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Volume 3, Issue 1

President's Message

By Irene Yesowitch

The most significant recent development in our insurance world in California was the recent adoption of amendments that once again impact the California Fair Claims Handling Practices Regulations. This month's column will provide a brief update on this development.

On June 1, 2006 the Office of Administrative Law approved the adoption of amendments to the Department of Insurance's Fair Claims Settlement Practices Regulations. The amendments were filed with the Secretary of State on June 1, 2006. Significantly, the amendments provide that insurers must comply with the requirements of the amendments 90 days after they are filed with the Secretary of State.

The amendments have a long history. A set of amendments was adopted by the Department of Insurance in April 2003. ACIC and the Personal Insurance Federation of California (PIFC) challenged the amendments. In July 2003, the Los Angeles Superior Court granted ACIC's request for an injunction on the enforcement of the amendments. ACIC, PIFC

and the Department of Insurance negotiated the objections to the amendments. Those negotiations resolved several issues and amendments to the Fair Claims Settlement Practices Regulations reflecting the resolution of several issues went into effect on October 4, 2004. This version of the Regulations is in place today.

On September 21, 2005, the department held a hearing on additional amendments to the Regulations. ACIC testified at the hearing. The amendments were revised in February 2006. ACIC submitted comments on the revisions.

These amendments were eventually submitted to and approved by OAL.

Here are some of the noteworthy provisions in the amendments.

- A new provision in the preamble section of the Regulations notes that the failure of an insurer "to provide the commissioner with requested information sufficient to

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Mold – What's up with THAT??? – A Lighter View

By Bruce White

Think about this....

- They make cheese out of mold, we eat mushrooms all the time, and yet, we shouldn't breathe it ... What's up with THAT ?
- It's thick in our forests, on lumber at any hardware store, yet a lawsuit was settled for the plaintiff (several million dollars) because it was on their house framing... What's up with THAT ??
- Mold is ubiquitous in our environment, but not in our home.... What's up with THAT ??

- Law follows science, but science follows law in mold lawsuits... What's definitely up with THAT ???

When we consider all of these issues, we have a recipe for financial disaster and a target on your back if you own property. Just what is it that makes junk science and junk medicine acceptable?

So... is it "...the truth, the whole truth and nothing but the truth ?" Follow this article down through the facts we do know, the facts we don't know, and the areas where we should focus our efforts.

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CCNC 2006 Update

Register now and avoid the jam for a conference that has 16 topical programs, a very entertaining keynote speaker, and two hands on activities all to bring you current on what's happening in the industry that is of importance to you.

You can register by going to the web site, www.claimsconference.org. Remember the dates are September 21 & 22, 2006. The location will be at the Hyatt Regency in downtown Sacramento.

The programs are varied, i.e. "Condos—who pays for what; Fine Arts—valuation, repair or replace: the latest on Bad Faith; Which is better—non waiver or reservation of rights; What is earthquake and what isn't; Getting certified for the DOI regulations" and many more.

Bob Fox,
Education Committee

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examine the licensee's claims handling practices may justify a finding that the licensee was in non-compliance with these regulations."

- The definition of "proof of claim" is changed.
- A new provision relating to whether a settlement offer is unreasonably low uses different standards for first and third parties.
- The Regulations use "comparable vehicle" to evaluate total loss claims. The amendments state that in determining the cost of a comparable vehicle, the insurer may use either the asking price or the actual sale price of the vehicle.
- In a first-party automobile partial loss claim, the expense of labor is not subject to depreciation or betterment unless the insurance contract clearly provides otherwise.
- After a covered loss, automobile collision coverage requires an insurer to

provide towing and storage that are reasonably necessary to protect the vehicle from further loss.

- In property claims, the expense of labor necessary to repair, rebuild or replace covered property is generally not subject to depreciation or betterment.

There are other changes that will no doubt impact the way some insurers and adjusters do business. Because compliance with the regulations is important, and the Department of Insurance insists that compliance be completed no later than September 1, 2006, we at PCAP urge you to review the amendments. If anyone needs a copy of the regulations with the new changes, feel free to contact me at YYesowitch@longlevit.com.

Upcoming Luncheon on Computer Estimating Programs

On October 19, 2006 PCAP will host a timely discussion on the use of computer estimating programs in the insurance industry. The program will take place at Marsh Risk Insurance Services, 1 California Street, 8th Floor (Twin Peaks conference Room) San Francisco, CA 94111, and will run from 12:00 p.m. to 1:30 p.m. Lunch will be served for free for members and there will be a \$7.00 charge to non-members.

PCAP has assembled a panel consisting of Anthony Hetchler of Marshall & Swift / Boeckh, whose company provides estimating programs, and Dave Warters of Belfor Property Restoration. Mr. Warters is responsible for all aspects of large scale operations related to property restoration activities.

The Program will discuss the pros and cons of electronic estimating programs, as well as practical and legal issues of interest to the insurance industry.

Mold

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We'll also discuss what the insurance industry, contractors and underwriters should do.

Let's take a brief peek at the facts we know in medicine, in construction and in litigation shall we?

Medicine

1. We know the ACOEM (American College of Occupational and Environmental Medicine) has identified respiratory problems (primarily asthma triggers) in buildings that have dampness associated with them. We have no concrete evidence that certain exposure levels are safe (or not safe) for any given types of mold in the environment.
2. We know when individuals are taken out of the damp and humid environmental buildings the symptoms seem to dissipate.
3. We know that some people can be affected who are weak, undergoing serious medical treatment (transplants, HIV/AIDS, etc), the very young, and those in the agricultural industry where mega doses of exposure occur daily.
4. We know some types of fungi can be used to cure disease (penicillin), or chemical/biological warfare agents (aflatoxin).
5. We know from a historical perspective, some exposures caused by ingestion of contaminated grain and wheat made the people judged to be crazy or witches (Salem witch trials).

What we don't know is how much is too much, and what individual dose/response relationship there is between you and I to the same stuff !

Construction

1. We know most homes and commercial building use many materials that are organic, have organic components or collect organic components (sounds like *Veganism doesn't it ?). Mold loves organic based materials as a source for food !

2. We know the way we build in Scottsdale, Arizona should be different from soggy Portland (Maine, of course...).
3. We know there may be some mold on lumber but there should not be mold on manufactured materials !
4. We know the construction industry can prevent growth by simply "drying down" a home after framing and roofing, using non-organic materials in the wet areas near plumbing sources.
5. We know if your irrigation water is hitting the house, it will not grow !

What we don't know is why, after thousands of years of building, we can't seem to grasp these simple concepts !!!

Litigation

1. This one is simple... We know anybody, can sue you for anything, and anytime they want !
2. We know there's more construction defect litigation going on in arid climate areas (less potential for growth) than wet climate areas (grows in your coffee it's so wet, "Hello, Seattle !!!")
3. We know, this is where a really, really experienced adjuster and consultant can make or break a claim, or a lawsuit !

Enough said about those folks ! Does the term "land shark" come to mind ?

So... what can we do in the insurance industry about this ? It's quite simple. If we know we can control the moisture, mold won't grow. We should build, or rebuild, towards that end.

An example is good don't you think ? Take a bathtub or shower stall. Doesn't it make sense in "wet" areas like this to not use drywall or "greenboard" and instead use "wonderboard" or ceramic backer board ? How about in hot and humid environments we use USG "Densglass" or "Denshield" instead of normal drywall. A few pennies more for the prevention of a are inspected in a matter of minutes or ilawsuit ? Hmmm, naw... too easy...

Alternatively, try this one... How many underwriters or agents require a cursory check of a structure for visible problems before they re-insure it ? Most homes or buildings n a day as a precursor to re-insuring or initial coverage. Spend a few bucks to save mega bucks!

How about adjusters; what can they do? Let's take a look at previous claims to litigation cases. Ed McMahon. Melinda Ballard. Do those names ring any bells ? How about the fact that we have two periodicals (call me if you want the names) devoted entirely to Mold Litigation? In both of these examples of individual cases, or in the magazines, the main themes are bad faith, improper identification/causation, or improper removal. That's 95% of the lawsuits.

What this means is for investigation, remediation, and re-construction use people who have a proven record of success. While the ACME Auto Repair Bureau, Mold Sniffers, Removers & Builders may be an attractive company because there cheap, seldom does the cheapest get what you really wanted to buy in the first place; prevention of claims escalation or lawsuits ! A jack of all trades is master of none as my daddy told me. Not to mention the conflict of interest of contractor and consultant being one in the same. "Fox watching the hen house" as momma told me. Enough of my family though... Your choice in how to approach a claim and the risk you want to take !

Meet you at the salad bar and watch your back !!!

*Disclaimer: The author is using "veganism" in an allegorical sense to drive home a point. It is simply intended to place a serious issue in a lighter context. Excuse my stepping on your mushrooms !

Bruce White is with Forensic Analytical in Portland, OR. He has written several articles in various publications dealing with environmental issues that affect the insurance industry. He can be contacted at bwhite@forensica.com.

PCAP's Annual Ballgame a Success!

On July 18, 2006 PCAP successfully hosted its fourth annual Giants baseball night at AT&T Park's Club level. The event was well attended as the Giants took on the Brewers. After a lively dinner and a raffle in which many PCAP members won prizes, the group viewed the game from club level seats.

PCAP would like to thank the sponsors and vendors who donated prizes for the raffle, and who sponsored the Giants baseball night including: RGL Accountants, Hagen Streiff Newton Oshiro, Matson Driscoll & Damico, Long & Levit; MKA; CCNC; Saylor, Greer & Kirby; Belfor; and Word-Tek.



Treasurer Report—Six Month Report 2006

Denial in Katrina Flood Suits

By Bob Fox

The financial results for the six months ended June 30, 2006:

Revenue:

Member Dues	\$1,745
Member Events	34
<u>Total Revenue</u>	<u>1,779</u>

Expenses:

Member Events	357
Giants Game Deposit	1,707
Insurance	508
Website	132
Other	76
<u>Total Expenses</u>	<u>2,780</u>
<u>Net Income</u>	<u>(\$1,001)</u>

We are still attracting new members as the year rolls on and we produce interesting lunch programs. With free lunch programs for members and a significant discount to the annual Giants game, it is still best to join PCAP and pay the annual dues and enjoy the rest of the year's events.

Michael Diliberto,
Treasurer

Three industry associations have concluded that a recent denial by a Mississippi court of a motion for dismissal concerning flood damage in Mississippi could end up being a silver lining to a lingering issue about flood versus wind.

The judge is reported to have acknowledged that any damage from hurricane flood waters would not be covered by the plaintiff's policy, which contained the standard flood exclusion. He also found there were issues of fact what the percentage of the damage was caused by flood waters and how much was caused by wind.

The Property Casualty Insurers Association stated, "While we would have preferred that the motion for judgment on the pleadings be granted at this stage, the underlying opinion is good because it strongly suggests that the Court understands that the explicit water damage/flood exclusion in this policy does exclude coverage for hurricane-driven water."



Working to better serve its members and the insurance industry, PCAP's mission is to provide a forum for the frank discussion of issues related to property loss adjustment, and a social venue for fostering professional relationships.

PCAP Searching for New Board Member

Currently PCAP is conducting a search for individuals interested in joining the board of directors. If you would like to join PCAP, please go to our website at www.propertyclaimsassociation.org, or contact Mike Diliberto at mdiliberto@us.rgl.com. If you have questions about this or past PCAP newsletters, please contact René Gamboa at gamboa@LBBSlaw.com.

Vice President On The Move

PCAP Vice President, René Gamboa, has joined Lewis Brisbois Bisgaard & Smith in San Francisco as a partner. His practice focuses primarily on insurance coverage and bad faith litigation specializing in lawsuits arising from first party coverage disputes. He is joining Jay Pardini, a Vice Chair of the firm's Insurance Coverage and Bad Faith Group, and former Vice President of PCAP. René can be reached at gamboa@LBBSlaw.com.

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