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Message from the Past Chair

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

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As all good things do, my tenure is coming to an end this year. It is with heartfelt "thanks" and gratitude that I would like to extend my sincere appreciation to our entire Risk Management Interest Group team for its support, hard work and dedication during my tour of duty as chair. The opportunity to serve in this role has been a very rewarding experience that has allowed me to participate with many excellent professionals.

In previous editions, I have taken great strides to individually recognize team members who have worked above and beyond the call of duty. I will be eternally grateful to these folks who have gone the extra mile. I also want to thank all of the committee members who have become good friends and unselfishly dedicate their time and, often at their own expense, attend mid-year and annual meetings to support the mission of our group and the CPCU Society.

As I turned the baton over to **Peg M. Jackson, CPCU, DPA,** in Las Vegas, I did so with complete confidence in her leadership abilities and know that she will continue to take the Risk Management Interest Group to the next level of success. I would like to call on all CPCUs and risk managers to join in and support the mission of the Risk Management Interest Group in promoting the discipline, as risk mitigation becomes an ever increasing priority with all businesses in the world. Risk management is simply a professional's profession.

In closing, not only do I want to say "thank you" to our Society staff members and The Institutes for supporting our mission, but also encourage each CPCU to get involved in one or more interest groups. As the old saying goes, "The more you give, the more you will receive." I personally have received an immeasurable amount of friends, satisfaction and personal development from my experience on this exceptional team. For that I am sincerely grateful. ■

What's in This Issue

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.

In this edition of the Risk Management Interest Group newsletter, we have compiled some of the problems and solutions that were presented at the "Commercial Coverage Conundrums" seminar during the 2010 CPCU Society Annual Meeting and Seminars in Orlando. This seminar was so informative that we wanted to share it with our readers. Additional problems and solutions will be presented in future editions.

We will also include in future editions the problems and solutions presented at the "Commercial Liability Coverage Conundrums" seminar during the 2011 Annual Meeting and Seminars in Las Vegas. Both seminars were the brainchild of committee member **Jerome "Jerry" Trupin, CPCU, CLU, ChFC,** whose tireless efforts led to excellent results!

Everyone has heard about all the data breaches in the news, so you will enjoy reading the article by **Joshua Gold, J.D.,** on "Data Security Issues for Cyber-Related Losses."

And where are all our employees going? **Nancy Germond, MA, SPHR, ARM, AIC, ITP,** has provided us with an article, "Brain Drain," on how to reduce the impact of retirement and increase employee retention.

William W. Clark, CPCU, discusses "Warehouse Legal Liability" and helps us understand this industry a little better … and how to handle the insurance necessary for warehouse operations.

And lastly, the American Transportation Research Institute has provided a summary of its article, "Predicting Truck Crash Involvement: A 2011 Update," which I know you will find useful.

Please 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 or peg@pegjackson.com. We welcome all authors and commentaries. ■

Commercial Coverage Conundrums — Property Appraisals and Theft Coverage Problems

by Joshua Gold, J.D., and Peter A. Halprin, J.D.

Joshua Gold, J.D., is a shareholder in the New York office of Anderson Kill & Olick P.C. He has represented numerous corporate and non-profit policyholders in various industries, with recoveries for his clients well in excess of $1 billion. His practice involves matters ranging from international arbitration, directors' and officers' (D&O) insurance, insurance captives, business income and property insurance, commercial crime insurance, and data security.

Peter A. Halprin, J.D., is an attorney in the New York office of Anderson Kill & Olick P.C. His practice concentrates in commercial litigation and insurance recovery, exclusively on behalf of policyholders. His litigation practice also includes domestic and international arbitration, as well as bankruptcy, environmental law and intellectual property matters.

Editor's note: At the 2010 CPCU Society Annual Meeting and Seminars in Orlando, the Risk Management Interest Group, together with the Underwriting Interest Group and the Claims Interest Group, presented an interactive discussion of 10 coverage problems. Here are discussions of two of them prepared by one of the panelists and an associate. (Additional problems will be discussed in future issues.)

Appraisal Argument

Problem: Fire damaged a building and its contents. The building is occupied as a knick-knack store operated by the insureds. The insured submits claims for total loss of $750,000 on building and $320,000 on contents. The carrier offers $550,000 on the building claim, asserting that the rear of the building is salvageable. This accounts for $100,000 of the difference. Differences in unit costs and labor allowances account for the other $100,000 difference.

On the contents, the carrier offers a replacement cost of $208,000 settlement subject to a 50 percent depreciation holdback. (The insurer doubts that the elderly insureds will replace a lifetime accumulation of knick-knacks). The insureds demand appraisal, which the carrier rejects claiming that the issues are coverage issues. The insureds delay re-building, stating that they do not have funds pending outcome of appraisal.

Discussion:

(1) *Are the insureds entitled to appraisal? If so, on what claims?*

Yes. The policy provides coverage for the damage to the building as well as for the loss of the contents that, given the function of the store, could fall under the business personal property coverage as "stock." CP 00100607§§A.1.a-b.

The policy further provides, in relevant part, that "[i]f we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss." CP 00100607§E.2.

The problem suggests that the difference between the carrier's offer and the policyholder's submission, with regard to the building, is that the carrier views the building as salvageable. Although salvage is often undefined in a policy, it can mean, for example, "a state of damage or disrepair such that the [building] is rendered unsuitable for its originally intended use in the absence of major alteration or repair and is in such condition that it is usable only for scrap value or secondary purposes." See Vanguard Ins. Co. v. McWilliams, 680 S.W.2d 5052 (Tx. Ct. App. 1984) (holding that "salvage" was an ambiguous term and therefore construing the term to provide coverage). Although a dispute over whether the building is salvageable would arguably fall within the realm of a disagreement as to the value of the property, and thus within the appraisal provision, the question of salvage can implicate a blend of legal and valuation issues, and thus a case could be made that appraisal is not warranted until disputes over salvage are resolved. See *Duane Reade, Inc. St. Paul Fire & Marine Ins. Co.*, 261 F. Supp. 2d 293, 296 (S.D.N.Y. 2003); *Indian Chef, Inc. v. Fire & Cas. Ins. Co. of Connecticut*, No. 02 Civ. 3401, 2003 WL 329054, at *3 (S.D.N.Y. Feb. 13, 2003) (denying motion to compel appraisal on the grounds that it was premature because a dispute between the parties "that goes to coverage under the policy can only be resolved by analysis

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Commercial Coverage Conundrums — Property Appraisals and Theft Coverage Problems

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and application of the policy."). However, the question of salvage only comprises $100,000 of the difference. The remaining basis for the difference, unit costs and labor would likely be subject to appraisal, as would differences in the valuation of the contents claim.

(2) *If the insured is entitled to appraisal, assume that it takes months to resolve these various issues and that, by the time the repairs are completed, the rental value loss exceeds the policy limit. What time limit applies to the rental value claim? Can the insureds recover in excess of their rental value limit?*

The Business Income Coverage includes coverage for the actual loss of Business Income (rental value) that is sustained due to the necessary suspension of operations during the "period of restoration." CP00300607, §A.1. The period of restoration is the period of time which begins 72 hours after the time of direct physical loss or damage for Business Income Coverage. CP00300607, §F.3.a. The period of restoration ends on the earlier of (1) the date when the property at the described premises could be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) the date when business is resumed at a new permanent location. CP00300607, §F.3.b.

The policyholder may be able to recover in excess of the rental value limit under two related theories. The first theory imposes consequential loss on an insurance company, where the insurance company withholds coverage benefits needed by the policyholder. In *Bi-Economy Market, Inc. v. Harleyville Ins. Co. of New York*, 10 N.Y. 3d 187 (N.Y. 2008), New York's highest court determined that the time element coverage period of liability is extended where an insurance company withholds

payments that are needed by a policyholder to re-establish business operations. See *Bi-Economy*, 10 N.Y. 3d at 195-96. Under such a scenario, the improper denial or withholding of payment of all or part of an insurance claim (including time element insurance coverage) will result in the insurance company being liable for all consequential damages.

Under the second theory, time element insurance coverage may be extended while coverage issues are adjusted and resolved. Case law under this theory deals with the issue more specifically. In one such case, *Vermont Mutual Insurance Co. v. Petit*, 613 F.Supp.2d 154 (D.Mass. 2009), the policyholders' rental property was destroyed by fire, and at issue was the rate of lost income, the length of the Period of Restoration, and the proper classification of continuing expenses. Richard Lewis, Business Income Insurance Disputes, § 5.02[F]. The Period of Restoration was held to be a "theoretical replacement time," which included "any delay attributable to [the insurance company's] failure to perform its duties under the policy," or "failure to adjust [a] loss within a reasonable time," along with "[a] reasonable extension in the adjustment period [to] include foreseeable delays in negotiating losses." Id. The court therefore extended the Period of Restoration to include the entire period taken to adjust and pay the loss. Id. Accordingly, the policyholder has an argument here that their time element insurance coverage is extended while the coverage issues are adjusted and resolved. Forms used in discussion: CP 00 10 06 07, CP 10 30 06 07, and CP 00 30 06 07.

Theft from Storage Shed

Problem: Insured put a $3,000 storage shed on the premises. It was placed 20 or so feet behind the sales office. The client did not want coverage for the shed itself. One night, the shed was broken into and more than $50,000 worth of business personal property (BPP) items were stolen.

The carrier denied the claim because the BPP was not in or on a building listed in the declarations. The insured pointed to the policy wording of " ... located in or on the buildings or 'mobile homes' at the described premises ... " which, he argued, did not state that the building had to be specifically listed on the policy to trigger coverage for BPP stored inside.

The adjuster responded that the shed is not considered to be part of the "described premises." He referred us to the Description of Premises on the dec page which lists Prem #1 and Bldg #1, along with the address. He said that since the shed was not Bldg #1, it was not part of the premises.

Discussion: Is the insured covered for the loss of the BPP in the shed? Policy forms CP 00 10 06 07 and CP 10 30 06 07 plus declarations page CP DS 00 10 00.

There are a number of arguments that the insured may be able to make in favor of coverage for the loss of the BPP in the shed. According to the Building and Personal Property Coverage Form, the insurance company "will pay for direct physical loss or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." CP00100607, §A.

Obtaining coverage under the policy may depend upon what items constituted the BPP. For instance, coverage is available for the following Covered Property: "materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, *used for making additions, alterations or repairs to the building or structure*." CP00100607, §A.1.a.(5)(b) (emphasis added). The BPP was clearly close enough to the building to obtain coverage but coverage may only be available if the BPP, for example, consisted of tools and supplies used to repair the building.

In addition, the insured might also argue that the BPP is covered under the Business Personal Property Coverage. This coverage extends to property within 100 feet of the described premises, including furniture and fixtures, machinery and equipment and all other personal property owned by you and used in your business. CP00100607, §A.1.a.(5)(b). If the insured can establish that the materials in the shed and the BPP housed in the shed constitute "all other personal property owned by you and used in your business" or any of the other enumerated categories, the insured will be entitled to coverage.

Another basis for coverage is that fact that the shed is covered because it is only 20 feet from the sales office and thus comprises part of the Description of Premises since it shares the same address with Prem #1 and/or Bldg #1. ■

Data Security Insurance for Cyber-Related Losses

by Joshua Gold, J.D.

Editor's note: This article originally appeared in Anderson Kill's *Policyholder Advisor* newsletter, Volume 20, Number 3, and is reprinted with permission.

Data security breaches continue to mount, and no institution or individual is immune. Defense contractors, video game companies, universities and other organizations have recently experienced serious data thefts and attacks by hackers. The problem is so acute that even firms specializing in computer security have been attacked. While there are many things an organization can do to minimize both the risk and severity of a cyber attack, this article focuses on business insurance policies that may cover a cyber-related loss and how to protect those insurance coverage rights.

Insurance in the Event of a Cyber Loss

If a company suffers a loss or faces liability due to a data breach, step one is to figure out which of its insurance policies might provide insurance coverage for the loss. One or more often-purchased commercial policies may respond to a data breach loss and provide partial or complete insurance coverage for the loss suffered. Insurance policies to be checked include the following: property insurance policies (including those promising business interruption insurance coverage), liability insurance policies (including E&O, D&O, general liability and umbrella insurance), crime insurance policies (including financial institution bonds, computer crime policies and fidelity insurance), and business owner "package" policies (which may include two or more of the above-mentioned insurance coverages).

Which Policies Apply?

Figuring out which policies provide coverage for a cyber-related loss is not always easy. In some cases there may be overlapping coverage, where two or more policies combine to cover different aspects of the loss; or overlapping coverage denials, where multiple insurance companies assert that none of the insurance policies they sold cover the claim, given the presence of conditions or exclusions that the insurance company argues preclude coverage.

Depending upon the nature and scope of a data breach, a policyholder could face an array of losses and claims: lawsuits seeking damages for invasion of privacy, negligence, violation of federal statutes governing the handling of customer, employee or health information, lawsuits over the misappropriation of sensitive or secret business information, investigations by governmental authorities and, potentially, other claims. Policyholders may also experience business interruptions if they must shut down certain online systems or websites in order to contain (or determine the method of) the attack. Other costs may be incurred after informing customers and third parties of data breaches pursuant to state notification laws, establishing call centers and providing guidance to those affected by the data breach.

Insuring Data Security with New Insurance Products

While some policyholders have secured insurance coverage for losses arising from computer fraud or theft under existing insurance policies, some have also purchased newer standalone insurance products to protect against the peril of data security breaches. Some of this more recent coverage is quite valuable, but it should never be thought of as "customer friendly." Internet suite insurance products, or "modules," are often confusing and unclear as to the true scope of insurance coverage.

Thus, policy terms should be closely scrutinized. For example, recent network security policies commonly include clauses that purport to condition coverage on the absence of errors or omissions in the data security measures employed by the policyholder. One policy clause purports to exclude coverage for any allegation that the policyholder knew about a "shortcoming in security" prior to the policy inception.

Another exclusionary clause seeks to bar coverage for any allegation that the policyholder failed to "take reasonable steps" to design, maintain and upgrade computer security at the company. Another clause, sometimes included in newer policy forms marketed to insure against data breaches, seeks to bar coverage where it is alleged that the policyholder used security software that has not been "proven successful" or has incomplete test results.

Such policy clauses are not only vague but also may be exploited by insurance companies arguing that the policyholder was somehow derelict in safeguarding computer data from hackers, among other coverage defenses. The risk of overly broad interpretations of exclusions is especially problematic in the context of computers, where the pace of technological developments (both good and bad) is rapid. Further exacerbating the risk is the reality that computer security is always playing catch-up and is never 100 percent ironclad. As such, these types of policy exclusions can be traps since it is not terribly difficult for a plaintiff to allege against the policyholder following a data breach that they somehow did not take enough security measures to protect data from disclosure.

Furthermore, some policies may attempt to limit insurance coverage if the data breach occurs when a computer is not actively connected to a network. For instance, will the insurance policy provide coverage for a laptop that is stolen from a car, hotel room or conference room where it is unconnected to the policyholder's network? Some insurance policy forms are either vague about this or actually purport to exclude computer hardware that is not actively tied to a network by omitting such devices from the policy's definitions. A stolen laptop storing sensitive information can pose just as many problems for a policyholder as a hacked network. Moreover, with the advent of table computers and handheld devices that have high-capacity memories and comparatively limited security, policyholders need insurance policies that protect against the risks inherent in these small, data-laden devices.

"Further exacerbating the risk is the reality that computer security is always playing catch-up and is never 100 percent ironclad."

Other exclusions that should be avoided are those that seek to bar coverage for dealing with the Federal Trade Commission, state attorneys general or other governmental entities. Policyholders can incur substantial expenses in addressing enforcement actions, inquiries, investigations and other matters that may result after a data breach has taken place. Also to be avoided are exclusions that seek to bar coverage where the policyholder actively acquires customer information. For a host of business applications, policyholders may seek out and store customer information. Should that data get hacked, loss and liability may ensue. If the policyholder is looking to insure this risk, it is vital that the insurance policy not contain a vague or unduly broad exclusion that ends up gutting the very coverage sought.

Accordingly, policyholders should steer toward selecting insurance policy forms that are devoid of as many coverage exclusions (aka the fine print) as possible. Data security measures coupled with risk transfer in the form of insurance coverage can further a policyholder's risk management strategies and serve as a financial buffer when the data genie does escape the bottle. ■

Brain Drain

Twenty-Two Steps to Reduce the Impact of Retirement and Increase Employee Retention

by Nancy Germond, MA, SPHR, ARM, AIC, ITP

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Editor's note: This article appears on the Insurance Writer website and is reprinted with permission.

Executive Summary

Is your organization ready to lose up to 25 percent of its intellectual capital in the next decade? More than one quarter of the U.S. working population will be old enough to retire in less than three years, according to the U.S. Bureau of Labor Statistics. This may lead to a shortfall of nearly 10 million workers. Add this flight to an average job stay of four years, where today's employees switch to a competitor without so much as a backward glance, and businesses in America are at risk.

America is poised for a brain drain so dramatic that many companies will find themselves unprepared to face the upcoming talent shortage. Yet it appears few companies are taking proactive steps to deal with the coming talent crunch.

This paper explores actions companies can take to manage looming intellectual losses. Some are straightforward; some will take more planning. Any organizational change comes from the top, so industry leaders must take proactive steps to deal swiftly and strategically with the changes our workforce will undergo in the coming years.

As companies increasingly rely on intellectual capital, the value of workforce intelligence to an organization cannot be overstated. This paper offers solid solutions to address the looming loss of intellectual capacity. There is little doubt that the insurance industry, so reliant on intellectual capital, should be at the forefront of addressing this important trend.

Where Did All the Experts Go?

Brain drain historically has been defined as the loss of human skills in developing nations, usually due to the migration of trained individuals to more industrialized nations or jurisdictions. However, as baby boomers begin to retire, the term is increasingly used to describe the loss of intellectual capital to U.S. organizations. Downsizing also takes its toll on workforce intelligence.

The U.S. workforce has changed dramatically. A baby boomer's parents may have held one job in their entire careers; experts estimate a typical young American will hold from seven to 10 different jobs before retirement. Insurance organizations, while they may not yet feel the pinch, are currently experiencing brain drain as long-term employees leave a company to retire, switch employers or change careers. There is little doubt — insurance organizations are about to see dramatic changes resulting from this exodus.

Future employment demographics should sound an alarm to insurance companies in America. Over time, the lack of top talent can be devastating to an organization, especially in an industry as complex as insurance. Add an increasing dependence on technology, and future employee skill deficits are a certainty, not just a theory. While this exodus is beginning to hit the insurance industry now, it will accelerate greatly in the next few years, as aging boomers, those best placed to assume senior management roles, retire. This talent shrinkage must be managed now, before organizations find themselves in crisis.

Penny-Wise, Pound Foolish?

It may seem profitable to replace an older, more costly employee with a younger person. However, organizations may lose a great deal more than they bargained for with that replacement. With the departure of these highly experienced employees, companies lose more than their individual expertise. Also lost is what psychologist Daniel Wegner calls "transactive memory."[1] Transactive memory is information a person accesses which is outside of his or her own memory, information routinely called up by using another person's memory.[2] Groups where this transactive memory is understood and valued function better than groups that lack this trait.[3]

Take co-workers, for example. On a difficult property claim, an adjuster may turn to a co-worker and ask, "What is the name of that engineer we used a few years ago in Georgia on that storm-surge claim?" Our brains can store only so much information. If we have access to people around us who may be more suited to remember a particular type of information, then we don't have to work as hard to remember items that we don't understand, don't recall or that we don't need at the time we hear it.

Brain drain slows down the work process and impairs a company's product quality. It can result in inefficiency due to the time it takes employees to find new co-workers with the information they may need. It can also result in costly mistakes resulting in lawsuits, lost subrogation opportunities or claims paid, ones that with a thorough investigation would have been denied. Probably most importantly, a workforce lacking robust intellectual capital loses its strategic advantages and abilities to respond quickly to business opportunities.

Insurance professionals are concerned about brain drain, yet even a casual review of insurance literature shows that much of the focus in industry research centers on improving technology to enhance operations. Even the term "human-resource management" seems to be morphing into a robot-like term, "human-capital management." This disembodied approach seems to negate the fact that we're still dealing with people; yes, they may be "capital' to a company, but most employees would be offended to hear themselves referred to in that manner. "Talent management," the new euphemism for recruiting and retaining employees, again seems to dehumanize the worker. Few people appreciate being "managed" or referred to as "capital."

The emphasis in insurance companies seems to have shifted away from quality toward quantity. How much faster can we complete a process appears to be the question. Can we settle a claim in 30 days, even if we have to throw more money at it? Has customer service and quality been forgotten in the effort to improve company operations? Have we, in an effort to increase profits, driven much of our brightest talent right out the door?

America is poised for a brain drain so dramatic that many companies will find themselves unprepared to face the upcoming talent shortage.

The Devalued Older Worker

Insurance message boards are filled with complaints from older, highly experienced insurance professionals who cannot find work, some with two to three decades of knowledge. "I have a solution to the brain drain in the insurance industry. Hire me and all those still looking for work … and some of the people whose résumés are posted on the Broward County RIMS website, among others,"[4] one frustrated professional said in a June 2007 online risk management discussion. If these complaints are true, the widespread reluctance by insurance organizations to hire older, experienced workers may backfire due to the lack of new talent breaking down doors to enter the industry.

Nowhere is brain drain felt more acutely, it appears, than in claims departments nationwide. According to Conning Research & Consulting,[5] 70 percent of the nation's adjusting staff is age 40 or older. "I have found this [talent leakage] particularly true in the claims arena," according to **James Brittle**, a producer in the National Accounts division of Cobbs, Allen & Hall in Birmingham, Alabama. "Coming from the highly engineered chemical and energy field, try to find one carrier that still has experienced and knowledgeable adjusters to handle property claims. There are two options — young and inexperienced or experienced and independent. The latter group is getting smaller and smaller. It's not real comforting."[6]

How Can Companies Prevent Brain Drain?

Here are some possible solutions to this problem:

Analyze Current Workforce Strengths and Talents to Determine Core Competencies

If an employee's store of knowledge is known only to a few co-workers, then it is largely useless to the organization as a whole. It becomes an information silo, a vertical information cluster that is not transmitted laterally to co-workers, usually to the detriment of the organization. Analyzing employees' expertise and knowledge, and categorizing it so that it becomes accessible by other employees and departments are critical to improving and strengthening the workforce.

Determine Through Surveys or Informal Meetings or Email Queries Where Employees Go for Specific Information

Who are your employees' "information agents" in given areas? Imagine this scenario — a Lloyd's underwriter wants to issue a binding authority to an agent in Florida. Before agreeing, however, the underwriter must determine wildfire hazards in the counties where the agent wants to write business. If the underwriter can, with a few keystrokes, search a database that shows Lloyd's experts who understand catastrophe modeling and perhaps understand wildfire exposures particularly well, the decision to issue the binding authority can be made more

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Brain Drain — Twenty-Two Steps to Reduce the Impact of Retirement and Increase Employee Retention

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easily and accurately, not to mention more quickly.

Knowledge asset mapping, written about extensively by British researcher Bernard Marr, allows organizations to locate and diagram internal knowledge. This visualization of intellectual capital, which Marr states is the "principal basis for competitive advantage,"[7] can then be used as a strategic planning tool so that organizations can predict future intelligence gaps before they occur.

Today's organizations must be agile to compete. Classifying employee knowledge to make it more accessible to others in the organization can help companies make decisions rapidly. It goes without saying that companies such as Apple Inc. have seized marketplace opportunities to catapult themselves into leadership positions. Without sufficient intellectual capital, however, a company may not be robust enough to respond to opportunities as they arise.

Prepare to Replace Exiting Information Agents When Those Employees Retire
In smaller organizations, this process may not be formal. It may be as simple as acknowledging an employee who is an expert on a subject is leaving. Notify all employees of the loss of this person, then, direct them to another employee who may not have as much knowledge but has some knowledge in that area. The company must develop incentives and time frames so that newer information agents can become experts on specific topics as gaps arise, and hopefully before they arise.

Determine Which Employees Are Potential Flight Risks, Whether to Retirement, Recruitment or Family Pressures Such as Aging Parents
Talk openly with employees who are considering retirement or having home/work difficulties to determine how you can retain them. Flexibility is the key — the employee may need more time off or greater leeway to work non-core hours or to work at home. If the Family and Medical Leave Act (FMLA) is voluntary, your organization should consider allowing FMLA leave.

Hire Retiring Employees as Consultants on a Part-Time Basis to Retain Their Expertise
With increasing cost of medical care for retirees, many welcome a supplement to their retirement income. Adding benefit package components that appeal to older workers, such as long-term care insurance or prorated health coverage from part-time work, may help retain them as well.

Provide Incentives for Employees to Consider Postponing Retirement
When an organization considers the total impact of losing a long-term employee, it is generally cheaper to retain that employee than to hire and train a replacement, especially if the employee's knowledge routinely saves the company money. Consider the following scenario:

> A claims manager will retire in two years, working more than 30 years for just two carriers. He is one of the top arson investigators in the Midwest, taking dozens of arson claims to trial or to closure. Currently, there is no one else in his company who handles arson files without his supervision, and no one who remotely approaches his level of expertise.

What happens to this company when he leaves? How much will his departure cost the company in terms of claim payments that might have, with his expertise, been compromised or denied? Can this organization really afford to lose the employee's expertise without a solid exit strategy?

Use Technology to Drive Intra-Company Communications
Intranets, videoconferencing, peer-to-peer technology and podcasts are information portals that allow workers to communicate over distance and varying time zones. Encourage disparate and divergent workers to develop virtual relationships to share ideas and solve problems using these tools. Why not take advantage of your global workforce?

Establish 'Practice Communities' Where Individuals from Various Departments — Claims, Underwriting, Marketing and Reinsurance — Meet Regularly to Solve Problems
According to **James Surowiecki**, author of *The Wisdom of Crowds*, a crowd is a group of diverse people with differing levels of intelligence and information who collectively make smart decisions. A good example of this wisdom, as many claim managers have found, is "round tabling" a claim. Allowing a group of adjusters with varying amounts of experience to determine a claim's value or to develop a plan of action to kick a stalled claim forward often provides excellent results and acts as a learning tool for less experienced team members.

Surowiecki defines four elements that make a smart crowd. He recommends a diverse group because each person will bring a different set of experiences to the process. The crowd should have no leader, so that the group's answer can emerge, but there must be a way to articulate the crowd's verdict. Finally, people in the crowd must be self-confident enough to rely on their own judgment without undue influence from other group members.

With today's sophisticated technology, organizations don't have to rely solely on local talent. A company-wide initiative can be implemented readily with some help from your organization's information technology department. Practice communities build virtual relationships, which in turn make employees more connected to the organization.

Organize and Memorialize Your Practice Community Results with Wikis, a Decade-Old Web Application That Allows Many People to Collaborate on a Single Document
There are several sites dedicated to collaborative writing, including www.writeboard.com, and www.writer.zoho.com. Visit www.wikipedia.org,

the online encyclopedia written by collaboration, to view an example of wiki technology at its finest.

Implement a Formal Mentoring Program
Some insurance organizations have implemented mentoring programs. The National Association of Catastrophe Adjusters (www.nacatadj.org) formed a mentoring program in 2005. While not online, it matches new adjusters eager to learn CAT adjusting with experienced field adjusters.

Aon Services Corporation is almost a year into an ambitious mentoring project. With 600 Aon employees in the pilot program, developed with assistance from Triple Creek Associates Inc. in Colorado, Aon expects to roll out the program companywide. The program was not limited to senior manager mentors; anyone in the organization with good performance was eligible to participate. "This challenged our operational paradigms, to have a junior person mentoring a senior person,"[8] according to **Talethea M. Best,** Aon's director of U.S. talent development.

The results have been positive, she reports. Eighty-six percent of the mentees and 62 percent of the mentors who responded to a recent survey felt that the mentoring process improved their own performance. Eighty-five percent of the mentees and 78 percent of the mentors would participate again if asked.

"We encouraged a protégé-driven process," Best said. Potential mentees used a computerized platform with specific parameters to search for what they wanted in the mentor relationship. "It was a win/win for all involved," Best said.

"This [mentoring project] was an opportunity for us to think more strategically," Best reported. "To retain employees, it is critical to make people feel invested and engaged. How do you make folks feel like they make a significant contribution? Mentoring is a way to address that" at a cost of pennies per employee, Best said.

Not all managers are mentor material. To be effective, mentors must receive some training in how to mentor. Aon addressed this concern with initial employee development workshops.

To ensure the highest quality mentorship for your employees, it is critical that mentors are carefully selected not only for their technical skills, but for their ability to communicate effectively in an increasingly diverse workforce.

It may seem profitable to replace an older, more costly employee with a younger person. However, organizations may lose a great deal more than they bargained for with that replacement.

Pool Knowledge across Organizations
Your Encore, founded by The Procter & Gamble Company and Eli Lilly and Company, is a society of retired research scientists and engineers who "continue to provide value — at its highest level — to companies on a consulting basis," according to its website. The insurance industry is particularly well suited to this approach because risk pools changed the face of insurance, so the models to implement this approach are already well accepted by our industry. Don't be unreasonable with information, but do set some ground rules and ensure employees comprehend which information is proprietary and which can be shared.

Crosstrain Employees
"A former employer of mine combined the loss control and underwriting functions to 'Loss Control/Field Underwriting Consultants'.[9] It worked out well," reports **Mike Benishek**, director of risk management for Pacific Tomato Growers Ltd. "They had a historical loss ratio of 30 to 32 percent annually for about 15 years." When they separated functions, losses once again spiraled, Benishek reported.

Crosstraining can limit employee burnout and provide new motivation for employees who feel stymied in their career. It also strengthens an organization's operational team.

Cultivate a Culture That Values Expertise
To prevent brain drain, an organization must provide an atmosphere that values aging workers and the knowledge they possess. Recognizing, but more importantly, *acknowledging* their overall contributions to the organization, not just the number of claims they close or the amount of new business they produce, may mean keeping employees just a few years longer. Small changes in any organization, as anyone who read the book *The Tipping Point* knows, can mean enormous changes overall.

Younger workers should be made aware of the demographic trends and what it means to their careers. Many younger workers are eager for career advancement. The demographics pointing to a sharp talent drop are in their favor if they prepare themselves, and organizations help them prepare, to take supervisory and management positions. Few younger workers recognize this trend. Organizations who speak frankly of these developments and what they mean to each person, not just the organization itself, will build loyalty and perhaps help to cultivate patience in generations that are used to quick answers and quick solutions.

Encourage Employees to Join Online Insurance Groups Such as RiskList or PRIMA-Watch
Insurance professionals are notoriously generous with their time and information when it comes to helping their counterparts, as any insurance industry

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employee who belongs to a professional organization knows. Insurance server lists have been online for many years with a faithful membership. List members will respond to just about any inquiry with an impressive depth and breadth of knowledge, with some humor thrown in as well.

Support Employee Membership in Professional Organizations Such as Your Local Claims Association, Insurance Women, RIMS or CPCU Society
"Support" means paying dues and supporting the absences necessary for employees to both attend conferences and to hold committee positions. This gives employees a strong network to turn to for information and support. There has been a mindset in the industry that allowing employees to network outside the company increases the employee's flight risk. More enlightened managers realize that if employees feel valued for their expertise and encouraged in their professional development, they are generally more loyal to their employers.

Offer Incentives for Obtaining Professional Designations. Offer Greater Incentives for Attending Classes Rather than Online Participation
According to the CPCU Society, in 2006, 88 percent of CPCUs were age 40 or older. Taking a class from an experienced instructor with students from other companies and disciplines gives students a much broader experience. It also exposes them to others with whom they can network or seek advice. Designations are a clear indicator that employees see insurance not just as a job, but a career.

Avoid the Human Resources 'Silo'
An information silo is a pool of information that is not well integrated in an organization. Human resources departments often act as "silos," gatekeepers in the hiring process, by determining which applicants get interviewed. Forming interdepartmental hiring panels, teams that develop job descriptions, review applications and give input on general hiring and other personnel issues, such employee retention, can greatly improve a company's workforce.

Don't Underestimate the Impact That Younger Generations and Their Different Work Standards Have on Older Workers
There are four generations of workers in today's increasingly diverse workforce. With Millennials, Gen Xers and Yers in the employment mix, many young people are either intimidated by older workers or downright contemptuous. Older workers, in turn, often cannot comprehend their younger peers' thinking and may be intimidated by their ease with technology.

Nowhere is brain drain felt more acutely, it appears, than in claims departments nationwide. According to Conning Research & Consulting, 70 percent of the nation's adjusting staff is age 40 or older.

Forming intergenerational teams can bring divergent employees together so that they can benefit from each others' strengths, not just complain about their weaknesses. Utilizing younger workers who are good communicators and technologically proficient to train older workers in new technology can bridge two gaps — the generation gap and the technology gap. In turn, older workers can mentor younger employees and model appropriate and ethical behavior.

Consider the Total Cost of Jerks (TCJ) to the Organization
Verbal abuse, intimidation and bullying are widespread in the American workforce.[10] But some companies are taking notice. There is a growing trend in companies to consider the TCJ impact on the workforce, including several organizations on Fortune's "100 Best Places to Work."

Robert Sutton, Ph.D., professor of management science and engineering in the Stanford Engineering School, views "jerks" in a much more explicit light. Sutton authored *The No Asshole Rule*, a business bestseller that provides steps organizations can take to quantify the cost of jerks and eliminate them.

He lists the "dirty dozen," the top 12 actions taken by those who use organizational power against those with less power. "It just takes a few to ruin the entire organization," Sutton writes.[11]

Older workers may have seen it all, but they don't always have the patience to put up with twits. That jerk in the cubicle next to a long-term employee may be the final nudge that pushes a valued older worker out the door. Most employees who have options like retirement tolerate jerks for just so long, and then they clean out their desk.

Eliminating toxic employees can improve more than the organization's internal structure, because if an employee treats co-workers badly, how is he or she treating your customers?

Make the Most of the Existing Workforce
Studies have found that up to 40 percent of the time spent handling a claim can be spent in administrative tasks that don't impact the claim's outcome significantly. It makes sense, then, to drive work down to its lowest possible level of the organization. Are adjusters still issuing checks, composing the same letters over and over, and answering calls that could be delegated? According to employment consultant **Peter Rousmaneire**, some corporations are outsourcing their claims-support systems. "[Outsourcing] offers the potential of injecting into the claims management process some very intelligent, well-educated people who are very motivated to perform functions which, due to global information systems, they can do proficiently."

Don't Overlook Diversity
Many employees are overlooked in the promotional process because they are of different nationalities, ethnicities or gender than the dominant makeup of an organization. Whites follow a different career path than their non-white counterparts, according to **David A. Thomas,** author of an article on minority mentoring that appeared in the *Harvard Business Review*. Whites frequently get more attention from their managers and hence more opportunities.

Thomas's research showed that the one common attribute people of color who rose to the tops of their organizations had was mentorship, but mentorship that went beyond what he termed "instructional." They had mentors that provided a deeper relationship which increased their mentees' confidence and did not shy away from frank discussions about race.[12] If we fail in our organizations to see beyond employees' gender, skin color or religious beliefs, we may overlook our brightest talent.

Address the Problems of Brain Drain Strategically
To date, there is a great deal of discussion on brain drain in the insurance industry, but little empirical evidence to use to determine which methods might avoid this loss. Many insurance executives are talking about the problem in conferences and trade journals, but what are insurance companies doing to address it?

To create organizational change, an organization must start with a vision. What are the problems we face and what are their consequences both short-term and long-term? Where will our workforce needs and realities stand in five years?

Effective Organizational Change Begins with a Plan
Without a roadmap, even the savviest traveler occasionally gets lost. To address brain drain strategically, a company must develop a strong vision and a stronger plan. This plan can be implemented over time, but it must have clear goals and time frames to avoid becoming mired down in processes.

From top management to line supervisors, there must be a shared sense of urgency to this problem, because any critical initiative can go astray due to the competition all organizations face in today's highly competitive global market. To solve the coming talent crunch, organizations must commit the resources to tackle this problem strategically, while there is still time. ■

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Warehouse Legal Liability

by William W. Clark, CPCU

William W. Clark, CPCU, has more than 40 years' experience in the property-casualty insurance industry, including more than 30 years of insuring public warehouses. Previously, he held positions at Pridemark-Everest Insurance Services and Marsh Advantage America. In 1992, he formed the Warehouse Insurance Management Company and subsequently designed the first total insurance package for the warehousing industry. He has taught insurance courses, and has written and co-authored many articles regarding warehouse legal liability, bailment liability and motor truck cargo legal liability.

Warehouse Legal Liability Insurance is without a doubt one of the most misunderstood insurance contracts in existence today. Not only is there limited knowledge among insurance brokers and companies, but also among the vast majority of warehouse operators and customers who use public warehousing. Why this lack of knowledge? It is partially attributable to an insurance industry that never has had a strong desire to insure public warehouse operations because of its perception of what a warehouse operation entails. Insurance companies still view warehouses as large buildings that store a wide variety of products that change constantly and pose enormous concentration of values. They feel there is no commodity control, and one day they could have bottled water and the next day hazardous materials. New sprinkler protection systems and technology, better construction, and warehouse owners' new awareness of loss potential have turned many operations into a very desirable class of business. Many insurance companies have "jumped" in and out of the Warehouse Legal market. They write this business till they have a loss, then cancel all their business. This historically has been a very common practice.

What is Warehouse Legal Liability and how should it be written? Under the Federal bailment laws Article 7, Section 204 of the Uniform Commercial Code, warehouse operators are considered "bailees." They are people who exert care, custody and control over the property of others. Under this law, a warehouse operator can be held liable for loss or damage to the bailors' goods, more commonly known as the customer, arising out of their negligence. "Negligence" is defined as not doing what a prudent person would have done under the like and same circumstances.

Because it is not the responsibility of the bailee (warehouse operator) to know the actual value of goods stored, the law permits the bailee to establish a loss limitation agreement. This agreement allows the warehouse operator to limit its losses based upon a mutually agreed formula. So why is there such confusion? Many of the major companies that use public warehouses, including members of the Fortune 500, have little knowledge or experience in bailment laws and how Warehouse Legal Liability actually works. The average customer thinks that it will collect 100 percent on the dollar for any losses in a warehouse, while the warehouse operator is under the assumption that if the customer has insurance coverage, it is unnecessary for the operator to carry it as well. Any time an insurance company pays a claim, the first order of business is to research any possible avenues of recovery against a responsible third party. In the event of a loss, the customers' insurance company would pay the claim, if the customer had the proper coverage, and then seek reimbursement from the warehouse if it were suspected or discovered that there was negligence on the part of the warehouse that led to or caused the loss or damage.

Warehouse Legal Liability insurance is the policy needed to pay such losses. It is a third-party liability policy that offers defense coverage as well as coverage for any damages that the warehouse is held liable for, subject to that particular policy's terms, conditions and exclusions.

The major problem in the area of Warehouse Legal Liability is structuring the policy to provide adequate protection for the operator. To accomplish this, we have to start with an understanding of the customer and his or her contract.

All contracts running between the warehouse and its customers should define how damages would be evaluated. The courts have held that a warehouse operator, in most cases, can only be held liable for the *manufactured landed* cost of the product at the warehouse. Customers often seek "all risk" coverage regardless of whether the warehouse operator is liable. The customers may request valuation based on "selling price." This is passing on risks to the warehouses that are not covered under the standard Warehouse Legal Liability policy and have to be addressed by other forms of insurance. In negotiating contracts with customers, a clear understanding should be made as to what type of valuation will be used and what is the maximum amount of damages that the customers can expect in any one occurrence. Too many contracts have no limitation of liability, which leaves the warehouse operator in the position of not knowing how much insurance to buy or what its ultimate liability may be.

This brings us to the critical question, "How much Warehouse Legal Liability insurance is enough?" The warehouse operator has historically been on his or her own in determining proper limits. As a result, warehouse operators picked a number and requested coverage in that amount. The most common limits are $1 million to $2 million without regard to what actual liability a specific operator could face. A warehouse operator must sit down and review his or her loss limitation agreements and contract liabilities to ascertain how much coverage is needed. During this process, the operator may discover ways to reduce his or her liability by adjustments in contracts and loss limitations.

Being underinsured in this critical area can cause severe problems should a loss occur. As stated earlier, warehouses are not subject to a frequency of claims but rather severity of claims. If the warehouse is underinsured, the limits of the policy will be apportioned to all customers whose goods have been damaged. This usually doesn't surface until after a claim. It is very common for a customer to ask for a Certificate of Insurance showing that the warehouse carries Warehouse Legal Liability, for example, in the

amount of $2 million. Unbeknown to the customer, he or she is sharing this limit with all other customers in that particular warehouse, and coverage will be apportioned. The balance of the loss, after the insurance limit is exhausted, will be the responsibility of the warehouse operator.

Finally, all Warehouse Legal Liability policies are not the same. Since this is referred to by the insurance industry as an "*uncontrolled*" class of business, each insurance company has its own coverage form. In most cases, the coverage provided is very limited. Purchasing a policy that excludes some of the major causes of loss could cost you your business. Some of the more common exclusions are losses as a result of:

- Inventory shortage and mysterious disappearance.
- Contamination and infestation.
- No coverage for goods for which a warehouse receipt has not been issued.
- No coverage while acting as a bailee, which could include operations such as cross docking, pooling or freight forwarding operations.
- Wrongful parting of goods as a result of *trick or device*. Also known as Voluntary Parting.
- Dropped or loaded trailers in the yard.
- Fourth Party warehouse agreements.
- Coverage for dated product.

An important point to remember: Even if you feel you are not liable for a loss, you could find yourself in a position of needing legal defense. If the cause of loss is excluded, the policy will not provide legal services or defense. With attorney rates approaching $1,000 per/hour, legal defense costs could very easily exceed the amount of loss.

Setting Loss Limitation Agreements

The first thing to ascertain when establishing a *loss limitation* is determining that it is legal. It must adhere to the provisions of the Uniform Commercial Code that establishes the basis for a legal limitation. Prior to the recent changes in the UCC, there were only two basic acceptable limitations: a per pound

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limitation or a per unit limitation. Under the new wording, the loss limitation can be anything you and your customer agree upon. Two things to keep in mind:

(1) Unless the state you are doing business in has adopted the new UCC wording, you are still subject to the original wording.

(2) The new wording does not "grandfather" existing contracts. In other words if you have a current contract with a customer that contains a loss limitation that was not legal under the old wording, it still remains illegal and can be voided, thereby making you potentially liable for the actual cash value of damaged or lost goods. If you have such a contract you should do two things:

  (a) Make sure your domicile state has adopted the new wording.

  (b) Update the contract date to meet the date that the new wording has been initiated in your state.

There remains no way to eliminate your liability absolutely, but there is a way to limit it. Setting a loss limitation with your customer does this. This can be accomplished by use of the Warehouse Receipt with the "Standard Contract Terms and Conditions for Merchandise Warehouses ed. 11/0" printed on the back. This contract has been designed and approved by the International Warehouse Logistics Association (IWLA). It has been the standard for more than 40 years and is accepted by most major manufacturers and customers of warehouses.

In this document, there is a provision to enter a loss limitation. This can be in any mutually accepted form between you and your customer. Some of the more common are a factor times monthly storage receipts, such as 100x, 150x, etc. Another is a dollar amount per pound. We have seen ranges starting from $.25 and up. Other units can be per pallet, container, gallon, carton or even individual item. Whatever measure is used, it must be agreed upon with your customer. You must also give your customer the right to increase the loss limit. Normally, if a customer does not accept your standard loss limitation and wishes it increased, the additional insurance costs should be passed back to your customer under your rate quotation presentation.

We have seen many situations where no loss limit was inserted in the Standard Contract, which would mean the warehouse has automatically increased its liability to the manufactured landed cost of the merchandised in its warehouse. It is also important that the loss limitation is measurable. One warehouse had a $.25 per pound loss limitation, but had no idea what the total weight in the warehouse was — eliminating the ability to determine its maximum liability potential. It is recommended that there be a correlation between the loss limit being set and the way a charge is made for storage or handling. One warehouse quoted to its customer a per item charge to perform some value added services. This quote included a cost for storage, but it was not reflected in the rate quotation. Since its loss limitation was 100x base storage charge, and there was no indication of a storage charge, its loss limitation could prove to be ineffective or voidable. In this case, it would be impossible to determine what potential liability the warehouse had. We suggest that when negotiating the rate quotation to make a note that a certain dollar amount of the per item charge for services be for storage. In this particular case, the warehouse was asking for $.65 per unit to package and label a product for a customer. After explaining the problem limiting the liability, the warehouse broke out a number of $.08 to represent that portion of the $.65 that was allocated to a storage charge.

It is of paramount importance that you take advantage of the laws that can protect you and set proper loss limitations. Remember that they must be calculable in determining your total limit of liability and be agreed upon by the customer, whether implied by accepting your rate quotation with a loss limit in it or acceptance of your warehouse receipt with the loss limitation so noted.

Dealing with Customer Contracts

More and more warehouses are going into long-term contractual relationships with their customers, either under Contract Warehousing arrangements or contracts for specific services. We have reviewed countless customer contracts and found that customers are trying to pass down as much liability as possible to the warehouse operator including a request for total insurance on their product. It is well to keep in mind that most customers, including the Fortune 500 companies, have limited knowledge of the bailment laws and workings of Warehouse Legal Liability insurance. It is important they understand that even though you carry Warehouse Legal Liability, you are not providing any insurance on their product, but are only protecting yourself from loss or damage as a result of your negligence.

Valuation Clauses

There are three extremely important clauses that must be in every customer contract. One clause is a pre-determined method of evaluating the product. This can be one of the factors mentioned above or can be an agreed upon value of the product. We have seen many contracts where the customer has asked for market value or *selling price* of the product as its valuation. Historically, the courts have limited a warehouse's liability to the manufactured landed cost of the product, which means its actual production, transportation, storage and handling expense at the time of loss. One of the pitfalls of signing a contract that values the product at selling price is a false sense of security on the part of your customer. You may sign this contract, and if you have the properly worded legal liability policy, you will be protected for your actual legal liability as determined by a court of law. The flaw is that the court may limit your liability to manufactured landed cost, thereby not reimbursing your customer for the selling price since this could be construed as a consequential loss. Under the bailment laws, a bailee is not responsible for consequential type losses unless assumed under a written contract. Even when these types of damages are assumed, your warehouse legal liability policy will not respond. The only time a customer would be legally entitled to the selling price is when it can demonstrate an actual economic loss. In other words, the sale was lost and could not be recovered as a result of the loss or damage of the product.

This could result in a very unhappy customer. It is important that this be understood before any contract is signed. We strongly recommend against signing any contract that values the product at selling price or market price.

The second clause that must be in the contract is a maximum loss limitation. This should state what your maximum liability would be in any one occurrence. This is missing in the majority of contracts we review. When negotiating, ask your customer what maximum loss limit it would be agreeable to and make sure it is in your contract. Without it, it is impossible to determine your maximum liability potential. Do not assume that when the customer, under its insurance requirements, requests that you carry a certain amount of Warehouse Legal Liability insurance that your loss potential is limited to this amount. When your customers' insurance carrier pays a claim for which you are held liable for, they can seek damages from you that may exceed your Warehouse Legal Liability policy limits. Because your contract requires you to carry a certain amount of Warehouse Legal Liability, it does not necessarily limit your liability to that amount. Always include in your agreement your total potential liability.

The third clause that should be contained in the contract would pertain to a *Waiver of Subrogation*. A maximum loss limit does not meet the standards of legal loss limitations under the Uniform Commercial Code unless your state has adopted the new UCC wording pertaining to loss limitations. After your customer's insurance company pays the loss over and above this loss limit, an insurance company may recognize this and have the maximum loss limit held invalid. By having the Waiver of Subrogation clause, it could preclude or discourage your customer's insurance company from coming back after you for the amount of damages in excess of the loss limit in the contract.

Notification and Payment of Claims

Many customer contracts have a provision for being reimbursed in the event of a shortage or damage. One common clause is that the warehouse will pay the customer within 30 days of notification of the loss or damage. If the warehouse does not pay in that time period, it will be deducted from the next month's billing. This should be amended to read that the 30-day period will not start until a signed proof of loss is rendered by the customer to the warehouse, since the warehouse's insurance company will not make any payment until it receives this proof of loss. Insurance companies may not respond in 30 days after notification of loss with a payment. By inserting or amending such clauses, you can save your company impeded cash flow problems.

Providing 'All Risk' Coverage for Your Customers' Goods

Another common request is a customer asking for "all risk" coverage on its goods. First, we do not recommend you do this. However, if it is a strong or non-negotiable point with your customer, you need to add additional coverage. Some insurance agents suggest a Personal Property of Others policy in lieu of a Warehouse Legal Liability. This is not acceptable as it eliminates some critical areas of coverage. In addition, a Personal Property of Others policy was not designed for a warehouse operation. The two major areas of coverage missing

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in this type of policy are legal defense coverage, and inventory or mysterious disappearance protection. We have also seen policies exclude coverage for anyone acting as a bailee or warehouse operator.

You should request a *Direct Damage Endorsement* on your Warehouse Legal Liability policy that broadens the coverage to include the perils of loss found in most standard *"all risk"* property policies.

We have also seen clauses requiring the warehouse operator to reimburse the customer for all loss or damage, regardless of cause. This is totally inappropriate and should be negotiated out of any contract.

Paying More Than Your Loss Limit

Warehouse operators will often ignore their own loss limitations and elect to pay a customer "full value" for lost or damaged goods. This is done to enhance customer relations. The pitfall here is that the minute you pay more than what you are legally liable for, you are in jeopardy of invalidating your legal loss limitation. This type of practice is normally for smaller losses, and in many cases, those losses that fall below the deductible amount on their warehouse legal liability policy.

If you are going to pay full value, it is of paramount importance that you qualify the fact that this is a gratuitous payment and in no way voids the established loss limitation. A letter should be sent out with the check stating that this is a one-time courtesy payment. The letter should also reiterate your legal loss limitation and the actual amount you are legally liable for. We suggest that two checks be made out in this situation. One for the amount you are legally liable for, and the other a supplemental "customer relations" check.

Without following these procedures, you could expose yourself to being held liable for the full amount of the value of the product in the event of a subsequent large loss. This could also create a situation where your insurance limits are no longer adequate to meet your total liability exposure.

Naming Clients as 'Additional Insureds'

A very common request from warehouse customers is to be named as an *additional insured* on the warehouse operator's Warehouse Legal Liability Policy. It comes from the misconception that being named on the policy will guarantee adequate coverage and insurance protection for that particular customer's product.

In reality, this precludes coverage for the customer who is named on the policy. Warehouse legal liability insurance is a third-party liability contract, meaning that it pays on behalf of the insured for losses as a result of the insured's (warehouse operator's) negligence. Since one cannot be liable to themselves, there would be no insurance benefit to that customer named on the policy.

Another reason for this request is based on the assumption that the customer would like legal liability protection in the event that its product stored in the warehouse may cause damage to another customer's product stored in the same warehouse. This is incorrect reasoning. Virtually all warehouse legal liability policies state in their insuring agreement that they will pay all sums, up to the limit of the policy, for which the named insured is held legally liable while acting as a warehouseman. Since the customer is not the warehouse operator or acting as a warehouse operator, there would be no protection or coverage afforded them.

It is important that these facts be explained to existing and prospective customers who wish to be added to your warehouse legal liability policy. You will be amazed at the misunderstanding even the largest manufacturers and users of public warehouses have when it comes to this issue.

Calculating Maximum Loss Potential

After reviewing the material outlined above and making the proper adjustments in your Warehouse Receipt and your Customer Contracts, you should be in a position to determine your total liability exposure at each location. It is simply a matter of using your limitation factors and adding up the various maximum loss limits in your customer contracts. When calculating exposure based on your loss limitation agreement — for example, 100x base monthly storage charge — make sure you use the maximum storage charge you could receive in any one month. This is especially important for warehouse operators who deal with customers that have large seasonal variations in the types of goods stored.

When you have ascertained this number, be sure you adjust the limits in your Warehouse Legal Liability policy to reflect the proper coverage.

'Blanket' Warehouse Legal Liability Limits

Some warehouse legal liability policies you will find the word *blanket coverage* when showing a loss limit. This is an improper use of this insurance term. What the policy is really saying is that it contains a per loss limit which applies to all locations in total. For example a policy may read "Blanket limit all locations $2,000,000." This means that the policy will pay up to $2 million for any one loss, and that this limit applies to all locations combined. This is different than showing a loss limit for each location of $2 million dollars. For example, under the "blanket" concept, if you were to have two adjacent or adjoining buildings and there was a fire that consumed both locations, you could only receive reimbursement up to $2 million dollars even if both buildings were destroyed. Under a per location loss limit you could receive up to $4 million ($2 million for each location). Using the term "blanket" in this regard in warehouse legal is very misleading.

Fourth Party (4PL) Agreements

There is an increasing trend in the use of fourth-party warehouse agreements. These arise when a customer requests of the warehouse to arrange storage and distribution at another location in the country or even in its home state. When the warehouse does not have a facility or chooses not to open another facility, it will turn to another 3PL to handle this request. This can be an "invisible" arrangement to the customer, or it may be disclosed. In any event, it gives rise to a serious insurance situation.

As with any business arrangement, a formal contract needs to be in place with both the customer and the other 3PL acknowledging this arrangement. The IWLA does provide a suggested contract to cover this situation.

Regarding the insurance issue and how the 4PL can be protected: In many cases we have reviewed, the current insurance broker merely adds the new 3PL location to the 4PL's warehouse legal liability policy. **This will not work.** Under practically all warehouse legal liability policies, the basic insuring agreement states that it will cover the *Named Insured* only while acting as a warehouseman or bailee. In the situation where you are the 4PL, you are not acting as the warehouseman or bailee.

To properly protect yourself as the 4PL, you need to secure a Certificate of Insurance from the 3PL as well as a copy of its warehouse legal liability policy. Why a copy of its policy? As we have stated earlier, every insurance carrier has its own policy form and coverages can vary drastically. For instance, we were called into a situation where the 4PL was using a 3PL out of state to handle rolled textiles. The product was damaged by rain while stored outside the building. The 3PL's policy excluded property stored in the open. The 4PL's policy did provide coverage for goods in the open; however due to the insuring agreement as state above, the 4PL was not acting as the warehouseman or bailee. The results were that the customer held the 4PL liable with no insurance in place. The loss was $875,000.

There are two basic issues to address. The 4PL could secure Contingent Warehouse Legal Liability insurance; however this only solves part of the problem. Contingent Legal Liability insurance will only activate if primary coverage is in effect and is rendered uncollectible due to insurance company insolvency or unknown lapse of coverage. It will not become primary if the underlying policy did not provide coverage for the cause of loss as in the example above, i.e., the 4PL had coverage for goods in the open, the 3PL did not.

To protect this difference in coverage, a DIC (Difference in Conditions) endorsement needs to be added. What DIC does is protect the 4PL for losses that are not covered under the 3PL's policy but are included in the 4PL's policy.

This coverage could be hard to find since most insurance companies have limited or no knowledge of these types of arrangements and how to protect their insured. This is another reason why insurance broker selection is so important.

Conclusion

As you can see, warehouse legal liability coverage is complicated and requires someone with extensive knowledge. Unfortunately, few insurance companies or insurance brokers/agents truly understand the complexities of this form of coverage. Like any other insurance policy, it must be structured to meet the unique demands of your particular operations and liabilities you assume as a warehouse operator and bailee. It is of primary importance that you have all contracts reviewed by competent legal counsel and an insurance specialist who understands bailment laws. There is a growing trend of customers trying to "lay off" potential liability and risk of loss to public warehouse operators. Before you sign a contract, make sure you know exactly what liabilities you are assuming and whether your insurance will respond properly to them. ■

Predicting Truck Crash Involvement: A 2011 Update

by Micah D. Lueck and Daniel C. Murray

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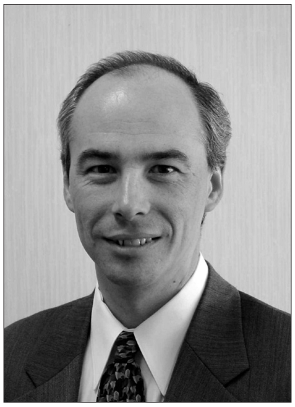

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Editor's note: This report was originally published in the *ATRInsider* newsletter and is reprinted with permission. To receive a copy of the report and other ATRI studies, please visit www.atri-online.org. ATRI's primary mission is to conduct and support research in the transportation field, with an emphasis on the trucking industry's essential role in the U.S. and international marketplace.

The Problem

Despite fatal truck crash totals reaching their lowest levels in U.S. DOT recorded history in 2009, both industry and government remain convinced there is room for improvement. Reacting to recent research which has highlighted the pivotal role that driver-related factors play in truck crashes, it is clear that efforts aimed at further reducing preventable crashes must focus in large part on driver behaviors.

In 2005, ATRI conducted research that identified specific truck driver behaviors that are most predictive of future truck crash involvement.[1] Numerous factors could have changed these relationships over the past five years, however. Therefore, an updated analysis was warranted to discern which truck driver behaviors from the original study continue to hold predictive value in terms of crash involvement.

Research Goal

The main objective of this research was the identification of specific types of driver behaviors (violations, convictions and crashes) that are most highly correlated with future crash involvement. The Research Team examined to what extent drivers with certain driving records in one year (2008) were more likely to be involved in a truck crash in the following 12 months (2009), compared to drivers who did not have the same violations, convictions or prior crash history. Additionally, the Research Team sought to determine how the updated 2011 findings relate to those from ATRI's 2005 study.

This research replicated a first-of-its-kind ATRI study which analyzed several driver-specific databases to statistically relate those data to future crash probability at the driver level of analysis. Data sources included the Motor Carrier Management Information System (MCMIS) and the Commercial Drivers License Information System (CDLIS).

For the purposes of this research, crash involvement was used as the dependent variable. The independent variables were driver-specific performance indicators mined from the data including: specific road inspection violation information; driver traffic conviction information; as well as past crash involvement information.

Driver data were gathered from a two-year time frame (2008–2009) and analyzed across those years to determine the future crash predictability of violations, convictions and crashes which occurred the previous year. Individual chi-square analyses were used to assess whether there was a significant difference in future crash rates for drivers based on their past violations, convictions and/or crash information.

Findings

This study's findings were based on data from 587,772 U.S. truck drivers. The analysis shows that a "failure to use/improper signal" conviction was the leading conviction associated with an increased likelihood of a future crash. When a truck driver was convicted of this offense, the driver's likelihood of a future crash increased 96 percent. Ten additional convictions were also significant crash predictors; of these, eight had an associated crash likelihood increase between 56 and 84 percent, while two registered between 36 to 40 percent.

In relation to driver violations, an improper passing violation had the strongest association with crash

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Table 1

If a driver had:	Increase in Crash Likelihood
A Failure to Use / Improper Signal conviction	96%
A Past Crash	88%
An Improper Passing violation	88%
An Improper Turn conviction	84%
An Improper or Erratic Lane Change conviction	80%
An Improper Lane / Location conviction	68%
A Failure to Obey Traffic Sign conviction	68%
A Speeding More Than 15 Miles over Speed Limit conviction	67%
Any conviction	65%
A Reckless / Careless / Inattentive / Negligent Driving conviction	64%

Table 2

Violation:	Percent of Drivers with Violation (2005 Study)*	Percent of Drivers with Violation (2011 Study)*	Percent Change
Improper Passing	0.49%	0.11%	-76.82%
False or No Log Book	44.44%	20.10%	-54.77%
Speeding	25.04%	11.96%	-52.26%
Failure to Yield Right of Way	0.27%	0.14%	-49.07%
Disqualified Driver	1.65%	0.86%	-47.92%
Improper Turns	0.16%	0.08%	-46.86%
Following Too Close	1.42%	0.80%	-43.79%
Medical Certificate	10.59%	6.19%	-41.53%
Reckless Driving	0.10%	0.06%	-39.89%
Size and Weight	23.88%	14.52%	-39.19%
Moving	44.50%	27.49%	-38.23%
Improper Lane Change	1.02%	0.64%	-37.44%
Failure to Obey Traffic Control Device	3.44%	2.52%	-26.81%
Hours-of-Service	20.50%	17.32%	-15.51%
Any OOS violation	37.95%	34.74%	-8.45%

*Figures are calculated using only those drivers in the study who had a Roadside Inspection in 2002-2003 and 2008, respectively.

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involvement. Drivers with this violation were 88 percent more likely than their peers to be involved in a crash. Seven additional violations had significant crash associations, with five ranging in magnitude between 38 and 45 percent and two between 18 and 21 percent.

Finally, the results indicated that drivers who had a past crash also had a significant 88 percent increase in their likelihood of a future crash. Table 1 ranks the top 10 driver events by the percentage increase in the likelihood of a future crash.

Conclusions drawn from this 2011 updated report include an acknowledgement that driver behaviors, while still associated with crash involvement, appear to be less strongly related than in ATRI's original report, when three predictors were found to more than double crash risk. Moreover, while many of the 2005 behaviors demonstrated similar patterns in the analysis update, a number of the most predictive behaviors from 2005 were replaced by new behaviors. Theories are proposed for these changes, with an emphasis on the finding that roadside inspected drivers generally had much safer records in the 2011 study, as evidenced by the lower proportion of drivers being issued violations (see Table 2).

Finally, the report provides recommendations for how the industry can apply the current study's findings to continue to reduce the occurrence of crashes and crash-related behaviors. ATRI developed a formula for identifying "top tier" enforcement states, which highlight those states that contribute proportionally more to the nation's traffic enforcement activity totals than truck crash statistic totals.

Overall, the findings in this report suggest that driver interventions and industry innovations are capable of altering the magnitude and even the presence of the linkage between behaviors and future exposure to crashes. By becoming aware of problem behaviors, carriers and enforcement agencies are able to address those issues prior to them leading to serious consequences. The converse is also true, however, as lower priority behaviors, if ignored, may begin to play an increasing role in crash involvement. ■

Reference

(1) American Transportation Research Institute. Predicting Truck Crash Involvement: Developing a Commercial Driver Behavior-Based Model and Recommended Countermeasures. Alexandria, VA. October 2005.

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