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President's Message

By Irene Yesowitch

I hope this newsletter finds you all well. My focus this time is on the California Department of Insurance's use of its regulatory powers to significantly alter our insurance policies. As we continue well into the first quarter of 2006 numerous bills are slowly making their way through our legislative process. Many of the bills are focused on automobile insurance and claim handling. Others are still directed at the licensing of brokers. Amidst these we find the ever-changing revisions to the Fair Claims Settlement Regulations, a work in progress since 2002. A work in progress that does not have to deal with the scrutiny suffered by all those other bills that require assembly, senate and gubernatorial approval.

Beginning in the summer of 2002, the California Department of Insurance has been proposing significant revisions that would make changes in claims handling practices as well as, in some

cases, changes to policy provisions and expansion in insurance coverages. The fact that our Supreme Court has repeatedly confirmed that the law in California continues to respect clear and unambiguous contractual terms, matters not to the DOI that appears hell-bent to turn insurance into something akin to a utility rather than the contractual relationship that it is.

Despite the myriad challenges to the proposed revisions, the OAL (Office of Administrative Law) approved the regulations on April 24, 2003, with an effective date of July 23, 2003. A lawsuit was filed by insurers on July 1, 2003 challenging the regulations in the California Superior Court in Los Angeles. The court issued a preliminary injunction on July 22, 2003 prohibiting the Commissioner from implementing, applying, or enforcing the changes to the regulations.

(Continues on page 2)

IN THIS ISSUE:

President's Message	1
PCAP's Year in Review	1
CCNC 2006 Update	2
Treasurer Report	2
Vehicle Accident Reconstruction Program	4
PCAP Fourth Annual Giants Baseball Night	4

PCAP's Year in Review

By René I. Gamboa

On January 19, 2006 PCAP hosted its annual "Year in Review" program in San Francisco, California. A panel made up of Irene Yesowitch, of Long & Levit, Julian J. Pardini, of Lewis Brisbois, Bisgaard & Smith, and John Norwood, of Norwood Associates, provided an entertaining and educational discussion on case law and legislation that impacted the insurance industry in 2005.

Among some of the cases covered were *Penn-America Insurance Company v.*

Mike's Tailoring (2005)125 Cal.App.4th 884, where the Third District Court of Appeal reversed a trial court's entry of judgment in favor of Mike's Tailoring, and held that a "sewer or drain" exclusion barring coverage for damage caused by water that backs up from a sewer or drain applies to bar coverage of a claim for damage caused when a sewer line backed up and deposited waste water in the basement. The Court of Appeal found that

(Continues on page 3)

CCNC 2006 Update

President's Message *continued from page 1*

Get ready for the all new Claims Conference of Northern California. It will be held at The Hyatt Regency Hotel in Sacramento opposite the State capitol on September 21 and 22, 2006.

A new location, venue and bigger and better exhibits will be available. Sponsors are already lining up. Recently, we had a committee and board meeting at the hotel to tour the facilities and set the program. An Advisory Committee has been established to help develop a program that will be attractive to industry property and casualty representatives.

PCAP members are well represented on the board and the committees. We have Mike Sowerwine, of Hagen, Streiff, Newton, and Oshiro, as the President of CCNC this year. René Gamboa, of Rudloff Wood & Barrows LLP, is CCNC Secretary. Steve Tilghman, of Claims Professional Resources, and Robert Fox, of Robert Fox Adjusters, are co-chair of the Education Committee. Jim Williamson, Past President of PCAP and VP of Claims for CSE Insurance Group, is in on the Advisory Committee.

Look for more news and updates in future newsletters.

Bob Fox,
Education Committee

The Court, thereafter, suggested that the parties endeavor to work out the disagreements.

On June 7, 2004, partial settlement was entered in the court case. Selected provisions of the regulations were allowed to take effect 60 days after they were approved by the OAL in October 2004. The provisions that were not settled were to be revised and reissued for public notice and hearing.

On May 13, 2005, the DOI noticed a public discussion on proposed amendments to the Fair Claims Settlement Practices regulations. Written comments were again submitted by a host of different insurance trade organizations on the proposal at the June 2, 2005 workshop hosted by the DOI.

On November 9, 2005, major trade associations met with DOI staff to discuss possible settlement of the outstanding issues: (i) regulation of

relationships with third-party vendors, and (ii) limitations on depreciation of labor in partial-loss property insurance claims. The parties reached conceptual settlement of the third-party vendor issue, with negotiation of specific language to follow. The parties agreed to litigate the depreciation of labor issue.

The proposed changes, which have not yet been approved but are likely to be approved, are significant in a number of ways. The DOI, curiously, does not post the proposed changes. We urge you to review the changes which can be found at the website of the Personal Insurance Federation of California (www.pifc.org). While there, you should also review some of the pending legislation that the organization is following.

As usual, should you have any questions, feel free to contact me at IYesowitch@longlevit.com.

Treasurer Report—February 2006

The final results for the year ended December 31, 2005:

Revenue:

Member Dues \$1,815

Member Events 4,459

Total Revenue 6,274

Expenses:

Member Events 4,440

Insurance 420

Website 298

Other 242

Total Expenses 5,400

Net Income \$874

Financially, 2005 was a successful year and we are appreciative to our members, guest speakers and sponsors. Your memberships fees help underwrite most lunch meetings, which is why we offer them at no-cost or low-cost to members. We also keep our operating costs trim so most of your membership dollars go to providing programs.

Michael Diliberto,
Treasurer

Year in Review

continued from page 1

the phrase “[w]ater that backs up from a sewer or drain” is facially unambiguous, and that “no reasonable person would assume that water backing up from a sewer would be pure water,” in rejecting Mike’s Tailoring’s argument. Other cases covered during the discussion included *Israel–Curley v. California Fair Plan* (2005) 126 Cal.App.4th 123. In that case, the Second District Court of Appeal affirmed the trial court’s entry of summary judgment in favor of California Fair Plan. The court found that California Code of Civil Procedure § 340.9 (which extends the time in which claimants may file an action in connection with Northridge Earthquake of January 17, 1994) includes an exception to the extension of the statute where the insured claimant had executed a release in connection with claims for earthquake damage, and had been represented by a licensed California attorney at the time of executing a release.

Also discussed was *American Insurance Association v. John Garamendi* (2005) 127 Cal.App.4th 228, in which the Third District Court of Appeal affirmed the trial court’s order declaring an emergency regulation drafted by the California Department of Insurance Commissioner invalid. The Commissioner argued that he had authority to regulate the use of loss history and the underwriting of homeowners policies based on Proposition 103. Both the trial court and the Court of Appeal disagreed, finding that the Commissioner had no authority to regulate the underwriting of homeowners policies.

In *Mitchell v. United National Insurance Company* (2005) 127 Cal.App.4th 457, the Second District

Court of Appeal affirmed the trial court’s entry of summary judgment in favor of United National Insurance Company, regarding the rescission of a commercial property policy issued to the policy holder. United National had issued a commercial property policy providing fire insurance coverage for a building owned by the insured. During the policy period the building was destroyed by an arson fire. United National discovered several misrepresentations in the application for insurance (including, but not limited to misrepresentations as to the actual square footage of the building, the use of the building, the amount of business generated in the building, existing insurance on the building, and/or code violations).

United National relied on Insurance Code § § 331 and 359, which allow rescission based on negligent misrepresentations and a subjective standard relative to determining materiality. The Court of Appeal agreed with United National, and also held that United National was not obligated to investigate information set forth in the insured’s application for insurance, and did not waive its right to rescind the policy.

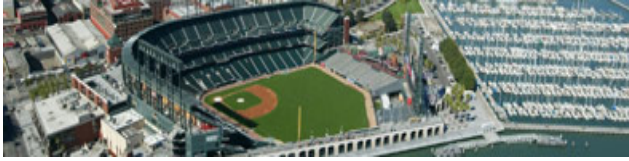
Apart from discussing relevant case law, the panel also discussed legislation affecting the insurance industry. Among the bills to come out of the 2005 legislative session in Sacramento, the panel discussed **AB 873**, which requires insurers, after a covered loss under a fire insurance policy, to provide the insured with a free copy of the policy within 30 calendar days of receiving the request from the insured. **AB 1640**, requires each homeowners insurer, when acknowledging receipt of a

claim, to notify the claimant that it reports claims history or loss experience to third-party databases, along with information on how the claimant can contact the third-party database.

SB 2 provides that starting January 1, 2007, a homeowners policy is prohibited from containing a provision for maximum additional living expenses of less than 24 months in circumstances where a state of emergency has been declared. Also, it requires insurers to provide a list of acceptable additional living expenses items to consumers. Additionally, SB 2 makes a mediation pilot program founded by insurers permanent. And, it requires the curriculum committee of the Department of Insurance to make recommendations regarding continuing education courses relative to the proper methods of estimating the replacement value of structures and determining the appropriate levels of homeowners insurance coverage.

Finally, **SB 150** requires insurers to provide consumers with a specific reason, in writing, for a declination, cancellation, or non-removal of homeowners, automobile, life, health, and disability policies. Implementation of these provisions becomes effective July 1, 2006.

PCAP Fourth Annual Giants Baseball Night!



On July 18, 2006 PCAP will host its fourth annual baseball night at AT&T Park's Club Level. So mark your calendar for an entertaining night of great food, great baseball, and an opportunity to see history in the making. We will provide more details as the game approaches.

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.

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 rgamboa@rwblaw.com.

March Luncheon Vehicle Accident Reconstruction Program

Join us at the upcoming PCAP program where leading experts will discuss vehicle accident reconstruction. The program will take place on Thursday, March 16, 2006, between 12:00 p.m and 2:00 p.m, at Marsh Inc., located at 1 California Street, 9th Floor (Potrero Hill Conference Room), San Francisco, California.

Michael Braun, P.E., of Boster, Kobayashi & Associates, will discuss the development of the Event Data Recorders (EDR's) for automobile, and how the data is collected, downloaded, and analyzed for accident reconstruction.

Jim Wagstaffe, of Kerr & Wagstaffe LLP, will discuss First Amendment aspects of the EDR's and potential abuses with their use.

Apart from learning about this cutting-edge technology, and the technical and legal issues surrounding it, CPCUs attending this program, will be awarded 2 points under the Continuing Professional Development program for CPCUs. Also, PCAP will offer 1.5 RPA CE credits.

PCAP will be serving a light lunch during the program. The lunch is free to members and \$7.00 for non-members. Because space is limited, reservations are a must. Please RSVP for you and your guests to Mike Diliberto, RGL Accountants, at 415.956.8323, or reply by e-mail to mdiliberto@us.rgl.com by Tuesday, March 14, 2006. Join PCAP now for \$35 and save for the rest of the year!

René I. Gamboa, Esq., Vice President, Property Claims Association of the Pacific
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