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 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's Atlanta Chapter, with prior service as director, secretary, president-elect and president.

Upon returning home from the 2010 CPCU Society Annual Meeting and Seminars, I had the opportunity to look back on the activities of the week and reflect on the many interactions I had experienced with individuals from all over the world. I'm constantly amazed at the degree of intellect and business knowledge that is represented inside the membership of the CPCU Society.

Since beginning my involvement with the Society in 2000, I have witnessed the continued evolution of the organization. As noted in previous "Messages from the Chair," a governance structure has been developed that addresses the needs of the Society, the chapters and the interest groups.

The Society has become an international organization, with CPCU chapters located all over the world. In addition, the newly formed Interest Group (IG) Executive Committee is looking at suggestions for forming additional groups to further address the growing interests of our membership.

And reflecting a changing marketplace, The Institutes now offer a variety of delivery methods for its CPCU designation program content and have changed the testing methods for some courses from essay-type to multiple-choice exams.

The CPCU Society is no different than any other company or organization. To provide value to its membership, we as an organization must continue to look for new and innovative ways to provide educational and career development opportunities that are of interest to all fellow CPCUs.

The key element to the success of the Society in this endeavor is ***you***. Companies and organizations can develop the very best educational and career development programs, but if ***you*** do not take advantage of these opportunities, the effort will not be successful. With the many changes within the industry at this point in time, the one constant is your ability to control your development. I encourage you to take advantage of the many opportunities the CPCU Society provides in the area of education and career development. I will promise you that you will not regret the commitment you make to your own development. ■

What's in This Issue

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 president of the Chicago-Northwest Suburban Chapter.

I assumed the *Claims Quorum (CQ)* editor position from a true legend in CPCU circles — **Marcia A. Sweeney, CPCU, AIC, ARM, ARe, AIS.** Last February, Marcia took over as editor on an interim basis, and I agreed to be assistant editor. Prior to around 2007, however, Marcia had been the Claims Interest Group (CIG) newsletter editor for many, many years.

Marcia has been an outstanding mentor to me. She has always been there to help and assist as I grew into the position. Hers will indeed be "big shoes to fill," and I pray I'm up to the task. Under her careful guidance, CQ has grown in stature and prominence within the CPCU community. It is considered by many (myself included) to be the best interest group newsletter. Rest assured she isn't going to be far away from CQ. Marcia, who is an assumed reinsurance claims manager with The Hartford's Horizon Management Group, will be co-assistant editor (if such a term exists) along with **Donald O. Johnson, CPCU, J.D., LLM.**

Don is the founder of D. O. Johnson Law Office PC in Philadelphia, Pa. He has more than 10 years' experience in property-casualty insurance coverage litigation and counseling. In addition, Don has extensive knowledge about e-discovery, having been a computer programmer and a computer systems analyst before becoming an attorney. He earned his CPCU designation in 2005.

Please be sure to read Don's excellent article on "Efficient Production of Electronically-Stored Claims Information," which will be featured in our next issue of CQ. Don can be reached at donjohnson@dojlaw.com.

In this issue, we have information on the Claims Interest Group seminars that the Claims IG either presented or co-presented at the 2010 Annual Meeting and Seminars in Orlando, Fla. In addition to recaps of these seminars, we have a report from the Claims Interest Group webmaster, an update from The Institutes, articles from various authors and a report on the CPCU Society Student Program. You will find a lot of valuable information in this issue!

At its Annual Meeting luncheon, the Claims Interest Group honored Marcia Sweeney for her service as the *Claims Quorum* newsletter editor and **Eric J. Sieber, CPCU, AIC, RPA,** president of E. J. Sieber Company in Alta Loma, Calif., for his work on our IG's Circle of Excellence submission, which again earned the group "Gold with Distinction." The CIG's Circle of Excellence submissions have continued to win gold recognition after gold recognition under Eric's skillful leadership. Please join me in extending congratulations to these two outstanding members of the Claims Interest Group.

If you have written an article or if you know of an article written by someone else that would be a good fit for *Claims Quorum*, please feel free to forward the information to me, Don or Marcia. We are always on the lookout for new articles or authors who want to publish. Also, remember that there are many other areas within the CPCU Society that encourage individuals to publish articles on topics in which they have expertise or a passion that translates to pen and paper.

I look forward to working with all of you to keep this publication moving ahead and providing meaningful information to claim professionals everywhere. ■

CPCU Society's Claims Interest Group — Website Annual Report

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

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

Maintaining an easy-to-use, informative and current website is one of the key goals for the Claims Interest Group. If we can provide and maintain a tool that is informative, we know CPCU Society members will come and utilize the tool.

One of the challenges is finding, publishing and maintaining information. Our success depends on the number of members who participate and submit information. The number of new articles has dropped significantly (four articles in 2010). Part of this may be related to the types of issues/litigation activity and how these fit with the claims environment.

We need everyone in the interest group (IG) looking for articles to publish and sending that information to me. With the amount of storage space allocated for this kind of document, we typically have about 120 reference items. This is a great resource tool.

While we have had the "blog" up and running for over a year, we have not generated much activity. The blog was activated at the end of March 2008, and an eBlast was sent to all members announcing its availability. We had one post in 2010 with one comment. At the Claims IG Committee meeting, we discussed this problem and decided that we would no longer maintain a blog and instead will turn to LinkedIn and develop our participation on that emerging business tool.

Some key information about the Claims IG site:

- The home page shows how we have segmented the site. We also use the home page to highlight key information. It also includes a statement related to articles published and a link to the Circle of Excellence (COE) submission form, and highlights our Annual Meeting luncheon presentation.
  - COE recognition to show Gold with Distinction for 2010 — three years in a row!
  - Counter tracks usage of website (as of Aug. 23, 2010).

In 2008, we upgraded to a better version of tracking software (Bravenet). In reviewing the current statistics, we show:

- We have had 12,556 hits. Based on hit tracking, we can pull the following statistics:
  - Busiest day of week is Wednesday — 23.17 percent.
  - Monday — 19.97 percent.
  - Tuesday — 19.32 percent.
  - Thursday — 16.17 percent.
  - Friday — 12.50 percent.
- We continue to see increased traffic on the weekends (4.38 percent and 4.48 percent).
- A new view showing "countries" is now available on the Web-counter site. Majority is U.S., but some activity present in other countries. Image is of last 500 visitors.
- Most active time is 8–8:59 a.m. Activity is trending to be more consistent between 5 a.m. and 2 pm.
- We get more Unique Visitors than First-Time/Return visitors, but First-Time visitors have increased.
  - First-time — never visited the site before.
  - Unique — has not visited the site in the last 24 hours.
  - Return — has been to site in last 24 hours.
- Most visitors use Internet Explorer (88.67 percent).
- Operating system used by most visitors is Windows XP (80.15 percent).

We have done a number of eBlasts in the past year. We did this in an attempt to drive people to the site. Types of eBlasts were:

- Information about our website.
- Highlight of current articles that might be of interest to our audience.
- Information on COE and link to submission form.
- Information about seminars at the Leadership Summit and Annual Meeting and Seminars.

To make it easier for members to provide information for Circle of Excellence, they can click on the COE logo (on the home page) and access the electronic submission form. ■

Updates from The Institutes

by Donna J. Popow, CPCU, J.D., AIC

Donna J. Popow, CPCU, J.D., AIC, is senior director of knowledge resources and ethics counsel for The Institutes in Malvern, Pa. The Institutes offer educational programs, professional certification and research to people who practice or have an interest in risk management and/or property-casualty insurance. Popow has responsibility for all aspects of claims education, including the Associate in Claims designation program and the Introduction to Claims certificate program. She can be reached at popow@cpcuiia.org.

The Institutes honored 1,246 new graduates of the Chartered Property Casualty Underwriter (CPCU®) program at the 2010 CPCU Conferment Ceremony in Orlando, Fla. The 2010 class brings the number of CPCU designations conferred since the program's inception in 1942 to more than 66,000.

In January 2009, The Institutes developed the President's CPCU Scholarship as an opportunity for organizations, colleges and universities to nominate high-potential employees or students. The scholarship covers the cost of the CPCU program, including textbooks, course guides, exam registration fees and SMART Study Aids.

As of Oct. 15, 2010, 91 President's CPCU Scholarships for the 2010 year had been awarded. The Institutes will accept applications until all 100 scholarships have been issued. Since the scholarship's inception, we have awarded a total of 174 scholarships and have nine designees. Six of those nine attended the conferment ceremony in Orlando.

In addition to the President's CPCU Scholarship, The Institutes, in collaboration with Western World Insurance Group, have developed the Andrew S. Frazier/The Institutes Honorary Scholarship. This scholarship provides two CPCU scholarships per year to full-time college and university students. The 2010 Andrew S. Frazier/The Institutes Honorary Scholarship recipients are **Kanwar Bir Singh Anand** from Virginia Commonwealth University and **Lacey B. Berry** from Missouri State University.

The Institutes, working in close cooperation with industry professionals, designees, training experts and the CPCU Society, have modified the CPCU program to ensure that it continues to meet the industry's needs in an ever-changing and competitive marketplace. In September 2010, The Institutes announced the following changes to the CPCU program:

The current CPCU 510 course is being replaced with CPCU 500 — Foundations of Risk Management and Insurance. The Institutes developed this new course to provide students with a more tightly focused starting point in the CPCU program. The CPCU 500 examination will be delivered in an objective (multiple-choice) question format.

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 Ethics 312 — Ethics and the CPCU Code of Professional Conduct. This revision helps students more effectively learn ethics and achieve a greater understanding of the science and art behind ethical decision making in an insurance industry context.

Beginning January 2011, ethics became a requirement of all Institutes designation programs. Individuals pursuing the CPCU designation are required to take Ethics 312 — Ethics and the CPCU Code of Professional Conduct. Individuals pursuing non-CPCU designations are required to take Ethics 311 — Ethical Guidelines for Insurance Professionals. Ethics 312 will satisfy the ethics requirement for other Institutes designations.

Exams for CPCU 555 — Personal Risk Management and Property-Casualty Insurance will be delivered in an objective (multiple-choice) question format beginning with the Jan. 15–March 15, 2011, testing window.

The Institutes revise all technical content to keep courses practical and relevant. This year, The Institutes are phasing in revisions to CPCU 520, 530, 540, 551, 553, 555 and 557. These revisions include the addition of case studies and even more application-oriented content. Online self-study courses for CPCU 500, 520, 530, 540, 551, 552, 553, 555 and 557 will also be available.

The Institutes™

Proven Knowledge. Powerful Results.

Effective immediately, the CPCU program will include an elective component as part of its education requirement. Individuals pursuing the CPCU designation will select one elective course from among 10 options in seven functional areas. Courses in the eight-part CPCU designation program now include four foundation courses, one elective course and three concentration courses (personal or commercial). 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.

The Institutes have thoroughly vetted these changes with CPCU designees and students, industry experts, training professionals, CPCU Society leadership, Institutes committee members, insurance executives and others. The Institutes carefully studied these changes to ensure that the CPCU designation program meets the needs of an ever-changing industry while remaining a rigorously administered and respected professional credential. For more information on the CPCU program changes visit www.TheInstitutes.org/CPCU.

In response to the increasing need for flood insurance, The Institutes have teamed up with the Federal Emergency Management Agency (FEMA) to create the new Associate in National Flood Insurance (ANFI™) designation. Designed for company underwriters, flood vendors and insurance and risk management professionals who need to be familiar with flood insurance, this program will reinforce the technical, practical flood insurance knowledge and skills needed to confidently and accurately handle all aspects of flood insurance coverage.

The Institutes have enhanced the Program in General Insurance (INS) to create the new Associate in General Insurance (AINS) designation. Built on the proven and popular INS certificate program, the new AINS designation provides a solid foundation for an insurance career. The INS courses provide comprehensive knowledge of insurance principles, practices, policies and coverages, while the optional electives allow individuals to focus on areas relevant to their professional goals.

Coming soon from The Institutes will be Mastering the Businessowners Policy (BOP), a three-course online suite that provides a high-level review or an in-depth look at Businessowners Policies. Depending on an individual's or organization's specific needs, each BOP course can be completed through a top-down or bottom-up approach. Additionally, this online suite of courses can be customized — course content can be aligned with an organization's proprietary BOP form to meet the organization's specific needs. Mastering the Businessowners Policy provides in-depth coverage analysis of the ISO BOP, including:

- Property.
- Liability.
- Additional Coverages.
- Optional Coverages.

On July 1, 2010, The Institutes announced a rebranding initiative. The American Institute for CPCU is doing business as The Institutes, complete with a new logo and look. The Institutes' new look can be viewed online at www.TheInstitutes.org. The Institutes' new look reflects the quality and value of our products and services and complements our customer- and solution-focused approach to doing business. The Institutes' new brand is built on a strong foundation, including:

- Respected technical content.
- Recognized credentials.
- Authoritative research.
- High quality.
- Exceptional service.

The Institutes' physical address and phone numbers remain the same, and the www.aicpcu.org Web address will remain functional. The brand changes do not affect any financial transactions. ■

Claims Interest Group Luncheon

by Barbara Levine, CPCU, J.D.

Barbara Levine, CPCU, J.D., is the founder and CEO of Exam Coordinators Network (ECN) in Boca Raton, Fla. ECN provides independent medical evaluations to assist employers and insurers in verifying the legitimacy of medical claims, which can substantially reduce the cost of both the human and financial capital associated with these claims. Its clients include major insurance carriers and several Fortune 500 and 100 companies. Prior to forming ECN, Levine worked as corporate counsel for both national and regional insurers specializing in coverage and regulatory issues.

The Claims Interest Group's Annual Luncheon took place on Sunday, Sept. 26, 2010, during the CPCU Society's Annual Meeting and Seminars in Orlando, Fla. The interest group enjoyed a lovely "sit down"-style luncheon with approximately 60 interest group members in attendance.

Chair **Tony D. Nix, CPCU, CICI,** presented awards to our Outstanding Claims Interest Group Committee members of the year, which went to **Eric J. Sieber, CPCU, AIC, RPA,** and **Marcia A. Sweeney, CPCU, AIC, ARM, ARe, AIS.** Eric is the chair of the Circle of Excellence Committee, and Marcia continues to show devotion and passion to the *Claims Quorum*, the interest group's newsletter. Both were given beautiful plaques in appreciation of their service to the committee and the Society.

The luncheon group was then treated to a half-hour presentation by **Thomas A. Conrad, J.D.,** a partner in the law firm of Shapiro, Blasi, Wasserman & Gora PA, located in Boca Raton, Fla. Conrad spoke about "getting the most bang for your defense counsel buck." He gave us some excellent ideas regarding setting expectations with defense counsel at the outset of the assignment, such as what items should and shouldn't be considered "billable" by the insurer. His talk was extremely informative. He may be contacted at (561) 477-7800, ext. 224, or taconrad@sbwlawfirm.com should anyone wish to contact him about these issues.

By far the most exciting aspect of the luncheon was our door prizes giveaways — ISO generously donated three iPads to the Claims Interest Group. These were "raffled" off. Congratulations to the lucky winners! And a big thank you to ISO for their generous donation! The luncheon lasted approximately one hour and was enjoyed by all. We hope to see more of you at our luncheon at the Annual Meeting and Seminars in Las Vegas, Nev., Oct. 22–25, at Caesars Palace. ■

Marcia A. Sweeney, CPCU, AIC, ARM, ARe, AIS, and Eric J. Sieber, CPCU, AIC, RPA, received the Outstanding Claims Interest Group member awards at the Claims Interest Group Luncheon held during the CPCU Society's Annual Meeting and Seminars in Orlando, Fla.

'Perspectives in Claims Communications — Write Makes Right'

by Tony D. Nix, CPCU, CIFI

The Claims Interest Group developed a workshop that was presented to the attendees at the CPCU Society Annual Meeting and Seminars on Sunday, Sept. 26, in Orlando, Fla. Participation was good, with 35 in attendance.

The insurance industry environment and the technology serving it have changed at an increasing pace in recent years. One thing unlikely to change is the need for effective communication among various parties, including policyholders, witnesses, management, experts and outside adjusters — especially when a claim is of a "suspicious" or "suspected" fraudulent nature.

This seminar was led by attorney **Thomas D. Martin, J.D.,** of the firm Swift, Currie, McGhee & Hiers, and claim manager **Tony D. Nix, CPCU, CIFI,** of State Farm. The session was presented in an interactive seminar format, using a hypothetical loss to examine the various perspectives of communication issues that arise throughout the claim investigation process. All feedback received from the attendees was positive. ■

Thomas D. Martin, J.D., (on left) and Tony D. Nix, CPCU, CIFI, present "Perspectives in Claims Communications — Write Makes Right" to Annual Meeting and Seminars attendees in Orlando.

Correction: Claims Interest Group Newsletter — October 2010 Issue

The opening question in the article "Additional Insured Status When Required by Contract, Late Notice and Designated Locations," by **Jerome Trupin, CPCU, CLU, ChFC,** was misstated in the print version of the October 2010 issue of the Claims Interest Group newsletter.

The question should have read: "What do additional insured status when required by contract, late notice and designated locations have in common?" The CPCU Society regrets the error.

The article has been revised to reflect the correction and is available in the Society's Online Library and on the Claims Interest Group website — or from the author at jtrupin@aol.com.

'Commercial Coverage Conundrums — An Interactive Case Study Approach'

by Barbara J. Keefer, CPCU, J.D.

Barbara J. Keefer, CPCU, J.D., is an attorney and member at Schuda & Associates PLLC in Charleston, W. Va. Her insurance practice focuses on extra contractual matters, agent E&O, coverage opinions, declaratory judgment actions and administrative representation of carriers at the West Virginia Department of Insurance. Keefer was selected for inclusion in *Super Lawyers Edition 2009* in Insurance Coverage, and was a presenter at the insurance law seminar sponsored by the West Virginia University College of law in 2008 and 2009. She earned a jurisprudence degree from West Virginia University College of Law.

On Sept. 28, 2010, the Claims Interest Group partnered with the Risk Management and Underwriting Interest Groups to jointly sponsor and present "Commercial Coverage Conundrums — An Interactive Case Study Approach" at the CPCU Annual Meeting and Seminars in Orlando, Fla.

This seminar was presented by a quality panel of coverage counsel from across the country. The moderator was **Janet L. Brown, CPCU, J.D.**, from the Orlando, Fla., firm of Boehm, Brown, Fischer, Harwood Kelly & Scheihing PA. Panelists were Claims Interest Group Committee member **Barbara J. Keefer, CPCU, J.D.,** of the Charleston, W. Va. firm of Schuda & Associates PLLC; **Joshua Gold, J.D.,** of the New York offices of Anderson, Kill & Olick PC; **Ernest Martin Jr., J.D.,** of the Dallas, Texas, firm Haynes and Boone LL; and **Ginny L. Peterson, CPCU, J.D.,** of the Indianapolis, Ind., firm Kightlinger & Gray LLP.

The program was an interactive discussion of thorny commercial property case studies. Ten different fact patterns were presented for analysis and discussion. Policy forms were provided and tables were requested to analyze the coverage issues presented by the fact patterns. Discussion on the "claims" was led by the panel members. At the conclusion of the discussion and analysis of the case studies, the panelist then provided a summary of case law research on similar cases throughout the country. ■

More than 50 attendees explored coverage issues presented by panelists at the "Commercial Coverage Conundrums —An Interactive Case Study Approach" Annual Meeting seminar in Orlando.

A Book Review — *General Liability Insurance Coverage: Key Issues in Every State*

Reviewed 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. He earned his juris doctor degree with honors from the University of Miami's School of Law and his Master of Laws degree with honors from Temple University's Beasley School of Law. In 2010, Johnson was named General Counsel of the National African-American Insurance Association.

As part of your work, are you occasionally or frequently confronted with questions about what the laws of distant states are on important coverage issues and informed that you will need to participate in a conference call to discuss those issues the next morning? If so, you know that it can be frustrating combing through the footnotes of multivolume coverage treatises, trying to locate the controlling case law or statutes. At those times, you may wonder why you don't have a state-by-state analysis of the law of each of the 50 states so that you could promptly determine what the applicable laws are and prepare yourself to report that information to your colleagues.

If so, fortunately, your prayers have been answered. *General Liability Insurance Coverage: Key Issues in Every State* (hereinafter *Key Issues in Every State*), a one-volume paperback treatise, discusses 20 general liability insurance coverage issues that repeatedly arise with important implications in the day-to-day work of risk managers, claims adjusters, coverage attorneys, corporate counsel and others. It identifies the various positions that courts and sometimes legislatures have taken when ruling on these issues (e.g., majority view and minority views) and, in 50-state surveys, catalogues each state's law on each of the selected issues (to the extent that an issue has been addressed).

The authors of this impressive work are **Randy J. Maniloff, J.D.,** and **Jeffrey W. Stempel, J.D.** Maniloff is a partner at White and Williams LLP in Philadelphia. His practice focuses on the representation of insurers in coverage disputes involving a wide range of policies, including commercial general liability policies. In addition to annually authoring an interesting article on "The Year's Ten Most Significant Insurance Decisions" (an excerpt of the 2010 edition will appear in the next issue of the *Claims Quorum*), he has written articles for numerous publications and is a frequent lecturer at insurance industry seminars.

Stempel is the Doris S. & Theodore B. Lee Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas, where he teaches legal ethics, civil procedure, insurance and contracts. He has authored or co-authored many law journal articles and six other books, which includes *Stempel on Insurance Contracts* (3d ed. 2006).

In *Key Issues in Every State*, the authors' analysis of the issues wisely does not evidence a policyholder or insurer bias, but rather sets forth the strongest arguments typically made by policyholders and insurers and explains the general reasoning that courts have given for accepting or rejecting these arguments. This background information educates readers who are unfamiliar with particular issues and refreshes the memory of other readers who regularly work on coverage issues. Summarizing the various arguments and the differing positions that states have taken with respect to given issues provides both audiences with the context in which they can effectively evaluate the law of the state or states of interest to them.

Among other coverage issues, the book examines, on a state-by-state basis:

- Choice of Law for Coverage Disputes.
- Late Notice Defense under "Occurrence" Policies.
- Insured's Right to Independent Counsel.
- Insurer's Right to Reimbursement of Defense Costs.
- Prevailing Insured's Right to Recover Attorney's Fees.
- Qualified and Absolute Pollution Exclusions.

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A Book Review — *General Liability Insurance Coverage: Key Issues in Every State*

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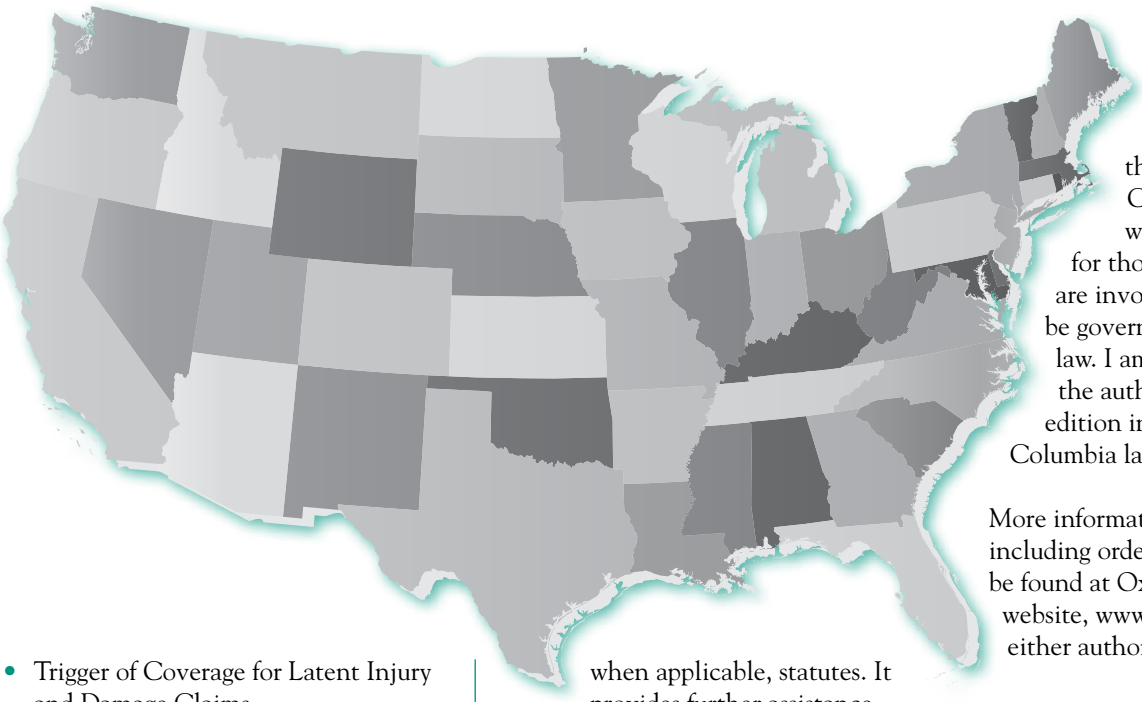

- Trigger of Coverage for Latent Injury and Damage Claims.
- Trigger of Coverage for Construction Defects and Non-Latent Injury and Damage Claims.
- Allocation of Latent Injury and Damage Claims.
- Insurability of Punitive Damage.
- First- and Third-Party Bad Faith Standard.

Key Issues in Every State is a valuable resource for anyone who works on or may be involved in general liability claims in multiple jurisdictions. Having the controlling law in each state at one's fingertips greatly reduces the time it takes to evaluate a policyholder's or an insurer's position with regard to a given set of facts. Reduced time, as we know, equals reduced costs, which is especially true when dealing with legal matters.

Although *Key Issues in Every State* is not, and is not intended to be, a compilation of all state and federal court cases on the selected issues, it provides an excellent starting point for in-depth research of a state's law on the selected issues by identifying controlling case law and, when applicable, statutes. It provides further assistance to those engaged in legal research by identifying other insurance law treatises that analyze the selected issues from various perspectives.

Key Issues in Every State *is a valuable resource for anyone who works on or may be involved in general liability claims in multiple jurisdictions.*

Beyond its primary utility as a statement of the law on key coverage issues in the 50 states, the book also can be used to spot potential coverage issues by considering its list of key issues when evaluating a given set of facts and to train people who have little or no experience with CGL policies by having them read Chapter 1 of the text, which examines the structure and contents of the CGL policy and outlines the history of its development.

The only subject that this reader would put on his wish list for inclusion in the next edition of *Key Issues in Every State* would be the law of the District of Columbia. That addition would make practice easier for those claims professionals who are involved with claims that may be governed by District of Columbia law. I am happy to report that the authors' to-do list for a future edition includes adding District of Columbia law to their survey.

More information about the book, including ordering information, can be found at Oxford University Press's website, www.oup.com, by searching for either author's last name. ■

A New TARP to Cover Mortgagee Losses?

Part Two — The Mortgagee's Right to All Dwelling Payments

by Thomas D. Martin, J.D., and Kathleen 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. Martin received his juris doctor from the University of Georgia School of Law.

Kathleen "Katie" A. Quirk, J.D., practices primarily in the property litigation and liability section of Swift, Currie, McGhee & Hiers LLP. She joined the firm in 2009. Quirk received her juris doctor from the University of Georgia School of Law in 2009. While in law school, she interned with the State Court of Fulton County.

In this second part of our series on mortgagee claims, we look at another type of mortgagee claim that has become increasingly commonplace. Assume a mortgage company forecloses (or threatens foreclosure) on a mortgaged property. In the course of inspecting the property, the mortgagee learns for the first time that a loss occurred at the premises some time earlier. Because the loss was small (perhaps $7,500 or less), the insurance company issued payment to the insured alone, anticipating that the insured would repair the premises. In some instances, the premises are repaired. In other instances, the premises were not repaired or the repairs were inadequate. In any case, when the mortgagee discovers the previous payment, the mortgagee demands payment again, insisting that the earlier payment was erroneous because it failed to include the mortgagee. The insurance company faces the difficult task of either paying the claim a second time or explaining a payment that failed to include the mortgagee named in the policy.

Once again, a few assumptions are being made for the purposes of this discussion:

- The mortgagee is named in the policy and the policy contains a "standard mortgage clause" that 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 ....

- The insurer has a general practice (though not specified in its policy forms) of paying the insured alone on losses involving small building damage claims.

To be sure, the insurance industry has many practical reasons for issuing nominal dwelling payments directly to the insured. Often, the payments are made in this manner to effect prompt repairs. Including the mortgagee on the check would require that the check be sent to the mortgagee for its endorsement. That endorsement could take weeks or longer if the mortgagee is a large, out-of-state mortgage lender. Policyholders, particularly in these troubling economic times, often struggle just to come up with the money to cover their deductible. It may be too much to expect of them to have the funds available to cover their deductible and repair the property promptly while an insurance check jumps from department to department in a mortgage bureaucracy. Further, the mortgagee may simply apply the proceeds to the principal loan balance, effectively denying the insured the necessary funds to repair the property. Either scenario places the property at risk of further damage. Such further damage likely will not be covered by the policy. If the damages linger and further losses ensue, the premises may become uninhabitable. The mortgagee's security may be adversely affected.

In a large loss, by contrast, the home already may be uninhabitable rather than becoming that way due to delay or untimely repairs. Additional living expenses and temporary repairs for a large loss likely will be considered "necessary" and therefore covered. In addition, while with a small loss it may not be clear whether the mortgagee's security has been affected, in a large loss the effect on the mortgagee's security is predictable. Further, in a large loss, there may be more of an issue as to whether restoration or repair is "economically feasible." This frequently is not the case with small losses. In the end, insurance policies dictate expediency and mitigation in both large and small losses. Arguably, however, the risk of further damage (an excluded loss) is less where the loss is more extensive.

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Despite the logic of the insurance industry's approach, payment of a dwelling claim without including a named mortgagee can be risky. Mortgagees contend that the standard mortgage clause essentially creates a separate contractual obligation between them and the insurer. That agreement is allegedly violated when an insurer issues payment to the named insured alone. For the most part, as it stands today, the law favors the mortgagee. In many jurisdictions, such payments by the insurer may be considered a voluntary payment which would not satisfy the insurer's obligation to the mortgagee.[1] As such, by issuing payment to an insured alone, insurance companies may be taking a calculated risk and opening themselves up to double liability for payment issued on a loss.

An Uphill Battle — The Voluntary Payment

A voluntary payment is one which a party is not legally obligated to make. Under Georgia law, for example, a voluntary payment of a claim made under an insurance policy cannot be recovered unless such payment was "induced by fraud, mistake of fact, misplaced confidence, duress, urgent and immediate necessity, or a need to prevent seizure or detention of person or property."[2] "Under the voluntary payment doctrine, the party seeking recovery must prove that the payment was not voluntarily made because certain material facts were not known at the time of payment or a valid reason existed for failure to determine the truth."[3] The court in *Gulf Life Ins. Co. v. Folsom*, held that the phrase "where all the facts are known" included both actual and constructive knowledge.[4] At least one Georgia court, moreover, has held that once an insurer has knowledge — even constructive knowledge — of a lienholder's interest in certain property, payment without protecting that interest would be improper.[5]

Other courts have taken similar approaches in the context of a mortgagee's interest. In *Ebensburg Building & Loan Ass'n v. Westchester Fire Ins. Co.*, a Pennsylvania court found that the presence of a mortgage clause in a standard insurance policy served as notice to the insurer of the mortgagee's rights so that if the mortgagor was paid by mistake, the company would still be liable to the mortgagee.[6]

What is the effect of this law concerning voluntary payments? If an insurer issues payment to the insured alone, to the extent that the payment is considered a violation of the policy and applicable law, such a payment may be considered voluntary. In that event, the payment may be unrecoverable and may not offset any unsatisfied obligation to the mortgagee. Thus, the safest route for an insurer to take is to include both the insured and the named mortgagee on any payment made for loss to the dwelling.

Few Options

Arguably, if the insurer chooses to exercise its option to repair the property (in lieu of issuing any payment on the claims) and fully restores the property, its obligation to the mortgagee presumably would be fulfilled since the mortgagee's interest in the property would be unaffected.[7]

The practice of issuing payment directly to the insured for small losses seems to be consistent with the principle behind the option to repair: If the nominal damage never affected the mortgagee's interest, then the contractual obligation to the mortgagee presumably would be satisfied. For example, if a mortgagee were to foreclose on the insured premises immediately following a loss (before any repairs or before any insurance claim), the residual value of the home (albeit partially damaged) might still be sufficient to cover the interest of the mortgagee. Subsequent sale of the property "as-is" for an amount sufficient to cover the debt could extinguish the mortgagee's interest without any repairs being effected. The phrase "as interests appear" in the mortgage clause seems to allow for some judgment about the measure of the mortgagee's interest as it compares to the value of the property after a loss.

Moreover, historically, homeowners obtained building insurance coverage primarily to satisfy a requirement in their mortgage agreement. Nowadays, however, homeowners have insurance coverage not

only to protect the mortgagee's interest in the home but also to protect their own interests. Thus, insurance policies on the home cover a wide variety of risks, including personal property, additional living expenses, lost rents, debris removal and so on. Coverage on the dwelling may exceed the mortgage debt depending upon the amount borrowed and the amount of "equity" that a homeowner has built up over time. If insurance policies were intended, as in the past, to protect only the mortgagee, coverage would only extend to the structure itself and only to the extent of the indebtedness.

Based upon these changing times, the phrase "as interests appears" might allow an insurer to contend that payment for a covered loss can be made to the insured as long as the insured's interest in the property is greater than the amount of the payment. If the mortgagee's interest (determined by the balance on the mortgage at the time of the loss[8]) is affected by the loss (i.e., the loss exceeds the insured's equity in the property and endangers the mortgagee's interest), payment should be issued to both the insured and the mortgagee. Accordingly, when an insurer issues nominal payments for minor losses at an insured premises, the insurer may not need to include the mortgagee on the payment as long as the payment is equal to or less than the insured's "equity" in the home. Effectively, this allows the insured to recover funds to repair his or her "equity" in the home without any encumbrance to the mortgagee.

This argument is consistent with other provisions commonly found in the policy, specifically the insurable interest provision (which limits liability to each insured to no more than the amount of each insured's interest). This is also consistent with evolving principles that permit an insured to recover first his or her uninsured loss before a subrogating or no-fault insurer recovers its previous payments.[9] Notably, however, there is no case law which directly supports this contention. Moreover, taking this position might impose a burden on insurers to investigate the measure of the respective interests in the property, which could be difficult depending upon the information available to the insurer (although a simple comparison between the balance on the mortgage and the dwelling limit might be sufficient to issue payment in good faith).

Nevertheless, without expressly relying upon the "as interests appears" language, some courts have held that payment to an insured alone for losses that are subsequently repaired would not violate the mortgagee's rights under the insurance policy. The most notable court holding in support of this notion is *Starkman v. Sigmond*, 184 N.J. Super. 600 (1982). In Starkman, the mortgage payments were up to date at the time a fire loss occurred. Nevertheless, the mortgagee argued that the following language in the insurance policy required direct payment to the mortgagee:

> 4. Mortgage Clause Loss, if any, under this policy, shall be payable to the mortgagee (or trustee) named on the first page of this policy, as interest may appear, under all present or future mortgages upon the property herein described, in which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of said mortgage...

The *Starkman* court acknowledged that the mortgagee clause created a contractual relationship between the mortgagee and the insurer separate from the contract between the insured and the insurer. However, the court found that the clause did "not establish that losses are to be paid to the mortgagees, but rather [set] the order of priority for payment if there is more than one mortgagee. The court cited to various other decisions in which the courts allowed the mortgagor to recover the insurance proceeds in order to rebuild the damaged property.[10] Quoting *Cottman v. Continental Trust Co.*, the court held that "... the purpose of the insurance is to maintain the security for the mortgage debt — if the property is restored, the security has not been impaired. Therefore, the purpose of the insurance has been fulfilled as to the mortgagee's interest and the mortgagor [should recover] the proceeds."[11]

The *Starkman* court also quoted a comment from Osbourne, Nelson and Whitman, in their treatise Real Estate Finance Law § 4.15 at 150 (3d ed. 1979):

> At least in the absence of mortgage provisions to the contrary, it would seem that in the modern standard mortgage policy context where the mortgage is not in default, the mortgagor normally should be able, where rebuilding is practical, to insist upon the application of the insurance proceeds to rebuild the premises. To be sure, to permit the mortgagor to defeat the mortgagee's right to recovery by rebuilding may force the mortgagee to litigate the extent and sufficiency of repairs. On the other hand, it is almost always the mortgagor who is paying the premiums on the casualty insurance policy. Moreover, while permitting the mortgagee to utilize the insurance proceeds to pay the mortgage debt presumably benefits the mortgagor by rendering the property free from the mortgage lien to the extent of the loss, in many cases the mortgagor probably cannot afford to rebuild or is unable to obtain new mortgage financing for that purpose. Thus, on balance, it would seem more equitable in most cases to permit the mortgagor to rebuild and have the insurance applied to that purpose.[12]

The *Starkman* court recognized "a general principle that hazard insurance is to protect the mortgagee's interest if the security for the debt is impaired. Absent an impairment, the mortgagee has no right to insist on payment from the

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insurer. The proceeds are to be paid to the insured mortgagor to effect the repair."[13] The court ordered that the proceeds of the fire insurance policy should be paid to the insureds "who, otherwise, would lose the benefit of their bargained-for long-term loan."[14] The court found that the mortgagees had not sustained a loss for which indemnification was required and that they had not been prejudiced by the insurer's payment to the insureds alone.[15]

Likewise, the court in *Schoolcraft v. Ross* held that because "there was no evidence of the impairment of the security, the mortgagee had no right to the funds."[16] The court, added, "[f]orcing the buyer to pay off in advance would result in a buyer losing certain property rights contemplated by the parties, among them the benefit of a long term loan which permits the buyer to spread the purchase price of the property over a long time."[17] The court found no evidence of impairment of the security and concluded, "to the extent the security was not impaired, [the mortgagee] had no right to the funds." *Id.*

The view set forth in *Starkman* and *Schoolcraft*, however, remains in the minority.[18] The majority viewpoint is that a mortgagee has the right to recover from an insurer based on its independent contractual rights under the insurance policy regardless of whether the insured repairs the property. The court in *Passarella* held, "in the absence of legislation or agreement of the parties giving the mortgagor the right to use fire insurance proceeds for repairing or rebuilding the damaged property, [a] mortgagee [has] the right to apply those proceeds to the outstanding debt.[19] In *Savarese v. Ohio Farmers' Ins. Co.*, the court supported its holding that the insurance proceeds should be received by the mortgagee and applied to the mortgage debt (as opposed to being used to repair the premises), by noting that the mortgagor benefits by a reduction in the mortgage debt equal to the reduction in value of the building caused by the fire, so the parties remain in the same relative position as before the fire.[20]

In fact, the court in *Walter v. Marine Office of America*, held that payment to a mortgagee for a "loss, if covered by the terms of the policy, becomes due on the happening of the event whether in fact the mortgagee has or will suffer an ultimate loss of security."[21] The Walter court went on to refer to various commentators on the issue, and stated,

> A standard clause payable as interest appears makes the loss payee an insured. The right of a mortgagee under a standard mortgage clause is not dependent upon his sustaining loss. That is, the mortgagee under such a clause acquires a right to the insurance proceeds even though he suffers no actual loss, as when the building was restored to its former condition by the mortgagor.[22]

Georgia courts have held that because the named mortgagee enjoys independent rights under the mortgage clause it has the right to apply them to the extent of the mortgage debt.[23] In fact, payment to the insured alone may be especially risky in Georgia since at least one court has held that an insurance company's constructive notice of a security interest alone may be sufficient to alert and require an insurance company to include the interest-holder as a payee on any insurance payment.[24] Similarly, the court in *Smith v. Texas Farmers Ins. Co.* noted that the "purpose of a loss payable [or mortgage] clause in an insurance policy is to protect the security interest of the mortgagee who has advanced money to others for the purchase of property, and who has taken a note and deed of trust, or mortgage on the subject property."[25]

The majority rule, however, seems to contradict the insurer's option to repair. If the insurer exercised the option to repair and returned the premises to the pre-loss condition, could the mortgagee still demand payment for the value of the loss in order to reduce the mortgage debt? Common sense says no but the majority position seems to conclude otherwise. Thus, despite the logic of the insurance industry's approach and the support it may gather from policy language and some favorable court decisions, the weight of the case law seems to favor the mortgagees' position: all dwelling payments should include the named mortgagee.

Superiority

Some courts have gone so far as to hold that a mortgagee's right to recover insurance proceeds after a loss occurs is superior to the named insured's right to recover under the policy. For example, in *Better Valu Homes, Inc. v. Preferred Mut. Ins. Co.*, the court noted that, while

> there is only one insurance commitment [that arises from an insurance policy], ... there are two separate contracts governing to whom the proceeds of the insurance policy are to be given and for what purposes. The standard mortgage-loss-payable clause gives the proceeds to the mortgagee to the extent that they equal or are less than the mortgage indebtedness of the property, and it gives the mortgagee's claims to the proceeds priority over the competing claims to them of the mortgagor (plaintiff); in other words, the clause gives priority to insuring the mortgage debt.[26]

Likewise, the court in *Guarantee Trust & Safe Deposit Co. v. Home Mut. Fire Ins. Co.* held,

> [t]he effect of the inclusion of a mortgagee clause in a fire insurance policy in relation to the disposition of the proceeds payable in the event of loss under the policy is well stated in Appleman, Insurance Law and Practice, § 3405, as follows: 'A mortgage clause in a fire policy is not, strictly, an assignment of the policy, but is, rather, an agreement between the insurer and the mortgagee as to the disposition of the policy proceeds. ... The purpose of such a provision is purely to protect the

> mortgagee's interest, and such interest continues until the mortgage debt is paid ... The effect of issuing a policy with such a clause is to charge the insurer with a duty to pay the proceeds to the proper person, or persons, if more than one be designated. ... Upon loss, the holder of mortgage notes recognized by such clause has a superior right to the policy proceeds.'
>
> ...
>
> It thus clearly appears that in paying the proceeds of the fire loss incurred under the policies here involved to the owners, the insurer violated the express provision of the mortgagee clause requiring payment to the mortgagee.[27]

These holdings seem to contradict the contention that the phrase "as interests appear" may provide the insurer with a basis for paying the insured directly to the extent that the payment was less than or equal to the insured's "equity" in the home.

Restoration or Repair of the Premises

One way that insurance companies can challenge the mortgagee's demand is to examine the terms of the mortgage documents. In years past, the courts broadly construed the options available to a mortgagee under the terms of loan and security deed. Some instruments, for example, gave the mortgagee the option of determining how to apply any insurance proceeds:

> Unless otherwise agreed to in writing, all insurance proceeds shall be applied to the restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of the scheduled payment nor change the amount of any payment. Any excess will be paid to the Grantor. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.[28]

Consistent with such agreements, many courts held that the mortgagee was not required to use insurance proceeds to restore the property and could instead use the proceeds to pay down the principal of the mortgage debt.[29] In *JEM Enterprises v. Washington Mutual Bank*, 99 Cal.App.4th 638, 121 Cal. Rptr.2d 458 (2002), the court found that the language set forth in the security agreement between the lender and the homeowner dictated which party had the right to control insurance proceeds.[30] The security agreement in JEM provided that the secured party had a right to use insurance disbursements to either repair the property, apply the money to reduce the debt, or release the proceeds to the homeowner.[31] The court relied solely on the terms in the security agreement in determining the respective rights of the parties to receive and control the insurance proceeds.[32]

Likewise, in *Conrad Brothers v. John Deere Ins. Co.*, supra, the mortgage agreement specifically provided that the mortgagee would receive the title to the buildings and the right to insurance proceeds in satisfaction of the mortgage debt.[33] The court held that as an assignee of the mortgagor's rights to the insurance proceeds under the mortgage agreement, the mortgagee stood in the shoes of the mortgagor, and as such had the right to receive all the insurance proceeds.[34]

Over time, however, the language in the security instruments has evolved, particularly with respect to insurance proceeds. Some instruments, including Fannie Mae's standard form, favor applying insurance proceeds to the repairing and restoring the secured property:

> Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. .... If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower...

In *Hoosier Plastics v. Westfield Sav. & Loan Ass'n*, the court noted, although "a mortgagee named in a loss payable clause will prevail over a mortgagor who wishes to use the proceeds for repair or restoration ... a mortgage agreement is a contract and the mortgagee and mortgagor are free to enter into an agreement respecting the disposition of insurance proceeds in event of a loss."[35] "Therefore, while the mortgagee is

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entitled to disposition of the proceeds pursuant to the loss payable clause, he may, by agreement, still have a liability over to mortgagor for the cost of repairs or restoration."[36]

Depending upon the language in the agreement, insurers may be able to successfully contend that repayment to the mortgagee would not be appropriate if repairs were effected by the insured following the first payment. This was an important factor for the court in *Starkman v. Sigmond*, above. Oftentimes, however, this is "the rub": many mortgagee claims of the kind described in this analysis come about after the mortgagee discovers that the property **was not repaired.** In that case, the property has not been restored and the mortgagee's rights to the proceeds may not be foreclosed.

Moreover, note the decision of the court in *Firstbank Corp. v. Wolverine Mut. Ins. Co.*, an unpublished opinion from the Michigan Court of Appeals, 2009 WL 2478088 (Mich. App. 2009). In this case, the insurer issued payment directly to the insured but failed to include the mortgagee on the check.[37] The property was repaired, but the mortgagee deemed the repairs unacceptable. The mortgagee asserted its right not only to be included on the insurance proceeds check but to use the proceeds to pay down the mortgage debt.[38] The court concluded that the [mortgagee] was a third-party beneficiary of the policy. Therefore, the insurer was liable to the mortgagee for breach of contract since the insurer failed to include the mortgagee on the proceeds check. However, the mortgagee was not necessarily entitled to apply the proceeds to the mortgage debt. Citing the mortgage clause in the insurance policy ("if we deny your claim, that denial will not apply to a valid claim of the mortgagee ..."), the court held that the mortgagee could apply the proceeds to the debt **only if** the insured's claim was denied.[39]

Obviously, the language in the mortgage documents can have a significant effect on the mortgagee's rights under a mortgagor's homeowners insurance. In essence, "the disposition or application of proceeds of insurance on mortgaged property may be controlled by an agreement between the mortgagor and mortgagee."[40] Thus, a mortgagee's right to control insurance proceeds may arise if its agreement with the insured "either (1) assigns to the mortgagee those loan proceeds regardless of whether the insurance was required as a condition of the loan, or (2) gives to the mortgagee the right to share, control, or direct those loan proceeds whether or not the insurance was required."[41] Many courts, like the court in *Sureck v. United States Fidelity and Guaranty Company*, have concluded that "[i]n reality[,] the parties to the mortgage agreement have effected a 'pre appropriation' of the proceeds to payment of the mortgage debt. It is intended [that] the insurance proceeds will stand in place of the secured property and are in effect an equitable conversion of it."[42] Given such decisions, the loan documents may give little relief to insurers.

So What Is an Insurer to Do?

Although a mortgagee's interest in an insured property may not be harmed if the insured repairs the premises after a loss, the rights of a mortgagee described above mean that an insurer should carefully weigh the decision to issue payment to the insured alone. Moreover, while the insurance environment may have changed since many of the above cases discussing mortgagee rights were decided, under the majority view, an insurer's decision to make even a small payment on the dwelling without protecting the mortgagee remains a calculated risk. The recommended procedure, therefore, is to include the mortgagee(s) on all drafts issued for a covered loss.

That being said, the following may be some useful tips to assist in evaluating a mortgagee's claim where the insured has already been paid:

- Examine the mortgage documents — do they require that the premises be restored?
- Examine the premises — have they been repaired (partially, substantially or completely)? If so, the insurer may be able to contend that the mortgagee's interest has not been impaired.
- Examine any foreclosure documents — if the property has been foreclosed upon, the mortgagee's subsequent sale of the property for an amount equal to or in excess of its interest at the time of the loss may extinguish its claim.
- Examine the interests as they appeared at the time of the loss — try to ascertain the mortgagee's interest (the balance on the loan), the value of the home (before the loss) and the insured's "equity" in the home.

In the end, paying insureds directly for smaller claims may be a calculated risk for the insurance industry. If the industry sees a significant increase in the number of mortgagee claims duplicating previous payments to the insured, then the practice may have to be re-evaluated. Frankly, however, there are some very reasonable and consumer-friendly explanations for the insurance industry's practice. The law simply may not have caught up to the practice because the disputed amounts are often too small to warrant significant litigation. That may change if the mortgage industry treats the insurance industry as a potential target for lessening some of the losses it has suffered in recent years. ■

Endnotes

(1) O.C.G.A. § 13-1-13, Georgia's statute dealing with voluntary payments provides, "Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed

voluntary and cannot be recovered unless made under an urgent and immediate necessity therefore or to release person or property from detention or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule prescribed in this Code section."

(2) *Couch v. Blackwell & Associates, Inc.,* 150 Ga. App. 739, 258 S.E.2d 552 (1979).

(3) *Liberty Nat. Life Ins. Co. v. Radiotherapy of Georgia, P.C.,* 557 S.E.2d 59, 63, 252 Ga. App. 543 (2001).

(4) 256 Ga. 400, 349 S.E.2d 368 (1986). See also *Aetna Life Ins. Co. v. Cash,* 121 Ga. App. 8, 172 S.E.2d 629 (1970) (Affidavit by insurer which stated that claim was paid without knowledge of any other policy or that payments had been made under any other policy was not sufficient to prove lack of knowledge, and thus its excessive payments were "voluntary" and not recoverable.)

(5) See *JCS Enterprises, Inc. v. Vanliner Insurance,* 227 Ga. App. 371, 489 S.E.2d 95 (1997).

(6) 28 Pa. Super. 341 (1905); See also 6f-171f *Appleman on Insurance* § 4008; *Westchester Fire Ins. Co. v. Coverdale,* 48 Kan. 446, 29 P. 682 (1982); *Hastings v. Westchester Fire Ins. Co.,* 73 N.Y. 141 (1878). See also *Conrad Brothers v. John Deere Ins. Co.,* 640 N.W.2d 231, 238-239 (2001) (The mortgage agreement requiring that the mortgagor maintain insurance gave the mortgagee an interest in the insurance policy such that the "insurance policy should be treated as if it named the mortgage holder [even if] a mortgagor failed to uphold its promise to do so.... Accordingly, we have consistently held a mortgagee has an equitable lien on the proceeds of an insurance policy procured by the mortgagor for the mortgagee's benefit despite the failure to expressly include the mortgagee in the insurance policy.")

(7) See *Abbottsford Building and Loan Association v. William Penn Fire Ins. Co.,* 130 Pa. Super. 422, 197 A. 504 (1937). An insurer's decision to exercise its option to repair may expose the insurance company up to a variety of other liabilities, including negligent or improper repair and other tort claims the company is not susceptible to if they instead decide to issue payment to the insured (and the mortgagee) for the loss and allow the insured to repair the property on their own.

(8) See *Tech Land Dev. Inc. v. South Carolina Ins. Co.,* 57 N.C. App. 566, 291 S.E.2d 821 (1982); *Hadjis v. Anderson,* 260 Md. 30, 271 A. 2d 350 (1970).

(9) See e.g. *Smith v. Employers' Fire Ins. Co.,* 255 Ga. 596 (1986).

(10) *Schoolcraft v. Ross,* 81 Cal. App.3d 75, 146 Cal. Rptr. 57 (1978); *Fergus v. Wilmarth,* 117 Ill. 542, 7 N.E. 508 (1886); *Cottman Co. v. Continental Trust Co.,* 169 Md. 595, 182 A. 551 (1936); 46 C.J.S. 2d, Insurance, § 1147 at 29. Id. at 608.

(11) *Starkman* at 608.

(12) *Starkman*, supra, at 609.

(13) *Starkman*, supra, at 610.

(14) Id.

(15) Id.

(16) 81 Cal.App.3d 75, 81, 146 Cal. Rptr. 57, 60 (1978).

(17) Id.

(18) See *Liberty Mut. Fire Ins. Co. v. Alexander,* 374 N.J.Super. 340, 349, 864 A.2d 1127, 1133 (2005); *General G.M.C. Sales, Inc. v. Passarella,* 195 N.J. Super. 614, 622 (1984) ("A minority of cases have upheld the right of the mortgagor to use the insurance proceeds to rebuild.").

(19) 195 N.J. Super. 614, 623 (1984).

(20) 260 N.Y. 45, 182 N.E. 665 (1932).

(21) 537 F.2d 89, 98 (5th Cir. 1976) (citing to *Saverse v. Ohio Farmer's Ins. Co.,* 260 N.Y. 45, 182 N.E. 665 (1932); See also *Hussain v. Boston Old Colony Ins. Co.,* 311 F.3d 623, 640 (5th Cir. 2002).

(22) Id., citing, 11 *Couch on Insurance* 2d § 42:696 (2d ed. 1971).

(23) See *Palmer v. Mitchell County Federal Sav. & Loan Ass'n,* 189 Ga. App. 646, 647, 377 S.E.2d 4, 6 (1988); *Cherokee Ins. Co. v. First Nat. Bank of Dalton,* 181 Ga. App. 146, 147, 351 S.E.2d 473 (1986); *Ins. Co. of North America v. Gulf Oil Corp.,*106 Ga. App. 382, 127 S.E.2d 43 (1962).

(24) *JCS Enterprises, Inc. v. Vanliner Insurance,* 227 Ga. App. 371, 489 S.E.2d 95 (1997).

(25) 82 S.W.3d 580, 584 (Tex. App.-San Antonio 2002), citing *Helmer v. Texas Farmers Ins. Co.,* 632 S.W.2d 194, 196 (Tex. App.-Fort Worth 1982, no writ).

(26) 60 Mich. App. 315, 319 (1975) (emphasis added), citing, *Citizens State Bank v. Fire Ins. Co.,* 276 Mich. 62; 267 N.W. 785 (1936) and *Pink v. Smith,* 281 Mich. 107; 274 N.W. 727 (1937). See also *Grady v. Utica Mut. Ins. Co.,* 69 A.D.2d 668, 419 N.Y.S.2d 565 (1979) (A standard mortgage clause "requires that the insurer first make payment of the loss to the mortgagee to the extent of his interest in the property and then pay the balance of the loss, if any, to the mortgagor, so long as the latter is not in default of any of the conditions of the policy.").

(27) 180 Pa. Super. 1, 7 (1955)(Emphasis added).

(28) Wolters Kluwer Financial Services Form RE-DSD-GA (5/9/05)[Emphasis added].

(29) See *Macy v. Kotta,* 252 A.D. 435, 299 N.Y.S. 478 (1937).

(30) Id. at 645.

(31) Id.

(32) Id.

(33) 640 N.W.2d 231, 239 (2001).

(34) Id. at 238.

(35) 433 N.E.2d 24, 27 (1982); see also 59 C.J.S. Mortgages § 328, pp. 452, 453; *Law v. Dewoskin,* 223 Tenn. 453, 458-459, 447 S.W.2d 361, 363 (1969).

(36) Id.

(37) Id. at 1.

(38) Id.

(39) Id. at 5.

(40) *Law v. Dewoskin,* 223 Tenn. 453, 458-459, 447 S.W.2d 361, 363 (1969).

(41) *Foothill Village Homeowners Assn. v. Bishop,* 68 Cal.App.4th 1364, 1376, 81 Cal.Rptr.2d 195, 203 (1999).

(42) 353 F. Supp. 807 (1973 W.D.Ark).

CPCU Society Student Program — 'A Great Success'!

by Lamont D. Boyd, CPCU, AIM

Lamont D. Boyd, CPCU, AIM, director, insurance scoring solutions, with Fair Isaac Corporation (FICO®), is responsible for client and partnership opportunities that make use of FICO's credit-based insurance scoring and property risk scoring products and services. Working with more than 300 insurance clients throughout the U.S. and Canada and speaking regularly to industry and consumer groups, Boyd is recognized as one of the industry's leading experts in predictive scoring technology. Previously, he served 19 years in underwriting and sales management with a major property-casualty insurer.

Editor's note: This article originally appeared in the CPCU Society's October 2010 Personal Lines Interest Group newsletter.

Given the number of comments we received during and following the 2010 CPCU Society Annual Meeting and Seminars, it's clear the CPCU Society 2010 Student Program was a "great success"! Such a success, in fact, that the Student Program will continue — and with the projected number of students joining us for the 2011 Annual Meeting and Seminars in Las Vegas significantly higher.

Here follows four very good examples of how the Student Program was received:

Douglas J. Holtz, CPCU, CIC, CSP, CRM, 2010–2011 CPCU Society immediate past president and chairman, offered the following observations and expressed his appreciation to all who contributed in making this program successful:

> "I was so impressed with the caliber of the students who joined us at the Annual Meeting in Orlando. They are a very bright and dedicated group of students who have gained tremendous insight into our business, the CPCU Society and all this wonderful industry has to offer. I'm thrilled with the response we received from the students, the chapters who financially assisted them with their travel expenses and our Board of Directors who supported their registration fees."

Warren L. Farrar, CPCU, CLU, ChFC, 2010–2011 CPCU Society president and chairman, shared his thoughts also:

> "To me, these young people represent our future. I met and had discussions with many of the students in Orlando, and was amazed by their enthusiasm and genuine interest in careers in insurance. They all had great things to say about the Student Program and especially appreciated having mentors with whom they could connect for guidance and counsel."

Veronica Fouad, St. John's University, echoed the sentiments of her fellow students:

> "I want to thank you for providing me with the opportunity to attend the CPCU Society Annual Meeting and Seminars. I had a wonderful time, and I have truly realized the importance of obtaining my CPCU designation. I would have to say that after this experience, I am a lot more serious about obtaining my CPCU in a very timely fashion. I met several great industry professionals, and I am inspired by the values they represent. I am also appreciative and fascinated by the support that this industry provides to its students. Please send my thanks to all of those CPCU chapters and sponsors who helped fund students at this Annual Meeting."

Jonathan Howard, University of North Carolina–Charlotte, shared these kind thoughts:

> "Thank you for taking the time to help us young emerging professionals in the insurance and risk management industries. I greatly appreciate your leadership in providing this wonderful opportunity to me and other students to attend this wonderful CPCU Society Annual Meeting and Seminars in Orlando. Thank you for coordinating all the efforts between mentors and students, roommates, committees, resource funding, hotel reservations for students and so much more. I believe that this was a great personal success as well a success in recruiting bright young talent from universities across the country."

You may be aware that we also developed a very unique "student-focused" seminar — "A Look into the Future" — for the Orlando Annual Meeting, one that highlighted the property-casualty insurance industry's need for the "best and brightest" now and in the future. This seminar was specifically designed to help risk management and insurance students, as well as new designees, understand more fully the variety of paths available to them in the property-casualty insurance industry.

The seminar not only provided the unique perspective of students working

toward risk management and insurance careers, but also provided attendees with a clear understanding of the value of the CPCU designation in helping them on their chosen path.

As seminar presenters, 2010 Student Program Committee Leader **Stacey Hinterlong,** Illinois State University, and **Ryan Rolfs,** Florida State University, offered their suggestions for pursuing a successful career in the insurance industry — and shared their own student and industry internship experiences.

Lynn M. Davenport, CPCU, AIC, AIM, with State Farm, and **Dave Newell,** with the Florida Association of Independent Agents (FAIA), offered excellent examples of successful industry representatives and highlighted industry and educational opportunities that can be pursued.

Our hope is that all students, new designees and industry veterans walked away from this seminar with great ideas and a clear understanding of what is needed to grow our industry through the development of talented individuals.

The CPCU Society is uniquely positioned, in large part due to the direction and support provided by CPCU chapter and interest group leaders, to offer a bridge between those who are seeking a rewarding future in the industry and those who are seeking people to contribute to a successful future.

A final note: Many thanks to all who contributed in so many ways to the success of our 2010 CPCU Society Student Program. Since another "great success" is fully expected for 2011, please don't hesitate to contact me by e-mail at lamontboyd@fico.com with any thoughts you may have, or assistance you're willing to offer, to help us attract bright, young minds to the insurance industry through the CPCU Society. ■

Twenty-five (25) students from some of the nation's leading universities and colleges joined us in Orlando, networking with industry leaders from a wide variety of CPCU Society chapters and interest groups. We took the opportunity to photograph some of the students during the CPCU Society's Diversity Reception.

Front row, from left, Donita Stevens, Temple University; Danielle Bastian, Olivet College; Samantha Reed, University of North Texas; Cassandra Wilcox, University of North Texas

Middle row, from left, Stacey Hinterlong, Illinois State University (Student Program Committee Leader); Carlie Peniston, St. John's University; Veronica Fouad, St. John's University; Brenae Robinson, Florida State University; Miranda Fouad, Rutgers University; Kelsie Griffin, Illinois State University.

Back row, from left, Douglas J. Holtz, CPCU, CIC, CSP, CRM, 2010–2011 CPCU Society immediate past president and chairman; Daniel Bean, Georgia State University; Michael Lungo, Florida State University; Josh Spencer, Ball State University; Ryan Rolfs, Florida State University; Casey Koontz, Illinois State University; Seve South, Ball State University; Luigi Biele, Rutgers University; Lamont D. Boyd, CPCU, AIM, the Society's Student Program director.

Participating students missing from photo: David Adams, New Mexico State University; Peter Curnin, Appalachian State University; Jonathan Howard, University of North Carolina-Charlotte; Hio Lam (Yoyo) Lao, University of Illinois; Nathan Mitzner, Southern Methodist University; Kanwar Singh, Virginia Commonwealth University; Stephen Walton, New Mexico State University; and Christopher Wexler, Appalachian State University.

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Questions? Contact the Member Resource Center at (800) 932-CPCU (2728) or e-mail membercenter@cpcusociety.org.

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