CPCU SOCIETY INSURING YOUR SUCCESS

Claims Interest Group

Volume 29 • Number 2 • June 2011

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 25 years. He obtained his bachelor's degree in management from the University of West Georgia, 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 since 2001 and is an active member of the CPCU Society Atlanta Chapter, with prior service as director, secretary, president-elect and president.

It's been more than six months since we all made our annual New Year's Resolutions. How are you doing on yours? This year I heard some of the best advice one can get relating to resolutions. What was the advice, you ask? To proclaim the following — eat healthy, lose weight and drink more. This approach will guarantee that you accomplish at least one of your resolutions.

While I am not a heavy drinker, I do understand the concept of setting obtainable goals. Whether on a personal or professional level, I think at times we can be our own worst enemies when establishing and setting our goals for the year. I, for example, pledged to not eat a cheeseburger until I lost 30 pounds; yet after my first half-pound of weight loss, I rewarded myself with a Whopper from Burger King.

Experts consistently cite that the most effective goal setting involves creating goals that are measurable and obtainable. One approach is to develop a series of smaller goals, or baby steps, that ultimately lead to the accomplishment of the larger goal. Using my cheeseburger example, maybe having cited the goal of limiting my burger consumption to once every couple of weeks rather than not eating a burger at all would have enhanced the probability of my accomplishing the goals to eat healthier and lose weight.

In addition, an important component of this process is to develop a tracking method. Without a method to track your progress and modify the ultimate end result, the likelihood of success is greatly diminished. For example, we have all been involved in projects at work where the goal of the project was clearly stated at the beginning of the endeavor, and then as the team progressed through the various stages, the goal was changed or altered in some form or fashion. The same is true with our personal goals. I encourage you to remain flexible and realistic in your expectations.

So, throughout the second half of 2011, I wish all of you the best of luck in achieving whatever you set out to do in your personal and professional lives. Remember that even a baby step forward is still a step forward!

Continued on page 2

What's in This Issue

Message from the Chair

Continued from page 1

The Claims Interest Group Committee has the goal of presenting top-notch and relevant seminars at October's CPCU Society Annual Meeting and Seminars in Las Vegas, and we are thrilled by our accomplishment so far. We have developed "When Right and Wrong Aren't Enough … Advanced Ethical Decision Making" and "Making Winning Strategies for Resolving Conflicts and Claims."

And in conjunction with the Risk Management and Underwriting Interest Groups, our interest group has developed "Commercial Liability Coverage Conundrums — An Interactive Case Study Approach" and with the Leadership & Managerial Excellence Interest Group, "Emerging Issues — Information and Insight You Can Bet On!".

Also, on Sunday, Oct. 23, the committee will be hosting its annual luncheon at the Annual Meeting, which this year will feature **Jim Hunt**, a partner with International Insurance Services in Las Vegas, Nev., and **Le Cretia Evans**, risk manager at Riviera Casinos, who will talk about "Gambling on Insurance Claims." Their presentation will include the ins and outs of fraud techniques used in an attempt to grab house money, and investigating gaming/resort claims with self-insured hotels and casinos. We are indeed fortunate that ISO will once again be sponsoring very special door prizes. ■

Editor's Notebook

by Charles W. Stoll Jr., CPCU, AIC, RPA

Charles W. Stoll Jr., CPCU, AIC, RPA, is branch manager of GAB Robins North America Inc. in Westmont, Ill., and is the newly-appointed editor of the *Claims Quorum*. He has had a career in claim and risk management positions. Stoll received his CPCU designation in 1991 and is currently completing his term as president of the CPCU Society Chicago-Northwest Suburban Chapter.

I am honored to present the June issue of *Claims Quorum (CQ)*. Again, I am grateful to **Marcia A. Sweeney, CPCU, AIC, ARM, ARe, AIS,** for her guidance and assistance. And it's reassuring to know that she is never far away. I'm also grateful to **Donald O. Johnson, CPCU, J.D., LL.M.,** who has assumed the role of assistant CQ editor. Don is a godsend, and he has really worked hard to help get the first two issues launched successfully. Thanks to you both.

You will find this issue full of interesting articles:

- **Adam Kutinsky, CPCU, J.D.,** a member of the Claims Interest Group Committee, has written an informative article about impartial defense despite coverage issues.
- **Thomas A. Conrad, J.D.,** who spoke at the Claims Interest Group luncheon at the 2010 Annual Meeting and Seminars in Orlando, Fla., discusses how to get the most out of your defense counsel.
- **Randy J. Maniloff, J.D.,** and **Joshua A. Mooney, J.D.,** contribute an article discussing the 10 most significant insurance decisions of 2010.
- **Donald O. Johnson, CPCU, J.D., LL.M.,** writes on the efficient production of what courts call electronically stored information (ESI).
- **Kevin M. Quinley, CPCU, AIC, ARM, ARe,** shares five email habits that undercut your effectiveness as a claim professional.
- And closing the issue is **Nancy Germond, AIC, ARM, ITP, SPHR,** who lets us know how to handle claims with a Scrabble®-like strategy.

I want to thank all the authors who contributed articles to this newsletter. Without their contributions, this newsletter would not be possible. If you are interested in having your article published, please feel free to contact me, Donald Johnson or any member of the Claims Interest Group Committee.

This is a great forum for anyone interested in having their thoughts and ideas published. There are 13 other CPCU Society interest groups that also publish newsletters. You can check the CPCU Society website for more information. ■

Maintaining an Impartial Defense despite Coverage Issues under a Policy of Liability Insurance

by Adam Kutinsky, CPCU, J.D.

Adam Kutinsky, CPCU, J.D., is a shareholder with the Midwest regionally based law firm Kitch Drutchas Wagner Valitutti & Sherbrook, which maintains offices in Michigan, Illinois and Ohio. His practice focuses on complex insurance coverage disputes and insurance defense litigation. A frequent lecturer and published author, Kutinsky received his CPCU designation in 2010, and is an active member of the CPCU Society Greater Detroit Chapter and a committee member of the CPCU Society Claims Interest Group. He can be reached at (313) 965-6731 or adam.kutinsky@kitch.com.

A tripartite relationship between an insurance company, the insured and defense counsel is created when the insured reports a liability claim or lawsuit to its insurance company and the insurer in turn hires an attorney to defend the claim or suit. Ordinarily, this proceeds unremarkably and without issues. However, where coverage is debatable, serious practical and legal questions arise that affect all three parties.

When a claim is submitted before defense counsel is retained, the insurer routinely examines the allegations to determine first, whether coverage under the policy is triggered, and if so, what aspects of the claim or suit may potentially fall outside of insurance coverage. From this "coverage review," the insurer determines whether it has a duty to defend the claim and if coverage issues should be pursued.

If the claim falls outside the scope of coverage or is without question excluded by the policy, the insurer simply "denies coverage" and declines the request for a defense. However, if some part(s) of the allegations or claim fall within policy coverage and others do not, or the issue of coverage is otherwise debatable, a prudent insurer will issue a reservation of rights letter to the insured advising that the insurer will defend the case while also reserving its right to deny coverage at a later date and also possibly filing a declaratory action against the insured to determine defense and coverage responsibilities without delay.

Under either scenario, the insurer must provide a defense to the insured. This is because the duty to defend is generally broader than the duty to indemnify, and in most states, extends to all claims made against the insured, even if some non-covered claims rise to the level of frivolity — so long as other allegations in the same claim or suit may fall within the scope of what is covered under the policy.

The insurer's *duty* to defend is coupled with its *right* to control the litigation, which usually begins by the insurer retaining defense counsel to represent the insured. This joint duty and right to defend a lawsuit is reflected in most liability policy Insuring Agreements, including the ISO Properties Inc., 2006 CGL form CG 00 01 12 07, which states, in pertinent part, under Coverage A: "We will have the right and duty to defend the insured against any 'suit' seeking those damages."

When a claim is submitted before defense counsel is retained, the insurer routinely examines the allegations to determine first, whether coverage under the policy is triggered, and if so, what aspects of the claim or suit may potentially fall outside of insurance coverage.

Defense counsel is almost always selected from an exclusive group of "panel counsel," whose members routinely handle the type of claim or suit tendered and provides the insurance company with preferred rates. Some courts have found that, if there is a coverage dispute, the divergent right of the insurer to provide and control the insured's defense, while also pursuing its own right to deny indemnification for non-covered claims, puts the selected defense attorney in a perceived conflict of interest.

These courts require the insurer to provide the insured with the right to decline representation by the assigned defense attorney and retain its own independent attorney with no connection or purported loyalty to the insurance

Continued on page 4

Maintaining an Impartial Defense despite Coverage Issues under a Policy of Liability Insurance

Continued from page 3

company ("Cumis Counsel" — named after the California case of *San Diego Naval Fed. CU, et al. v. Cumis Insurance Society Inc.*, which first created the doctrine). The Cumis Counsel attorney then takes control of the litigation and submits its fees and costs to the insurer for payment.

Other states do not abide by the Cumis doctrine and instead rely upon the ethical and common law rule that counsel assigned by the insurance company to represent the insured in a liability suit represents the insured as its client and has no direct duty to the insurer. This alternative to the Cumis doctrine is aligned with the presumption that defense counsel will act ethically and in accordance with its state bar rules of professional conduct in looking out for the best interests of the insured and not be influenced by what some courts have pessimistically characterized as a temptation to steer the outcome of the case toward a non-covered claim to help the insurer (because that is who pays its fees and refers it cases).

Although there is no single set of ethics rules which govern the insurance industry as a whole that are similar to a state bar rules of professional conduct, a prudent insurer should at least set up a partition to clearly demarcate between its coverage rights (anti-insured) and defense duties (pro-insured) as soon as the insurer makes the decision to contest or reserve its rights on coverage. This will minimize any question of impartiality of assigned defense counsel and will further demonstrate the proper conduct of the insurer if a bad faith allegation, including a "steering of factual development" claim, is made by the insured after the outcome of the litigation.

At the very least, the insurance company's partition should separate the "coverage file" from the "claim file" so that communications concerning coverage are kept apart from communications with defense counsel. If the doubts concerning

coverage are very serious, separation of responsibilities for management of the insured's defense and the insurer's coverage position is also advisable. Generally assigning each to a different internal claims representative is enough. However, if the coverage issues are really "hot" and a claim of "steering" the claim is likely, the additional step of sending out management of either the defense or the coverage dispute to a third party attorney or claims organization, who reports to different claims executives, may be appropriate.

By maintaining file separation and independent management of the defense and coverage issues, no question should remain open concerning the impartiality of the defense provided to the insured. Moreover, when separate "coverage counsel" is retained by the insurer to represent the insurer, it goes without saying that all communications between the insurer and its coverage counsel are to be totally confidential and not shared with defense counsel, whose sole duty remains to the insured. If coverage information is inadvertently offered to defense counsel beyond what is intended to be shared, the defense attorney's response must be, "I do not want to hear it."

While the law of bad faith in insurance can vary from state to state, an insurer knowingly failing to respect the policy rights of the insured is bad faith. Prudent management of the relationships with the insured, the provider of defense and the proponent of a coverage defense, including the file structure and communications with defense counsel and, if applicable, the insurer's coverage counsel, is essential. It is also in the interest of all involved in the claim. ■

How to Get the Most Out of Your Defense Counsel

by Thomas A. Conrad, J.D.

Thomas A. Conrad, J.D., is a partner with the law firm of Shapiro, Blasi, Wasserman & Gora PA, in Boca Raton, Fla. He represents clients in a wide range of litigated matters, including cases involving construction defects, product liability, legal and medical malpractice, and insurance coverage issues. Previously, Conrad spent 12 years as staff counsel for Zurich American Insurance Company, where, as a chief trial attorney, he defended a wide variety of complex litigated disputes, including wrongful death, construction defects, legal and medical malpractice, products liability, employment discrimination and RICO matters.

Editor's note: This article is based on a presentation given by **Thomas A. Conrad, J.D.**, at the Claims Interest Group Luncheon during the 2010 CPCU Society Annual Meeting and Seminars in Orlando, Fla.

Demands upon claim representatives and defense counsel to handle more with less continue to challenge the defense team to find approaches that will maximize each dollar and minute spent on a claim. Sacrificing quality or results (indemnity) is not an option. What is required, then, is the more efficient and effective use of the resources that are at hand. In this article, the focus is on getting the most "bang" for your defense counsel buck or minute. The key — as the adage goes — is to do it smarter.

- **Selection of Counsel.**
  The process starts with the thoughtful selection of counsel. This has two aspects. First, as to panel counsel, approved lists should be periodically reviewed and updated. Attorneys can get "stale." The quality of a firm's work may change over time with attorney turnover, reduction in staffing levels or through mere complacency. Competing firms may be more aggressive, and newer firms may be more technologically savvy. Consequently, approved counsel lists should be elastic rather than static. However, all new attorneys should be "test-driven" first. Do not try out an unknown attorney with a wrongful death case. Second, even within an approved firm or with the company's own staff counsel offices, more thought should be given to selecting the best attorney for the job. A simple inquiry to the office's managing attorney can provide information about the attorneys' experiences in handling specific types of cases. This is particularly important with larger or more complex cases. Not infrequently, one of the attorneys in the office may be handling or may have recently handled a claim similar to the one to be assigned. In such a case, no reason for "re-working the wheel" may exist.
- **Establishing a Balanced Team.**
  Efficient and effective claim handling is not possible if the claim representative is not working well with defense counsel. Compatibility is important, but retaining a "yes" person can be counter-productive. Generally, the best attorney will be one who is rationally aggressive. Irrational aggression wastes time and money. Counsel's level of aggression should be complementary to but not necessarily the same as the claim representative's. The right attorney can provide a useful check and a helpful balance. Disastrous results often occur when the attorney and claim representative proceed in lock step, right off a "cliff," with neither heeding the warning signs along the way. Defense counsel must be comfortable with questioning the strategy and objectively assessing the risks and should be encouraged to do so.
- **Good Communication.**
  Good communication is the most important factor in assuring the optimum use of defense counsel. Attorneys are very literal. If you tell them to take the depositions of all the witnesses, then all the witnesses, no matter how minor or peripheral, are going to get deposed. Be specific and do not assume. Attorneys cannot read your mind. Every conversation about strategy should end with a recap of exactly what was agreed upon, who is to be responsible for what and when tasks are to be accomplished. Most problems with the representation can be avoided if you have a clearly communicated plan.
- **Focused Planning.**
  You need a focused plan. Without a well-defined plan, your case is going to drift. The longer it drifts, the more unnecessary expenses are going to mount and the less likely a favorably result will be achieved. To avoid going down the wrong path and encountering unwelcomed surprises, make sure the legal landscape in which you are going to be navigating is clearly mapped out. How sure is defense counsel about the applicable law? This needs to be determined upfront because it will not only dictate the tasks to be included

Continued on page 6

How to Get the Most Out of Your Defense Counsel

Continued from page 5

in the plan, but also impact the case evaluation and resolution strategy. Your litigation plan should be specific as to tasks; for instance, take the depositions of A and B, not C. It should also set reasonable, but still ambitious, time parameters — depositions to be completed by a certain date, for instance. The claim representative, with defense counsel's input, should set the priorities and be clear on expectations. The burden should be put on counsel to justify any deviations.

- **Some Specific Recommendations.**
  - **Do the "Grunt" Work Yourself.** Do not pay attorney or paralegal fees for tasks that you can complete yourself. Limit counsel's role to performing the legal work. Whether it is ordering surveillance, performing corporate searches or conducting jury verdict research, do as much of the investigatory work yourself.
  - **Focus on Critical Information.** Many cases can be resolved earlier and cheaper if the focus is kept on securing the critical information needed for a proper evaluation. For instance, if you are defending an automobile accident claim with just one independent witness, take the deposition of the independent eyewitness first. If he or she makes a good witness, the case can be assessed based on the strong probability that the jury is going to reconcile any differences in the parties' versions by accepting the eyewitness's recollection of events. Similarly, if you are defending a slip-and-fall claim involving an allegedly slick walking surface, get a coefficient of friction test done upfront. Nothing is going to get resolved until the test is done.
  - **Lay Down Some "Ground Rules."** Part of communicating expectations is laying down some basic "rules." For instance, all research must be approved, or no expert is to be retained without a proposed budget. These rules can also be useful to counsel by allowing you to be the "bad cop." Generally, attorneys want to accord each other professional courtesy. Keeping a "friendly" relationship with opposing counsel can also help reduce unnecessary litigation of minor matters that frequently arise throughout the course of a case. However, too much "courtesy" can also have a deleterious effect. Let counsel use you as an excuse to say "no." Tell your counsel he or she is not authorized to agree to more than one extension for discovery, cannot accept subpoenas for depositions of the insured's employees or must hold the plaintiff's deposition at a court reporter's office (for examples).
  - **Seek to "Compress" the Case.** Considerable expense of defending a dispute can be eliminated simply by pushing the case to a prompt conclusion. The number of extensions and continuances should be kept to a minimum. Jury verdict research should be performed at the beginning of the case, and mediation should be held well in advance of the trial date. On the defense side, initial discovery should go out with the answer. If the plaintiff's deposition is to be set, defense counsel should schedule the deposition for a date shortly after the plaintiff's responses to paper discovery will become due and notice the deposition immediately. When the defense has its case prepared, the action should be noticed for trial — do not wait for the plaintiff to get around to it.
  - **Avoid Unnecessary Expenses.** By prioritizing the steps needed to defend a case, a lot of expense can be saved. Even where a case cannot be resolved early, many unnecessary expenses can be avoided by eliminating the "fluff." Your counsel may prepare papers that do not serve any real purpose other than to provide a billing opportunity. Notices of appearance, notices of non-objections to subpoenas, non-dispositive motions to dismiss, and replies to affirmative defenses that simply deny defenses to cross-claims or third-party complaints are, or may be, unnecessary. Travel to noncritical witness depositions (set by plaintiff) can be eliminated by counsel's attending by phone or by use of video conferencing or other means (e.g., Skype). Many motions to compel answers or better answers to interrogatories are a wasted effort, as the same information can be obtained during plaintiff's deposition, if that is to follow.
  - **Timely Invoke Fee-Shifting Provisions.** Many states, like Florida, have proposal for settlement or offer of judgment statutes or rules. Quite a few are patterned after Rule 68 of the Federal Rules of Civil Procedure, which provides for offers of judgment. Typically, these provisions include deadlines for serving offers or proposals prior to the trial date. No case should go to trial without a proposal or offer having been made, and this should be included in the litigation plan. The deadline should be calendared as soon as trial is set. Multiple offers or proposals can be made over the course of the litigation. Early offers or proposals, even if quite small, can trigger a right to attorney's fees and thereby put pressure on plaintiffs to settle. They also can serve to cut off a plaintiff's right to statutory or contractual attorney's fees.

With the increasing pressures to do more with less, "business as usual" is not an option. Under today's realities, defending a case requires a focused approach that can only succeed if the claim representative and defense counsel are working in synch. Good communication and an agreed plan are critical to establishing and maintaining the necessary focus to ensure that activity is directed towards the desired goal and is not superfluous, inessential or even counter-productive. All extraneous activity should be eliminated. The claim representative can help ensure this takes place by establishing clear expectations and by periodically reviewing defense counsel's bills for compliance. ■

'Endurance Coverage 2010: The Year's Ten Most Significant Insurance Decisions Reaches the Decade Mark'

'3rd Annual Coverage for Dummies, Et Al'

by Randy J. Maniloff, J.D., and Joshua A. Mooney, J.D.

Randy J. Maniloff, J.D., is a partner in the Business Insurance Practice Group at White and Williams LLP in Philadelphia. He writes frequently on insurance coverage topics for a variety of industry publications (including, for the 10th time, a review for *Mealey's Litigation Report: Insurance* of the year's 10 most significant insurance coverage decisions).

Joshua A. Mooney, J.D., is counsel in the Business Insurance Practice Group at White and Williams LLP in Philadelphia. His practice primarily focuses on representing insurers in coverage litigation and bad faith matters under commercial general liability and various professional liability policies.

Editor's note: (1) Over the past few years, *Claims Quorum (CQ)* has had the opportunity to publish a summary of attorney **Randy J. Maniloff's** annual article on the top 10 insurance cases of the year. This *CQ* article is a shorter version of the original 24-page article recently published in *Mealey's™ Litigation Report: Insurance*. It has been edited and is being reprinted with the permission of White and Williams LLP. (2) Due to space considerations, we have chosen three of the 10 case discussions. The entire article can be requested from co-author Randy Maniloff via email at maniloffr@whiteandwilliams.com. (3) The views expressed herein are solely those of the authors and not necessarily those of White and Williams or its clients. (4) All uses herein of the first person are references to Maniloff.

A sullen-faced man walks up to the counter of a flower shop. By his expression, the clerk is expecting to take an order for a funeral arrangement. But he quickly learns that he was wrong when the man asks to have a large bouquet of flowers sent to his wife for their anniversary. "And when would you like to have this delivered?" the clerk asked. "Yesterday," the customer replied.

The Year's Ten Most Significant Insurance Coverage Decisions is celebrating its 10th anniversary. That is cause for celebration. After all, think of all the much more important things — in insurance and elsewhere — that never make it to 10 years. There's third-party bad faith in California (nine years), the impact of Montrose's "known loss" rule (six years) and The Brady Bunch (five years).

Admittedly, there were times I doubted that the Top Ten would make it this long. The seven-year itch was a particularly rough patch. But the ship was righted to allow this day to arrive.

I checked to see what the traditional symbolic anniversary gift is for this achievement and discovered that it was, well, not exactly what I had been expecting. I thought 10 was the silver anniversary. Or at least crystal or maybe ivory. Boy, I wasn't even close. It turns out that silver is 25 (25!?) and 10 is tin. Huh? Say that again. Ten years of following coverage cases on a daily basis, to be able to select the 10 each year that mattered most, followed by slogging through drafting the article — much of it over the Thanksgiving weekend when I could have been shopping at Best Buy at 3 a.m. — and that's all 10 gets you? Lousy stinkin' tin? I wish I had known this sooner. I could have bought my wife a roll of Reynolds Wrap for our anniversary.

But the Coverage Top Ten has endured for one reason — people tell me that they read and enjoy it. (Here comes the soppy part.) The feedback and kind words that readers have provided over these years is what has kept this series going. Without such encouragement, I would have stopped it long ago. To the readers of this annual insurance coverage best-of — thank you for your support.

Coverage for Dummies, Et Al

Reading a lot of insurance coverage cases makes you realize that some people do really dumb stuff. Their shocking behavior causes injury and not long after a lawsuit is filed against them. The tomfools then make an insurance claim. Actually, at least making an effort to pass the buck for their stupidity is the only intelligence that these people demonstrate. For the past two years, the annual insurance coverage hit parade has included a special report — "Coverage for Dummies."

Continued on page 8

'Endurance Coverage 2010: The Year's Ten Most Significant Insurance Decisions Reaches the Decade Mark'

Continued from page 7

Dummies has been a look at several examples from the year of attempts by individuals to secure insurance coverage for the frailty and imperfection of the human brain.

But the entertainment value of coverage cases isn't limited to this window into the world of the common-sense challenged. Coverage cases are full of all sorts of interesting observations. While perhaps not important or relevant to anything, when has that ever stopped lots of things from being published? So this year's Dummies will include a hodgepodge of random observations from coverage decisions in 2010 that, while unimportant, are just too interesting to go unnoticed. In no particular order, here is Coverage for Dummies 2010 n/k/a Coverage for Dummies, Et Al:

(1) Do you want mustard with that construction defect coverage decision? *See Oregon Mut. Ins. Co. v. Ham & Rye, LLC*, No. C10-579, 2010 U.S. Dist. LEXIS 70774 (W.D. Wash. July 14, 2010).

(2) Patron of the Finger Rock Bar was standing near a door when it flew open, slammed against his left hand and broke his, get this … finger. *See Eaton v. United America Ins. Group*, 685 F. Supp. 2d 154 (D. Maine 2010), *affirmed* 2010 U.S. App. LEXIS 24049 (1st Cir. Nov. 23, 2010).

(3) What not to allegedly do at a little league game — sit behind home plate in the lowest row of the bleachers and tell the catcher, who is someone else's son, that he is making too many mistakes. And especially don't do it six or seven times in one inning. And doubly especially don't do it if you need a cane to walk. *See Baggett v. Allstate Ins. Co.*, 39 So. 3d 666 (La. Ct. App. 2010).

(4) What else not to allegedly do at a little league game, in particular when you are the league president — assault a spectator causing multiple facial fractures, including a broken nose and septum, and permanent nerve damage. And in particular avoid doing this when the spectator is Grandmom Nellie — a player's nana. *See Nellie Ellison v. Kentucky Farm Bureau Mut. Ins. Co.*, No. 2009-CA-116, 2010 Ky. App. Unpub. LEXIS 567 (Ky. App. Ct. July 9, 2010).

(5) You wouldn't think there was a risk of getting stabbed at a bar called Daiquiris & Creams. Would you like one of those little umbrellas with your flesh wound? *See Fouquet v. Daiquiris & Creams of Mandeville, LLC (Colony Ins. Co.)*, __ So. 3d __ (La. Ct. App. 2010).

(6) How much pain can you endure? You don't know? Well then I'll just shoot you in the wrist and we'll find out. *See Auto Club Group Ins. Co. v. Booth*, __ N.W.2d __ (Mich. Ct. App. 2010).

(7) Pollution exclusion does not apply to odors emanating from the "King of Sturgeon's" delicatessen. In support of its opinion, the court noted that, according to Zagat's restaurant guide, "[t]he smells alone are worth the price of admission." *See Greengrass v. Lumbermans Mut. Cas. Co.*, No. 09 Civ. 7697, 2010 U.S. Dist. LEXIS 76781 (S.D.N.Y. July 27, 2010).

(8) Whatever you do, do not try to return something to Walgreens without a receipt. Trust me, or *see Benham v. S & J Security & Investigation, Inc.*, No. B207420, 2010 Cal. App. Unpub. LEXIS 1616 (Cal. Ct. App. Mar. 8, 2010) (addressing coverage issues, among others).

(9) What not to say in a letter of recommendation for an anesthesiologist whom you fired after suspecting that he was diverting demerol for personal use and whom you found passed out in the break room from taking valium — an "excellent anesthesiologist" and "highly" recommended. *See Preau v. St. Paul Fire & Marine Ins. Co.*, No. 09-4252, 2010 U.S. Dist. LEXIS 77210 (E.D. La. July 30, 2010).

(10) Coverage for Dummies Encore: Another decision issued in the long-running saga of coverage being sought by a husband, for eye injuries sustained by his wife, when he threw a carrot at her. Aren't carrots supposed to be good for your eyes? *See Safeco Ins. Co. of Am. v. Vecsey*, No. 3:08cv833, 2010 U.S. Dist. LEXIS 103503 (D. Conn. Sept. 30, 2010).

(11) Insured responded to a property line dispute by attaching to the fence at issue life-sized paper targets cut into the shape of human beings and riddled with bullet holes. And that was probably his tamest response. *See Browning v. American Family Mut. Ins. Co.*, No. 09-1375, 2010 U.S. App. LEXIS 19697 (10th Cir. Sept. 22, 2010) (applying Colorado law).

(12) Public storage company makes repairs to the ceiling in a storage unit. Good news doctor, we fixed the ceiling. Bad news — we accidentally disposed of those 600 boxes of medical and financial records you had in there. *See Zurich American Ins. Co. v. Public Storage*, __ F. Supp. 2d __ (E.D. Va. 2010).

(13) Trust us — we really would have declined your request to backdate your policy by a few days if you had told us that the new inception

date was a few days before someone was shot and killed in your bar, followed by a fire at the premises a day or two later. *See Burlington Ins. Co. v. Barefield*, No. 09CV5280 (N.D. Ill. Oct. 28, 2010).

(14) Best artfully drafted complaint of the year to be successful in triggering a duty to defend: Bar patron, stabbed in the face, alleged that the defendant "caused a knife to make contact with plaintiff." Even the judge recognized the insanity of his decision, calling it one "only lawyers could love." *Gakk, Inc. v. Acceptance Cas. Ins. Co.*, No.09-6282, 2010 U.S. Dist. LEXIS 84971 (D. Or. Aug. 16, 2010).

(15) In a category that always has a lot of contenders — Worst Bar Security of the Year — the award goes to *Rizzi v. United States Liability Ins. Co.*, No. 095010775S, 2010 Conn. Super. LEXIS 1808 (Conn. Super. Ct. July 13, 2010): Patron spends six hours in a gentlemen's club drinking, locks himself in the men's room for 30 minutes, emerges completely naked, after which club employees tie his pants around his waist, wrap his head in a shirt and ridicule him as he is escorted out of the establishment, whereupon he falls down an embankment and is killed.

(16) Honorable Mention — Worst Bar Security of the Year — *American Best Food, Inc. v. ALEA London, Inc.*, 229 P.3d 693 (Wash. 2010): Nightclub patron is ejected by security for a confrontation with another patron; he is allowed to return to the club and reinitiates the confrontation; both patrons are ejected and the originally ejected patron shoots the other patron nine times; victim staggers back to the club and is carried inside by security; club owner instructs employees to remove the victim from the establishment and the employees "dumped him on the sidewalk." (Entire incident started when the two men brushed up against each other on the dance floor.) (Unknown if "Stayin' Alive" was playing at the time.)

(17) Best line of the year by a court in a coverage decision: Quoting an arbitration panel that took judicial notice, that's right, judicial notice, "of the common practice in correspondence between coverage counsel and an insured's counsel to reserve rights to assert all sorts of positions — often fairly ridiculous ones — and for all parties to accept such reservations as effective means of avoiding waivers of positions." *See Illinois Union Ins. Co. v. North County Ob-Gyn Medical Group, Inc.*, 09cv2123, 2010 U.S. Dist. LEXIS 50095 (S.D. Cal. May 19, 2010).

(18) On Halloween eve, the Wisconsin Court of Appeals ruled that bat guano is not a pollutant. *See Hirschhorn v. Auto-Owners Insurance Company*, __ N.W.2d __ (Wis. Ct. App. 2010). December 24 decision will address whether reindeer guano is distinguishable.

(19) Bad, bad idea to use gasoline to clean the floor of a food truck that contains a stove with a pilot light. *See Employers Mut. Cas. Co. v. Bonilla*, 613 F.3d 512 (5th Cir. 2010) (applying Texas law).

(20) Proof that the legal system is broken: *Scottsdale Ins. Co. v. Shageer*, No. 10-80418, (S.D. Fla. Dec. 1, 2010): An exotic dancer at Cheetah's was walking along the top of the bar collecting tips when she was groped by a male patron. Her leg instinctively kicked out and struck the patron. Guess which one got sued?

The Ten Most Significant Insurance Coverage Decisions of 2010

I am once again grateful for the opportunity to make the case for the 10 most significant insurance coverage decisions from the year gone by. The selection process operates throughout the year to identify coverage decisions (usually, but not always, from state high courts) that (1) involve a frequently occurring claim scenario that has not been the subject of many, or clear-cut, decisions; (2) alter a previously held view on an issue; (3) are part of a new trend; (4) involve a burgeoning issue; or (5) provide a novel policy interpretation. Admittedly, some of these criteria overlap.

In general, the most important consideration for selecting a case as one of the year's 10 most significant is its potential ability to influence other courts nationally. That being said, the most common reasons why many unquestionably important decisions are not selected is because other states are not lacking for guidance on the particular issue or the decision is tied to something unique about the particular state. Therefore, a decision may be hugely important for its own state, but is nonetheless very likely to be passed over as one of the year's 10 most significant because it has little chance of being called upon in the future by other states confronting the issue.

For example, in *Minkler v. Safeco Ins. Co.*, 232 P.3d 612 (Cal. 2010), the Supreme Court of California held that a policy containing a severability-of-interests provision and an exclusion for bodily injury expected or intended by "an" insured did not preclude coverage for an innocent co-insured. Given the frequency in which the "an insured" versus "the insured" issue arises, *Minkler* is a hugely significant decision that will undoubtedly affect numerous California claims. However, because this issue is so

Continued on page 10

'Endurance Coverage 2010: The Year's Ten Most Significant Insurance Decisions Reaches the Decade Mark'

Continued from page 9

well-developed nationally, it is unlikely to have much influence on courts outside of the Golden State.

Another example is *American Best Food, Inc. v. ALEA London, Inc.*, supra, where the Washington Supreme Court held that an insurer's failure to defend, based upon a questionable interpretation of law, was unreasonable and therefore the insurer acted in bad faith as a matter of law. *American Best* set the bar for bad faith about as low as it can go. However, the decision is so inconsistent with national bad faith standards that its impact is likely to be limited to Washington State and not have any impact on the other 49. For these reasons, while *Minkler* and *American Best* were hugely significant decisions in 2010, both remained on the sidelines when the year's 10 most significant coverage decisions were being selected.

As I remind readers every year, the process for selecting the year's 10 most significant insurance coverage decisions is highly subjective, not in the least bit scientific and in no way democratic. So, if you think a decision should have made the list, but didn't, I probably wouldn't argue with you too much. But just because the selection process has no accountability or checks and balances whatsoever does not mean that it lacks deliberation. In fact, a lot of deliberation goes into the process. It's just that only one person is deliberating.

Below are the 10 most significant insurance coverage decisions of 2010 (listed in the order that they were decided):

- ***Pharmacists Mutual Ins. Co. v. Myer*** — Vermont Supreme Court prescribed tough medicine for insurer that failed to take action to allocate damages between those that are covered and uncovered.
- ***Medical Protective Co. v. Bubenik*** — Insureds will scream over losing the right to remain silent. Eighth Circuit held that insured that "takes the fifth" in a civil case because of possible criminal liability forfeits coverage for lack of cooperation.
- ***Gilbane Building Co. v. Empire Steel Erectors, L.P.*** — ISO In Search Of an additional insured endorsement that operates as it intended. Texas District Court rejected the organization's latest additional insured offering in one important context.
- ***Travelers Prop. & Cas. Co. v. Hillerich & Bradsby Co., Inc. (Louisville Slugger)*** — Sixth Circuit ended the policyholder squeeze-play for demands on insurers to settle in the face of coverage defenses.
- ***Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*** — North Carolina Supreme Court told manufacturer of insect repellant apparel to, what else, buzz-off for coverage claims that resemble "greenwashing."
- ***World Harvest Church, Inc. v. Guideone Mut. Ins. Co.*** — Georgia Supreme Court held that insurer didn't have a prayer after issuing an ineffective reservation of rights to a church.
- ***Pekin Ins. Co. v. Wilson*** — Supreme Court of Illinois: Insureds are not down for the count when facing the "expected or intended" exclusion for an assault and battery claim. (Supreme Court of Virginia did the same.)
- **C.R.S.A. § 13-20-808** ("An Act Concerning Commercial Liability Insurance Policies Issued to Construction Professionals") — Botox injection: Colorado General Assembly eliminated the lines that have been drawn over the faulty workmanship as an "occurrence" debate.
- ***Flomerfelt v. Cardiello*** — The death and taxes of insurance no more: New Jersey Supreme Court rejected broad interpretation of "arising out of."
- ***State Automobile Mut. Ins. Co. v. Flexdar, Inc.*** — Indiana Appeals Court gives the Heisman to insured's argument that insurer's amendment of a policy provision is admissible to interpret the meaning of a prior version.

Discussion of 'The Ten Most Significant Insurance Coverage Decisions Of 2010'

Editor's note: There are 20 pages of discussion about the 10 cases in the original article. We have chosen the discussion on three of the cases for our CQ readers. Please feel free to contact the author for the complete article or the discussion about any particular case listed.

Medical Protective Co. v. Bubenik, 594 F.3d 1047 (8th Cir. 2010) (applying Missouri law)

Nobody can claim complete ignorance about the American legal system. This is because everyone, even kids, know at least one thing: Upon being arrested, a person has the right to remain silent. As a technical matter, this principle stems from the Constitution's prohibition against self-incrimination — specifically that no person shall be compelled to testify against himself. There is no shortage of judicial opinions characterizing this Constitutional protection as fundamental, bedrock and a cornerstone of our adversarial criminal judicial system. It is as black letter as coal. Indeed, the concept traces its roots to English common law and **Oliver Cromwell** in the 1600s.

It is for this reason that some policyholder counsel may be puzzled, and perhaps incensed, by the Supreme Court of Georgia's decision in *Medical Protective Co. v. Bubenik* that if "taking the Fifth" violates the insured's duty to cooperate, it may eviscerate coverage. Granted, as a general principle, the Fifth Amendment "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (quoting 8 J. Wigmore, Evidence 439 (McNaughton 1961)). But that may still not prevent policyholder shock and awe at the decision.

The insured, Bubenik, was a dentist specializing in conscious sedation dentistry. MPC provided his medical malpractice insurance. A patient, Marlon Jaudon, died in July 2004 during a procedure at Bubenik's office. Six months later, Bubenik performed the same procedure on Henry Johnston, who also died. *Id.* at 1050. Malpractice actions followed. In both cases, Bubenik asserted his Fifth Amendment right against self-incrimination, and refused to answer interrogatories, submit for a deposition or testify at trial. *Id.*

During the *Jaudon* litigation, MPC repeatedly warned Bubenik that his refusal to testify might jeopardize his insurance coverage because he would be in material breach of the cooperation clause in his policy, which provided that "[t]he Insured shall at all times fully cooperate with the Company in any claim hereunder and shall attend and assist in the preparation and trial of any such claim." *Id.* On the morning of the Jaudon trial, the presiding judge disqualified Bubenik's expert witness because her opinion was based on information which had been given to her by Bubenik, but which was not in the record. MPC settled the Jaudon case that day. (It was unable to contest coverage at that point because it had not sent Bubenik a reservation of rights letter. *(See World Harvest Church, supra).*

During the course of the *Johnston* litigation, MPC also repeatedly informed Bubenik that his refusal to provide information in assistance of his defense constituted a breach of his duty to cooperate. Although Bubenik informed MPC that the case was defensible, he refused to discuss why. He also refused to release a state dental board report that detailed what had occurred on Johnston's visit and contained Bubenik's opinion as to the cause of his death. *Id.* MPC ultimately reserved its right to deny coverage based on his failure to cooperate, and, after judgment was entered against Bubenik, MPC sought a declaration that the judgment was not covered. *Id.* at 1051. The federal district court agreed, entering judgment in favor of MPC. The Eighth Circuit affirmed.

The Eighth Circuit initially rejected outright arguments that the cooperation clause was ambiguous and therefore unenforceable, stating that "[a] common sense interpretation" of the provision requiring Bubenik to "fully cooperate" and "assist in the preparation and trial of any [claims]" included the duty "to assist MPC in its defense strategy, provide relevant documents, answer interrogatories, submit to depositions, and testify at trial if necessary." *Id.* at 1052.

Nobody can claim complete ignorance about the American legal system. This is because everyone, even kids, know at least one thing: Upon being arrested, a person has the right to remain silent.

The court thereafter rejected the heart of the matter — that the provision could not be enforced because "it amount[ed] to a waiver of constitutional rights." *Id.* In rejecting the argument, the Eighth Circuit reasoned that the MPC policy did not require an actual waiver of Bubenik's constitutional rights, but rather gave him a choice of either to assert them or cooperate with his insurer. His argument, therefore, was based on a false premise:

[T]he MPC insurance policy did not require an actual waiver of Dr. Bubenik's constitutional rights. He retained the choice whether to invoke his Fifth Amendment rights at the price of losing his insurance coverage or to cooperate with the defense attorneys provided him and retain his coverage. Both options remained available to him throughout the pendency of the Johnston case. We conclude that the district court did not err in concluding that Dr. Bubenik materially breached the cooperation clause in his insurance policy. *Id.* at 1052. Thus, like a litigant in a civil action, although Bubenik could invoke his Fifth Amendment right, there would be consequences. The choice was his.

The court also easily found that Bubenik's material breach of the cooperation clause substantially prejudiced MPC and that MPC had acted diligently in its communication with Bubenik to secure his cooperation in order to support a declaration of no coverage. *Id.* at 1053. Thus, there was no coverage.

The logic of the opinion and Fifth Amendment case law in general suggest that other courts will follow the Bubenik decision. As civil and coverage litigation continues in the fallout of Wall Street scandals and the criminal prosecutions that followed, it is an issue worth watching.

Travelers Prop. & Cas. Co. v. Hillerich & Bradsby Co., Inc., 598 F.3d 257 (6th Cir. 2010) (applying Kentucky law)

For various reasons, coverage litigation between insurers and insureds is not played on a level field. For example, many coverage disputes involve the duty to defend. Insureds clearly have the advantage here because the duty to defend is usually determined against a backdrop that it is exceedingly broad. But this can be justified. Since liability insurance is "litigation insurance," coverage for defense is a fundamental aspect of the product being sold. For this reason, the duty to defend should necessarily be broad. Further, ambiguities in an insurance policy are generally construed against the insurer. This provides a monumental advantage to insureds since the question of whether a policy provision is ambiguous is about as subjective of a determination as there is. But this rule of policy interpretation is justified on the basis that the insurer was the one who drafted the policy. And, of course, unless the policyholder is BP, insurers are

Continued on page 12

'Endurance Coverage 2010: The Year's Ten Most Significant Insurance Decisions Reaches the Decade Mark'

Continued from page 11

almost certainly never going to win the sympathy vote. In general, all things being equal on the merits, these intangible factors make insurers about a 7-point underdog in a lot of coverage litigation.

But if there is one situation where the playing field deserves to be perfectly level, it is this one. An insurer is defending its insured in an underlying action. There are potential coverage defenses. Accordingly, the insurer is providing its defense under a reservation of rights. The insurer has done exactly what the law asks of it when faced with such a situation.

At some point further down the road, perhaps after the insurer has spent a significant sum on the insured's defense, an opportunity to settle the case within policy limits arises. And when this happens, it has a way of being close to trial. The insurer is getting tremendous pressure from its insured to settle the case to avoid any risk of a verdict in excess of policy limits. The insured is also threatening that, given the potential liability and damages at issue, any excess verdict will be the responsibility of the insurer on account of its failure to accept the demand within limits. And based on the relevant bad faith "failure to settle" standard, the insured may very well be correct.

But if the insurer does what its insured is demanding, and settles the case, what happens to the insurer's coverage defense? Did the insurer just pay to settle an uncovered claim and now has no recourse? Was the insured able to use the risk of saddling the insurer with liability for an excess verdict as a means to obtain (read as, extort) coverage for uncovered claims? Having done exactly what was asked of it — defended its insured under a reservation of rights — the insurer does not deserve to have to forego its coverage defenses as the price to pay to avoid exposure for an excess verdict. It is the proverbial damned-if-you-do and damned-if-you-don't for the insurer.

The Supreme Court of Texas described this situation for insurers as an untenable one and even went so far as to say that insurers could account, in their rate structure, for the possibility that they may occasionally pay uncovered claims. *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000). However, in *Travelers Prop. & Cas. Co. v. Hillerich & Bradsby Co., Inc.*, the Sixth Circuit was not so quick to throw up its hands and dismiss the issue as just a cost of doing business for insurers. Rather, the court recognized the risk of unfairness for insurers facing this settlement quandary and devised a solution that attempted to keep the playing field level.

Since liability insurance is "litigation insurance," coverage for defense is a fundamental aspect of the product being sold. For this reason, the duty to defend should necessarily be broad.

At issue in *Hillerich & Bradsby Co.* was coverage for a claim made by Baum Research and Development Co. against Hillerich & Bradsby Company (surely best known as the manufacturer of Louisville Slugger baseball bats) with respect to the Baum Bat and Baum Hitting Machine. *Hillerich & Bradsby* at 262. The underlying claims generally involved antitrust violations and tortious interference. *Id.* at 262. Hillerich & Bradsby sought coverage from Travelers under Coverage B, Personal and Advertising Injury, of its Commercial General Liability policies. *Id.* at 263. Travelers initially refused to defend Hillerich & Bradsby because the complaint did not allege personal and advertising injury. Travelers then undertook the defense, under a reservation of rights, following the filing of a second amended complaint that alleged disparagement. *Id.*

In 2005, after trial in the underlying action had commenced, the parties settled. *Id.* at 262. Hillerich & Bradsby's portion of the settlement was $500,000. *Id.* In the time leading up to the settlement, Travelers informed Hillerich that it would only fund settlement costs while reserving a right to seek reimbursement for any contribution found to be funding noncovered claims. *Id.* at 263.

Needless to say, Hillerich did not agree to this condition. Hillerich acknowledged Travelers' claim of a right to seek reimbursement but expressly objected to this right, instead arguing that the claims at issue in the *Baum* litigation should be covered by Travelers. Hillerich demanded that Travelers settle the case while still refusing to recognize a right to reimbursement, which Travelers again invoked as a condition for funding settlement. Hillerich threatened to sue Travelers for bad faith for defending under a reservation of rights if Travelers did not settle the underlying litigation. Travelers again invoked its reservation of rights to seek reimbursement for noncovered claims included in the settlement while it funded the settlement on March 18, 2005. *Id.* at 264.

Travelers initiated coverage litigation seeking reimbursement of its settlement if it were determined that funds were paid to resolve uncovered claims. *Id.* The Kentucky District Court concluded that Travelers had such right to reimbursement. *Id.* The case was appealed to the Sixth Circuit, which framed the issue as follows: "[W]hether Travelers can seek reimbursement of settlement for noncovered claims when it funded the settlement under a reservation of rights, when Hillerich was given notice of its intent to seek reimbursement, and when Hillerich retained meaningful control of the defense and negotiation process." *Hillerich & Bradsby* at 265.

The Sixth Circuit — following a review of the issue nationally — affirmed the lower court, allowing "reimbursement for an insurer after a unilateral reservation of rights by the insurer over the objection of the insured in at least the narrow circumstances posed in this case." *Id.* at 268. The court concluded that a right to reimbursement exists under an implied-in-law/unjust enrichment theory. In other words, the insured only paid premiums for coverage of the specified claims in the policy and the insured had full knowledge of the consequences of accepting the defense and settlement under the insurer's reservation of rights. *Id.* at 266-67 (discussing *Blue Ridge Ins. Co. v. Jacobsen,* 22 P.3d 313 (Cal. 2001)). The Sixth Circuit specifically held that "this reimbursement right arises under an implied-in-law contract theory to allow an insurer to seek reimbursement when '(1) the insurer has timely asserted a reservation of rights; (2) the insurer has notified the insured of its intent to seek reimbursement; and (3) the insured has meaningful control of the defense and negotiation process.'" *Id.* at 268 (quoting District Court's opinion).

While the appeals court couched its decision in legal doctrine, the case's money paragraph indicates that the court's decision was also based on what it perceived as fundamental fairness for insurers. The Sixth Circuit clearly appreciated the conundrum facing insurers. Travelers was in a difficult position — either settle the claim without an agreement on reimbursement when Travelers was contesting coverage or delay settlement when that would increase defense costs that it had already waived the right to recoup and might lead to liability on a bad faith claim.

Kentucky favors fair and reasonable settlements, and all parties agree that the underlying settlement was fair and reasonable. Allowing insurers to reserve a right to seek reimbursement in at least some limited circumstances where it is done expressly and where the insured retains meaningful control over the defense encourages settlements when coverage is uncertain, while not permitting unjust enrichment to the insured that demands settlement but refuses to recognize a right to reimbursement. Here the insured was arguing that coverage was afforded for both defense and settlement costs, but refused to allow the insurer to seek reimbursement if a court later determined that the insured's position was incorrect. It would seem to be an unjust outcome for the insurer if this Court were to sanction that position. The insured would be both getting the settlement at the time it preferred and having that settlement funded by the insurer when no coverage was afforded under the policy. It is unlikely Kentucky would approve such a position. *Id.* at 269.

The Sixth Circuit then held that disparagement was not a part of the litigation at the time of the settlement. *Id.* at 272. Therefore, Travelers was entitled to reimbursement of the settlement funds it paid on Hillerich & Bradsby's behalf. *Id.*

Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 692 S.E.2d 605 (N.C. 2010)

Now, more than ever, consumers may pick and choose between products touted as "organic," "all-natural," "eco-friendly" or "green." A recent survey reported that 17 percent of U.S. consumers are willing to pay more for environmentally-friendly or "green" products. That number is growing. Eco-labeling, a system by which consumers may determine whether products are grown, manufactured or processed in an environmentally-friendly manner, also is on the rise. When testifying before Congress, the Federal Trade Commission characterized the onslaught of green marketing as a "virtual tsunami." But despite such claims, consumer protection groups believe that well-over 90 percent of all green marketing is in fact false, a practice called "greenwashing." In early 2010, the FTC warned 78 companies that it might be liable for greenwashing in violation of the Federal Trade Commission Act, which prohibits false and deceptive advertising.

Greenwashing can lead to claims of various types, such as an insured's competitor may allege injury from loss of business and unfair competition caused by the insured's false advertisements exaggerating its product's environmental attributes. Or a consumer may initiate a class action because he and other members of the consumer class have paid higher prices in return for environmental attributes that do not exist.

And experience teaches us that when there are claims made for damages, it is usually not long before another type of claim is made — for coverage. Greenwashing claims are likely to result in litigation between insurers and insureds over the availability of coverage for such damages.

Although *Buzz Off* is not a pure greenwashing case, the Supreme Court of North Carolina provided insight into some issues to anticipate in greenwashing coverage litigation and whether the "Quality or Performance of Goods — Failure to Conform to Statements exclusion ("Failure to Conform exclusion"), commonly found in the "Personal and Advertising Injury" section of CGL policies, will apply to preclude coverage for greenwashing claims.

In *Buzz Off,* the insureds processed clothing manufactured and marketed by others, such as Orvis and L.L. Bean, to add insect repellant to the apparel. The insureds promoted the insect repellant apparel through various advertisements on its websites, claiming the apparel provided its wearers with protection against insect bites that was superior to "messy" topical insect repellant. *Id.* at 608-09. The insureds also suggested that the insect repellant used in the apparel was "natural" and obviated the need to

Continued on page 14

'Endurance Coverage 2010: The Year's Ten Most Significant Insurance Decisions Reaches the Decade Mark'

Continued from page 13

apply "greasy," "nasty," "unappetizing" and "oily chemicals to your skin." *Id.* at 608-09, 622. The apparel also was promoted by manufacturers and retailers who sold it. *Id.* at 608-09.

S.C. Johnson ("SCJ"), which manufactures and sells various topical insect repellants under the Off!® product line, commenced an action against the insureds, alleging false advertising and unfair competition claims under the Lanham Act and violation of the Illinois and North Carolina Consumer Fraud and Deceptive Business Practices Acts. *Id.* at 609. SCJ alleged that the Buzz Off advertising campaign, concerning the efficacy of its apparel, was false and that its business was damaged because the false advertisements diverted sales from SCJ's Off! products. *Id.*

The insurers, Harleysville Mutual and Erie Exchange, denied coverage under the Failure to Conform exclusion, which barred coverage for "'personal and advertising injury' arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your 'advertisement.'" *Id.* at 609-10. The trial court disagreed, and the North Carolina Appeals Court affirmed, both holding that the insureds' advertising campaign had disparaged SCJ's own goods and, therefore, fell within coverage. The North Carolina Supreme Court disagreed and reversed.

In reversing the trial court's decision, the North Carolina Supreme Court first disagreed that Buzz Off had disparaged SCJ's goods. Although the insureds' advertising campaign had placed SCJ's products in a negative light, the court concluded that "the alleged falsity of that portrayal lies solely in the alleged failure of defendants' products to be of the quality and as effective as defendants claimed." *Id.* at 622. "Conspicuously absent" from SCJ's complaint was any statement from SCJ that it intended to prove anything about its own products or the insureds' statements that characterized them. *Id.* Instead, SCJ intended to place Buzz Off's product on trial, not its own. *Id.* Therefore, there was no product disparagement.

The court then held that the Failure to Conform exclusion applied because: "[T]he Failure to Conform exclusion envisions a scenario in which a plaintiff shows that an insured's product is, in reality, something different from what the insured has advertised … Thus, this exclusion removes from coverage 'personal and advertising injury' proximately caused by a false statement an insured had made about its own product." *Id.* at 613.

Greenwashing can lead to claims of various types, such as an insured's competitor may allege injury from loss of business and unfair competition caused by the insured's false advertisements exaggerating its product's environmental attributes.

In so holding, the court rejected the insureds' attempt to confine the exclusion's scope to any particular context or scope based on its perceived "purpose." The court rejected the argument that the exclusion was ambiguous in the present circumstance because the exclusion really had been created to preclude coverage for products liability claims disguised as false advertising claims. *Id.* at 613-14. It also rejected the insureds' argument that the exclusion should not apply because the alleged damage was not the failure of their product to conform, but instead, was the competitive impact of the advertising campaign complained of. *Id.* Importantly, the court observed that drawing a distinction between an injury caused by a product and an injury caused by a false advertising campaign for the product, for purposes of coverage, was "untenable." *Id.* The exclusion still applied.

Because the court held that the Failure to Conform exclusion applies to competitive injuries caused by false advertising, and not just to injuries suffered by consumers who purchase products that fail to live up to their hype, the ruling — and the rulings of other courts of alike mind — will surely bring the exclusion into play in the context of greenwashing litigation. Typically, a plaintiff in a greenwashing case alleges damages caused by the promotion of the offending product and its effect on competition in the marketplace, and not by the product itself. Thus, Buzz Off leaves open the possibility that the Failure to Conform exclusion may apply to such litigation. This could reduce far-stretched claims and litigation where coverage under CGL policies clearly was not contemplated. It also could bring would-be perpetrators of greenwashing into line. And all of this would be good for the trees.

For more information, see Mooney, Joshua A., "The Failure to Conform Exclusion: How Will It Apply to the 'Virtual Tsunami' of Green Marketing and Tide of Greenwashing Litigation?" *Mealey's Emerging Insurance Disputes*, Volume 15, No. 10, May 20, 2010. Copy available upon request (mooneyj@whiteandwilliams.com). ■

Efficient Production of Electronically-Stored Claims Information

by Donald O. Johnson, CPCU, J.D., LL.M.

Donald O. Johnson, CPCU, J.D., LL.M., is the founder of D. O. Johnson Law Office PC in Philadelphia, Pa. He has more than 15 years' experience in commercial litigation and counseling and has represented clients in state and federal courts. His practice has concentrated primarily on insurance coverage and bad faith claims-handling litigation involving commercial property and commercial liability policies. In addition to his legal experience, he has nine years of experience in computer operations and computer systems analysis. In 2010, Johnson was named General Counsel of the National African-American Insurance Association.

Documents are the life blood of companies in the insurance industry — insurance policies, endorsements, broker and agency agreements, financial statements, claim files, etc. Many of these documents must be retained for specific periods for business reasons or due to government mandates. A portion of them, however, may have to be retained for longer periods for another reason — potential claims litigation.

As you know, when you are called upon to produce your claim file, in addition to your paper file you need to produce your electronic email file and the letters and other documents that you keep on your computer's hard drive. With the ever increasing quantity of claim-related information that is stored on computer equipment because of now essential office technologies, such as word processing, email and document scanning, the efficient production of what courts call electronically stored information (ESI) becomes an increasingly important litigation cost containment issue.

Containing Costs by Knowing and Obeying the E-Discovery Rules

Federal and many state courts have enacted rules and written legal opinions that specifically address the production of ESI in litigation. One way to control the cost of discovery of ESI is to know and follow these rules and court decisions. The *Zubulake* decisions are an excellent source for many of the general rules, which are summarized below.[1]

Once a company becomes aware of litigation, anticipates litigation or receives a non-party subpoena, the company should identify the scope of its potentially relevant ESI as soon as possible and preserve it. In claims litigation, the scope of discovery inevitably will include discovery of the electronic documents in your claim file; so it must be preserved.

If a party to litigation demands that relevant ESI be produced in a particular form, such as a paper copy or an electronic copy, the respondent must produce the information in that form unless the respondent objects to that form of production. Absent a demand for a particular form of production, the respondent must produce ESI in a form in which it is ordinarily maintained or in a reasonably useable form**.** In other words, the responding company cannot produce a "data dump" of uncollated documents.

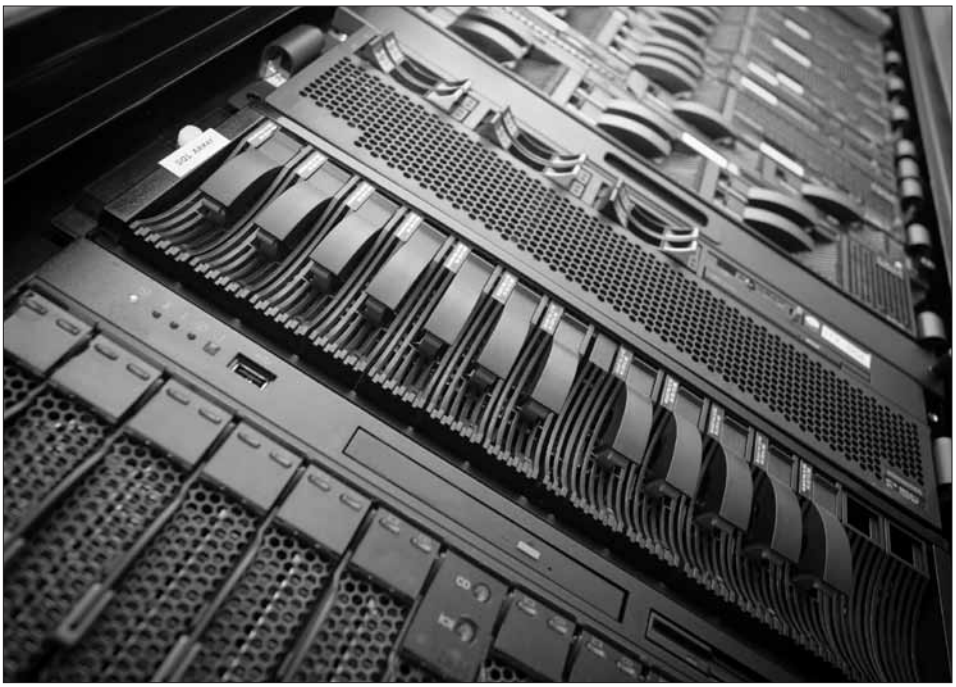
As with paper documents, a respondent may refuse to produce requested ESI that is covered by the attorney-client privilege, the work product doctrine, or other applicable privileges. The federal rules also specify that the respondent need not produce ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. *See* Fed. R. Civ. P. 26(b)(2)(B). The requesting party, however, may move to compel production of the identified ESI. If so, the respondent has the burden of proof on the issue of undue burden or cost. Notwithstanding the fact that the respondent carriers its burden, the court may order discovery if the requesting party shows good cause for production of the ESI. In this event, the court may specify conditions for discovery, such as shifting the cost of production to the requesting party.

Generally, courts consider information stored on personal computers, laptop computers, CDs, DVDs, and similar devices to be accessible.[2] In contrast, they may consider electronic information inaccessible if, among other reasons, the information is stored on back-up tapes, has been erased or damaged, or, for extraction, requires computer software that the respondent no longer uses.[3]

Continued on page 16

Efficient Production of Electronically-Stored Claims Information

Continued from page 15



It is essential that respondents obey court rules and controlling case law that specifically address the preservation and production of ESI in claims and other litigation. Failing to do so can lead to severe and costly sanctions.

Containing Costs by Involving Your Company's IT Staff and Claims Staff in E-Discovery

Before production and cost-shifting issues can be reached, a respondent must determine what discoverable information is stored on its computers, where the information is stored, and how much it would cost to collect and review the information.

The most efficient way that companies can answer these questions is to employ a team approach that combines the knowledge and skills possessed by in-house counsel, litigation counsel, IT staff and the business people who use the information at issue — the claim staff.

What are each group's roles in this effort? In-house counsel must authorize cooperation by relevant company personnel and the expenditure of their time, ensure adherence to information preservation obligations and help define the scope of the discovery. Litigation counsel must assist in-house counsel with the latter two responsibilities, work with claim staff to identify potentially discoverable ESI and work with the company's IT staff to collect it. Afterwards, litigation counsel must conduct a substantive and a privilege review, and oversee production to the requesting party.

Effective communication with, and use of, the IT staff is essential. Personnel in the computer systems and operations departments know where particular ESI is physically located. Programmers know which information is stored electronically as opposed to being used only temporarily while data is processed. Database department personnel understand how the company's ESI is organized and can identify ESI that can be understood as stored versus ESI that must be reorganized to be intelligible to the people who have to review it. Unless all relevant IT departments are consulted, a respondent cannot be sure that its ESI collection effort has been thorough.

Preservation and production of electronically stored information involves complex legal and technical issues. Court rules and rulings provide guidelines for addressing many of the issues. Merely knowing the court rules and rulings, however, is not enough to ensure compliance with the discovery rules. Compliance necessitates close interaction between legal counsel, IT staff and claim staff because, while attorneys hold the keys to the courthouse, IT staff and claim staff hold the keys to the evidence in claim litigation. Companies that take this into account will do a much better job of containing the costs of e-discovery than companies that engage in unfocused, disjointed e-discovery efforts, which often lead to wasted employee time, higher litigation costs and potentially costly sanctions. ■

Endnotes

(1) *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*") (production); *Zubulake v. UBS Warburg, LLC,* 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*") (production); *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake IV*") (preservation); and *Zubulake v. UBS Warburg, LLC,* 2004 WL 1620866 (S.D.N.Y. July 20, 2004) ("*Zubulake V*") (preservation).

(2) *Zubulake I,* 217 F.R.D. at 318.

(3) Id.

DELETE These Five Adjuster Email Habits that Mark You as a Dweeb

by Kevin M. Quinley, CPCU, AIC, ARM, ARe

Kevin M. Quinley, CPCU, AIC, ARM, ARe, is vice president, risk management resources, at Berkley Life Sciences LLC. He is a leading authority on insurance issues and the author of 10 books and more than 600 articles on risk management and insurance. The views expressed here are his own. They do not constitute legal advice and do not necessarily reflect those of Berkley Life Sciences or the W.R. Berkley Company.

In the Crosby, Stills, Nash & Young song "Almost Cut My Hair," singer/songwriter David Crosby boasts of "letting my freak flag fly." That won't get you very far in the world of claims (or business for that matter). Similarly, there are certain email habits that are annoying and can brand you as a dweeb. This undercuts your effectiveness as a claim professional and the "personal brand" that you want to project to position yourself for promotions, raises and other goodies.

What are the five email habits that can brand you as a L-O-S-E-R? These five habits are as follows:

Copy in the World

This is overkill. Do all those "Cc" recipients really need to be privy to your message or reply? Are you copying in everyone as a "CYA" tactic, just to make yourself feel better? Do all these people really need to read your reply? Ask yourself these questions before you automatically — by default — "reply to all."

In this instance, less is more. If you must Cc in a whole bunch of people, use the "Bcc" (blind carbon copy) field. Place your own email address in the "To" field. This way, those receiving the email will not be able to view the other's email addresses. Further, no matter what button they hit, any reply they make will come back to you alone.

Place the Whole Message in the 'Subject' Line

If you have a concise message to convey, this is perfectly fine. Otherwise, just because you can see the whole subject as you type it does not mean your recipient will share the same view. In fact, his or her email program may even chop off part of your message. Reserve this practice for terse messages. So, if the message is brief, consider putting the whole message in the subject line and placing the initials "EOM" (end of message) at the end of the subject line. For example:

- "Got your V/M; will call soon to chat. EOM"
- "OK on settlement authority request for $XX. EOM"
- "OK to proceed as outlined. EOM"

Omit Punctuation

Writing in all lower case without punctuation does not make you look smart. Take time to use correct punctuation. It will make the adjuster's messages easier to understand. Got it?

I had one client — then a Fortune 500 company — that used an Atlanta lawyer who actually sent me emails in this fashion. (The client had a massive self-insured retention, so I got nowhere pleading with the policyholder to consider different law firms.) To make things more remarkable, this attorney — whom I (not so) affectionately nicknamed "e e cummings," billed at about $350 per hour. (Her punctuation was in lower case, but believe me, her bills were all in upper case.)

She wrote in complete lower case, as if she was way too busy to be bothered with the niceties of standard punctuation. This casual and bizarre style exuded the air that reporting to a mere insurance company was beneath her dignity and did not merit a high degree of care. I doubt that the attorney really intended to send that message, but that's what her style of written communication telegraphed. The inattention to detail came off as unprofessional and insulting.

Yes, email is an informal medium. Nevertheless, that fact is no invitation to let your hair all the way down or to put your feet up on the coffee table. Punctuation rules exist for a reason. They genuinely make it easier for people to understand what you are saying in your email. In some cases of claim-related communications, omitting punctuation can result in sentences with ambiguous or entirely different meanings.

Further, the appearance and precision of your email is part of your personal brand. You do not have to be Shakespeare or Hemingway, but you can and should observe the niceties of spelling and punctuation. Forget whatever you've heard about "not sweating the small stuff." The way you communicate is big stuff! And today, the No. 1 communication tool — for better or worse — is email.

Continued on page 18

DELETE These Five Adjuster Email Habits that Mark You as a Dweeb

Continued from page 17

WRITE IT ALL IN CAPS

This makes it sound like you are yelling at someone. When you emphasize everything, you emphasize nothing. Reserve all caps for infrequent situations. Reading a message in ALL CAPS either tires the recipient or risks setting an unintended brusque tone. IT SOUNDS LIKE YOU ARE SHOUTING EVEN WHEN YOU DON'T INTEND TO BE. No use making your message strident. Turn off the caps, except for words meriting capitalization. Claim professionals will get nowhere by yelling at people, either figuratively or literally. Modulate the use of all caps for selective situations.

Omit Paragraphs

Constructing one huge gob of text does not make your email reader-friendly. More likely, it will induce people to bypass long messages they cannot easily skim, especially if your message comes in to recipients on a cell phone, Blackberry or other PDA types. Be considerate of your recipients; make it easy on their eyes. Make your written communication — either by email or in paper form — reader-friendly.

Break up your email into short paragraphs. We live in an attention-deficit society, unfortunately. We are easily distracted. People's attention spans are gnat-sized. Anything and everything you can do to make your written communication, including electronic communication, reader friendly enhances the oomph of your message. Pack yours with extra readability by breaking up ideas and text blocks into frequent paragraphs.

Observe these five guidelines, and you'll never have to let your adjuster's "freak flag fly." In fact, you will boost the power of your email messages. Then, you can confidently stride down the hall of your claims department, assured that you will never overhear others sounding the alarm of "Dweeb Alert!" ■

Handle Claims with Scrabble®-Like Strategy

by Nancy Germond, AIC, ARM, ITP, SPHR

Nancy Germond, AIC, ARM, ITP, SPHR, is the founder of Insurance Writer, a full-service risk management consulting firm located in Phoenix, Ariz. A second-generation insurance professional, Germond has authored scores of risk-management articles and white papers and is on the faculty for *Insurance Journal*'s Academy of Insurance.

Editor's note: This article was written by **Nancy Germond, AIC, ARM, ITP, SPHR,** for her Insurance Writer blog (www.insurancewriter.com/blog) and is reprinted with permission.

Last year, I bought a Scrabble® game to entertain my guests at my summer home, which is out in the sticks in a little town called Skull Valley. With no TV, a group activity like Scrabble helps prevent descents into insanity from the silence. Although we hear an occasional elk bugle or coyote howl, Skull Valley is pretty darn quiet.

Although I hadn't played Scrabble in decades, I figured I would pretty much smoke my opponents, since one speaks Czech as a first language and the other reads mostly romance novels (nothing against romance novels, but the most complex words are usually "sigh" and "crushed"). I was dead wrong. In the first game, the romance reader smoked us both, indeed so badly that the Czech speaker quit in the first 10 minutes of the game when we refused to let him spell phonetically and sat glaring at us, his arms folded across his chest.

I started thinking about Scrabble strategy, and in anticipation of facing them on their next visit, I visited Google and typed "Scrabble strategy." I found a great link that outlined top tips for Scrabble players. Upon reflection, and because I think of almost everything in terms of risk management, I realized the same rules that applied to Scrabble could apply to managing claims.

What I figured out after my initial Scrabble trouncing is that I was applying the way I settled claims to my Scrabble game. I was trained by some great claims managers who taught me the first important lesson of claims handling — make a decision. There are plenty more files where the one you are agonizing about came from, so decide and move on. That is precisely how I played Scrabble, and ended up with about one-fifth the points of my opponent.

As I read the tips on the ScrabblePages.com site, and a few others, I translated many of those tips, using or paraphrasing Scrabble language, to efficient and ethical claim handling. Here are a few tips. However, I'm sure if you're a claims person, you could add a few of your own.

Move Your Tiles!

A file doesn't get any better sitting on your desk. Pick it up, develop a plan of action, make a decision and kick the claim forward!

Maximize Your Power Tiles

Don't squander the biggest advantages you may have. If you have winning surveillance, determine the best time to disclose it. If your plaintiff has a criminal record or previous injury you discovered that may undermine credibility, decide how and if that factors into the settlement equation. Play your tiles closely until you have a strategy; don't inadvertently let diamonds fall through your fingers.

Be Consistent

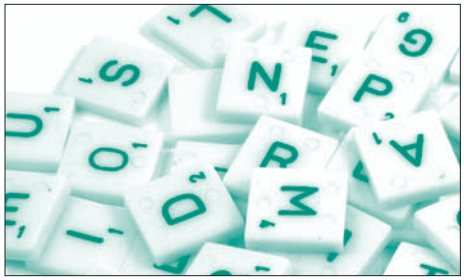
Inconsistency is some adjusters biggest failing — don't fall prey to it. In Scrabble, you need 20 points a play to win. Score 10 and you need to score 30 on the next word to catch up. The same is true with files. You may be wildly successful on one file, but if you let 20 others erode because you are too focused on the one you spotlight, your performance will still be criticized.

Get Thee to a Claims Association or Obtain an Insurance Designation

Did you know there are 126 official Scrabble clubs in the U.S.? If you want to improve your game, which for our purpose is handling claims, join an insurance association or take insurance classes and network with your peers. I teach the Associate in Claims (AIC) designation classes, and it is sometimes difficult to convince adjusters these classes improve their chances of promotion. Do you sit around and moan about who gets promotions? You are only as strong professionally as your education, your experience and your network.

Follow the Rules

Study ethical behavior and know the rules your company espouses. When adjusters schmooze too much with vendors, saying "no" or criticizing them becomes difficult. Keep a professional distance between you and your vendors, no matter how much you like them. In addition, don't take



advantage of claimants just because you know more about their coverage than they do. I have sometimes heard adjusters crow about the money they saved the carrier on insignificant charges that in reality should have been paid. Candor should be your mantra, even when it costs a little bit more.

Look for the Hooks

To score in Scrabble, words hang on existing words. In claims, we generally settle claims one at a time. However, one of the first rules in claim handling I was taught is that we will work with the same people, including plaintiff attorneys, over and over again, so build relationships. Relationships are our hooks. When I have worked with an attorney on one file, I've determined what other files I had with that attorney or that firm. Next, I keep notes on attorneys. What is his hobby? Where did she go to law school? Is she a Denver Broncos fan? Maybe he is a Civil War buff and I can couch a settlement in terms of a famous Civil War battle. Do they take cases to trial or are they simply geared to settle?

Early in my career, I was led down the garden path by one plaintiff attorney in the Bay Area on traffic light sequencing. When I wrote the denial letter, I addressed him by saying, "Bernie, Bernie, Bernie." About four years later, I was working in Los Angeles on a claim and which attorney surfaced? Bernie. I was able to pick up the phone, call him and immediately we had a rapport. Little things stand out and improve your "hook." Those hooks are our signature as negotiators and make the next claim with that attorney easier to settle, sometimes even enjoyable.

Track Your Opponent

Before beginning negotiations, I wrote a list of the strengths and weaknesses of my case. This way, I know what my opponent is likely to emphasize, and I have either an answer, an admission —"You've got a point!"— or a counterargument. In other words, I know what my opponents are going to say almost before they say it. I can usually anticipate what is coming next. One word of caution — do not become so focused on framing a response that you stop listening. If you have outlined your case's weaknesses on paper before you negotiate, you can frame a response so you don't have to think too long before you reply.

It's OK to Root for Yourself or Your Company

I have an advanced degree in sociology, and sometimes I feel badly when bad things happen to good people. However, at some point early in my career, an excellent file auditor told me to "lose the sociology" and just handle the claim. Ultimately, you work for your employer and are not a social service agency, despite how you may feel personally on a loss. I realize this is not a problem for most claim people, but for some, it is. It is perfectly okay to know that you are, overall, fighting the good fight, even if a particular claim outcome bothers you.

It's Just a Game

With claim handling, just like in life, you will win some and you will lose some. Get used to it. Savor the wins, learn from the losses, but most of all, once the claim is closed, forget about it. There are plenty more where that one came from.

I often tell others that despite the bad rap the insurance industry receives, I would recommend it in a heartbeat to young people looking for an exciting career. Each day in my career has been totally different and challenging, and on some days, downright fun. Much like Scrabble. ■

Claims Interest Group
Volume 29 • Number 2 • June 2011
Claims Quorum

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

Address Service Requested

PRSRT STD
U.S. POSTAGE
PAID
BARTON & COONEY

10 Reasons Why You Should Attend the CPCU Society Annual Meeting and Seminars

1. Celebrate with the CPCU Class of 2011.
2. Spend four great days with the best and brightest in the business.
3. Hear exclusive insights from senior-level executives on today's hottest topics.
4. Sharpen your knowledge through the industry's finest array of educational programs.
5. Be inspired by compelling speakers to achieve your goals.
6. Learn new technical skills that you can put to use immediately.
7. Strengthen your leadership skills.
8. Find out how to take control of your career.
9. Network with your CPCU Society peers at special events.
10. Be energized to achieve your personal best!

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

Claims Interest Group
http://claims.cpcusociety.org

Chair
Tony D. Nix, CPCU, CIFI
State Farm
E-mail: tony.d.nix.aqf9@statefarm.com

Editor
Charles W. Stoll Jr., CPCU, AIC, RPA
GAB Robins N.A. Inc.
E-mail: stollc@gabrobins.com

Assistant Editor
Donald O. Johnson, CPCU, J.D., LL.M.
D. O. Johnson Law Office PC
E-mail: donjohnson@dojlaw.com

CPCU Society
720 Providence Road
Malvern, PA 19355
(800) 932-CPCU (2728)
www.cpcusociety.org

Director of Program Content and Interest Groups
John Kelly, CPCU

Managing Editor
Mary Friedberg

Associate Editor
Carole Roinestad

Design/Production Manager
Joan A. Satchell, PPPC

Statements of fact and opinion are the responsibility of the authors alone and do not imply an opinion on the part of officers, individual members, or staff of the CPCU Society.