CPCU SOCIETY INSURING YOUR SUCCESS

Claims Quarterly

CQ

Volume 26 Number 2 October 2008

Chairman's Corner

by Robert E. McHenry, CPCU, AIC, AIS

Robert E. McHenry, CPCU, AIC, AIS, is a claims specialist with the Westfield Group in Jacksonville, Fla. 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 Interest Group Committee.

Your Claims Interest Group met Apr. 5, 2008, at the beautiful Rosen Shingle Creek Resort in Orlando, Fla. It was a very productive meeting and a lot was accomplished. Shingle Creek Resort sits beside historic Shingle Creek, the headwaters to the Florida Everglades. We will miss this beautiful facility. The Leadership Summit is going back to Arizona for 2009 and 2010.

We presented two seminars in Philadelphia at the Annual Meeting and Seminars. One was titled "Ethics and Diversity," which was a panel presentation on working with a diverse workforce and was filed for CE credits. **Cecelia Foy-Dorsett, CPCU, AIC,** and **Rodney Caudill, CPCU, AIC,** were responsible for the topic, which fit the overall theme of the conference. **Andrew Zagrzejewski, CPCU, CLU, AIC,** and **Barbara Keefer, CPCU, J.D.,** partnered with the Agent & Broker Interest Group to present the other seminar, "Agents E&O Coverage and Claim Avoidance."

The CLEW and Claims interest groups partnered to present the Mock Trial. Let's just say "National Treasure" and Philadelphia are appropriate hints to describe the presentation.

Our luncheon meeting was on Sunday, Sept. 7. **Bill McCullough, CPCU, Tony Nix, CPCU,** and **John Giknis, CPCU,** secured an excellent speaker. **John Nickolas** is the vice president and CFO for the Philadelphia Phillies major league baseball team. His topic was managing the risk of a major league team. **Eric Fitzgerald, CPCU, J.D., ARe,** arranged for some Phillies gear as door prizes.

Ken Hoke, CPCU, AIC, presented an analysis of the CQ articles going back several years. The purpose was to evaluate the balance of personal versus commercial lines. He found that of 15 mixed articles, 5 were clearly personal and 13 were commercial lines. There are many articles on Katrina and litigation

Continued on page 2

What's in This Issue

Chairman's Corner

Continued from page 1

after the 2004 hurricane season. Hoke suggested putting deadlines on the Web site for authors to make submissions. I challenge each reader to submit an article to the *Claims Quarterly*.

Other news: Beginning in 2009, every Society member will be entitled to receive benefits from every interest group and will enjoy access to all their information and publications.

Donna Popow, CPCU, J.D., AIC, is our liaison with the Institutes. She reports that there were 757 new designees invited to Philadelphia for conferment. Fifteen new COMET Online Learning courses (the Commercial Insurance Series) are now available. COMET courses, which count toward Continuing Professional Development (CPD), deliver Institute content online in small, manageable pieces. Popow also discussed new Institutes' initiatives, including Shared Vision, a joint program between the AICPCU and the CPCU Society that was established to enhance the CPCU experience, beginning with CPCU candidacy and continuing through lifelong Society membership.

Seminar topics for Denver 2009 and Orlando 2010 may include "E-Discovery and IT" and "Investigation for Dummies," stressing communication with policyholders and choosing expert witnesses. We also hope to develop webinars during 2008–2009. For Orlando, John Giknis will begin checking into a luncheon speaker from Disney. While there was no discussion on lunch in Denver, perhaps a ski resort operator would be a good draw.

At the Leadership Summit, Tony Nix was nominated and approved as the new chairman-elect. He has been a very active supporter of the CPCU Society and assistant to the chairman. Nix works hard all year round to present claims education meetings. He also serves in his chapter. The "T-Man" has been in the Claims Interest Group for six years, and was unanimously elected to the position. Congratulations, Tony, and any way we can help you, please ask.

On a personal note, my three years as chairman ended after Philadelphia. It was the best experience imaginable. There are fine people who volunteer their personal time to manage the largest interest group of the Society. These people present education seminars, write articles, serve as local chapter officers and take care of their families. It is an honor to have worked with them. They won't get rid of me that easily, though. The Nominating Committee recommended that I become an Interest Group Governor and member of the Society Board. The official election was this summer and training began in August. My new official duties begin this month. My outgoing advice to you is to get active and stay active. ■

"Work while you have the light. You are responsible for the talent that has been entrusted to you."

— Henri F. Amiel

From the Editor

by Keithley D. Mulvihill, CPCU, J.D.

■ **Keithley D. Mulvihill, CPCU, J.D.,** is a resident partner in the Pittsburgh, Pa., office of Rawle & Henderson LLP, a regional defense firm headquartered in Philadelphia. Mulvihill graduated from the University of Pittsburgh School of Law in 1981. He obtained his CPCU in 2000. Mulvihill's practice focuses on defense of product liability matters, including toxic tort cases, insurance coverage, and general defense matters such as professional liability. He is active in the CPCU Society's Allegheny Chapter, and regularly provides an update on recent developments in insurance law for the chapter's newsletter.

This issue of *Claims Quarterly* contains technical articles addressing both specialized and broad industry issues. As to the more specialized issues, **William J. Warfel, CPCU, Ph.D., CLU,** and **Jeffrey J. Asperger, J.D.,** discuss a landmark Arizona Court of Appeals decision interpreting the coverage provided by builder's risk policies. The case is significant because the Court recognized that builder's risk coverage is not ordinary property coverage and therefore not subject to the Arizona Standard Fire Policy statute. The article expands on the Court's comparison of the coverage provided by standard fire and property policies and builder's risk coverage. For those of us who obtained the CPCU designation several years ago, the article provides an excellent refresher on the elements and origins of inland marine coverages.

In another specialized article, my partner, **James A. Wescoe, J.D.,** analyzes what constitutes sufficient notice of a cargo loss claim under Interstate Commerce Commission regulations. He offers practical suggestions for increasing the likelihood of prevailing on a lack of notice defense to a cargo claim. For insurance carriers who may be asserting a cargo loss claim by way of subrogation, the article is helpful to avoid being subject to the notice defenses.

As to the broader issues, **Deanne K. Sasser, CPCU, J.D., AIM,** analyzes the elements and valuation of a type of claim that most adjusters deal with on a regular basis — loss of consortium. Loss of consortium claims are asserted routinely in injury and death cases, and Sasser's article provides valuable insights into issues that arise with such claims.

Finally, **Jon Gice, CPCU, ARM,** addresses various issues raised in the handling of claims made by undocumented workers. With the increase of undocumented workers in this country, it is ever more important for claim handlers to be aware of the potentially unique issues presented by such claims.

One final note: I want to recognize the service of our Claims Interest Group Chairman, **Robert E. McHenry, CPCU, AIC, AIS,** who completed his term as chair at the 2008 Annual Meeting and Seminars. McHenry has done a truly first-rate job as chairman, as evidenced by the Claims Interest Group having been awarded Gold Circle of Excellence recognition during every year of McHenry's term. Moreover, in the last two years, the Claims Interest Group has obtained Gold with Distinction recognition. McHenry is moving on to a position on the Board of Governors, where he will undoubtedly be equally effective. ■

A Landmark for Builder's Risk Insurance Policies

by William J. Warfel, CPCU, Ph.D., CLU, and Jeffrey J. Asperger, J.D.

- **William J. Warfel, CPCU, Ph.D., CLU,** is a professor of insurance and risk management at Indiana State University. He received his doctorate in insurance and risk management from Indiana University. Warfel is widely published in applied professional journals; a number of his articles have appeared in the *CPCU eJournal*, *Risk Management Magazine*, and *The John Liner Review*, among other publications. He has served as a testifying and/or consulting expert witness in over 40 cases; most of these cases have concerned breach of contract, agent-broker liability and bad faith issues. Warfel can be reached at aadams8@indstate.edu.
- **Jeffrey J. Asperger, J.D.**, is the principal and founder of Asperger Associates LLC. His practice includes the handling of complex and multiparty litigation involving negligence, product liability, contract, and commercial liability, among other areas. Asperger earned a bachelor's and master's degree from Kent State University and a J.D. from The John Marshall Law School in Chicago. In the legal case discussed in this article, he served as lead coverage counsel for the insurer. Asperger has served as lead coverage counsel in a number of insurance cases.

Editor's note: This article is reprinted and has been edited for length with permission from *Risk Management Magazine.* The article originally appeared in the February 2008 issue of *Risk Management Magazine.*

Liberty Insurance Underwriters, Inc. v Weitz Co., LLC, 215 Ariz. 80, 158 P.3d 209 (2007)

The Weitz Company was the general contractor for a project to erect four dormitory buildings at Arizona State University. Consistent with the custom and practice and Occupational Safety and Health Association (OSHA) fire safety requirements, the applicable builder's risk policy contained several protective warranty endorsements (e.g., maintain adequate fire extinguishers on site, conduct a fire watch during all welding operations or other hot processes, inspect for fire hazards at the end of the work day, etc.). A breach of a protective warranty automatically renders the coverage null and void. In this particular case, a subcontractor's employee was performing "hot work" operations using a blowtorch to cut and weld structural steel supports for the roof of a dormitory building. As a result of the cutting and welding, the combustibles in the immediate area were ignited and spread to destroy the entire dormitory building and caused damage to adjacent property.

According to a written statement provided by the subcontractor's employee subsequent to the fire, he was performing this "hot work" alone, there was no one providing a fire watch for his work, and he did not have a fire extinguisher either with him or in the vicinity. The subcontractor's employee attempted to extinguish the fire with a jug of water, but this attempt was unsuccessful. A co-worker summoned by the subcontractor's employee after the fire started ran to another floor of the building to find a fire extinguisher, but the fire spread unchecked, destroying the dormitory building and causing damage to the adjacent property. Based on these statements, it was clear that several protective warranties in the builder's risk policy were breached.

In contending that coverage was available under the policy, the Weitz Company challenged the legal validity of the protective warranties. It contended that the policy constituted property insurance rather than inland marine insurance and therefore had to be consistent with the Standard Fire Policy (SFP). Arizona is one of about 29 SFP jurisdictions. Weitz contended that a protective warranty conditions coverage on compliance with terms and conditions not found in the SFP and, thus, is inconsistent with it, detracting from the coverage required to be provided by the SFP.

Hence, Weitz contended that Liberty could not rely on the breach of a protective warranty to defeat coverage otherwise provided by the builder's risk policy. Liberty contended that the policy constituted inland marine insurance and therefore any conflict with the SFP was moot. In all SFP jurisdictions, an inland marine policy is statutorily exempted from complying with the terms of the SFP.

Without engaging in any factual analysis concerning whether the policy was constituted inland marine insurance or property insurance, the trial court summarily ruled that the policy is not an inland marine policy. In a landmark decision filed on March 27, 2007, the Arizona Court of Appeals, Division One, overturned the trial court decision and ruled that the policy constitutes an inland marine policy.

A Landmark Decision

Like virtually all states, Arizona has adopted the nationwide inland marine definition. This definition includes four general classes of property, one of which is "Commercial property floater risks covering property pertaining to a business … Builder's risks and/or installation risks covering interest of … contractors, against loss or damage to machinery, equipment, building materials or supplies, being used with and during the course of installation, testing, building … Such policies may cover at points or places where work is being performed, while in transit and during temporary storage or deposit, of

property designated for and awaiting specific installation, building … " is a subclass within this general class.

The guidelines further stipulate that (1) "Such coverage shall be limited to builder's risks or installation risks where perils in addition to fire and extended coverage are to be insured," and (2) "if written for account of a … contractor the coverage shall terminate when the interest of the … contractor ceases."

In ruling that the Weitz policy constituted inland marine insurance as opposed to property insurance as a matter of law, the Arizona Appellate Court relied upon the presence of two coverage features customarily associated with inland marine insurance that were contained in the policy. Both of these coverage features are referenced in the guidelines pertaining to coverage for builder's risks and/or installation risks and, thus, are codified in the Arizona statute.

First, coverage terminates under the applicable policy when the interest of the contractor ceases (i.e., upon completion of the building, at which time the owner takes possession). This provision is consistent with inland marine insurance as opposed to property insurance. An inland marine coverage form is flexible and adaptable with respect to the terms of coverage including, for example, the time period for which coverage is applicable, such that the coverage form is responsive to changing circumstances and provides coverage consistent with an exposure to loss that is not static—the parameters of the exposure to loss are unknown on the inception date of coverage. Inland marine insurance is an outgrowth of ocean marine insurance. In the case of ocean marine insurance, coverage terminates upon the completion of the voyage—a parameter that is unknown when coverage commences. For this reason, an expiration date as such is not identified in the declarations of an ocean marine policy.

Similarly, while the builder's risk policy contained an expiration date, the coverage form allowed for some flexibility in terms of the policy period. Coverage may terminate before the expiration date if, for example, the owner or buyer accepts the property before this date.

In emphasizing the presence of this coverage feature, the Arizona Appellate Court distinguished this case from 1993's *Village of Kiryas Joel Local Development Corporation v Insurance Company of North America*, in which the question of whether cancellation of a policy prior to the loss was defective hinged on whether the applicable builder's risk policy constituted inland marine insurance or property insurance. There were statutory restrictions on grounds for cancellation that applied to property insurance but not to inland marine insurance. In holding that the applicable policy constituted property insurance as opposed to inland marine insurance, the U.S. Court of Appeals, Second Circuit, noted that coverage under the policy did not terminate upon completion of the structure or receipt of certificate of occupancy.

Second, the Weitz Court relied upon the fact that coverage under the applicable policy included perils in addition to fire and the extended coverage perils, an apparent reference to the breadth of coverage provided under the applicable policy in terms of coverage for the perils of transportation. Such breadth of coverage is consistent with inland marine insurance as opposed to property insurance.

While the builder's risk policy excludes causes of loss that pertain to exposures that are clearly uninsurable (e.g. flood, wear and tear) or are more appropriately addressed under a specialty insurance coverage form (e.g., loss caused by dishonest acts of employees of the policyholder is excluded; this exposure is more appropriately addressed by an employee dishonesty policy), the exclusions are carefully defined and limited so as to preserve broad coverage while property is in transit and exposed to transportation perils.

Other coverage features customarily associated with inland marine insurance as opposed to property insurance were not considered by the Arizona Appellate Court because these coverage features are not specifically identified in the Arizona statute. However, the court noted that these other coverage features may be relevant in the event a case is submitted to a fact finder. The presence of these other coverage features, or the lack thereof, in a builder's risk policy may create a factual issue in terms of whether the policy constitutes inland marine insurance as opposed to property insurance.

Other Coverage Features

Other coverage features customarily associated with inland marine insurance also are contained in the applicable builder's risk policy:

- Coverage under the applicable policy is contingent on adherence to warranties, the breach of which automatically voids coverage. In ocean marine insurance, the potential magnitude of the risk of loss is so substantial that the exposure to loss is uninsurable in the absence of warranties. The character of the vessel and its equipment for the particular cargo or voyage are fundamental to the underwriter in arriving at a decision whether or not to accept the risk and in establishing the premium to be charged. Thus, for example, the policyholder must warrant that the vessel is "seaworthy." Coverage is automatically void in the event that the warranty is breached.

  Similarly, the builder's risk policy contained a fire extinguisher warranty that requires the maintenance of an adequate number of fire extinguishers on the premises at all times; a fire watch warranty that requires an

Continued on page 6

A Landmark for Builder's Risk Insurance Policies

Continued from page 5

employee with a fully operational fire extinguisher to observe welding or other hot process during the operation and for at least 20 minutes thereafter; and a daily inspection warranty that requires daily inspections for the purpose of uncovering fire hazards. The potential magnitude of the risk of loss associated with the erection of a dormitory facility on a major university campus is substantial. Inclusion of protective warranties in the policy made it possible for Liberty to provide coverage at a reasonable cost for an exposure that otherwise would have been uninsurable.

- Coverage under the applicable policy includes coverage for property exposures that are mobile, or temporal, in nature. In the case of ocean marine insurance, coverage is provided to shippers and vessel owners (i.e., carriers) for ocean shipments of cargo. Ocean marine insurance was designed to cover property in transit on the sea.

  The builder's risk policy includes $100,000 of land-based transit coverage for materials and supplies while being transported from an off-premises site to the university campus.
- Coverage under the applicable policy includes coverage for remote losses beyond direct damage to property. In ocean marine insurance, coverage is provided not only for direct damage to property (e.g., hull insurance encompasses direct damage to the vessel and its equipment), but also for financial losses that are remote in nature. An ocean marine insurance policy includes a sue, labor and travel clause under which, for example, expenses incurred by the insured to prevent an imminent covered loss are addressed.

  The builder's risk policy includes substantial coverage for a range of financial losses that are remote in nature, such as $100,000 of accounts receivable coverage; coverage for added costs related to impaired collections; $25,000 of valuable papers and records coverage; coverage ($25,000) for a contract penalty imposed on the policyholder for failure to meet a "deadline;" coverage for expediting expense incurred by the policyholder to prevent a delay that otherwise would have resulted because of direct damage to covered property caused by a covered cause; and $25,000 of computer equipment, data and media coverage.
- Coverage under the applicable policy includes coverage for non-owned property in the care, custody, or control of the insured for which the insured is legally liable. In ocean marine insurance, coverage is provided for the liability exposure faced by the carrier (i.e., the vessel owner) in connection with loss to cargo in its care, custody or control while being transported by the vessel.

Inclusion of protective warranties is in the interest of both general contractors and insurers. Absence of such warranties would render the exposure uninsurable and result in a higher incidence of construction accidents, making many construction projects economically infeasible.

The builder's risk policy provides substantial coverage for non-owned property in the care, custody or control of the insured for which the insured is legally liable. First, coverage property is specifically defined to include not only property owned by the insured, but also property of others for which the insured is legally liable. Second, the $25,000 coverage extension pertaining to computer equipment, data and media includes not only owned property, but also non-owned property for which the insured is legally liable. Defense coverage is implied under the policy (i.e., the "duties in the event of loss" condition specifies that the insured is not authorized to admit any liability without the consent of the carrier, which means that the carrier reserves the right to contest a suit alleging liability on the part of the insured—presumably at the expense of the carrier).

All of the coverage features associated with inland marine insurance need not be present for a builder's risk policy to qualify as inland marine insurance as opposed to property insurance, and the presence of a single coverage feature per se does not automatically transform what otherwise would be property insurance into inland marine insurance. These coverage features must be collectively considered in determining whether a builder's risk policy constitutes inland marine insurance as opposed to property insurance.

Preserving Affordable Coverage

Because the risk of loss that is insured under a builder's risk policy is substantial, particularly in the commercial arena, insurers typically issue such policies on an inland marine coverage form. Inclusion of protective warranties is in the interest of both general contractors and insurers. Absence of such warranties would render the exposure uninsurable and result in a higher incidence of construction accidents, making many construction projects economically unfeasible.

For such warranties to be upheld in SFP jurisdictions, at a minimum, insurers and brokers must carefully design the policy to meet statutory requirements for inland marine insurance. Meeting these statutory requirements entails the inclusion of certain coverage features in the policy. An abundance of these coverage features likely will tilt resolution of a dispute between an insurer and a policyholder in favor of the policyholder. *Liberty International v the Weitz Company* et al. bodes well for the continued availability of comprehensive builder's risk insurance at an affordable price. ■

Damages Allowed in a Civil Action for Loss of Consortium and Services

How Much Is Your Marital Relationship Worth?

by Deanne K. Sasser, CPCU, J.D., AIM

■ **Deanne K. Sasser, CPCU, J.D., AIM,** is an attorney for State Farm Litigation Counsel in Crown Point, Ind. She is a member of the Indiana Bar Association, the Illinois Bar Association, the Northern District of the United States District Court, Lake County Bar Association, the Defense Trial Counsel of Indiana and the CPCU Society.

What goes into a marriage?

In this country, more than two million couples marry each year.[1] Every marriage is entered into with the hope that it will last a lifetime. In the typical wedding, the couple exchanges the following wedding vows: "for better or worse … for richer or poorer … in sickness and in health … 'til death do us part."[2] The institution of marriage embodies certain essential elements and duties. Some of these elements of marriage have been found to be so important that courts have held that a marriage entered into without them is invalid. Under common law, the duties of husbands and wives were rigidly defined by gender. The husband had a duty to financially support his wife, and the wife had the duty of providing domestic services to her husband.[3] However, in the 1960s, the courts struck down many of these ideologies and made the duties of husbands and wives more gender neutral.[4] The courts have also noted that the duty of spouses also includes providing social companionship, including sexual companionship, to the other spouse.[5] It is fundamental that the relationship between husband and wife impose on each of them certain legal marital duties and gives each of them certain legal marital rights.[6] It is clear that these duties and obligations within a marriage carry significant legal weight and value.

What if the marriage suffers a loss in "sickness and health" that was caused by another?

If someone is injured as a result of the negligence of another, the injured party has the legal right to file a civil cause of action for his/her damages. Likewise, a spouse of the injured party may also suffer damages as a result of the accident through loss of consortium/services. Loss of consortium/services claims are based on a recognition of a legally protected interest in marital relationships.[7] Loss of consortium/services is more than a loss of the overall happiness within the marriage.[8] The basis for recovery is an interference with the continuance of a healthy and happy marriage and an injury to the conjugal relation.[9] Some courts have made a distinction between a claim for loss of services and loss of consortium. Loss of services is exactly that, tangible and identifiable services provided by a spouse. These services can include cutting the grass, shoveling the snow, doing the laundry, cleaning the house, and a whole host of the many shared duties spouses provide to one another within the marriage. Loss of consortium includes not only sexual relations, but also intangible elements of companionship, love, care and affection.

What evidence is needed to establish a loss of consortium/services claim?

To establish a claim of loss of consortium/services, the consortium/services plaintiff has the burden of proving the following elements:

(1) That the defendant is liable to the plaintiff.

(2) That the consortium/services plaintiff suffered damages or loss because of the injury to the plaintiff spouse.

(3) That the defendant's negligence to the plaintiff spouse was the proximate cause of any damages or loss sustained by the consortium/services plaintiff.[10]

The burden of proof in these cases is the same as any other civil action — a preponderance of the evidence. A typical jury instruction in a loss of consortium/services claim states:

Continued on page 8

Damages Allowed in a Civil Action for Loss of Consortium and Services

Continued from page 7

> "If you find from a preponderance of all the evidence that defendant is liable to the consortium plaintiff, you must then decide the amount of money which will fairly compensate [him] [her] for the reasonable value of the loss of services, society and companionship of the spouse and such loss, if any, which is reasonably certain to occur in the future.
>
> "You must decide whether plaintiff proved these elements of damage by a preponderance of the evidence relating to damages. Your decision must be based on the evidence relating to damages and not on guess or speculation."[11]

In order to evaluate the extent of the loss of consortium/services claim, the jury may take into consideration the quality of the marital relationship before the injury and the severity and length of the injury to the injured spouse.[12] Evidence of the monetary value of the lost services and society of a spouse is not necessary, and when the fact they were lost is shown, the assessment of compensation for their loss is left to the sound discretion of the trier of fact.

Is a loss of consortium/services claim an independent or a derivative claim?

A loss of consortium/services claim can be classified as both an independent and a derivative claim. In one respect, a claim for loss of consortium/services is derivative in nature.[13] This is true because a cause of action for loss of consortium/services derives its viability from the validity of the claim of an injured spouse against a wrongdoer.[14] Therefore, a loss of consortium/services claim is only viable if the injured spouse's claim is viable against a tortfeasor. Because the loss of consortium/services is derivative in nature, it is also subject to any percentage of fault arguments. As such, any fault attributable to the injured spouse will also be applied to the loss of consortium/services spouse. A typical jury instruction in a personal injury claim states:

> "A claim for loss of consortium is based upon the alleged injury to the consortium/services plaintiff's spouse. The claim is derived from the action filed by the plaintiff. For that reason, if you find in favor of the defendant upon the claim of the plaintiff, your verdict must also be for the defendant concerning the claims of the consortium plaintiff. If you find fault on the part of the defendant, you must apply the same percentages of fault to the consortium plaintiff's claim as you apply to the plaintiff's claims."

Although loss of consortium is a derivative action, it is still separate and independent from the primary action. A spouse's right to make a loss of consortium/services claim is a personal right and is separate and independent property that may be pursued in one's own name.[15] If the injured spouse settles his/her claim, the loss of consortium/services claim still stands, as it is considered a separate and distinct cause of action. The claim of loss of consortium can be barred only when the injured spouse's claim is completely invalid. If a spouse's cause of action for personal injury fails, the loss of consortium claim fails with it.[16]

What effect does the derivative nature of the loss of consortium/services claim have on insurers?

Most insurance policies provide coverage for damages sustained by an insured because of bodily injury, sickness or disease, including death. However, depending on the language of the policy, loss of consortium/services may or may not be included in that definition. The language of an insurance policy must be very clearly written. A court interprets insurance contract provisions using the same rules of interpretation and construction as it uses with other contracts.[17] The court's goal is to enforce the intent of the parties, as reflected in the insurance contract.[18] The court will give clear and unambiguous language its plain and ordinary meaning, and will enforce the contract according to its terms.[19] Ambiguous language will be construed against the insurer.[20] An ambiguity exists where the provision is susceptible to more than one reasonable interpretation.[21] Where the term "bodily injury" in an insurance policy is specifically defined to include the loss of consortium/services, an insurer is bound by that definition, and claims for loss of consortium/services may be subject to the per-occurrence limitation, rather than the per-person limitation.[22] However, in those policies in which a loss of consortium/services is not included in the definition of "bodily injury" and is thus considered a derivative claim, the per-person limits will apply.[23] Therefore, the policy language of the insurance contract must be carefully examined to determine whether the per-occurrence or person limitation applies to the loss of consortium/services claim. ■

Footnotes

1. U.S. Census Bureau, U.S. Department of Commerce, Statistical Abstract of the United States, 59 (121st ed., 2001).
2. "Solemnization of Matrimony," *The Book of Common Prayer,* in Carl E. Schneider & Margaret F. Brinig's, *An Invitation to Family Law: Principles, Process and Perspectives,* 5 (2nd ed. 2000).
3. Homer Clark, *Domestic Relations,* 34 (2nd ed. 1988). For a detailed account of the traditional rule of support and a description of the way in which this duty was traditionally assigned by gender, see Joan Krauskoph & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support,* 35 Ohio St. L.J. 558 (1974).
4. Homer Clark, *Domestic Relations,* 34 (2nd ed. 1988) note 4, at 251. See, *Orr v Orr, 440 U.S. 268* (1979) (holding unconstitutional a state statute authorizing alimony for wives only). Some state statutes also specifically provide that the duty of support is mutual as between spouses. See *Schilling v Bedford County Mem. Hosp.*, 303 S.E.2d 905 (Va. 1983) (holding gender-based necessaries doctrine

unconstitutional and leaving it to the legislature to impose an alternative rule); *Memorial Hospital v Hahaj*, 430 N.E.2d 412, 415-16 (Ind. Ct. App. 1982) (extending necessaries doctrine to both spouses); *United States v O'Neill*, 478 F. Supp. 853 (E.D. Pa. 1979). See also, Cal. Civ. Code 5100 (1983); Brian Bix, "Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage," 40 Wm. & Mary L. Rev. 145, 164 (1988) note 30, at 164 (noting that "states have removed the vast majority of stereotype-ridden, sex-based duties and obligations under which, for example . . . the wife was obligated to follow the husband's choice of domicile"). See generally Paul Benjamin Linton, "State Equal Rights Amendments: Making a Difference or Making a Statement," 70 Temp. L. Rev. 907, 9930-31 n.99 (1997) (discussing potential impact of state equal rights amendments on spousal obligation of support); Note, "The Unnecessary Doctrine of Necessaries," 82 Mich. L. Rev. 1767 (1984).

5. *Ostriker v Ostriker*, 609 N.Y.S.2d 922, 923 (app. Div. 1994) (sexual relations are among "the basic obligations arising from the marriage contract"); *Zagarow v Zagarow*, 430 N.Y.S.2d 247, 250 (Sup. Ct. 1980) (stating that "marital sexual relations . . . are, per se, part of the essential structure of marriage"); *Cox v Cox*, 493 S.W.2d 371, 373 (Mo. Ct. App. 1973) ("sexual intercourse is an inherent right of marriage").
6. *Martilla v Quincy Mining Co.*, 221 Mich. 525, 191 N.W. 193, 30 A.L.R. 1249 (1923).
7. *Gunning v General Motors Corp.*, 239 Mont. 104, 779 P.2d 64 (1989); *Boucher By and Through Boucher v Dixie Medical Center, a Div. of IHC Hospitals,* Inc., 850 P.2d 1179 (Utah 1992).
8. *Ezernack v Progressive Sec. Ins. Co.*, 899 So. 2d 870 (La. Ct. App. 3d Cir. 2005); *Green v K-Mart Corp.*, 849 So. 2d 814 (La. Ct. App. 3d Cir. 2003), writ granted, 864 So. 2d 608 (La. 2003) and aff'd in part, rev'd in part on other grounds, 874 So. 2d 838 (La. 2004).
9. *Monroe v Trinity Hospital-Advocate*, 345 Ill. App. 3d 896, 281 Ill. Dec. 381, 803 N.E.2d 1002 (1st Dist. 2003).
10. Indiana Pattern Jury Instruction 13.15 (2005).
11. Indiana Pattern Jury Instruction 11.51 (2005).
12. 22 Am Jur 2d Damages § 234 (2007).
13. *Thomas v ABX Air, Inc.*, 290 F. Supp. 2d 532 (E.D. Pa. 2003). (Under Pennsylvania law, a spouse's right to recover for loss of consortium derives only from the other spouse's recovery in tort.)
14. *Bowen v Kil-Kare, Inc.*, 585 N.E.2d 384 (Ohio 1992), reh'g denied, 589 N.E. 2d 46 (Ohio 1992) (citing *Schiltz v Meyer*, 289 N.E. 2d 587, 588-89, Ohio Ct. App. 1971). The Bowen court reiterated that if an action for personal injury was not an action recognized under Ohio Law, then the consortium claim was barred along with the underlying tort action.
15. *Flandermeyer v Cooper*, 98 N.E. 102, 104 (Ohio 1912); *Westlake v Westlake,* 34 Ohio St. 621 (1878).
16. *Bender v Peay*, 433 N.E.2d 788 (Ind. App. 1982).
17. *Rice v Meridian Ins. Co.*, 751 N.E.2d 685 (Ind. Ct. App. 2001); *Armstrong v Federated Mutual Insurance Co.*, 785 N.E.2d 284 (Ind. App. 2003).
18. Armstrong, 785 N.E.2d at 291.
19. Id.
20. Id. at 292.
21. Id. at 291.
22. 7A Am Jur 2d Automobile Insurance § 433 (2007).
23. **Ill.** – *Fidelity & Casualty Co. v Merridew,* 327 Ill. App. 3d 51, 59-60, 261 Ill. Dec. 1, 8, 762 N.E.2d 570, 577 (2001) (tortfeasor had single liability limit of $500,000.00, and insured's policy included underinsured motorist coverage endorsement with $500,000 limit). The tortfeasor's insurer paid $350,000 to the insured and $150,000 to his wife for loss of consortium. The loss of consortium claim was a derivative claim and could not be counted separately in determining whether the tortfeasor was underinsured.

    Minn. – *Carlson v Mut. Serv. Casualty Ins. Co.,* 527 N.W.2d 580, 583-584 (Minn. Ct. App. 1995) (insurer's maximum liability on claim for loss of consortium was single per person limit for claims of both spouse and accident victim).

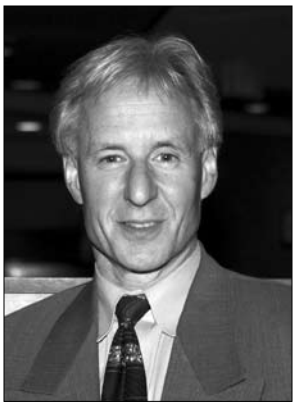
    N.H. – *Brouillard v. Prudential Property & Casualty Ins. Co.,* 141 N.H. 710, 693 A.2d 63, 68, (1997) (loss of consortium claim is not separate bodily injury triggering additional limit of insurance coverage).

    R.I. – *Allstate Ins. Co. v. Pogorilich,* 605 A.2d 1318, 1321 (R.I. 1992) (spouse of injured insured could not recover additional sums for loss of consortium beyond policy's limit of $200,000 per person because spouse did not suffer bodily injury in accident; spouse's loss of consortium claim arose out of bodily injury to injured insured).

    Vt. – *Waters v. Concord Group Ins. Cos.,* 725 A.2d 923, 926 (Vt. 1999) (uninsured motorcyclist struck 18-year-old plaintiff as she stood in store parking lot, and her medical expenses were $200,000. She had uninsured motorist [UM] coverage under her own policy and her parents' policy. Both policies contained a split UM limits endorsement. The plaintiff's policy had split limits not to exceed $25,000 per person/$50,000 per occurrence, and her parents' policy had limits of $100,000 per person/$300,000 per occurrence. The parents' insurer paid $125,000. The split UM limits endorsement effectively restricted the maximum recoverable for bodily injury under both policies, and the policy language was not ambiguous. Because the split UM limit endorsement applied, the parents' claim for temporary loss of consortium was subject to the per person limits.)

The Challenge of Undocumented Workers

by Jon Gice, CPCU, ARM



Jon Gice, CPCU, ARM, is the second vice president of the workers compensation major case unit at Travelers. An insurance executive with more than 25 years' experience, Gice previously held senior leadership positions at Royal & Sun Alliance, Managed Comp, Orion Capital and the St. Paul Companies. In addition to having built and managed workers compensation claims and managed care programs, he has worked in workplace health, safety and underwriting. Gice is a frequent author and speaker on industry trends and topics.

Not an Incidental Exposure

Claim operations are confronted with the reality of an ever-growing number of claims involving undocumented workers. While it is a violation of federal law to hire an illegal alien, it is estimated that there are millions of undocumented workers currently employed in the United States. A significant number are often hired to perform dangerous tasks. During a recent five-year period, the rate of workplace fatalities for foreign-born workers increased 43 percent compared to a 5 percent decline among U.S. citizens. Undocumented workers are either poorly trained or not provided with any safety orientation, due to cultural or language barriers.

The Federal Immigration Reform & Control Act was enacted by Congress in 1986. The law made it illegal to hire a worker who is either unlawfully living in the United States or unlawfully authorized to work in the United States.

Employers are mandated under this law to verify the legal status of every hire by completing an I-9 form with the federal government. Employers face civil fines and may be subject to criminal prosecution if found guilty of failing to verify legal status or knowingly hiring an illegal alien.

But even for diligent employers, this process of verification isn't enough. It is estimated that millions of illegal immigrants have purchased some combination of a counterfeit Social Security card, driver's license, work visa, green card and/or birth certificate. These documents are very authentic looking, so only an expert review can identify them as counterfeit. Many of these documents are acquired as part of the price paid to be smuggled into the U.S., or are easily acquired through vendors operating on the street and/or flea markets.

Other employers are not so diligent in their hiring efforts, either through lack of controls or deliberate avoidance of the law. These customers may fail to complete the I-9 form and, in the worst scenario, pay the worker cash rather than through a formal payroll process. Such customers are not only in violation of federal law, but are also potentially guilty of payroll fraud in the eyes of their workers compensation insurance carrier.

Despite the illegality, the hiring of undocumented workers continues unabated in many industries. One author has taken the position that the problem isn't illegal workers, the problem is illegal employers. *Fortune* magazine estimates that up to 40 percent of all new U.S. home construction is completed by illegal workers.[1] A recent study cited in that same article concluded that 36 percent of insulation workers, 29 percent of roofers and 28 percent of drywall workers are undocumented workers.

Beyond the difficulty of finding people to perform jobs that U.S. citizens may be unwilling to perform, another incentive for hiring undocumented workers is the opportunity to pay a lower wage to this worker. The lower labor cost provides a perverse economic reality. It has been suggested that the price of a new home in Florida would increase by as much as 40 percent if these lower-paid workers were eliminated from the home building industry.

Challenges of Undocumented Workers

An undocumented worker is not likely to report a soft tissue injury for fear of losing his or her job. It is the undocumented worker who falls from a rooftop or is crushed by a piece of equipment whose claim is reported. It is common for a claim involving traumatic brain injury, a severe burn or a spinal cord injury to easily exceed $1 million.

Attempts to deny these claims based on arguments that these workers are illegal have largely failed. For example, a key decision in Connecticut was rendered in *Dowling v Slotnik*, 712 A.2d 386, 409.

The court held that the legislature intended to include illegal aliens in the group of persons who, in order to obtain compensation for work-related injuries, are not only eligible, but also requested to invoke the remedy provided by the Workers Compensation Act. When confronted with a claim that involves the issue of an illegal alien or undocumented worker, it is essential that the appropriate state or jurisdiction's laws, court decision, and rules are carefully considered in all claim decisions. There are several comprehensive documents available to member companies of the American Insurance Association (AIA), www.aiadc.org, and other organizations. But the law in this area is not static, and no one document should be relied on in considering our duties and obligations under the law or the benefits that are allowable under law. To that end, contact local defense counsel to assure compliance with the state's current law on these issues.

An undocumented worker who sustains a catastrophic injury presents additional costs that are only occasionally faced in claims involving U.S. citizens. Interpreter service is the most common and perhaps obvious additional cost, but the undocumented worker also presents the following potential additional claim costs:

- **Transportation.** Family members, if they reside in the U.S., often do not hold a valid driver's license or own a vehicle, so expensive medical transportation services become necessary.
- **Housing.** Family members often do not reside in the U.S., resulting in the catastrophically injured worker having no viable U.S. residence to return to that can be modified to meet the worker's needs.
- **Agency attendant care.** Family members often do not reside in the U.S., producing increased costs through the use of professional agencies in meeting the ongoing nursing and home care needs of the undocumented worker.
- **Return to work is not an option.** Because the undocumented worker can not be legally reemployed, a return-to-work effort may be deemed a violation of the Federal Immigration Law.

Claim Handling Suggested Solutions

The following two actions are suggested to meet the challenges of each claim involving a known or suspected undocumented worker:

- **Social Security number.** A claim where the injured worker can not produce a Social Security number is easy to identify as involving an undocumented worker. A claim where a Social Security number is presented is more complicated, as the number may be counterfeit. Any claim that is suspected to involve an illegal worker must be investigated to confirm legal status through contacting a local Social Security administration office. The Social Security office will require the employer's TIN number, so be prepared before making the call. If the employer refuses to participate in the investigation, this refusal may strongly suggest that the worker is undocumented. The Social Security office is the easiest way to verify the number, and there is no charge.
- **Benefit Limitations.** Once it is found that the worker is truly an undocumented worker, claim handling needs to focus on expediting maximum medical improvement. Additional care must be taken in the calculation of average weekly wage. For example, some states, such as Florida, define wages as: " … earned and reported for federal income tax purposes on the job where the employee is injured … ." Obtaining a wage statement from the employer is a critical step in the investigation of a claim involving an undocumented worker, as real wages, using the definition of what is reported for federal tax purposes, may total zero. Local law may permit or require only a minimum compensation rate be paid in such cases. State law may also limit the other benefits the claimant might otherwise be entitled to receive, such as vocational rehabilitation benefits, since rehiring the undocumented worker in any new position violates federal law!

Handling claims that involve an undocumented worker are challenging, and from all indications, these claims will only continue to grow in number. A claim handler needs to understand the challenge and find ways to best handle the claim to the most optimal conclusion. ■

Endnote

1. Birger, J. and Mero, J. "Immigration reform: Building costs could soar." *Fortune* 12 Jun. 06, Vol. 153, No. 11. Accessed 9/9/06:www.money.cnn.com.

The Importance of Notice in Defending Cargo Claims

by James A. Wescoe, J.D.

■ **James A. Wescoe, J.D.**, is a partner in the Philadelphia, Pa., office of Rawle & Henderson LLP, a regional defense law firm. He concentrates his practice in commercial motor vehicle matters. Wescoe is a graduate of Temple Law School and admitted to practice in the state courts of Pennsylvania, New York and New Jersey, as well as all federal courts in Pennsylvania, New Jersey, Maryland and New York. He is a member of the Conference of Freight Counsel and the Freight Claims Committee of Transportation Lawyers Association. Wescoe is also a member of the Trucking Industry Defense Association.

Editor's note: This article originally appeared in *Rawle's Reports*, a client newsletter produced and copyrighted by Rawle & Henderson LLP, and is reprinted here with permission.

Introduction

When served with a lawsuit for loss or damage to goods in interstate or foreign commerce, a motor carrier's first step in determining liability should be an investigation of whether the shipper or its subrogated insurer provided proper, written and timely notice of the claim. In many cases, particularly with unsophisticated shippers or claims representatives unfamiliar with the regulations covering cargo claims, proper notice is not provided and liability can be avoided. This is especially important since the applicable federal law governing interstate cargo claims is a strict-liability statute. In addition, regardless of the level of sophistication of the shipper, the shipper is conclusively presumed to have knowledge and understanding of the terms and conditions in a Bill of Lading or similar contract of carriage. See, e.g., *American Railway Express Company v Daniel*, 269 U.S. 40 (1925). Thus, the "notice" defense is often the most effective method of defeating or successfully resolving cargo claims. This article briefly examines some issues which may arise when a "notice" defense is asserted and emphasizes the importance of investigating whether proper notice was provided.

History of Notice-Related Regulations

The Carmack Amendment to the Interstate Commerce Termination Act of 1995 imposes liability on carriers for the actual loss of or damage to shipments in interstate commerce. 49. U.S.C. §14706(a)(1). Section (e) of the Carmack Amendment provides that "[a] carrier may not provide by rule, contract, or otherwise, a period of less than nine months for filing a claim against it under this section and a period of less than two years for bringing a civil action against it under this section." Consistent with this section, motor carriers, almost without exception, require that the shipper provide written notice of a cargo loss or damage claim within (9) nine months of the delivery date.

What, however, constitutes "sufficient" notice? The standard for evaluating claims submitted pursuant to the Carmack Amendment was initially set forth by the Supreme Court in the case of *Georgia, Florida and Alabama Railway Co. v Blish Milling Co.*, 241 U.S. 190 (1916). In that case, the U.S. Supreme Court stated that the purpose of a requirement in a Bill of Lading that claims for damages be presented in writing within a certain time after delivery was not to allow the carrier to avoid liability, but to "secure reasonable notice" for the carrier to investigate the claim. Accordingly, the Supreme Court held that the notice requirement "did not require documents in a particular form," so long as its purpose was served. In other words, so long as the carrier was provided constructive notice of a cargo loss or claim, the claim-filing requirements were satisfied.

As a result, there were no judicially established requirements that the shipper's claim had to be in writing or contain a specific claim amount.

Courts subsequently applied the ruling in *Blish Milling Co.* in a very liberal manner, and shippers' claims were found to be sufficient so long as they gave the carriers "reasonable notice" of the loss. See, e.g., *Wisconsin Packing Co. v Indiana Refrigerator Lines, Inc.*, 618 F.2d 441 (7th Cir. 1980). Indeed, the U.S. Court of Appeals for the Fifth Circuit ruled in 1953 that "there is no requirement that a written instrument be submitted in detail or that the cause and exact amount of damage be stated thereon in order to constitute a valid claim." *Thompson v James G. McCarrick Co.*, 205 F.2d 897, 901 (5th Cir. 1953).

Predictably, shippers took advantage of the liberal claim-filing requirements and, in 1972, the Interstate Commerce Commission responded by promulgating regulations which established minimum claim-filing standards "for the investigation and voluntary disposition of loss and damage claims." The regulations were codified at 49 C.F.R. § 1005.2, and have been re-codified at 49 CFR 370.3.

Among other things, 49 CFR 370.3 provides minimum filing requirements for a written notice of claim. Specifically, the shipper must provide written or electronic communication of the claim to the carrier which contains: (1) facts sufficient to identify the shipment; (2) an assertion of liability of alleged loss, damage or delay; and (3) a claim for a specific or determinable amount of money. In situations where the shipper may not be able to state an exact amount of a claim, the carrier must attempt to ascertain the extent of the loss or damage. However, the carrier shall not pay a claim under these circumstances "unless and until" the shipper submits a written claim containing a specified or determinable amount of damages.

49 CFR 370.3 also states what is not considered to be sufficient notice to the carrier of a claim for loss or damage. Specifically, the regulations state that "documents not constituting claims" include "bad order reports," appraisal reports, or notations of shortage or damage on freight bills, receipts or invoices. In addition, notice is not provided by inspection reports issued by carriers or their insurance agencies. Indeed, inspection reports or surveys which contain a specific amount of damages do not provide sufficient notice to the carrier.

There are two judicially established exceptions to the notice requirements of 49 CFR 370.3. First, a shipper's failure to file a completed claim within the specified time period might be excused if, even after exercising reasonable diligence, it cannot ascertain the extent of its loss within the filing period. *Nedlloyd Lines, V.V. Corp. v Harris Transport Co.*, Inc., 922 F.2d 905, 909 (1st. Cir. 1991). Second, a shipper may be excused from the claim-filing requirements if the carrier misled the shipper into believing that a timely filing was unnecessary. Id.

What Constitutes "Good" Notice?

Perhaps the most frequently litigated notice-related issue is whether the shipper's notice to the carrier was sufficiently specific or determinable. In other words, did the shipper give the carrier enough information about the amount of damage or loss to investigate the claim? For example, is a shipper's damage claim in an amount "between $700,000 and $800,000" sufficiently specific?

The answer, of course, is: it depends. It depends on where the issue is considered, since there is a split among the federal circuits as to whether, as in the above example, a claim must be for an actual dollar amount. In the above example, the U.S. District Court for the Middle District of Florida ruled that the shipper's failure to state an exact dollar amount to the carrier invalidated its claim. However, on appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed. See, *Seimens Power Transmission & Distribution, Inc. v Norfolk Southern Railway Company*, 2005 U.S. App. LEXIS 17202 (11th Cir. 2005). In doing so, the Eleventh Circuit adopted a "substantial compliance" standard with respect to whether or not a shipper must provide the carrier with an exact dollar amount of a loss. The substantial compliance standard has also been adopted by the Sixth, Seventh and Ninth Circuits. Conversely, the First, Second and Fifth Circuits apply a "strict compliance" standard, and require the shipper to provide an exact amount in its claim to the carrier. In those Circuits, the shipper's claim for damages "between $700,000 and $800,000" would most likely have been found insufficient. See, e.g., *McLaughlin Transportation Systems, Inc. v Rubinstein*, 2005 U.S. District LEXIS 19932 (D.Mass. 2005).

Another oft-litigated notice-related issue involves whether the carrier's knowledge of the claim — apart from the written notice provided by the shipper — waives the notice requirements of 49 CFR § 370. In the Third, Fifth, First and Second Circuits, the filing of a written claim within the prescribed period is a strict condition precedent to the filing of a lawsuit. For example, a carrier's denial of a shipper's claim for damages arising from the theft of model railroad trains was upheld even when the carrier had investigated the thefts. See *S&H Hardware & Supply Co. v Yellow Transport.*, Inc., 432 F. 3d 550 (3d. Cir. 2005).

For an opposite result, see *Mitsui Sumitomo Insurance Co., Ltd. v Watkins Motor Lines, Inc.*, 2004 U.S. Dist. LEXIS 20829, where the trial court ruled that the carrier's "actual knowledge" of the theft of the shipment — without any written notice filed within the nine-month period — satisfied the requirements of 49 C.F.R. § 370.3.

Defending Claims Under 49 U.S.C. § 14706 and 49 C.F.R. § 370.3

The rules and regulations regarding the disposition of cargo claims set forth in 49 U.S.C. § 14706 and 49 C.F.R. § 370.3 were promulgated, in part, to assure the efficient flow of goods. The rules place the carrier "on the hook" for loss or damage to cargo if the goods are received in good condition and delivered otherwise. However, in exchange for the strict liability standard of 49 U.S.C. § 14706, shippers must adhere to the regulations regarding proper notice of their claims. Thus, the carrier must ensure that it collects and retains information which proves that the shipper's notice was "bad." The carrier should take the following steps when a damage or loss claim is presented to ensure that it will be able to raise the notice defense at the appropriate time:

First, the carrier must make every effort to obtain a "clean" copy of the Bill of Lading for the shipment as soon as possible after the loss is reported. Bills of Lading are frequently mishandled and

Continued on page 14

The Importance of Notice in Defending Cargo Claims

Continued from page 13

often become illegible as the result of frequent transmission between interested parties. Most importantly, the back side of the Bill of Lading, which frequently contains the applicable notice provisions, should be secured as quickly as possible. If the back side of the specific Bill of Lading cannot be secured, another copy from a different Bill should be retained in anticipation of future litigation.

Second, any applicable contracts, agreements or tariffs should be secured as soon as practicable after the loss. In many instances, the carrier's tariff or the transportation agreement refers to, or incorporates, the notice provisions of the Bill of Lading and provides further evidence that the shipper should have known about the notice requirements.

Third, in situations where the loss or damage is reported to the carrier at time of delivery, the adjuster or surveyor assigned by the carrier or insurer assigned to investigate the claim must make every effort to avoid making representations to the shipper that his or her receipt of the claim satisfies 49 C.F.R. § 370.3. As discussed, the notice requirements are waived if the carrier (or its agent) leads the shipper to believe that it did not have to file a written, timely claim. The surveyor or adjuster must be trained to avoid such situations.

Similarly, drivers who deliver damaged cargo should be instructed to avoid making statements which may give the shipper (particularly an unsophisticated shipper) the incorrect impression that his awareness of the damage waives the requirements of 49 C.F.R. § 370.3.

The foregoing suggestions should make it easier for the carrier to rely upon a "notice" defense if the facts allow. Further, the cases interpreting the Carmack Amendment and the accompanying regulations require that notice be given to the carrier. Thus, particularly in household goods cases, attention should be given to ensure that the carrier, and not, for example,

a storage facility, should be provided notice. See, e.g. *Kuehn. v United Van Lines,* 36 F.Supp. 2d 1047 (SD Miss. 2005).

Defending cases based on improper, non-specific or untimely notice, although fact-intensive, are often resolved by dispositive motion. Therefore, careful analysis of the shipper's notice-related actions or omissions may, and frequently does, result in cost-effective settlements or, even better, in the dismissal of the lawsuit. ■

2008–2009 Claims Interest Group Committee

Chairman

Tony D. Nix, CPCU
State Farm Group
5301 Snapfinger Park Drive
Decatur, GA 30035-4041
Phone: (770) 593-6520
E-mail: tony.d.nix.aqf9@statefarm.com

Webmaster

Arthur F. Beckman, CPCU, CLU, ChFC
State Farm Group
A2
One State Farm Plaza
Bloomington, IL 61710-0001
Phone: (309) 766-0952
E-mail: art.beckman.bltw@statefarm.com

Editor

Keithley D. Mulvihill, CPCU, J.D.
Rawle and Henderson LLP
535 Smithfield St., Ste 1000
Pittsburgh, PA 15222-2305
Phone: (412) 261-5707
E-mail: kmulvihill@rawle.com

James William Beckley, CPCU
American Agricultural Insurance Company
1501 E Woodfield Road, Ste 300
Schaumburg, IL 60173-5422
Phone: (847) 969-2766
E-mail: jbeckley@aaic.com

L. Jane Densch, CPCU, CPIW
Fireman's Fund Insurance Companies
4601 DTC Blvd.
Denver, CO 80237
Phone: (303) 222-7832
E-mail: jdensch@ffic.com

Maureen P. Farran, CPCU
Crawford and Company
Phone: (503) 255-4820
E-mail: maureen.farran@choosebroadspire.com

Eric A. Fitzgerald, CPCU, J.D.
Marshall Dennehey Warner Coleman and Goggin
1845 Walnut St.
Philadelphia, PA 19103-4708
Phone: (215) 575-2688
E-mail: eafitzgerald@mdwcg.com

Cecelia T. Foy-Dorsett, CPCU
Senn Dunn Agency
P.O. Box 9375
3625 N. Elm St.
Greensboro, NC 27455
Phone: (336) 346-1303
E-mail: cfoydorsett@senndunn.com

John A. Giknis, CPCU
ISO
545 Washington Blvd. 22-8
Jersey City, NJ 07310-1607
Phone: (201) 469-3103
E-mail: jgiknis@iso.com

Karen Hope, CPCU
State Farm Group
2370 Towne Center Blvd.
Baton Rouge, LA 70806
Phone: (225) 237-2837
E-mail: karen.hope.a792@statefarm.com

Barbara J. Keefer, CPCU, J.D.
MacCorkle, Lavender & Sweeney PLLC
300 Summers St., Ste 800
Charleston, WV 25301-1632
Phone: (304) 344-5600 ext. 218
E-mail: bkeefer@mlclaw.com

Christian J. Lachance, CPCU, CLU
State Farm Insurance Cos
2056 Vista Pkwy #400
West Palm Beach, FL 33411
Phone: (561) 801-0621
E-mail: chris.lachance.amot@statefarm.com

Barbara Wolf Levine, CPCU, J.D.
Exam Coordinators Network
123 NW 13th St., Ste 207
Boca Raton, FL 33432-1618
Phone: (877) 463-9463
E-mail: blevine@ecnime.com

William D. McCullough, CPCU, CLU, ChFC
State Farm Group
112 East Washington St.
Bloomington, IL 61701
Phone: (309) 763-3856
E-mail: william.mccullough.aops@statefarm.com

Robert Riccobono, CPCU
Rockville Risk Management Associates
119 N Park Ave., Ste 407
Rockville Centre, NY 11570
Phone: (516) 536-2700
E-mail: rriccobono@rockvrisk.com

Ray A. Rose, CPCU
Hastings Mutual Insurance Company
404 E Woodlawn Ave.
Hastings, MI 49058-1091
Phone: (269) 948-1525
E-mail: rrose@hastingsmutual.com

Eric Jay Sieber, CPCU
Sieber Claim Investigation
P.O. Box 9267
Alta Loma, CA 91701
Phone: (909) 987-6112
E-mail: ejsieberco@aol.com

Marcia A. Sweeney, CPCU
Hartford Financial Services
55 Farmington Ave., Suite 800
Hartford, CT 06105
Phone: (860) 520-2761
E-mail: marcia.sweeney@thehartford.com

Andrew Lech Zagrzejewski, CPCU, CLU, ChFC
Farmers Insurance Group
4680 Wilshire Blvd.
Los Angeles, CA 90010-3807
Phone: (323) 932-7592
E-mail: andrew_zagrzejewski@farmersinsurance.com

Liaisons

John J. Kelly, CPCU
CPCU Society
720 Providence Rd.
Malvern, PA 19355
Phone: (610) 251-2773
E-mail: jkelly@cpcusociety.org

Donna J. Popow, CPCU, J.D., AIC
AICPCU
720 Providence Road, Ste 100
Malvern, PA 19355-3433
Phone: (610) 644-2100 ext. 7225
E-mail: popow@cpcuiia.org

Plan to Attend

April 21–25, 2009 • Phoenix, Ariz.

CPCU Society's 2009 Leadership Summit

Witness Leadership in Action!

Plan to be a part of this distinguished gathering of CPCU Society leaders and insurance industry professionals. Open to all volunteer leaders.

This unique event will feature:

- Society business meetings.
- Specialized chapter leader workshops.
- CPCU Society Center for Leadership courses, including courses designed for chapters and interest group leaders. Open to all Society members.

Visit www.cpcusociety.org in early 2009 for the latest information.

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

Claims Interest Group Chairman
Tony D. Nix, CPCU
State Farm Group
E-mail: tony.d.nix.aqf9@statefarm.com

***Claims Quarterly* Editor**
Keithley D. Mulvihill, CPCU, J.D.
Rawle & Henderson LLP
E-mail: kmulvihill@rawle.com

Director of Program Content and Interest Groups
John Kelly, CPCU
CPCU Society

Managing Editor
Mary Friedberg
CPCU Society

Associate Editor
Carole Roinestad
CPCU Society

Design/Production Manager
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 26 Number 2 October 2008

PRSRT STD
U.S. POSTAGE
PAID
BARTON & COONEY