

**PROPERTY
CLAIMS
ASSOCIATION**

◆ *of the Pacific* ◆

San Francisco, California

May 2009

Volume 2 • Number 3

Association News Network Associate Affiliate



You're Gonna Like This One!

May Message from 2009
PCAP President Robert Fox



Bob Fox

A new venue and a new location. Coming up on May 21 is a program that covers a topic we are hearing a lot about these days — FORECLOSURE! California led all states in the number of foreclosure filings with 523,624. Claims associated with foreclosed properties are a different breed from most run-of-the-mill, first party property claims. Unusual circumstances and events have to be accounted for and questions have to be answered. When did the property become vacant? Had foreclosure

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The Mortgage Crisis and Its Impact on Property Claims



Stephen E. Smith is a partner in the law firm of Smith Smith & Feeley, LLP with a focus on Property Insurance law, Insurance, and Bad Faith Litigation.

Mr. Smith received a B.A. degree from California Lutheran College in 1982, and admitted to Practice in all California State Courts, United States District Court (Central District and Southern District) and United States Court of Appeals (Ninth Circuit).

Mr. Smith received a B.A. degree from California Lutheran College in 1982, and his Juris Doctorate from USC in 1985. He is Martindale-Hubbe AV rated, a member of all appropriate bar associations, and admitted to Practice in all California State Courts, United States District Court (Central District and Southern District) and United States Court of Appeals (Ninth Circuit).

**Join PCAP
Thursday,
May 21, 2009**

as we welcome

**Attorney
Stephen E. Smith**

**Smith Smith & Feeley LLP
Insurance Lawyers**

for a timely and valuable discussion on the impact of the mortgage crisis on property claims

at the offices of
on the impact of the mortgage crisis on property claims

**at the offices of
Wells Fargo Insurance Services**
45 Fremont Street, Suite 800, San Francisco, CA 94105

(Earn 2 MCLE, RPA, CPCU and DOI CA CE Credits!)

Inside This Issue

- President's Message
- The Appraisal Conundrum:
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*Because space is generally limited,
Reservations are a must by the Monday before each meeting date.*

Please RSVP for you and your guests to:

Mike Diliberto-RGL Accountants,
100 Bush St, 20th Floor, SF, CA 94104.

Call 415/503-1201 or email reply to mdiliberto@uc-rgl.com

President's Message

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proceedings begun? When did the damage occur? Was the property properly protected? What was the mortgagee's interest in the property at the time of loss? Who do you pay and how much?

These and other issues will be taken up by Stephen Smith of Smith, Smith & Feeley. Join him for this interesting program.

July's program will acquaint you with "Green Coverage" and what LEED is all about; and how our industry will become more active in this new construction and insurance field. You will benefit knowing about the code, statute and legal aspects of building repair that require environmental upgrades and the insurance to pay for them. Gil Malmgen will lead the group presentation.

Member, Helen Greenstrand has arranged for our programs to be presented from the conference room of Wells Fargo Insurance Services, 45 Fremont Street, 8th Floor, San Francisco. Members and non members are welcome. Bring a guest and if you cant, come anyway. But remember to make the reservation. Mike is waiting to hear from you at 415 593 1301.

We are still looking for newsletter articles you can share with the Mike is waiting to hear from you at 415 593 1301.

We are still looking for newsletter articles you can share with the association. If you have one, send it to me at rseefox@sbcglobal.net. Our thanks to this months contributor.

Hope to see you at the May meeting.

Bob Fox

Robert Fox
2007-2008 President
Property Claims Association of the Pacific
Robert Fox Adjusters
(650) 589-1438
rseefox@sbcglobal.net

The Appraisal Conundrum

May appraisal be compelled in spite of an unequivocal denial?

by Anna A. Chopova

Rudloff, Woods & Barrows, LLP



In 2001, Senate Bill 658 (Escutia-2001-02) changed the appraisal language in the standard form fire insurance policy contained in California Insurance Code Section 2071. In the old version, either party could make a written demand for appraisal, and that demand by itself was sufficient to compel the other side to submit to appraisal. In contrast, the appraisal

provision in the current version of Section 2071 provides that "[i]n case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the appraisers shall first select a competent and disinterested umpire..." Although the change appears minor, this additional requirement appears to

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have the effect of making appraisal voluntary. Or does it? May appraisal be compelled in spite of an unequivocal denial? The answer to these questions lies somewhere in the legal nebula created by Section 2071 and the California Arbitration Act.

The plain language of Section 2071 suggests that compelling arbitration is a viable option in most cases. For example, Section 2071 expressly states that in government-declared disasters, even if requested, appraisal "may not be compelled." The fact that Section 2071 specifically prohibits compelling appraisal in the particular scenario of government-declared disasters suggests that compelling appraisal is possible in other insurance claims. This conclusion is supported by the legislative history of SB 658. In particular, arguments in support of making appraisal "voluntary" were presented by the Foundation of Taxpayer and Consumer Rights and the Consumer Attorneys of California. Senate Rules Committee, Unfinished Business Digest, Bill No.: SB 658, September 26, 2001. And, early drafts of SB 658 contained the phrase "In the event either the insurer or the insured declines the in support of making appraisal "voluntary" were presented by the Foundation of Taxpayer and Consumer Rights and the Consumer Attorneys of California. Senate Rules Committee, Unfinished Business Digest, Bill No.: SB 658, September 26, 2001. And, early drafts of SB 658 contained the phrase "In the event either the insurer or the insured declines the request, neither party may compel appraisal." Legislative Counsel's Digest, SB 658, February 23, 2001. Yet, this language was eliminated from the final version. Thus, it is safe to say that Section 2071's lack of prohibitory language on compelling appraisal is not a mere oversight. Instead, the legislative history of SB 658 supports the reasonable conclusion that the Legislature considered making appraisal voluntary, and rejected the idea in favor of a limited voluntary appraisal in government-declared disasters only. In all other cases, it would appear that a party whose request to appraise was rejected may move to compel appraisal. And this is where the appraisal conundrum begins.

It is well established that appraisal hearings are a form of arbitration, and therefore are governed by the California Arbitration Act, California Code of Civil Procedure Section 1280 et seq. *Devonwood Condo. Owners Ass'n. v. Farmers Ins. Exch.* (2008) 162 Cal. App. 4th 1498, 1505; *Kacha v. Allstate Ins. Co.* (2006) 140 Cal. App. 4th 1023, 1031. Under CCP §1281.2, a motion to compel arbitration will be granted where the petitioner alleges 1) the existence of a "written agreement to arbitrate a controversy" and 2) that a party to

The Appraisal Conundrum

PCAP 2009 Events Calendar

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such agreement to arbitrate "refuses to arbitrate." A corollary to the mandate of Section 1281.2 is the conclusion that a motion to compel arbitration is properly denied where there is no evidence to support the allegation that a party consented to arbitration. *Lazarus v. Titmus* (1998) 64 Cal. App. 4th 1242.

The issue then becomes whether an insurance policy based on Section 2071 constitutes a "consent to arbitration/appraisal." Arguably, under the appraisal provision of Section 2071, a party must accept the other side's request for an appraisal before it could be said that an "agreement" exists. The effect of this "request + acceptance" framework is that a policy which mirrors the language in Section 2071 may amount to no more than an "agreement to agree to appraisal," which is far from the "written agreement to arbitrate a controversy" required by Section 1281.2. If the request is not accepted, there is no agreement, and under Section 1281.2 of the Arbitration Act, a motion to compel may not be granted. Because Section 2071's appraisal provision falls short of Section 1281.2's requirement for a "written agreement to arbitrate," it is possible to argue that appraisal may not be compelled if a request for appraisal is rejected. The fact that this conclusion appears to contradict the legislative history of SB 658 and the plain language of Section 2071's prohibition on compelling arbitration only in government-declared disaster scenarios may well be the subject of future litigation in California.

Anna A. Chopova is an associate attorney with Rudloff, Wood & Barrows LLP. She practices in the areas of insurance coverage and "bad faith" defense, including first and third party property insurance coverage.

Ms. Chopova is a 2006 graduate of the University of California, Hastings College of the Law. During law school Ms. Chopova was a member of the Hastings Women's Law Journal and worked as a law clerk for a major insurance company. This experience provided Ms. Chopova with a solid foundation in policy language interpretation. Ms. Chopova also worked as a legal intern for one summer with the San Francisco District Attorney's Office. Prior to embarking on her legal career, Ms. Chopova received her Bachelor of Arts degree in French and American Studies at the University of California, Berkeley.

Ms. Chopova was born in Bulgaria, a beautiful country, filled with ancient history and rich traditions.

During her legal career, Ms. Chopova received her Bachelor of Arts degree in French and American Studies at the University of California, Berkeley.

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In her spare time, Ms. Chopova enjoys reading, biking and cooking.

She may be reached at: 510.740.1500, or www.rwblaw.com.

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Please submit articles for consideration by email, to
PCAP President/Editor Robert Fox:

rseefox@sbcglobal.net • (650) 589-1438

Published by Association News Network, Inc.

Bryan Harrison, Publisher: Bryan@AssociationNewsNetwork.com

(925) 888-1888 www.AssociationNewsNetwork.com

Thursday, May 21, 2009

Attorney Stephen Smith

"The Mortgage Crisis and its Impact on Property Claims."
at Wells Fargo Insurance Services offices
(Earn 2 MCLE, RPA, CPCU and DOI CA CE Credits!)

Thursday, July 16, 2009

"Green Reconstruction"

Coverages offered, legal impact, code compliance
and how they affect the cost of repair.
The speakers will be Gil Malmgren, Ed Rudloff, John Osteraas
at Wells Fargo Insurance Services offices

Thurs-Friday, Sept 10-11, 2009

16th Annual Claims Conference of N. California

www.ClaimsConference.org

Thursday, October 15, 2009

Speaker/Topic to be announced
at Wells Fargo Insurance Services offices

PCAP Meeting Location

Wells Fargo Insurance Services
45 Fremont Street, Suite 800, San Francisco, CA 94105

PCAP Treasurer's Report

March 2009

The financial results through February 2008:

Beginning Balance 1/1/09	\$4,931	
Revenue:		
Member Dues & Events	\$2,340	
Expenses:		
Member Events Revenue	92	
Member Dues & Events	\$2,340	
Expenses:		
Member Events	92	
Insurance	187	
Other	124	
Total Expenses	\$403	
Net Income	\$1,937	
Ending Balance 2/28/09		\$6,868

The financial results for the two-months ended February 28, 2009 are shown above. We continue to return much of the member's annual dues back to the membership in quality programs with free lunch, our newsletters, and continuing education credits, which is our goal. We have had a very good response to our 2009 memberships. I encourage everyone to join and get the benefits of great free programs including lunch and continuing education credits for MCLE, RPA, CPCU, and the new California Department of Insurance requirements.



Property Claims Association of the Pacific

www.PropertyClaimsAssociation.org

2009 Membership Application

Please print this page, fill it out and mail it with your check to the address indicated below.

Name _____
 Company _____
 Current Position _____
 Business Address _____

Phone _____
 E-Mail _____
 Fax _____

Membership dues are based on the calendar year.
 Please return application with check for \$45.00 payable to

Property Claims Association and send to:
 Michael Diliberto III, CPA
 RGL Forensic Accountants and Consultants
 100 Bush Street, 20th Floor
 Michael Diliberto III, CPA
 RGL Forensic Accountants and Consultants
 100 Bush Street, 20th Floor
 San Francisco, CA 94104

PCAP MISSION STATEMENT

The purpose of The Property Claims Association of the Pacific is to advance the members' knowledge of:

- legal issues associated with insurance claim adjustments;
- the Statutory and Department of Insurance Regulations governing fair claims handling;
- technical advancements in construction/restoration;
- applicable code changes effecting real and personal property loss;
- consumer insurance related concerns by providing continuing education programs that foster a professional approach to claims handling in the Property and Casualty Industry

PCAP 2009 Officers

President Vice President Secretary Treasurer Legal Counsel



Robert Fox
 Robert Fox Adjusters
 (650) 589-1438
 rseefox@sbcglobal.net



John Kelly
 John Kelly & Associates
 (707) 552 0636
 johnpkelly@aol.com



Scott D. Schwartz, Esq.
 Rust, Armenis and Schwartz
 (415) 765-5910
 ssschwartz@raslb.com



Michael Diliberto, CPA
 RGL Accountants
 (415) 956-8323
 mdiliberto@us.rgl.com



John Hook, Esq.
 Long & Levit
 (415) 397-2222
 JHook@longlevit.com