Claims Interest Group

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Claims Quorum

Message from the Chair

by Tony D. Nix, CPCU, CIFI

Tony D. Nix, CPCU, CIFI, is a special investigations unit (SIU) team manager for State Farm in Atlanta, Ga., and has been employed with State Farm for 27 years. He obtained his bachelor's degree in management from the University of West Georgia in 1980, and earned his CPCU designation in 1999 and the CIFI (Certified Insurance Fraud Investigator) designation in 2000. Nix has served on the Claims Interest Group Committee for the last six years and is an active member of the CPCU Society's Atlanta Chapter, with prior service as director, secretary, president elect and president.

It is with great sadness that I share with my fellow CPCUs the loss of a true friend and industry professional. **Brian N. Marx, CPCU,** passed away on March 4, 2010, after suffering a heart attack. His death is a shock to us all, as he was known for his dedication to fitness and good health. Brian was an employee of Chubb Insurance and served as a longtime member of the CPCU Society's Claims Interest Group Committee. Most notable was Brian's contribution to this newsletter as the writer of many articles on a variety of technical subjects. In addition to his industry involvement, he was an active volunteer of the New Jersey Special Olympics. Brian was a man of character; he will truly be missed.

As part of the Claims Interest Group's succession planning efforts, **Charles W. Stoll Jr., CPCU, AIC, RPA,** has been appointed to the newly created role of assistant editor of the *Claims Quorum* (*CQ*). During the next six months, Chuck will be working with current editor **Marcia A. Sweeney, CPCU, AIC, ARM, ARe, AIS,** and will assume the role of CQ editor in October 2010.

Our webinar subcommittee has an exciting schedule of presentations coming up. Look for the following:

- May 12 — "It's Not Always What You Say — It's How You Say It."
- July 14 — "Correct Methodology Defending TBI Cases."
- Sept. 15 — "Premises Security."

As indicated in the February 2010 CQ issue, the Claims Interest Group was awarded "Gold with Distinction" for our Circle of Excellence (COE) submission. This recognition is a result of contributions of Society members from across the country. I encourage you to go to our Claims Interest Group Web site often and record any activity completed during the period July 1, 2009, through June 30, 2010. Our COE subcommittee will compile the information and incorporate it into our 2010 COE submission, which is due by June 30.

We will be conducting our Claims Interest Group Committee mid-year meeting on May 1 in Phoenix during the CPCU Society's Leadership Summit, April 29–May 1. If you are planning to attend the Summit, you are welcome to drop in at our meeting. ■

What's in This Issue

Swine Flu — Implications for First-Party and Workers' Compensation Insurance

by Jeffrey S. Weinstein, J.D., David W. Kenna, J.D., and Gretchen Henninger, J.D.

Jeffrey S. Weinstein, J.D., is a partner at Mound Cotton Wollan & Greengrass and has handled domestic and international insurance coverage matters for more than 20 years.

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Editor's note: This *Claims Quorum* article is a shorter version of the original 14-page article published by the authors in their law firm's newsletter. It has been edited and is being reprinted with the permission of Mound Cotton Wollan & Greengrass. The entire article is available from co-author Jeffrey S. Weinstein, J.D., at jweinstein@moundcotton.com.

Overview[1]

During spring 2009, the Swine Flu, or H1N1 Virus, which has been reported to have only sporadically appeared since at least the close of World War I,[2] re-emerged as a worldwide health crisis.[3] The Centers for Disease Control (CDC) reported that it expects this disease to continue to spread globally.

Its recent outbreak reached proportions that raised concerns worldwide, especially in North America. The World Health Organization (WHO) reports that as of March 2010 a total of 213 countries and territories reported laboratory confirmed infections, and estimated that there have been at least 16,713 deaths from the Swine Flu. The CDC reports that there were approximately 42 to 86 million cases of Swine Flu in the United States for the period April 2009 to February 2010. The CDC estimates 8,520 to 17,620 deaths resulted from the Swine Flu during that period.

In anticipation of the first-party property claims that may be submitted in connection with this and future outbreaks, we have attempted to identify the coverage issues that we believe will prove to be the most significant.

What is Swine Flu?

Swine Flu is a respiratory disease caused by Type A influenza (H1N1) viruses that cause regular outbreaks in pigs. While these viruses occur naturally among pigs, and people do not normally contract Swine Flu, human infections can happen and indeed have happened. Moreover, Swine Flu viruses are contagious and can be passed from person to person. The symptoms are similar to the symptoms of regular human flu and include fever, cough, sore throat, body aches, headache, chills and fatigue. Severe illnesses, including pneumonia and respiratory failure, have been known to accompany the virus. And like ordinary flu strains, the Swine Flu has been known to worsen underlying chronic medical conditions.

Although sales — and correspondingly prices — of pork and other pig products reportedly decreased as a result of the reports of Swine Flu, the CDC reports that the virus is not spread through the consumption or preparation of food. Indeed, there appears to be no connection whatsoever between the pork industry and the current outbreak. Nonetheless, when the outbreak began, several countries, including the Philippines, Kazakhstan, Ukraine and Ecuador, banned some or all pork products from the United States or specific states within the United States, with Mexican pork exports also covered by most of those bans. Russia and China, which together account for roughly 30 percent of all U.S. pork sales, banned all meat imports, not just pork, from certain states for a period of time.

'Physical Damage'

Some first-party insurance policies (particularly those written in the London Market and those issued to health care facilities) contain extensions of coverage for business income losses arising from an "outbreak" of an "infectious" or "communicable" disease. These coverage provisions can be implicated if there is an interruption and/or interference with the insured's business. Such policies do not require that there be property damage for coverage of business interruption losses, as would be the case under most U.S. policies.

On the other hand, the more customary forms of business interruption and contingent business interruption coverage, particularly those written in the United States, typically require that the insured property or some other qualifying property suffer some form of direct physical loss or damage as a predicate to coverage for loss of business income. Therefore, it may become important to determine whether the detection of a viral infection such as Swine Flu at an insured premises can constitute **direct physical** loss or damage.

A number of courts in the United States have wrestled with whether some form of contamination constitutes physical damage. For example, in *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 U.S. Dist. LEXIS 11873 (D. Or. 1999), the policy insured against "all risks of direct physical loss of or damage to the property insured except as hereinafter excluded." *Id.* *1 Inventory at the insured's warehouse sustained water damage resulting from rainwater entering the building and saturating fabric and garments stored therein. The insurer paid for damage to the building and the loss of water-saturated garments and fabrics. The insured sought coverage for the remainder of the property on the theory that it had been damaged by "elevated levels of microbial mold and fungi." *Id.* at *2.

The court noted that "the *insured* need only show that a physical loss occurred to covered property." *Id.* at *4. The court also opined that "physical damage can occur at the molecular level and can be

undetectable in a cursory inspection." *Id.* at *6. The court held, however, that "to the extent that plaintiff seeks to recover for losses other than direct physical loss or damage (e.g., loss in value solely from a decision not to sell as first-quality goods), plaintiffs may not recover." *Id.* at *5; see also *Prudential Prop. & Cas. Co. v. Lillard-Roberts,* 2002 WL 31495830 (D. Or. 2002) (holding that because the house had visible and unremovable mold, it had suffered "distinct and demonstrable" damage sufficient to constitute a "direct" and "physical" loss); but see *Borton & Sons, Inc. v. Travelers Ins. Co.,* 2000 Wash. App. LEXIS 1593 (Wash. Ct. App. 2000) (holding that loss in apple sales resulting from the stigma of an ammonia leak in a different warehouse was not sufficient to create coverage); *Pirie v. Federal Ins. Co.,* 696 N.E.2d 553, 555 (Mass. 1998) (holding that levels of lead in paint many times the legal limit did not constitute a "physical loss"); *Great Northern Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Assoc.,* 793 F. Supp. 259, 263 (D. Or. 1990), aff'd, 953 F.2d 1387 (9th Cir. 1992) (holding that "direct physical loss" did not include the cost of removing asbestos because the building had remained physically intact and undamaged by the presence of asbestos); *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.,* 311 F.3d 226, 232 (3d Cir. 2002) (observing that the "continued and uninterrupted use of the buildings without any indication of elevated airborne asbestos levels, coupled with the plaintiffs' own assurances of public safety, 'belie the existence of contamination to the extent required to constitute physical loss or damage'").

In these cases, the key word is "physical," which is thought of as a "distinct and demonstrable" alteration of the property. Cases involving alleged asbestos or mold damage may be distinguished from situations where an odor is so pervasive that it can rise to the level of a distinct and demonstrable alteration of property.

One oft-cited decision in this context is the decision in *Western Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52 (Colo. 1968), which addressed whether the insured, whose church building was shut down because gasoline and vapors had "infiltrated and contaminated the foundation and halls and rooms," suffered a "direct physical loss." *Id.* at 54. The court expressly rejected the insurer's characterization that the loss was simply a "loss of use," and held that it was "a direct physical loss" as defined by the policy. See also *Largent v. State Farm Fire & Cas. Co.,* 842 P. 2d 445, 595 Or. Ct. App. (1992) (holding that odors from methamphetamine cooking were "direct physical loss" to covered property under a homeowner's policy); *Matzner v. Seaco Ins. Co.,* 1998 Mass. Super. LEXIS 407 (Mass. Super. Ct. 1998) (holding that carbon monoxide levels in apartment buildings sufficient to render the buildings uninhabitable constituted a direct physical loss); but see *Crestview Country Club, Inc. v. St. Paul. Guardian Ins. Co.,* 321 F. Supp. 2d 260 (D. Mass. 2004) (declining to follow *Matzner* and holding that "physical" must be given its plain and ordinary meaning, i.e., "material").

These cases provide fodder for debate as to whether a building "infected" with the Swine Flu virus has suffered a "direct physical" loss under U.S. law. Although on the one hand it is almost

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inconceivable that a virus could cause a distinct and demonstrable alteration to a building, the "odor" cases may lay the groundwork for an argument that physical damage can exist even if the structure itself does not suffer some tangible injury. Indeed, even in the asbestos context, the *Port Authority* court recognized that if asbestos fibers were to permeate a building to such a degree as to render the building unusable, a direct, physical loss can be deemed to have occurred. It is not beyond the realm of possibility then that a court would hold that the potential hazard to human health posed by Swine Flu that impairs a building's function — coupled with the likely need to decontaminate the building — is sufficient to create coverage. The resolution of this issue may well depend on the jurisdiction in which the litigation is pending and/or which state's law is applied.

Interruption or Suspension of Business

Typically, under a U.S. policy, in order for the insured to recover for Business Income loss — be it under the policy's basic business interruption provisions or an extension of coverage such as a civil authority or dependent properties provision — it must also be established that some covered event caused the insured to suffer an "interruption" or "suspension" of its business operations. Many courts have interpreted those terms narrowly to mean a cessation of operations as opposed to a mere decrease in customers, attendance or sales. See, e.g., *Ramada Inn Ramogren, Inc. v. Travelers Indemnity Co.*, 835 F.2d 812 (11th Cir. 1988) (no coverage for decrease in occupancy where hotel operation was able to accommodate the same number of patrons); *Howard Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398, 441 N.Y.S.2d 674 (1st Dept. 1981) (no coverage for business interruption where there was no actual suspension of the insured's business operations but merely an adverse effect on continuing sales), *aff'd*, 56 N.Y.2d 991 (1982); see also *National Children's Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428 (2d Cir. 1960); *American States Ins. Co. v. Creative Walking, Inc.*, 16 F. Supp. 2d 1062, 1065 (E.D. Mo. 1998) (applying Mo. law), aff'd, 175 F.3d 1023 (8th Cir. (Mo.) 1999); *Royal Indemnity Ins. Co. v. Mikob Properties, Inc.*, 940 F. Supp. 155, 160 (S.D. Tex.1996); *Home Indemnity Co. v. Hyplains Beef*, 893 F. Supp. 987, 991 (D. Kan.1995); *Keetch v. Mutual of Enumclaw Ins. Co.*, 831 P.2d 784, 786 (Wash. Ct. App. 1992); compare *Omaha Paper Stock Company v. Harbor Ins. Co.*, 596 F.2d 283 (8th Cir.1979); *Hawkinson Tread Tire Service Co. v. Indiana Lumbermens Mutual Insurance Co. of Indianapolis, Ind.*, 245 S.W.2d 24 (Mo. 1951).

If coverage depends upon a "necessary suspension of business" (or similar language), then a business that experiences a reduction in patronage/income as the result of Swine Flu-related events arguably would not be able to recover for business interruption loss if it remains open (or able to open) for business. On the other hand, a policy requiring only that the business be "interfered with" suggests coverage does not depend on an actual suspension and/or cessation of business. Thus, if the insured can establish a decrease in patronage because of an interference with its business caused by an infectious disease, even in the absence of a suspension of operations, this element may be satisfied under such policies. This, of course, is but one of the requirements that would need to be considered and whether coverage ultimately is available would depend on the specific policy wording and whether the other policy requirements are satisfied.

Causation

Business interruption and contingent business interruption (CBI) coverage require that the interruption or suspension of the insured's business be caused by some variation of direct physical loss of or damage to the insured's property, or in the case of CBI, someone else's property. The causal connection between damage to a qualifying property (the insured's property, a dependent property, etc.) and the interruption/suspension of the insured's business is a key predicate for this coverage. Depending on the policy wording, a downturn in business because of the presence of Swine Flu in a particular area — even if it manifests at a dependent or attraction property — might not be a covered loss.

For example, in *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp.*, 486 S.E.2d 249 (N.C. Ct. App. 1997), a snowstorm caused some damage to the insured's roof, and the insured submitted a property damage claim, which was paid. The insured then sought to recover for lost profits resulting from the interruption of its business due to the snowstorm. The roof damage, however, did not result in any interruption of business. The sole basis for the business interruption claim was that the storm rendered the premises inaccessible. The court upheld the denial of business interruption coverage, noting that the insured "neither alleged nor offered proof that its lost business income was due to damage to or the destruction of the property, rather all the evidence shows that the loss was proximately caused by plaintiff's inability to access the dealership due to the snowstorm." *Id.* at 251–252.

Thus, where the policy requires a causal connection between damage to property and the interruption of business, if an infectious disease indirectly interferes with the insured's business by deterring potential customers, coverage will not necessarily follow.

Loss of Attraction

In addition to basic business interruption and contingent business interruption coverage, some policies extend coverage to include loss sustained by the insured as a result of the interruption of the insured's operations caused by damage to property at an "attraction" or "leader" property.

What constitutes an "attraction" or "leader" property is usually defined by the policy. See, e.g., *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir. 2005) (defining "Attraction Property" as "properties within one mile of [the insured's] location, not operated [by the insured], which attract[s] potential customers to [the insured's] location"); see also *Zurich American Ins. Co. v. ABM Indus, Inc.*, 265 F. Supp. 2d 302 (S.D.N.Y. 2003), rev'd, in part, 397 F.3d 158 (2d Cir. 2005) (holding that the janitorial service provider for the World Trade Center was not entitled to recover under the "Leader Property" provision of the policy because "neither the World Trade Center nor its constituent parts is 'leader property' in the 'vicinity' of [the insured] which 'attracts business' to [the insured], but rather is itself the site and source of the [insured's] business ... at issue").

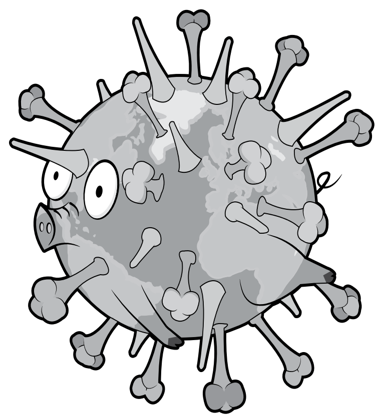
Generally, in order for there to be coverage under this type of policy, there must be damage within the vicinity that results in a "loss of attraction" to the insured's business. Here, it must be the damage, and not the fear of flu generally, that causes the loss of attraction. If it is simply the presence of flu in the vicinity of the insured's premises, and not the damage caused by flu, that deters business, this provision would not apply.

Was There an Outbreak?

Another issue that may come into play in evaluating "infectious disease" coverage extensions or similar wording is whether the manifestation of the disease rises to the level of an "outbreak." There is no uniform definition of the term "outbreak," and it may vary depending on the disease at issue. For example, the CDC considers one case of SmallPox to constitute an "outbreak," but three cases of the more common Varicella (Chickenpox) are necessary before an outbreak will be declared. Given that the CDC and the WHO declared Swine Flu in 2009 to be a "pandemic," an outbreak that occurs over a wide geographic area and affects a high proportion of the population, we believe the requirement that there be an "outbreak" has been met.

Prevention of Access

Because the Swine Flu epidemic may lead to the postponement or cancellation of many events, and is likely to have significant impact on travel-related businesses in general, we may see claims brought under various extensions of coverage for first-party policies in which physical damage at the insured location is not a prerequisite for coverage.



A typical example of such coverage can be found in a "civil authority" provision, which provides coverage if access to the insured's premises is "prevented" or "prohibited" by order of a civil authority because of damage to some other property. Ordinarily, complete prevention of access is necessary. Difficulty in accessing the insured's premises would not be sufficient to afford coverage. See, e.g., *Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, LLP v. National Fire Ins. Co. of Hartford*, 2007 U.S. Dist. LEXIS 64849 (M.D. La. 2007) (finding no "prohibition of access" where the government authority merely "recommended" and "encouraged" residents to stay off the streets following a hurricane); *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 912 (fn. 6) (W.D. Tenn. 2001) (holding that there was no civil authority coverage where insured was denied use, as opposed to access, to the hotel); 730 *Bienville Partners, Ltd. v. Assurance Co. of Am.*, 2002 U.S. Dist. Lexis 18780 (E.D. La., 2002), aff'd, 67 Fed. Appx. 248 (5th Cir. 2003) (holding that difficulty in reaching the hotel as a result of suspension of air travel following September 11 did not satisfy the requirement that access be prohibited).

Moreover, the civil authority order typically must be in response to physical loss of or damage to some property. See, e.g., *South Tex. Med. Clinics, P.A. v. CAN Fin. Corp.*, 2008 U.S. Dist. LEXIS 11460 (S.D. Tex. 2008) (upholding the requirement that the evacuation order be due to direct physical loss of or damage to property and not merely the fear that the hurricane would result in physical damage); *Syufy Enterprises v. The Home Ins. Co. of Ind.*, 1995 U.S. Dist. LEXIS 377 (N.D. Cal. 1995); *Brothers Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. Ct. App. 1970).

Sue and Labor

The "Sue and Labor" clause became a major (and, for the most part, ultimately unsuccessful) focus of insureds hoping to recover for Y2K preventive activities. The Swine Flu virus certainly has the potential to encourage similar claims by insureds who will seek recovery for prophylactic measures taken to prevent the spread of infection at their premises.

A typical Sue and Labor provision reads:

> "[i]n case of actual or imminent loss or damage by peril insured against, it shall, without prejudice to this insurance, be lawful and necessary for the Insured . . . to sue, labor, and travel for, in and about the defense, the safeguard, and the recovery of the property insured ... ."

The Sue and Labor clause functions to "reimburse [an] insured for those expenditures that are made primarily

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for the benefit of the insurer to reduce or eliminate a covered loss." *Tillery v. Hull & Co., Inc.*, 717 F.Supp. 1481, 1486 (M.D.Fla. 1988) (quoting *Blasser Brother*, 628 F.2d 376, 386 (5th Cir. 1980)), aff'd, 876 F.2d 1517 (11th Cir. 1989) (emphasis added); see also *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991); *Destin Trading Corp. v. Royal Ins. Co. of Am.*, 1990 WL 238988 (E.D. La. 1990) (coverage under the Sue and Labor provision is "tied irrevocably to the insured perils coverage of the policy ... [as] recovery is only permitted for those expenditures made to avert or minimize a loss" that would be covered under the policy); *Continental Food Prods, Inc. v. Ins. Co. of N. Am.*, 544 F.2d 834 (5th Cir. 1977).

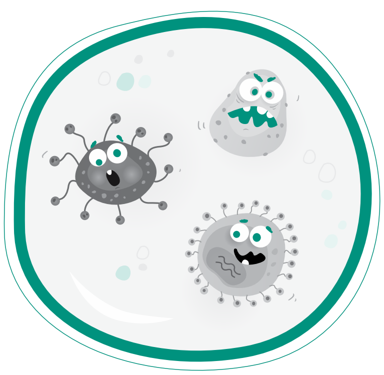
Thus, in order to establish a claim for Sue and Labor, an insured must establish: (1) that the expenses were incurred to avoid an "imminent" loss; and (2) that the Sue and Labor efforts performed and costs incurred were for the insurer's benefit, i.e., to avoid or minimize a loss that otherwise would be covered under the policy in question.

Number of Occurrences

Another potentially significant area of concern in Swine Flu claims is how courts will decide to treat policy limits that are based on a "per occurrence" or "per event" scenario. The question of "number of occurrences" has been heavily litigated under U.S. law, recently most notably in the "Silverstein Litigation" *SR Int'l Bus. Ins. Co. Ltd v. World Trade Ctr. Props., LLC*, 222 F. Supp. 2d 385 (S.D.N.Y. 2002), aff'd, *World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2d Cir. 2003). The various decisions (from many jurisdictions) often are difficult to reconcile because the positions of the litigants are inevitably based on the expected outcome. For instance, an insured looking to recover multiple policy limits will argue for a ruling of multiple occurrences, whereas an insurer looking to apply multiple deductibles would promulgate a multiple occurrence position. It remains to be seen how the principles developed under United States law may play out in the context of a Swine Flu claim.

Product Recall Coverage

Many companies in the food products and pharmaceutical industries protect themselves from losses driven by "contamination" incidents by purchasing "accidental contamination," "malicious product tampering" or "product recall" insurance. These policies generally protect the insured against profit losses and cover recall expenses as well as expenses incurred to rehabilitate the product following a recall. Although loss of profits can occur after widespread consumer panic and long-term loss of interest in the recalled product, for the most part these policies only provide coverage when it is the insured's own product that is contaminated.



To underscore the point that these insurance products are designed to cover expenses arising strictly from contamination to an insured's own product, rather than losses associated with a media-driven frenzy, these policies usually exclude losses that are attributable to "changes in consumer tastes," "changes in the competitive environment" or "loss of market share." Even when the insured's own product is contaminated, if the insured's claims are exacerbated by similar problems suffered by a competitor, or by the industry as a whole, the incremental increase in the insured's claim would not be covered.

The public's reaction to negative news coverage of the recent swine flu outbreak is starting to result in an apparent decrease in the purchase of pork products[4] and has caused significant anxiety and financial loss to the pork industry as a whole, even though the ingestion or handling of pork products is not a transfer mechanism for the disease. Recent efforts by the CDC, WHO and pork industry (including the public change of the name of the disease to the more technical and generic "Influenza A [H1N1]") may not stem this tide. Indeed, some media outlets apparently believe that the proverbial "cat is out of the bag" already, and the name change will have little effect on public perception.

Workers' Compensation

Depending on the language in the workers' compensation statutes and policies in each state, workers' compensation coverage could be called on to respond to certain Swine Flu-related claims if the threshold compensability requirement is met. The majority of states' workers' compensation statutes require the claimed injury or illness to be "arising out of and in the course of" employment.

In all likelihood, the critical issue will be causation. Infected workers must prove that exposure to the virus "arose out of" and occurred "in the course of" their employment. The issue of whether workers will actually meet this burden will depend on the individual circumstances of each claim.[5] Although coverage would depend on the specific statutory and/or policy language involved, it is unlikely that workers who merely contract the Swine Flu during the course of their employment or at their workplace would qualify for workers' compensation benefits unless the risk of exposure is special or peculiar to the nature of the work involved such that it "arises out of" the employment. For example, health care workers might have arguable claims because they are especially at risk to the Swine Flu to the extent they would be

required to have contact and treat patients infected with the contagious condition.

We may also see an incidence of workers who are required to handle pork products as part of their employment duties claimed to be among the most susceptible to Swine Flu infection and to have compensable workers' compensation claims — except, under some circumstances, farm workers who are exempt from workers' compensation statutes. But, recent efforts in the media and by the pork industry (as well as by the CDC) to dissociate the presence or spread of the virus from exposure, handling or ingestion of pork products may minimize this risk to insurers.

Under California law, a claim for injury or disability from a non-occupational disease — i.e., a disease that is not an incident to a particular kind of occupation and that is contracted merely because of exposure during work — is not compensable. To recover under the California workers' compensation statute, it is not sufficient that the disease is contracted on the employer's premises, but the disease must result from the hazards of the particular kind of employment. See, e.g. *Johnson v. Industrial Acc. Comm.*, 157 Cal. App. 2d 838, 321 P.2d 856 (Dist. Ct. App., Cal. 1958) (holding that disability was not compensable because claimant's exposure to polio occurred only incidentally during the course of her work as a recreational director and not from the nature of her work); but see *San Francisco v. Industrial Acc. Comm.*, 183 Cal. 273, 191 Pac. 26 (1920) (upholding an award for the hospital steward because the medical testimony established that the steward contracted influenza as a result of his peculiar exposure to it in connection with his occupational duties during a pandemic).

Similarly, in order to obtain workers' compensation benefits under New York law, a claimant must establish a recognizable link between the claimant's condition and some distinctive feature of his or her occupation. See *Palmer v. SUNY Upstate Med. Univ.*, 14 A.D.3d 737, 787 N.Y.S.2d 489, 491 (3d Dep't 2005). The fact that an injury is the result of a specific condition peculiar to the claimant's place of work does not by itself make the claim compensable under the workers' compensation statute. *Martin v. Fulton City School Dist.*, 300 A.D.2d 901, 754 N.Y.S.2d 676, 677 (3d Dep't 2002) (holding that a teacher's chronic rhino-sinusitis and upper airway irritation resulted from exposure to dust and mold in a building where she worked, but was not compensable because her disability did not result from some distinctive feature of her employment as a teacher).

Conclusion and Parting Thoughts

The issues discussed in this paper relating to property and monetary losses obviously pale in relation to the human loss. Nonetheless, as so often happens in the insurance industry, world events and tragedies inevitably generate insurance claims activity, and such claims inevitably give rise to new legal issues, or at least place familiar issues in novel contexts. One must also give consideration to the current economic situation of the world and recognize the impact that it may have on the occurrence and number of claims submitted as a result of Swine Flu. ■

Endnotes

1. The Centers for Disease Control (CDC) and World Health Organization (WHO) Web sites (www.cdc.gov/swineflu and www.who.int) are the primary source of the information contained in the first two sections.
2. The "Spanish" influenza pandemic of 1918–1919 caused roughly 50 million deaths worldwide. An estimated one-third of the world's population (or 500 million persons) was infected and had clinically apparent illnesses during that pandemic. All influenza A pandemics since that time, and indeed almost all cases of influenza A worldwide (excepting human infections from avian viruses such as H5N1 and H7N7), have been caused by descendants of the 1918 virus, including "drifted" H1N1 viruses.
3. This is not to say that Swine Flu has not appeared since 1918. Rather, its occurrences have been very limited and resulted in very few deaths, if any.
4. Notwithstanding seasonal or cyclical price drops in the industry, pork producers undoubtedly will flag the virus outbreak as the cause of the recent price drop.
5. With regard to exposure overseas, many states extend benefits to those injured outside their territory provided the contract of hire was made in the state or the principal location of employment is in the state. U.S. nationals assigned to work outside of the United States for an extended period or indefinitely generally are not covered by workers' compensation policies absent a foreign voluntary workers' compensation endorsement with language providing coverage for endemic disease, such as Swine Flu.

Why, When and How to Use a Civil Engineer

by Thomas A. Mierzwa, P.E.

Thomas A. Mierzwa, P.E., is a licensed civil-structural engineer with LWG Consulting, investigating civil-structural claims for various adjusters and attorneys. Licensed in 12 states, he has more than 12 years' experience handling forensic claims in all areas, including structural design, construction and inspection. Mierzwa is a member of the New England Claims Executives Association as well as the American Society of Civil Engineers. He can be reached at (603) 714-8197 or tmierzwa@lwgconsulting.com.

Civil engineers are often overlooked when it comes to hiring an expert for insurance investigations. The field of civil engineering is quite broad, and probably factors into more damage claims than one would think. Much of the world around us — from buildings, bridges and roadways to underground pipelines, waterways, flood surveys and traffic flow — is impacted by civil engineering.

Why would an insurance adjuster want to use a civil engineer? Did the homeowner discover foundation cracks in his or her new home that indicate vibration from nearby construction activities? Did a contractor utilize improper methods or materials during a new project causing damages and major time delays? Was there a defect in a stairway that caused a patron to fall and injure himself? How significant is the water damage to a specific building?

There is always a fine line as to how well an adjuster can answer these types of questions on his or her own without receiving coverage disputes from the insured or claimant. Do I pay this or that? Do I pay at all? If I deny the claim, will a lawsuit commence? What about subrogation? Most likely, these questions pass through an adjuster's mind every day. A civil engineer can assist insurance adjusters in answering these common questions.

When structural damage is suspected, a civil engineer can determine if a foundation crack was caused by construction activities by visually examining the cracks for details such as color, sharp edges or the presence of any dust, debris and/or paint. Additionally, a civil engineer will inspect for evidence of building settlement, soil conditions and temperature changes within building materials as well as examining preconstruction damage surveys and seismographs.

Within the construction field, a civil engineer can evaluate the roles of various contractors working on the same project. Factors such as weather, time constraints and contractor coordination can complicate activities, especially those granted to the lowest bidder. In these cases, a civil engineer can recognize trends that lead to cost-cutting methods, substituted materials and labor quality as well as identify details that could contribute to the problem.

Civil engineers can also be assets to insurance adjusters in cases of construction accidents. Construction accident cases can involve multiple parties, including the claimant, contractors, subcontractors, suppliers, installers, various third-party inspectors, safety officials, owners and town representatives. In investigating whether proper safety or building practices were followed, a civil engineer can lead the investigation to provide insight and ideas on what could have been done to have prevented the accident. Due to the potentially large number of parties and various building, construction and safety codes involved, this process can become very complicated. Having an expert on hand to assist with the many details

of construction accident cases greatly alleviates chances of risk and exposure.

Due to the recent recession, many insurers have seen increased instances of fraud, even in the form of slip-and-fall claims. In these situations, a civil engineer can assist with investigating the conditions of walkway surfaces and stairways in cases where a claimant alleges to have been severely injured. Civil engineers can inform the adjuster on the amount of required lighting along the means of egress, such as stairways and aisles; perform coefficient of static friction testing; measure clearances between the stairway treads and risers; and comment on the surface contrast. In these claims, the age of the building, recent renovations, upgrades, existing building codes and maintenance requirements are some of the imperative factors used when determining degrees of negligence and fault as well as identifying potential responsible parties.

Weather-related losses are another area where a civil engineer can greatly assist with claim investigations. The wreckage from a catastrophic hurricane strike can devastate whole cities and cost insurers and reinsurers hundreds of millions of dollars. The common question tends to be what damage was caused by wind and rain and what damage was caused by flood. A civil engineer can provide a site inspection documenting crucial information to help separate these damages.

Water-mark lines along building walls, trees and hills should always be inspected. Impact strikes indicative of objects crashing around during a tidal surge period are major indicators of flood damage. Usually, wind damage affects weaker materials, such as vinyl siding and asphalt-shingled roofs. Wind forces are strongest along building corners and edges and can damage structures from both a positive and negative (vacuum) pressure. If a building is entirely leveled without anything left to inspect, civil engineers can also estimate damage that could have been caused by wind, rain and flood based on storm weather data and flood survey maps.

As structural, construction, weather damage and accident claims occur, the question of when to bring a civil engineer onboard arises. On a covered first-party loss, the scope and costs of actual damages are paramount. For the upfront minimal cost of having a civil engineer perform an inspection, his or her information can be used as a method of checks and balances to prevent an insured, its contractor or public adjuster, for instance, from swelling a $50,000 repair-damage claim to a new $300,000 structure. Also, a civil engineer adds value to any investigation by providing highly specialized repair schemes that are safe and code compliant and that minimize downtime. For a small percentage of claims, the value provided can reduce the overall claim-handling process.

When dealing with most construction liability claims, several weeks or months have passed before third parties are aware that an incident occurred. Sometimes the incident area has been disturbed, repaired, cleaned or replaced, which makes the scene extremely difficult to inspect. A civil engineer can review various plan documents, specifications, contracts, daily logs, photographs and, hopefully, remaining evidence, in order to assemble a timeline of what happened, when and by whom. Regardless of time, it is always important that a site visit be performed if claims are in litigation. Site visits add an aspect of credibility to any defense and help provide valid insight that otherwise is extremely difficult to obtain. To most, that edge would seem well worth the minimal expense to help potentially lower the overall exposure amount.

For the cost of hiring a licensed civil engineer, an adjuster can be assured that the most common aspects of structural damages, construction claims, premises liability and any weather-related losses can be determined with authority. This additional investigation, which utilizes the scientific-method approach to investigations, including evidence testing and engineered calculations, paired with the education and background of a licensed civil engineer, will add a quality that can provide a strong technical opinion to assist both first-party property and third-party liability claims. ■

Kidnap and Extortion — A Global Concern

by Kevin Henry

Kevin Henry is vice president of crisis management for Hiscox, a specialist insurer underwriting personal and business risks. Henry has spent more than 17 years working in the international risk assessment and insurance field. He is a U.S. Navy veteran and holds a bachelor's degree in economics from West Chester University of Pennsylvania and a master's in business administration from Wilmington College. He holds a certificate degree in terrorism and national security management from Kaplan University and is a graduate of the U.S. State Department's Security Overseas Seminar and the FBI's Citizen's Academy. Henry is an adjunct professor and guest lecturer on terrorism and counterterrorism for various universities and is an active member of the International Association for Counterterrorism & Security Professionals.

Editor's note: This article originally appeared in the CPCU Society's International Insurance Interest Group March 2008 newsletter.

Kidnap, ransom and extortion (KRE) has become a global industry. Don't believe me? Recent press reports document kidnap and extortion incidents in places as diverse as China, India, Nigeria, Italy, Russia, Japan, Indonesia, Argentina, and even the United States and Canada. Of course, there are plenty of kidnap examples from the traditional kidnapping capitals of Colombia, Mexico, Philippines, Afghanistan, Brazil and Venezuela. There are more than 20,000 reported kidnap for ransom incidents annually, with 48 percent of them occurring in Latin America. Notice the use of the word "reported" incidents — the vast majority of kidnap and extortion incidents are never reported. Experts estimate the actual number of annual kidnap and extortion incidents worldwide is five to six times the reported number, worth hundreds of millions of dollars annually. Incidents affect organizations as varied as small businesses, large corporations, wealthy families, churches, relief organizations, media groups and universities. There is no country or organization on earth immune to kidnap, ransom and extortion incidents.

One of the most common discussion points relate to the current top 10 most risky areas in the world for KRE incidents. Since we know that most KRE incidents are not reported (usually due to distrust or outright participation by local law enforcement), the top 10 list changes month to month, depending on reported incidents, underground reports, local security conditions and local political conditions. Some areas are consistently known as "kidnap hotspots." These areas include Mexico, Brazil, Colombia, Venezuela, Philippines, Nigeria, Chechnya region of Russia and Afghanistan. These areas have a long history of using kidnapping for ransom to further tribal disputes, fund separatist movements, fuel organized criminal gangs and fill the coffers of drug cartels. Incidents in areas like Iraq, Haiti, South Africa, Argentina, Nepal and Chechnya region of Russia ebb and flow, depending on the security and political situation on the ground and the criminals' need for funds. The newest area to be welcomed to this distinguished list is India, with the Indian government acknowledging more than 700 active kidnap for ransom gangs. The Indian gangs range from separatist and jihadist movements located in the rural parts of the area to highly organized crime groups operating in the major cities. Organizations around the world are turning to comprehensive kidnap, ransom and extortion insurance programs for financial protection and expert advice on how to successfully mitigate these incidents.

It's not often you can say that insurance saves lives — literally. But, in the case of KRE insurance, thousands of lives are saved annually by the coverage, training and response services provided by such insurance policies. The key to obtaining full value from a KRE policy is to verify that the coverage and response fit the exposure presented by the policyholder.

Two long-standing myths surrounding KRE insurance should be dispelled immediately. One, KRE policies do not directly pay the ransom or extortion demand for the client. All KRE policies are reimbursement forms, designed to reimburse the policyholder for ransoms and expenses incurred during a covered incident. Secondly, KRE policies do not provide for the services of a special forces team to rescue the victim. **Russell Crowe** is not going to swoop down and pull the victim to safety (sorry, leave that to Hollywood). KRE policies do provide for the services of very specialized consultants, who assist the client in negotiating a kidnap or extortion incident. That might sound less exciting, but negotiation is much safer and more successful than rescue attempts where the first person injured or killed is often the victim.

It is important to confirm who is insured under a KRE policy and when coverage applies. Most KRE policies cover all employees, officers, directors and relatives. Often guests and residents of the household are covered. But, what if the organization has students, volunteers, independent contractors and consultants? Those categories may need to be endorsed onto the policy. Many, but not all, KRE policies provide coverage 24 hours a day, seven days a week, both business and nonbusiness related incidents. Criminals do not ask their victims if they are traveling on vacation or business before kidnapping them, so organizations must double check that their coverage responds to both business and non-business related events.

Although it might seem obvious, it is important to confirm that the KRE program provides coverage for the specific risks facing the organization. The largest risk facing companies doing business in the United States is not kidnapping but extortion. Many companies across the United States have received e-mail and phone messages threatening to kidnap an employee or child of an employee if a ransom or extortion demand is not paid. Increasingly, criminals are resorting to computer virus threats — the release of a computer virus into a company's system if a ransom or extortion demand is not paid. Not all KRE programs automatically provide coverage for such ransoms or computer virus-related extortion demands. Nongovernmental organizations (NGOs), media companies, relief groups and religious groups face an increasing risk of wrongful detention (detention without a ransom demand, often political in nature) in countries like Venezuela, Zimbabwe, Afghanistan, Iran, China, Russia and many of the former Soviet Republics. These groups need to confirm that their KRE program will respond to incidents of wrongful detention. Finally, it is important to confirm that broad expense coverage is provided by the KRE policy. Many policyholders have to take out loans to pay a ransom or extortion demand — interest costs and related fees should be covered by the KRE policy. Other expenses that should be covered are travel, salaries of the victim and replacement employee, business interruption, rest and rehabilitation, informants, extra security and job retraining.

The most important parts of any KRE policy (and most overlooked) are the preventative and response services included within the policy. This is the part of a KRE policy that most directly saves lives. All KRE policies contain the specialized services of a response firm. These firms employ consultants who respond to a threat or incident and assist the policyholder in negotiating the safe release of a kidnap victim or the successful resolution of an extortion attempt. These consultants are usually retired law enforcement, military or intelligence officers with specific country and language skills. Their maturity, local country knowledge, local contacts and negotiation experience ensure the vast majority of kidnap victims are released unharmed. Negotiation tactics surround one common goal — the safe release of the victim. If negotiations are held correctly, the victim, victim's family and victim's company will be less likely to be targeted in the future.

Finally, many KRE policies contain preventative services (i.e., loss control) from the response firm. These preventative services vary depending on the nature of the exposure, but can include safe travel training, country-specific briefings, site security surveys, kidnap simulations, kidnap prevention briefings and crisis management plan creation. One important point to note — the fees for the response consultants are most often paid directly by the insurance company, so the client does not have to be concerned about paying for response services in the event of an incident. Some preventive services may also be covered by the insurance company.

When reviewing response firms and their services, it is important to make sure the consultants match the exposure presented by the policyholder. For example, a relief organization with employees in Iraq and Nigeria does not benefit by a response company that does not have local representation, language capabilities, contacts or experience. A manufacturing company with operations in China receives no value from a response firm that doesn't have consultants in Asia. For a company with an office in Brazil, KRE coverage provides no value if the response company doesn't have local representation with Portuguese speakers and experience dealing with Brazilian kidnap gangs. Finally, a financial institution in the United States with a large exposure to extortion needs to ensure its response consultants have U.S.-based law enforcement backgrounds, as well as access to computer extortion experts. Insurance professionals and clients should not be afraid to ask pointed questions about the consultants, their expertise, worldwide locations, language capabilities and negotiating tactics.

Kidnapping for ransom is an ancient crime and continues to be a frequent and profitable offense. Technology and political events around the world have allowed criminals involved in kidnapping for ransom to branch out into related crimes such as extortion and wrongful detention. Organizations of all sizes and shapes have a responsibility to protect their assets, especially their employees. A kidnap, ransom and extortion insurance policy can help prevent and respond to such incidents through appropriate coverage, training and response services. ■

Ethics and Adjusting Claims

by Charles W. Stoll Jr., CPCU, AIC, RPA

Charles W. Stoll Jr., CPCU, AIC, RPA, is branch manager of GAB Robins North America Inc. in Westmont, Ill., and is the newly-appointed assistant editor of the *Claims Quorum*. He has had a career in claim and risk management positions. Stoll received his CPCU designation in 1991 and is currently acting president of the Chicago-Northwest Suburban Chapter.

Adjusters face tough situations when it comes to acting in an ethical manner with the various entities that they deal with when adjusting claims. Adjusters must maintain ethical conduct with the party that contracts for their services. Company adjusters owe that conduct to their employers; independent and public adjusters owe that loyalty to the party that hires them to handle the claim. All parties to a claim — the insured, the claimant, vendors, attorneys, other adjusters and anyone else who has a vested interest in the claim's fair and equitable settlement — are also owed ethical consideration by the adjuster.

The adjuster must obtain truthful and factual information in the investigation and settlement of the claim. This information comes from disinterested parties as well as from interested parties. Insurers and self-insureds will set reserves or set aside funds to pay the claim and related expenses based on the information provided by the adjuster. The adjuster is expected to be the eyes and ears of the party that contracted for his/her services. The party that contracted the adjuster to investigate the claim expects that he/she will be honest, forthright and ethical in dealings with all parties to the claim. Unethical behavior will jeopardize the handling of the claim. Such conduct could make the parties that contracted for services be viewed in the same unethical manner as the offending adjuster.

Insurance companies or self-insureds sometimes rely on the adjuster to review and interpret coverage. The adjuster is obligated to give an honest assessment of coverage. If the adjuster has any doubts about coverage, he/she must immediately bring it to the attention of the party or parties that contracted for his/her services and make them aware of the situation. Hopefully, everyone can come to a mutual agreement on how to interpret coverage. Often a decision is made to send the policy to a coverage attorney to obtain an opinion regarding coverage.

Independent adjusters, in most circumstances, do not choose appraisers, contractors or other vendors. The contracting party may make that decision, or the contracting party may simply defer to the insured or claimant to choose someone based on past personal experiences or someone who provides an acceptable comfort level. There are many instances where the independent adjuster is simply hired to write the estimate, submit it to the contracting party and close the file. Ethical consideration

still applies, as the adjuster is expected to write a clear, concise and fair estimate based on his/her observation of the damages. Attempting to bury the deductible in the estimate is unethical because the contracting party is asked to pay for more than the fair and equitable value of the loss.

Claim investigations should be done to protect all parties that have an interest in the resolution of the claim. For example, it would be unethical to investigate the claim in a manner that would show favoritism of one party over another rather than a fair, unbiased investigation. Such conduct might allow one party greater leeway in determining liability and place more responsibility for fault on another party, when in actuality both parties could be equally at fault. The focus of any claim investigation must be on the accumulation of facts and reliable information.

Another area where ethics plays an important role is the method employed to gather information and facts. Falsifying data or providing misinformation can be detrimental to the eventual resolution of the claim. Unethical behavior can make settlement impossible because one party has presented information that, while favorable to its side, is false or presents an image of no liability when the opposite is actually the truth. Equitable resolution of claims can only be accomplished when the truth is presented, and facts are clearly stated for all parties to see and understand.

Adjusters are often presented with information from attorneys, carriers, insureds, claimants, self-insureds and others that is false or provides incorrect facts that attempt to strengthen one party's cause of action and weaken another party's claim. The adjuster must make every attempt to try to investigate the claim and verify what is factual and what is false. He/she may use attorneys, state officials, private investigators, cause-and-origin investigators, specialists or other sources to confirm, verify or refute documentation presented by other

parties to the claim. The adjuster should attempt to keep all parties to the claim apprised of the investigation and be ready to answer any inquiries relating to facts or information discovered in the course of the investigation.

The adjuster must keep his/her superiors and those who have a vested interest in the resolution of the claim updated regarding the possible unethical behavior of others. This behavior can cast doubts as to the ability of all parties to reach a fair and reasonable settlement. Unethical conduct may lead to litigation and possible legal consequences for the guilty party. Ethical behavior, on the other hand, leads to an equitable resolution of the claim. ■

Your
Claims Interest Group *presents …*

Perspectives in Claims Communications — Write Makes Right

Sunday, Sept. 28, 2010 • 9:30–11:30 a.m.

Presenter: Thomas D. Martin, J.D., Swift, Currie, McGhee & Hiers; Tony D. Nix, CPCU, CIFI, State Farm

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Claims Interest Group Luncheon

Sunday, Sept. 28, 2010 • 11:45 a.m.–12:45 p.m.

Network with members of the Claims Interest Group Committee while enjoying lunch. Thomas Conrad, J.D., a partner in the law firm of Shapiro, Blasi, Wasserman and Gora PA, will speak on "Getting the Best Bang for Your Defense Counsel Buck." *Tickets are required.*

The Claims Interest Group thanks ISO ClaimSearch for generously donating funds for door prizes.

Lessons Learned from Recent Catastrophes — Have We Really Skinned the CAT?

Tuesday, Sept. 28, 2010 • 1:30–3:30 p.m.

(Co-Developed with the Loss Control and Underwriting Interest Groups)

Moderator: Jill D. McCook, CPCU, AIS, State Farm; **Presenters:** Debra T. Ballen CPCU, J.D., Institute for Business & Home Safety; Charles M. Nyce, CPCU, Ph.D., ARM, Florida Catastrophic Storm Risk Management Center

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Write a Claim Article and Earn CPD Points

by Marcia A. Sweeney, CPCU, AIC, ARe, ARM, AIS

Marcia A. Sweeney, CPCU, AIC, ARe, ARM, AIS, serves on the Claims Interest Group Committee and is the editor of its newsletter, *Claims Quorum*. Sweeney is a reinsurance claims manager for Horizon Management Group, and specializes in run-off claims management. She is an active member of the CPCU Society's Connecticut Chapter and the New England Claim Executives' Association. Her profile and contact information can be found on LinkedIn.com.

Claim professionals with a CPCU designation can earn up to 15 Continuing Professional Development (CPD) points by writing an article for publication in the *Claims Quorum (CQ)* or any other CPCU Society interest group newsletter.

One of the goals of the CPCU Society's Claims Interest Group is to provide the opportunity and the platform for members to begin to hone their writing skills. If you have a hidden desire to write and to see your name in an industry periodical byline, think about writing an article for publication in the CQ.

Write an article on what you know best — claims. It can be on technical claim handling within a particular line of business, it can be on claim management issues, claim operations, claim service, claim training and development, or anything else related to the topic of claims.

You are the author. Choose a topic that would be of interest to the 1,200-plus CPCU Society members who hold an interest in our group. A good rule of thumb is: If the topic interests you, most likely it will interest the majority of CQ readers. The article can be short (400 words is about a half-page), or it can be longer — up to four pages and about 3,000 words.

If you need help getting started, I recommend that you read the article "Technical Writing: Don't Let It Be Your Nemesis." This article was written by the late **Brian N. Marx, CPCU,** a former Claims Interest Group Committee member and originally was published in the December 2003 issue of the CQ. It is a very helpful guide that is intended to provide you with an outline to jumpstart your writing.

The article can be found in the CPCU Society's online library. Go to the CPCU Society's Web site, www.cpcusociety.org, and log in. Choose "Publications" from the top menu and select "Online Library." Click on "Online Library Database Search." You can search by author's name, article title, publication year or interest group.

Feel free to contact me at marcia.sweeney@thehartford.com if you need any assistance in choosing a topic or wanting to know an upcoming newsletter issue deadline. ■

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