

Message from the Chair

by Jeffery L. Bronaugh, CPCU, CLU, ChFC, CIC



Jeffery L. Bronaugh, CPCU, CLU, ChFC, CIC, is managing director of the Phoenix office of BBVA Compass Insurance and has more than 30 years' experience in the insurance industry. Prior to moving back to Arizona, he was president of Bank of Hawaii Insurance Services in Honolulu, Hawaii. Bronaugh's background includes technical underwriting, design of insurance contracts, risk management, marketing and sales. He also worked in executive management for a major insurance company before joining the brokerage business.

We're off to a running start this quarter, and our committee members, led by **Jerome "Jerry" Trupin, CPCU, CLU, ChFC**, have been busy at work planning for this year's Annual Meeting and Seminars in Orlando.

Though we all are hopeful for an economic turnaround this year, I think we are also cautious enough to know that a turnaround may very well be slow. As such, we all need to continue working with our clients in emphasizing the importance of mitigating risks in order to manage personal and company finances.

I encourage everyone to consider the importance of a positive risk management discipline, one that establishes good discipline through bad times and good. The more we can "spread the word" regarding the risk management discipline, the better for all.

Our team is hopeful that every CPCU integrates risk management in his or her everyday life — personally and professionally. If you would like to be an active participant in promoting the risk management discipline, please contact one of our committee members.

Their names and contact information are listed on the Risk Management Interest Group Web site. Go to the CPCU Society's Web site, www.cpcusociety.org, and log in. Select "Interest Groups" in the top menu and click on the "Risk Management Interest Group."

Finally, we will be holding a mid-year planning meeting on the Saturday morning of the 2010 CPCU Society Leadership Summit in Phoenix, April 29–May 1. If you're attending the event, please stop in to say hello and meet our members. ■

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Co-Editor's Note

by Jane M. Damon, CPCU, MBA, CIC, CPIW



Jane M. Damon, CPCU, MBA, CIC, CPIW, is an assistant vice president and commercial account executive with Wells Fargo Insurance Services Inc. in Dallas, Texas. She earned a bachelor of business administration in management and master of business administration in strategic leadership from Amberton University. Damon has more than 20 years' experience in the insurance industry, and works on large complex accounts in the real estate, construction and technology fields. In October 2001, Damon joined Wachovia Insurance Services, which officially changed its name to Wells Fargo Insurance Services Inc. in July 2009.

Welcome to a new edition of the Risk Management Interest Group newsletter.

Peg M. Jackson, CPCU, DPA, our newsletter's new co-editor, leads off the issue with an article that I am sure you will enjoy reading: "Risk Management Planning and the Underwriter."

Next, we present the final installment of a series of articles by **Robert D. Chesler, J.D., Ph.D.**, and **Cindy Tzvi Sonenblick, J.D.** This month's article is entitled, "Navigating the Cyber-Insurance Marketplace."

If you missed any of the previous three installments on privacy liability, cyber policies and intellectual property infringement, past Risk Management Interest Group newsletter issues are available electronically.

Log on to the CPCU Society Web site, www.cpcusociety.org, choose "Interest Groups" in the top menu and click on "Risk Management Interest Group." Select "Newsletter" in the left menu.

We also have an article by **Earl D. Kersting, CPCU, AAI, AIC, AIS, ALCM, ARM, AU**, on self-improvement and what you do once you have your CPCU designation. And **Jerry Trupin, CPCU, CLU, ChFC**, one of our regular contributors, has written an article on electronic data liability.

Tommy R. Michaels, CPCU, AIC, ARM, ARe, lets companies know how to find money from their old insurance

policies after a loss has occurred.

Our new series of interviews with risk management professionals continues in this edition with **Richard G. Berthelsen, CPCU, J.D., MBA, ARM, AIC, ARe, AU**, interviewing **William D. Motherway, J.D.**, risk manager and executive vice president of Tishman Realty & Construction Co. Inc. Tishman was the construction manager of the World Trade Center (WTC) twin towers and was selected as the construction manager for One World Trade Center (formerly named the Freedom Tower), which currently is under construction on the northwest corner of the WTC site.

In closing the issue, **Paul Edgcomb, CPCU**, discusses the importance of focusing on risk assessment and how it helps with profitable underwriting performance.

Please enjoy your Risk Management Interest Group newsletter, which is packed with great articles. We could not create this newsletter without our great authors, and we would like to thank them for their continued contributions providing information to our CPCU Society members.

As always, please feel free to let us know your thoughts on the articles, what you would like to see, what you like and don't like. Please contact either jane.damon@wellsfargo.com or peg@pegjackson.com. We welcome all authors and commentaries. ■

Happy Spring!



Risk Management Planning and the Underwriter — Facilitating a Partnership with the Insured

by Peg M. Jackson CPCU, DPA



Peg M. Jackson, CPCU, DPA, is a leading authority on nonprofit risk management, strategic and contingency planning, and Sarbanes-Oxley compliance. She is a principal with Peg Jackson & Associates in San Francisco, Calif., and Alexandria, Va. In her work as an author, lecturer and consultant, she focuses on designing strategies for nonprofits to strengthen their infrastructure and solidify their competitive positioning. Jackson's latest book, entitled *Reputational Risk Management: Four Steps to Safeguarding Your Company's Most Valuable Asset*, will soon be released. She is a member of the CPCU Society's District of Columbia Chapter and a co-editor of the Risk Management Interest Group's newsletter.

Introduction

Risk management planning adds value for commercial as well as personal lines clients by means of reducing their potential for financial losses and adverse events. As these clients further incorporate risk management practices into their everyday operations and/or household routine, the overall risk profile for the organization is reduced. Underwriters often do not seem to consider the value of a risk management plan when making determinations on premium, extent of coverage and/or access to specialty lines.

By implementing a streamlined approach to risk management, the producer can assist his/her clients in understanding how risk management practices can add value to their business/household. This stepped-up approach to risk management, as evidenced by the client's risk management plan, is a signal to the underwriter that the client/potential insured will add value to the insurer's book of business. The key is to develop a risk management plan that encompasses what is necessary and sufficient to improve the client's risk management practices.

Risk Management and the Client — Taking a Streamlined Approach

Understanding the notion of risk management can be somewhat daunting for the insurance layman. Producers often have widely differing concepts of what risk management is and how it can be useful to a particular client. One method for bridging the learning gap is to offer the client a streamlined "template" for identifying and selecting strategies to deal with the risks.

Clients are much more receptive to a "fill-in-the-blanks" approach for their initial round of risk management planning. First, however, the value proposition of risk management must be

presented to the client in a meaningful fashion. Preparing a simplified risk management plan helps clients to:

- Identify and prioritize risks within the business or household.
- Identify strategies for reducing the potential frequency and severity of the risk areas. Occasionally, clients need to be disabused of the notion that risk can be eliminated.
- Incorporate risk management planning as a routine part of their business operations.
- Leverage their risk management plan to improve strategic positioning, to reduce costs associated with financial transactions and to possibly reduce the cost of their insurance coverage.
- Present a cogent case to the underwriter for obtaining (or renewing) insurance coverage.

Helping the Client Develop a Risk Management Plan

Preparing a streamlined risk management plan does not need to be time or labor intensive. There are four steps in this process:

- **Step 1 — Identify and prioritize risks.** Clients should be open to seeing what might open their business up to claims and/or litigation. Often clients think that no one would want to sue a small business or nonprofit — wrong! Clients should not be paranoid, but with your help, they can be more realistic about their risk profile. Risks emerge from these four generic elements that are present in every business/nonprofit organization.
 - **Board/Management** — The board and senior management are the decision-makers and head the risk management planning process. The risk management plan needs to address risks that relate to the way in which the organization is managed.

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Risk Management Planning and the Underwriter — Facilitating a Partnership with the Insured

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- ♦ Human Resources — The risk management plan needs to address risks that relate to the firm's HR practices, policies and procedures.
- ♦ Operations — Operations refers to the nature of the business or nonprofit and its associated activities such as inventory, transportation, Web-related retail activities
- ♦ Reputational Risk — This area is one of the most difficult for a client to understand, yet is one of the most fragile elements of a business or nonprofit. In preparing a risk management plan, the client needs to understand the firm's vulnerabilities and its current ability to effectively deal with a crisis situation.
- **Step 2 — Select a strategy to deal with the risk.** Once the risks are identified and prioritized, help the client select reasonable strategies for dealing with the risks. Risk transfer isn't the only approach. Work with the client to implement risk modification and retention features.
- **Step 3 — Check to see if the strategy is working.** Help clients to identify a timeframe (3–6 months from the initial risk management planning in which they would determine if the strategies that they selected are working).
- **Step 4 — Set up a time to look at the business/household's risks in another six months to a year.** One of the most important lessons in this process is that risk management planning is ongoing. The first round of planning will deal with immediate risks, but the client needs to understand that in the coming months/years other risks will surface. The client can use the same template ("fill in the blanks") to prepare updated risk management plans, but the planning needs to become an integral part of the operations.

Risk Management and the Underwriter — Seeing the Value

As part of their negotiations, producers should present the risk management plan that the client prepared to the underwriter as a central element in the overall framework of the client's risk profile. The value of a risk management plan includes:

- A more comprehensive and substantive "overview" of the business or home environment.
- Insight into the insured's operations, scope of the business, managerial philosophy and commitment to risk management planning.
- A better understanding of the types of risks that the insured faces, particularly for those businesses which have multiple office/manufacturing locations; channels of distribution, including subsidiary transportation risks; and reputational risk vulnerabilities.
- A means by which the underwriter can identify other services, such as loss prevention (LP) and workplace safety training, that the insured would be open to purchasing.

Conversely, the underwriter should require a client's risk management plan to include:

- Evidence of a coherent approach to risk management planning. The risk management plan should be structured and presented in a fashion that makes sense to the client as well as to the underwriter.
- Description of priority risk areas and the steps taken to reduce the frequency and severity of potential incidents. The risk management plan needs to clearly identify the priority risks and provide a coherent description of the risk modification strategies and other risk management techniques that are being applied to address the risk.

- Description of improved internal controls, governance practices, policies and procedures to reduce potential for waste, fraud and abuse, improved HR policies and practices. This component is particularly significant for underwriting decisions. The client needs to clearly describe what operational changes are being implemented as well as evidence to support these assertions.
- Plans for evaluating the effectiveness of the risk mitigation activities. The risk management plan needs to present a timetable that the client is planning to implement to evaluate the effectiveness of the risk management strategies.
- Plans for incorporating the risk management planning into regular business operations. The plan needs to present evidence that risk management planning has been effectively incorporated into business operations. The underwriter needs to feel confident that the risk management planning is not a one-time-only event.

In today's challenging environment, underwriters can look to the insured's risk management plans as substantiation that the insured is actively engaged in risk management activities as a full partner to the producer.

Summary

Risk management plans offer value to underwriters in providing a more substantive client-risk profile. In turn, the underwriters might want to offer insureds some financial incentives to prepare comprehensive risk management plans. Producers should be encouraged to work with their clients to establish ongoing risk management planning. Both underwriters and producers should recognize the value proposition in risk management planning and reward insureds who take the process seriously. ■

Navigating the Cyber-Insurance Marketplace

Part 4 of 4 in a Series

by Robert D. Chesler, J.D., Ph.D., and Cindy Tzvi Sonenblick, J.D.

Robert D. Chesler, J.D., Ph.D., is a member and chair of the Insurance Practice Group of Lowenstein Sandler PC.

Cindy Tzvi Sonenblick, J.D., is an associate in the Litigation and Insurance Practice Group of Lowenstein Sandler PC.

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Technological change is occurring at a dramatic pace. As companies increasingly rely on technology to sustain their business, the cyber-liabilities that companies face change accordingly. The drafters of cyber-policies are thus faced with a moving target. Over the years, the insurance industry has developed over two dozen cyber-policies — each with very different terms. The result is a variegated but imperfect market. Some policies are risk-averse and written narrowly so that they provide little coverage, while others are written very broadly and may result in coverage disputes.

It is instructive to compare the new cyber-policies with employment practices liability insurance (EPLI). When the insurance industry developed EPLI policies in the late-1980s, the world of employment liability was already well-defined. All of the insurance companies that chose to enter this field developed policies that provided similar basic coverage, with the differences in the nuances. These policies largely met the expectations of companies in need of protection, and little coverage litigation ensued.

Insurance companies are often accused of having a herd mentality, so that they tend to offer the same basic policies. The cyber-insurance market is different. It is a complex marketplace with radically different products available. Since cyber-insurance is still in its infancy, it remains unclear whether cyber-policies follow the path of EPLI, or will result in a new wave of coverage litigation.

Understanding the Options for Cyber-Coverage

To obtain the appropriate protection, a company may need to rely on both an insurance professional and an intellectual property (IP) consultant before purchasing coverage. The term "cyber-insurance" is a catch-all that sweeps in

totally different categories of risk. On the liability side, these include:

- All IP infringement risks, including trade dress, trademark, copyright and even patent.
- Privacy liability, a vast new and quickly expanding field.
- Slander, libel, defamation and related torts.
- Liability for damage to another's computers and data.

The first party exposures involve a company's own data and computers, electronic theft and cyber-extortion. Policies exist that cover only one of these exposures or multiple exposures, and insurers will customize policies to meet an individual company's needs.

The CNA Net Protect insurance policy is an example of a broad policy that provides coverage against multiple cyber risks. The policy includes four liability coverages and seven first-party property coverages. The liability coverages are:

- (1) Content injury liability (which includes defamation related injuries and intellectual property infringement claims, except patent and trade secret).
- (2) Privacy liability, which includes coverage for both claims by private parties and also by the government.
- (3) Professional services liability.
- (4) Network security liability, which includes coverage for denial of access claims, claims of damage to a third party's network, and claims involving data.

The policy has 36 exclusions and 78 definitions, many of which have multiple subparts.

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At the other end of the spectrum, Samian's IPGuard policy is an excellent example of an innovative, narrowly focused policy. This policy only provides coverage for the insured's defense costs against any allegation that its "Declared Product" or "Declared Intellectual Property" infringes on the intellectual property rights of a third party. "Declared" means specifically submitted to and approved by the insurer. The policy provides coverage against infringement claims arising from the actual or prospective manufacture, sale, licensing or distribution of a "Declared Product," and the licensing of an Intellectual Property Right. The policy also provides coverage for the prosecution of counter-claims. A wide variety of such narrow policies exist.

Can the Insurers Defeat Ambiguity?

In cases involving advertising injury coverage under a commercial general liability policy, the insurers frequently lost because of their failure to define terms. As a result, the new cyber-policies try to control the insurers' exposure through numerous definitions and exclusions. However, even defined terms cannot always avoid ambiguity or, from the insurers' viewpoint, overreaching by insureds. For example, in *i-Frontier Inc. v. Gulf Underwriters Insurance Company*, No. 04-5797 (E.D.Pa. 2005), an employee of MBC downloaded MBC's manual on his last day of work, and used it at his new employer, i-Frontier. MBC sued the employee and i-Frontier. i-Frontier had an insurance policy that provided coverage for:

- D. infringement of copyright, plagiarism or misappropriation of ideas under implied contract;
- E. misuse of intellectual property right in Content, but only when alleged in conjunction with the types of Claims named in [C. and] D. above;
- I. errors, omissions, and negligent acts; committed by the Insured

during the Policy Period in performing Cyberspace Activities as stated in Item 6. of the Declarations, including obtaining, processing, uttering, or disseminating Content in or for the Cyberspace Activities, regardless of when Claim is made or suit is brought.

i-Frontier at 2-3.

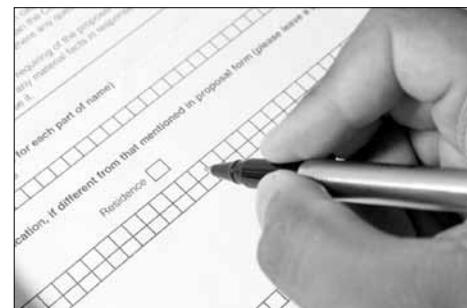
"Cyberspace Activities" was defined as "creation of Internet advertising content for others." *i-Frontier* at 3. *i-Frontier* sought coverage, asserting that the MBC claim alleged Cyberspace Activities. The insurer replied that the employee did not create Internet advertising content; rather, it wrongfully accessed MBC's manual. The court found against the insured on other grounds, but this case demonstrates that even carefully defining terms will not necessarily prevent coverage litigation. See also *Walt Disney Company v. American Casualty Company*, 65 Fed. Appx. 147, 149 (9th Cir. 2003) (finding the terms "utterance or dissemination" and "matter" ambiguous, and ordering insurer to defend insured against claim for theme park idea infringement).

Key Provisions to Look Out For

What is a Claim?

The cyber-policies usually provide definitions for the key term "claim," which can create a trap for insureds. Claim is the key trigger term; once the insured receives a claim, it must provide notice to its insurer. Because cyber-claims can arise in a variety of contexts, the policies often have broad definitions of claim. One problem with these broad defense triggers is that they can result in late notice that forecloses coverage. Risk managers and general counsel generally are aware of the need to place insureds on notice when they receive a complaint. The less a triggering document resembles a complaint, the greater the likelihood that no one will think to notice the

insurer. Moreover, all cyber-policies are claims-made policies — policies that provide coverage in the year in which the insured receives a claim. In all jurisdictions, the insured forfeits coverage if it provides notice after the end of the policy period. Further, some policies contain provisions that require notice within a shorter period of days.



In *General Insurance Company v. Marvel Enterprises, Inc.*, 2004 NY Slip Op 50129 (N.Y. Sup. Ct. 2004), the policy defined "claim" as "[A] demand or suit for money tendered to the insured for loss or injunctive relief." While the insured ultimately won the notice issue in this case, it is nonetheless instructive. Marvel became involved in a dispute with Fox over the licensing of the X-Men, and Fox wrote to Marvel:

Fox hereby demands that any further development, production and distribution of "MUTANT X" cease immediately, and Fox will take all appropriate action to enforce its rights, and will seek such remedies as may be necessary to protect itself against such a flagrant and willful breach of our agreement . . .

At the end of the letter, Fox additionally requested that:

In order to prepare for the contingency of litigation Marvel retain all documents, including e-mails, related to this project and notify Tribune Entertainment, Fireworks and any other entities involved with the production or distribution of "MUTANT X" to do the same.

On the advice of its broker, Marvel did not provide notice of this letter to its insurer. In the coverage litigation that ensued, the Special Master found that the letter sought injunctive relief and was a claim, and that late notice foreclosed coverage. The trial judge reversed, on the highly technical ground that a letter by its very nature could not "seek" injunctive relief; rather, only a complaint asking a court for that relief could be said to seek injunctive relief. The insured narrowly escaped a bullet. The best advice for any insured is to give notice broadly and early.

Notice provisions must be a major consideration when purchasing cyber-policies. In this regard, one key provision that can usually be manuscripted controls who must provide notice. In any organization, a claim may first be received by someone who is unskilled in insurance and is not aware of the notice ramifications. This increases the risk of late notice. Thus, many companies have provisions stating that the insured does not need to provide notice until specified individuals, such as the general counsel and risk manager, receive the claim.

Choice of Law/Forum

Choice of law and choice of forum provisions are also prevalent in these new policies and must be carefully analyzed. The construction of insurance policies differs dramatically from one state to the other, with New York usually considered a 'bad' jurisdiction for policyholders. Many new policies contain New York choice of law provisions, and require the insured to submit to alternative dispute resolution (ADR) before litigation. Further, policies written by insurance companies headquartered outside the United States can require that disputes be arbitrated in, for example, England or Bermuda, pursuant to the laws of that jurisdiction. The purchaser of insurance products must weigh the utility of a policy with such a provision against a policy that permits the insured to sue in its own jurisdiction.

Control of Defense and Settlement

In the Samian policy discussed on Page 6, the relationship between the insurer and insured in controlling the litigation and settlement has a dominant role. The collision of interests between insurer and insured on this issue has produced frequent disputes under general liability and D&O policies. Policyholders must review the new cyber-policies to make sure that they are not ceding too much authority to the insurer on issues that can go to the heart of the way that the company does business. The insured should negotiate to make sure that it can use its attorneys of choice in claims that come under the purview of the insurance policy.

Insurance companies are often accused of having a herd mentality, so that they tend to offer the same basic policies. The cyber-insurance market is different. It is a complex marketplace with radically different products available.

Definition of Covered Loss

Certain risks covered by cyber-policies may have unique remedies. For example, privacy violations can result in a duty to notify affected individuals and to provide credit monitoring. The policyholder must make certain that the "Loss" covered by the policy is co-extensive with the types of relief that the insured may need to provide. Policyholders benefit here from broadly and carefully defined terms. While undefined terms are construed in a manner favorable to the insured in most jurisdictions, lack of definition can also produce litigation.

Conclusion

All told, companies are well advised to treat the purchase of a "cyber-policy" with the sort of caution that is warranted for such a nuanced insurance product. Given that insurers are seeing a definite up-tick in claims activity, more aggressive claims handling will naturally follow. In other words, doing more work on the front-end negotiation process will ensure that the coverage intended is actually set forth in the policy. ■

You've Earned the Designation — Now What Are You Going to Do with It?

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



Earl D. Kersting, CPCU, AAI, AIC, AIS, ALCM, ARM, AU, is division sales manager at Kroger Personal Finance. He previously served as assistant risk manager for The Kroger Co., Delta Division, in Memphis, Tenn., where he oversaw all areas of risk faced by more than 100 retail stores located throughout a five-state area. Kersting is a past president of the CPCU Society's Memphis Chapter and a past member of the Risk Management Interest Group Committee.

Ask yourself, "Why did I become a CPCU?" When you first began the journey, were you seeking to improve yourself? Perhaps broaden your knowledge base? Maybe you were looking for an advantage over your competition, or seeking that extra edge that would make you stand out in a crowd? The odds would be in my favor if I bet that you became a CPCU because you understood the value of possessing the CPCU designation and wanted to enjoy all the benefits that came with it. If so, you're probably a lot like me.

During these past too many years to count, I've earned a CPCU and an AAI, AIC, AIS, ALCM, ARM and AU. I completed each of these courses of study for all of the reasons I've stated above. I wanted to broaden my knowledge, my professionalism, my visibility and my marketability. Yet even after earning seven (so far) of the most prestigious

and recognizable designations in the industry, along with a master's degree, I came to realize an important aspect of my education had been overlooked.

I had held the same role in my organization for many years before someone had the courage, and thankfully compassion, to tell me I needed to improve my communication and presentation skills. I had technical skills beyond compare, I was told, but could benefit from learning how to self-promote, or in his terminology, "toot my own horn."

I grew up being taught that it's in poor taste to brag. Your good works will speak for themselves was the decree by which I was raised. If you treat all you encounter with respect and honor, you'll get noticed, I was told; yet I wasn't getting noticed. It took an outside observer to tell me the obvious: You can have all the knowledge possible, but you've got to let others see it. No, you've got to *make* others see it — but with tact and respect.

How do you do this? You've got to put yourself in situations where you can command attention and respect by applying your knowledge. Be a participant, not an observer.

As a CPCU, I volunteered to serve as public relations officer for my chapter. I created, wrote and published a monthly chapter newsletter. My name was being put in front of every chapter member, every month. I was making myself visible and was self-promoting, but in a manner that was also serving the greater good of the entire chapter. I was helping myself by helping my fellow CPCUs at the chapter level.

I volunteered and served as chapter president. My name was now constantly in front of not only chapter members, but other organizations and local media. I was making my chapter more visible, but at the same time making myself more

visible, too. I was self-promoting, but in a manner that was now serving not only my chapter, but also the community at large — by raising the awareness of CPCU.

I volunteered and served as a member of the Risk Management Section, now known as the Risk Management Interest Group. By contributing to the efforts and results of this group, and by regularly contributing to its quarterly publications, I was again making myself visible and self-promoting, but in a manner that was also benefitting all the members who have an interest in the Risk Management Interest Group.

I started a Toastmasters Club in my workplace. My peers and I are learning how to better present ourselves to our clients and to the public. We're learning the speaking and communications skills that increase our confidence and sharpen our style, and therefore our ability to take command of any audience, be it a single client representative or a boardroom filled with executives.

The bottom line is simply this: Don't stop short in your quest to improve. Once you've got your CPCU diploma hanging on your office wall and the CPCU designation proudly following your name on your business card, you're not finished. In fact, you're just beginning. Now you have to let your CPCU serve you through your actions.

Take an active role in your local CPCU chapter. Seek a Society post by which you can serve your peers at large. Form a Toastmasters Club at your office to help your peers improve their speaking and communications skills — and at the same time, yours. After years in the same role, I was promoted twice during 2009, but not until after I learned to sell myself, not just my product. Let your CPCU serve you as an active tool, not a passive accomplishment to collect dust.

You've earned the designation. Now what are you going to do with it? ■

Electronic Data Liability

by Jerome Trupin, CPCU, CLU, ChFC



Jerome Trupin, CPCU, CLU, ChFC, is a partner in Trupin Insurance Services, located in Briarcliff Manor, N.Y. As an "outsourced risk manager," he provides property-casualty insurance consulting advice to commercial, nonprofit and governmental entities. Trupin regularly writes articles on insurance topics for industry publications and is the co-author of several insurance textbooks published by the AICPCU/IIA. Trupin has been an expert witness in numerous cases involving insurance policy coverage disputes, has spoken on insurance topics across the country, and has taught many CPCU and IIA courses. He can be reached at cpcuwest@aol.com.

Author's note: A presentation made by **R. Bryan Tilden, CPCU, CLU, ChFC, CIC, ARM, ALCM, SCLA**, at the CPCU Society's Westchester Chapter workshop on June 30, 2009, gave me the idea for this topic. Bryan is an outstanding presenter. If you ever have a chance to hear him, don't miss it.

A Hypothetical Case Study

Pipes Up Inc., a large plumbing contractor, severs the main feeder cable to a large office building while excavating a trench to install a new sewer line. The resultant current surge damages the tenants' computer systems and electronic equipment, on which most are very dependent. Claims are made against Pipes for:

- Repairs to the feeder cable.
- Damage to computer hardware.
- Damage to phone systems.
- Loss of electronic data and programs.
- Resultant loss of business.

What coverage does Pipes have under its CGL policy (ISO form CG 00 01 12 07)?

Pipes' liability for damage to the feeder would be covered — the underground excavation exclusion was removed from the CGL policy in the 1980s. There's an endorsement that can be used to restore the exclusion, but it isn't part of Pipes' policy. Liability for physical damage to the computers and phone systems is also covered.



The problem is the damage to electronic data and programs and the resultant interruption of the tenants' operations.

CGL policies cover property damage liability claims arising from physical damage to *tangible* property. Insurers always contended that electronic data was not tangible property until a decision that shook the insurance industry: An

Arizona court in 2000 held that loss of electronic data triggered a covered loss.¹

ISO was quick to react, modifying its property and liability policies to eliminate electronic data damage claims. In the CGL policy, ISO did this by adding the following sentence to the definition of property damage: "For the purposes of this insurance, electronic data is not tangible property."

Since property damage liability is tied to damage to tangible property, this eliminates coverage for claims based on loss of, or damage to, electronic data. To further insure that these losses wouldn't be covered, ISO added exclusion 2 p. It reads:

2. This insurance does not apply

to:

... p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

It's important to note the very broad definition of electronic data. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

Back to our story ... Mr. Pipes was not happy that he didn't have coverage for these multiple claims. The day after receiving a declination letter, he muttered to an insurance broker golfing buddy (who was not his current agent) that: "Insurance companies are happy to take my premiums, but they don't want to pay my claims." After listening to his tale of woe, his golfing buddy pointed out that

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Electronic Data Liability

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the fault was with his present insurance broker, not the insurance company. Was the buddy right? Did he just become the new broker for Pipes Up?

Buddy was right, and do you think he had any trouble getting a broker-of-record letter? The now former broker's error was in not having the Electronic Data Liability (CG 04 37 12 04) endorsement attached to the policy.

The Electronic Data Liability endorsement changes exclusion 2 p. to read as follows:

2. This insurance does not apply

to:

... p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate "electronic data" **that does not result from physical injury to tangible property** (emphasis added).

Attaching this endorsement would have covered the claim for damage to electronic data because the loss of data resulted from the severing of the feeder cable, and that's "physical injury to tangible property."

This exposure isn't limited to contractors — although they're the first ones that come to mind. Building owners and tenants could be sued for loss of data arising out of repairs done by them or on their behalf, or fires alleged to be due to their negligence. The list goes on and on.

I e-mailed **David Ford**, a computer guru I know (he's married to my daughter), for his thoughts about this. He wrote back:

... most large companies in data-intensive industries would have sophisticated battery backup and surge protection in place to guard against such accidents. Also, they'd probably have data redundancy and backup systems to make sure "mission-critical" data survives in

the event of a fire, explosion, flood, terror/cyber attack or coffee spilled in the wrong place. But, hey, you never know — sometimes all that fancy stuff doesn't work and they lose their data anyway!

As an example of the possible breadth of the exposure for damage to electronic data, he came up with this scenario: "... Downstairs from a data services company there's a pet shop whose white mice get loose in the walls and chew through all the company's Ethernet cables at just the wrong moment. Result: fried mice and lost bytes."



Just about any insured can face an electronic data claim. The endorsement can enable you to close a gap in your clients' coverage and open the door to a discussion of coverage for loss of electronic data by other than physical injury. This is important for your clients' own data as well as their liability for negligently transmitting malicious code, viruses, cyber-attacks, etc., that damages others.

Have you looked at your exposure to electronic data loss? ■

Reference

1. *American Guarantee & Liability Insurance Co. v. Ingram Micro Inc. Civ. 99-185*
TUC ACM, 2000 U.S. Dist. Lexis 7299
(D. Ariz., April 19, 2000). Although this was a property case, the implication for liability policies was obvious.

Searching for Dollars in Old Policies

by Tommy R. Michaels, CPCU, AIC, ARM, ARe



Tommy R. Michaels, CPCU, AIC, ARM, ARe, is the principal of T. R. Michaels Claim Consulting LLC and has been involved in property-casualty claims for more than 39 years. Michaels serves as an expert witness on claim-handling issues and coverage interpretation and is an instructor of insurance. A CPCU since 1976, he is a member of the CPCU Society's Connecticut Chapter.

You can recover money from insurance policies only if you have the policies or can prove their existence, terms and conditions. Paper takes up a lot of space, which is often expensive, and locating the exact document can be difficult to find when you need it. If your company has recently purged old documents, follows a document retention and destruction policy scrupulously, or has acquired other companies, you need to read this article.

Asbestos litigation continues, as does enforcement actions and suits by environmental agencies. Add to this the growing litigation concerning sexual abuse that occurred 30 or more years ago and other latent injury claims. This potential liability can be a great financial risk to your company if you cannot locate insurance policies for the period of alleged injury or damage.

Much of the alleged liability predates most of the current employees at a company and, very likely, the insurance policies you can quickly locate. In some instances, the lawsuit will allege specific dates of when bodily injury or property damage occurred. In other instances, the lawsuit will allege sales of products or operations that caused bodily injury or property damage but no specific dates.

Bodily injury or property damage that occurred during the policy period triggers occurrence-based policies. So, your current policy would not apply if the allegations of bodily injury or property damage were all before your current policy inception. If the allegations in the lawsuit are silent as to dates of injury, or the injury may be continuing, your current policy should respond. Exclusions, however, may preclude coverage.

Your company may also face significant exposure if the policy has a self-insured retention (SIR) or large deductible. Regardless, once you have received notice of a lawsuit that alleges injury over several years, you should immediately

notify your current carrier and all known prior insurance carriers, including umbrella and excess carriers.

The lawsuit requires an answer, or other appropriate legal response, and depending on the actions of the insurance carrier(s), your company may or may not begin incurring legal costs. In particular, defense costs for environmental damage lawsuits can be very large. The duty to defend in the policy is broader than the duty to indemnify.

Most states require the insurance carrier to pay defense costs for its insured if there is only a potential for coverage. Some states, though, allow the insurance carrier to seek reimbursement of defense costs for allegations later determined not covered. A carrier can assume the defense under a reservation of rights, but other carriers may deny coverage from the onset. Locating older policies increases the likelihood your company will not be paying the defense costs.

The duty to indemnify is narrower than the duty to defend, and the carrier only pays if the claim is covered. The bodily injury or property damage must have occurred during the policy period and not otherwise excluded. Courts have considered different theories of when bodily injury or property damage occurs. It may be only during exposure to asbestos, or when the injury or damage is discovered or all the time in between.

This will determine which policies would pay indemnity, but your company may have to pay a portion of indemnity if a policy cannot be located for that period. Umbrella and excess policies may also be required to share the indemnity costs depending on court rulings. They may refuse to drop down if one or more of the underlying policies is lost. If needed, seek advice of your general counsel or outside counsel for which policies apply.

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Searching for Dollars in Old Policies

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All of this makes it imperative that you identify and put on notice all carriers that have any potential for coverage. You need to research back to the earliest possible date of injury or damage. If you do a diligent search and are unable to find all the policies, but have some evidence of the policies' existence, a court may accept this evidence as proof of the policies and require the insurance company to fulfill its obligations. Again, the courts of the various states do not agree on what evidence is acceptable and how much you must have.



The courts will either require a preponderance of the evidence or clear and convincing evidence. A preponderance of the evidence is a lower threshold and means it is more likely than not that the policy did exist and the terms and conditions can be determined. The clear and convincing standard is a higher threshold and requires more evidence to establish existence and the terms and conditions.

When you are searching for policies, you need to know what the court will look for in determining if you have met

the burden of proof, whether it is a preponderance of the evidence or clear and convincing.

The court will look at:

- Primary evidence — actual parts of the original policy.
- Secondary evidence — any documents that may bear on the existence of the policy and its terms and conditions.

The closer the evidence is to the actual policy, the stronger the evidence to carry the burden of proof.

Here are some suggestions to help in your research:

- **Start With Your Company.**

The oldest policy you can locate is the best place to start your search. This policy may refer to a previous policy number or have documents attached that discuss a prior insurance carrier. Long-term employees are also a good source of information. They may know which insurance agent or broker the company used and, possibly, which insurance carrier/s. Old accounting records may also have names of insurance companies, policy numbers and limits. These may be in the accounts payable area, showing the premium, or may be in the accounts receivable area, showing receipt of a claim payment or premium refund or dividend. Do not limit your focus to general liability policies. Look for all insurance information. Often a workers compensation carrier also wrote the general liability coverage. Umbrella and excess policies will usually contain information of underlying policies.

- **Ask Your Customers.**

Contact current and past customers. Customers often require certificates of insurance, and sometimes a copy of the policy — if the policy names them as an additional insured. This is especially true for government contracts. A company that worked for the federal government located

50-year-old general liability policies at the National Archives. Depending on the relationship, your company may be an additional insured on a customer's policy.

- **Request Information from Insurers.**

Request each insurer you identified to conduct a search of its records. Provide them with any policy numbers or claim numbers that you have, along with a list of possible names on any policy. The insurance company should check its underwriting department, claims department, loss control department, premium audit department and marketing department for any policy or information indicating coverage. Some states also will require insurance companies to provide copies of the most common coverage forms if policies cannot be located. The coverage form will help establish the terms and conditions of the lost policy.

Though your search may be time consuming and seem fruitless, a diligent and creative search can pay off. The more policies you can locate and the more coverage you can confirm, the greater potential for recovery on a loss. ■

An Interview with a Prominent Risk Manager — William D. Motherway, J.D.

by Richard G. Berthelsen, CPCU, J.D., MBA, ARM, AIC, ARe, AU



Richard G. Berthelsen, CPCU, J.D., MBA, ARM, AIC, ARe, AU, is director of content development for the American Institute for CPCU/Insurance Institute of America (the Institutes) in Malvern, Pa. He writes and maintains textbooks, course guides and other course materials for several programs, including those used in risk management. Before joining the Institutes in 2003, Berthelsen worked as an attorney in private practice for the insurance defense law firms of Chunn & Pilcher and Phillips & Akers in Texas. Previously, he served as regional counsel for USAA and as in-house counsel for Alliance Insurance companies. Berthelsen can be reached at berthelsen@cpcuia.org.

Editor's note: In this regular feature of the Risk Management Interest Group newsletter, we interview prominent risk management professionals from around the country. This issue highlights

William D. Motherway, J.D., risk manager and executive vice president of Tishman Realty & Construction Co. Inc., which owns Tishman Construction, one of the nation's leading construction management firms, and Tishman Hotel & Realty, a large-scale property and asset management firm. Tishman currently has more than \$9 billion in projects under construction.

What motivated you to become a risk manager?

I started off with a degree in biology. After graduation, I taught high school for a year. Then I became a Marriott corporate fire safety director. That involved risk management of workers compensation, claims and emergency medical training for the hotels. I reported to human resources and was essentially a loss prevention proponent. While with Marriott, I then transferred from New York to Miami. Soon after, I accepted a risk management position with the City of Coral Gables, also in Florida. I worked full-time during the day and went to law school at night. After three years, I graduated and practiced law for two years with a firm in Miami.

Back when I was with the City of Coral Gables, we won a Public Risk and Insurance Management Association (PRIMA) award. Representatives from the City of New York were at that awards ceremony, and a few years later, when they were looking for a risk manager, they contacted me about the job. I accepted and moved back to New York. I worked a year under Mayor **David Dinkins** and a year under Mayor **Rudy Giuliani**. That job was like trial by fire. I survived it, though, and after two years was offered a risk management job with Tishman Realty & Construction Co. Inc. That's how I got to where I am today. The

reason I chose to pursue risk management over the practice of law was because I felt I could make more of a difference in risk management.

What are your responsibilities now?

As the risk manager for Tishman Realty & Construction, I manage the risks created by its operations, which include being a general contractor in New York City, owner and developer of real estate, owner of a hotel company and manager of hotels. I oversee corporate-wide risk management, which involves \$20 million in project premiums and 425 million square feet of commercial space. I am involved in construction wrap-ups, supervise claims and litigation management, assist in employee benefits administration and manage our captive insurance company.

What risks keep you up at night?

Unforeseen incidents that occur during construction. It seems you can't read a paper on construction without it mentioning a catastrophic loss. Often, these losses are caused by human error. The contractor or subcontractor may have failed to properly train and/or oversee its employees. The tragedy is that sometimes something so very small could have prevented the loss — for example ... when taking scaffolding off a building, the workers throw the boards over the edge. Unfortunately, losses have occurred when a worker is still roped onto the board being thrown. Ironically, the worker initially is roped onto the board for safety.

How are you managing those risks?

With safety, Tishman has committed resources to developing a nationally renowned safety program. We get contractors and subcontractors to train their employees and partner with us in a solid industry-leading safety program.

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An Interview with a Prominent Risk Manager—

William D. Motherway, J.D.

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What would you recommend a new risk management professional do to learn the job as quickly as possible?

Sign up with Risk and Insurance Management Society (RIMS). Get a broker's license. Get an Associate in Risk Management (ARM) designation. We pay for our employees' training. We want them knowledgeable about risk management, insurance and our business. You have to know your employer's business. Our risk management department started with two employees, and we now have 25. The problem is we train them so well other employers want to steal them from us.

What source of education did you find most helpful in your career?

On-the-job training as a risk manager for the City of New York. So many things were going on. In terms of formal education, I'd say going to law school provided the best preparation for risk management.

What publications do you read to stay current in the profession?

Risk Management magazine from RIMS, *Business Insurance*, *Engineering News Record* (regarding construction), *The Wall Street Journal*, *Crane's Business Weekly* (in New York), *The John Liner Letter* and various other legal publications.

What future trends do you see in the profession?

Enterprise risk management (ERM) is a trend of the future — although it has experienced fits and starts. One month you read how it is the panacea of risk management. The next month you read not many organizations are using it. But it is definitely worth looking into, especially if your employer is publicly traded and needs to comply with Sarbanes Oxley (SOX).

Another trend is increased emphasis on safety. A lot of resources are being devoted to safety.

What advice would you pass on to your fellow risk management professionals to help them in their careers?

Learn your employer's business. If your employer does construction — go to a construction site. Learn what goes on there. If your employer runs hotels — go to one of the hotels and learn its operations. If your employer runs a restaurant — go to the restaurant. Don't be afraid to get involved in your company. Get out of the ivory tower.

Also, know areas you may be weak in, such as finance. Finance and risk

management are tied together. If you're weak in finance, you must get the training and education necessary to be competent in this area.

What are you most proud of accomplishing as a risk management professional?

After 15 years with Tishman, it's that risk management is considered an integral part of our operation. ■

Focusing on Fundamentals in Risk Assessment

by Paul Edgcomb, CPCU



Paul Edgcomb, CPCU, joined ISO in 1979 and earned his CPCU designation in 1987. He served as ISO's liaison with the American Institute for CPCU and Insurance Institute of America (The Institutes), providing ISO materials for and overseeing technical review by ISO specialists of texts and other educational materials. For the past 10 years, he has served as manager of field operations in ISO's Risk Decision Services Division.

Present financial markets are showing signs of renewed vigor. But the alarming financial volatility and troubling market uncertainty affecting the United States since 2008 should remind even the most aggressive property-casualty insurers to remain focused on the fundamentals of the business — disciplined underwriting, sound pricing and meaningful application of loss control and other risk management techniques.

To improve loss experience and generate underwriting profit, no insurer can bypass these long-standing essentials. Insurers must know every risk they write, set premiums appropriate to each one and take all reasonable steps to mitigate potential causes of loss.

Following are examples of recent industry performance:

- The combined ratio — a key measure of losses and expenses per dollar of premium — has been above 100 in 32 of the 40 years since 1969. And

that ratio exceeded 100 in every year of the two-decade span from 1980 to 1999. More recently, it deteriorated to 105.1 in 2008 from 95.5 in 2007.

- After a net underwriting gain of \$19.3 billion in 2007, the industry suffered a net underwriting loss of \$21.3 billion in 2008 — a serious \$40.6 billion reversal.
- The financial crisis and recession have significantly influenced insurer investments. Property-casualty industry net investment gains fell dramatically to \$31.4 billion in 2008 from \$64.0 billion in 2007. Net investment income dropped to \$51.2 billion from \$55.1 billion. And insurers suffered a \$28.7 billion swing to \$19.8 billion in realized capital losses on investments from \$8.9 billion in realized capital gains.

Today's losses are driven by both new and cyclical conditions in the insurance marketplace, including:

- A soft market, placing pressure on product pricing.
- Large and more-frequent-than-anticipated catastrophic weather losses.
- Major losses incurred by mortgage and financial guaranty insurers.

Insurers, once able to remain profitable through investment gains that offset losses, must now pay close attention to the details and fundamentals of underwriting. Positive investment results are never guaranteed and will remain uncertain in the foreseeable future, making it clear that insurers must seek profits from their business, not their portfolios.

A back-to-basics approach is essential to achieve and sustain profitable underwriting performance. Insurers must also have quality information about risks to be insured and then use appropriate analytic tools to evaluate those risks. In assessing individual risks, insurers need reliable answers to the following questions:

- What products or services does the risk provide?
- What clientele does the risk serve?
- What are the core operational processes and procedures of the risk?
- What are its exposures?

Underwriters need the detailed information that will help them truly understand the risks they are evaluating. For example, commercial property insurers need to know the core rating elements of construction, occupancy, protection (both internal and external) and exposure. To obtain this information, they employ a variety of methods and sources. However, these methods and sources can vary significantly in accuracy, thoroughness and timeliness. Insurers must also be confident of the quality and value of the information they obtain and use.

Positive investment results are never guaranteed and will remain uncertain in the foreseeable future, making it clear that insurers must seek profits from their business, not their portfolios.

Site-observed and site-verified information collected at the actual risk during surveys and inspections is the most valuable data because it proves to be the best predictor of loss. If the data in those surveys and inspections is collected and reported on by representatives who are experienced and trained in conducting surveys and providing information used in loss control, insurers can be confident they are getting the highest-quality information.

The present financial volatility further increases the possibility of difficulties at risks, underscoring the need for solid, site-verified information. Underwriters should be on the lookout for changes in occupancy and exposure, vacancies and

deferred maintenance of the building, machinery, equipment and fire-protection systems. That information can be determined from location-specific surveys.

Obtaining site-verified information is important, but equally important is choosing the right company to provide that information. Cost will certainly be a factor, but costs should be measured against the value of the survey product

For example, a survey company that simply verifies that a fire sprinkler system is installed at a risk provides vastly different information than a survey company that evaluates the adequacy of water supply and suitability of design, installation, maintenance and inspection of systems. Having information in sufficient detail enables underwriters to know and select the best risks rather than the bad or questionable ones.

To assess potential vendors, insurers should consider the following factors:

- The experience or track record of the company.
- The background and experience of the company's loss control representatives.
- The training and professional development of the company's representatives.
- The emphasis the company places on quality assurance.
- The emphasis the company places on timely delivery of its products.
- The responsiveness of the company to customer needs and expectations.
- The sense of urgency displayed by the company's representatives. (Do they immediately alert underwriters when they notice unusual or imminent hazards at a site? Do they confirm those observations in the full survey reports delivered to customers?)

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CPCU Society
720 Providence Road
Malvern, PA 19355
www.cpcusociety.org

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Focusing on Fundamentals in Risk Assessment

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To know the risks they are facing, insurers also need to know the companies providing them with information and choose only the most reliable vendors to serve their needs.

Site-gathered survey data can often be aggregated and used in predictive analytics and modeling, making this growing area of analytics-based risk assessment more attractive to underwriters. And the underlying data is more credible. Enhanced accuracy is an even more compelling benefit, considering that a catastrophe modeling study revealed a 20 to 40 percent discrepancy between the cost of actual catastrophe events and modeled ones. The risk divergence can be further minimized if information collected during on-site surveys helps to add another layer

of reliability to the data used in predictive models for extreme events.

To summarize:

- Insurers must profit from their underwriting in light of current economic volatility and disappointing investment returns.
- To do so is impossible without placing full focus on time-honored underwriting fundamentals.
- A full focus on underwriting fundamentals requires sound analysis of solid information. In commercial property, the best and most valuable information is obtained from site-verified surveys conducted at specific risks. This allows underwriters to truly know each of their risks. ■

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Risk Management Interest Group
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Chair
Jeffery L. Bronaugh, CPCU, CLU, ChFC, CIC
BBVA Compass Insurance
E-mail: jbron01@live.com

Co-Editor
Jane M. Damon, CPCU, MBA, CIC, CPIW
Wells Fargo Insurance Services Inc.
E-mail: jane.damon@wellsfargo.com

Co-Editor
Peg M. Jackson, CPCU, DPA
Peg Jackson & Associates
E-mail: peg@pegjackson.com

CPCU Society
720 Providence Road
Malvern, PA 19355
(800) 932-CPCU
www.cpcusociety.org

Director of Program Content and Interest Groups
John Kelly, CPCU, ARM

Managing Editor
Mary Friedberg

Associate Editor
Carole Roinestad

Production Manager/Design
Joan A. Satchell

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