

Message from the Chair

by Thomas M. Pavelko, CPCU, J.D., ARe



Thomas M. Pavelko, CPCU, J.D., ARe, is assistant general counsel, contracts and regulatory, for American Agricultural Insurance Company (AAIC), where he has worked for 13 years. Previously, he ran an active law practice for 15 years. Pavelko earned his juris doctor from Washington University School of Law in St. Louis, Mo., and his bachelor's degree from Marquette University in Milwaukee, Wis. He is currently chair of the CPCU Society Reinsurance Interest Group Committee. In the past, he served on the board of the CPCU Society Chicago-Northwest Suburban Chapter and was its president in 2006–2007.

Racing to the finish line. That's how I feel about the current year of the Reinsurance Interest Group and its committee. It is speeding past us, and yet we have accomplished much and still have much more that we plan to do.

Just over three years ago, my term as Reinsurance Interest Group Committee chair began. At the 2011 CPCU Society Annual Meeting and Seminars in Las Vegas, my term as chair will end. I am pleased that we are racing to that finish line and not crawling to it. In case I have not said it enough before, the successes we have had these past three years are the result of the cumulative efforts of every member of this committee. I greatly appreciate each of them.

Since our last edition of this newsletter, the Reinsurance Interest Group Committee presented its 2011 Reinsurance Symposium in Philadelphia. Elsewhere in this edition, you can read an excellent summary of that program, which **Thomas N. Thompson, CPCU, ARe**, has authored. We have also included must-read material from **H. Wesley Sunu, J.D.**, and **Wayne G. Keebler, CPCU, ARe**, two prominent presenters

at that event. The Union League in Philadelphia is the perfect venue for this landmark symposium, and plans are already underway to return there in 2012.

On April 8, 2011, I had the honor of participating in a webinar on the Japan earthquake and tsunami. Giving the reinsurance perspective, I relayed that analysts believed the expected losses from these Japan events would affect reinsurance profits for 2011 but were not expected to create a capital shortage. I have heard similar comments in the industry media since then with regard to the other 2011 catastrophes.

On May 5, 2011, we hosted our annual Reinsurance Workshop in Chicago. This event had been postponed from February due to a snowstorm. The workshop consisted of two panels — **Eric F. Hubicki, CPCU, ARe, ARM, AU, AFIS**, moderated a panel of reinsurance executives, and **Michael J. Lamplot, CPCU**, moderated a panel of reinsurance claim professionals.

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Message from the Chair

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On Sept. 28, 2011, the second annual Reinsurance Symposium will be held in Dallas, Texas, at the Hilton Anatole-Dallas. After registration and a continental breakfast, the program will begin with an executive panel moderated by **Steve M. McElhiney, CPCU, MBA, ARe, AIAF**, president of EWI Risk Services Inc. and CPCU Society president-elect.

Next, **Fred E. Karlinsky, J.D.**, of Colodny, Fass, Talenfeld, Karlinsky & Abate PA, will discuss national and state regulatory issues. Then, **Andrew S. Boris, J.D.**, of Tressler LLP, will discuss emerging issues in reinsurance. The keynote speaker at lunch will be Texas Railroad Commissioner and United States Senate candidate **Elizabeth Ames Jones**.

Afternoon sessions will include an update on the Texas Wind Insurance Association (TWIA) from **John Polak**, its interim general manager; a reinsurance claims update by Cooper & Skully PC and **Lynn Sheils, J.D., ARe**, general counsel for EWI Risk Services; a rating agency's view of the state of the reinsurance industry by **Gale Guerra**, a reinsurance analyst with A.M. Best; and trends in information technology for insurance with **John Chevalier** of CSC.

The afternoon concludes with a networking reception. The program has been filed for CE and CLE credits in the state of Texas. To register or to obtain additional details, please check the CPCU Society's website.

Finally, we hope to see you at our two events at the 2011 CPCU Society Annual Meeting and Seminars in Las Vegas. First, please plan to attend our seminar, "Reinsurance — State of the Art," on Monday, Oct. 24, 2011, from 8 to 10 a.m. It will consist of a panel of reinsurance executives discussing current and emerging issues in the industry. **Tracey W. Laws, J.D.**, senior vice president and general counsel of the Reinsurance Association of America, will be moderator, and **Pina C. Albo**, of Munich



**CPCU Society Annual Meeting & Seminars
October 22-25, 2011 • Las Vegas, Nevada**

Reinsurance America, Inc., and **Rupert C. Hall**, from Golden Bear Insurance Company, will be presenters.

Then, that evening, the Reinsurance Interest Group, in conjunction with the Agent & Broker, International Insurance and Leadership & Managerial Excellence Interest Groups will host a networking dinner. The program will include **Michael Shackleford, ASA**, also known as the "Wizard of Odds," who will offer a crash course on gaming. Shackleford holds an associate designation with the Society of Actuaries. Did you know that the mathematical principles that underlie probability and statistics had their origin in gambling in the 17th century? It was the study of games of chance that motivated **Blaise Pascal, Pierre de Fermat** and **Jacob Bernoulli**, among others, to develop mathematical tools such as the law of large numbers that are now integrated into everyday insurance business decisions.

In conclusion, I have thought repeatedly these past few months about our 2011 Philadelphia Reinsurance Symposium title — The Decade of Disasters. The name was intended to refer to the steady stream of natural and man-made disasters that occurred from 2001 to 2010. When we named the symposium, perhaps we hoped to put an endpoint on the disaster stream. I wish we had such power.

A major portion of Joplin, Mo., was just decimated by tornadic activity. Today, I saw a press release from the National Oceanic and Atmospheric Administration's Climate Prediction Center. Its forecasters call for a 70 percent chance of 12 to 18 storms with tropical-storm-force winds or higher. This prediction comes after record spring storms in southeastern United States communities, such as Tuscaloosa, Ala., as well as the Japan earthquake and tsunami, and the New Zealand earthquake.

Our thoughts and prayers go out to all who have been affected by physical injury or property loss. Ours is a generous industry, so please live that by helping in every way that you can through service and through relief agencies. ■

Reinsurance Symposium Encounter

By Thomas N. Thompson, CPCU, ARE



Thomas N. Thompson, CPCU, ARE, is the founder and CEO of Reinsurance Results Inc. (RRI), a company that specializes in the identification and recovery of hidden reinsurance assets through forensic audits. Prior to forming RRI in 1998, Thompson was a reinsurance broker for 13 years with Sedgwick Re and E. W. Blanch Co.

Editor's note: Readers who enjoyed "A Primer on Allocation Methodologies," by **Scott M. Seaman, J.D.**, and **Jason R. Schulze, J.D.**, in the March 2011 *Reinsurance Encounters* should be on the lookout for additional articles on the subject by the authors in the next two editions of *Reinsurance Encounters*.

On March 31, 2011, the CPCU Society Reinsurance Interest Group returned to the historic Union League in Philadelphia to hold its annual Reinsurance Symposium. Coming on the heels of the most powerfully known earthquake to hit Japan since modern record keeping began in 1900, this year's theme, entitled Decade of Disasters — Impact on the Reinsurance Industry, was disturbingly topical.

The morning session featured a panel discussion moderated by **Franklin W. Nutter, J.D., ARE**, president of the Reinsurance Association of America. Panelists included industry leaders **Pina C. Albo**, president of Munich Reinsurance America, Inc.; **John Bender**, chief operations officer at Allied World Reinsurance Company; **William O'Farrell, J.D.**, chief reinsurance officer for the ACE Group; and CPCU Society President-Elect **Steve M. McElhiney, CPCU, MBA, ARE, AIAF**, president of EWI Risk Services.

Being only three weeks removed from the Japanese earthquake, the panelists agreed it was far too early to effectively estimate the impact this event would have on their companies and the reinsurance marketplace as a whole. However, business interruption claims, which are anticipated to ripple throughout the global marketplace, were of primary concern to the group. All agreed that diversification was a key strategy to limiting the adverse impact from such a catastrophic event.

Standard & Poor's **Laline Carvalho** followed the panel discussion with an overview of the reinsurance marketplace from a rating agency perspective. While the past decade was marked by significant earnings and balance sheet volatility, the majority of reinsurance players today are larger, more diversified and more global versus a decade ago. Underwriting cycles will continue to live on with greater

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At the end of March, the Reinsurance Interest Group held its 2011 Reinsurance Symposium, entitled Decade of Disasters — Impact on the Reinsurance Industry, at the historic Union League of Philadelphia.

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emphasis on earnings performance over market share and an increased focus on enterprise risk management.

During lunch, the new ARe inductees were recognized, and **Anita Z. Bourke, CPCU, CPIW**, an executive vice president of The Institutes, shared with the group exciting new services and resources available from The Institutes' website, www.theinstitutes.org.

The afternoon session began with a riveting firsthand account by **Wayne G. Keebler, CPCU, ARe**, of Wright Risk Management, of the 9/11 terrorist attack on the World Trade Center. He detailed the events of that morning and some tough decisions he had to make that ultimately saved his life. This presentation was so emotionally captivating that we asked Wayne to provide us with a written account of his experience, which we have included in this edition of *Reinsurance Encounters*.

The afternoon's second speaker was **H. Wesley Sunu, J.D.**, attorney and

director at the law firm of Tribler, Orpett & Meyer PC. From Y2K and 9/11 to class action coverage disputes and never-before-seen criminal activity, Wes's presentation, entitled "Litigation and Legislation from a Decade of Disasters," explored the major events that have shaped the current insurance marketplace. A copy of this presentation has also been included in this edition of *Reinsurance Encounters*.

The third speaker during the afternoon was **Sharon A. Binnun, CPA**, chief financial officer of Citizens Property Insurance Corporation. As a state-created, not-for-profit governmental entity, Citizens has grown to be the largest property insurer in Florida, with more than 1.2 million policies in force as of Dec. 31, 2010.

Established as a provider of last resort, state of Florida leaders have recognized the need to curtail Citizens' growth, refocus the entity on its original purpose and expand the offering of property insurance in Florida by the private sector. Binnun discussed the many challenges

faced by Citizens in meeting its goals and objectives while operating in the state known as the "hurricane capital" of the world.

The final speaker for the day was **Thomas Toth**, vice president—property claims for Munich Re America. He reviewed important property catastrophe reinsurance benefits, clauses, definitions and frequently asked questions. Have you ever wondered why the peril of lightning is not specifically mentioned in a property catastrophe reinsurance contract or if coverage is extended for damage caused by lightning? These and many more questions were addressed during Toth's presentation.

The CPCU Society Reinsurance Symposium continues to be a dynamic gathering of reinsurance leaders sharing their thoughts on the current events shaping our industry. You are invited to join us at a future symposium encounter. ■

2011 Annual Meeting and Seminars

Oct. 22–25, 2011 • Las Vegas, Nev.

The Reinsurance Interest Group Presents

Reinsurance — State of the Art

Monday, Oct. 24 • 8–10 a.m.

The 2011 edition of this perennial Annual Meeting favorite will feature a panel discussion by executive-level talent from reinsurance providers, a reinsurance broker and reinsurance customers. Attendees will leave with up-to-the minute information on critical issues pertaining to reinsurance and its industry as well as their impact on the entire insurance marketplace.

Agent & Broker/International Insurance/Leadership & Managerial Excellence/Reinsurance Interest Groups Dinner

Monday, Oct. 24 • 6:30–9 p.m.

At this joint interest group dinner, **Michael Shackelford, ASA**, a gaming consultant, will offer a crash course in gaming, entitled "The Wizard of Odds." Attendees will get a refresher on the meaning of long-term probabilities and will also receive practical advice on gauging risk and responding appropriately, and how to improve their odds in a casino.



Litigation and Legislation from a Decade of Disasters

by H. Wesley Sunu, J.D.

H. Wesley Sunu, J.D., is a director with Tribler Orpett & Meyer PC in Chicago, Ill. His areas of practice include insurance coverage, reinsurance litigation and arbitration, professional liability and general tort defense. Sunu received his juris doctor from Loyola University Chicago School of Law. He is a member of a number of professional and not-for-profit organizations, such as the American Bar Association, Illinois State Bar Association, Asian American Bar Association, AIDA Reinsurance & Insurance Arbitration Society, and Travelers & Immigrants Aid Society of Chicago. Sunu can be reached at hwsunu@tribler.com.

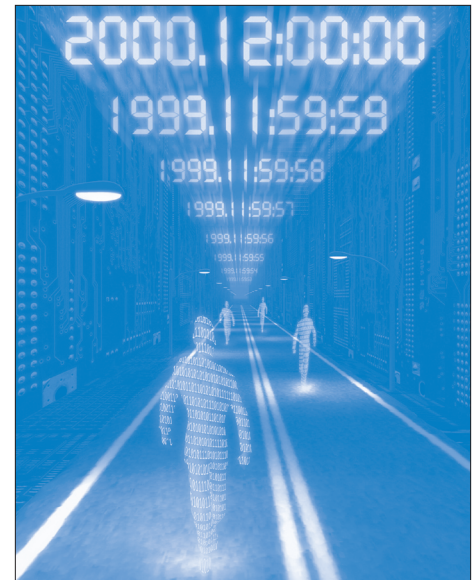
Editor's note: This article is based on the presentation **H. Wesley Sunu, J.D.**, made at the CPCU Society Reinsurance Interest Group's 2011 Philadelphia Reinsurance Symposium: Decade of Disasters — Impact on the Reinsurance Industry, held March 30–31, 2011, in Philadelphia, Pa.

We began the last decade anticipating power grids failing, airplanes falling from the sky and bank accounts being deleted. Y2K was a highly anticipated non-event. However, in the 10 years that followed, many disasters struck the world, and several of those events made an impact on the insurance and reinsurance industry. For example, 9/11 brought profound changes to national security, risk assessments and even to the insurance industry with the passage of the Terrorism Risk Insurance Act (TRIA). The accounting scandals and high profile criminal prosecutions of Enron and WorldCom executives also swept up AIG and Gen Re executives. The last decade also had the most active hurricane season in more than 150 years, which resulted in high-stakes fights over the flood exclusion. Most recently, the collapse of the financial market has brought about the passage of the Dodd-Frank Act, the full impact of which has yet to be determined.

The last decade also brought us highly publicized settlement funds to handle mass tort claims. Indeed, this may have been the decade of **Kenneth R. Feinberg**, as the mediator of disasters. From 9/11 to the BP oil spill, Feinberg has been in the spotlight. For better or for worse, he has made an impact on claim handling and litigation management of mass tort disasters. While there were many other disasters that took place around the world over the last 10 years, this article focuses on some of the domestic disasters that impacted insurers and reinsurers.

Computers Recognize 1/1/00

Because of the uncertainty of how computer systems might fail to recognize internal calendars turning from 1999 to 2000, many insurers had placed Y2K exclusions in their new and renewal policies prior to the Y2K event. Insurers were bracing for the worst, and businesses were working frantically to fix computer systems or to implement backup data plans before Jan. 1, 2000. Many had



predicted D&O claims being made against those officers and directors who had failed to correct Y2K problems; negligence lawsuits being filed against computer consultants who worked on Y2K fixes; and business interruption claims being brought as well. Much to everyone's relief, no major Y2K event or losses took place.

While there were no significant Y2K losses, insurance claims were still made by insureds seeking recovery for the remediation work done to fix Y2K issues on their computer systems. The leading case was *Port of Seattle v. Lexington Insurance Co.*, 111 Wash.App. 901, 48 P.3d 334 (2002). There, the Port of Seattle, whose operations include Sea-Tac Airport, determined in the early 1990s that its computers did not recognize the year 2000. Beginning in 1997, the Port began remediating or replacing those computers. The Port then brought an action against its property insurers to recover the costs for Y2K compliance.

The *Port of Seattle* case involved the Port's 1997 and 1998 policies, which the insured argued provided coverage for "loss of computer resources." While the policies contained an inherent vice exclusion, the Port argued that the policies provided

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coverage for the costs of remediation because those costs constituted a loss of computer resources due to a computer virus. The Port also argued that the sue and labor clause, which provides coverage for costs incurred in preventing an insured loss, would also provide coverage.

The insurers denied coverage on the grounds that: (1) there was no computer virus; (2) even if there had been a computer virus, the loss was excluded by the inherent vice exclusion; (3) the sue and labor clause did not provide coverage; and (4) the Port had not brought suit within the 12-month period provided by the suit limitation clause incorporated into the policies. The trial court granted all insurers summary judgment on all grounds.

On appeal, the *Port of Seattle* court held that the undefined term computer virus, in its common, ordinary meaning, referred to an external problem which is transferred to the computer, and is “infectious” in character. The court ruled that none of those qualities applied to the Y2K programming defect in the Port’s computers. The court also held that the inability of the Port’s computers to distinguish between 1900 and 2000 was inherent in the computer and that, even if coverage was otherwise available, the inherent vice exclusion precluded coverage. Lastly, the court held that the sue and labor clause provides coverage only where an insured undertakes to prevent a loss that would otherwise be covered.

Because any possible loss would have occurred on Jan. 1, 2000, when the computers failed to recognize the year 2000, the 1997 and 1998 policies of insurance did not provide coverage for any such loss that would take place in 2000. Therefore, the court ruled that work undertaken by the Port in 1997 and 1998 to prevent a loss in 2000 was not subject to coverage under the sue and labor clause in the 1997 and 1998 policies.

While there were other coverage cases resulting from Y2K, most of the courts

followed the rulings made by the court in the *Port of Seattle* case. For insurers, Y2K was not the disaster that many had predicted. However, as a result of the Y2K issue, millions of dollars were spent on upgrading and updating computer systems, which benefited businesses around the world.

The Impact of 9/11

On the beautiful morning of Sept. 11, 2001, coordinated terrorist attacks took place in New York and Washington, D.C. Two airplanes struck the World Trade Center (WTC) twin towers. More than 2,600 people were killed, many of whom were at their places of employment. This disaster changed all our lives. We now have color-coded threat advisories, Homeland Security, TSA and full-body scanners at airports.

As for insurance, the most significant issues arising from 9/11 were the coverage dispute over the number of occurrences for the attack on the twin towers, the passage of TRIA and the use of settlement funds in handling victim injury claims. In protracted litigation, the property insurers went through two jury trials before they settled the number-of-occurrence coverage issue. TRIA was passed as a temporary measure but is still in effect today. As



for the claim settlement process for 9/11 victims, that same procedure is being used today for the BP oil spill claims.

Two Towers, Two Occurrences?

The lesson learned from the number-of-occurrence coverage dispute is that policy language really does make a difference. Developer [Larry Silverstein](#) had recently leased the World Trade Center properties and had obtained property insurance prior to 9/11. There were 22 insurers with two different policy forms at issue. One month after 9/11, Silverstein filed lawsuits against the property insurers of World Trade Center properties. Numerous lawsuits were filed, but they were all litigated in New York after the passage of the Air Transportation Safety and System Stabilization Act. The Act required all claims arising out of the 9/11 attack to be adjudicated in the Federal District Court for the Southern District of New York. After years of litigation, the courts determined that the language used in the Willis Group Holdings Ltd. form, known as WilProp, limited the number of occurrences to a single occurrence while the language in the other insurance policies was found to provide two occurrence limits.

In the complex maze of litigation, one of the first significant rulings was that there was only one occurrence under the WilProp policy form. The WilProp form defined “occurrence” as follows:

All losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur. *World Trade Center Properties v. Hartford Fire Ins. Co.*, 345 F.3d 154, 160 (2d Cir. 2003).

The appellate court ruled that “no finder of fact could reasonably fail to find that the intentional crashes into the WTC of two hijacked airplanes 16 minutes apart as a result of a single, coordinated plan of attack was, at least, a ‘series of similar causes.’” *Id.*

However, the remaining 19 insurers were required to go to trial on the issue of the number of occurrences. There were two jury trials. The first jury found that some of the insurers were part of the WilProp form and would only be subject to one occurrence limit. The second jury found that all of the non-WilProp form insurers followed the terms of the Travelers primary insurance policies, which did not contain a definition of occurrence. At trial, Silverstein presented evidence of the insurers treating similar losses as separate occurrences. Such examples included a case where an arsonist set fire to four California courthouses, which Travelers treated as separate occurrences. The jury agreed with Silverstein and found that the insurers were liable for two occurrence limits. Essentially, the juries found that Silverstein was entitled to \$4.68 billion in insurance, and he ultimately settled in 2007 for \$4.55 billion.

Terrorism Risk Insurance Act

Congress acted quickly to pass legislation after 9/11. One piece of legislation passed was the Terrorism Risk Insurance Act (TRIA). Because there were concerns about large losses due to possible future acts of terrorism, Congress passed TRIA as a “temporary” solution to permit insurers and the federal government to share the costs of terrorism coverage. TRIA was intended to be a temporary act, so that the insurance market would have time to adjust and price for terrorism risks. TRIA was enacted on Nov. 26, 2002, and then extended an additional two years to expire on Dec. 31, 2007. Under the Terrorism Risk Insurance Program Reauthorization Act, the expiration date was extended until Dec. 31, 2014. Thus, the “temporary” terrorism insurance act will remain on the books for at least 12 years.

Kenneth R. Feinberg and Settlement Funds

Kenneth R. Feinberg, an attorney, was appointed as the mediator to establish the protocol for settling 9/11 victims’ claims. Ten years later, he has reappeared as the administrator for the \$20 billion



BP/Deepwater Horizon Oil Spill Fund. Because of his involvement in two of the most devastating disasters of the decade, Ken Feinberg has made a marked impact on how mass tort claims were resolved during the last decade.

The September 11 Victim Compensation Fund was established to compensate the families of 9/11 victims. Ken Feinberg was appointed by U.S. Attorney General **John Ashcroft**, as special master of the fund. Feinberg worked for almost three years on a pro bono basis to establish the protocol for administration of the fund and administered all aspects of the program, including evaluating applications and determining appropriate compensation.

Feinberg determined claim payments based on lifetime earnings and then offered settlement amounts to families. If a family accepted the offer, the payment was a final settlement. Families unhappy with the offer could appeal and present their case at a hearing. It was reported that Feinberg sat in on more than 900 of the 1,600 hearings. Many of the victims were highly compensated employees, and the average family compensation was \$2.1 million. In total, \$7 billion was awarded to 97 percent of the families.

Thereafter, thousands of 9/11 rescue and recovery workers sued the City of New York and its contractors over their exposure to toxic fumes and dust clouds of pulverized materials at the World Trade Center site. The concept of a “settlement fund” was used to administer settlements

for thousands of first-responder claims. In November 2010, a required 95 percent of the plaintiffs, 10,043 of the 10,563 claimants, agreed to take a settlement from the \$625 million settlement fund.

While no formal class action was pending, the funds acted similarly to a class action settlement by providing payment to all claimants who agreed to accept money under the settlement fund rather than pursuing litigation. Feinberg’s approach with the September 11 Victim Compensation Fund helped lay the groundwork for establishing and using settlement funds to resolve mass tort claims brought by first responders.

Several years later, when the I-35W Mississippi River Bridge collapsed in Minneapolis on Aug. 1, 2007, a similar victim fund was established to compensate the 158 victims and survivors of the bridge collapse. In May 2008, Minnesota legislators created a \$36 million compensation fund for victims. Like Ken Feinberg, the Minneapolis attorneys also worked on a pro bono basis to help administer the bridge collapse settlement fund. Of the total amount of the fund, \$24 million was used to make payments up to \$400,000 per individual. The remaining \$12 million of the fund was set aside for victims who were “extraordinarily impacted” by the bridge collapse.

It would appear, however, that the real test for the settlement fund approach is now being played out with Feinberg in the spotlight once again. On April 20, 2010, an explosion at the Deepwater Horizon oil rig in the Gulf of Mexico killed 11 men and injured 17 others. The BP oil spill flowed for three months until the well was capped on July 15, 2010. The spill caused extensive damage to marine and wildlife habitats as well as the fishing and tourism industries in and around the Gulf.

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Hundreds of thousands of people and businesses filed for emergency payments from the \$20 billion BP/Deepwater Horizon Oil Spill Fund. It has been reported that \$3.5 billion has been paid in emergency money to those affected by the spill. In the meantime, the claim-handling procedures were being drafted. They were made public on Dec. 1, 2010, as the Final Protocol for Interim and Final Claims for the BP/Deepwater Horizon Oil Spill Fund.

Unlike the 9/11 and Minneapolis bridge cases, Feinberg is not working pro bono but is being paid by BP for administering the fund. Feinberg has held town hall meetings and reportedly advised claimants that they did not need a lawyer to make a claim against the BP oil spill fund. Hundreds of lawsuits filed against BP have been consolidated in the U.S. District Court for the Eastern District of Louisiana. In that proceeding, plaintiffs objected to Feinberg's representations and filed a motion to require BP and Feinberg to advise claimants that Feinberg was not neutral and that they have a right to consult a lawyer.

On Feb. 2, 2011, the District Court ordered that Feinberg can no longer be referred to as "neutral" or completely "independent." *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179* (E.D. La., February 2, 2011). The court also ordered that Feinberg be disclosed as a party "acting for and on behalf of BP in fulfilling [BP's] statutory obligations as the 'responsible party' under the Oil Pollution Act of 1990."

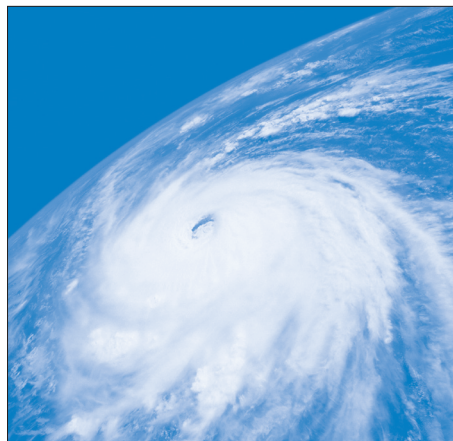
Judge Carl J. Barbier, who is presiding over the consolidated lawsuits, ordered full disclosure of the relationship between Feinberg and BP when he found that Feinberg was "quoted on a number of occasions as publicly advising potential claimants that they do not need to hire a lawyer and will be much better off accepting what he offers rather than going to court." *Id.*

While Barbier stated that he "encourages and commends any claims process that will fairly, quickly and efficiently resolve claims," he also noted that the "procedures must, however, be fully transparent so that claimants can evaluate them appropriately." Therefore, Barbier ruled that a full disclosure of the relationship between Feinberg and BP be made so that it will "make transparent that it is BP's interests ... that are being promoted." *Id.*

It is too early to tell if the BP settlement fund process will work or if it will fail to resolve the thousands of claims that have been asserted because of the oil spill. If settlements cannot be reached, claimants may continue with their lawsuits. While settlement funds and claims protocols appear to have worked well for 9/11 and the Minneapolis bridge collapse, the BP oil spill presents many different and difficult issues. Only time will tell if Feinberg can pull off the BP oil spill settlement. However, if he is successful, we may see more claim funds being established for future disasters and mass tort claims being handled by mediators such as Ken Feinberg.

Wind versus Flood and Repairing Homes with Chinese Drywall

The 2005 hurricane season was the most active in the 154 years that records have been kept. There were 28 storms. The



National Hurricane Center had to use Greek letters to name the storms after the first 21 names were used. However, we all remember the Hurricanes named Katrina, Rita and Wilma. Three years later in 2008, Hurricanes Gustav and Ike hit the southern states. Hurricane Katrina caused more than \$44 billion in property damage. When the levees broke in New Orleans, more than 80 percent of the city was under standing water.

The Battle over Wind versus Flood

The "wind versus flood" issue revolves around how much damage was caused by wind and how much by flood. If a homeowner has a flood policy, that policy should cover damage caused by flood. However, if the homeowner has no flood insurance, then only the homeowner policy will respond and cover damage caused by wind. After the 2005 hurricane season, policyholders sought to have the flood exclusion and the anti-concurrent causation clause found ambiguous, so that all damage could be covered under the homeowner policies.

The following is a standard water damage exclusion in a homeowners policy. The commercial property policy is nearly identical.

Exclusions

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

Water Damage means:

a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind; b. Water or water-borne material which backs up through sewers or drains or which overflows or is discharged from a sump, sump pump or related equipment; or c. Water or water-borne material below the surface of the

ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure; caused by or resulting from human or animal forces or any act of nature.

At first, it appeared that the policyholders would be successful. Not only were policyholders winning at the trial-court level, embarrassing side issues surfaced when attorney **Dickie Scruggs** was provided evidence by former insurance adjusters that allegedly showed an insurer altering reports to shift losses to the National Flood Insurance Program. Other attorneys and politicians piled on, and insurers were soon being blamed for everything. It was not looking good for those insurers litigating in these southern states. However, while policyholders were winning their coverage cases at the trial-court level, the tide began to turn in the insurers' favor as the cases made their way up to the appellate courts.

In the appellate court, *Leonard v. Nationwide Mut. Ins. Co.*, 499 F 3d 419 (5th Cir 2007) and *Tuepker v. State Farm Fire and Casualty Co.*, 507 F 3d 346 (5th Cir. 2007) were the key cases to overturn the trial court rulings and uphold the anti-concurrent causation clause in the flood exclusion. At the same time, the 5th Circuit Court of Appeals in the *In Re: Katrina Canal Breaches Litigation*, 495 F3d 191 (5th Cir. 2007), upheld the flood exclusion when policyholders argued that the breach of the New Orleans levees was a result of negligent design, construction or maintenance. Policyholders argued that the flooding from the levee breach was "man-made" and therefore not subject to the flood exclusion. The court, however, applied the exclusion and found that, whether the flooding was "man-made" or natural, the waters were "still floodwaters, and the result is a flood."

Also, in 2008, the Louisiana State Supreme Court ruled in favor of insurers on the flood exclusion issue. In *Sher v.*

Lafayette Insurance Co., 988 So.2d 186 (2008), the court ruled that the flood exclusion in an insurance policy was not ambiguous and that damage caused by flooding from a hurricane was not covered under the policy. While the trial court had ruled in favor of the policyholder, the Louisiana Supreme Court sided with the insurers and held that the Lafayette policy excluded all forms of flooding. Therefore the insurer was responsible for paying only for damages that were caused by wind. Thus, after years of litigation, state and federal appellate courts upheld the anti-concurrent causation clause, which excludes flood losses even if other causes acted concurrently or in any sequence with the excluded event to produce the loss.

As a postscript, it was reported that Dickie Scruggs ran into his own troubles when he was convicted of attempting to bribe a judge in a case over an award of attorneys' fees in a previous settlement with an insurer.

Chinese Drywall Repairs Damage Houses

In the mid-2000s, there was a shortage of U.S.-made drywall. This was in part due to the construction boom spurred on by the ability of developers to obtain easy financing. Additionally, homes in the South and along the Eastern Seaboard were being repaired due to the nine hurricanes that hit the southern states between 2004 and 2005. Foreign drywall was imported to the United States during the construction boom between 2004 and 2007. However, in 2008, complaints were received about odor and a sulfur gas smell coming from the Chinese-made drywall.

In January 2009, the U.S. Consumer Product Safety Commission began looking into whether the Chinese drywall was toxic and also looked into the damage that the drywall caused to homes. Testing revealed that Chinese-made drywall showed significantly higher levels of pyrite. This was the source of sulfur compounds being released by Chinese drywall. It has been determined that the gypsum in Chinese drywall was from a mine from one

Chinese province that was contaminated with coal fly ash. The Chinese drywall degrades in the humid climates of the southern states, emitting sulfuric gas that has a rotten-egg smell. The sulfuric gas also corrodes metal, causing decay in electrical, plumbing, HVAC systems and other electrical appliances.

Federal lawsuits were consolidated in the multidistrict litigation in the Eastern District of Louisiana. Thus far, seven Virginia homeowners were awarded a total of \$2.6 million in a default judgment against Taishan, the manufacturer of the Chinese drywall. *Germano v. Taishan Gypsum Co. Ltd.*, Case No. 1 09-6687, MDL No. 2047 (E.D. La., April 8, 2010). However, Taishan Gypsum has now appeared for the first time in a U.S. court to appeal the court's ruling.

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The *Germano* opinion lays out the procedures and damages related to the remediation of the drywall. This includes removal and replacement of the drywall, replacement of the HVAC and mechanical systems, and replacement of furniture and personal property that cannot be cleaned. Similarly, two Louisiana homeowners were awarded \$164,000 for remediation and related repairs. *Hernandez v. Knauf Plasterboard (Tianjin) Co.*, Case No. 2:2009 CV 06050 (E.D. La., April 28, 2010).

In June 2010, a Florida jury awarded almost \$2.5 million to a Miami homeowner. That verdict included an award of \$1.7 million for loss of

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enjoyment. Banner Supply Company and Knauf Plasterboard are the two major builders associated with Chinese drywall. It was reported that Banner has been named in more than 2,800 lawsuits. Its insurer filed a declaratory judgment action, which was dismissed without prejudice because it was premature. *Chartis Specialty Ins. Co. v. Banner Supply Co.*, No. 8:10-cv-00339 (M.D. Fla.) (July 12, 2010). In the meantime, several builders have filed for bankruptcy under Chapter 11. Insurance coverage litigation will spawn from the bankruptcies insofar as insurance is an asset of the bankrupt builder's estate.

Recently, an important early victory was given to insurers when, in December 2010, the U.S. MDL District Court ruled that insurance policies do not cover losses due to the destructive properties of Chinese drywall because of the faulty materials exclusion and corrosion exclusion contained in the policies. *In Re: Chinese Manufactured Drywall Products Liability Litigation*, Case nos., 09-6072, 09-7393, 10-688, 10-792, 10-929, 10-930, 10-931, 10-1420, 10-1693, 10-1828 (E.D. La., December 16, 2010). The motions of 10 insurers to dismiss coverage litigation against them were granted by the court. In a 50-page ruling, the judge ruled that homeowners could not seek coverage due to the faulty materials and corrosion exclusions within the policies.

In making his ruling, the judge found that the drywall was a faulty material, much like products containing asbestos. The court stated that the drywall was "like the radioactive table bases and building components containing asbestos or lead, which function for all practical purposes as table bases and building components but are faulty because of the materials of which they are composed." The faulty materials and corrosion exclusion in the homeowner policies applied and excluded coverage for the Chinese drywall damage claims.

There will be further insurance coverage litigation over Chinese drywall.

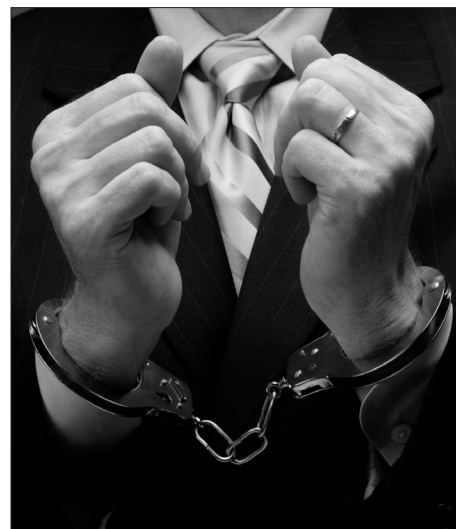
Subcontractors and other entities are facing third-party liability claims. However, it appears for the time being that homeowner insurers have dodged a big bullet on Chinese drywall.

Reinsurance as a Criminal Activity and the Current Financial Crisis

In the last quarter of 2000, Gen Re and AIG entered into a \$500 million loss portfolio transaction. This transaction untimely resulted in a criminal prosecution of Gen Re and AIG executives, which many viewed as a disaster in the insurance industry. The prosecution of the insurance and reinsurance executives appears to have been part of the political landscape that brought criminal prosecutions for accounting misrepresentations and off-balance-sheet transactions found in companies such as Enron and WorldCom. The current political landscape does not appear to include criminal prosecutions for companies that have recently failed. However, Congress has passed the Dodd-Frank Act which may increase regulations and make changes for the insurance industry with the creation of the Federal Insurance Office.

Enron, WorldCom and Reinsurance

In late 2001 and early 2002, Enron and WorldCom filed for bankruptcy.



Investigations revealed that these companies had overstated assets while hiding or shielding their liabilities. Over the next few years, newspapers detailed the excessive spending of executives like **Bernie Ebbers** of WorldCom and **Dennis Kozlowski** of Tyco, who paid millions for his wife's birthday party on an Italian island.

Criminal investigations resulted in securities and wire-fraud prosecutions of CEOs, CFOs and even in spouses being charged with income tax evasion. Ebbers and **Jeffrey Skilling** received 25-year sentences. Arthur Andersen was also criminally charged and found guilty of obstruction of justice for shredding documents — a conviction that was later overturned on appeal. But by that time, the accounting firm had already been dissolved.

Not to be out done by these highly publicized prosecutions, the attorney general of New York, **Eliot Spitzer**, had begun investigations into insurance and insurance brokers. In 2004, a lawsuit was filed against Marsh & McLennan, and contingent commissions became an issue. Settlements were reached with brokers over contingent commissions. However, as part of the insurance company investigation, the Gen Re/AIG loss portfolio contract was uncovered and the SEC sought to prosecute the executives involved in the reinsurance transaction.

The investigation focused on whether the reinsurance contracts transferred risk or were simply used to smooth AIG's earnings. As the transaction was scrutinized, AIG filed a revised statement with the SEC in 2005, classifying the transaction as deposits rather than reinsurance. In February 2006, the SEC filed an enforcement action against five former senior executives of Gen Re and AIG for allegedly helping AIG mislead investors through the use of fraudulent reinsurance transactions.

In February 2008, the prosecutors obtained criminal convictions against the five reinsurance executives for conspiracy, securities fraud, making false statements to the SEC and mail fraud. The prosecutors argued that the loss portfolio transfer allowed AIG to book \$500 million of loss reserves in the fourth quarter of 2000 and first quarter of 2001 without assuming any real risk. It was argued that Gen Re had paid \$10 million in premiums that AIG secretly returned through a side deal.

The reinsurance executives received sentences ranging from one to four years in prison and were also ordered to pay fines ranging from \$100,000 to \$250,000. The five executives are free on bail pending appeal of the convictions. The oral arguments on the appeal took place in November 2010, and the appellate court has not issued its opinion on these convictions.

The disaster of the corporate accounting scandals resulted not only in criminal prosecutions, but also in the filing of numerous D&O lawsuits. A few months after WorldCom's 2002 bankruptcy filing, which was the largest bankruptcy at the time, Congress passed the Sarbanes-Oxley Act. Given the examples of the Enron and WorldCom corporate executives, CEOs and CFOs no longer readily signed their name to SEC filings.

Sarbanes-Oxley required more transparency in corporate accounting. Also, with new corporate accounting governance regulations, and with lawsuits being filed against directors and officers, corporations began purchasing more D&O insurance with higher limits of coverage. Given the current situation with bank failures and companies in financial trouble, there have been predictions that we could see more D&O lawsuits being filed in the near future.

Too Big to Fail and the Dodd-Frank Act

In September 2008, not only did we have another round of hurricanes with



Gustav and Ike, but a new hurricane was brewing which would devastate businesses all over the world. The housing market and mortgage-backed security crisis claimed its first big victims: Lehman Brothers filed for bankruptcy on Sept. 15, 2008, and 10 days later on Sept. 25, 2008, Washington Mutual was placed into receivership.

Three months later in December 2008, **Bernie Madoff** turned himself in. While the federal government passed the Troubled Asset Relief Program (TARP), which permitted the U.S. Department of Treasury to purchase or insure up to \$700 billion of "troubled assets," Lehman Brothers was not provided any help from TARP. However, AIG, which was viewed as a company that was too big to fail, received \$68 billion in TARP funding.

While there has not been a rash of D&O lawsuits filed against corporations related to the recent financial meltdown, litigation has been commenced in relation to the Bernie Madoff Ponzi scheme. Also, in December 2010, the FDIC issued a press release wherein it authorized the filing of claims against 109 bank officials to recover \$2.5 billion. Unlike the numerous criminal trials during the Enron era, there have been no highly publicized criminal prosecutions against CEOs resulting from the recent financial crisis.

However, similar to the Enron financial crisis that pushed Congress to pass the Sarbanes-Oxley Act of 2002, the mortgage-backed securities crisis resulted in Congress passing the Dodd-Frank Act, which was signed into law on July 10, 2010. The Dodd-Frank Act is 2,319 pages long and has 16 titles. It requires regulators to create 243 rules, conduct 67 studies and issue 22 periodic reports.

The stated purpose of the Dodd-Frank Act is:

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail," to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

There are many different aspects to the Dodd-Frank Act. While the Act establishes the Financial Stability Oversight Counsel, which will identify and monitor financial companies that could "pose a threat" to the financial stability of the U.S., this article only touches on the creation of the Federal Insurance Office. Regulators are still working on implementation and have not drafted all of the rules. Given the current Congress, it is predicted that the implementation process will be slow.

The Dodd-Frank Act states that the director of the Federal Insurance Office will be appointed by the Treasury Secretary. The director of the Federal Insurance Office will monitor the industry, conduct studies on the role of the global insurance and reinsurance market, and also study regulations to modernize and improve insurance. The Federal Insurance Office will not oversee health, LTC and crop insurance. However, the director will run the TRIA program.

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One of the issues debated during the passage of the Dodd-Frank Act was whether the federal government rather than the states should regulate insurance. While there had been some debate as to the repeal of the McCarran-Ferguson Act, which gives the states the right to regulate insurance, no such repeal took place. However, the Dodd-Frank Act provides that the director will be able to address state versus federal insurance regulation, by giving the director the ability to negotiate agreements with other countries. Such international agreements may require states to recognize federal insurance standards set forth in those international agreements.

The Dodd-Frank Act is 2,319 pages long and has 16 titles. It requires regulators to create 243 rules, conduct 67 studies and issue 22 periodic reports.

In March, Treasury Secretary **Timothy F. Geithner** named Illinois Insurance Director **Michael T. McRaith** the first director of the Federal Insurance Office. He took office on Monday, June 13, 2011.

While the Dodd-Frank Act is the law, how the Act will be actually implemented will greatly impact the future regulation of insurance and reinsurance. It appears that it will be sometime before implementation is completed. However, deadlines are approaching and if another big company nears the brink of failure, the Dodd-Frank Act will certainly be one of the key pieces of legislation from which regulators will be seeking guidance in handling the next big financial meltdown. We can only hope that there will be enough time for the Act to be fully implemented before another financial crisis hits. ■



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Memories of Sept. 11, 2001

by Wayne G. Keebler, CPCU, ARe

Wayne G. Keebler, CPCU, ARe, is vice president, underwriting, at Wright Risk Management. Since joining Wright in 2005 to head up its underwriting function, Keebler has worked to formulate, align and enhance corporate underwriting strategies, and to procure and implement reinsurance for new and existing programs. Prior to Wright Risk, he worked for more than 40 years in the insurance industry, specializing in management, risk analysis, reinsurance and pricing for multilines at the primary level. On Sept. 11, 2001, at SCOR Reinsurance Corporation, where he was vice president and global U.S. casualty practice leader, his office was on the 23rd floor of the World Trade Center.

Prologue

All of us have fond memories of important events in our lives — a high school or college graduation, a wedding day, birthdays of our children and grandchildren. One infamous day I will never forget is Sept. 11, 2001. On that morning, terrorists intentionally crashed two commercial passenger jet airliners into the twin towers of the World Trade Center in New York City, killing everyone on board and many others in the buildings when both towers collapsed.

Nearly 3,000 victims died on Sept. 11, 2001, including those on a third airliner that crashed into the Pentagon in Washington, D.C., a fourth plane that crashed into a field in Pennsylvania, and firefighters and police personnel who died. I worked in the south tower of the World Trade Center, and I'm a survivor of that day. These are my experiences on 9/11.

With good reason, Sept. 11, 2001, is a date that has had a profound impact on me personally as well as on the American psyche. We call that day 9/11 — not September 11th, not WTC Day, not Americans against Terrorism Day, but simply 9/11. Ironically, "911" is the phone number we call when we have an emergency.

My story is unique because my insurance career and the World Trade Center completion started almost together. During 1971, I started my first job in insurance on Wall Street with Atlantic Mutual Insurance Company. My office was only a few short blocks from the twin towers, and I used to take lunchtime constitutionals in order to watch the last phases of the construction. Actually, the north tower was completed in 1970, while the south tower was completed in spring 1972 — about the time my daughter was born. For two years, the World Trade Center twin towers were the tallest buildings in the world. Their status was short-lived because Chicago's Sears Tower replaced it during the spring of 1973. When the twin towers collapsed, they were only the fifth largest buildings.

My next encounter with the World Trade Center towers was in 1976, when Hollywood did a remake of the movie "King Kong." For those of you who remember this movie, King Kong was killed at the World Trade Center instead of the Empire State building as in the original movie. After the filming, the giant torso of the mechanical beast lay strapped down in the plaza area for a couple of months. A friend of mine took a snapshot of me with Kong in the background. Ironically, that photo was in an album in my south tower office on 9/11.

In 1993, terrorists first attacked the World Trade Center when 1,100 pounds of Semtek was loaded in a rental truck, and it exploded in the huge underground parking garage. This was the very same garage where I rented a Hertz car the week before. Six people died that day, and more than 1,000 were injured. I had a friend, a port authority engineer, who took me to the "hole" the explosion created to show me the damage. I was shocked. I was having lunch only a few blocks away at the time. Lunch was with a couple of Chicago colleagues who couldn't wait to get on their afternoon flight that day.

The Event

I started working for SCOR Reinsurance on the 23rd floor of the south tower of the World Trade Center during the winter of 2000. Remember Y2K, the millennium bug that was going to paralyze the universe? (By the way, since A.D. started at year one, the millennium actually didn't happen until 2001.) I enjoyed my brief time working in the World Trade Center. It was convenient to get to from Penn Station, there were plenty of retail shops on the lower levels, and a number of my clients were located in or near the twin towers. My office was located at the east side of the 23rd floor of the south tower, overlooking One Liberty Plaza and the Millennium Hotel.

Sept. 11, 2001, was a beautiful day with a gorgeous light blue sky and brilliant sun; the temperature was in the mid-70s. As normal, I arrived that day around 7:30 a.m., grabbed a cup of coffee and began to sort through the stack of paperwork and emails that were directed to me since the previous evening. At 8:45 a.m., I went to our coffee station for my second cup and ran into my boss as he was coming through the elevator doors. We had a couple of meetings set up for late morning and lunch, so I was advising him of what was on my specific agenda for those meetings.

As we proceeded to his office, the building was rocked with a violent tremor. When we looked out the window toward the north, we observed a huge flame, some metal fragments and a bunch of burning paper fly by the window. We had no idea what caused the explosion. Our first thought was a bomb had exploded — this time high up in the north tower. We were unaware that American Airlines Flight 11 had crashed into the north tower at 8:46 a.m. and had impacted between the 93rd and 99th floor. Since my boss had been in the World Trade Center during the 1993 bombing, he immediately thought the explosion was a second bombing.

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We went to the north-side windows to view the damage, and we saw pieces of the north tower still falling, along with several bodies. My boss ordered an immediate evacuation of the floor. He went to the south side of the floor, and I went to the north side to encourage everyone to leave immediately. About half of the managers and all of the other employees began the evacuation process almost at once. We gathered in a systematic fashion in front of one of the fire stairwells. Everyone seemed a bit shocked, but they stayed calm and orderly. As we advanced on the stairwell, our fire marshal, a manager on the floor, was on the phone trying to find out what had happened and tried to determine how to proceed. Since the phones were not working, he was reluctant to let us in the stairwell.

We could have waited all day for instructions from the civil authority because the central command center was located in the north tower and all communication was out. For a short while, our fire marshal prevented us from entering the stairwell to evacuate the building. I became worried about smoke finding its way to our tower, so I let him know that we were evacuating

the building with or without civil authority. Approximately five minutes went by before we finally entered the fire escape stairwell.

When 20 or 30 of us finally entered the stairwell, we proceeded into a crowded passageway — a number of the upper floors had already begun to evacuate. The evacuation went well and was extremely orderly. The main question that everyone was asking was, “What happened?” No one speculated that a major passenger airplane had struck the building. The plane had crashed into the opposite side of the north tower; therefore, no one in the south tower had a view of the incident. Most of the speculation was about a bomb or a mechanical failure.

It took us about eight minutes to descend the stairway. We did hear the automatic enunciator telling people to stay on their floor until further orders. One of my direct reports wanted to know if we should go back up. We were in a narrow passageway with many people descending behind us, so the easy answer was for us to continue our descent to the bottom floor and then figure out what to do next. When we exited the stairwell, we noticed that no one was at any of the normal World

Trade Center security stations. There was no one directing anyone except for one Spanish-speaking gentleman with a walkie-talkie, who kept using the word “*peligroso*.” If you regularly ride subways in New York City, you know that the word “*peligroso*” means danger.

I could not get a security guard to talk to me. He looked annoyed because he apparently thought I was interrupting another conversation. Meanwhile, one of our colleagues ascended up the escalator to see what was happening at the plaza level. There was a great deal of smoldering debris and a bunch of other stuff flying through the air, landing in the plaza. The building windows at the plaza level were huge. If any of the flying objects hit the windows, we could have been showered with glass. Our colleague came back downstairs to ground level and advised that we should get everyone out of the building as quickly as possible.

The Journey Uptown

When we reached ground level, our CEO was just coming into the lobby area. He had parked his car in the underground garage and had no idea what was happening. He mentioned that he was unable to go up in the elevators. We decided to leave the building on the south side, which was away from the danger zone. We tried to keep the south tower between us and the north tower danger since pieces of the north tower building structure — glass fragments and jumpers — were a huge concern. As we walked out the door, I heard a couple of bystanders talking about how a commercial jet passenger plane had crashed into the north tower. I doubted what I heard them say; however, I was not in a position to contest it. Besides, something major had happened to the north tower, and the open air parking lot just down the street had a couple of cars on fire.

We sauntered up the street on the side of the south tower. Suddenly, I turned to look toward New Jersey because I

heard the deafening roar of a jet engine that I thought was coming from the Hudson River. A friend grabbed my arm and pointed upward. My head spun around just in time to see the last half of a passenger airline strike the east side of the south tower. At 9:02 a.m., United Airlines Flight 175, traveling at 590 nautical miles per hour, had struck the south tower. It began to rattle like a wagon full of pots and pans, and a huge orange fireball quickly spread about 200 yards from the side of the building where it struck. I don't remember telling my feet to run, but they were moving about as fast as a 53-year-old Bostonian could move. I remember seeing huge pieces of the building fall from the orange ball, and I was certain that I wasn't going to make it at this point.

Roughly two out of every three people on the street were running away from the World Trade Center towers, while the others stood frozen in place staring at the cloud of smoke and fire. I'm not certain how many of the bystanders who did not run made it out of the debris field. As I crossed Church Street and ran toward Liberty Street, I felt a heat shear blow across my body, and as I started up Liberty Street, I began to feel particles of sand or dust hit my head and neck. I was in full-sprint mode when a lady in high heels, dragging a wheeled suitcase, fell in front of me. I reached down to grab her hand and pull her up, but she moved her hand, and I missed. The chivalrous half of me wanted to go back, but the cowardly half of me was in control. I kept running and never found out what happened to her. Of all the things I remember the most clearly, that lady sticks in my mind the most. Could I have saved her?

I continued up the block until I got to about 20 feet from the corner of Liberty Street and Broadway. I then began to think that if I could just turn the corner, I would be safe. As I turned the corner, I slowed down but kept on running until I got to Chase Manhattan Plaza at street level. I was out of breath, sweating and

dazed, but alive. I walked back up the street to look back at the south tower and was shocked at the size of the hole in the building and the amount of fire pouring out of it. After about five minutes of staring at the building, my friend, who had gone up to the plaza level, grabbed my arm and said that he had been calling to me and wanted to know why I wasn't answering him. I looked back to see that around 10 people I started out with were up on the plaza level and waving.

I walked back up the street to look back at the south tower and was shocked at the size of the hole in the building and the amount of fire pouring out of it.

It was then that I realized that my hearing cut out, and I had not heard anything since the explosion. Recently I watched the movie "The Book of Eli," where there were several traumatic scenes in which the heroine screamed without making any sound. It reminded me of that specific moment of my 9/11 experiences. My first words to my friend were, "What happened?" I was still fairly shaken up and had meant to say, "How did it happen?" I was questioning how two commercial jet airliners could have hit the World Trade Center buildings 20 minutes apart. By that time, we pretty much knew that it was an act of terrorism, even though it all seemed so surreal.

I gathered myself mentally and began to process what needed to be done. I met with my fellow workers up on the Chase Manhattan Plaza to decide what our next steps should be. My instincts were to get away from danger; however, not everyone had a similar opinion. Some wanted to stick around to witness a major news and historical event. Some wanted to go back and watch the buildings burn, while others wanted to simply get away as fast and far as possible. Somebody yelled out

that the White House and the Capitol were also hit by planes. Even though those reports turned out to be inaccurate, the frightening prospects persuaded most of my colleagues to get out of town, given the possibility that additional hijacked planes were still in the air.

We picked up some bottled water that local street vendors were giving away and headed east until we reached the FDR Drive. We continued walking north on the FDR Drive toward midtown. All northbound motorized traffic on the FDR Drive was blocked to allow room for hundreds of emergency, police and fire vehicles heading south toward the World Trade Center. People were trying to use their cell phones with limited success. At one point, someone yelled out that a plane had crashed into the Pentagon in Washington, D.C., and that all traffic in and out of New York City had been halted. When we finally reached the Brooklyn and Manhattan bridges, we found out that the rumor was true.

We walked for about 20 more minutes, when one of the women in our group looked back and yelled, "One of the towers is down." I looked back and only caught sight of one tower but thought that the other tower was just hidden by all the smoke. We were staring at the fire and smoke emanating from the south tower for about five minutes when suddenly the south tower collapsed. In shocking disbelief, we all fell silent and continued to walk northward. It was then that I remembered that I had not called my wife and also remembered that I had left my cell phone in my desk.

One of the women in our group gave me her cell phone to call home. I had to dial the school where my wife worked at least 40 times until I finally got through. Unfortunately, the school was not allowing any calls past the switchboard and would not take any messages because a number of the children had mothers

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and fathers who were either police, firemen or worked in the World Trade Center. Actually, seven children in my wife's school did lose parents or close relatives that day. While restricting communications in the school on 9/11 may have been a smart decision, it just did not seem like the humane thing to do.

The woman who lent me her cell phone allowed me one more call to my mother-in-law. Once again, it took about 40 attempts before I got through. My mother-in-law was crying because she thought that I had not made it out of the tower building. I explained to her that she needed to get a hold of herself and needed to go to my wife's school to tell her that I was OK and that I could not reach her by phone.

My wife is a special education teacher, and her room was at the very end of the most remote hallway in her building. About 11:15 a.m. each day, she takes her class to the art room and begins her morning prep period break. When she arrived at the art room, the art teacher mentioned the horrible events in New York City that morning. Since my wife was located in a remote part of the building, she was unaware of the tragedy. She began to cry and told the art teacher that I worked in World Trade Center and had gone to work that morning. The art teacher was stunned. My wife immediately ran down the hall toward the main office at about the time my mother-in-law was coming through the front door. When she realized that my wife was crying, she yelled out that I was OK and informed her that I had called.

When one of the members of our group with whom we were walking asked where we were going, I said that we were headed north and needed to figure out where we wanted to go. He told us that his wife's grandparents lived only a couple short blocks from where we were and that they were vacationing in Italy. We went to their apartment to rest, go to the bathroom, have some water and figure out our next steps. About half of us went into

the apartment, while the others stayed in the hallway to talk. My friend went to the roof to see what was going on. One of the neighbors, a woman with a cast on her right leg, opened her door and told us to leave immediately because we did not belong there and she was calling the cops. I told her that we had been in the World Trade Center that morning, and we were sorry if we were making too much noise.

Obviously, she was oblivious to the events of that day and said, "So what? What does that mean?" I explained to her to please turn on her television. I was certain that every channel was covering the buildings' collapse. Being a good New Yorker, she became even more confrontational. She told me to mind my own business and to get out of the building immediately. She slammed the door in our faces, and I thought she was phoning the police. Instead, she did take my advice and turned on her television. Her apartment door opened a few minutes later and a very apologetic and contrite woman appeared. She invited all of us into her apartment and made us sandwiches while we struggled to relax and watch replays of the tragic events over and over again.

The Journey Home

About three hours later, I was determined to get home. I walked up to Penn Station and spotted a crowd of a few thousand people surrounding the building. Penn Station is the main train station for many Long Island and New Jersey commuters. The Penn Station crowd was the only group that seemed edgy and unruly that day. I did not blame them for their frustration; however, I had no stomach to join them. I saw a police sergeant on the outer end of the periphery and started making small talk with her. I told her that my office was in the south tower and that I had no idea if I had a job anymore. She pulled me aside and said that a special train was being put together to take police, fire and city workers home, and would be leaving in about half an hour. She gave me her badge number, her name and directions to a back entrance

to the Long Island RR trains. I ran into a gauntlet of police and was stopped several times, but I made it to the train.

About an hour and a half later, I arrived at my station in Massapequa, where my wife was waiting for me. When we got home, she became very emotional, and I just felt drained. I did not have an office. I may not have had a job. I did not know how many of my colleagues and friends had escaped the building. I was greatly concerned about my future. All I knew for sure was that I was alive, and I would never be the same again.

Epilogue

My daughter came over to our house that evening to see me. My wife had assured her that I was fine, but she wanted to talk to me. She was a fourth-grade teacher and had missed school that day because she was at her doctor's office finding out that she was pregnant with my first grandchild — Katelyn. Fortunately, I will be around to watch her grow up.

My son was a senior at Clemson University on 9/11, and it took him a day to finally get to me. All of the phone service east of Manhattan had been cut off for a while. Ironically, he had been in college for more than three years and was unaware that I was working in the World Trade Center. When I visited him at Clemson a month later, he took me around to introduce me to all of his friends.

Lastly, lessons learned. The terrorist acts of 9/11 were senseless. It's been nearly 10 years since 9/11, yet the horrible event will never be forgotten. I have endeavored to become a better person since then, and every day I ask myself two questions when I wake: "Who am I?" and "What is my purpose?" I can't change the world, but I can change my effect on it. It may not be much, but it's all that I can offer. ■

Sendai Earthquake and Tsunami — First-Party Coverage Implications

by Mound Cotton Wollan & Greengrass

Editor's note: The law firm of Mound Cotton Wollan & Greengrass anticipates that a variety of coverage issues will arise in connection with the disaster in Japan. The firm prepared a white paper to identify and clarify the issues it believes will prove to be the most significant and has graciously provided a copy of its white paper to the Reinsurance Interest Group. It is available on the Reinsurance Interest Group's website, <http://reinsurance.cpcusociety.org/>, for anyone who is interested in knowing more about coverage issues arising from the Japanese disaster. The following excerpt from the white paper is published with permission of Mound Cotton Wollan & Greengrass.

Executive Summary

The March 11, 2011, Japanese earthquake and tsunami have led to a series of economic aftershocks that are already sweeping over U.S.-based businesses. Insurers should expect a wide variety of claims arising from that disaster, foremost among them claims for contingent business interruption (CBI), as both vendors and customers of U.S. businesses are forced to suspend operations. We have prepared this white paper to alert our clients to the types of legal issues that will likely be associated with those claims, and to provide guidance with regard to those issues.

Background

On Friday, March 11, 2011, at 2:46 p.m. local time, a 9.0-magnitude earthquake occurred off the coast of Japan, approximately 80 miles from the East Coast of the Oshika Peninsula and 230 miles northeast of Tokyo. This was the strongest recorded earthquake ever to hit Japan. Scientists estimate that the quake moved the main island of Japan some 8 feet and shifted the axis of the Earth by about 4 inches. More than 160 aftershocks — 141 of which measured a magnitude of 5.0 or more — hit the region in the

first 24 hours following the earthquake. Aftershocks continued for more than a week, with magnitudes of up to 6.3.

Immediately after the earthquake, tsunami warnings were issued in Japan and 50 other countries, including countries along Pacific coasts of South and North America.¹ Minutes after the earthquake, a 33-foot tsunami struck the Northeast Coast of Japan (Miyagi and Fukushima prefectures), traveling in some cases up to six miles inland. The devastating tsunami wiped away whole villages. It is estimated that more than 22,000 people were killed.

In addition to the earthquake and tsunami, fires broke out across the region, including a fire at an oil refinery in Ichihara, a city in Chiba Prefecture. A dam broke in Fugushima Province, washing away scores of homes. Train services were suspended immediately following the earthquake, and power outages affected large parts of the country, including about 4 million homes in and around Tokyo. Four hundred flights were cancelled at Tokyo's two main airports, stranding some 23,000 passengers. One week after the earthquake, 850,000 households remained without power and 1.5 million households were without running water.

Following the earthquake and tsunami, explosions rocked the Fukushima Daiichi nuclear power plant, a six-reactor plant located 150 miles from Tokyo.² Three of the plant's reactors were shut down at the time for inspection; the other three shut down automatically when the earthquake was detected. The tsunami, however, swamped the diesel generators that provided backup power to the reactor cooling systems and disrupted electrical power to those generators.

Plant officials flooded the cooling chambers with seawater to prevent meltdown, but the chemical makeup of the seawater caused hydrogen explosions in the reactors.³ Difficulties persisted, leading to a

series of explosions, partial meltdowns and radiation leaks. In addition, the water that filled the separate pools in which spent nuclear rods were stored was depleted, creating the risk that the rods would ignite and release radioactivity.

On Tuesday, March 15, explosions in the plant's No. 2 reactor and a fire in a cooling pond used for the No. 4 reactor briefly pushed radiation levels at the plant above 8,000 microsieverts per hour (1,000 microsieverts can cause radiation poisoning). The Japanese government ordered the evacuation of a radius of six, and then 12 miles around the plant, and urged residents between 12 and 18 miles of the facility to remain indoors. Radiation levels in Tokyo also rose before winds dispersed the radiation over the Pacific. Tokyo residents who had not already left the city rushed to stock up on supplies, including food, flashlights, candles and radios.

The crisis at the Fukushima Daiichi nuclear power plant worsened on Wednesday, March 16, as efforts to cool the reactors failed and radiation was again released. The 50 remaining workers at the facility (which employed 800) had to leave temporarily because of radiation levels. Helicopters and water cannons were used in an effort to keep the reactors cool. Efforts were made to reconnect the facility to the main power grid, but it was unclear whether the water pumps would be operational even when power was restored.

On Friday, March 18, a week after the earthquake and tsunami, Japan raised the incident level at the Fukushima Daiichi plant to 5 on the 1–7 INES scale used to rank nuclear accidents, and was weighing whether it would be necessary to bury the reactors in concrete and sand if power could not be restored to cooling pumps to prevent a catastrophic radiation release. Farm products in the area closest to the plant were found to contain radiation.⁴

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Sendai Earthquake and Tsunami — First-Party Coverage Implications

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On Monday, March 21, the plant was again evacuated. At the time of the evacuation, smoke was rising from the area of the spent fuel storage pool at the plant's Unit 3 reactor building, but no spikes in radiation were reported.

The combination of the earthquake, fires, tsunami and nuclear disasters will likely have a crippling economic impact. Japan's stock market lost approximately \$620 billion the first two days of trading after the earthquake and tsunami (Monday, March 14, and Tuesday, March 15). The damage is currently estimated to exceed \$309 billion.⁵ Many Japanese firms stopped production, and global companies faced disruptions to operations as a result of the damage to their vendors' and customers' factories and infrastructure in Japan.⁶

The four most severely affected prefectures — Iwate, Miyagi, Fukushima and Ibaraki — are home to a number of industries — from farming to auto parts to electronics — and account for some 6 percent of Japan's economy. The largest port on the Northeast Coast, Sendai, was destroyed, and three other ports, Hachinohe, Ishinomaki and Onahama, were severely damaged and will likely be out of commission for months. Six oil refineries, representing one-third of Japan's refining capacity, shut down because of the earthquake. In addition, many companies, such as Sony Corp., Toshiba and all Japanese automakers including Toyota, have stopped production nationwide. Companies that continue operations face problems shipping components, receiving raw materials and getting workers to facilities that are open.

Summary of Key Issues

While the full extent of the loss resulting from this disaster will not be known for some time, in anticipation of the first-party property claims that will be submitted in its aftermath, we have attempted to identify the coverage issues that we believe will prove to be the most significant.

The United States insurance industry — like the insureds it underwrites — is a

global industry. Many of the policies issued to insureds headquartered in the United States provide coverage for loss or damage at insured locations across the world. Therefore, United States insurers will likely see claims for property damage and business interruption losses being made by U.S. insureds with interests in Japan.

An insurer need not have property in Japan, however, to feel the effects of the disaster. The earthquake and tsunami will also have an effect on businesses around the world that depend on delivery of key raw materials and component parts from Japan. For example, less than one week after the disaster, General Motors announced that it was temporarily shutting down a truck plant in Louisiana because it could not obtain sufficient Japanese-made parts.⁷ Such U.S. factory closures likely will lead to claims under CBI coverage.

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The availability of such coverage will require a careful review of the applicable policy language, including whether the supplier was located in a covered territory; whether the supplier sustained direct physical loss or damage; whether that direct physical loss or damage was the result of a covered cause of loss; and whether the supplier was a direct or indirect vendor to the insured.

Multinational U.S.-based insureds may also seek recovery for interruption of their own business operations in Japan. The availability of such business interruption coverage will also turn on specific policy provisions: whether the insured suffered physical loss or damage from a covered loss, experienced the requisite suspension of business activities, and suffered lost profit that was not counterbalanced by make-up sales from other of its facilities. ■

Endnotes

- (1) Tsunami warnings were issued for the coastal areas of Alaska, California, Hawaii, Oregon and Washington, and evacuation orders were issued for some areas, including the northern California counties of Del Norte and Humboldt. Waves struck Hawaii and California, but there have been no reports of major damage to regions outside of Japan.
- (2) Units 1, 2 and 3 were operating at the time of the earthquake, but shut down automatically when the quake hit. Units 4, 5, and 6 were offline at the time of the earthquake, but even these offline reactors have nuclear fuel, either inside the reactors or in storage ponds, that needs to be kept cool. Unit 3 is considered to be the most crucial reactor, inasmuch as it was the only reactor to use plutonium. See, e.g., "MOX Fuel Rods Used In Japanese Nuclear Reactor Present Multiple Dangers," D.C. Bureau, March 15, 2011, <http://www.dcbureau.org/201103151304/Natural-Resources-News-Service/is-airborne-plutonium-a-threat-from-reactor-number-three.html>
- (3) A meltdown occurs when nuclear fuel rods cannot be cooled, and melt the steel and concrete structure containing them. In the worst-case scenario, the fuel can spill out of the containment unit and spread toxic radioactivity through the air and water. That, public health officials say, can cause both immediate and long-term health problems, including radiation poisoning and cancer. See, e.g., "Death Toll In Japan From Quake, Tsunami Tops 6400," CNN, March 17, 2011, http://articles.cnn.com/2011-03-17/world/japan.disaster_1_nuclear-plants-death-toll-reactor?_s=PM:WORLD
- (4) See, e.g., "Radiation Found In Food, Water and Milk Near Fukushima," Xinhua News Service, March 24, 2011, http://articles.cnn.com/2011-03-17/world/japan.disaster_1_nuclear-plants-death-toll-reactor?_s=PM:WORLD
- (5) "Japan Disasters To Cost Up To \$309 Billion," *Business Week*, March 23, 2011, <http://www.businessweek.com/ap/financialnews/D9M4P1PO0.htm>
- (6) As one example, 20 percent of all semiconductors and 40 percent of all flash memory chips in the world are made in Japan. See "Japanese Crisis Threatens Global Shortage of Electronic Components" at <http://broadcastengineering.com/news> (March 15, 2011).
- (7) See "Lacking Parts, G.M. Will Close Plant," *New York Times*, Friday, March 18, 2011.

It May Not Be So Easy to Blame the Reinsurance Intermediary

by Andrew S. Boris, J.D.



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For decades, the process leading to the placement of reinsurance was largely viewed as a private business transaction and somewhat immune from deep investigation. Interestingly, some believe that the criminal convictions of former reinsurance executives at major companies concerning their role in reinsurance transactions several years ago heightened the pressure and attention paid to the placement of reinsurance.

With increased regulatory, media and business scrutiny, the role and function of the reinsurance intermediary has concurrently come under greater attention. In turn, when there is an

alleged error or problem, it is not all that uncommon for a party to the reinsurance placement process (usually the insurer seeking the reinsurance) to contend that the reinsurance intermediary or broker caused a problem or made an error. To that end, some maintain that the reinsurance intermediary serves a special role in the placement process and should have special legal duties and responsibilities.

A recent case from California identifies some of the challenges that are associated with allegations that the reinsurance intermediary breached one of those alleged special duties (a fiduciary duty). See *Workman's Auto Ins. Co. v. Guy Carpenter & Co Inc.*, B211660 (Cal.App. May 4, 2011).

In *Workman's*, the insurer contended that Guy Carpenter acted as a reinsurance intermediary and secured reinsurance on its behalf from PMA Capital Insurance Company of Philadelphia, Pa. The insurer initially contended that Guy Carpenter: (1) was negligent; (2) breached its contractual obligations; and (3) breached a fiduciary duty owed to the insurer during the reinsurance placement process.

To support its claim that Guy Carpenter breached a fiduciary duty, the insurer contended that Guy Carpenter failed: (1) to secure timely payments from the reinsurer; (2) to secure the best available terms of reinsurance; and (3) acted with the intent to injure the company by incurring inflated commissions.

As part of the trial court proceedings, the insurer's count for breach of a fiduciary duty was dismissed. The case proceeded to trial on the insurer's other causes of action for negligence and breach of contract with a jury finding in favor of Guy Carpenter.

The principal issue on appeal was the question of whether a reinsurance intermediary, Guy Carpenter in the instant case, owed a fiduciary duty



to the insurer, *Workman's*, as part of the reinsurance placement process. Of importance, as identified by the California appellate court, a fiduciary duty would require insurance brokers and intermediaries to disclose all material knowledge and advise clients on specific insurance matters even if it would not be required to do so under a traditional negligence standard. The court noted that a fiduciary is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor, the most sensitive is then the standard of behavior. *Workman's* at p.13, B211660 (Cal.App. May 4, 2011). Thus, the imposition of a fiduciary duty would place a high standard of conduct on a reinsurance intermediary.

As noted by the California appellate court and causing it great confusion was the recognition that the high standard of conduct imposed by a fiduciary duty was in direct conflict with established insurance law. The court reviewed historical insurance law and found there was no general, heightened duty of care to advise regarding the sufficiency of

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insurance and could not identify one California case permitting a client to sue an insurance broker or intermediary for breach of a fiduciary duty. The court recognized that traditional agency law (classifying Guy Carpenter as an agent of the insurer and imposing a finding of a fiduciary duty) conflicted with established insurance law (rejecting such a high standard) and could not be reconciled given their divergent standards.

In the end, faced with the conflict, the court determined that it would favor insurance law. Thus, the court refused to: (1) impose a heightened duty on Guy Carpenter; and (2) find that Guy Carpenter had an independent fiduciary duty as part of its relationship with Workman's Auto Insurance Company. Further, the court noted that certain elements of a fiduciary duty cause of action mimic a negligence cause of action and were already presented to a jury,

which returned a verdict in favor of Guy Carpenter.

The case is instructive on a number of points. First, as an initial matter, the case demonstrates the challenges that exist in trying to impose the high standard (and the concurrent obligations) of a fiduciary duty upon a reinsurance intermediary. Second, to the extent that a reinsurance intermediary agrees to accept a higher standard of care via written agreement or other affirmative action, the question of a fiduciary duty may still exist.

Of note, this case from the California appellate court addressed the fiduciary duty question based on individual facts, including the fact that Guy Carpenter was successful at trial on all arguments and California law. Undoubtedly, the question will continue to be raised in other jurisdictions, even in California. ■

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