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## 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. Most recently, he was president of Bank of Hawaii Insurance Services in Honolulu, Hawaii, prior to moving back to Arizona. 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 prior to joining the brokerage business.

**G**reetings and Happy New Year! It's hard to believe the CPCU Society's 2009 Annual Meeting and Seminars in Denver was four months ago. Many thanks to **Jerome Trupin, CPCU, CLU, ChFC**, for leading the charge in support of the risk management seminars our interest group sponsored this year.

"The Changing World of the Internet, Cyber Risk and Insurance" and "Supply Chain Management and Insurance" were excellent educational seminars, both exploring important topics during these challenging economic times. We were also pleased to sponsor the "Changing Environment for Builders Risk Insurance for Larger Projects" seminar.

On behalf of the entire Risk Management Interest Group, best wishes and sincere appreciation go to **Stanley Oetken, CPCU, ARM**, who has been chair of our interest group for the past two years. Under his leadership, our various initiatives and programs have flourished. We are grateful to Stan for his willingness to continue serving as a Risk Management Interest Group Committee member.

Also, I would like to say "thank you" to **Jane M. Damon, CPCU, MBA, CIC, CPIW**, for her continued excellent work as editor on our Risk Management Interest Group newsletter. And "thank

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# Message from the Chair

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you" to **Peg M. Jackson, CPCU, DPA**, for volunteering to be co-editor during the 2009–2010 season.

Planning has already begun for the 2010 Annual Meeting and Seminars in Orlando, and we have many great programs in the works. This year we are making a special effort to partner with other interest groups to broaden the scope and depth of our seminars.

We have been very fortunate in having had a top-notch professional team of interest group committee members over the past several years, and I'm excited about the new members joining our team this year. We have added even more strength to our team; however, we are always looking to add more members. Please contact me if you are interested in serving as a volunteer on the Risk Management Interest Group team!

Best wishes for a happy, healthy and prosperous 2010! ■



## 2009–2010 Risk Management Interest Group Committee

### ***Chair***

#### **Jeffery L. Bronaugh, CPCU, CLU, ChFC, CIC**

BBUA Compass Insurance  
Phoenix, Ariz.  
E-mail: jbron01@live.com

### ***Webmaster***

#### **Martin J. Frappolli, CPCU, AIS**

AICPCU  
Malvern, Pa.  
E-mail: frappolli@cpcuiia.org

### ***Newsletter Co-Editor***

#### **Jane M. Damon, CPCU, MBA, CIC, CPIW**

Wells Fargo Insurance Services Inc.  
Dallas, Texas  
E-mail: jane\_damon@wellsfargo.com

### ***Newsletter Co-Editor***

#### **Peg M. Jackson, CPCU, DPA**

Peg Jackson & Associates  
Alexandria, Va.  
E-mail: peg@pegjackson.com

#### **Edward M. Breight Jr., CPCU, ARP**

Safety National Casualty Corp.  
St. Louis, Mo.  
Phone: (314) 995-5300  
E-mail: ed.breight@sncc.com

#### **Salvatore W. "Bill" DiSalvo, CPCU**

State Farm  
Beverly Hills, Calif.  
E-mail: bill.disalvo.b9h1@statefarm.com

#### **Patricia A. Hannemann, CPCU, MBA**

Summerville, S.C.  
E-mail: david-patricia@hoco150.com

#### **Deborah Ann Kerr-Orlik, CPCU**

GNW-Evergreen Ins. Services LLC  
Encino, Calif.  
E-mail: deborah.kerr@gnw-eg.com

### **Maureen C. McLendon, CPCU, ARM, CPIW**

International Risk Management Institute Inc.  
Dallas, Texas  
E-mail: maureen.m@irmi.com

#### **Stanley Oetken, CPCU, ARM**

Highlands Ranch, Colo.  
E-mail: stanoetken@msn.com

#### **Timothy M. Rodriguez, CPCU, ARM**

Salt Lake City Corporation  
Salt Lake City, Utah  
E-mail: timothy.rodriguez@slcgov.com

#### **Jerome Trupin, CPCU, CLU, ChFC**

Trupin Insurance Services  
Scarborough, N.Y.  
E-mail: jtrupin@aol.com

### ***Liaisons***

#### **Richard G. Berthelsen, CPCU, J.D., ARM**

AICPCU  
Malvern, Pa.  
E-mail: berthelsen@cpcuiia.org

#### **John J. Kelly, CPCU, ARM**

CPCU Society  
Malvern, Pa.  
E-mail: jkelly@cpcusociety.org

#### **Christopher H. Ketcham, CPCU, CFP, CIC**

AICPCU  
Malvern, Pa.  
E-mail: ketcham@cpcuiia.org

# 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 2010. I am sure everyone will agree with me that 2010 is bringing in the hope of welcome change from all the turmoil of 2009.

As well as a new year, we have a new addition to the Risk Management Interest Group newsletter editorial staff. I am pleased to announce that **Peg M. Jackson, CPCU, DPA**, will be working with me as co-editor. She is a leading authority on nonprofit risk management and has written numerous books and publications. Peg brings a world of experience to our team.

In this issue, we have a wonderful selection of timely and relevant articles. **John R. Koenig, CPCU, AIC, ARM, AIM, SCLA**, writes about how working together as insurance professionals always brings value to everyone involved, including insurer, producer and insured.

Committee member **Salvatore W. "Bill" DiSalvo, CPCU**, helps us debut a series of interviews with risk management professionals, which will provide insight into their professional lives and the risk management industry. This issue features **Susan M. Waters, CPCU, ARM**, risk manager for Venetian Resort Hotel Casino, with locations in Nevada, Macao, Singapore and Pennsylvania.

Committee member and regular contributor **Jerome Trupin, CPCU, CLU, ChFC**, has written an article on using risk management and insurance coverage to protect against the threat of employee dishonesty.

"What We Can Learn from a Challenging Economy — Six Business Lessons from the Recession," by marketing and sales consultant **John R. Graham**, provides insight on what we can learn from a recessionary environment that hopefully can be applied to efforts to battle out of today's ongoing economic turbulence.

**Robert A. Bregman, CPCU, MBA, MLIS, RPLU**, has provided an article

on Side-A and retired directors insurance coverages relative to the current litigation involving Stanford Financial Group.

"Four Commercial Auto Endorsements Every Insured Should Consider," by **Christopher J. Boggs, CPCU, ARM, ALCM, LPCS, AAI, APA, CWCA, CRIS**, discusses endorsements available for use with the business auto policy.

We also present "Insurance Coverage for Intellectual Property Infringement," the third installment of a four-part series by **Robert D. Chesler, J.D., Ph.D.**, and **Cindy Tzvi Sonenblick, J.D.** If you missed Part 1 on privacy liability or Part 2 on cyber policies, you can access the last two newsletter issues by going to the Risk Management Interest Group Web site. Log on to the CPCU Society Web site, [www.cpcusociety.org](http://www.cpcusociety.org), choose "Interest Groups" in the top menu and click on "Risk Management Interest Group."

We wrap up this issue with "Risk Trek — Risk Management Future Trends," an article by **Nancy Germond, M.A., ARM, AIC, ITP**, that asks, "Where will the next few years take risk managers?"

We hope you enjoy another information-packed issue provided by our authors. As always, please feel free to let us know your thoughts on the articles, what you would like to see, and what you like and don't like. Please contact [jane.damon@wellsfargo.com](mailto:jane.damon@wellsfargo.com) or [peg@pegjackson.com](mailto:peg@pegjackson.com). We welcome all authors and commentaries. ■

# Adding Value — Risk Management as a Collaborative Method

by John R. Koenig, CPCU, AIC, ARM, AIM, SCLA



**John R. Koenig, CPCU, AIC, ARM, AIM, SCLA**, was the commercial property claims manager with Nationwide Insurance Company but has returned to being the principal/resident agent of J.R. Koenig & Associates LLC, an independent adjusting firm. In addition to the CPCU designation, he holds the professional designations of Associate in Claims, Associate in Management, Associate in Risk Management, Associate in Management and Senior Claim Law Associate. He is a past treasurer of the CPCU Society's Maryland Chapter and currently teaches an INS 23 (commercial insurance) class through the Insurance Society of Baltimore.

**I**nsurance as an industry has tended to be specialized in terms of functions. For instance, claims professionals have not until recently interacted closely with underwriters, agents or brokers. The competitive environment in today's insurance industry emphasizes value and service as differentiating factors. Collaborative consultation among risk

managers, loss control specialists, claims professionals, underwriters and producers has the potential to not only lower cost, but also identify those risk elements that could emerge as problematic in the future. Generally, the insured is asked to front the costs for risk management and loss control measures to remedy issues and concerns that have emerged in the initial examination of the risk.

Recently, I had the opportunity to participate in a project that resulted in a win-win for the insured and the insurer. I was invited by the regional leadership team of a national insurer to accompany its risk manager, loss control specialist, underwriter and producer to an insured's facility. This insurer was intending to bid on a particular risk that had an estimated package premium in the low millions. Upon arrival at the insured's facility, the producer and insured led the tour of the facility. We also reviewed the specifications for the completion of the project, which was to be in two to four years.

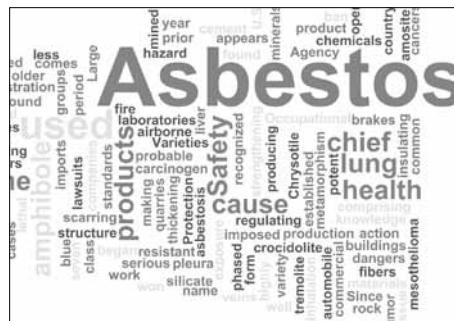
Upon completion of the “above-ground” tour, I inquired as to whether the current and future buildings were on slab construction or if there was a basement area. In our “below-ground” tour, we found the remnants of approximately 25 to 50 tons of asbestos rolls, in addition to asbestos just hanging from the leaking basement pipes and drains. We also found the sewage drains had deteriorated to such a level that we were able to observe raw sewage waste traveling through the pipes. There were several other potentially large exposure hazards, which we need not thoroughly address in this article.

Suffice it to say, the costs of nearly any claim exposure could have exceeded the “package premiums” by 100 to 200 percent. Since the state was assisting in brokering the deal for the building, several options for the costs were available. With this in mind, the team first suggested the insured apply to the state’s Department of the Environment for possible assistance via municipal or state bonds, loan guarantees or grants to clean up the asbestos. Second, it was suggested that the insurer write the policy using manuscript endorsements to specifically exclude many of the exposures. Another option suggested was to write a manuscript policy and clarify what each party did or did not intend to fall within the coverages or exclusions. Regardless of how the policy was written, the insured was requested to maintain a “significant” Self-Insured Retention (SIR).

Because every member of the team participated in a thorough investigation, the insured and the insurer benefitted. The knowledge, skills and training of all of the participants, including a claims professional, facilitated a positive outcome to the examination of this particular risk.

The expanded collaborative effort on the front end of a risk may ensure a reduction in the severity and frequency of claims. By working together, insurance specialists can identify and retain those insureds whose risk profiles match the company's strategic direction. This combination of expertise is even more important if the insured had misunderstood the policy or claim subject matter.

Working as a team to reconcile an issue that would or could be damaging to any member of the team is crucial. Collaborative efforts benefit insureds, the company and the common good in keeping insurance costs down and coverages available to a wider audience.



# An Interview with a Prominent Risk Manager

by Salvatore W. "Bill" DiSalvo, CPCU

Since earning his CPCU designation in 1974, **Salvatore W. "Bill" DiSalvo, CPCU**, has served in various CPCU Society positions, including past president of the Los Angeles Chapter. He is a member of the Risk Management Interest Group. DiSalvo currently serves as a Beverly Hills, Calif. commissioner, where he is president of DiSalvo Insurance Agency Inc. DiSalvo holds a bachelor's degree in business administration from Loyola University of Los Angeles.

**Editor's note:** Risk Management Interest Group Committee member **Salvatore W. "Bill" DiSalvo, CPCU**, interviewed **Susan M. Waters, CPCU, ARM**, risk manager for the Venetian Resorts Hotels and Casino in Nevada, Macao, Singapore and Pennsylvania. He first met Waters in Nevada when she was an underwriter and had just received her CPCU designation. Waters then became a broker — during which time she wrote an insurance manual for gaming enterprises — and is now a risk manager. As a CPCU Society director, it was DiSalvo's unpleasant task to go to Nevada to disband the local chapter. Waters, however, dissuaded him, offering to "get to work on the problem." The continued existence of the Las Vegas, Nevada Chapter proves that she was successful in her efforts. Another successful effort of hers was getting an insurance chair established at the University of Nevada, Las Vegas (UNLV).

## What motivated you to become a risk manager?

I was an underwriter and then a broker specializing in large and complex accounts — and dealing with risk managers on a daily basis. I helped establish the first-ever Owner Controlled Insurance Program (OCIP) in Nevada for the construction of the Venetian Resort Hotel Casino. When the executives there started interviewing for the risk manager position and asked me for recommendations, the idea of utilizing the knowledge I had and putting some

of my ideas into practical application intrigued me. Also, closing my circle of experience plus facing the challenge of dealing on a day-to-day basis with the inherent problems of the position greatly interested me. So ... I told them I would like the job myself!

## What are your responsibilities now?

A lot more than I expected — handling the negotiations and purchase of insurance for a worldwide conglomerate with very diverse needs, such as standard property-casualty, aviation for a large fleet of aircraft, marine for a large ferry operation in Asia, international cargo and new construction projects around the world. Plus handling every type of claim imaginable — from guest injuries and guest vehicle damage, cargo claims, large property losses and litigated liability cases to workers compensation and ADA complaints. Then there's filling out paperwork for various authorities, dealing with HR issues, internal corporate politics, traveling to our worldwide locations to conduct personal inspections, meeting with underwriters and various internal departments, and much more.

## What risks keep you up at night?

What doesn't would be more appropriate! It seems that I am always putting out fires with not enough firefighters and not knowing what will be the next big fire I need to deal with.

## How are you managing those risks?

If you mean how I handle the financial consequence, it is a combination of self-insurance, insurance and noninsurance transfer. Safety awareness training and incident handling have major roles in preventing and reducing risk.

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

Meet with other risk managers and attend as many risk management-type meetings/seminars as possible. Don't be afraid to ask questions. Take courses, especially the Associate in Risk Management designation program courses offered by

the American Institute for CPCU and Insurance Institute of America (the Institutes).

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

The ARM program and on-the-job training.

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

There is very little time for reading publications, so I have to be very specific in what I do read. *National Underwriter* and *Advisen Front Page News*, which comes up on my e-mail each morning, are very helpful.

## What future trends do you see in the profession?

Less staff, more work, more leaning on outside help, less opportunities to attend meetings, etc., with the cutback on budgets.

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

Communicate with one another and don't be afraid to ask for help. Become a sponge for knowledge — even the littlest bit of what may seem unimportant right now may come in useful in the future.

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

Creating an insurance and risk management program that includes the internal handling of claims, safety and OSHA compliance from scratch. And being able to grow this program and adapt it to the various international expansions we have going on. ■

# Insuring against Employee Fraud

**Employee Fraud Can Happen Anywhere. Learn How to Provide Complete Coverage in Risk Management Programs**

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](mailto:cpcuwest@aol.com).

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**I**n today's recessionary times, more businesses — maybe even your own — need to be worried about employee fraud. It can happen anywhere: In May 2009, two ACORD employees were arrested on theft charges, accused of embezzling more than \$1 million from the nonprofit association.

According to research conducted by the Association of Certified Fraud Examiners, U.S. organizations lose an estimated 7 percent of annual revenues to fraud. Based on the projected U.S. Gross Domestic Product for 2008, this percentage indicates a staggering estimate of losses around \$994 billion among organizations, despite increased emphasis on antifraud controls and recent legislation to combat fraud.

Based on a survey of international employers over the past five quarters, the Corporate Executive Board reported a 20 percent increase in observations of misconduct from the first to the second half of 2008; a 5 percent decline in frontline employee perceptions of senior management's commitment to integrity; and an increase in the number of disengaged employees, from one in 10 to one in five, causing declines in companywide productivity of up to 5 percent. The Corporate Executive Board's research shows that business units with the weakest cultures have experienced five times the amount of misconduct as those with the best.

Employee theft and dishonesty is a serious exposure that needs attention in any risk management program. The first step is analyzing exposures and instituting robust loss control procedures. Next, carry high-limit employee theft/dishonesty coverage, choosing the form that best fits the insured's needs. Finally, broaden the coverage to provide the most cost-effective protection.

## Loss Control

The first step is basic risk management based on loss control. This begins with checking an applicant's employment history and references. The Internet makes a basic check on a prospective employee simple and inexpensive.

Other good steps are outlined in the questions in typical employee dishonesty applications. These include:

- Auditing by an independent CPA with a review of internal controls.
- Requiring two signatures on checks.
- Separating accounting and bookkeeping functions; for example, individuals who authorize checks also should not be able to produce them.
- Mandating vacations — a frequent comment after a large embezzlement is that the embezzler "never took a vacation."
- Confirming bank statement balances by someone outside the accounts payable unit.
- Stamping invoice "paid" when checks are issued.
- Inventorying valuable equipment on a regular basis and storing it in secure areas.
- Instituting strict computer controls including: automatic prevention of repeated attempts to gain unauthorized access, exception reports generated for unauthorized sign-in or repeated access attempts, and segregating programmers' and operators' duties.

## Purchasing Insurance

The next line of defense is insurance. Once the insured has decided to purchase insurance against employee thefts, the plot thickens. For a long time, the commercial insurance market offered primarily employee dishonesty insurance that covered losses incurred during the policy period (or during prior policy periods, if insurance had been continuous). The market now offers four

types of employee fidelity insurance for commercial and nonprofit enterprises:

- (1) Employee dishonesty insurance on an incurred loss basis.
- (2) Employee dishonesty insurance on a discovery basis.
- (3) Employee theft insurance on an incurred loss basis.
- (4) Employee theft insurance on a discovery basis.

To decide which coverage to recommend to our clients, let's look at employee dishonesty versus employee theft forms and then incurred loss versus discovery.

## Dishonesty versus Theft

Employee dishonesty was the traditional form for insuring commercial enterprises. The insuring agreement says:

**We will pay for loss of or damage to money, securities and other property resulting from dishonest acts committed by an employee.**

Dishonesty is not defined, and on the surface, that makes employee dishonesty seem to be a better choice than employee theft. After all, "dishonesty" is a broader term than "theft." But most employee dishonesty forms include what I call the "triple trigger." This provision requires showing that:

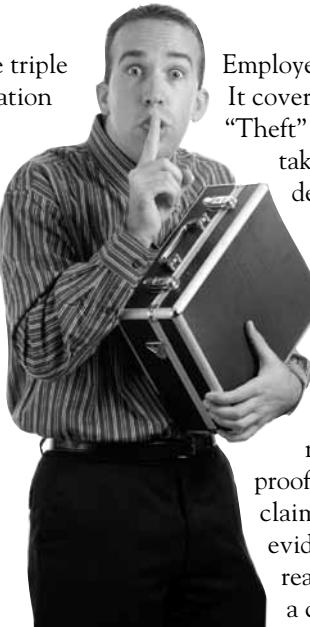
- (1) The employee intended to cause the insured to sustain loss; and
- (2) Intended to obtain financial benefit for the employee or another person; and
- (3) The financial benefit is something other than salaries, commissions, bonuses, promotions, profit sharing, etc.

The major problem with the triple trigger is the court interpretation of the financial benefit requirement. A classic example is the bookkeeper who decides that he's underpaid and raises his salary check from \$1,000 to \$2,000 per week on his own initiative. While this is clearly dishonest and easily meets the requirement that the embezzler intended to cause a loss and derive a benefit for himself, the courts have held that the financial benefit involved does not pass the test of being something other than salary. The result is no coverage for a loss that most of us think should be covered. We're joined in this opinion by some of those who drafted the original policy language; they changed policy wording in an unsuccessful attempt to reverse the court interpretation of the policy.

There are some ways to overcome this problem. For example, in one insurer's policy the financial benefit requirement provision reads as follows:

**Obtain financial benefit (other than employee benefits known to the insured, approved by the insured, and earned in the normal course of employment, including salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions [emphasis added]).**

The requirement that the financial benefit be "known to the insured and approved by the insured" would provide coverage in a situation such as the one cited above. Even better, the American Association of Insurance Services (AAIS) employee dishonesty coverage form CO 1007 04 02 does not contain any manifest intent requirement at all.



Employee theft is simpler to discuss. It covers theft by an employee. "Theft" is defined as the unlawful taking of property to the deprivation of the insured. At first blush, that appears to be overly restrictive. Does unlawful mean that the employee must be indicted or convicted? No. What it means is that the act must be of an unlawful nature; but the standard of proof is that required for a civil claim: a preponderance of the evidence, not proof beyond a reasonable doubt as required for a criminal conviction.

Employee theft wording has been used for many years by several insurers who developed their own wording; ISO converted to employee theft wording about 10 years ago. The Surety & Fidelity Association of America and AAIS forms are still written with employee dishonesty language.

## Loss Sustained versus Discovery

"Loss sustained" covers losses incurred during the current policy year or under prior continuous insurance. Note particularly that the prior insurance must be continuous; even a one-day gap is sufficient to end coverage for prior losses. But even when the insurance is continuous, coverage for prior losses is limited to the lower of the amount of coverage in the prior period or the amount available in the current period.

The "loss discovered" form covers any loss, no matter when it occurred, as long as it is discovered during the policy period or within 60 days of expiration. If the insurance is renewed or replaced, the discovery period ceases when the new policy takes effect. The limit of the

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# Insuring against Employee Fraud

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current policy applies regardless of what coverage the insured carried in the past.

The underwriter can attach a retroactive date endorsement, similar to the retroactive date endorsement used with claims-made liability coverage. It excludes coverage for any loss that occurred entirely prior to the retroactive date. It does provide coverage, up to policy limits, for losses that occurred partly before and partly after the retroactive date or that occurred entirely after the retroactive date.

## Which to Choose?

The question of which form to choose lends itself to a decision tree. When choosing between loss sustained and discovery, ask your customer these questions:

- Has the insured not carried employee dishonesty or theft insurance in the past?
- Has there been a coverage lapse that would wipe out the continuous coverage for prior acts under a loss-sustained form?
- Has the insured carried inadequate limits in the past?

If the answer to any of these questions is yes, a discovery form is the insured's best bet, unless the underwriter wants to attach a retro date endorsement with an unacceptable date. In that event, go for loss sustained coverage. If the answer is no to all three questions, then either discovery or loss sustained would be satisfactory. Choose the policy with the best other terms and conditions.

When deciding between employee dishonesty and employee theft, determine whether the insurer will provide employee dishonesty coverage without the "manifest intent" requirement or with a satisfactorily modified "manifest intent" provision. If yes, the choice is the employee dishonesty form. If no, then I recommend the theft form.

## How Much Coverage?

There is no accumulation of limits from year to year under employee dishonesty and theft insurance. For example, if an insured carried a \$500,000 limit each year for the past 10 years on a lost sustained form, and discovers this year that an employee has been embezzling \$250,000 a year for the past eight years, the most the insured can collect is \$500,000. The discovery form is, by its terms, limited to losses discovered during the policy period, avoiding arguments over accumulation. This is one of the reasons why high limits of fidelity insurance are vital. Fidelity losses can go on for many years, so even a small business can sustain a surprisingly large loss. As an example, the CFO of two Hollywood hotels siphoned \$11.4 million from his employers over an eight-year period.

The New York School Board Association recommends 10 percent of budget as a suggested limit for schools, which establishes a starting point for many entities.

*When deciding between employee dishonesty and employee theft, determine whether the insurer will provide employee dishonesty coverage without the "manifest intent" requirement or with a satisfactorily modified "manifest intent" provision.*

Try to involve the firm's accountant or CFO in a discussion of the worst-case scenario for an embezzlement loss.

## Broadening Coverage

Price should not be the sole deciding factor when purchasing employee theft/dishonesty coverage — or any other insurance, for that matter. Some carriers offer broader coverage or will provide it if

you ask for it. Areas of broader coverage include:

- Extending the definition of "employee" to include persons performing acts of employees, such as directors, trustees, noncompensated officers, volunteers, students, interns and retired employees working as consultants.
- Covering the cost of preparing and proving the claim.
- Expanding policy territory definition to anywhere in the world.
- Including insured's ERISA plans as named insureds to avoid the need for separate ERISA fidelity coverage.
- Waiving prior fraudulent or dishonest acts by employees exclusion if the amount taken by the employee was \$5,000 or less.
- Proving that knowledge of prior fraudulent or dishonest acts is limited to knowledge by the insured's risk manager.
- Covering terminated employees for up to 90 days instead of 30 days.
- Waiving notice of consolidation, mergers and new acquisitions provided the insured's total assets do not increase by more than 25 percent.
- Including "faithful performance" coverage for governmental entities.
- Eliminating the treasurer and tax-collector exclusions in policies covering governmental entities.

In most policies, the definition of "employee" does not include agents, consultants and others performing services for the insured as nonemployees. Frequently in volunteer or public organizations, nonemployees have important responsibilities that can create large exposures. For example, the treasurer for one organization with more than \$1 million on deposit in various accounts was an independent contractor. Such people can be added to the coverage using an "agent's rider." Whether there are nonemployees with the opportunity to embezzle the insured's money or other property is something to explore with

# Meet New Co-Editor Peg M. Jackson CPCU, DPA

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

clients when discussing employee theft and dishonesty coverage.

## A Big Gap

While employee theft/dishonesty coverage is broad, careful reading turns up some serious gaps. Typically, coverage applies to loss of or damage to money, securities and "the property resulting directly from theft committed by an employee" or employee dishonesty. The problem is that "other property" is defined to mean tangible property. In our knowledge-based economy, our most valuable assets often are intellectual property such as formulas, patents, copyrights, customer data, etc.

Neither employee dishonesty nor employee theft forms provide coverage when an employee steals intangibles, but the loss to the firm can be devastating.

And these losses do occur. An employee of Avery Dennison, the label company, sold trade secrets to a competitor. When the company submitted a claim to its insurer, it was turned down because trade secrets are not tangible property. The declination was confirmed by the courts in the ensuing lawsuits. This is a gap the insurance industry should try to close; at the moment, loss prevention is the only line of defense.

Careful risk management, high-limits insurance and appropriately broadened coverage will go a long way toward protecting your clients against the growing threat of employee dishonesty. ■



**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. 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 has authored five books on nonprofit risk management, strategic and contingency planning and Sarbanes-Oxley compliance for John Wiley & Sons Inc. Her latest book entitled, *Reputational Risk Management: Four Steps to Safeguarding Your Company's Most Valuable Asset*, will be released in the Spring of 2010.

Jackson is a principal with Peg Jackson & Associates in San Francisco, Calif., and Alexandria, Va., and is a member of the CPCU Society's District of Columbia Chapter. Check out Peg's Web site at [www.pegjackson.com](http://www.pegjackson.com), and contact her at [peg@pegjackson.com](mailto:peg@pegjackson.com). ■

# What We Can Learn from a Challenging Economy — Six Business Lessons from the Recession

by John R. Graham



**John R. Graham** is president of Graham Communications, a marketing services and sales consulting firm specializing in the insurance industry. He writes for business publications and speaks on business, marketing and sales issues. Contact him at 40 Oval Road, Quincy, Mass. 02170; (617) 328-0069; [jgraham@grahamcomm.com](mailto:jgraham@grahamcomm.com). The company Web site is [grahamcomm.com](http://grahamcomm.com).

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**P**aying attention to business is one of the major benefits of a recession. Ford figured it out. And so has Starbucks by bringing back the founding CEO, closing nearly 1,000 marginal stores and — most significantly — introducing its own instant coffee. This could be a brilliant move. While proudly passing up its \$4 cup of coffee, we take the instant stuff home and keep a little Starbucks in our lives.

But the recession has worn on so long, we're tired of hearing so much bad news. Yet, pushing all that aside misses the point and so do all the layoffs and foreclosures. Dwelling on the real but negative skews our perspective: *We are so preoccupied with getting through the recession, we can easily fail to learn from the experience.* We're like students who are so focused on graduating they miss the education.

To help avoid missing our recession education, here are six clarifying lessons from the current state of the economy:

**(1) Cutting prices can kill business.** In a recent Yankelovich Partners survey, 70 percent of the respondents assume a brand that lowers its prices during a recession is already overpriced. Further, 62 percent believe the products are old, perhaps ready to expire or are about to be revamped.

There's more. In the same survey, 65 percent assume that leaving prices unchanged is a sign that the brand is popular, while the same percentage believes it indicates that the product is already a good value.

In the food business, McDonalds, Burger King, Chili's, Applebee's and others recognize the price-cutting problem by creating new value menus that don't compete with their regular offerings. Some car manufacturers are responding with the same strategy by introducing new, lower-priced models such as the Nissan Cube and the Kia Soul.

**(2) Figure out that tough is normal.** Referring to the devastation of the recession, we hear people say, "We didn't need this." Of course, we didn't need all the job losses, dashed personal plans and families forgoing basic necessities.

What we need is an attention-getting wake-up call. Whether you agree with it or not, that's what the president gave the banks and the auto industry.

The lesson in all this is simply that tough is normal. Just ask the people of Fargo, N.D., about tough. They didn't whine or whimper when the Red River reached a crest at more than 40 feet. They filled and stacked more than three million sandbags in record time. They won some and lost some and after the river began receding, the plain-talking, gutsy mayor, **Dennis Walaker**, gave the city a new challenge: "Our word for the day is restore and recharge." That's the right memo!

Tough is normal, and it's time to get used to it.

**(3) Get the right vision.** In *Epic of America*, **James Truslow Adams** explored what it was that gave America its prominence. As **David Kamp**, writing in *Vanity Fair*, notes, "What Adams came up with was a construct he called 'that American dream of a better, richer, and happier life for all our citizens of every rank.'" He wrote those words in 1931, the heart of the Great Depression.

We all know someone from a dirt-poor family who gained a college education and later looked back and said, "How the hell did that ever happen?" It happened because someone had the right vision.

**(4) Give customers a reason to have confidence in you.** GM's "value-added" strategy for clearing out its obese inventory included a 100,000-mile warranty, a plan to make up to nine monthly car payments

of up to \$500 each if you lose your job, and to throw in its OnStar emergency system for a year. Unfortunately, GM has an unparalleled credibility crisis: *Consumers don't believe them.*

If GM would ever consider leveling with consumers, they might inspire confidence and sell more cars. The pitch might go something like this: "Look, folks, we're in a jam (We're all aware of this). We've got hundreds of thousands of cars sitting around the country on dealer lots (We've seen dozens of pictures of acres of cars), and we need to sell them fast because we need the cash (Now, we're listening). We can't give them away (Makes sense), but we're going to do everything to give you more value than ever for your dollar (Seems reasonable). Come in and let's talk about it" (Call to action).

Far-fetched? Impossible? Everything else has failed, so why not try it? Honesty creates confidence and trust.

## **(5) Give the customer a solution pitch.**

Why do we think a "sales pitch" is what it takes to make a sale? What the customer wants is a *solution pitch.*

A good example is Kraft Foods. Even though we all know Kraft Mac & Cheese, we probably draw a blank when it comes to the company's other brands. In the past, they would have poured on the ad bucks to get our attention, but not today.

Since more of us are eating in, but have less time to prepare meals and are watching our budgets, Kraft came up with an incredibly

creative solution: an iPhone app called iFood. The promise is saving time and having great meals.

When you pick your recipe on iFood, you can also pick the store where you want to shop, and iFood not only gets you there, but it also tells you the aisles in your store where the items are located! And when it comes to ingredients, Kraft products are highlighted as you might expect.

Best of all, the iFood app is free and it's so effective, it has one guy I know cooking for the first time in his life. His creamy chicken enchiladas are terrific. By the way, how do you think he feels about Kraft Foods?

Give consumers a solution pitch if you want to pull more customers.

## **(6) Improve customer experience.**

Many companies talk about "delighting customers," but few seem serious about giving customers what they want. Apple is a major exception. While shopping traffic is less than robust these days, there's always plenty of action in the Apple retail stores.

Here's why: Apple focuses on improving the customer experience. For example, the customer greeters serve a specific purpose. They don't just say, "Welcome to Apple." They ask the people coming in what they are interested in. They then log them in on a Mac, which connects the customer instantly with a personal shopper who stays with them, answering questions, providing detailed product information and offering helpful suggestions on how to get the most from what they buy. The personal shopper delivers the

product to the customer and takes care of the transaction right on the spot. There's no handoff or unanswered questions. Most of all, the customer feels valued.

The salesperson performs one more surprising, but highly appreciated task — the rebate. No need to mail it in and wait 10 weeks, hoping the check will arrive. The rebate is immediately deducted from the price of the total sale and the customer receives an e-mail confirmation.

Apple's personal shoppers send a powerful message to customers: "We want you to know that our service, as well as our products, goes beyond your expectations." Instead of cutting back in a challenging business environment, Apple has further improved its customer service.

Here they are, six business lessons taught by a recession. Instead of just trying to get through or survive a trying period, the lasting benefits will be learning from it. ■

# Stanford Financial D&O Coverage Dispute Illustrates Value of Side-A and Retired Directors Insurance

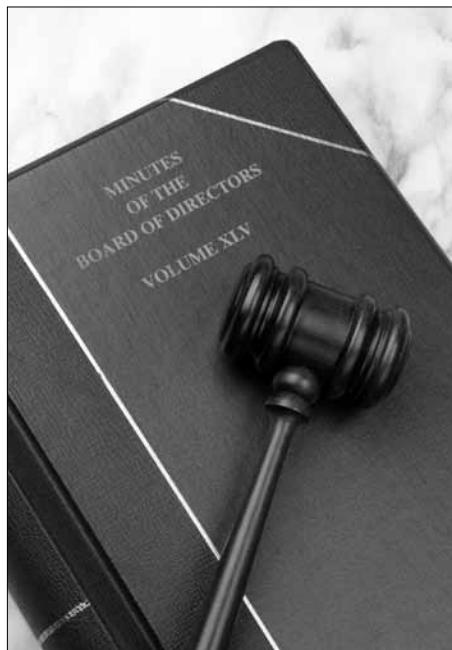
by Robert A. Bregman, CPCU, MBA, MLIS, RPLU

**Robert A. Bregman, CPCU, MBA, MLIS, RPLU**, is the principal author and editor of *Professional Liability Insurance*, an online and print resource published by International Risk Management Institute Inc. (IRMI) that covers medical and nonmedical, D&O, E&O and employment practices liability exposures and coverages. He is also the author of the seven online courses comprising IRMI's Management Liability Insurance Specialist (MLIS) certification program. Prior to joining IRMI in 1989, Bregman was a liability claims adjuster, insurance company underwriter and assistant risk manager at two Fortune 500 companies, and a risk management consultant at a Big Five accounting firm.

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**T**he current litigation involving Stanford Financial Group provides an elegant illustration of why it is a good practice for corporations to consider purchasing Side-A and retired directors insurance coverages.

Although high-profile defendant **R. Allen Stanford** has garnered nearly all of the media's attention thus far, a no less critical issue looms over the case. Specifically, in addition to Mr. Stanford, it was reported by Bloomberg.com (Oct. 10, 2009) that "... As many as 60 Stanford executives and employees are seeking to use the directors' and officers' coverage to defray their legal bills ..." in defending themselves against a blizzard of civil and criminal charges.



Preliminary reports indicate that between \$50 million to \$90 million in D&O proceeds are available to protect the defendants. While not insubstantial, given the magnitude of damages alleged, complexity of the proceeding and the number of potential defendants, such limits should provide little cause for

optimism about the prospect of everyone receiving an adequately funded defense. While countless details concerning the Stanford operation remain as yet unrevealed, it is likely that there are widely varying degrees of culpability, as well as sharply conflicting legal interests, among the many defendants. This will doubtlessly raise the overall defense tab.

In these situations, the existence of Side-A coverage for both officers as well as inside and independent directors (especially the latter) still may not necessarily assure, but certainly increase, the likelihood that all persons embroiled in such cases have the requisite coverage to ensure a vigorous defense.

In addition, it is probable that a number of persons being sued were, but no longer are, serving as board members of the Stanford organization. Accordingly, such individuals would now be feeling much better if the corporation had purchased retired directors coverage for them prior to the conclusion of their service.

One key lesson from the Enron case was that the adage "We're all in this together" rarely applies in the complex world of D&O litigation. In situations such as these, which are becoming all too common, the existence of Side-A and retired directors insurance can assist in (1) creating additional coverage limits and (2) for defense purposes, separating the divergent interests of multiple defendants. ■

# Four Commercial Auto Endorsements Every Insured Should Consider

by Christopher J. Boggs, CPCU, ARM, ALCM, LPCS, AAI, APA, CWCA, CRIS



**Christopher J. Boggs, CPCU, ARM, ALCM, LPCS, AAI, APA, CWCA, CRIS**, is the director of education with *Insurance Journal's* Academy of Insurance. Prior to being appointed to this position, Boggs was an associate editor with *Insurance Journal*, writing most often for its [www.MyNewMarkets.com](http://www.MyNewMarkets.com) Web site. With nearly 20 years' experience in insurance and risk management, his background includes teaching prelicensing and insurance continuing education courses and writing three books and more than 250 research papers and articles on coverage and insurance-related issues.

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**T**he Insurance Services Office (ISO) lists more than 100 endorsements available for use with the business auto policy (BAP). (The total number varies by state.) Out of that heap of policy-altering endorsements, most designed to meet the needs of a specific class of insured or specific state's laws, are at least four that every insured should consider.

Regardless of the industry or state of operation, the following four endorsements alter the availability of coverage for exposures common to most insureds: (1) Employees as Insureds (CA 99 33); (2) Fellow Employee Coverage (CA 20 55); (3) Auto Loan/Lease Gap Coverage (CA 20 71); and (4) Rental Reimbursement (CA 99 23). Each is discussed in the following paragraphs.

## Employees as Insureds

Coverage granted to the named insured (the policy's "you") in the BAP is initially based on the definition of "covered auto" as granted by the applicable covered auto symbols. Each symbol grants the insured protection against the financial liability associated with the ownership, maintenance or use of a specific class of vehicle — owned, non-owned or hired.

(See "Does 2 + 8 + 9 = 1? Use of Covered Auto Symbols in the BAP," written by Boggs for MyNewMarkets.com on May 28, 2009.)

When symbols "1," "8" or "9" are used, the named insured is financially protected for its vicarious liability arising out of the use of a hired or non-owned auto. This includes protection for the named insured's vicarious liability that can arise from an employee's use of their personal vehicle **on the behalf of and for the benefit** of the named insured.

Assume, for example, the office manager uses his personal car to make daily trips to the post office, bank and other trips for the insured; the named insured is benefiting from the activities of the office manager and is thus exposed to vicarious liability for the negligent actions of the office manager. Should the office manager be involved in a serious crash on the way to the bank, the named insured could be held vicariously liable for any injury or damage suffered by a third party.

If the appropriate covered auto symbol is used, the named insured's BAP responds, *Continued on page 14*



# Four Commercial Auto Endorsements Every Insured Should Consider

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on an excess basis, to protect it for any vicarious liability that may arise from the accident. However, the unaltered BAP will not extend to protect the employee for his liability when using his personal auto for the benefit of the named insured.

In fact, the employee's personal auto policy responds first to protect the employee **AND** the company for which he works. The named insured's BAP, by application of the "Other Insurance" provision, actually applies as excess over the at-fault employee's personal auto policy; but again, only for the benefit of the named insured, not the employee.

To add further insult, the named insured's BAP carrier may even be able to subrogate against the employee to recover any money it pays out on behalf of the named insured because of the employee's negligence. Since the unaltered BAP specifically excludes the employee from "insured" status while driving his own vehicle, even on company business, the ability to subrogate is retained. Whether the insurer will or can carry through on this opportunity is based on the totality of the surrounding circumstances.

The Employees as Insureds (CA 99 33) endorsement closes these gaps and seeming inequities by altering the definition of "Who is an Insured" to include an employee while using an auto the "you" (the named insured) does not own, hire or borrow while it is being used on the named insured's behalf. This extends insured status to the employee while using his personal vehicle on company (the named insured's) business.

But even with the Employees as Insureds endorsement, the employee's personal auto policy (PAP) remains the primary protection. However, if the total of bodily injury and property damage exceeds the employee's PAP limits, the BAP with the CA 99 33 attached will respond as excess on behalf of BOTH the named insured and the employee. Plus, as an insured, the BAP insurer cannot subrogate against

the employee (unless a policy provision is violated, such as intentionally hitting the other person(s)).

## Fellow Employee Coverage

Exclusion "5" in the business auto policy reads: "**Fellow Employee:** Bodily injury to any fellow employee of the insured arising out of and in the course of the fellow employee's employment or while performing duties related to the conduct of your business." In essence, if one employee through the use of a vehicle injures a fellow employee on the job, there is no coverage extended from the BAP to protect the "at-fault" employee.

Combining exclusion "5" with exclusions "3" (Workers' Compensation) and "4" (Employee Indemnification and Employer's Liability) effectively removes any protection available under the BAP for an auto-related injury an employee might suffer in the course of employment (depending on who is classified as an "employee" based on entity type and law). Work-related injuries are to be covered elsewhere. The employer (named insured) has the opportunity to purchase workers' compensation to protect it from these exclusions, but an employee has **NO** such commercial insurance option, only a personal option he or she may not recognize is needed.

Employees who unintentionally cause an auto-related injury to a fellow employee may be left with no insurance protection should the fellow employee file suit. Three examples of possible fellow-employee gaps include:

- The employee driving a company-owned vehicle is negligent in his operation of the vehicle and is involved in an accident causing bodily injury to a co-employee riding with him (depending on the provisions of the "business use" exclusions and the meaning of "furnished for regular use" exclusion in the relevant PAP).
- The at-fault employee injures a fellow employee while using a company-

owned vehicle assigned to the at-fault employee (a company car). The at-fault employee does not have the proper endorsement on his PAP (extended non-owned auto) and is sued by the injured employee.

- During a business trip, the at-fault employee rents a car in the name of his employer to travel to various appointments. He and a fellow-employee are injured in an at-fault accident and the fellow employee sues the driver.

Yes, these are all work-related injuries and the injured fellow employee will be eligible for workers' compensation benefits (provided no policy provisions have been violated). However, this does not preclude the injured employee from suing the at-fault fellow employee. Workers' compensation's benefit as a sole remedy applies only to the employer, not the fellow employee; some states allow the injured party to also pursue and recover from any fellow employees causing the injury. Such allowance is based on the injury, the benefits received and the facts of the case.

Lacking the correct endorsements on the personal auto policy, the at-fault employee may end up having to pay out of pocket for such injuries to a fellow employee.

The Fellow Employee Coverage (CA 20 55) removes the fellow employee exclusion from the BAP, allowing the policy to respond on behalf of the at-fault employee following a vehicle-related injury to a fellow employee caused by a covered vehicle. When employers make company-owned vehicles available for employee use or allow employees to rent vehicles to benefit the company, this endorsement should be attached.

## Auto Loan/Lease Gap

As the name suggests, this endorsement alters the amount paid under the physical damage section of the BAP to include the difference between the actual cash value of the vehicle and the amount remaining

on the loan or the amount remaining on the lease. Basically, it helps insureds who are "upside down" on their loan or lease at the time of the loss.

Obviously, the Auto Loan/Lease Gap Coverage (CA 20 71) is a first-party coverage intended for the benefit of the insured. The coverage allows the insured to satisfy its contract with either the loss payee (lienholder) or lessor.

This endorsement pays the difference between the amount paid by the physical damage coverage and the amount owed and only when there is a total loss. Payment is limited to the value associated with the specific vehicle. Expenses such as overdue payments, high-mileage and usage penalties, security deposits, add-on costs (i.e., credit life, etc.) and balances from prior loans or leases carried over to the current financing agreement are excluded from coverage.

Vehicle values drop so quickly and the difference between the actual cash value (ACV) and the amount owed can be substantial. Consider this endorsement for all insureds with leased or recently-purchased vehicles.

## Rental Reimbursement

Insureds do not necessarily need a specific vehicle — they need the **use** of that

or a similar vehicle. The vehicle itself is covered under the physical damage section of the BAP (under other-than-collision or collision); but the loss of use of that vehicle following a first-party comprehensive or collision loss is not covered by the unendorsed business auto policy.

When the insured suffers a first-party loss of a covered vehicle, they also lose the use of that vehicle while it is being repaired; a replacement must be procured. Rental Reimbursement Coverage (CA 99 23) provides some of the necessary reimbursement to rent a replacement vehicle.

Rental Reimbursement Coverage is designed, as the name suggests, to reimburse the insured for the cost to rent a replacement vehicle while a covered vehicle is being repaired following a covered loss. The policy is subject to three "maximums" — a maximum per day limit; a maximum number of days; and a maximum total per loss, per vehicle. Further, the policy contains a 24-hour "after-the-loss" time deductible.

Coverage limits should be based on the type of vehicles being replaced. Private passenger autos may easily be attainable for \$30 per day — depending on the size of vehicle rented. Renting a replacement dump truck or other large work vehicle may run as high as \$500 or \$600 per day. Know the rental market in the insured's area when selecting limits as the policy limits payment to the lesser of the actual rental cost or the limit purchased.

One last important provision of which the agent needs to be aware: There is no coverage extended from this form if the insured has a spare or reserve auto available for use. The policy pays only when the insured needs a replacement vehicle, not just because the covered vehicle is not available for use due to a covered cause of loss.

Insureds rarely have spare vehicles just sitting around waiting to be used. Generally the vehicle serves a purpose and the loss of use of that vehicle can result in financial harm beyond the cost of rent (loss of sales opportunities, the inability to fulfill a contract, etc.); Rental Reimbursement Coverage finances part of the cost to regain the use of a missing vehicle by replacing it with another for a short period. ■

# Insurance Coverage for Intellectual Property Infringement

## Part 3 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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liability policy, including the new cyber policies. The challenge now for the insurance industry is to offer meaningful IP infringement coverage in these new policies while avoiding another flood of coverage litigation.

The key coverage grant of the 1976 advertising injury provision provided coverage for “infringement of copyright, title, slogan, trademark, service mark or trade name” and “unfair competition or piracy ... in the course of advertising.” This coverage had one overall problem: The insurance industry left all of the key terms undefined. “Advertising” itself was undefined, and soon became the subject of litigation. While terms such as “copyright” and “trademark” had settled meanings, the term “unfair competition or piracy” did not, leading to substantial litigation over the breadth of that coverage, including over whether it encompassed patent infringement.

For example, the insurance policy in *John Deere Insurance Company v. Shamrock Industries*, 696 F.Supp. 434 (D. Minn. 1988) required that the injury for which the insured sought coverage resulted from “advertising injury.” In this case, the insured had sent three letters to a potential buyer describing the strength of its machine, and also held demonstrations of the machine on the premises of the potential purchaser. The insurer argued that advertising injury required “public or widespread distribution of the alleged [advertising] material” and that the demonstrations and letters were selling activities that did not constitute “advertising” to the public at large. *Id.* at 439 (citations omitted).

The court disagreed. It looked at dictionaries and other sources that gave very broad definitions of advertising. The court found the term “advertising activity” ambiguous, and applied the rules of insurance contract construction. The

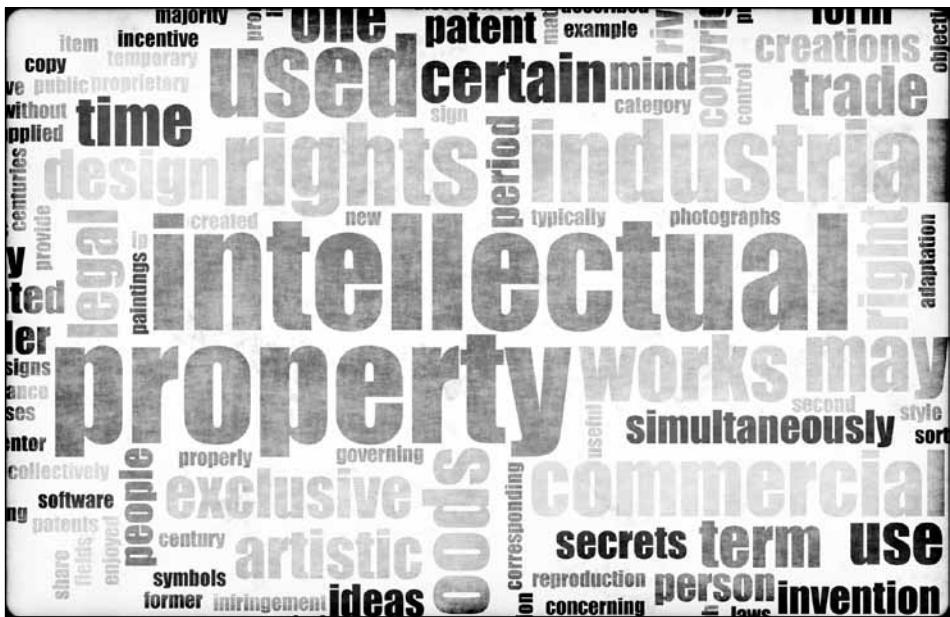
court stated that if the insurer had wanted to narrow the definition of advertising to widespread public dissemination, that it would have explicitly done so. In the absence of such a restriction, the court held that advertising could reasonably be interpreted to include letters sent to a single customer.

In 1986, the insurance industry introduced a new version of advertising injury coverage, providing coverage for “copyright, slogan, or title infringement;” “misappropriation of advertising ideas or style of doing business ... in the course of advertising.” Once again, the insurance industry made the same mistake of failing to define key terms. “Advertising” still remained undefined. While the insurance industry deleted “trademark, service mark or trade name” from the coverage, it did not include an exclusion for those categories of infringement. The policy continued to contain very broad undefined terms. Despite the deletion of trademark, insureds claimed with significant success that “misappropriation of advertising ideas or style of doing business” included trademark infringement.

In *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Insurance Group*, 50 Cal. App. 4th 548 (1997), the insured, Lebas, was sued for trademark infringement. The insurance policy provided coverage for “the misappropriation of advertising ideas or style of doing business.” *Id.* at 554. The policy did not contain an intellectual property exclusion. The insurer denied coverage. Lebas filed suit, and Hartford moved for summary judgment. The court granted Hartford’s motion, and the appellate court reversed.

The appellate court first took notice of the prior definition of advertising injury, which included piracy and unfair competition and expressly excluded trademark infringement. The court noted that not only had the terms been

**T**he insurance industry introduced “advertising injury coverage” in 1976, providing significant coverage for intellectual property (IP) infringement. In 2002, after repeated revisions to the advertising injury provision, the insurance industry introduced an almost absolute intellectual property infringement exclusion. The history of the insurance industry’s failure successfully to offer IP infringement coverage in the commercial general liability policy is symptomatic of that policy’s general failure to adapt to new risks during the past 30 years. Instead, the insurance industry has introduced niche policies to fill the gaps created by new exclusions in the general



changed, but the insurer had deleted the exclusion for trademark infringement. The court also noted that the key terms of “misappropriation,” “advertising idea” and “style of doing business” were not defined in the policy.

Hartford argued that the term “misappropriation” referred only to the common law tort and not to federal statutory issues. Lebas argued that the lack of a definition made the terms ambiguous. The court found that there was no evidence that the parties intended to use the policy terms in a technical way, and that these terms were subject to multiple reasonable meanings and connotations, and were therefore ambiguous. However, the court ultimately found coverage, concluding that:

"When read in light of the fact that a trademark infringement could reasonably be considered as one example of a misappropriation, and taking into account that a trademark could reasonably be considered to be part of either an advertising idea or a style of doing business, it would appear objectively reasonable that

"advertising injury" coverage could now extend to the infringement of a trademark." *Id.* at 565.

In the succeeding years, the insurance industry introduced newer versions of advertising injury coverage that had mixed success in reducing coverage. In *Villa Enterprises Management, Ltd. v. Fed. Insurance Co.*, 360 N.J. Super. 166, 175 (App. Div. 2005), the policy limited IP coverage to “infringement of copyrighted advertising materials or infringement of trade-marked or service marked titles or slogans.” The policy specifically excluded coverage for “trademark, or service mark or certification mark or collective mark or trade name, other than trademarked or service marked titles or slogans.” *Id.* The problem for the insurance industry here was again lack of definition: Apparently, no one knew what a “trademarked or service marked title or slogan” was. At summary judgment, the insurer’s attorney opined that it referred to trademarked titles of books.

The suggestion did not sit well with the court in *Villa Enterprises*, which

concerned infringement of the “Villa Pizza” trademark and service mark.

“Federal urges that the word ‘title’ means, exclusively, the name of a literary work and that its duty to defend and indemnify extends only to trademarked and service-marked names of literary works. Thus, Federal argues that the underlying dispute over the trademarked and service-marked name VILLA PIZZA® is excluded from coverage. Presumably, it would concede that an infringement of ‘DANTE’S INFERNNO PIZZA®’ would be covered. Federal’s tortured definition of ‘title’ in the context of this comprehensive general liability policy and New Jersey law governing construction of insurance policies cannot be sustained.” *Id.* at 172.

Finally the insurance industry introduced sharply curtailed coverage, coupled with a restrictive definition of advertising and a detailed intellectual property exclusion for “personal and advertising injury arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. However, this exclusion does not apply to infringement, in your advertisement, of copyright, trade dress or slogan.” The combination of the sharply curtailed advertising injury coverage with the new IP exclusion meant that, except for a tiny number of cases, the commercial general liability no longer provided coverage for IP infringement.

The reduction and consequent removal of intellectual property infringement coverage from the commercial general liability policy was often unannounced by the insurer and unnoticed by the insurance broker. In both cases, this could lead to redress by the policyholder left without coverage. Generally, an insurer

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# Insurance Coverage for Intellectual Property Infringement

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cannot reduce coverage on a renewal without giving notice to the insured. See, *Bauman v. Royal Indem. Co.*, 36 N.J. 12, 25 (1961) (“[I]nsurer must call attention to any change in the terms and, if it does not, the change cannot be a part of the contract, and the renewal is subject to reformation.”); *Skeete v. Dorvius*, 184 N.J. 5, 9 (2005) (“[P]olicy changes must be conveyed fairly to the policyholder.”); *McClellan v. Feit*, 376 N.J. Super. 305, 315 (App. Div. 2005) (“[W]hen the insured is not specifically and clearly informed of the change, the renewal will be ineffective.”).

Insurance brokers who fail to advise their clients of these changes are also at risk, as some states, including New Jersey, have held that a broker has a duty to advise the insured of any reduction in coverage. See, e.g., *Wasserman v. Wharton*, 223 N.J. Super. 394, 407 (App. Div. 1998) (Broker has duty to advise “client that critical coverage which he already has is not only being unilaterally withdrawn but is replaceable at nominal charge.”) Thus, insureds without intellectual property infringement coverage should investigate whether the loss of coverage resulted from omissions by their insurers or brokers.

Moreover, insurance carriers are now inserting their own ad hoc, individual exclusions into policies. These have the effect of barring coverage for certain categories of claims or intellectual property risk altogether, such as absolute IP exclusions and absolute Web site/Internet exclusions. Indeed, some general liability policies do not contain advertising injury coverage at all. Most policyholders, and many of their brokers, do not know which form of advertising injury coverage their policy contains. Based upon the above discussion, it is safe to assume that many companies now have essentially no coverage for intellectual property infringement.

Moreover, the insurance industry has been slow to develop new intellectual property infringement policies. One of the newest cyber policies in the marketplace that addresses these issues is the Corporate Expression insurance policy of Media/Professional Insurance. This is a claims-made policy, with claims expense within the limit of insurance. It provides coverage for four broad areas of corporate expression activities, including:

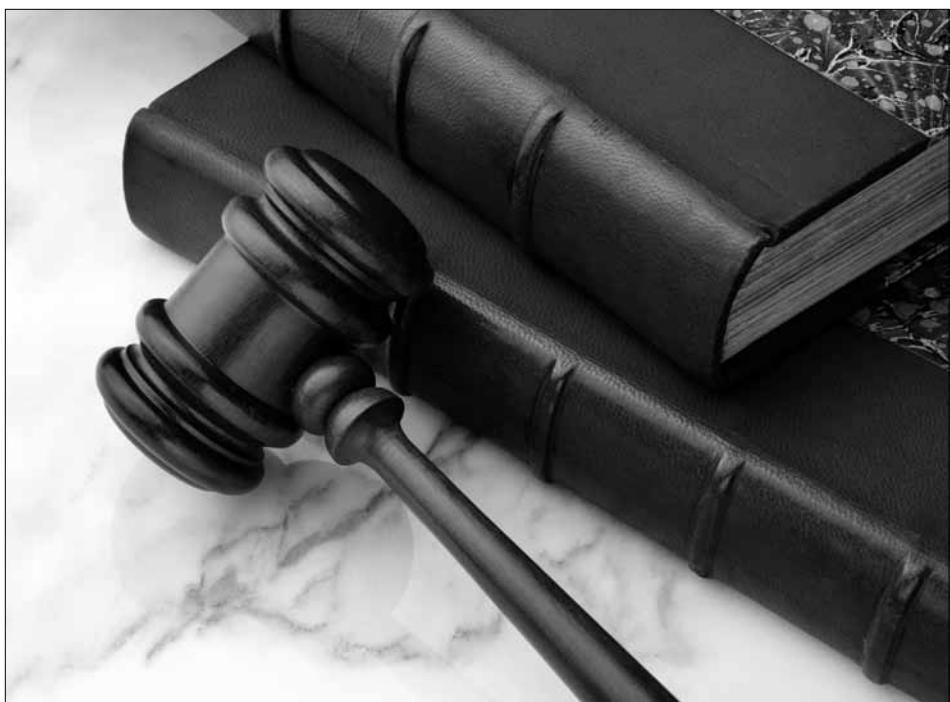
- (1) Any type of advertising activity, broadly defined.

- (2) Gathering, maintaining or disseminating data or information regarding customers.
- (3) Design, manufacture, labeling, sale and distribution of products.
- (4) The development, creation or use of any computer code, software or system.

The policy provides coverage for eight types of Wrongful Acts arising out of these corporate expression activities. Generally, the wrongful acts are broadly defined. They include:

- (1) Invasion or infringement of privacy.
- (2) Wrongful entry.
- (3) Any type of defamation or disparagement.
- (4) Trademark infringement.
- (5) Copyright infringement.
- (6) Errors or omissions in advertising.
- (7) Transmission of a computer virus.
- (8) Unfair competition, conspiracy and infliction of emotional distress, if based upon one of the previous seven defined Wrongful Acts.

Every company has insurance coverage for fire loss and auto collision, and for slip-and-fall accidents. Yet those same companies usually do not have coverage for intellectual property infringement. Indeed, many companies do not even know that those assets are uninsured, or that insurance for them might be available. Every company should conduct an audit of its intellectual property, and examine the insurance marketplace to see if appropriate products are available. ■



# Risk Trek — Risk Management Future Trends

by Nancy Germond, M.A., ARM, AIC, ITP



**Nancy Germond, M.A., ARM, AIC, ITP**, is the founder and president of Insurance Writer, a risk management and insurance firm that specializes in quality writing, consulting and training services. With more than two decades of risk management experience, Germond writes business columns and blogs, and has authored scores of articles on risk management, safety, personnel matters and claims management. She was the first risk manager of the City of Prescott, Ariz. A skilled and experienced consultant and presenter, Germond holds a master's degree in sociology and a bachelor's degree in communications; she also is a certified Insurance Training Professional.

**Editor's note:** This article was written by **Nancy Germond, M.A., ARM, AIC, ITP**, for her regular AllBusiness.com blog, Risk Management for the 21st Century. It was posted on June 4, 2009, at 1:10 a.m., and is reprinted with the permission of AllBusiness.com. Material copyrighted by AllBusiness.com.\*

**W**here will the next few years take risk managers? It probably depends on the size of the organization involved. With smaller firms, it may be business as usual, with a slightly higher employment-practice exposure as layoffs increase.

In larger financial firms, expect a move toward less complicated financial products. In the wake of the financial crash, increased regulatory agency oversight is a certainty. In a recent OpenPages survey, fully 90 percent of those Fortune 1000 risk professionals believed that increased regulation was a certainty.

Expect increased violence abroad due to economic instability, according to Strategic Risk, a U.K.-based publication. It cited Iceland as one example. According to the Global Peace Index, based on economic strife, Iceland went from the most peaceful nation to the fourth. Clearly, this international trend will compel risk managers to brush up on their kidnapping and ransom coverage understanding as well as implement better travel and security policies for their employees, both at home and abroad.

A trend toward licensed risk managers who purchase coverage for their companies will increase, according to one commercial underwriter at a national carrier. "This will enable them to have greater control over the risk transfer and selection process and control costs by absorbing commissions that would be paid to the broker." He foresees risk managers forming "insurance clusters to gain access to multiple markets for coverage." This model has worked for small independent insurance agencies, so why not for risk managers?

According to one risk management specialist, the sustainability movement will impact risk management. Green supply chains, additional costs to implement green technology, radical social movements that threaten developers, researchers and others all pose risk that is difficult to quantify and even more difficult to prevent. Privacy concerns will also continue to force companies to invest in more technology.

As enterprise risk management gains acceptance, risk managers will often become chief risk officers and must be able to "speak CFO," according to one

risk management consultant. An "MBA in finance will be the minimum education requirement," according to one health care director.

The need for management of reputational risk for companies will increase as social networking can quickly damage a company's reputation. While it used to take months or years for a company's misdeeds to penetrate the media, today one misstep can be spread virally in virtually minutes. YouTube and social networking sites can literally engulf a company's reputation in minutes. In addition, key employees' postings and online behavior can expose a company to risk, as well. Human resource managers are currently grappling with this reality, according to a Deloitte LLP-commissioned April 2009 study.

While greater financial skills will be required for risk managers working in larger corporations and especially in any financial firms, the bedrock skill of a sound risk management program is still strong communication skills. That will never change. Unfortunately, in the Fortune 1000 survey noted above, over 70 percent of the respondents described their governance, risk and compliance as "siloeed," which is problematic for the very companies that should be implementing enterprise risk management.

One thing is certain — the next years will be challenging for risk managers as they strive to balance profits with managing risk. ■

*\*AllBusiness.com provides resources to help small and growing businesses start, manage, finance and expand their business. The site contains forms and agreements, business guides, business directories, thousands of articles, expert advice and business blogs.*



# Risk Management Interest Group

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CPCU Society  
720 Providence Road  
Malvern, PA 19355  
[www.cpcusociety.org](http://www.cpcusociety.org)

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**Chair**  
Jeffery L. Bronaugh, CPCU, CLU, ChFC, CIC  
E-mail: [jbron01@live.com](mailto:jbron01@live.com)

**Co-Editor**  
Jane M. Damon, CPCU, MBA, CIC, CPIW  
Wells Fargo Insurance Services Inc.  
E-mail: [jane\\_damon@wellsfargo.com](mailto:jane_damon@wellsfargo.com)

**Co-Editor**  
Peg M. Jackson, CPCU, DPA  
Peg Jackson & Associates  
E-mail: [peg@pegjackson.com](mailto:peg@pegjackson.com)

**CPCU Society**  
720 Providence Road  
Malvern, PA 19355  
(800) 932-CPCU  
[www.cpcusociety.org](http://www.cpcusociety.org)

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

**Managing Editor**  
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