

Message from the Chairman

by Debra L. Dettmer, CPCU



Debra L. Dettmer, CPCU, is director of risk management claims and loss prevention for FCCServices, a consulting firm for captives, risk management and insurance needs. She has been with FCCServices for almost 23 years. Dettmer is responsible for the claims administration of 14 different insurance lines for the Farm Credit System's Captive Insurance Company, as well as developing loss prevention models and guidelines for this customer. She earned her CPCU designation in 1987 and is a past president of the CPCU Society's Colorado Chapter. Dettmer also teaches CPCU classes on occasion.

It's hard to believe another year has gone by! Soon we will be heading to Philadelphia to celebrate "CPCU: Heritage & Horizons" at the 2008 Annual Meeting and Seminars. The Loss Control Interest Group has great speakers lined up for a session on identity theft and data protection. As an added bonus, this session is scheduled for continuing education credit. The Society is already planning for the Annual Meeting and Seminars in Denver in 2009. I hope to see you in both Philly and Denver!

Your Loss Control Interest Group leaders have been busy watching out for your interests. One bit of news to pass along to you is about a new CPCU Society membership enhancement. Beginning in 2009, every Society member will be entitled to receive benefits from every interest group and will enjoy access to all their information and publications. Stay tuned . . . it is an exciting time for the Society (and our interest group) as we grow and change to reflect our industry.

Four members of the Loss Control Interest Group Committee made it to Orlando for the Leadership Summit. A recap of our Orlando meeting discussions is as follows:

- We will begin to research CPCUs with an interest in loss control and solicit membership in our committee. You don't have to participate in the meetings, although we'd love to have you at the Leadership Summit and the Annual Meeting and Seminars to help out.
- We will improve our newsletter by actively soliciting articles. Did you know you may earn credits toward your CPD and your CSP designation by writing an article for our newsletter?

- We offer congratulations to committee members **Eli D. Stern, CPCU, Charles H. Morgan, J.D., CPCU, CLU, CSP, ARM**, and **Julie L. Sealey, CPCU**, on their new positions. Because of Eli's increased business travel, **Jan M. Dimond, CPCU, CLU, ChFC**, agreed to help out on the Web site.

The Loss Control Interest Group has received Gold in the 2008 Circle of Excellence recognition program.

For the 2009 Circle of Excellence submission, we will need everyone's input.

Our group has more contact with the general public than most, and one of our many ongoing challenges is to find out about your activities.

If you have conducted any classes or training, written any articles, or made a presentation to any group under your CPCU credential, please let us know. To report completed activities, either log in to our Web site or send me an e-mail at cpculoscontrol@gmail.com. Thanks for your help. ■

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Overview of a NCCI Research Brief

by Julie L. Sealey, CPCU



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Author's note: This is an overview of "Traffic Accidents — A Growing Contributor to Workers Compensation Losses," by Tanya Restrepo, Harry Shuford and Auntara De, published in December 2006, by the National Council on Compensation Insurance Inc. (NCCI). The complete brief is posted on the Loss Control Interest Group's home page on the Society's Web site, www.cpcusociety.org.

Compared with other types of workers compensation claims, motor vehicle claims are more severe, costly and tend to involve more lost-time, subrogation and attorney involvement. "Traffic Accidents — A Growing Contributor to Workers Compensation Losses," examines NCCI workers compensation data and provides conclusions which can help employers focus their efforts on reducing the severity of claims by encouraging safe practices and procedures.

The study contains a large number of graphs and tables of data, which, along with the conclusions and key findings, can be used to justify efforts in ensuring that fleet safety programs address employee safety. The following NCCI abstract summarizes the brief:

"In this time of declining frequency and surging severity, the workers compensation industry needs to focus on reducing high-cost injuries. A key step is developing a sound understanding of the characteristics of high-cost claims. Work-related injuries due to traffic accidents are high-cost and are a growing share of workers compensation loss costs.

"The high cost of traffic accident-related injuries and deaths is not limited to workers compensation claims. Traffic accidents are by far the leading cause of accidental deaths in the United States. Moreover, the total costs of traffic accidents borne by employers are many times greater than the workers compensation claims costs due to traffic accidents. Efforts to reduce the frequency

and severity of workers compensation claims due to highway traffic accidents should generate much more extensive benefits than just lower claims costs. Indeed, the Network of Employers for Traffic Safety estimates that both on- and off-the-job motor vehicle crashes cost employers \$60 billion per year from 1998 through 2000.

"Key findings of this study:

- Motor vehicle accidents are more severe than the average workers compensation claim, comprising close to 2 percent of claims but more than 5.5 percent of losses, on average, from 1997 to 2003. They are more likely to be lost-time and comprise a disproportionate share of the most severe claim types.
- Risk varies by type of vehicle. Frequency of fatalities is higher for trucks; frequency of nonfatal injuries is higher for passenger vehicles.
- Motor vehicle accidents comprise a growing share of workers compensation injuries. Frequency is declining but at a slower pace than for workers compensation claims overall.
- In terms of claims characteristics, motor vehicle claims impact a diverse range of occupations in addition to truckers (particularly salespersons and clerical). Top diagnoses include neck injuries, duration is more than 70 percent longer, subrogation is significant, and attorney involvement is greater.
- Driver attitudes and driving practices are essential to safety, and employers can play a large part in encouraging safe practices and procedures." ■



Danger! The Legal Duty to Warn and Instruct

by Kenneth Ross, J.D.



Kenneth Ross, J.D., of counsel to Bowman and Brooke LLP in Minneapolis, has provided legal advice to manufacturers on warning labels and instruction manuals since 1976. This article, which appeared in *Risk Management* magazine in March 2007, was adapted from a 2005 article authored by Ross and published by the Defense Research Institute. Ross can be reached at kenrossesq@comcast.net or (952) 933-1195.

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A claim of failure to warn and instruct is a staple in product liability litigation. It is also a potentially dangerous claim because it is so easy to argue that adding a few words to the label or manual would have prevented the accident from happening. For example, a chemical manufacturer was held liable because use of the word "toxic" was deemed inadequate when the consequence of not avoiding the hazard was death. In addition, manufacturers have been held liable where their warnings were deemed not conspicuous enough, were placed in the wrong location, or fell off of the product before the accident.

Standards for developing warning labels have been in existence for many years. However, in late 2006, the committee that created the warning label standards also created a new standard for instruction manuals. This committee, sponsored by the American National Standards Institute (ANSI), has created an excellent guide that should be considered by manufacturers as they evaluate their current labels and manuals.

This article will discuss the legal duty to warn and instruct, U.S. labeling standards, the new standard on instruction manuals, and best practice suggestions.

Basic Legal Duty to Warn and Instruct

Product sellers must provide "reasonable warnings and instructions" about their products' risks. The law differentiates warnings and instructions as follows: "Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or

consume." Instructions "inform persons how to use and consume products safely."

A court has held that warnings, standing alone, may have no practical relevance without instructions and that instructions without warnings may not be adequate.

Therefore, when the law talks about the "duty to warn," it includes warnings on products in the form of warning labels; safety information in instructions; instructions that affirmatively describe how to use a product safely; and safety information in other means of communication such as videos, advertising, catalogs and Web sites.

The law says that a manufacturer has a duty to warn where: (1) The product is dangerous; (2) The danger is or should be known by the manufacturer; (3) The danger is present when the product is used in the usual and expected manner; and (4) The danger is not obvious or well known to the user.

Once the decision has been made to warn, the manufacturer needs to determine whether the warning is adequate. Generally, the adequacy of a warning in a particular situation is a question of fact to be decided by the jury. However, one court provided a useful description of an adequate label as follows:

"If warning of the danger is given and this warning is of a character reasonably calculated to bring home to the reasonably prudent person the nature and extent of the danger, it is sufficient to shift the risk of harm from the manufacturer to the user. To be of such character the warning must embody two characteristics: first, it must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use; secondly, the content of the warning must be of such a

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nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person."

More specifically, various courts and commentators described a list of requirements and goals of an adequate warning. An adequate warning will:

- Alert the consumer or user to the severity of the hazard (severity being defined as the magnitude of the hazard and the likelihood of it being encountered).
- Clearly state the nature of the hazard.
- Clearly state the consequences of the hazard.
- Provide instructions on how to avoid the hazard.

A court must focus on a warning's "content and comprehensibility, intensity of expression and the characteristics of expected user groups" to determine its adequacy.

Case law concerning the adequacy of warnings and instructions is not particularly illuminating. Most of the cases talk about the adequacy of warnings either on the product or in the instruction manual. In discussing the adequacy of instructions, the cases only say that manuals should be "adequate, accurate and effective" and "clear, complete and adequately communicated."

Despite the lack of guidance from U.S. courts, there are voluntary consensus standards that do provide some help. The ANSI Z535 standards provide some good guidelines on creating warning labels and how to incorporate safety information into instructions. Unfortunately, these standards mostly provide format guidelines and not specific content guidelines. As a result, it is possible to comply with these standards and still have inadequate content, thereby resulting in potentially legally inadequate warnings and instructions.



While compliance with standards is not an absolute defense, noncompliance can be used by plaintiff's experts to argue that the manufacturer did not keep up with the "state of the art."

ANSI Standard on Labels

ANSI Z535 was initially published on June 6, 1991, with revisions in 1998 and 2002, and another revision to be published this year. This ANSI standard provides the basis for developing a warning label system. Unlike some other labeling standards, ANSI Z535.4 sets forth performance requirements for the design, application, use and placement of warning labels for all consumer and industrial products.

The purpose of this standard is "to establish a uniform and consistent visual layout for safety signs and labels applied to a wide variety of products." It is also designed to create a "national uniform system for the recognition of potential personal injury hazards for those persons using products."

ANSI Z535.4 deals with on-product warning labels and provides for a specific label format containing a signal word panel, word message panel, and an optional pictorial or symbol panel. It does not deal with instructions that accompany the product.

The message required by the standard to be transmitted, with words or symbols individually or in combination, is

(1) Nature of the hazard; (2) The seriousness of the hazard or probability that the user will encounter the hazard; (3) The consequences of encountering the hazard or the severity of the injury; and (4) How to avoid the hazard.

These requirements are consistent with the case law that requires a label to convey the "nature and extent" of the danger.

ANSI Standard on Instructions

Even if the manufacturer meets its "duty to warn" with on-product labels, with most products, it will also need some instructions. Given the limited space on products, and the ever-expanding need to warn about even remote risks, safety information in instructions is taking on increased importance.

With some products, there is only room for one label referring the user to the instructions that need to be read before the product is used. Some courts have permitted manufacturers to do that and then place all of the specific safety information in the instruction manual.

ANSI Z535.6, the new standard dealing with instructions, was published in late 2006. The purpose of the new standard is, in part, to "establish a uniform and consistent visual layout for safety information in collateral materials for a wide variety of products and establish a national uniform system for the

recognition of potential personal injury hazards for those persons using products.”

The standard applies to all “collateral material” that accompanies a product but does not include safety information placed in advertising and promotional material, or stated in audio/visual material such as safety videos and websites.

The standard includes guidelines for the purpose, content, format and location of four different kinds of safety messages:

- Supplemental directives.
- Grouped safety messages.
- Section safety message.
- Embedded safety messages.

Supplemental directives instruct users to read the entire manual or lead them to the safety information in the manual. They can be located on the cover of a manual or on the first page of a section in the manual. For example, while the standard does not specify any language, a boxed message on the cover should say something to the effect of: “Read this manual before using this product. Failure to follow the instructions and safety precautions in this manual can result in serious injury or death.” It should also say, “Keep this manual in a safe location for future reference.”

Grouped safety messages are commonly referred to as a “safety section.” This section usually appears at the beginning of the manual, before or after the table of contents, and generally describes the risks involved in the use of the product and how to minimize or avoid them. These sections should include definitions of the signal words—such as “danger,” “warning,” and “caution”—that are used on labels and in the manual, as well as reproductions of the labels in an illustration showing where they are attached to the product. If the product has symbol-only labels, the manual should describe the meaning of all symbols.

Section safety messages are included at the beginning of a chapter (i.e., maintenance or installation or operation) or within a chapter and do not specifically

apply to a procedure. They include general messages such as “Do not perform maintenance without first reading this chapter and the safety precautions at the beginning of this manual” or “Failure to follow safety precautions in this chapter could result in serious injury or death.”

Embedded safety messages are contained within a specific procedure. For example, “To prevent burns, wear protective gloves when performing this procedure.”

These different kinds of messages, albeit without these fancy names, have been in use for decades (a military standard from many years ago required a safety section in instruction manuals for products sold to the military), so many manufacturers’ manuals may not change significantly. However, for the first time, the ANSI committee is giving guidance on how to locate and format the Z535-related information in the text of the manual. There is important guidance on formatting the safety information so it is easy to see but does not overwhelm the instructional text, as is common in many manuals.

This standard only dealt with basic safety instructions usually in a manual form. However, as technological capabilities continue to develop, the standards groups, including ANSI, will provide guidance on additional ways to transmit safety and instructional information.

Today, more interesting, compelling and understandable safety information can be transmitted by video, CDs and webcasts in combination with written literature. The challenge for manufacturers in the future will be to provide information in a way that is more likely to be read or viewed. While the law does not specifically require it, it is important for manufacturers to consider doing more to encourage people to read or to view their instructions and to use their products more safely.

What to Do

Every manufacturer of consumer products or industrial products should use the passage of this new section of ANSI Z535 to reevaluate its warnings and instructions and other safety communications.

This is a complex area of law and practice. Other difficult issues that have not been discussed include the use of multilingual labels, use of pictorials in place of words, how to prove that the labels and instructions are understandable, whether to offer new labels and manuals to prior purchasers, and when to exceed the standards.

As a result, it would be a good idea for manufacturers to first ask legal counsel experienced in this area to perform a legal audit of their current warnings and instructions and provide a legal opinion as to what steps, if any, need to be taken to upgrade the current warnings and instructions. This legal audit and opinion can be done quickly in that counsel only needs to see one or two exemplar manuals that typify the kinds of warning literature the organization produces.

As an added benefit, the audit and opinion should be protected from disclosure under attorney-client privilege. And, if assistance is needed by professionals such as technical writers and human factors experts, they can be retained by legal counsel and their suggestions can be provided to counsel and be considered by counsel in rendering a legal opinion. In that way, these suggestions would also arguably be privileged.

Be Prepared

As more and better warnings are placed on products and more safety information is inserted into manuals and elsewhere, plaintiff’s experts will attack the adequacy of the labels if they do not comply with applicable standards. Every manufacturer needs to be prepared to prove that its safety communications complied with all legal requirements and applicable standards. ■

Educate, Don't Alienate:

How We Reduced Workers Compensation Frequency and Severity

by Earl D. Kersting, CPCU, ARM, ALCM, AIC, AU, AAI, AIS



Earl D. Kersting, CPCU, ARM, ALCM, AIC, AU, AAI, AIS, is assistant risk manager for The Kroger Co., Delta Division, in Memphis, Tenn., where he oversees all areas of risk faced by more than 100 retail stores located throughout a five-state area, a position he has held since 1986. Kersting is a past president of the CPCU Society's Memphis Chapter, and a past member of the Risk Management Interest Group Committee. Kersting may be contacted at EARLKERSTING1@yahoo.com.

The other day I was asked to explain why, if we all oversee similar operations, and our employees all perform similar job duties, my division's workers compensation frequency and severity were notably better than those of my peers. After contemplating the question, it occurred to me that our path to improvement began when we took a proactive stance and decided it was better to educate, not alienate, our employees.

Let me explain what I mean, as well as describe my approach, as several of the processes implemented were considered quite controversial by my peers, and some were even thought to carry risk.

The first step implemented was designed to control the severity of incidents as they occurred. My approach was considered radical at the time by my peers. Its purpose was not only to simply reassure injured employees in an effort to reduce their uncertainty about what would now happen to them post-injury, but also to eliminate the perception that we didn't care about them, or that they needed to seek legal representation to protect their interest. After all, you and I know that workers compensation benefits are typically statutorily governed, so there are certain benefits to which the employee will be entitled regardless. So why not voluntarily explain those benefits up front, and show our employees that they won't be left to fend for themselves?

How exactly do we accomplish this? At the time of incident, we explain to the injured workers to not worry, that their necessary medical care will be provided at no cost to them. We further explain that should they be unable to immediately return to their normal job duties, we will work collectively as a team with them, the physician and their site manager to return them to productive employment as soon as the physician believes it in their best interest, in an effort to continue their earning ability, even if we have to temporarily modify their job duties. Should they be unable to immediately return to even an alternate-duty position, we explain that there are wage replacement benefits available, subject to certain statutory limitations. Again, all these benefits are statutorily provided, yet by

reassuring employees right up front that they will receive medical care, that they will be able to keep earning an income, and that if unable to work, will be provided replacement income, we've eliminated much of the apprehension and fears that drive employees to seek legal representation.

Does this approach work? Now several years into this process, we have significantly decreased workers compensation litigation in this division.

My next target was to reduce the frequency of incidents. I performed the typical loss analysis we all do to determine where injuries were occurring, but then went one step further — by not only sharing this information directly with employees, but also educating them on how to avoid becoming the next statistic. Yes, we all do preventive measures such as machine safeguarding, but how about voluntarily explaining to employees the early-stage symptoms of repetitive motion injuries and carpal tunnel syndrome? Yes, you heard me correctly: We teach employees the early-onset symptoms of repetitive stress injuries so that they may receive conservative treatment before it becomes a full-blown surgically treated condition. Did we not see an increase in the number of injuries reported? Only at the very onset of this process, and many of those were referred for evaluation and released with anti-inflammatory medication, perhaps a wrist splint to wear while sleeping, or other very minor treatment. Once this initial influx passed, our incidence of repetitive motion injuries and carpal tunnel syndrome drastically decreased and is now nearly nonexistent.

From repetitive motion injuries and carpal tunnel syndrome, we moved on to back and shoulder injuries, explaining not only how to properly lift, but also providing strengthening exercises, warm-up exercises, and easy-to-understand, easy-to-implement, educational materials that are applicable both on and off the job. As additional injury causal factors were identified, our library expanded and our frequency rate decreased.

Next I introduced *The Risk Review*, a safety-specific newsletter distributed to every

employee, from the division president to the 15-year-old kid who carries out your groceries. This is not a canned newsletter purchased from a vendor, but an in-house produced publication that is very applicable to our employees' actual "real-world" environment. We discuss actual events and incidents that have occurred in our stores, how and why they occurred, what could have prevented their occurrence, and what the reader can do to protect themselves from personally becoming the victim of a similar incident. We also share success stories, in which case we name names, giving credit where due to those who went above and beyond to improve safety in their job, their department, their store, or in our division, recognizing and rewarding those who make a difference.

The Risk Review also became a vehicle in which to convey supplements to the educational materials previously described, such as short refreshers of strengthening exercises, in addition to providing off-the-job tips that may impact an employee's health and safety. After all, off-the-job safety issues, such as cellular telephone use while driving, also directly affect job performance and attendance, and topics related to the employees' family members' safety impact the company's overall health care and insurance costs. We also actively encourage all employees to submit articles or story ideas, truly making *The Risk Review* their publication.

This is not an exhaustive list of my processes, but only a brief overview of how we have tremendously reduced workers compensation frequency and severity by choosing to educate, not alienate, our employees. Not every method we implemented is transferable to every type of employer, but the bottom-line message is the same. Don't be afraid to step beyond perceived boundaries simply because it hasn't been done in the past, or may be controversial or pose risk. Every new or different approach poses some degree of risk; but without risk, there can be no change, and without change, one is destined to accept the same results as in the past. Your reading this means that you seek education and the change it brings. Educate your employees and see what change it can bring. ■

Your Loss Control Interest Group Presents a Seminar at the 2008 Annual Meeting and Seminars

Identity Theft and Data Protection

Sunday, September 7 • 9:30 – 11:30 a.m.

Every three seconds, a person's identity is stolen in the United States. Every individual is at risk, and most businesses have some exposure to liability resulting from the wrongful disclosure of personal information. This seminar will focus on the impact of identity theft and real-world situations that insurance professionals face when dealing with the threat or reality of identity theft. *Filed for CE credits.*

Developed by the Loss Control Interest Group.

Presenters Judd Rousseau, CFS, Identity Theft 911, LLC; Dan Taylor, CPCU, Identity Theft 911, LLC



Get Exposed . . . and Earn CPD and CSP Points!

We're always looking for quality article content for the Loss Control Interest Group newsletter. If you, or someone you know, has knowledge in a given insurance area that could be shared with other insurance professionals, we're interested in talking with you. Don't worry about not being a journalism major; we have folks who can arrange and edit the content to "publication-ready" status.

Here are some benefits of being a contributing writer to the Loss Control Interest Group newsletter:

- Share knowledge with other insurance professionals.
- Gain exposure as a thought leader or authority on a given subject.
- Expand your networking base.
- Overall career development.

As an author or co-author, you may earn 25 CPD points. In addition, you may obtain CSP continuation of certification (COC) points for safety articles of at least 1,500 words.

To jump on this opportunity, please e-mail either

Charles H. Morgan, J.D., CPCU, CLU, CSP, ARM, at cmorgan917@gmail.com, or **Julie L. Sealey, CPCU**, at julie_sealey@cfins.com.



Attend the CPCU Society's Annual Meeting & Seminars

September 6-9, 2008 • Philadelphia, PA
Philadelphia Marriott Downtown

Commemorate "CPCU: Heritage and Horizons"

Celebrate with colleagues and new designees at Conferment!

Hear Phil Keoghan, adventurer and television host. Best known for his role in *The Amazing Race*.

Gain first-hand historic insights! Hear Keynote Speaker Doris Kearns Goodwin, an award-winning author and historian. Author of *The New York Times* best seller, *Team of Rivals: The Political Genius of Abraham Lincoln*.

Glean inside perspectives on where the industry is heading! Attend two new exciting panel discussions: "Heritage and Horizons: Leadership Perspectives of Large Regional Carriers," and "Through the Looking Glass: Industry Insiders Contemplate the Future."

Increase your professional value! Experience an all-new educational lineup of 30-plus technical, leadership, and career development seminars.

Register online today at www.cpcusociety.org.

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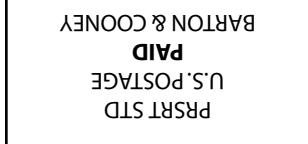
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