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 more than 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 10 years and is an active member of the CPCU Society's Atlanta Chapter, with prior service as director, secretary, president-elect and president.

As autumn begins to emerge around the country, I find myself busier than ever and can't help but wonder where the time is going. I'm reminded of the Kenny Chesney song "Don't Blink."[1]

> So I've been tryin' to slow it down
>
> I've been tryin' to take it in
>
> In this "here today, gone tomorrow" world we're living in
>
> So don't blink, 'cause just like that you're six years old
>
> And you take a nap
>
> And you wake up and you're twenty-five
>
> And your high school sweetheart becomes your wife

In speaking with my friends, I know we are all under the same pressures to do more with less, and as a result, we are spending more time focused on our job responsibilities.

I encourage each of you to keep balance in your life and "don't blink."

During the past year, the Claims Interest Group (IG) Committee has been hard at work providing educational, informational and networking opportunities to the Society membership. Those opportunities include the publication of the *Claims Quorum*, conducting webinars, maintaining a website, developing the LinkedIn networking site and producing the seminars that were presented at the 2010 Annual Meeting in Orlando.

The Claims IG presented a seminar titled, "Perspectives in Claims Communications — Write Makes Might," which addressed effective communication throughout the claims process. In addition, with the Risk Management and the Underwriting IGs, we presented "Commercial Coverage Conundrums — An Interactive Case Study Approach," and with the Loss Control and Underwriting IGs, we presented "Lessons Learned from Recent Catastrophes — Have We Really Skinned the CAT?"

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Also at the Annual Meeting, we hosted our Claims IG luncheon on Sept. 26; the theme of the program was "How to Get More for Your Defense Buck." ISO generously sponsored the event and provided some great door prizes — including an iPad!

Since I began my participation on the Claims IG Committee in 2000, one constant has been the quality of our newsletter. This publication has consistently provided value to our membership. In this edition, we have an article authored by Class of 2009 designee **Joseph J. Badowski, CPCU,** who is with Harleysville Insurance. I commend Joseph for getting involved with the Society upon receiving his designation.

After completing this issue, longtime CQ Editor **Marcia A. Sweeney, CPCU, AIC, ARM, ARe, AIS,** stepped down and turned over the reins to Assistant Editor **Charles "Chuck" W. Stoll Jr., CPCU, AIC, RPA.** Marcia has become a role model and resource to other IG newsletter editors, and she truly will be missed. I look forward to working with Chuck, as he has demonstrated a commitment and passion to maintaining the quality and quantity of our publication. The CQ Committee is seeking articles and potential authors for future publications. If you would like to submit an article or know of an author, please contact Chuck Stoll at stollc@gabrobins.com.

As you can see, the Claims IG Committee members have been dedicated to the goal of providing value to the Society membership. As the Claims IG chair, I believe that many hands make for light work and strive to maintain balance in all we do. Remember, "don't blink!" (1) ■

Reference

(1) "Don't Blink." Words and music by Chris Wallin and Casey Beathard; recorded by Kenny Chesney.

The Institutes™

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The Institutes Announce New Changes to the CPCU Program

The Institutes, responding to the needs of the property-casualty industry, have made changes to the CPCU designation program. Working in close cooperation with industry professionals, designees, training experts and the CPCU Society, they have modified the CPCU designation program to ensure that it continues to meet the industry's needs in an ever-changing and competitive marketplace.

The current CPCU 510 course is being replaced with CPCU 500 — Foundations of Risk Management and Insurance. This course provides students with a more tightly focused starting point in the CPCU program.

The Institutes have separated the study of ethics and the CPCU Code of Professional Conduct from the old CPCU 510 course and integrated it into the new online Ethics and the CPCU Code of Professional Conduct (Ethics 312). There is no charge for completing Ethics 312.

As with all its technical content, The Institutes revise courses in the CPCU program so that content remains practical and relevant. This year, additional case studies and application-oriented content will be added to select courses.

Effective immediately, the CPCU program will include an elective component as a part of its education requirement, which consists of four foundation courses, one elective course and three concentration courses (personal or commercial).

Individuals pursuing the CPCU designation will select one elective course from among 10 options in seven functional areas. The elective choices are as follows:

- AAI 83 — Agency Operations and Sales Management.
- AIC 34 — Workers Compensation and Managing Bodily Injury Claims.
- AIC 35 — Property Loss Adjusting.
- AIC 36 — Liability Claim Practices.
- ARe 144 — Reinsurance Principles and Practices.
- ARM 56 — Risk Financing.
- AU 65 — Commercial Underwriting: Principles and Property.
- AU 66 — Commercial Underwriting: Liability and Advanced Techniques.
- CPCU 560 — Financial Services Institutions.
- ERM 57 — Enterprise-Wide Risk Management: Developing and Implementing.

For more detailed information on all CPCU program changes, log on to The Institutes website, www.aicpcu.org.

Social Media in Claims Investigation — The Smell of 'Tweet' Success

by Richard J. Cohen, J.D., Daniel W. Gerber, J.D., and Tamara C. Bigford

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Daniel W. Gerber, J.D., a partner of Goldberg Segalla LLP, maintains a national practice in commercial litigation and heads up the firm's Social Media Strategic Team.

Tamar C. Bigford is a principal in B Social LLC, a professional social media consulting firm that works closely with professional firms on their social media practices and policies.

Perhaps the vast expansion of electronic social networking into our culture is best captured by a recent *New Yorker* cartoon. The cartoon in the June 1, 2009, issue depicts a firing squad and an officer saying to a condemned man: "Last tweet?"[1] There is little doubt that social networking through mediums such as Twitter, Facebook, MySpace and LinkedIn has become an established type of participatory communication.[2]

As a result of the explosion of information available online, claim professionals and defense counsel are discovering that social media is useful for uncovering relevant information on claimants. This includes:

- Postings about the incident (i.e., discussing the injury or visits to doctors, boasting about a lawsuit, or describing trips or activities inconsistent with claims).
- Photographs showing a plaintiff engaged in post-accident activities.
- Photographs showing plaintiff in a poor light (i.e., drinking, using drugs).
- Descriptions of education/experience/skills in the "more professional" networking sites (such as LinkedIn), indicating ability to mitigate damages.

It is becoming more and more apparent that by utilizing social networking tools, claim professionals increase the chance of successful claim resolution. One must, however, understand the processes and have a strategy.[3]

Understanding Social Media Resources

In order to understand the application to claim investigation, it is important to understand the various media and their different applications. Twitter, for example, is a focused medium. It allows a person to send messages of up to 140 characters in length to anyone who "follows" him or her. Messages (i.e., "tweets") can be sent on any topic. In many respects, it is like a mini-blog. A blog is different than a website in many respects. A website is static. A blog on the other hand is a running stream of content-driven posts that all fall within the subject matter of the blog.

Tweets are instantaneous and can be received on cell phones as text messages, in e-mail or through other Web portals such as Facebook or LinkedIn. Anyone can choose to follow someone else on Twitter. A user can prevent a "follow" by "blocking" that person, but Twitter is more freestyle than other social networking sites like Facebook, where a user must invite another user to be a "friend." This, of course, means that a claimant with a Twitter account opens him/herself up to the world. This is, in part, because anyone else can see who follows him or her, and anyone else can become a follower of that person.

Of course, Twitter and blogging are just two mediums used in social networking. By far, the most utilized outlets are sites such as LinkedIn, MySpace and Facebook. Each of these sites allows users to set up a profile that others can view and allows others to connect their profiles to other users. Each site varies in the method and amount of information exchanged once one user is connected with another.

LinkedIn is more suited to the business world than Facebook and MySpace. For example, LinkedIn allows users to send an "introduction" to someone so that two people might do business together. Facebook allows users to send someone a "teddy bear." LinkedIn allows users to share expertise by answering questions posted by other users. Facebook allows

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users to share how they are feeling by adding applications like "Happy Island," "My Personal Weather" or "Care Bears."

As a result of the differences, LinkedIn is better suited for vocational information, while sites like Facebook and MySpace may be best suited to unveil personal information about a claimant and his or her claim.

Additional sites should not be overlooked. In particular, claimants have taken to knowingly creating video and photographic accountings of their lives on the Internet. Sites such as YouTube are used to post videos for the world to see. Sites such as Flickr and Photobucket are used to upload, share and print photographs. Claimants visit forums about medical conditions and often make comments in these forums.

Understanding the Power of Social Media

The amount of information available about people through these sites is astounding. Google CEO **Eric Schmidt,** during a keynote address to Mobile World Congress in February 2010, stated that "[T]hese networks are now so pervasive that we can literally know everything if we want to ... What people are doing, what people care about, information that's monitored, we can literally know it if we want to ... ."[4]

This vast amount of information is already having an effect on courts and claims. Several courts have banned jurors from using social media.[5] Plaintiff's lawyers often advise their clients on their first meeting to discontinue using social media.[6] Lawyers have even found themselves in hot water for posting personal views on social networking sites.[7]

Utilizing Social Media

Basic investigation can take place with respect to almost any person on any social media site. Name searches can be made in the site's search engine or on Google. Several blog-specific search engines exist, such as blogdigger.com. The amount of information available once a profile is found will depend upon a person's privacy settings. The more difficult question ethically is whether to attempt to "friend" a claimant on Facebook or "follow" him/her on Twitter. In other words, should a social media investigation include creating a directly electronic relationship with the claimant?

The danger begins once a claim professional or lawyer steps outside of the controlled feed from a regular source and starts into the quick back-and-forth exchange that characterizes social networking at its best. Lawyers are prohibited from communicating with parties known to be represented by counsel, and it is untested whether courts would extend that rule to an insurer who is investigating a claimant clandestinely through social media.

The Stored Communications Act creates a criminal offense and civil liability for whoever "intentionally accesses without authorization a facility through which an electronic communication service is provided" or "intentionally exceeds an authorization to access that facility" and by doing so "obtains, alters or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." 18 U.S.C. §2701.

In *Van Alstyne v. Electronic Scriptorium Ltd.*, 560 F.3d 199 (4th Cir. 2009), the plaintiff sued her employer for sexual harassment and the employer countersued for business torts. The boss accessed the employee's AOL account using her password. The jury awarded $400,000, including punitive damages, which was affirmed on appeal.

In light of potential liability, it is best to proceed with caution before creating a direct relationship with a claimant as part of a social media investigation. Inquiry should be made as to whether corporate policies are in place governing this type

of investigation, and further inquiry should be made with counsel as to the appropriate boundaries. In addition, there are several well-qualified investigative firms that know precisely how to utilize social media in investigations.

Once a matter is in suit, however, it is important that several questions are asked in the discovery process. Some of these include:

(1) Do you have a computer, laptop or Netbook? (At home or at work?)

(2) What do you use it for?

(3) Do you send e-mails to your co-workers?

(4) Have you ever gone into a chat room, message board or posted on any website?

(5) Do you blog?

(6) Do you have online e-mail (Yahoo, AOL, Gmail)? Do you access this through work?

(7) Are you on Facebook? Twitter? LinkedIn?

(8) Have you visited any medical-related sites to examine your condition (i.e., WebMD.com or health-related chat rooms?)

(9) Have you posted any videos on YouTube? Ever used the Internet to post photographs or upload prints for ordering?

Discovery should be used to establish relevance of the home or office computer, Internet accounts or other electronic devices. At a minimum, initial discovery demands should seek:

(1) Authorizations for social networking sites.

(2) Identification of social networking sites.

(3) Screen names, logons and passwords.

(4) Release of information from social networking sites.

If necessary, a court order can be sought against the plaintiff to "freeze" the computer and its contents. Forensic analysis of a plaintiff's home computer or electronic devices may lead to e-mail or social media that contradicts the claim. This analysis will also ascertain any destruction of evidence (drive-wiping programs, reformatting or loss of the hard drive; destruction of the computer or deletion of specific files). For example, the court in *Foust v. McFarland*, 698 N.W.2d 24 (Minn. 2005) affirmed the trial court's adverse inference charge against plaintiffs in an auto accident case for using a "WipeInfo" program to permanently delete data from a computer hard drive.

It is important to realize that social networking sites want to appear to protect users. Facebook, MySpace and Twitter currently receive thousands of requests from law enforcement and civil litigation and want to discourage these requests. According to Facebook's Deputy General Counsel **Mark Howitson**, Facebook is "looking for a fight."[8] As such, Facebook will not hand over any information on its 350 million users without a subpoena. Even then, the company will only provide basic subscriber information unless that user gives his or her consent. In addition, Facebook is only responding to California subpoenas and orders.

Don't Forget to Look in the Mirror

While the impact of social media is vast, it may also pose serious consequences for an insurer or insurance professional. While it is important to investigate and know as much as possible about the claimant, it is key in today's world to understand all information available about a policyholder or corporate witness. A very professional company witness's credibility can be destroyed by plaintiff's counsel's reference to her "MySpace" posting. Companies should consider well-planned social networking policies which reinforce the consequences of ill-advised social networking. From an insurer's perspective, consideration should be given to potential additional areas for discovery in bad faith litigation.

Tying It All Together

Of course, electronic social networking is not a substitute for normal investigation and personal interaction. It is, however, an additional valuable tool. With the advent of new means of communication come several obstacles, as well as opportunity. No doubt there will be abuses of social networking by an unscrupulous few. It is imperative, however, that claims professionals and counsel embrace and understand social media and use it appropriately. ■

Endnotes

(1) David Sipress. Cartoonbank.com, June 1, 2009. <http://www.cartoonbank.com/item/130799>.

(2) NewsBusters. "Will Social Networking Sites Like Facebook Destroy Our Society?" August 29, 2009. <http://newsbusters.org/blogs/noel-sheppard/2009/08/25/will-social-networking-sites-Facebook-destroy-society>.

(3) "Success Stories." June 16, 2009. <http://webworkerdaily.com/2009/06/16/real-life-twitter-business-success-stories/>.

(4) *Computer World*. Feb. 18, 2010.

(5) "As 'Tweeting' Grows, the Question of Jury Taint Arises." *Pittsburgh Tribune-Review*. Feb. 9, 2010; "Twitter Crackdown in Baltimore Circuit Court." *Baltimore Sun*. Feb. 9, 2010.

(6) "First Thing Lawyer Tells New Clients: Shut Down Facebook Account." *ABA Journal Law News Now*. Feb. 9, 2010.

(7) "Hennepin County Prosecutor Accused of Anti-Somali Posting on Facebook." *Star Tribune*. Feb. 17, 2010.

(8) Legaltech. Feb. 1, 2010.

A New TARP to Cover Mortgagee Losses?

by Thomas D. Martin, J.D., and Kathleen "Katie" A. Quirk, J.D.

Thomas D. Martin, J.D., practices civil litigation emphasizing first-party insurance defense with Swift, Currie, McGhee & Hiers LLP. His practice includes arson and fraud insurance defense, where he has extensive experience defending carriers with claims involving homeowners, auto, life, disability and health insurance fraud. His practice also includes insurance coverage defense in the context of both first-party and third-party property losses. Martin received his juris doctor from the University of Georgia School of Law.

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Difficult economic times often can create new or unique challenges for the insurance industry. The last few years have seen a dramatic increase in the number of property foreclosures. With the increased foreclosures, insurers have experienced an increase in claims relating to foreclosure properties. Two types of mortgagee claims have been particularly troublesome.

One involves a reluctant insured. In this situation, a substantial loss occurs (often a fire), and the insured stops paying the mortgage. The mortgagee receives notice of the loss. It may or may not begin foreclosure proceedings (or the proceedings may already have begun). In either case, the mortgagee begins to put pressure on the insurance company to pay its claim while the insured's claim is still under investigation. No repairs are completed. The insurance company attempts to obtain the insured's cooperation with the claims process, but for various reasons, the insured does not respond (or only partially responds, offering various excuses for non-compliance). In these instances, the mortgagee often asserts that its rights are "independent" of the insured's and demands that payment be made directly to it. The mortgagee demands that its claim be paid independent of any claim that eventually might be asserted by the insured. In the first part of this article, we address the rights of the mortgagee, the insured and the insurance company in such situations.

Another increasingly common mortgagee claim is, in some ways, more troubling and more difficult to address. In this instance, the mortgagee discovers, either before or following a foreclosure, that the insured property was damaged at some point in the past. The insured homeowner made a claim that was eventually paid. Because the claim involved a nominal amount (often less than $5,000), the insured was paid directly. Nevertheless, the mortgagee may contend, correctly or not, that the insured failed to repair the property or failed to make adequate repairs. The mortgagee suspects that the homeowner "pocketed" the money only to later abandon the property when foreclosure began or was threatened. The mortgagee submits its own claim for the damage, despite the previous payment to the insured. Under these circumstances, mortgagees have argued that, because the insurer was obligated to pay both the insured and the mortgagee on any structural damage claim, the insurer should pay the loss again.

There may be a number of factors that contribute to the rise in these two types of claims. Regardless of the cause, these mortgagee claims pose serious dilemmas for the insurance industry. This is particularly true in the current times when mortgage companies are becoming increasingly aggressive about making insurance claims and demanding recovery on nonperforming mortgage loans. In two parts, we address these dilemmas insurance companies face and offer some suggestions on how to respond to each.

A few assumptions are in order:

- We will address situations involving named mortgagees, the rights for whom are dictated by the "standard mortgage clause." Such a clause typically provides, in pertinent part:

  "If a mortgagee is named in this policy, any loss payable under [the coverage applying to the home] will be paid to the mortgagee and you, as interests appear ..."

  "If we deny your claim, that denial will not apply to a valid claim of the mortgagee ... ."

- We will assume that, in those cases involving an insured's failure to cooperate, the insured's cooperation is partial — that the insured has not breached the policy or abandoned the claim but has indicated some interest in pursuing a claim and cooperating with the investigation.

- We will assume that carriers have a general practice (though not contained in its policy forms) of paying the insured alone on losses involving small building damage claims.

Part One — The Scope of a Mortgagee's Independent Right of Recovery

The last two years have seen some remarkable changes in the housing market. Many of these changes have been the subject of news articles, political discussions and economic analyses. Quietly, insurers have been experiencing these changes in their own ways. One way that insurers have experienced these changes is through mortgagee claims. Where at one time mortgagees seemed content to wait for an insurance company's decision on a claim before asserting their rights under a standard mortgage clause, today mortgagees are more often pursuing a right to recover independent of the named insured. These situations often arise where an insured has been reluctant (for whatever reason) to pursue a claim aggressively or has been slow to respond to an insurance company's request for cooperation. In such cases, mortgagees have become increasingly aggressive about demanding payment even before the insurance company has been able to complete its investigation.

Often, the mortgagees rely upon favorable-sounding language from court opinions to the effect that mortgagees enjoy an "independent right of recovery" under the policy. The genesis for the approach appears to come from opinions that have been restated as "black letter law" in numerous decisions over the years. In *Abbottsford Building and Loan Association v. William Penn Fire Ins. Co.*, for example, the court recognized that a mortgagee clause in an insurance policy serves to create two separate contracts — one between the insurer and the insured and one between the insurer and the mortgagee.[1] The court noted that because two contracts were created, the

mortgagee's contractual interest could not be negated by actions on the part of an insured that violated certain conditions of the policy and therefore precluded the insured's own recovery.[2]

Similarly, in *Reed v. Firemen's Ins. Co.*, 81 N.J.L. 523, 525, 80 A. 462, 463 (1911), a case cited favorably by the court in *Abbottsford*, the court held that the standard mortgage clause created an independent contract of insurance for the separate benefit of the mortgagee, "engrafted" upon the main contract of insurance.[3] From such language, some mortgagees have increasingly sought to test the reaches of this separate agreement — seeking to recover on the policy in their own name regardless of whether the insured has made a claim or initiated a lawsuit.

These general principles have enjoyed wide acceptance throughout the country.[4] For example, in *Southern States Fire & Ins. Co. v. Napier*, 22 Ga. App. 361, 362, 96 S.E. 15 (1918), the court held:

> "But where to the policy of insurance there is attached in favor of the mortgagee what is known as the 'New York standard mortgagee clause,' by the terms of which it is provided that the interest of the mortgagee shall not be invalidated by reason of any act or neglect on the part of the mortgagor, this agreement operates as a separate and distinct contract of insurance upon the mortgagee's interest, and gives to the mortgagee such an independent status as might authorize a recovery by him on the policy even though the circumstances were such as would prevent a recovery by the mortgagor."[5]

The general principle has resulted in protections for the mortgagee that arise separate and apart from defenses that might apply to the insured's claim. Thus, in *American Central Ins. Co. v. Lee*, 273 Ga. 880, 881, the Georgia Supreme Court held:

> "... it is well established that a mortgagee possesses an insurable interest in the property covered by the mortgage, O.C.G.A. § 33-34-4, and that the standard or union mortgage clause, such as the one in issue here, creates a separate and distinct contract on the mortgagee's interest which protects the mortgagee's interest independent of the status of the insured."[6]

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Accordingly, a mortgagee has the right to recover under an insurance policy even when the insured has acted in some way that precludes the insured's recovery.[7]

However, it does not follow from these protections that the mortgagee gains rights that are superior to or "trump" the named insured's rights where there are no circumstances which " ... would prevent a recovery by the mortgagor ... ." As the mortgage clause states, the mortgagee is entitled to payment " ... if we deny [the insured's] claim ... ." Before a denial, however, the mortgage company does not seem to have any basis for pursuing a claim directly against the insurance company.

This issue was addressed squarely by the court in *Equitable Fire Ins. Co. v. Jefferson Standard Life Ins. Co.*, 26 Ga. App. 241, 105 S.E. 818 (1921). In this case, Equitable issued to Ms. M. E. Thornton a policy for $4,000, covering a certain building belonging to her. The policy included a standard mortgagee clause making the loss, if any, payable to the Jefferson Standard Life Insurance Company. The property insured was totally destroyed by fire. Jefferson Standard, the mortgagee, sued Equitable on its own behalf and on behalf of the named insured. But Ms. Thornton was not a party to the lawsuit. The insurance company moved to dismiss on the grounds that the suit was improper. The trial court denied the motion. The insurance company appealed.

The Georgia Court of Appeals reversed, finding that the suit was improper. The question, as framed by the court, was whether the standard mortgage clause gave the mortgagee the right to sue in its own name where Ms. Thornton was the party to the insurance contract. To this question, the court answered "no."[8] Citing Georgia statutes on general rules of contract construction, the court of appeals held that, as a general rule, an action on a contract had to be brought in the name of the person in whom the legal interest in the contract is vested.[9] Insurance contracts were no exception.[10] Regarding the effect of the standard mortgage clause, the court cited some of the above "black letter law" principles giving the named mortgagee such an independent status as might authorize a recovery on the policy. However, the court found that the mortgagee's rights required first that the insured invalidate its own interest by some act contrary to the terms of the policy:

> Had the policy in this case been invalidated by reason of any act or neglect of the insured, and if under the policy she had no rights, then the mortgagee in this case, whose interest is less than the amount of the policy, could have brought suit, not for the whole amount of the policy, but for the amount of its interest therein as shown by the amount due on the indebtedness to it. Such is not this case. The insured still has an interest in the policy, the title to which is still in her name, but the suit is in the name of another, and for the full amount of the policy, and in addition thereto is for damages and attorney's fees.[11]

Other jurisdictions have similarly held that a mortgagee may enjoy only a limited right to sue under a policy of insurance obtained by the borrower.[12] Admittedly, however, the ability of mortgagees to sue on a policy independent of the borrower varies wildly from jurisdiction to jurisdiction. As was noted by the Georgia court in *Equitable Fire* above:

> "After patient, prolonged, and diligent search in text books, encyclopedias, and reports, we find that in passing on the right to sue under insurance policies containing loss-payable clauses, the decisions of the courts of the several States are as different and divergent as the ingenuity of attorneys has found ways in which to bring suits where these clauses are involved. This is largely due to a difference of statutes of the several States and to the difference between the common law and code practice. Under the laws of Georgia we are convinced, as stated above, that the plaintiff had no right to maintain the action in this case, and that the court erred in overruling the demurrer to the petition."[13]

Based upon the foregoing, if the mortgagee cannot bring suit against the insurer before the contract is invalidated by the insured's conduct, it seems to follow that the mortgagee likewise cannot bring a claim of its own before the insured has invalidated the contract in some way. Furthermore, if, as noted above, insurance proceeds for a dwelling loss are properly payable to both the insured and the mortgagee, it follows that payment to a mortgagee alone, before the insured's claim is determined, would be inappropriate as well. A mortgagee's right to recovery should not ripen until the

insured's claim has been fully evaluated by the insurer and the insurer can determine to whom payment is due.

Nevertheless, mortgagees continue to seek payment based on their "interest" in the insurance proceeds before the insurance company has completed its investigation and determined the extent (if any) of the insured's coverage.[14] In the end, we believe that the more reasoned conclusion is that a mortgagee's rights under a policy do not ripen until the insured's claim has been concluded. Until the insurer makes a determination on coverage for the insured's claim, consideration of the mortgagee's claim is premature.

Although a mortgagee ultimately may have the right to determine how the proceeds of a dwelling claim are used (to pay principal or repair the property) based upon the terms of its agreements (the note and security deed) with the homeowner, those rights should not trump or obviate the insured's rights under the contract with the insurer. This makes sense where, in the modern era, policies cover more than just the mortgage debt. Nevertheless, we would urge caution in responding to any mortgagee's claim pending a thorough review of the law of the jurisdiction and the content of the mortgage documents. ■

Endnotes

(1) 130 Pa. Super. 422, 197 A. 504 (1937).

(2) Id. at 427.

(3) 81 N.J.L. at 526 (1911).

(4) See e.g., *Evans Products Co. v. West American Ins. Co.,* 736 F.2d 920, 926 (3d Cir. 1984); *Better Valu Homes, Inc. v. Preferred Mut. Ins. Co.,* 60 Mich. App. 315, 319 (1975); *Shores v. Rabon,* 251 N.C. 790 (1960); *Firstbank Shinnston v. W. Va. Ins. Co.,* 185 W. Va. 754, 759 (1991) ("In essence, there are two separate and distinct contracts of insurance created under the standard mortgage clause, one with the owner of the property and one with the mortgagee."); *Hennessey v. Helgason,* 168 Miss. 834, 839, 151 So. 724, 725 (1934); *Malvaney v. Yager,* 101 Mont. 331, 339, 54 P.2d 135, 139 (1936); 10A G. Couch, Couch's Cyclopedia of Insurance Law § 42:728 (2d ed. rev. 1982); *Fireman's Fund Insurance Co. v. Rogers,* 18 Ark. App. 142, 712 S.W.2d 311, 314 (1986); *Bankers Joint Stock Land Bank v. St. Paul Fire & Marine Insurance Co.,* 158 Minn. 363, 366, 197 N.W. 749, 750 (1924); *Fidelity-Phoenix Fire Insurance Co. v. Brennan,* 85 N.H. 291, 294, 158 A. 124, 126 (1931); *Syracuse Savings Bank v. Yorkshire Insurance Co.,* 301 N.Y. 403, 407, 94 N.E.2d 73, 75 (1950).

(5) Citing, 13 Am. & Eng. Ency. Law, 205; *Cooley's Briefs on Insurance*, vol. 2, pp. 1228, 1525. See also 11 *Couch on Insurance* 2d, 344, 348, §§ 42:685, 42:694; *Employers' Fire Ins. Co. v. Penna. Millers Mut. Ins. Co.*, 116 Ga. App. 433, 436, 157 S.E.2d 807(1967).

(6) *Cherokee Ins. Co. v. First Nat. Bank of Dalton,* 181 Ga. App. 146, 147, 351 S.E.2d 473 (1986).

(7) See *B X Corporation v. Aetna Ins. Co.,* 187 Misc. 806, 63 N.Y.S. 2d 14 (1946); *Aetna State Bank v. Maryland Casualty Co.,* 345 F. Supp. 903, 905 (N.D. Ill. 1972); *Aetna Life & Casualty Co. v. Charles S. Martin Distributing Co.,* 120 Ga. App. 133, 169 S.E.2d 695 (1969); see also 5 Appleman: *Insurance Law & Practice* § 3401; 11 *Couch on Insurance* 2d §§ 42:685, 42:694, 42:714. This is the majority view. *American Nat'l Bank & Trust Co. v. Young,* 329 N.W.2d 805, 811 (Minn. 1983); *Piedmont Fire Insurance Co. v. Fidelity Mortgage Co.,* 250 Ala. 609, 35 So.2d 352 (1948); *Underwriters at Lloyds, London v. United Bank Alaska,* 636 P.2d 615 (1981); *Southwestern Funding Corp. v. Motors Insurance Corp.,* 59 Cal.2d 91, 378 P.2d 361 (1963); *Foster v. United States Aviation Underwriters, Inc.,* 241 A.2d 914 (D.C. 1968); *Americas Aviation & Marine Insurance Co. v. Beverly Bank,* 229 So.2d 314 (Fla. Dist. Ct. App. 1969); *Bennett Motor Co. v. Lyon,* 14 Utah 2d 161, 380 P.2d 69 (1963); *Don Chapman Motor Sales, Inc. v. National Savings Insurance Co.,* 626 S.W.2d 592 (Tex. Civ. App. 1981).

(8) 26 Ga. App. at 241.

(9) Id.

(10) Id.

(11) Id. Compare, *Citizens Finance Co. v. Insurance Co. of St. Louis,* 105 Ga. App. 422, 124 S.E.2d 676 (1962)(where the insurance company has fully settled and satisfied all the claims of the mortgagor and no cause of action on the insurance policy exists in him, the mortgagee has a contractual right which it is entitled to enforce).

(12) See, e.g., *Hartford Fire Ins. Co. v. Davenport,* 37 Mich. 609 (1877); *Carberry v. German Ins. Co.,* 86 Wis. 323, 328 (1893); *Donaldson v. Sun Mut. Ins. Co.,* 95 Tenn. 280, 285-286 (1895); *Nevins v. Rockingham Mut. F. Ins. Co.,* 25 N.H. 22; *Blanchard v. Atlantic Mut. F. Ins. Co.,* 33 N.H. 9; *Chandos v. American Fire Ins. Co.,* 84 Wis. 184, 195 (Wis. 1893); but see *Messner, Inc. v. Travelers Indem. Co.,* 620 F. Supp. 1444 (W.D. Wis. 1985); *Pavano v. Western Nat'l Ins. Co.,* 139 Conn. 645 (1953); *Glens Falls Ins. Co. v. Sherritt,* 95 F.2d 823 (4th Cir. Va. 1938); *Trust Co. of GA v. Scottish Union & Nat'l Ins. Co.,* 119 Ga. 672 (1904); *Capital City Ins. Co. v. Jones,* 128 Ala. 361 (1900); *Pitney v. G. F. Ins. Co.,* 65 N.Y. 6; *Donaldson v. Ins. Co.,* 95 Tenn. 280; *Bartlett v. Iowa Ins. Co.,* 77 Iowa 155; *Hanover F. Ins. Co. v. Brown & Son,* 77 Md. 64; *Motley v. Ins. Co.,* 29 Me. 337; *Franklin v. National Ins. Co.,* 43 Mo. 491; *Brown v. Insurance Co.,* 5 R.I. 394; *Insurance Co. v. Chase,* 72 U.S. 509, 5 Wall. 509, 18 L. Ed. 524; *Flanders on Insurance,* 588 (where mortgagee's claim exceeded the amount of the insurance).

(13) 26 Ga. App. at 247.

(14) A delay in an insurer's investigation of a loss can occur for any number of reasons, such as an insured's failure to fully cooperate with the insurer, scheduling conflicts which preclude the insurer from obtaining the insured's examination under oath, or other unavoidable or uncontrollable delays in processing the claim.

Understanding Generations, Part II

by Stacie Lightner

Stacie Lightner is a senior employee trainer with Learning Solutions at FBL Financial Group in West Des Moines, Iowa. Lightner develops and facilitates hard and soft business skills courses for FBL Financial Group employees. One of her courses is a popular series on generations in the workplace. She earned a bachelor's degree in education from Iowa State University. She is currently pursuing a Masters of Science in adult learning and organizational performance from Drake University.

Editor's note: In the December 2009 *CQ* article "Understanding Generations," we wrapped up the generation conversation with how people in general have the need to be respected and valued. If we start with that final concept in mind, let's dive a little deeper into the differences of each generation and provide some real-life scenarios that might help bring the generations to a place of understanding and acceptance on the job.

One More Look at Each Generation

Traditionalist (1922–1946)

Traditionalists grew up during the growth years for the United States. Between the years 1870–1900, 14 million immigrants arrived in America. Many traditionalist parents were immigrants, desperate just to have a job to support their families in this new country. Jobs were tough and physically demanding, so getting your hands dirty was the norm. Traditionalists grew up after the depression. Their parents were forced to be tight with money, and most did without, just to have enough money for food and shelter.

World War II changed families and the respective role of females. Auto factories were converted to build airplanes, and shipyards and more factories were built to meet the high demand of the government and the war effort. When the United States joined the war, this was another point in our history that changed how society viewed men and women's roles. When men enlisted and went to war, companies finally accepted the idea of hiring women because of the labor shortage. For the traditionalist, work was a means to ensure a better future for the family. The traditionalist also found meaning in a "job well done."

When working with traditionalists:

- **Be Direct** — Get to the point and be prepared with details.
- **Be Respectful** — They expect appropriate etiquette, both written and personal.
- **Be Formal** — A formal communication style is preferred — face-to-face or written communication.
- **Be Discreet** — Traditionalists are private. Don't expect them to share their thoughts immediately.

Baby Boomer (1946–1960)

Boomers are usually idealistic and were coined with the name "yuppies" as adults. They were born after the success of WWII and the economy was on an upswing. They were brought up as perfect children and were doted on. Parents tapped into the teachings of Dr. Spock, who encouraged positive reinforcement. This generation also learned from their parents that if they worked hard, they would move up to better pay and a secure life for their family.

Serving the public and making a historic impact was a driving force for this generation. This generation also fought in the Vietnam War, which led to public protests against it. Boomers also observed major change and struggle when people fought to make new rules for individuals — voter rights, women's rights and the ruling of racial segregation being unconstitutional. Most of these changes were taking effect during their formative years (ages 1 to 20).

Television was the new source of news and aired the challenges and unrest of the nation. These social challenges included the assassinations of **John F. Kennedy**, **Martin Luther King** and **Robert Kennedy** in addition to the Kent State shootings, which were all broadcast on national TV. This generation would question the current status quo and find new and better ways that protected individual rights. Work for the baby boomer is "achievement-driven and change-motivated."

When working with baby boomers:

- **Be Collaborative** — Offer ideas and be prepared to discuss, so there is group consensus.
- **Be Available** — They appreciate face-to-face meetings to work through issues/tasks.
- **Be Creative** — Boomers like to think outside-the-box and find new ways to improve things.

- **Be Team-Oriented** — They are social and like working with others.

Gen Xers (1960–1980)

For the Gen Xers, survival is key. Gen Xers saw their parents get laid off or have to deal with job insecurity. Many of them also entered the workplace in the early 1980s, when the economy was in a downturn. They also observed major institutions, nonprofits and even the presidency practicing unethical business acts. This experience helped this generation embrace its skepticism even more. Because of these factors, Gen Xers redefined loyalty and work/life balance. Instead of remaining loyal to their companies, they have made a commitment to their work, to the team they work with, and the boss they work for.

For example, a baby boomer complains about his/her dissatisfaction with management, but figures it's part of the job. A Gen Xer doesn't waste time complaining; instead he or she sends a résumé out and accepts the best offer from another organization. At the same time, Gen Xers take employability seriously. This generation doesn't see a career ladder but rather opportunities to grow and move laterally. This generation isn't afraid of starting with one area of expertise and moving into another field.

Gen Xers' life experiences didn't just change their loyalty point of view but also their independence at work. They were often coming home to an empty house with either mom or dad working, or they lived in a single-parent environment. This experience allowed Gen Xers to become independent and forced them to learn how to work efficiently and fix things on their own without assistance. In the workplace, this generation prefers working independently and doesn't work well if micromanaged. Work for the Gen Xer is "work/life balance."

When working with Gen Xers:

- **Be Task and Result-Oriented** — Provide tasks/goals with deadlines and let them work.

- **Be Straightforward** — Get right to the point and tie feedback to their goals/big picture.
- **Be Over-Prepared** — Have details and specifics ready to share.
- **Be Efficient and Flexible** — Respect their time. They find quicker, more efficient ways of working so they have balance between work and family life.

Millennial (1980–2000)

This generation spent more time with their parents, and the roles of parenting went beyond just being mom and dad. Parents became coaches, Sunday school teachers, mentors and friends to not only to their kids but their kids' friends. Millennials were included in the direction and choices of activities in which they were involved. If they liked or had special skills and abilities in an activity, they gave it more time and attention — to the extreme of getting an expert/pro to guide and develop their skills.

Millennials found themselves involved in many team activities — softball, show choir, basketball, football, marching band, soccer, etc. This generation is the most diversity-accepting generation because they were brought up with multiple cultures, not only in the classroom and neighborhoods, but also on the Web. This generation dealt with problems with their peers differently than other generations because of parent involvement.

When millennials dealt with problems at school or at home, parents helped with the intervention and guided this generation through their problems. Because of these experiences, millennials' job expectations include wanting to work with positive people, to be challenged, to be treated with respect, to learn new information and skills, to have flexible schedules, to be recognized and to making a difference. Work for the millennials needs to be "meaningful."

When working with millennials:

- **Be Positive** — They value positive reinforcement and attitudes.
- **Be Achievement-Oriented** — Provide goals and specify how they can succeed.
- **Be Inclusive** — Keep them in the loop and communicate any changes right away.
- **Be Accepting** — Listen to their ideas. They resent it if you talk down to them.

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Understanding Generations, Part II

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A Couple of Scenarios

The characteristics and experiences listed in each generation do not mean that every person in a specific generation will share all of its intrinsic characteristics with others in the same generation. Individuals born at one end of the date range or the other may also share similar characteristics with the preceding or succeeding generation.

Looking into different situations may give us a glimpse into our own interactions with other generations. Remember, as we work through the scenarios, the study of generations is based on generalities. These generalizations are valuable when we try to see how generations clash and collaborate. Individuals grow up with unique circumstances, but depending on the time we were most impressionable (ages 1 to 20), common imprints are established and shared.

Scenario One

James (age 52) is a hard-working and reliable auto claim adjuster. His customer is involved in an auto accident. The claimant lives in another district, so, according to company guidelines, James is to assign the claimant part to the adjuster representing the respective district. At 5:30 p.m., James calls Emily, the adjuster in the claimant's district. Emily (age 30) is a very skilled and efficient adjuster. Emily answers the phone, but just as she is walking out the door for the day to get to her workout. When she hears what the call is about, she tells James she will take the information in the morning during normal business hours, or he can e-mail details to her. James complains to his manager that he was not treated with respect and Emily is not committed to giving quality service.

Keep in mind that every work situation has its unique environment, rules and individuals who interact with one another. Because we don't have all the facts with these scenarios, we are offering recommendations to these specific topics that have been cited in current work environments. Some solutions may not be viable because of the lack of resources the company might not have access to nor has the opportunity to offer.

Baby boomer James is part of a generation that typically consists of over-achievers/workaholics. They invented the 60-plus hour work week, and their work ethic is intrinsically motivated — they work for work's sake and feel honored to have a job. Characteristically, the self-image of baby boomers is based on their success level. Here are a few potential things to think about with this situation.

- The lack of immediate follow-through by Emily was possibly perceived by James as disrespectful and an indication of her not adequately serving customers.
- James might feel as if Emily's priorities are not in order and her work ethic is lacking.
- James may not feel as if Emily respects him or his time — making him do more work by e-mailing the information to her just because she is walking out the door at the end of the day.
- James could try to understand that Emily has another commitment and the claim will still be there when she returns in the morning

Millennial Emily is a part of a generation that was given a lot of attention, and teachers and parents had high expectations for them. This generation was the most scheduled and managed of any generation. Emily learned there was time for everything, and once one task stopped, something else took its spot. If you aren't flexible and are not concerned with this generation's other activities/priorities, this is a perfect way to lose this individual. (Flexibility is a retention issue. Millennials will quit jobs that make them feel too constrained.) Emily may not intentionally mean to be disrespectful by not taking time for James when he called.

- Emily needs to have balance in her life. She works hard while she is at work, completes what she needs to and then at the end of her work day, places her personal priorities first.
- Her employer and colleagues need to understand that sometimes Emily has to keep her priorities in place and that isn't disrespecting anyone and doesn't mean she doesn't take her job seriously.
- Emily will also need to understand James and his idea of a work ethic and respect.
- Emily can communicate future expectations with James, so they can understand each other's expectation.
- Their manager should encourage all employees to communicate and work as a team.

Communication and understanding for both James and Emily will be something they will both need to work toward, and their manager needs to encourage them to discuss their similarities and differences. Opening a dialog is very important when working with internal customers/colleagues.

Scenario Two

Acme Insurance is in the midst of converting to a new claims system. It is generally deemed "slicker" than the old system but will have adjusters doing data entry they did not do before. Rhonda (age 59) is a hard-working and reliable adjuster. She has demonstrated skill throughout her long career at Acme, making claims decisions and dealing with people. The new system will give Acme enhanced abilities to measure new, open and closed claims data. Rhonda's computer application skills are minimal. She tells her manager that it seems her skill set is no longer recognized at Acme, and it is now all just a numbers game.

Many traditionalist/boomer workers performed their jobs for years without the benefit of today's technology. At first, they might have been resistant to this change and found ways around it. When computers found a spot on everyone's desk, these workers had to learn and adapt to stay up to date to maintain their

positions. Technology keeps changing and speeds processes up, forcing companies to have the most up-to-date equipment and systems to stay competitive. Because of this push to keep technology current, employees are finding themselves having to keep up with the technology curve on the job. Here are some possible options to keep Rhonda up to speed without making her feel like she is getting pushed out the door because of technology upgrades.

- Use Rhonda as a mentor and partner her with a younger employee, so they can train and learn from each other (experience versus technology).
- Offer Rhonda more complex and time-consuming claims, so the quantity of claim entries is minima. (She might also be used as a resource person with a specific area of expertise that can be shared with internal colleagues.)
- Coaching and training will be important for Rhonda to feel confident with the new system.
- It will be important for her to have job aids available that can visually step her through the system's screens.

Research indicates that this generation prefers training on-the-job or one-on-one without a lot of attention. Retention tomorrow is dependent on management practices today. Here are some other things to keep in mind when working with baby boomers.

Communicate, Communicate, Communicate

- Be clear about your expectations with respect.
- Ask for feedback on a regular basis.
- Model an open, contribution-based environment.

Promote and Support Continuous Learning

- Build on the natural desire to have continuing education. Use job rotation and cross training to strengthen your employees' skills.
- Have all employees become technologically literate. Create procedures everyone is clear on how to follow.
- Require all workers to participate in new and refresher skill training — not just those who are struggling.

Conclusion

In work situations, generational differences can affect everything, including recruiting, building work teams, dealing with change, motivating, productivity and managing. These differences might affect misunderstandings, retention and gaining employee commitment and loyalty.

After looking at these two scenarios, you can see that generations have distinct attitudes, behaviors, expectations, values and motivations. Research reveals that people communicate based on their generational backgrounds and experiences. Learning how to communicate with the different generations can eliminate many major confrontations and misunderstandings in the workplace. Knowledge of the generational differences is a starting point to open conversation and begin to meet one another's business needs.

Ultimately, when you understand that differences in values are just that, it doesn't make it good or bad. We grew up in different worlds and acknowledging that is important. After bringing all of this knowledge together in your work environment, it still comes down to all generations/people wanting the same thing — to feel respected, important and valued. ■

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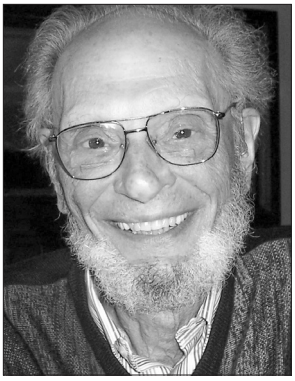
Additional Insured Status When Required by Contract, Late Notice and Designated Locations

by Jerome Trupin, CPCU, CLU, ChFC



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What do additional insured status when required by contract, late notice and designated locations have in common?

They were subjects of interesting decisions reported in a recent issue of Hurwitz & Fine's bi-weekly e-mail newsletter *Coverage Pointers*.[1]

Additional Insured Status When Required by Contract

Today's commercial general liability policies issued to contractors frequently provide automatic additional insured status for the owner the contractor is working for, but only when the contract between the parties clearly calls for it. Requests for additional insured status are commonplace. This endorsement saves work for the insured, the broker and the insurer, but it's not fail-safe.

The ISO endorsement is CG 20 33 07 04 (Additional Insured — Owners, Lessees Or Contractors — Automatic Status When Required In Construction Agreement With You). Many insurers use their own forms to accomplish the same end. A problem arises when the contract between the parties doesn't specifically say that the contractor shall provide additional insured status for the owner.

In one reported case, 140 Broadway Property had contracted with Schindler Elevator Company to do work in 140's building. Although the written contract between 140 and Schindler required Schindler to purchase several forms of insurance coverage, it did not expressly state that Schindler was required to name 140 as an additional insured on its general liability coverage.[2] Zurich provided general liability coverage for Schindler. Its policy extended coverage to any entity "for whom the named insured [Schindler] has specifically agreed by written contract to procure bodily injury, property damage and personal injury liability insurance." The court ruled that because the contract between the parties did not specifically require that 140 be added as an additional insured, Zurich was not obligated to defend and indemnify 140.

A similar problem arose for Hargob Realty Associates. Its contract (which ran all of one page!) with USA Interior LLC for demolition work contained a hold harmless agreement but no language requiring that Hargob be named as an additional insured. A certificate of insurance was issued showing Hargob as an additional insured on USA Interior's policy, nevertheless USA Interior's insurer declined to cover Hargob as an additional insured, and the court agreed that Hargob was not an additional insured on the policy.[3] (Certificates of insurance do not amend policy provisions. That's well-settled law in New York and most other states.)

When our clients hire contractors, they want the contractors to be responsible for accidents arising out of the work and to defend and indemnify them when there is a claim. To accomplish this, they should include specific wording in all their contracts requiring that they be named as additional insureds as well as incorporating a properly worded hold harmless/indemnification agreement.

It is helpful if the client's attorney works with the client's insurance advisers. I've seen newly drafted insurance requirements that call for "comprehensive general liability" despite the fact that comprehensive general liability policies haven't been available in the insurance marketplace since 1986. I recommend that specific policy forms be listed in the requirements, for example: commercial general liability insurance at least equal to ISO form CG 00 01 12 07.

Late Notice

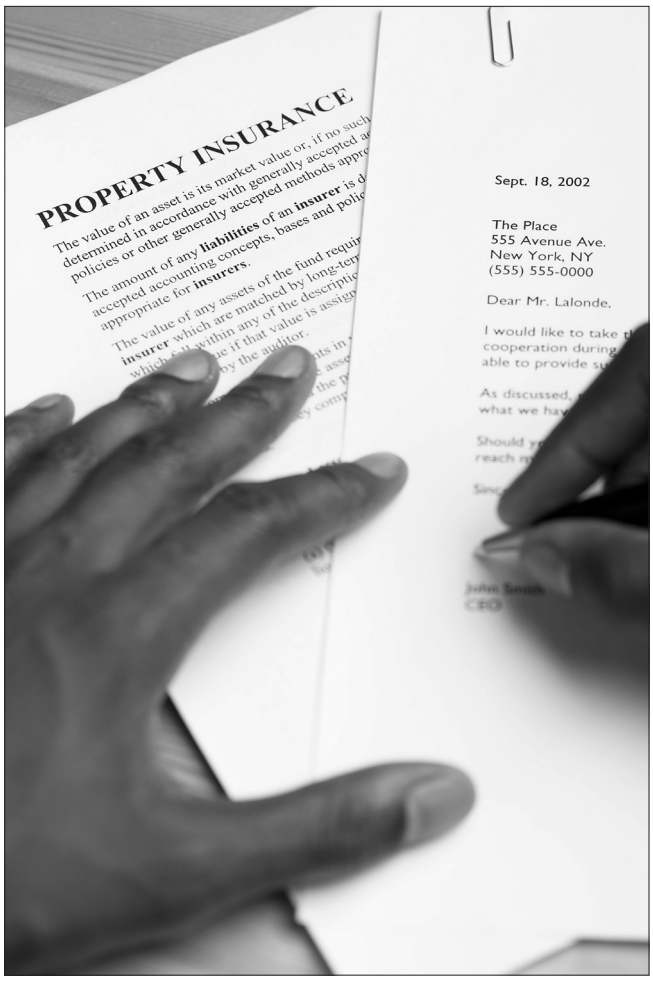
Prompt notice of an occurrence is a standard insurance policy provision. New York courts have been the strictest in the nation when it comes to enforcing this policy condition. New York cases abound where coverage has been denied for not much more than one month's delay in giving notice. Effective with policies issued after Jan. 19, 2009, New York law now provides that the insurance company must show that it was prejudiced by the failure of the insured to promptly report an occurrence.

This puts New York in sync with most of the rest of the country. However, it does not change the requirement to promptly report losses; it only requires that the insurance company show it was prejudiced by the late notice if the insured challenges the denial.

No one knows for sure how the courts will interpret the term "prejudice." One attorney suggests the following as possible bases to support a claim of prejudice: Did the insurer lose the opportunity to get substantially the same information in its investigation? Could it take photos of the scene or has the area changed? Are all the witnesses available and do they still have good memories of the accident or have witnesses become unavailable?[4] In the opinion of many observers, it will be much more difficult for insurers to sustain a denial for late notice. However, it's a new law; it will be fleshed out as New York courts deal with actual cases.

A late-notice case involving a claim that pre-dated the change in law is *Tower Ins. Co. of N.Y. v. Classon Heights LLC*. Tower disclaimed for late notice. The building manager knew about the accident and knew that the injured party was taken away in an ambulance.[5] The accident occurred on Oct. 30, 2006, but no notice was given to the insurance company until March 26, 2007. The court agreed with Tower.

If the new law were applicable to such a case, the insured might have argued that the insurer was not prejudiced by the late notice. Other states that have adopted a notice-prejudice standard require the insurer to prove prejudice by a preponderance of the evidence.[6] Further, the New York law requires that the prejudice be material. But, even if the insured was successful in disputing a declination, its legal expenses to obtain coverage are not insured and there's no coverage for the wear, tear and worry that this type of incident generates. The courthouse is never the place to look for coverage.



Insureds can protect themselves by having a knowledge-of-occurrence provision attached to their policies. This endorsement, which is widely offered to middle-market insureds, requires the insured to provide notice only when a specified individual (for example, the risk manager for firms that have one) has knowledge of the occurrence.

The best advice in any event? Remember the three rules of claims handling: REPORT, REPORT, REPORT.

Designated Premises Coverage

We're seeing more and more liability policies that are limited to specifically designated premises. The ISO endorsement is CG 21 44 07 98 (Limitation Of Coverage To Designated Premises Or Project). The key wording is as follows:

> "This insurance applies only to 'bodily injury,' 'property damage,' 'personal and advertising injury' and 'medical expenses' arising out of:
>
> (1) *The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises* (emphasis added); or
>
> (2) The project shown in the Schedule."

It's a provision that we ask to have removed from our clients' policies, but that's not always possible. There are sometimes legitimate reasons for

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Additional Insured Status When Required by Contract, Late Notice and Designated Locations

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attaching it, for example, when the named insured has locations that are covered by other insurance.

Richner Communications is an insured that lost coverage due to a designated premises endorsement. Its CGL policy contained a designated premises endorsement. A claimant was injured at a location that Richner admitted was not listed. It argued that because the policy said that the insurance applies to bodily injury caused by an occurrence that takes place in the coverage territory, the policy should provide coverage, the designated premises endorsement to the contrary notwithstanding. The Appellate Court disagreed; it upheld the insurer's declination.[7]

Arguments frequently center on the portion of the endorsement that reads: "operations necessary or incidental to the premises." Just what that means can be a tough call, but the answer frequently leaves the insured empty-handed. Trader Ed's, a restaurant in Hyannis, Mass., came up short on its quest for coverage.[8] Its policy had a designated premises endorsement similar to the one discussed above. The events that left it without coverage arose when Bacardi U.S.A., a supplier to Trader Ed's Restaurant, sponsored a Jimmy Buffet concert and supplied tickets for some of Trader Ed's personnel. Baccardi also donated alcohol for tailgate parties, which started an unfortunate chain of events.

The owner of Trader Ed's organized a group trip to the concert and a tailgate party. He rented a bus to transport employees and customers and invited other local business owners to travel on the bus for a $20 fee. Trader Ed's supplied a gas grill, a frozen drink machine, food and drinks, and equipment. Three of its employees operated the grill. Training for the employees running the event occurred at Trader Ed's premises in Hyannis. The purpose of Trader Ed's involvement was to promote its business and improve its employees' morale.

Things did not go smoothly at the tailgate party. The employees had difficulty lighting the grill; it was alleged that one of the employees used gasoline to get the charcoal to burn. An explosion ensued, badly burning one person. When the injured person, who was not an employee, sued Trader Ed's, its insurance company declined coverage. The insurer said that the occurrence at the concert did not arise out of the insured premises nor was it incidental to the operation of that premises. The court agreed. It reasoned that while there may have been a causal connection to the insured's **business**, there was no causal connection to the insured's **premises**. In its opinion, the endorsement requires that the occurrence at least be incidental to the insured's **premises**. (emphasis added).

Learning point: When a policy includes a designated premises provision, the insured should notify the insurance company whenever it has activities at, or involvement with, an unlisted location. ■

Endnotes

(1) *Coverage Pointers* is an e-mail newsletter published every other Friday by Hurwitz & Fine P.C., insurance attorneys in Buffalo. I'd recommend that every insurance practitioner with an interest in New York insurance law subscribe. If you'd like to receive it, e-mail Dan Kahane at ddk@hurwitzfine.com. Tell him Jerry sent you.

(2) "Contractual Additional Insured Status Not Triggered Where Underlying Contract Did Not Require Such Status." *Coverage Pointers*, May 14, 2010. The case is: *140 Broadway Property v. Schindler Elevator Company,* NYS Appellate Division, Second Department 2009-02305 (Index No. 40725/07)

(3) *Hargob Realty Associates v. USA Interior, LLC.* 2010 NY Slip Op 04143 NYS, Appellate Division, Second Department (May 11, 2010). <http://www.courts.state.ny.us/reporter/3dseries/2010/2010_04143.htm>

(4) Based on an e-mail message dated 5/27/10 from Daniel Kohane, attorney with Hurwitz & Fine, Buffalo, NY. E-mail address: ddk@hurwitzfine.com.

(5) *Tower Insurance Company Of New York v. Classon Heights LLC,* et al., 109826/07. Supreme Court, New York County. 2010 NY Slip Op 31105 May 3, 2010. <http://scholar.google.com/scholar_case?case=17431975953855012145&hl=en&as_sdt=2&as_vis=1&oi=scholarr >.

(6) For an excellent discussion of the topic see *Friedland v. Travelers Indem. Co.* 105 P. 3d 639 - Colo: Supreme Court 2005. <http://scholar.google.com/scholar_case?case=18287696011854705902&q=Friedland+v.+Travelers+indemnity&hl=en&as_sdt=20000000002&as_vis=1>.

(7) *Richner Communications, Inc., respondent v. Tower Insurance Company.* Supreme Court of the State of New York Appellate Division: Second Judicial Department, Case # 2009-07300 4/6/2010 <http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2010/D26819.pdf >.

(8) *United States Liability Insurance Company v. Harbor Club, Inc. & East Bay Management d/b/a Trader Ed's etal.* Suffolk Superior Court Civil Action No. 06-3938-BLS2 (May 2008). <http://www.socialaw.com/slip.htm?cid=18211&sid=121>.

Anatomy of a General Liability Claim Investigation

by Joseph J. Badowski, CPCU

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As in life, handling general liability (GL) claims is, borrowing a quote from actor Tom Hanks in the movie *Forrest Gump*, " ... like a box of chocolates. You never know what you're gonna get."[1] The GL adjuster is faced with a myriad of issues — from coverage analysis to liability evaluation to risk transfers — and he or she must be able to address these issues in an organized, timely and calculated manner.

In addition, the GL claim may involve technical issues that require an adjuster to have years of education in coverage and law in order to understand and formulate a complete file analysis and strategy to resolve. To successfully handle these issues, the adjuster must develop a claims-handling protocol so that nothing is overlooked during the course of an investigation. The following steps will lead an adjuster through all phases of investigating a GL claim.

Step 1 — Understand the Issues

When a claim is first assigned, there may be minimal to no valuable information that can provide an adjuster with a basis to proceed with the initial investigation of a claim. The claim may be reported with a date of loss several weeks, months or years prior to the report date. The description provided in an initial report of loss, or in a letter of representation, may be vague, with no specific allegations or theory of liability presented. In addition, damages claimed may be unspecified or unclear.

The first thing that needs to be done by the adjuster is to obtain an understanding of the issues involved. What exactly is being claimed? Do the damages claimed meet the definition of bodily injury or property damage as defined in the policy? The insured may have no clear idea as to why it has been placed on notice or the allegations being made against them. The insured may have had no prior knowledge of the claim being advanced against it.

It therefore becomes the responsibility of the adjuster to develop a clear understanding of the issues involved in the claim. Contacting and/or meeting with the policyholder is key, and it is not only good for public relations, but it is the first step to undertake in any claim investigation. Securing the allegations and theory of liability from the claimant is also key to initiating an investigation.

Step 2 — Investigate Coverage

There are numerous types of GL claims, each involving varying degrees of complexity and exposures. They can range from operations or premises liability, products liability, completed operations, construction defect and a whole array of other exposures. The claims can involve bodily injury, property damage or both. There could be issues involving hold-harmless agreements, additional insured endorsements, lease agreements, snow and ice contracts, construction contracts, chain of commerce, sewer backup, breach of contract and risk transfer exposure.

Once the adjuster understands the issues involved, the next step is to identify and address any potential coverage issues. Oftentimes, the initial coverage analysis is based on very limited information. For this reason, a timely and well-written reservation of rights letter should be issued citing the potential coverage issues, which must be perfected through further investigation. Failure to properly and timely reserve rights may result in forfeiture of any coverage defenses a carrier may have to the underlying claim. Coverage is a very complex issue and should not be taken lightly by the adjuster. Discussions with supervisors and senior management should be an ongoing process to ensure that the correct coverage position is taken. These discussions also should result in the establishment of further investigation that might be needed to finalize the coverage analysis and take a position.

Step 3 — Determine the Insured's Role or Status

It is essential that the adjuster develop a clear understanding of the role or status that the insured has in a GL claim. Does the insured own or lease the premises? Is the insured a real estate management company? If so, does the insured have a real estate management agreement? Is the insured the snow and ice removal contractor? Is the insured the general contractor, or is the insured a subcontractor? Is the insured the manufacturer, distributor, retailer or installer of a product? Understanding the insured's role or status in a GL claim will serve as the basis for further investigation and evaluation of the liability exposure as to the insured.

Step 4 — Understand the Work or Service Provided by the Insured

The adjuster needs to take the time to learn about the type of work or service the insured performs and how this work or service contributed to the alleged bodily injury or property damage. It is during this phase of the investigation that the technical aspects of the claim will need to memorialized and decisions made as to whether the cost of an expert will have to be incurred. An expert

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will not only provide vital testimony to refute allegations of negligence being made, but also will assist the adjuster in developing an understanding of the technical issues involved with the claim. These issues may involve complex scientific, engineering or architectural information, which may exceed the adjuster's educational or training levels. By interviewing the insured, and through expert testimony, the adjuster can obtain necessary information and become educated on the technical issues involved with his or her claim. The adjuster will need this information to provide a clear understanding of the facts and to be able to properly and accurately document the claim file.

Step 5 — Secure and Analyze Contracts or Lease Agreements

Analyzing contracts and lease agreements is an essential and complex part of a GL claim investigation. Although an insured may have no tort liability, an insured may have entered into a contract or lease agreement that could expose it to contractual liability. The contract or lease agreement contains vital information needed to complete a contractual liability or risk transfer analysis. For this reason, an adjuster needs to recognize when there is a potential risk transfer exposure and to secure copies of any applicable contracts or lease agreements. Once secured, these contracts or lease agreements need to be thoroughly reviewed by the adjuster. The adjuster may need to partner with other resources, such as legal counsel or an underwriter, in the review of legal contracts and the coverage afforded to losses arising out of a breach of the contract.

The analysis of any contract or lease should begin by confirming that the insured is an actual party to the contract and the role the insured assumed when entering into the contract or lease. Does the contract define the insured as the owner or tenant, general contractor or subcontractor, or indemnitee or indemnitor? Different roles may have different degrees of liability assessed against them.

Contracts and lease agreements will provide the adjuster with information as to the duty or obligation the insured agreed to perform or undertake. Indemnification or hold-harmless wording, insurance and additional insured paragraphs will identify those duties or obligations for which the insurance policy will provide coverage. Does the indemnification or hold-harmless wording require the insured to defend and indemnify the other contracting party for its own negligence? Does the contract require the insured to name the contracting party as an additional insured on the insured's policy? Did the insured agree in the contract to provide additional insured coverage on a primary, noncontributory basis? Does the insured's policy contain the appropriate additional insured endorsement to comply with the insurance requirements of the contract?

The contracts or lease agreements also may contain waiver of subrogation wording which may apply — specifically in construction-related claims where the claimant is an actual party to the contract or lease. The waiver of subrogation provisions may prohibit subrogation when agreed to in the contract and where there is first-party coverage that is available to the contracting parties.

Step 6 — Secure Field Investigation

Photographs provide a visual description of the loss that helps to complete the investigation and finalize the evaluation on liability. The field investigation should be undertaken as soon as possible in order to preserve vital information or evidence. Accident scenes may change as efforts are made by an insured to complete a job. For instance, defects in a sidewalk may be repaired before the claim even is reported, or efforts by the insured to remediate a loss after it has occurred may result in spoilage of evidence.

Statements from key witnesses as soon after the loss are essential to preserve the facts. For these reasons, it is essential that the adjuster develop a close rapport with his or her field investigator to ensure accurate and timely flow of information. Specific instructions should be provided to the field investigator so there is a clear understanding of what is needed. The field investigator has the responsibility of communicating information that is essential to the disposition of the investigation.

Step 7 — Pulling It All Together

The task is often a daunting one, so the GL adjuster must be well organized, and understand and follow the steps needed to complete the investigation. By following these steps, the adjuster will acquire the information he or she needs to finalize the coverage, liability and risk transfer analysis.

- Recognize the issues, or potential issues, at the onset of the investigation.
- Identify and apply your coverage terms and conditions.
- Determine the insured's role and status.
- Understand and learn about the insured's work or the service provided.
- Secure and analyze contracts or lease agreements.
- Secure field investigation to lock down the visual facts.

With the claim investigation now completed, the next steps will be to evaluate the damages claimed, assess the liability as to the insured, determine a settlement value and negotiate a resolution of the claim — all topics for a future article on GL claim handling. ■

Reference

(1) *Forrest Gump*. 1994. Screenplay by Eric Roth. Based on the novel by Winston Groom.

What's New in Our Quest for Diversity? — How Your Interest Group Can Help

by Elizabeth A. Carter, CPCU, AIS, AIT

Elizabeth A. Carter, CPCU, AIS, AIT, is the immediate past co-chair of the CPCU Society's Diversity Committee. She works in finance planning and performance management at 21st Century Insurance and Financial Services and is the director of financial operations.

Diversity has been an ongoing focus of the CPCU Society, and I am honored and excited to update you on the accomplishments of the committee and the future activities that we are planning.

Accomplishments 2009–2010

- **June 2009** — The Diversity Committee prepared and analyzed survey results from a questionnaire distributed by the Society to chapter leaders. The questions pertained to their awareness of the committee and its efforts. The survey requested information about the chapters' diversity activities. The results were reported in the October/November edition of *CPCU News* and then became the basis of a webinar that we presented in June 2010.
- **August 2009** — At the Annual Meeting and Seminars in Denver, the Society deemed Aug. 31, 2009, "Diversity Day." The morning began with the General Session, which was titled, "The Faces of Change — Individual Stories of Achievement." Panelists shared their stories of change, challenge and growth, and explained how their experiences shaped their personal and professional lives. My co-chair, **Martin Alpert, CPCU, J.D.,** and I moderated the session. In the afternoon, the Kaleidoscope Group presented a diversity seminar entitled, "Developing Internal Capability." The evening closed with the fifth annual Diversity Reception, which was graciously sponsored by Chartis Insurance Company, the premier sponsor, and Erie Insurance Company and Sonnenschein, Nath & Rosenthal, LLC, the partner sponsors.
- **August 2009** — The Diversity Committee recommended that the Society add a diversity section to the Circle of Excellence (COE) criteria to support the Society's strategic goal of attracting a stream of diverse new talent through CPCU-focused programs. The recommendation was approved. Sections 2A1 and 2C of the 2010–2011 COE program now describe activities that chapters can complete to earn points towards bronze, silver or gold COE recognition.
- **June 2010** — The Society and the Diversity Committee co-sponsored a successful webinar entitled, "Chapter Panel Discussion — Ideas for Promoting the Society's Diversity Goals." Representatives of four chapters participated as panelists and shared the diversity efforts that their chapters had undertaken. Registration was free and was open to chapter leaders throughout the country. We welcome you to visit the Diversity Committee's Web page on the Society's website to view the slides from the presentation.
- **July 2010** — The Diversity Committee held its second annual Diversity Essay Contest. The topic of the contest was: "What specific solutions can you offer to address the substantial challenges that the CPCU Society and our industry face in recruiting and maintaining a diverse membership?" We recently chose and notified the winners of this year's contest. The winning essays are available on the Diversity Committee's Web page. The committee will review the recommendations from all the submissions and utilize them for future strategic initiatives.
- **September 2010** — At the Annual Meeting and Seminars in Orlando, we recognized the winners of our second annual Diversity Essay Contest at the Diversity Reception. Continuing our efforts to expand our reach, the committee participated in the New Designee Open House, which gave our committee an opportunity to recognize the achievements of the Class of 2010 and meet many of its members.
- **Ongoing Activities** — The committee continues to enhance the Diversity Committee Web page on the Society's website. The Web page was launched in late 2008. We have added information to all of our "Resource" categories, including a list of chief diversity officers, a business case template for chapters to use if they are considering sponsoring a student to an Annual Meeting, updated Society statistics and CPCU student demographic statistics provided by The Institutes, a list of events held during the year, and the *Opportunity Rocks* brochure, which was spearheaded by then CPCU Society President and Chairman **Marvin Kelly, CPCU, MBA,** in 2009.

Future Events

There is so much the committee wants to do that it is always challenging to choose and prioritize future events. The committee spends a substantial amount of time planning, organizing and executing its activities. The committee met in Orlando during the recent Annual Meeting and Seminars and continued discussions and planning for the 2010–2011 year, which will include topics such as:

- Reaching out to champions, interest groups and governors.
- Considering using social media to help spread the word about the Society's diversity activities.
- Preparing for our third annual Diversity Essay Contest.

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- Considering the presentation of another webinar and/or another vehicle that allows chapters to share ideas about successful diversity efforts with each other.
- Leveraging the recommendations from the essay contest entries on ways to recruit and maintain a more diverse membership.
- Having committee members meet and speak to affiliation groups such as colleges, chapters and other professional organizations.

How Your Interest Group Can Help

When I think about how the Diversity Committee defines "diversity" as "respecting and appreciating each person's uniqueness," I realize that our claim partners do that every day. Anyone can have a claim. Accidents and natural disasters do not target a specific race, background, socio-economic status or religious belief. As claim professionals, you promote diversity daily when working with your customers and peers by showing care and concern equally. I encourage you to continue that practice and to leverage those skills and extend that care to new employees on your teams, your new chapter and interest group members, and new designees.

Please visit our Web page, save the link as a favorite, and utilize the tools and information. Also, please participate in our onsite events, such as the annual Diversity Reception at each Annual Meeting and Seminars, and our online events, such as our webinars and contests. We need your help to increase the diversity of the CPCU Society's membership, and we need your participation in spreading the word and encouraging change.

THANK YOU for what you do and what you will do in the future! ■

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