CPCU SOCIETY INSURING YOUR SUCCESS

Claims Interest Group

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Claims Quorum

Message from the Chair

by Tony D. Nix, CPCU, CIFI

Tony D. Nix, CPCU, CIFI, is a special investigations unit (SIU) team manager for State Farm in Atlanta, Ga., and has been employed with State Farm for 27 years. He obtained his bachelor's degree in management from the University of West Georgia in 1980, and earned his CPCU designation in 1999 and the CIFI (Certified Insurance Fraud Investigator) designation in 2000. Nix has served on the Claims Interest Group Committee for the last six years and is an active member of the CPCU Society's Atlanta Chapter, with prior service as director, secretary, president-elect and president.

As I begin my term as chair of the Claims Interest Group Committee, I can't help but think about how I have gotten here and the importance of following in the footsteps of my CPCU Society mentors, such as **James A. Franz, CPCU, AIC, ARM; James D. Klauke, CPCU, AIC;** and **Robert E. McHenry, CPCU, AIC, AIS.** All these individuals have brought different skill sets to the position, and I hope to utilize these skills to develop my own leadership style.

It seems like yesterday when I graduated from college and joined the ranks of State Farm as a claim representative for the Fire Company. At the time, I wasn't sure what the job entailed, but I knew State Farm was a good company that paid a competitive salary. I remember walking across campus after my last college exam thinking, "No more studying and no more exams!" How naive I was to think that my development was finished. Little did I know at the time that it was just the beginning.

As I began my career, I witnessed my peers making a commitment to career development through participating in various programs such as INS, CPCU and CLU. Admittedly, I was a slow learner and did not connect the dots between continued development and a successful career. I was of the school of thought that believed just doing a good job was enough to advance you to higher levels of leadership. As the old saying goes, "With age comes wisdom." I, too, got involved with CPCU and obtained my designation in 1999. Yes, you can do the math — it was some 18 years after starting my career in the industry. I acknowledged earlier that I was a slow learner, but I do eventually learn.

Continued on page 2

What's in This Issue

Message from the Chair

Continued from page 1

Since obtaining my CPCU designation, I have chosen to get involved on a local level with the Atlanta Chapter and on an international level with the Claims Interest Group Committee. In addition, I try to serve as a resource to my peers and co-workers on career development issues. As stated earlier, it may have taken a long time for me to connect the dots, but I now recognize that regardless of your career aspirations, continued development is the critical component of becoming and remaining an engaged industry professional.

The knowledge I have gained from my pursuit of the CPCU designation and my continued involvement in the industry has been invaluable. I challenge everyone who is reading this issue of CQ to get involved with your local chapter for one year. My bet is that after the year is over you will agree with me that the leadership skills and industry knowledge gained will far outweigh your time commitment. In addition, you develop a great network of friends, and you will want to find other ways to stay engaged. I would love to hear from any of you who are going to take the challenge so that we can stay in contact over the year. My e-mail can be found on the back page of this newsletter. I wish you the best over the coming year. ■

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 defense firm with offices throughout the mid-Atlantic region. 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, where he has provided insurance law updates for the chapter's newsletter and at All-Industry Days and other meetings.

Sharp-eyed readers will notice two important changes starting with this issue of the Claims Interest Group newsletter, both visible on the front page. First, we inaugurate a subtitle — *Claims Quorum* — in the publication's masthead. As part of the new interest group member benefit initiative, Society management requested interest groups to consider adding subtitles to their newsletter mastheads.

Our new name was suggested by our former editor, **Marcia A. Sweeney, CPCU, AIC, ARM, ARe,** who pointed out that one definition of quorum is "a select group." We like to think that definition applies to our interest group members. And the new name has the added benefit of allowing us to continue using the CQ shorthand. Good job, Marcia!

In addition to a new name, we also have a new Claims Interest Group chair, **Tony D. Nix, CPCU, CIFI.** He is a longtime, highly active member of our group. Tony is replacing our outgoing chair, **Robert E. McHenry, CPCU, AIC, AIS,** so he has big shoes to fill. Tony has certainly demonstrated, however, that he is more than up to the task.

The feature article in this issue concerns a subject that over the last several years has become near and dear to all of us who handle claims — mediation. Both state and federal courts now encourage, and in many cases require, that all lawsuits be mediated. Successful mediation requires a different mindset from the adversarial practice of litigating in court.

John M. Noble, J.D., is a former defense lawyer who now practices full time as a mediator. He has a busy mediation practice and is well respected by judges and lawyers on both sides and clients, including claims professionals. Noble's article provides valuable tips for what is one of the most difficult areas of mediation practice, the multidefendant case. Anyone who has been involved in a number of multidefendant mediations has undoubtedly experienced the types of situations that he describes — defendants spending the day pointing fingers at each other and an unhappy plaintiff going home at the end of a long day, both with no offer and less inclined to be reasonable than he or she was before the mediation. Noble provides some great suggestions on how to make mediations in multidefendant cases more productive.

Claims Interest Group leader **Eric J. Sieber, CPCU, AIC, RPA,** reports on the presentation by **John Nicholas, CPA,** chief financial officer of the world champion Philadelphia Phillies, at the 2008 Annual Meeting Claims Interest Group Luncheon. Nicholas provided a fascinating overview of the unique claim exposures involved in operating a major league baseball team. Various members of the Claims Interest Group work hard to provide timely and interesting presentations at Annual Meetings.

Finally, we have a more technical article on a nettlesome coverage issue, particularly for those involved in handling environmental and other toxic tort claims — limits involving coverage for long tail claims. **Tommy R. Michaels, CPCU, AIC,** reviews the history of the CGL policy and the development of general aggregate limits. He also addresses various arguments made by policyholders looking to expand their limits. ■

New Interest Group Member Benefit

by CPCU Society Staff

Beginning Jan. 1, 2009, *every* Society member became entitled to benefits from every interest group for no extra fee beyond the regular annual dues, including access to their information and publications, and being able to participate in their educational programs and functions.

An Interest Group Selection Survey was e-mailed to members beginning mid-November. By responding to the survey, members could identify any of the existing 14 interest groups as being in their primary area of career interest or specialization. If you did not respond to the survey and want to take full advantage of this new member benefit, go to the newly designed interest group area of the Society's Web site to learn more about each of the interest groups and indicate your primary area of career interest. You will also see options to receive your interest group newsletters.

Currently, there are 14 interest groups: Agent & Broker; Claims; Consulting, Litigation & Expert Witness; Excess/Surplus/Specialty Lines; Information Technology; International Insurance; Leadership & Managerial Excellence (former Total Quality); Loss Control; Personal Lines; Regulatory & Legislative; Reinsurance; Risk Management; Senior Resource; and Underwriting.

As part of the Interest Group Selection Survey, members also were asked to express their interest in the following proposed new interest groups: Actuarial & Statistical; Administration & Operations; Client Services; Education, Training & Development; Finance & Accounting; Human Resources; Mergers & Acquisitions; New Designees/Young CPCUs; Nonprofits & Public Entities; Research; Sales & Marketing; and The Executive Suite.

Members who missed the Survey may update their selections on the Society's Web site or by calling the Member Resource Center at (800) 832-CPCU, option 4. Members can also order printed newsletters for nonprimary interest groups at an additional charge. ■

The **Agent & Broker Interest Group** promotes discussion of agency/brokerage issues related to production, marketing, management and effective business practices.

The **Claims Interest Group** promotes discussion of enhancing skills, increasing consumer understanding and identifying best claims settlement tools.

The **Consulting, Litigation & Expert Witness Interest Group** promotes discussion of professional practice guidelines and excellent practice management techniques.

The **Excess/Surplus/Specialty Lines Interest Group** promotes discussion of the changes and subtleties of the specialty and non-admitted insurance marketplace.

The **Information Technology Interest Group** promotes discussion of the insurance industry's increasing use of technology and what's new in the technology sector.

The **International Insurance Interest Group** promotes discussion of the emerging business practices of today's global risk management and insurance communities.

The **Leadership & Managerial Excellence Interest Group** promotes discussion of applying the practices of continuous improvement and total quality to insurance services.

The **Loss Control Interest Group** promotes discussion of innovative techniques, applications and legislation relating to loss control issues.

The **Personal Lines Interest Group** promotes discussion of personal risk management, underwriting and marketing tools and practices.

The **Regulatory & Legislative Interest Group** promotes discussion of the rapidly changing federal and state regulatory insurance arena.

The **Reinsurance Interest Group** promotes discussion of the critical issues facing reinsurers in today's challenging global marketplace.

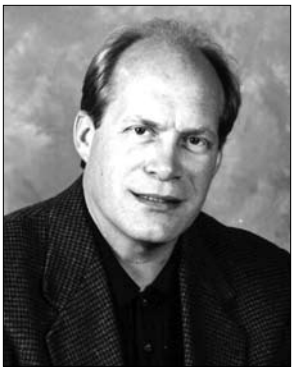
The **Risk Management Interest Group** promotes discussion of risk management for all CPCUs, whether or not a risk manager.

The **Senior Resource Interest Group** promotes discussion of issues meaningful to CPCUs who are retired (or planning to retire) to encourage a spirit of fellowship and community.

The **Underwriting Interest Group** promotes discussion of improving the underwriting process via sound risk selection theory and practice.

Advanced ADR Practice — Mediating the Multidefendant Case

by John M. Noble, J.D.



John M. Noble, J.D., is a longtime litigator and certified mediator. Formerly an equity partner with Meyer, Darragh, Buckler, Bebenek & Eck PLLC, he now conducts more than 250 mediations/arbitrations annually from Erie to Philadelphia, including complex medical malpractice, products liability, commercial/personal motor vehicle, commercial business and labor/employment disputes. Noble is very active as a federal court mediator, arbitrator and early neutral evaluator for the Western District of Pennsylvania and has also served the Westmoreland County Bar Association in a wide variety of capacities, including chair of the ADR Committee. He may be reached at john@noblemediation.com.

Remember that last "big" mediation that got nowhere? What a "big waste of time" it was and how everyone left in frustration? Remember how you swore that you would never get into that situation again (but you did) and that the mediation actually made any future negotiations next to impossible? If you've answered any (or all) of these questions with a resounding "yes," read on and consider the following as you ever so carefully tread down the multiple-defendant mediation path once more.

Signs, Signs, Everywhere Signs

Now, as a full-time observer, I often see firsthand a fair number of predictable signals impeding meaningful negotiations before the mediation even begins. For example, as the various parties filter into the room, plaintiff's counsel typically tend to sit themselves closely while the various co-defendants jockey for seating — where else but furthest from the friendly mediator. In the larger cases, certain parties choose not to seat themselves at the conference table at all, otherwise creating somewhat of an "observation deck" reserved, optimistically, for "spectators only."

As mediator, whether I have received confidential position statements or not, it's just not that hard to figure out where everyone is coming from within the very first seconds of interaction. Plaintiff's counsel are generally anxious to present their case, while co-defense counsel not so discreetly physically "telegraph" their individually perceived level of exposure merely by where they sit. Some of you have gone so far as to announce that you are "only" attending the mediation as an "observer" — to the facially expressed surprise of your co-defendants.

There have also been those occasions where the "nonparticipating" party has attempted to attend the mediation despite "no authority" to pay for it. Consider the mediation where the first 1½ hours of negotiations involved hostile debate on whether or not the nonpaying-yet-observing party was "allowed" to remain without the commitment of payment. After being voted off the island, counsel ultimately obtained authority to pay an equal share of the mediation expense, regaining admission to the festivities. Surprise ending? Following extended effort, the "observing-only" party ultimately paid its limits into the global pot and the case settled — more than a month later.

Another common "signal" within multidefendant mediation is the awkward silence as counsel and their clients/representatives quietly take their well-positioned seats. As mediator, this is usually the tip-off that none of the co-defendants will be making any opening remarks, while deferring all commentary privately. This is also an early signal of the approaching "sideways paralysis," where no card will be shown from anyone's deck — a sure bet for either an unnecessarily long day or an early lunch.

Where those of you do choose to venture an opening summary of your physically signaled defense position, the presentation usually includes any or all of the following expressed statements of "good faith":

- "We view this as a case of no-liability."
- "We view this claim as little to no exposure."
- "We're only here to sweeten the pot."

Time and again, these statements are often met with visible unable-to-be-restrained surprise from your co-defendants, who will later certainly assert your "target" status in the claim.

Continued on page 6

Advanced ADR Practice — Mediating the Multidefendant Case

Continued from page 5

The Big Chill

What does the above typically mean and how does it affect meaningful settlement discussions among co-defendants? Plenty. It reveals that co-defense counsel have not discussed the case with each other before they walked into the conference room and, worse, the collective defendants — for the very first time — have openly drawn the battle lines not only between themselves and the plaintiff but also against each other (in full view of their watchful clients). A collective cold front approaches with almost certain chilling effects upon fruitful negotiations.

It raises the question, "Why don't co-defense counsel talk to each other before the mediation?" The answer is simple — no one really wants to be the first to show their hand, much less an ace (or lack thereof). Instead, well before the mediation, respective counsel unilaterally discuss and evaluate their legal position with their claims representatives, risk managers, colleagues and/or clients; separately assess their "relative" exposure; and thereafter enter the negotiations pretty much blind to the similarly reached positions of the other parties (who are unilaterally blind in return). It's like opening holiday gifts — absent any planning there are usually a few awkward if not unwelcome moments on the horizon.

What this generally means to those of you "upstream" from your respective defense counsel is a day of reckoning of sorts, because this is the forum selected to disclose your separately developed position. Quite often, at least one camp in the room is surprised, if not shocked, to learn that no one else agrees with its no-liability position and that, in fact, the consensus is there is one party who "stands alone" as the target defendant (remember not wanting to be "the cheese?"). This often is the case at the early stages of the mediation — one party is unexpectedly exposed by consensus as the target. Most of us have unfortunately experienced the unenviable chill of that position. It isn't pretty when it is you and there is no graceful exit.

The end result of this failed mediation-waiting-to-happen goes something like this:

(1) Defense counsel become all the more entrenched in their defense position to "save face" with the attending client.

(2) The client "digs in" to that position as the events must be reported upstream to watchful superiors in further defense of that well-considered unilateral evaluation position.

(3) Co-defense counsel dig in as to each other, often as mirror-images, both asserting that the other party carries the "lion's share" of the liability.

Meanwhile, plaintiff's counsel, who optimistically laid out the entire case, has been sitting on their hands for the last many hours, not having received a single offer from the collective sideways-fighting co-defendants. Frustrated and now all the more reactively dug in, plaintiffs and their counsel leave, emotionally vowing never to return to the negotiation table. Negotiations have now plunged well beyond the chill into a "deep freeze."

Sound all too familiar? It should, because you have likely been there once too often. But, it doesn't have to be that way, if you care to consider the following the next time you find yourself negotiating with multiple defendants.

Defense-Liability Mediation

Now that we are well into the alternative dispute resolution (ADR) era, where we can mold the process to adapt to the dispute, multidefendant cases often beg for a meeting of all defense counsel and/or their principals well before meeting with the plaintiffs. Consider the example of a one-vehicle accident case involving multiple defendants facing disputed liability exposure as to roadway conditions arising from construction activities.

In this scenario, co-defendants rather quickly proceeded to engage in a percentage tug-of-war, preventing any meaningful offer to the plaintiff. The individual defendants seemed to have sufficient "overall" authority to resolve the claim; however, the

parties respectively "locked in" to specific comparative percentages, effectively paralyzing the negotiations (i.e., defendant A will pay "x" only if defendant B pays two times "x," etc.). Ironically, after extended negotiations, the respective parties revealed sufficient authority to settle the case but for the imposed percentage restrictions.

It doesn't make great sense, but it happens. A defense-only mediation could thoroughly address this inevitable competing-percentages battle among co-defendants and remove the deal-killing downside of the resulting paralysis, namely, plaintiffs who still have no offer after five or more hours of cooling their heels in a conference room. When the co-defendants can privately come to an agreement on the percentage liability share in advance, the conciliation with the plaintiffs can more effectively focus on issues of damages, causation, comparative negligence, etc.

If the parties fail to even get close to an acceptable agreement at the defense mediation, something valuable has still been accomplished — you have learned that there is no viable basis for meaningful global negotiations with plaintiffs and, better, you have avoided the near-irreversible souring of plaintiffs arising solely from failed traditional negotiations.

Damages-Only Mediation

With increasing frequency, I find that the above "sideways" crossfire is not necessarily fatal where the focus of the negotiations is shifted toward a damages discussion to a point where the collective defense can agree on "the number," despite the dispute of percentage contribution of liability. In those instances, the respective co-defendants agree to front or pledge the settlement proceeds, pending subsequent litigation, by way of a jury or nonjury trial or binding arbitration. This practice:

(1) Removes the plaintiff from the equation.

(2) Caps the exposure.

(3) Allows the co-defendants to eliminate court mandates and deadlines.

(4) Reduces defense costs (in lieu of "live" experts, for example).

This is really more or less a "call-your-(liability)-bluff" approach, where, if you are that sure of your well-considered liability position, here's your chance to significantly hedge the bet while cost effectively proving it.

Under this scenario, consider the guest-passenger brain injury claim where the parties reached a number, agreed that no moneys would be fronted, and that the defendants would proceed to the scheduled trial date solely on the issue of percentage negligence. In that case, opposing motorists were approaching a red light with one vehicle making a left-hand turn while the oncoming vehicle, according to an eyewitness, accelerated through the intersection.

At the mediation, the left-turning defendant was locked into a 50/50 position while the other defendant evaluated the negligence at 80 percent on the turning party. Unable to reach an agreement at the mediation, the parties wisely capped the potential exposure and received a jury verdict that determined the left-turning defendant at 20 percent negligence while the "accelerating" defendant at 80 percent.

Regardless of the outcome, which was somewhat of a surprise to both parties, the case resolved efficiently, the damages risk was removed and substantial expense was saved by both sides — with closure the welcomed end result.

Binding-Liability Mediation

For those of you out there who have had enough of the paralyzing co-defendant crossfire, consider a binding mediation limited to the relative negligence of the co-defendants in advance of the negotiations with plaintiff. The benefits? You get the input and interaction of the mediation process, liability closure and much less likelihood of a "surprise" verdict.

In the end, do you really want the not-so-fully-informed jury to determine your share of liability, or the experienced mediator tuned-in to the negotiations slicing the liability pie? Yes, you may get lucky with the jury more than once in a while, but that unexpected surprise lurks within every courtroom. Consider this more practical, less costly and less risky approach — resolving liability before the damages discussion begins. At which point, once fault has been sorted out, a global settlement may be just around the corner.

Single-Issue Mediation

On lesser occasions, meaningful negotiations with plaintiffs have been prevented because of a sole issue between co-defendants, such as disputed language contained in an indemnification agreement between contractors. On one occasion, separate defense counsel appeared at the mediation without having had any prior mention of the issue and, from the outset of the negotiations, presented their opposing viewpoints and "dug in," stalling any ability to develop an offer to plaintiff until several hours into the mediation. Co-defense counsel had never even raised the issue until well into the private session — a deal killer for sure.

In these circumstances, while a separate mediation may not be necessarily suited, defense counsel should at least consider bifurcating the day so that the morning session is devoted to the indemnification issue, with plaintiffs scheduled to appear at a later designated time. This accommodation for the plaintiff also serves as a well-received common courtesy, the value of which should not be underestimated.

Continued on page 8

Advanced ADR Practice — Mediating the Multidefendant Case

Continued from page 7

R-E-S-P-E-C-T

As noted previously, it is generally my observation that plaintiffs typically appear ready to engage in serious negotiations at the outset of any mediation. On the other hand, I see with greater frequency the defense room viewing the mediation with no such urgency — looking at it as more of a two- if not three-step process. This divergence of approach to settlement often thrusts the negotiations in reverse, with plaintiffs and their counsel distrustful of further discussion.

It seems apparent on these occasions that defense counsel received orders "from above" to appear at the mediation with limited authority that clearly could not resolve the matter. Some may think that this "wearing down the plaintiff" is a worthy strategy; it often has the opposite effect, however. Instead, where the defense appears with unexpectedly low authority, incomplete information or documentation and/or, after four hours, suggests more discovery, the negotiations fail miserably and the future ability to resolve the claim is significantly undermined. If this is the intended strategy from the outset, so be it, but caution — this approach will only work so many times until plaintiff's counsel will refuse to mediate. Otherwise, counsel will eventually list their demands before agreeing to meet again.

Moral to the story? Know what you want going in because usually in the end it all boils down to simple respect. In almost every instance, the plaintiffs, brand-spanking new to the process, have never been to a mediation and have no realistic understanding of the process. In my experience, most plaintiffs are looking for respect — plain and simple — whether deserving or not. While this may be translated in various ways, most plaintiffs not used to "our world" just want to be treated fairly and with fair consideration for their emotional experience or loss, regardless of the legal issues standing in their way. There is clearly a fine negotiation line between respect and insult. Just try to keep in mind how you would like to be treated if you had never been on the other side of the table.

Keep Holding On

In a recent, fairly intricate medical malpractice claim, there was little to no co-defense discussion pre-mediation, with the parties relatively frozen by the conflicting opinions of "Who was the target" — no surprises. From the outset, the respective co-defense counsel looked sideways, severely entrenched in their otherwise well-considered unilateral evaluations. As anticipated, some postured respective coverages, others focused on relative liability exposure while others disputed verdict potential.

All attempts to agree on a number and settle out with the plaintiff given the huge verdict potential also failed, as the plaintiff, who flew in from several states away, ultimately left after seven hours, beyond insulted, along with angry counsel. With trial a mere month away, all was lost (or so it seemed) because nothing suggested above succeeded.

In this instance as mediator, all that was left in the bag was to just keep holding on, making sure the conversation stayed alive regardless of the collectively disconnected resistance. Fourteen days later (along with dozens of phones calls and e-mails), the case finally settled to a justifiable end because everyone remained in the game. It reminded me of my early wrestling days when I asked my coach how to get out of a tough hold. "There's no 'magic button,'" he barked, "just bull your way out of it, Noble!" Sometimes it's just that simple.

Separate Checks Please!

In the end, mediating with multiple defendants is very much like attending a big dinner party where the waitress brings one check. An uncomfortable tug-of-war follows with the typical "Who had the shrimp?" question. All too often, the first time around the table, there is not enough to pay the tab, much less to leave a tip. Those who had more than their fill generally suggest an "equal split," while those who ate lightly scrutinize the bill and position from there.

As noted previously, it's just not too hard to figure out where everyone is coming from either by body language or silence, and, after the fact, there are those who certainly wished they had seen it coming and had coordinated a request for separate checks in advance. One thing is for sure, in the end, no one wants to be standing alone with the tab for more than his or her fair share. Think about this the next time you schedule that big mediation with multiple parties and include a little bit of planning before you sit down at the negotiation table. You and, more importantly, your clients will be glad you did. ■

Annual Meeting Claims Luncheon Recap — Baseball and Claims

by Eric J. Sieber, CPCU, AIC, RPA

Eric J. Sieber, CPCU, AIC, RPA, is the owner of Sieber Claims Investigation in Rancho Cucamonga, Calif. His 33 years in claims includes extensive experience in trial preparation investigation of personal and commercial casualty claims. He specializes in handling severe casualty claims, fraud investigation, trial preparation and jury debriefing investigations. Sieber currently is a member of the CPCU Society's Claims Interest Group Committee, the California Association of Independent Insurance Adjusters and the California Association of Licensed Investigators. He is also an associate member of the Association of Certified Fraud Examiners.

The Claims Interest Group held a lively and fascinating luncheon at the Annual Meeting and Seminars in Philadelphia. Our speaker was Vice President and CFO **John Nicholas, CPA,** of the World Series Champion Philadelphia Phillies.

Claims Interest Group Committee member **William D. McCullough, CPCU, CLU, ChFC, AIC,** introduced Nicholas, a native of Philadelphia who attended West Chester University of Pennsylvania. He provided an interactive discussion of the insurance and risk management issues affecting Major League Baseball (MLB) teams in general and the Philadelphia Phillies in particular. Having done a little background investigation into what it takes to be a CPCU, he likened the requirements to what it took for him to achieve his CPA designation.

Nicholas began his presentation with an overview of the baseball industry, noting that there were about 120 million tickets to baseball games sold in 2008, roughly 80 million to major league games and 40 million to minor league games. Professional baseball is a $6 billion industry, of which roughly 50 percent goes toward player compensation. The average MLB player's salary is about $3 million annually.

Nicholas noted the dichotomy between Major League Baseball and other professional sports. MLB pays for, and supports, the development system directly. By contrast, the National Basketball Association (NBA) and National Football League (NFL) rely on major college sports programs.

Moving to a discussion of specifics relating to insurance, he first addressed property exposures. The key property of MLB franchises are their ballparks, which most own except for eight or 10 MLB teams. Some are built entirely by the respective MLB team, but most parks are built with some combination of public and private funds. The Phillies own their facility, Citizens Bank Park, which opened in 2004 and was built with 50/50 public and private funds at a cost of about $500 million.

Revenues for MLB teams come from gate receipts; network, local and cable TV; radio; concessions ("good ole" hot dogs and beer); and advertising and parking revenue. Luxury suites and club seats substantially increase revenues. Rental fees for the 69 suites at Citizens Bank Park range from tens of thousands to $200,000 per year. Parking and other

Continued on page 10

Annual Meeting Claims Luncheon Recap — Baseball and Claims

Continued from page 9

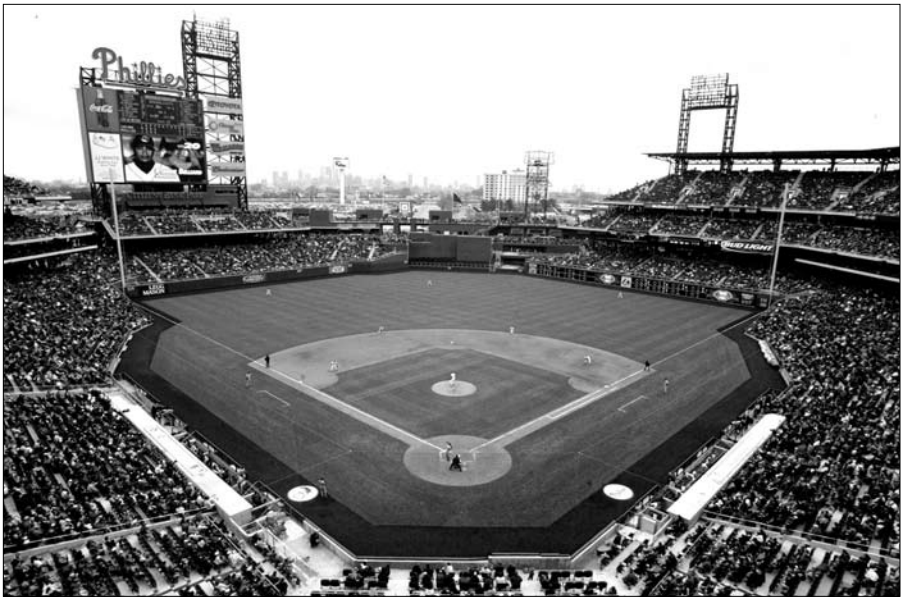


Photo courtesy of the Philadelphia Convention & Visitors Bureau.

Citizens Bank Park, home of the 2008 World Series Champion Philadelphia Phillies, is a state-of-the-art, 43,000-seat ballpark that opened in April 2004.

revenues are increased by using the facility for nonbaseball events such as concerts.

On the expense side, player compensation, as already noted, is about 50 percent of a MLB team's total outlay. Because of union agreements, all MLB contracts are guaranteed contracts. Many people familiar with professional sports are aware that professional athletes are contractually prohibited from certain hazardous activities, such as skydiving. Nicholas mentioned that pro athletes, however, are also prohibited from playing other sports and activities such as racing, bobsledding and even — rather curiously — spelunking (cave exploration).

As to insurance issues, Nicholas first discussed disability insurance for the players and noted that the disability policies exclude injuries suffered while engaging in activities prohibited by the player contract. One unique aspect of baseball disability policies is that because the contract is guaranteed, disability payments are made to the team rather than the player.

Other team costs involve the managers and coaches; charter jets (under the labor agreement MLB teams are required to fly all players first class); scouting and development; ballpark costs; and utilities, interest, marketing and publicity.

About 10 years ago, an agreement with the union required major league teams to have a certain amount of capital to be able to make payments. This was referred to as the "debt service rule" because there were a number of teams that were not making any profit. Nicholas gave examples of team owners from other sports who are wealthy enough that losing money on the sports franchise was not an issue to them.

Major league teams contribute to a captive insurance pool known as MLB BASES (MLB Burlington Assurance Exchange Society). Some of the teams' exposures are handled on a league-wide coverage basis through MLB BASES, and others through traditional external carriers. According to Nicholas, the Phillies do not have anyone on staff holding the title of "risk manager," per se, although this area falls under his purview within the management team.

With respect to insurance costs, consistent with the expense profile of a major league baseball team, 50 percent of the Phillies' cost for insurance protection goes to workers compensation. Property exposures account for about 20 percent of the insurance expense.

The Phillies have a total staff of about 500 people on nongame days, doubling to about a thousand on the day of a game. Many of the "game day" employees work in concessions. Like most major league teams, the Phillies utilize a concessionaire to handle food service, thus transferring many of the exposures. Its own coverage covers full-time, part-time and event employees, which describes the extra people required whenever a ballgame or other event is held at the stadium. The Phillies also have coverage for all of the major league and minor league players. Club-specific coverages include both player life insurance and disability insurance.

There have been very few claims relating to player life insurance. Two examples Nicholas mentioned were St. Louis pitcher **Darryl Kyle,** who died of a heart attack, and three players who died in a boating accident several years ago during spring training. Life policies typically insure 100 percent of the life, and the present value of the contract commitment with disability coverage being quite expensive and done on a case-by-case basis.

Considering the dollar values of some recently signed contracts, involving up to more than $100 million for certain players over the life of the contract, disability cover is quite expensive. He gave the example of baseball player **Jim Thome,** who in 2002 was injured shortly after signing a large contract. These are evaluated for coverage on a player-by-player basis.

Disability policies for baseball players typically have a lengthier waiting period, possibly as much as an entire season. The cheapest to insure are first basemen, with pitchers (through arm injuries) being the most expensive, as pitchers rely on

The Claims Interest Group Luncheon was filled to capacity with CPCU baseball fans and their guests.

one arm to pitch and can in an instant be seriously injured or suffer a career-ending injury.

According to Nicholas, the Phillies have had four or five disability claims over the years. He specifically mentioned **Lenny Dykstra** and **Darren Daulton,** who were injured shortly after signing big dollar contracts in the 1990s.

> ■ ***… 50 percent of the Phillies' cost for insurance protection goes to workers compensation.***

Nicholas also gave an example of an athlete who was about to sign a very high-dollar contract but severely injured his knee the day before playing pick-up basketball, thus losing the entire guaranteed contract.

As to liability claims exposures, one of the most important is the most routine — the slip and fall. With three million people coming through the turnstiles annually, the Phillies will typically get double the slip-and-fall reports as claims actually made. The Phillies rely on loss control and risk management inspections, which are conducted twice a year by their insurers, to assist in minimizing the risk.

An exposure unique to major league baseball is balls and bats going into the stands and injuring fans. To limit the risk, each ticket includes an assumption of risk waiver and the Phillies post additional warning signs around the ballpark and make a public service announcement at each game warning of the inherent risk of balls or bats entering the stands. The alcohol dram shop exposure has been essentially transferred to its concessionaire.

Although many believe that baseball teams have fireworks only on special dates, Nicholas explained that fireworks are much more frequent (for example, homeruns and promotions) and have a long history of claims. People living around the stadium have made claims of various types, mostly involving windows and damage to cars. He gave an example of one person who claimed that fireworks had damaged the paint on his car three years in a row. Nicholas has dealt with so many fireworks claims that he coined the term "window-seeking missiles." He did note that the team's fireworks exposure has been reduced since moving to Citizens Bank Park, as parking and other structures are farther away.

It was heartening to hear Nicholas say in the question-and-answer session that his No. 1 goal during his 10 years with the Phillies, including since he became VP and CFO in February 2007, has been to keep ticket prices down. He noted that his father was a machinist and it was a major event to be able to go to a ballgame. Nicholas's goal is to keep prices reasonable so that a family can attend a game comfortably on a $100 bill.

This was an informative and lively session. In addition to the wonderful talk from John Nicholas, there were many new designees in attendance along with Claim Interest Group Committee members. New acquaintances and friendships were formed.

We hope to see all of you — and more new folks — at the 2009 CPCU Society Annual Meeting and Seminars Claims Interest Group Luncheon in Denver. We have some great plans for that event! ■

The General Aggregate Limit and Long Tail Claims — A Historical Perspective on Claims for Increased Limits

by Tommy R. Michaels, CPCU, AIC

Tommy R. Michaels, CPCU, AIC, is the principal of T. R. Michaels Claim Consulting LLC and has been involved in property-casualty claims for more than 37 years. Michaels serves as an expert witness on claim handling issues, a consultant in coverage interpretation and an instructor of insurance. A CPCU since 1976, he is a member of the CPCU Society's Connecticut Chapter, the Claims Interest Group and the Consulting, Litigation & Expert Witness Interest Group.

Asbestos, environmental, sexual abuse and other claims that date back to, and originate from, the 1940s continue to be a drag on insurance company earnings. Most of these claims are on policies issued before 1985, when the general aggregate limit was added to the policy. To fully understand the evolution of aggregate limits and the reasons why a general aggregate limit was not used until 1985, it is necessary to go back to the early part of the last century.

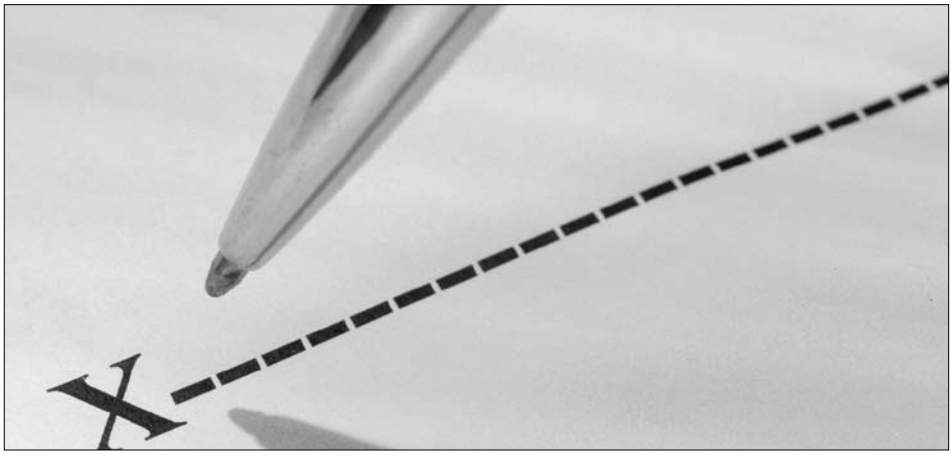
At that time, liability insurance was sold for specific hazards such as public liability, manufacturing liability, team liability and various types of contingent liability, to name a few. Having separate policies for each hazard was based on the belief that "the cost of the hazards of the new types of insurance should not be averaged in the premiums of all policyholders, because not all of the policyholders would have such hazards." (Sawyer, p. 13)

Each policy, therefore, had its own premium-rating basis. This might be area, payroll, sales, receipts or another basis. "Because each separate cover was regarded as a separate policy or contract, not only different rating bases were adopted but separate rules governing the writing of each cover were formulated." (Sawyer, p. 15)

As companies expanded operations throughout the nation and hazards increased, a need was recognized for a policy combining several coverages. In 1939, the National Bureau of Casualty and Surety Underwriters and The Mutual Casualty Insurance Rating Bureau began developing a comprehensive liability insurance program. In 1941, when the comprehensive general liability (CGL) insurance policy first became available nationwide, a new approach to the writing of liability insurance began.

Rather than needing a separate policy for each hazard to which an organization could be potentially exposed, an insured could obtain the CGL policy, which would insure all hazards not specifically excluded. This would mean that as new hazards arose, an exclusion would have to be added or an appropriate premium charge made.

There were many challenges and obstacles in implementing the new policy, with the different manual rules and rating bases serving as two of the biggest challenges. To meet the challenge of complying with the various manual-rating rules for the different types of coverage combined in the comprehensive liability form, there were separate aggregate limits — not a general aggregate limit on the policy.



Though the declarations page in the early versions of the CGL form had only one bodily injury aggregate limit, and that applied to products and completed operations, the declarations page had four separate property damage aggregate limits. These separate aggregate limits corresponded to the separate covers that were combined into the CGL policy:

- Premises.
- Operations.
- Protective.
- Products-Completed Operations.
- Contractual.

The limits of liability section of the form described the circumstances under which each aggregate would apply. The four separate property damage aggregate limits remained on the declarations page of the policy until the 1966 revision, but the description of circumstances for the different aggregates continued to be in the form with little change. This was finally overcome in 1985, when the general aggregate came into existence.

Having separate aggregate limits gave policyholders and their attorneys opportunities to make several different arguments to increase the limits of coverage and ultimate payout beyond what drafters intended. Listed below are three of the more common arguments and the basis of each argument:

- *The Products-Completed Operations Aggregate for Bodily Injury does not apply to workers exposed to asbestos during installation of asbestos-containing products even if the triggered policy incepts after the installation is completed.*
  From the early 1980s until the mid-1990s, most insurers made payments for asbestos claims as Products-Completed Operations, therefore subject to an aggregate. As limits became exhausted, policyholder

attorneys sought other ways to access insurance coverage. Policyholders oftentimes did not have umbrella or excess coverage, especially during the 1940s and 1950s, or the umbrella or excess insurer in place at the time may have subsequently become insolvent. In those instances, policyholder attorneys began making the argument that the policies were not exhausted because these were operations claims and there was no aggregate for bodily injury. Additionally, plaintiff attorneys began suing peripheral defendants that were considered second- or third-tier defendants. The attorneys for the plaintiffs and policyholders have been fairly successful in advancing this argument, and asbestos litigation has continued beyond the mid-1990s when it was believed to be going away.

- *A Property Damage Aggregate limit does not apply to environmental contamination caused by operations of a policyholder if the premium rating basis was not remuneration.*
  This argument is likely to be advanced for a policyholder whose policy was composite-rated for ease of premium calculation. The composite-rate may certainly include remuneration rating for manufacturer and contractor exposures, but oftentimes the rating sheets for a policy issued more than 20 years ago are not available.
- *There is a separate aggregate limit for each site where the policyholder is liable for environmental contamination.*
  This argument is premised on the policy language that describes the circumstances for the Premises Operations Aggregate and Protective or Independent Contractor Aggregate, which states, "These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured" or uses similar language. Separate aggregate limits for each project reflect the manual rules in effect in 1941. The manual called for "Property damage liability for a contractor requires a limit upon the aggregate losses which result from each separate project." (Sawyer, pp. 15–16) Even though there is no definition in the coverage form for "project," there is a statement that the aggregate for Protective or Independent Contractors is for operations performed for the named insured by independent contractors and general supervision thereof by the named insured.

The CGL form promulgated in late 1940 was a beginning, and all understood it would continue to change. The first revision to this form was in 1943, with other revisions taking place in 1947, 1955, 1966 and 1973, before the massive landmark revisions in 1985. Though **E. W. Sawyer,** a person instrumental in the development of the CGL policy, acknowledged that the CGL policy would continue to change and be modified, I do not believe he ever

Continued on page 14

The General Aggregate Limit and Long Tail Claims — An Historical Perspective on Claims for Increased Limits

Continued from page 13

anticipated the long tail type of claims that insurance companies are being confronted with today.

An exclusion dealing with pollution exposure was finally added to the CGL policy in 1970. This exclusion was only a qualified exclusion and allowed the policy to still provide coverage for "sudden and accidental" pollution events. In 1985, the absolute pollution exclusion was adopted and incorporated into the CGL policy. Exclusions dealing with asbestos were added in the late 1970s and early 1980s. Since the courts consider sexual abuse to be an intentional act, the "expected or intended" injury exclusion would apply to those types of claims. Even though these exclusions were developed to restrict the scope of coverage to that anticipated by the premium, policyholder attorneys developed creative methods to expand coverage beyond that which was originally contemplated when the policy had been issued. This was done primarily through interpretation of the four or five different aggregates on the CGL policy.

This ability to increase the limits of coverage and ultimate payout continued until the General Aggregate limit came into existence along with massive changes made to the CGL policy in 1985. This was also the edition that changed the name of the form from Comprehensive General Liability to Commercial General Liability. The current CGL policy form has a General Aggregate limit and a Product-Completed Operations Aggregate limit. These limits apply to all bodily injury and property damage under Coverage A, damages under Coverage B and medical expenses under Coverage C.

The use of a General Aggregate limit resolved these issues because there was an aggregate limit that applied to bodily injury other than Products and Completed Operations. The General Aggregate limit is not dependent on a rating base or for separate projects, although there are endorsements available currently that allow a policyholder to have separate General Aggregate limits for each designated project.

As new hazards develop, new legal theories emerge and courts interpret the policy in ways not anticipated by the drafters at the time it was issued, the CGL policy form will continue to change and evolve. As always in handling claims, it is important to read the policy. ■

Reference

Sawyer, E. W. *Comprehensive Liability Insurance.* New York: The Underwriter Printer and Publishing Co., 1943.

Circle of Excellence (COE) Submissions Needed

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

CIRCLE OF EXCELLENCE RECOGNITION PROGRAM

The Claims Interest Group needs your help to qualify for Circle of Excellence (COE) recognition. And not only can the information you provide be used by our group, but you can also supply that information to your local chapter for its submission.

To access the Claims Interest Group's COE submission form online, log onto www.cpcusociety.org, and click on the Interest Groups tab at the top of the page, which brings you to the directory of all Society interest groups. Click on the Claims Interest Group link to take you to our Web site.

Click on the COE logo on the Claims Interest Group home page, which will bring you to the submission form. If you prefer to go directly to the submission form without first logging on, type the following Web page address in your browser: http://claims.cpcusociety.org/page/137090.

We appreciate your support in helping us once again achieve Circle of Excellence Gold with Distinction! ■

Claims Interest Group Web Site Semiannual Report

by Arthur F. Beckman, CPCU, CLU, ChFC, AIM

Arthur F. Beckman, CPCU, CLU, ChFC, AIM, is assistant vice president, property and casualty claims, for State Farm in Bloomington, Ill. In 1971, he began his career with State Farm in the Mountain States Region's fire division. One year later, Beckman transferred to the data processing department, which allowed him the opportunity to work full-time at night while attending the University of Northern Colorado full-time during the day. He subsequently advanced steadily throughout State Farm's regional office network. Beckman assumed his current position in April 1997. He is serving a three-year appointment on the Claims Interest Group Committee as webmaster.

Maintaining an easy-to-use, informative and current Web site is one of the key goals of the Claims Interest Group. Interest group members and visitors will utilize a tool that is all-encompassing.

One of the challenges is finding, publishing and maintaining information. Our success largely depends on the number of members that participate and submit information. A special thanks to **William D. McCullough, CPCU, CLU, ChFC, AIC,** who consistently submits articles.

This past year we activated a blog on the site, which gives members the opportunity to post a topic and experience real-time feedback. The blog was activated at the end of March 2008, and an eBlast was sent to all members announcing this new Web site feature.

Some key information about the Claims Interest Group Web site:

- The home page is segmented into various sections, such as CPCU Meeting Locations, Claims Interest Group Blog, Discussion Topics, News, and so forth. It contains a left-side menu that provides links to other pages, including the Claims Interest Group Newsletter, the Message from the Chair, and meeting minutes, among others. We also use the home page to highlight key information.
- As of September 2008, statistics indicate the site has had 8,366 hits. Based on hit tracking, we can pull the following statistics:
  - Weekday visitors.
    - Wednesday — 24.56 percent of the visitors.
    - Monday — 20.15 percent.
    - Thursday — 17.24 percent.
    - Tuesday — 17 percent.
    - Friday — 12.99 percent.
  - We are starting to see more traffic on the weekends (3.74 percent for Saturday and 4.32 percent for Sunday)
  - The most active time is 8 to 8:59 a.m. This is a change. Previously, the busiest time was 11 to 11:59 a.m.
  - We get more unique visitors than first-time/return visitors. (A unique visitor has not visited a Web site in the past 24 hours; a first-time visitor has never visited a Web site; and a returning visitor has previously visited a Web site.)
  - Most visitors look at multiple pages within the site.
- Visitors come to the site in several fashions. Although most go directly to the Claims Interest Group site, others first go to the CPCU Society site and then click through to the interest groups.

To make it easier for members to provide information for our Circle of Excellence submission, they now can click on the COE logo on the home page and access the electronic submission form. For the latest report, we split the form into different categories to make it easier to compile results.

The Claims Interest Group is always interested in suggestions for improving member services, including the Web site. If you have any suggestions regarding the Web site, please contact me at art.beckman.bltw@statefarm.com. ■

http://claims.cpcusociety.org

Claims Interest Group

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Claims Quorum

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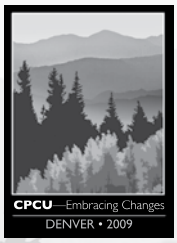

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Expand your knowledge base with an all-new lineup of more than 45 technical, leadership and career development seminars.

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Glean inside perspectives on diversity and international issues from industry leaders at two new General Sessions.

Mark your calendar today! Stay tuned for more details and online registration, available in May, at **www.cpcusociety.org.**

The Claims Interest Group newsletter is published by the Claims Interest Group of the CPCU Society.

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