page 6

Sections Strategic Implementation Task Force Report Summary

Continued from page 5

the web liaison position and one for newsletter editors. The task forces should develop the training curriculums for both positions. Training could be done by Society staff in Malvern or as an online course. The outgoing web liaisons and newsletter editors should continue to be a resource to the person coming into the positions.

LD2—Create a Developmental Scorecard for Section Volunteers and Society Members. *(This is something that section members and volunteers can present to their employer evidencing the technical and developmental value of membership.)*

1. A task force should be formed to develop a "tactical scorecard," that can be used by section leadership to measure the section's progress toward strategic goals and related tasks. The scorecard criteria should be developed based on the results of the section SWOT analysis, as proposed under section VA4—Conduct SWOT analysis for each section. Each criterion should have a set of tasks, which are required to achieve the goal.

2. A task force should be formed to develop a "value scorecard," which can be used by section members to evidence the technical and developmental value of membership. Consideration can be given to expanding this scorecard to the value of membership in the Society, not just interest group membership. Development of the "value scorecard" should consider:

   a. The value to the member and the member's employer of involvement in particular activities.

   b. The role of the individual during the particular activities, i.e. leader, committee member, etc.

   c. The skills and experience obtained as a result of involvement and role in particular activities.

Membership

M1—Create Value Statements and other Communications Tools to Promote Interest Groups

1. Collect the value statements and other communications currently used by the existing sections. Assess the current state of the value statements and communications against the new interest group branding strategy.

2. Assess and incorporate branding strategy for interest groups.

3. Solicit feedback from interest groups on gaps between current state and future state (focus groups, surveys, etc.).

4. Draft language for new value statements and communications, targeting the increased value (technical content, reduced cost, etc.) to existing members and incorporate new value statement and communications messages into society publications.

M2—Establish Affiliations between Interest Groups and other Industry Organizations (e.g., PLRB, The "Big I," and RIMS)

1. Identify key organizations to focus our research by soliciting feedback from sections and the CPCU Society.

2. Assess the current collaboration between interest groups and key industry organizations (focus groups, surveys, etc.).

3. Assess the current collaboration activity against new opportunities with joint sessions with interest groups and key industry organizations.

4. Draft and validate an action plan to build collaboration.

5. Confirm plan with interest groups and industry organizations.

6. Publicize new direction in CPCU Society publications.

M3—Refresh the Interest Group Newsletters

1. Examine alternative publication options to current newsletters, including the potential use of a magazine-styled compilation of comprehensive interest section information and articles in a journal-style publication.

M4—Designate Liaison(s) to Promote Interest Group Benefits to Chapters, Major Employers, and the Insurance Services Community

1. Identify the key major employers and insurance services community organizations.

2. Assess the current outreach underway between interest groups and local chapters, major employers, and the insurance services community (focus groups, surveys, etc.) and identify gaps.

3. Identify responsibilities of a liaison and prepare training conducted for liaisons by the Society.

4. Identify liaison volunteers, establish a process for selecting them, and introduce and promote them through various industry publications.

M5—Strengthen Connection between CPCU Society and Accredited Risk Management and Insurance Degree Programs

1. Identify the key major insurance degree programs to focus our research by soliciting feedback from sections and CPCU Society.

2. Assess current outreach underway between sections and key insurance programs (focus groups, surveys, etc.).

3. Identify new collaboration opportunities with joint sessions between interest groups and industry organizations and develop and implement an action plan to institute collaboration between interest groups and insurance degree providers.

4. Publicize new direction in CPCU Society publications.

Value-Added Services

VA1—Develop Consistent Format and Content Standards for Core Interest Group Offerings (Newsletter, Web, Symposia)

1. Create a committee for each—newsletter (this dovetails with M3 and might best be accomplished there), web, symposia. Each committee should be composed of section members responsible for the format. Each committee chairman would be a member of the Interest Group Resource and Governance Committee.

2. The committee establishes guidelines and templates for each: newsletter, web, symposia.

3. The committee is responsible for coaching and mentoring the sections on the guidelines and templates.

VA2—Expand Delivery Methods of Technical Content

1. Establish a vehicle, guidelines, and templates for webinars. The webinars would focus on pertinent and timely topics that are delivered in one hour or less. The structure should be such that it will easily facilitate the rapid development and presentation of a topic.

2. Establish guidelines, templates, and vehicles for teleconferences and videoconferences.

3. Expand delivery of technical content by partnering with other insurance organizations and presenting at their meetings.

4. Each committee outlined in VA1 would also be charged with the responsibility of identifying avenues to expand the delivery methods of technical content.

VA3—Encourage Interest Groups to Convert Highest Rated Annual Meeting Technical Seminars into Symposia

1. Within 30 days of the Annual Meeting and Seminars, the Interest Group Resource and Governance Committee selects three to five technical seminars. The selection is based upon the rating feedback sheets, number of persons attending the seminars, and the pertinence of the information content.

2. The Society and the section seminar liaisons will format and package the seminars making them available to the chapters and as regional meetings as in VA3.

3. The top three to five seminars would be packaged into a day of training, knowledge transfer, and held four to six months after the Annual Meeting and Seminars at three different strategic sites around the country.

VA4—Conduct SWOT Analysis for Each Interest Group; Implement Findings

1. Introduce the SWOT concept to the section chairmen during the sections leadership meeting with reference material at the Leadership Summit in Orlando.

2. At the 2007 Leadership Summit, the section chairmen would identify a committee member responsible for the SWOT analysis as a "point person" for contact.

3. Designate a SWOT coordinator to liaison and assist the section SWOT "point persons" in conducting the SWOT within each section. The SWOT coordinator would be a member of the section task force, and ideally would transition to serve on the initial Interest Group Resource and Governance Committee. This group would develop a SWOT template to be used by all sections. In addition, they would develop and conduct a SWOT training program.

4. Before the 2007 Annual Meeting and Seminars, a SWOT training program for section chairmen and all other interested section committee members would be conducted through an appropriate medium.

5. At the 2007 Annual Meeting and Seminars, the section chairmen will conduct the SWOT analysis with his or her committee and complete the SWOT templates.

6. Society Interest Group Resource and Governance Committee would review, coordinate, encourage, and challenge each interest group to then create interest group goals based upon the SWOT. ■

Introduction to Metadata

by Laurie A. Weiss

Laurie A. Weiss is a partner in Fulbright & Jaworski L.L.P.'s San Antonio, Texas office, and has enjoyed an active litigation practice. Prior to joining Fulbright & Jaworski in 1988, Weiss had a 10-year career in business, including work with a service company providing computer-based risk management information services to major corporations. She is co-chair of Fulbright's Electronic Discovery and Information Management Group.

Introduction to Metadata—"DNA" of Electronically Stored Information

Metadata functions as the "DNA" of your electronic documents and e-mail. Metadata is information regarding the characteristics, history, tracking, or management of an electronic file. Most metadata is not visible to the user during routine operation of a software application. Among other things, metadata can tell you who authored or revised the document, what substantive revisions were made and when, who received the document and on what date, what law firms worked on it, and what formulas were used, for example, to create a competitive advantage in pricing products.

Metadata includes information specific to the software application and embedded within the file itself, such as tracked changes or macros in a Word document, and formulas in an Excel spreadsheet. Metadata also includes information based on the operating system used to store the electronic information, such as bibliographic information (author, date created, file names, path locations, file size, etc.); history (users who have viewed, opened, or modified a document); recipient tracking information; and prior versions.

Depending on software packages, file types, and operating system, there can be as many as 300 fields of potentially available metadata. Most are not relevant for litigation purposes. The most frequently requested fields in the context of litigation include date sent, date created, date received, subject, from, to, cc, bcc, custodian, page count, file name, title, author, comments, last access date, last modified date, file size, and directory path.

What Do You Do with Metadata Once You Have It?

In the context of litigation matters and large document productions, it is helpful to import metadata fields into a database to allow search and sorting capability. This functionality was costly in the paper world and could be argued to be work product when coding was performed by law firm staff. As metadata in electronic documents, it can be effective for searching and sorting. In addition, among other things, litigants have used metadata for the following reasons:

Reducing Volume of Documents for Review

The large volume of electronically stored information is a major factor driving the cost of electronic discovery. Metadata can be used to narrow the scope of data for review by filtering by file type, date, size, or location (e.g., custodian or departmental files).

Underlying Formulas

The reason some litigants request production in electronic format, specifically native format, is precisely so that they will have access to the metadata. Some of the document's "DNA," such as formulas in a spreadsheet, disappears once imaged or printed into paper form. In financial cases, that type of information may be critical to the requesting party.

Attribution

Metadata can trace the document's life cycle from beginning to end, from initial author through edits, and can track whose eyes have seen the document. Timelines can be reconstructed.

Recent Case Law and Rule Revisions

Until recently, courts provided little guidance regarding any duty to produce metadata. Various jurisdictions are weighing in, and local rules are being written to address form of production, including metadata.

Case Law

Williams v Sprint/United Management Co., 230 F.R.D. 640 (D. Kan. Sept. 29, 2005). In this seminal case on production of metadata, plaintiffs requested the production of Excel spreadsheets in native format, and the court ordered that the spreadsheets be produced in the manner in which they were ordinarily maintained. *Williams* at 644-56. The defendant produced the spreadsheets in electronic format but scrubbed the metadata and locked cells preventing access to the underlying formulas. *Id.* at 644. At a discovery conference, the court ordered the defendant to show cause why it scrubbed the metadata, locked the cells, and should not be sanctioned for such actions. *Id.* at 644-45. The court found little guidance on the issue of whether the production of electronically stored information as ordinarily maintained would require the production of metadata. *Id.* at 648-52. The court wrote:

> [b]ased on . . . emerging standards, the Court holds that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order. *Id.* at 652.

Williams v Sprint/United Management Co., No. 03-2200-JWL-DJW, 2006 U.S. Dist. WL 3691604 ("Sprint II"). After the December 1, 2006, effective date of the Amendments to the Federal Rules of Civil Procedure relating to electronically stored information (ESI), the *Sprint* court reached a different decision in addressing a motion to compel production of metadata. In *Sprint II*, the court declined to order the defendant to produce e-mails in native format (i.e., Microsoft Outlook or Lotus Notes) and with metadata because: (a) the defendant had already produced the e-mails in non-native format and under amended Rule 34(b), parties are only required to produce documents in a single format; (b) production of metadata would have made it difficult and potentially impossible to redact privileged information; and (c) the plaintiff did not make a sufficient showing as to why it needed metadata. The lesson of *Sprint II* may be that requesting parties seeking metadata must raise the issue as early as possible and, in any event, before the responding party has produced information without accompanying metadata.

Kentucky Speedway, LLC v NASCAR, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028. In *Kentucky Speedway*, the court held that there is a presumption against the production of metadata in the absence of an agreement between the parties or a court order. The plaintiff sued automobile racing associations under the Sherman Act for monopolizing the national stock car racing events. Relying on *Williams*, the plaintiff sought the metadata for all electronic documents produced by the defendant. *Id.* at *20. Referencing Principle 12 of the Sedona Principles, the court held that there is a presumption against the production of metadata, especially since the plaintiff failed to show a "particularized need" for metadata. *Id.* at * 22-23. *See also Wyeth*, No. 06-222-JJF, 2006 U.S. Dist. LEXIS 79761, at *4-5. (Relying on the presumption in Delaware against the production of metadata as well as the "emerging standards of electronic discovery," the court held that there is not a requirement to produce metadata where the parties have not agreed to such a production and the requesting party has failed to demonstrate a "particularized need.")

Hagenbuch v 3B6 Sistemi Elettronici Industriali S.R.I., No. 04 C 3109, 2006 WL 665005 (N.D. Ill. Mar. 8, 2006). In this case, the court held that the defendant, by turning over .TIFF documents (an image or "snapshot" of the electronic document) instead of electronic media, which the plaintiff previously viewed on the defendant's premises, had "altered the format and characteristics of the electronic media by converting it into .TIFF format—essentially creating new documents. . . " *Hagenbuch* at *2. TIFF is an acronym for "tagged image file format" and is a widely used industry standard file format for producing electronic data in litigation. In discussing the case, the court found that the .TIFF images lacked metadata that would enable the plaintiff to track the history of the documents, their creation and modification dates, whether e-mail contained attachments and even to whom e-mails were sent. *Id.* "The parties agree that, unlike the original electronic media, the .TIFF documents do not contain information such as the creation and modification dates of a document, e-mail attachments and recipients, and metadata." *Id.* The court felt that the plaintiff's ability to search the documents was also a factor. *Id.* at *4. This court was not swayed by the argument that .TIFF images allow the producing party to brand or number the image. *Id.* at *3. A viable alternative to production of metadata may have been to produce the .TIFF files along with text files allowing searching capability, with an agreed-upon database of limited and relevant metadata fields.

Local Rules Adopting or Expanding Amendments to Federal Rules

Federal, state, and local rules are addressing electronically stored information and production of metadata. If not specifically mentioning metadata, some rules are requiring parties to produce data in ways that may include at least some metadata. Check your local jurisdiction for applicable rules.

Key Metadata Considerations in Litigation

Key metadata considerations include methods for identifying, preserving, accessing, reviewing, and producing metadata fields. Potential pitfalls include changes to metadata that may occur when accessing files non-forensically; copying to another location; drag and drop; burning to CD or DVD; truncating original path; forwarding e-mail messages; or moving data between different operating systems. As a requesting party, be as specific as possible about metadata fields that are being requested, and be specific about requests for preservation, review, and format of production. As a responding party, develop a forensically sound, defensible strategy for preservation, collection, and potential production of metadata. ■

Claims Handling of the Future

by James D. Klauke, CPCU, AIC

James D. Klauke, CPCU, AIC, is an executive general adjuster for Crawford Technical Services, Global Division of Crawford & Company in St. Louis, MO. A CPCU since 1985, he has 40 years of adjusting experience and is a member of the St. Louis Chapter. In 2002, he was named "Claims Professional of the Year" by *Claims* magazine. He is a member of the Senior Resource Section Committee and past chairman of the Claims Section Committee. He has conducted seminars, classes, and luncheon presentations for various groups, including organizing and leading seminars at the Society's Annual Meeting and Seminars.

"People often overestimate what will happen in the next two years and underestimate what will happen in ten."

—Bill Gates, Microsoft Founder

What will the future of claims handling be 20, 30, or 50 years into the future? What sort of tools can we expect from science to make our jobs easier, or harder? Will there be adjusters at all or will most of the claims function be handled by computer robots or very low-paid clerks? Will producers be required to be claims people as well; and will claims people also become producers? Will agents and brokers take over the mundane claims, leaving only the large losses to the carrier's adjusters?

These are all very interesting questions that might be hard to answer at this time. However, this writer suggests that to provide the answers, we must first look to the past.

I started my claims career on July 6, 1968, at Royal Globe Insurance Company in St. Louis as an adjuster trainee. Turnover was a problem that year, and by August, I was the senior person on the staff. My prior job was police work, and it seemed like it would be an easy jump to claims.

My first two weeks were spent reviewing claims files of the other adjusters in the office. I was then considered trained and ready to begin adjusting claims. I was given an auto accident claim notice, a company car, a pencil, and a pad of notepaper. I was told to investigate the facts and submit a report similar to the ones I had been reading. I found my first claim both interesting and amusing. You see, the accident was also the last investigation I had performed as a police officer. I felt that gave me an edge, so I accepted the claim.

When the investigation was completed, I submitted a written report on a memo form with carbon paper to make my copy. You see, we had no dictation equipment. In fact, the manager had the only dictation machine, which had a drum and a flexible plastic membrane about 10 inches long and two inches wide that went around the drum. The needle, much like a record player, etched the sound onto the plastic. It could be used once for recording and once for listening by the transcriber.

We could not copy our reports or supporting documentation because copy machines had not made it to the insurance company office as yet. However, we had a machine that we could place a document on glass with another piece of special paper. After a bright light was used for almost a minute, the extra piece of paper could be put in a tube with ammonia for five minutes. This would produce a very light blue copy of the document. Only the most important documents were allowed to be copied, certainly not a claim file.

In addition to these missing tools, we had no calculators, adding machines, car phones, cell phones, or fax machines, but we did have staplers. Our company cars were full-size vehicles, but were devoid of any options such as a radio or air conditioner. We had to pay for those items out of our pockets. In this new job of mine, I was paid $5,400 per year and had $100 settlement authority. The office had an additional $2,400 authority on liability claims and less authority on property.

Computers were not available. In fact, Univac and IBM were still working on their computers that usually filled very large, climate-controlled rooms. They spoke in very difficult languages such as "Fortran," which I was never able to figure out. Companies generally leased space on

a strategically located computer, and sent data back and forth by mail.

If you told me then that in 30 years I would have a personal computer, cell phones, and a calculator, I would have asked what they were before I laughed. It was not even imaginable at that time that such things would be invented in my lifetime. Cell phones were the imagination of Hollywood in the Buck Rogers movies.

"Prediction is very hard, especially when it's about the future."

—Yogi Berra

Three of the most important advancements in my career to date are the calculator, the copy machine, and then the computer. The first calculator I saw was a funny machine with levers and a round disc and a crank to turn the disc. You typed in the number and then turned the drum the number of times to get the number you were looking for. Eventually there came the Texas Instruments calculator for more than $100, in those days equal to a house payment. The same item today would sell for a few dollars and are frequently given away as marketing gifts. This was in the early 1970s.

Next came the copy machine. Printing stores used the early machines. It was in the mid-1970s that I remember having one in the office. They were unreliable and broke down every other week. Only then were we able to send copies of loss documentation to the home office. Fax machines arrived after the copy machines as they were based on similar technology.

I remember seeing the first computer in the office when I was an examiner for Kemper in 1978. It merely took in data and sent it overnight to the mainframe at the home office. The computed data came back the next morning. It was used mostly for file control and home office audit purposes. Everyone was concerned that the magic machine would require much more work rather than make it easier. Finally, I received my first laptop computer in 1990. The laptops had been on the market for a few years at that time.

It is now 2007 and we all have a computer, regularly surf the Internet for both business and pleasure, have one or more cell phones, and only use our calculators for reconciling our check books. What will we have to work with in 2020, 2030, and 2050?

In a recent book titled *Visions*, author Machio Kaku suggests that the science industries will explode with new discoveries over the next 50 years. Computer power has been under Moore's Law for the past 50 years, which means that it doubles every 18 months. In the next 50 years this speed will increase. He predicts that computers will become so cheap that sensors will be imbedded in rooms so when you walk in you can talk to your computer. It will sense your needs and take your commands using the sensors and hidden video cameras.

In short, it will be HAL in the movie "2001 A Space Odyssey." Robots will follow your verbal instructions to clean the floor and cook your meals, remind you of your agenda, and tell you who you forgot to put on your agenda. They will maintain information on your female, or male, friends and advise which one is available for a date.

Money in the form of cash will all but disappear. Everyone will use smart cards and digital money. In 1990, the $4 trillion in U.S. circulation was already just 10 percent in cash. Claims will be paid by direct deposit, and claim checks will be a thing of the past.

With all these and many more increases in technology, the speed of transactions and the claim process will continue to grow. These changes will force the adjuster of the future to work ever faster and more efficiently.

You will input the offer to settle, and your computer will contact the insured computer. The computers will settle the claim, get the settlement document, and complete the payment transaction. You will already have moved on to the next claim, and the insured will be completing the repair work. The insured's computer will check with the contractor's computer to make sure all the work was completed, check out the workmanship with the video cameras, and pay the contractor.

Contents claims will be a complete computer claim from start to finish. The insured computer will maintain records with full details of all property owned by its owner. When the loss occurs, the computer will use the video sensors to prepare and present the claim to the insurance company computers. The company computers will review the video and data and pay the claim under the guidelines previously set by the carrier. Then, the insured's computer will sense what the insured wants to replace and order it online through the Internet.

Business interruption claims will be even easier. The insured's computer will be directed to provide the necessary data to the forensic accountant's computer for review. The accountant's computer will already have all the history of the type of business and be able to analyze the claim in a nanosecond. The next day the report would be received by the adjuster's computer.

Does all this sound unimaginable? That is how I thought of the cell phone in 1968. And later, the laptop when the only computer at the time filled most of the floor of an office building. I just wish I could be around to see what you can't imagine. ■

"The opportunities of man are limited only by his imagination . . ."

—Charles F. Kettering (1876–1958)
Inventor

West Virginia—"Open for Business" for Insurance Companies—Changes that Will Help

by Barbara J. Keefer, CPCU

Barbara J. Keefer, CPCU, is an equity partner in MacCorkle, Lavender, Casey & Sweeney, PLLC located in Charleston, West Virginia. She is a 1980 graduate of the West Virginia University College of Law and 1999 recipient of the CPCU designation. Keefer has worked internally for several insurance companies and is now engaged in private practice. She focuses on insurance law, both in representation of insureds for carriers and representation of the carriers and their employees.

West Virginia was in the news in December 2006 for being identified as the nation's worst "Judicial Hellhole in 2005 and 2006".[1] Yet, this label fails to impart the impact that the recent reforms passed by the West Virginia legislature have had in this state. West Virginia's Governor Joe Manchin III, has coined a new slogan for West Virginia—"Open for Business." Insurance carriers need to look at changes that have taken place and consider that "Open for Business" includes insurance companies.

One of the most difficult challenges presented to the insurance carriers that did business in West Virginia was "third-party, bad-faith" law that allowed claimants and their counsel to sue an insurance carrier (and individual claims handlers) for alleged "improper or mishandling" of their third-party claims. The financial consequences of these actions were summarized in a report authored by the West Virginia insurance commissioner issued in February 2005 entitled, "Third Party Causes of Action: Effects on West Virginia Insurance Markets."[2] This 48-page report concluded that West Virginia's approach to third-party causes of action was in the clear minority, had "deleterious effects on the insurance climate of the state" and it resulted in a "climate that is overly litigious and premium rates that are higher because of it."[3]

This report resulted in the West Virginia legislature's passage of Senate Bill 418, effective July 8, 2005, which eliminated a third-party claimant's private cause of action for an unfair claim settlement practice. Subsequent to the passage of this legislation, new legislative rules were promulgated by the insurance commissioner regarding "Unfair Trade Practices" and "Administrative Proceedings Brought by Third Party Claimants." 114 C.S.R. 14 and 114 C.S.R. 76, respectively.

With the elimination of the private cause of action for third-party "bad-faith," under the provisions of West Virginia Code §33-11-4a, a third-party claimant's sole remedy for an unfair claim settlement practice or for the "bad-faith" handling of a claim is the filing of an administrative complaint with the West Virginia Insurance Commission. Such a complaint must be filed no later than one year following the actual or implied discovery of the alleged unfair claim settlement practice. *Id.* §33-11-4a(a) and (b).

Once an administrative complaint is filed, the West Virginia insurance commissioner is required to provide written notice to the party against whom the complaint is filed. Once the commissioner provides the insurer with written notice of the administrative complaint, the insurer then has a "right to cure" period consisting of 60 days in which to correct the circumstances that gave rise to the complaint or offer to resolve the complaint in a manner found to be reasonable by the commissioner. In the event that the commissioner determines that the matter has been resolved and/or corrected in a reasonable manner, the commissioner will close the complaint and no further action will be available to either the third-party claimant or the commissioner. *Id.; see also* 114 C.S.R. 76. If, however, the complaint is not resolved within the 60-day period, the commissioner is required to conduct an investigation to determine whether or not the allegations in the complaint have merit. W. Va. Code §33-11-4a(c).

In instances where the complaint is not resolved, the commissioner must conduct an investigation to determine whether the allegations regarding unfair settlement practices have merit. W. Va. Code §33-11-4a(c); 114 C.S.R. 76 §6.1. If a merit determination is made, the matter is set for a hearing. W. Va. Code §33-11-4a(d). A copy of the complaint is also forwarded to the Office of Consumer Advocate at this time. W. Va. Code §33-11-4a(d); 114 C.S.R. 76 §6. The Office of Consumer Advocate can decide whether to intervene in the case and/or represent a pro se claimant. W. Va. Code §33-2-17. A hearing on the complaint must be held within 90 days from the date of filing the complaint. W. Va. Code §33-11-4a(d); W.Va. C.S.R. 76 §7.

The purpose of the hearing is to determine whether "the person has committed the unfair claim settlement practice with such frequency as to constitute a general business practice." W.Va. Code §33-11-4a(e). A finding by the commissioner that the person engaged in "any method of competition, act or practice that involves an intentional violation of" the unfair claims settlement practices set forth in W.Va. Code §33-11-4(9) can result in the commissioner taking appropriate administrative action such as the imposition of a civil penalty, license revocation or suspension or payment of restitution. A finding of a "general business practice" can only be based on the existence of substantially similar violations contained in a number of separate claims or causes of action. W.Va. Code §33-11-4a(f). A good-faith disagreement over the liability of any party or the value of a claim is not an unfair claim settlement practice. *Id.* §33-11-4a(g).

If the West Virginia insurance commissioner determines, after a notice and a hearing, that a person or an insurer has engaged in an unfair claim settlement

practice then, the commissioner may, in his or her discretion, impose one or more of the enumerated penalties set forth in W. Va. Code §33-11-6. *See also* W. Va. C.S.R. 76 §9. Significantly, any restitution that is ordered under the provisions of W. Va. §33-11-6 cannot exceed the amount of $10,000 for noneconomic damages and may not include attorney fees and punitive damages. *Id.*; 114 C.S.R. 76, §9.2(b). Finally, orders issued by the commissioner may be appealed to the Circuit Court pursuant to the Administrative Procedures Act as provided in W. Va. Code §33-2-14 and 33-11-6(g).

The results, so far, regarding the effectiveness of the administrative procedure for the handling of third-party, "bad-faith" complaints reveal that between July 8, 2005, the effective date of W. Va. Code §33-11-4a, and September 8, 2006, 365 third-party administrative complaints were filed with the West Virginia insurance commissioner.[4] Approximately 50 percent or 180 of those complaints were resolved during the 60-day "right to cure" period. The other complaints were referred to the legal division for action.[5] Of these complaints, about 25 percent were resolved prior to a merit determination, about 50 percent were determined to be without merit, and the other approximately 25 percent were determined to have merit.[6]

While the elimination of third-party "bad-faith" has had the most significant impact on the insurance industry in West Virginia, the modification of "joint and several" liability makes both pieces of legislation worthy of a closer examination. Prior to this legislation, West Virginia followed a rule that only 1 percent allocation of fault to a party could make him/her/it liable to the plaintiff for the entire amount of the verdict. It was then incumbent on the payor to seek contribution from others found to be at fault. If such others were bankrupt, uninsured or judgment proof, the payor could bear the entire loss.

Amendments to W. Va. Code §55-7-24 modified "joint and several" liability. West Virginia Code §55-7-24 now provides that when multiple defendants are involved in a case, the judge shall enter the verdict against each defendant found to be liable based on the rules of "joint and several" liability, ***except*** for those defendants who are found to be 30 percent or less at fault. *Id.* §55-7-24(a)(2)(emphasis added). In those cases where a defendant is found to be 30 percent or less at fault, the defendant's liability shall be several only, and he or she shall be liable only for the comparative percentage of damages attributed to him or her. *Id.*

The statute mandates that "joint and several" liability must still apply in the following situations: intentional acts; conspiracy; negligent or willful discharge of a toxic or hazardous substance; and strict liability for manufacture and sale of defective products. *Id.* §55-7-24(b)(1)-(4).

West Virginia Code §55-7-24(c) also provides for a reallocation of unpaid judgments if a claimant, through good-faith efforts, is unable to collect damages from a liable defendant. According to the statutory provisions, not later than six months after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, the claimant may move the court to reallocate the uncollectible amount among the remaining liable parties. Such reallocation shall take the uncollectible amount and "reallocate" it among the other liable defendant parties, using the same percentages of fault established in the original verdict. Any order regarding such a motion shall be entered within 120 days after the date of filing such a motion. *Id.* §55-7-24(c)(1)-(3).

A defendant's share of the obligation to a claimant may not be increased by reason of allocation under this subsection if the defendant's percentage of fault is equal to or less than the claimant's percentage of fault. *Id.* §55-7-24(c)(4). Also, reallocation shall not apply at all to any defendant whose liability was less than 10 percent. *Id.*

Finally, nothing contained within the provisions of West Virginia Code §55-7-24 affected the traditional rights of indemnity, contribution, and/or subrogation. The statute applies only to causes of action that arise on or after July 1, 2005.

Unlike the empirical data that is available for third-party, "bad-faith" claims, there is no statistical information that is readily available regarding the effectiveness of the modification to "joint and several" liability. The lack of statistical data should not reduce the beneficial aspect that this modification has had on civil justice reform in West Virginia.

These changes are positive from insurance carriers' point of view. Carriers should be aware of these changes for claims handling purposes, pricing and consideration of conducting, or initiating business in West Virginia. ■

Endnotes

1. Chris Dickerson, "West Virginia Named Nation's Worst Judicial Hellhole," *The West Virginia Record,* December 18, 2006, at 1, and April 25, 2007. See also www.atr.org and "Lawsuit Climate 2007 Rating the States" published by U.S. Chamber Institute for Legal Reform by Harris Interactive, Inc.
2. See www.wvinsurance.gov/reports/pdf/third_party_causes_action_effects.pdf
3. Id. at page 46 of the report.
4. *Inside Insurance:* Episode Ten (West Virginia Offices of the Insurance Commissioner), available at http://www.wvinsurance.gov/videos/index.htm (with Andrew Pauley, Associate Counsel with the WVIOC).
5. *Inside Insurance,* supra note 2.
6. *Inside Insurance,* supra note 2.

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

by William F. Stewart

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

Isn't Global Warming Just Scientific Conjecture?

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

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

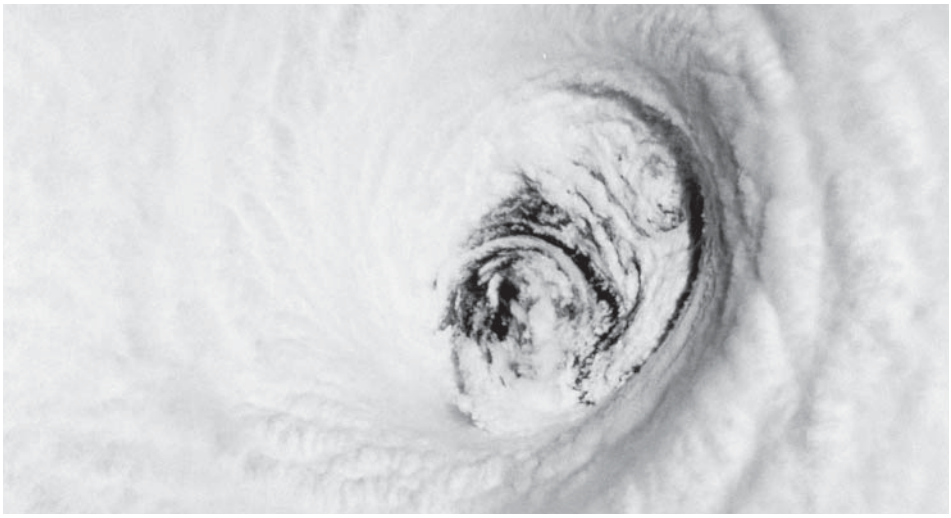
How Will Global Warming Impact the Insurance Industry?

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

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

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

While most of the focus to date has been on coastal areas, the effects of global warming will be universal. Tim Wagner, the director of the Nebraska Department of Insurance, recently offered the following assessment: "After New Orleans, it's becoming clearer that we are experiencing more frequent and more powerful weather events that pose huge challenges for the insurance



industry. . . . [but] this is both a coastal issue and a heartland issue . . . we're seeing all kinds of extreme weather in the Great Plains, including drought, tornadoes, brushfires and severe hailstorms."

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

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

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

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

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

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

Endnote

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

Debunking Neuropsychological Injury Litigation

by Peter R. Reilly

Peter R. Reilly is a complex injury analyst who evaluates neuropsychological, medical, and psychiatric litigation for defendants. His "work-product" reports demystify medical issues, develop defense and cross-examination strategy, and consider contemporary research and medical literature. Reilly assesses the technical merits of a case and advises if it is medically defensible or whether settlement should be considered.

For additional information contact Reilly directly at (386) 569-1277 or visit his web site www.DynamicClaimsSolutions.com.

Editor's note: Here is an interesting article on brain injury claims. While most of our focus is on underwriting, pricing, and programs, it's always good to be mindful of trends in the claims arena and to learn how to handle these fairly, accurately, and expeditiously for all parties involved.

Complex injury litigation often involves allegations of organic brain injury secondary to blunt head trauma, hypoxic/anoxic compromise, electric shock, or whiplash. The purported foundation for these claims is that a change in the neuro-anatomy, electrophysiology, metabolism, or neurochemistry of the brain has occurred. Commonly, the results of diagnostic studies such as MRI, CT, or EEG are presented as objective evidence of acute damage. Increasingly, however, plaintiffs are pursuing allegations of brain injury without objective test data or examination findings that correlate with their subjective reports of pathology and dysfunction. Many times these plaintiffs have been evaluated by a neuropsychologist who administered and interpreted a battery of neuro-cognitive and intelligence tests, inventories, and self-report measures.

Brain injury litigation that relies heavily or solely on neuropsychological testimony is often countered by the defendant with contradictory neuropsychological testimony. This approach commonly results in further confusion, not clarity, as neuropsychology can be highly subjective and speculative in forensic cases. While neuropsychological tests can identify areas of neuro-cognitive or other deficit, weakness, or impairment, they cannot establish the etiology of the performance variation. There is no proven objective method to determine whether the data represents acquired neuropsychological impairment or if it represents the effect of other non-organic factors also known to alter neuropsychological performance.

An alternate defense strategy to consider in this situation is to forego cognitive re-testing and to prepare aggressive cross-examination material to discredit the validity of the plaintiff's neuropsychological evidence as it pertains to a proximately caused brain injury with cognitive residua. Commonly, along with cognitive dysfunction, plaintiffs report depression, anxiety, pain, poor sleep, fatigue, and the use of a host of medications, all of which negatively effect test performance and clinical condition.

Additionally, the defendant's neuropsychological expert witness should administer psychological tests, personality inventories, and measures of effort, manipulation, and malingering to underscore the non-organic nature of the plaintiff's pathology.

The following guidelines can be used as the foundation to cross-examine the credibility and accuracy of plaintiff's neuropsychological evidence:

- Did the plaintiff's neuropsychologist confirm the plaintiff's baseline by reviewing pre-morbid medical, pharmaceutical, psychological, vocational, and academic records? This data is imperative to determine authentic functional changes.
- Did he or she review the medical records from the day of the alleged injury to confirm the type and severity of the initial injuries?
- Did he or she discuss the impact of other non-brain injury factors that may have negatively affected the plaintiff's test performance? Medical conditions, psychological overlay, medications, illicit substances, and manipulation all impact test performance.
- Did he or she discuss the plaintiff's differential diagnosis using the multi-axial diagnostic system (MADS) to confirm that other influencing factors were considered?
- How did he or she control for the accepted statistical problems with the neuropsychological tests, which limit their reliability and validity?
- Are the neuropsychological interpretations consistent with the plaintiff's ability to function in the community setting and with the neurological examination results?

Litigants alleging cognitive and psychological harm often use neuropsychological testimony in an attempt to objectify damages. However, the plaintiff's data typically results in a gross over-interpretation and over-statement of accident-related pathology. These cases are commonly fueled by clinical confusion, manipulation, and longstanding, underlying psychiatric conditions. Aggressive defense strategies are worth exploration and employment in these high-risk cases. ■

Is There Coverage Under an Insurance Policy for Construction Defect Claims?—The "Occurrence" Conundrum

by David L. Brown, J.D., and Martha P. Brown, J.D.

David L. Brown, J.D., and **Martha P. Brown, J.D.,** are partners in the Greensboro, North Carolina law firm of Pinto Coates Kyre & Brown, PLLC, where their practice is concentrated in the areas of insurance coverage, appellate practice, and construction litigation. David Brown and Martha Brown each earned a J.D. degree from the University of North Carolina at Chapel Hill. They are frequent writers and speakers before legal and industry groups concerning insurance coverage matters and tort defense issues. They are active members of the North Carolina Association of Defense Attorneys and the Defense Research Institute.

In the burgeoning arena of construction defect claims, conflict among the courts of various states has arisen regarding the issue as to whether coverage exists under policies of commercial general liability issued to the contractor, subcontractor, or builder for claims of defective construction. In fact, the state courts are unable to provide a uniform response to the preliminary inquiry as to whether construction defect claims constitute an "occurrence" under the provisions of a commercial general liability policy. This article looks at the two main, but conflicting, conclusions reached by state courts on this issue.

The Policy Language

In order to be covered under a commercial general liability (CGL) policy, the damages sought by a third party in a lawsuit filed against an insured must fall within the insuring agreement contained in the policy. The insuring agreement contained in a standard CGL policy states:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," . . . to which this insurance applies. . . .
>
> a. This insurance applies only:
>
> (1) To "bodily injury" or "property damage:"
>
> (a) that occurs during the policy period; and
>
> (b) that is caused by an "occurrence." The "occurrence" must take place in the coverage territory.

Therefore, in order to fall within the insuring agreement, the damages sought must have been caused by an "occurrence" as that term is defined in the policy. CGL policies generally define "occurrence" as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

One Line of Cases: Construction Defect Claims Damaging the Work Product of the Insured Alone Does Not Constitute an Occurrence

In evaluating the scope of coverage afforded by the insuring agreement contained in CGL policies, some state courts have recognized that there are two general types of risks arising from a general contractor's work. The first is the risk of not performing the job as it should be performed, i.e. in accordance with the requirements of plans, specifications, industry standards, and applicable building codes. This risk, known also as a business risk, should be borne by the contractor, both to satisfy his obligations under his contract to construct the specific project, as well as to satisfy his customer. Many times, coverage for this business risk is procured through a performance bond. Under a performance bond, the surety or guarantor, who may pay the claim for the faulty workmanship, has the right to seek reimbursement of the claim from the general contractor who performed or was responsible for the poor work.

The second risk that a general contractor may face is for injuries or damages suffered by parties who were not a party to the construction contract (third parties), as a result of the contractor's work. This risk, of accidental injury and damage to other persons or property, is the risk that is insured under a commercial general liability policy.

The Indiana Court in *Amerisure, Inc. v Wurster Construction Company, Inc.*, 818 N.E.2d 998 (Ind. Ct. App. 2004) provided a good example of the difference between a business risk (which is uninsurable) and an insurable risk:

> [A] business risk arises when, for example, a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly performed work must be repaired or replaced by the contractor. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is covered under a CGL policy. Therefore, injury to persons and damage to other property constitute the risks intended to be covered under the CGL. *Id.* at 1003.

Recognizing the differences between the two types of risks that a general contractor faces in performing his work, the South Carolina Supreme Court held in *L-J, Inc. v Bituminous Fire & Marine*

Continued on page 18

Is There Coverage Under an Insurance Policy for Construction Defect Claims?—The "Occurrence" Conundrum

Continued from page 17

Insurance Company that the business risks of a general contractor are not covered under a commercial general liability policy. Specifically, the Supreme Court held:

> We find these negligent acts constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence. . . . As a result, the insurance policy will not stand to cover liability for the Contractor's contract liability for a claim that was for money damages to compensate for the defective work. *L-J,* 366 S.C. 117, 123-24, 621 S.E.2d 33, 36 (2005).

In *L-J*, a general contractor was hired to prepare and build roads for a new subdivision. The general contractor hired subcontractors to perform most of the work. Four years after the roads were built, the roads had deteriorated, showing signs of cracking. It appeared that the premature deterioration of the roads was caused by the negligent acts of the general contractor and its subcontractors. The alleged negligence of the general contractor and its subcontractors included the improper preparation of the subgrade, the faulty design of the drainage system, the improperly constructed road course, which was too thin for the traffic loads, and the inadequate curb-edge detail. *Id.* at 122-23, 621 S.E.2d at 36. The South Carolina Court found that these negligent acts by the general contractor and its subcontractors were not covered under the commercial general liability policy because they constituted faulty workmanship, which caused damage to the work product alone. *Id.* at 123, 621 S.E.2d at 36.

By analyzing the specific language contained in the insurance policy at issue, the South Carolina Court found that damages to the insured's work does not fall within the coverage provided by the insuring agreement. More specifically, the general contractor's faulty workmanship, which caused damage to his work product alone, did not meet the definition of an "occurrence" under the policy. *Id.* Recognizing that claims for faulty workmanship fall within the business risks assumed by a general contractor in conducting its business, and therefore represent a risk that should not be borne by the insurance carrier, the Supreme Court held:

> Accordingly, we hold that the damage in the present case did not constitute an "occurrence." If we were to hold otherwise, the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy which is intended to insure against accidents. A performance bond guarantees that the work will be performed according to the specifications of the contract by providing a surety to stand in the place of the contractor should the contractor be unable to perform as required under the contract. Consequently, our holding today ensures that the ultimate liability falls to the one who performed the negligent work—the subcontractor—instead of the insurance carrier. *Id.* at 124, 621 S.E.2d at 37.

The South Carolina court's decision in *L-J* is representative of what the majority of states have held regarding this issue: that CGL policies provide coverage for the tort liability of a general contractor for damages to other property, ***not*** for the contractual liability of the contractor for the performance of its own work. These cases have recognized that claims of faulty construction lack the fortuity necessarily inherent in the type of risks covered by CGL policies. See, e.g., *Firemen's Ins. Co. v National Union Fire Ins. Co.*, 387 N.J. Super. 434, 904 A.2d 754 (2006) (New Jersey); *Kvaerner Metals Div. of Kvaerner US, Inc. v Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888 (2006) (Pennsylvania); *Auto-Owners Ins. Co. v Home Pride Co., Inc.*, 268 Neb. 528, 684 N.W.2d 571 (2004) (Nebraska); *Grinnell Mut. Reinsurance Co. v Lynne*, 686 N.W.2d 118 (2004) (North Dakota); *State Farm Fire & Cas. Co. v Tillerson*, 334 Ill. App. 3d 404, 777 N.E.2d 986 (2002) (Illinois); *Pursell Construc. Co. v Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (1999) (Iowa); *Amerisure, Inc. v Wurster Construc. Co.*, 818 N.E.2d 998

(2004) (Indiana); *Heile v Herrmann*, 136 Ohio App. 3d 351, 736 N.E.2d 566 (1999) (Ohio); *Hawkeye-Security Ins. Co. v Vector Construc. Co.*, 185 Mich. App. 369, 460 N.W.2d 329 (1990) (Michigan); and *U.S. Fidelity & Guar. v Advance Roofing & Supply Co.*, 163 Ariz. 476, 788 P.2d 1227 (1989) (Arizona).

An Alternative Line of Cases: Construction Defect Claims Constitute an "Occurrence"

In those jurisdictions in which it is found that construction defects claims arise from an "occurrence," the courts have emphasized the definition of "occurrence" as an "accident." Since the term "accident" is not further defined in the CGL policy, these courts have looked to the ordinary, usual, and generally accepted meaning of the word. In so doing, these courts have found that the word "accident" connotes an undesigned, sudden, and unexpected event. Where the claimed damages were not intentionally caused by the insured, the construction defect claims meet the definition of an "occurrence."

Illustrative of this line of cases is the recent decision from the Kansas Supreme Court, *Lee Builders, Inc. v Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 137 P.3d 486 (2006). In *Lee Builders*, the insured under a policy of insurance issued by Farm Bureau Mutual Insurance Company was the general contractor. The general contractor contracted to build a residential house, utilizing subcontractors to perform all of the work. After construction of the house was completed, the owner noticed that the windows were leaking. It appeared that the leaking was caused either by the negligent installation of the windows or a manufacturing defect within the windows themselves.

The Kansas Supreme Court ultimately found that there existed coverage for these claims under the CGL policy issued by Farm Bureau to the general contractor. It based its reasoning on the fact that the damages were not foreseen nor intended by the insured. The court was also persuaded by the fact that the CGL policy contained certain exclusions and exceptions, specifically the "Damage to Your Work" exclusion and the subcontractor exception to that exclusion, which it found would be rendered meaningless if all construction defect claims were found not to fall within the purview of the insuring agreement. Lastly, it found that the reasonable expectations of an insured to a CGL policy would be that it would have coverage for claims of defective construction. Based on these factors, the Kansas Supreme Court found:

> While Farm Bureau's position is accepted in some jurisdictions, we agree with the holdings and rationales of the Court of Appeals and Fidelity discussed in this opinion. Farm Bureau generally disregards the CGL policy language where an occurrence is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" and specifically disregards the prior holds of this court where "accidents" have been defined. The damage in the present case is an occurrence—an even more expansive coverage term than "accident"—because faulty materials and workmanship provided by Lee's subcontractors caused continuous exposure of the [ ] home to moisture. The moisture in turn caused damage that was both unforeseen and unintended. *Id.* at 859, 137 P.3d at 495.

Although in the minority, other jurisdictions have also found that claims for construction defects fall within the purview of the initial grant of coverage in the insuring agreement. See, e.g., *Lennar Corp. v Great Am. Ins. Co.*, 200 S.W.3d 651 (2006) (Texas); and *American Family Mut. Ins. Co. v American Girl, Inc.*, 268 Wis.2d 16, 673 N.W.2d 65 (2004) (Wisconsin).

Lessons for the Claims Professional

It is important to determine whether the state in which you are handling claims has definitively determined the issue of whether claims of faulty construction meet the definition of "occurrence" found in the CGL policy. If no definitive decision has yet been rendered on this issue, a consideration must be made regarding the court's interpretation of the definition of "occurrence" as an accident. If the state courts have found that only acts whose resulting damages were intended are not covered as an "occurrence," then it may be that the courts may ultimately find that construction defect claims may be covered as meeting the definition of "occurrence."

Even in those jurisdictions where it has been found that claims for faulty construction damaging the work product of the insured alone are not "occurrences" under the provisions of a CGL policy, the issue in determining whether coverage exists for a claim of faulty construction is to define the extent of the insured's "work product." If an insured's work product is less than the entire construction project, and the insured's negligent construction caused damage to other parts of the construction project, then there may be an "occurrence" under a CGL policy.

Lastly, this discussion does not preclude the determination that other terms, conditions, and provisions of the CGL policy may bar coverage for claims of defective construction. Even if a claim meets the policy's definition of "occurrence," it may not meet the policy's definition of "property damage," or coverage may be specifically barred under one of the enumerated exclusions. ■

Make Hawaii Your Destination of Choice!

CPCU Society 2007 Annual Meeting and Seminars
September 8–11, Honolulu, HI

Be part of one of the Society's largest meetings in history. And be sure to bring your family for the experience of a lifetime.

- ***Celebrate at Saturday's Opening Session,*** AICPCU Conferment Ceremony, and Congratulatory Reception.
- ***Hear Sunday's Keynote Speaker,*** James Bradley, best-selling author of *Flags of Our Fathers.*
- ***Choose from more than 40 exceptional educational seminars,*** and meet top leaders of the industry.

Register Now!
Visit **www.cpcusociety.org** for details and to register online, or call the Member Resource Center at 800-932-CPCU (2728), option 5.

Claims Quarterly
is published four times a year by and for the members of the Claims Section of the CPCU Society.
http://claims.cpcusociety.org

Claims Section Chairman
Robert E. McHenry, CPCU, AIC, AIS
Westfield Group
E-mail: RobertMcHenry@westfieldgrp.com

***Claims Quarterly* Editor**
Robert M. Kelso, J.D., CPCU
Kightlinger and Gray
E-mail: rkelso@k-glaw.com

Sections Manager
John Kelly, CPCU
CPCU Society

Managing Editor
Michele A. Ianetti, AIT
CPCU Society

Production Editor/ Design
Joan Satchell
CPCU Society

CPCU Society
720 Providence Road
Malvern, PA 19355
(800) 932-CPCU
www.cpcusociety.org

CPCU Society
720 Providence Road
Malvern, PA 19355
www.cpcusociety.org

Claims Quarterly

Volume 25 Number 3 July 2007

PRSRT STD
U.S. POSTAGE
PAID
BARTON & COONEY