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PLUS
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Journal
Your source for professional liability education and networking

Outgoing President's Message

PLUS: Our Organization Thrives as We Focus on the Future

Daniel J. Standish
Outgoing 2011 PLUS President

PLUS has had a remarkable year. By every objective measure, the leading association of the professional liability insurance industry continues on a trajectory that few could have envisioned when it started 25 years ago:

Membership numbers are setting records: Based on current trends, PLUS' membership tally will top 7,000 early in 2012 for the first time in its history. Few non-profit educational organizations can match this growth rate in an otherwise challenging economic environment.

Chapters are booming: Our chapters offered 75 different educational and networking events in 2011, an all-time high. Dedicated chapter leaders, implementation of a successful annual sponsorship concept and the hugely popular Chapter Charity Grants from the PLUS Foundation have invigorated our association's chapters and provided key exposure to new members.

The RPLU designation is the marker for professional success: PLUS conferred 216 RPLU and 15 RPLU+ designations in 2011—the highest number in a calendar year since the program incepted in 1994. Indeed, the Class of 2011 represents over 10% of the total RPLUs in its 17-year history. This year's designees include seasoned professionals as well as newer industry members. Achieving the RPLU and RPLU+ designations reflects a commitment to excellence and professional success.

Our corporate sponsors recognize the value of PLUS: 2011 proved to be another year of record sponsorship levels for our events. The impressive list of companies that have thrown their support to PLUS clearly shows that this is a list from which no key player in the industry wants to be omitted. The sponsorships are vital to subsidizing our educational offerings and networking events, which are far less expensive than for-profit alternatives—not to mention much higher in quality.

PLUS and the PLUS Foundation are working hand in hand like never before: During 2011, PLUS assumed all of the overhead expenses for our charitable arm, the PLUS Foundation. This means that every dollar donated to the PLUS Foundation goes directly to serving its charitable mission. The Foundation conducted its own, highly successful fundraising drive, made numerous successful Chapter Charity grants, continued the Women's Leadership Network and sponsored another outstanding Conference Cause in San Diego, just to name a few of its many accomplishments.

PLUS adopted a new, forward-looking logo: On November 1, 2011, PLUS unveiled its new logo. The new emblem combines elements of PLUS' history through the use of the traditional PLUS colors of maroon and gray at the base of the logo—a solid foundation for the future—and the addition of two new colors at the top of the logo to reflect our increasing size, diversity and global reach.

We launched Future PLUS: Keenly aware of the need to ensure the relevance and vitality of PLUS for our next generation of industry leaders, the PLUS board of trustees created a new "Future PLUS" membership category with discounted dues for those age 35 and under. We also created the Future PLUS Committee, which is tasked with undertaking initiatives to build the strength of our association among newer entrants to the industry. The Committee is brimming with ideas, and its chair will attend our board of trustee meetings to add the Committee's voice to the mix of views on strategic initiatives.

We are exploring global expansion: With successful chapters in Canada and Europe, PLUS is actively

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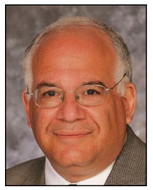
Cyber Liability Insurance: The Value of an Educated Broker in the Age of E-Commerce

by Richard J. Bortnick and Abby J. Sher



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Introduction: Insurance Products for Cyber Risks

Recent media reports of cyber intrusions, data thefts and computer system malfunctions involving large, high-profile companies such as Sony PlayStation, Citigroup and Lockheed's Security Vendor, RSA, have led a rapidly growing number of companies to consider the necessity of insurance coverage for technology and cyber privacy risks. As these businesses become more reliant on electronic communication and data storage, they are also developing a heightened awareness that an unauthorized intrusion could endanger their tangible and intangible assets (including their intellectual property) and, in many cases, their reputations and abilities to conduct business. Consequently, prospective policyholders are becoming more cognizant of the necessity for insurance covering these exposures.

There is significant uncertainty, however, about the nature and scope of the insurance products available to cover a company's technology and cyber privacy risks. The lack of familiarity with insurance products extends not only to businesses that use technology incidental to their business operations, but also, surprisingly, to large companies which develop, market and sell technology products. While businesses and their insurance brokers typically are knowledgeable about insurance policies covering traditional general and professional liability exposures, today's online society introduces new exposures, many of which are not covered under traditional general and professional liability policy forms. Given (1) the multitude of different insurance products now offered in the global market that purportedly extend coverage to cyber risks, and (2) the business communities' lack of familiarity with this emerging insurance, policyholders' reliance on the insurance brokerage community is heightened. As such, it has become increasingly important for insurance brokers to develop a sophisticated understanding of these products, perform a thorough analysis of a policyholder's insurance needs, and work with underwriters to obtain and tailor insurance policies to meet those needs.

To illustrate, many policyholders may be surprised to learn that a standard CGL policy likely would not apply to a technology or cyber privacy claim, notwithstanding that the form typically includes coverage for "property damage" and "personal and advertising injury." As such, insurance brokers must be proactive in recognizing the limitations of a CGL policy for their clients' business operations, and recommend comprehensive multi-line insurance programs to properly address their clients' cyber/technology insur-ance needs. This article highlights some of the issues that may arise from the application of conventional insurance coverage in respect of cyber risks.

Evolving Risks in the Age of E-Commerce

A typical CGL policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property." Although this definition would apply to traditional property damage losses (such as those arising from fires, impaired property and the like), many policyholders and brokers might incorrectly assume that it also extends to technology and cyber privacy losses involving intangible property, such as electronic data. Such an interpretation, however, may be regarded as contrary to the plain and ordinary meaning of the policy language, which specifies that "property damage" is premised upon "*physical* injury to *tangible* property."

This misconception perhaps is based upon the intuition of policyholders and brokers that traditional policy forms should adapt to protect against evolving risks. While this assumption may seem reasonable to policyholders, it is not one ratified either by policy drafters or the courts, as will be discussed more fully below.

Prior to the widespread use of technology and paperless systems, the disclosure of confidential information and destruction or theft of client or employee records would, generally speaking, have involved paper documents—that is to say, "tangible" property—and thereby possibly would have been covered by a CGL and/or fidelity policy. At the same time, prior to the advent of the internet and the widespread use of computers, the possibility that a company might be damaged by the electronic "equivalent" of a data theft or computer breakdown was largely unimaginable, and surely not contemplated by underwriters, brokers or their policyholders. Thus, CGL policies were not drafted with the thought that such risks would exist—or be covered.

Oddly, it is sheer coincidence that a typical CGL policy specifically carves out *intangible* property damage from its definition of "property damage." Indeed, ISO's addition of the word "tangible" to its standard CGL form in 1966 was in response to efforts by policyholders to obtain coverage for rights, obligations, and other forms of economic loss. Prior to 1966, "property damage" was defined as "injury to or destruction to property." The 1966 definition, which defined "property damage" as "injury to or destruction of tangible property" was "misleadingly simple." Laurie Vasichek, *Liability Coverage for "Damage Because of Property Damage" Under the Comprehensive General Liability Policy*, 68 Minn. L. Rev. 795, 801 (1984). In view of this and other criticisms of the 1966 revision, ISO further clarified the definition in 1973 so as to require "physical injury to tangible property." Like the 1966 amendment, this change was designed to limit coverage to the intended categories of loss, and to preclude coverage for diminution in value and other intangible losses.

It nonetheless remains that CGL policies were not drafted in contemplation of cyber losses and were not rated to address their potential breadth, as the scope of a cyber loss can easily exceed the loss resulting from a typical property damage claim. In the course of a data breach, a large quantity of data can be remotely accessed, duplicated, and disseminated within a fraction of a second; certainly far more permanent damage can be done in a nano-second than in the case of a defective product or a natural catastrophe involving traditional brick and mortar property damage. Moreover, if stolen personal or confidential corporate information is circulated on the Internet, the harm becomes both permanent and widespread. The potential implications of this loss extend far beyond the scope of traditional tangible property damage. Cyber breach remediation requires time, intelligence and a significantly more advanced means of reparation, if any such repairs are even achievable when it comes to personal and confidential corporate information.

Cyber Risks as 'Property Damage'

Beginning in 2001, during the early emergence of electronic commerce, some CGL policy forms began to specifically exclude electronic data from their definition of "property damage" in an effort to further limit the scope of coverage. In such policies, "electronic data" is generally defined as the "information, facts or programs stored as or on, created or used on, or transmitted to or from computer software."

Some policyholders have elected to test this principle, arguing that "property damage" includes damage to computer software, information and data. The results in most cases were not favorable to policyholders. For example, in *America Online, Inc. v. St. Paul Mercury Insurance Co.*, 347 F.3d 89, 96 (4th Cir. 2003), the Fourth Circuit properly recognized that data, web pages and computer systems do not constitute tangible property because they are not capable of being touched, held or sensed by the human mind. As such, they were not "property damage," as that term is used in a CGL policy. The Eighth Circuit concurred with this proposition, holding in *Eyeblaster, Inc. v. Federal Insurance Co.*, 613 F.3d 797, 802 (8th Cir. 2010), that a "complaint would have had to make a claim for physical injury to the hardware in order for [the policyholder] to have coverage for 'physical injury to tangible property'" under a general liability policy's "property damage" coverage.

Despite the inherent logic of these appellate decisions, one trial court, in dicta, has endorsed an expansive definition of "property damage," that arguably extends beyond its plain and ordinary meaning. In *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185, 2000 WL 726789 (D. Ariz. Apr. 18, 2000), the court considered whether a first-party property policy covered losses incurred after a power outage rendered the computer systems inoperable. The court rationalized that the physical attributes of "bytes," as well as the particles and atoms that comprise a hard drive, constituted "tangible" property in order to justify, arguably, its result-oriented conclusion that the corruption of data constituted "physical damage," as required by the policy. The *Ingram Micro* court rationalized its construct

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by hypothesizing that "[a]t a time when computer technology dominates our professional as well as our personal lives... 'physical damage' is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality." Though the policy insured against "direct physical loss or damage," the court conflated the phrases "physical damage" and "property damage" and held that the loss of programming information and network configurations "*does* allege property damage." The *Ingram Micro* decision is frequently cited by policyholder counsel seeking to argue away the limitations of a CGL policy, despite the fact that the issues are presented in the context of an all-risks property policy.

Cyber Risks under Endorsements

Notwithstanding the "property damage" jurisprudence, certain CGL policy forms may expand the scope of their traditional coverages to include certain data losses. Because traditional CGL policies typically do not provide property coverage for technology and cyber privacy risks, insurance companies are marketing specific policies and endorsements with specialized forms of coverage. For example, ISO form endorsements are available for use with CGL policies that provide coverage for loss of, and loss of *use* of, electronic data resulting from physical injury to tangible property. Insurers may also offer technology stretch, computers and media, and technology services coverage endorsements in combination with CGL policies.

Cyber Risks as 'Personal and Advertising Injury'

The foregoing is not intended to suggest that a standard CGL policy may never apply to a cyber privacy claim. Indeed, many general liability policies include "personal and advertising injury" coverage which, in some cases, may subsume certain portions of a cyber privacy event. The term "personal injury and advertising injury" typically is defined to include a list of enumerated offenses such as injury arising out of the infringement of another's copyright and the oral or written publication of material that slanders a person or organization, or violates a person's right to privacy.

In *Netscape Communications Corp. v. Federal Insurance Co.*, 343 Fed. Appx. 271, 272 (9th Cir. 2009), the Ninth Circuit held that a CGL insurer providing "personal and advertising injury" coverage had a duty to defend where AOL was alleged to have intercepted and disseminated private online communications. The *Netscape* court found such claims implicated a person's right to privacy and thereby potentially triggered the policy's "personal and advertising injury" coverage section. In addition, in *Zurich American Insurance Company v. Fieldstone Mortgage Company*, No. CCB-06-2055, 2007 U.S. Dist. LEXIS 81570 (D. Md. Oct. 26, 2007), the court found that Zurich had a duty to defend against claims brought by individuals who received prescreened offers based on information contained in their consumer credit reports, allegedly in violation of the Fair Credit Reporting Act. The court held that even though the solicitations were not divulged to a third party and did not contain protected information, the solicitations constituted "publication" of material violating a person's right to privacy, in the context of an "advertising injury" policy provision.

Overlapping Coverage

Beyond the question of whether a CGL insurer has a duty to defend, or even a duty to indemnify, a technology and/or cyber privacy claim, another problematic issue that may arise in such cases is that of overlapping coverage. Where a policyholder has obtained multiple policies covering multiple types of exposures and risks, a CGL policy's coverage may overlap and converge with those provided by other insurance products, including, for example, (i) pure cyber and technology forms; (ii) third-party professional liability and directors and officers liability policies; and (iii) first-party and business interruption certificates.

Issues then posed may include:

- the extent to which damages are covered under each form (i.e., in the third-party context, damage to hardware may be covered under a CGL form policy while corresponding corruption of software may be covered under a technology policy);
- the manner in which defense costs should be allocated between the policies;
- the implications of "other insurance" clauses; and
- the scope of an insurer's duty to defend and/or pay defense costs under a pure indemnity policy.

Conclusion

In short, virtually all modern businesses rely, in some manner, on technology. They can—and should—take all reasonable steps to ensure that they have virtually seamless insurance coverage by working with sophisticated insurance brokers well-versed in the myriad policies and forms available to cover technology and cyber privacy risks. Just as our economy is quickly evolving, so too are the types of insurance products and coverage available to meet a policyholder's changing needs. Understanding the components of these new-age policies is critical, and prudent business executives should devote the necessary time and resources to identify a sophisticated insurance broker who can assess a company's vulnerabilities and ensure that the necessary insurance products are purchased. At the same time, brokers need to have a deep and rich understanding of the available products—and their limitations—in order to explain to their clients—in writing—which products best meet their needs, and why CGL insurance alone may be insufficient (including the fact that electronic data may be specifically excluded). Having written such policies, and having worked with many brokers and underwriters, we can assure readers that the exercise will not be easy. But it certainly will be worth it in the end. ●

A Defining 'Claim': Negotiating the Right EPL Term

by Catherine Asaro and A. Serra Cremer

Not all insurance policies, especially when it comes to Executive Liability coverages, are created equal. For that reason, it is important for insureds to review and consult with their brokers so there is a mutual understanding of the scope of the coverage before their policies are tested with a claim. To that end, a recent case impacting an Employment Practices Liability (EPL) policy serves to reinforce this point. In *Cracker Barrel Old Country Store, Inc., v. Cincinnati Insurance Company*, USDC, MDTN Case No. 3:07-cv-00303, the central issue in the coverage dispute between the insured and insurer hinged on the policy's definition of "Claim". Despite the insured's attempt to interpret for the Court the meaning of the term by relying on elementary grammatical principles, the Court granted summary judgment to the insurer on the basis that the policy's definition was clear on its face. Whether an appeal is filed and this decision will stand remains to be seen; however, in the interim, there are valuable lessons to be learned.

In brief review, the genesis of this claim arose from the filing of charges by ten employees to both the Illinois Department of Human Rights and EEOC alleging various discriminatory violations. Subsequent to the filing of these individual charges, the EEOC filed suit against the insured asserting multiple violations of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. The EEOC's claims arose from discriminatory allegations made by former and current employees including those ten charging parties. A resolution was reached between the insured and the EEOC resulting in a consent decree designating $2M to be put into a settlement fund, the allocation of which was to be determined by the EEOC.

Coverage litigation between Cracker Barrel and Cincinnati Insurance Company ensued on the heels of the resolution of the case in chief. The insurer moved for summary judgment on the grounds that the underlying lawsuit was brought solely by the EEOC, an entity that fell beyond the purview of the policy's definition of "Claim" as such entity was not an employee of plaintiff. On the contrary, Cracker Barrel interpreted the definition to mean that the underlying complaint or charge must be brought by an employee, not the proceeding. To that end, Cracker Barrel relied on a basic grammatical principle given the placement of the comma in the sentence defining "claim" in support of its argument.

Based on a review of the Court's September 21, 2011, Order granting summary judgment, Cracker Barrel's EPL policy defined "Claim" as:

> *A civil, administrative or arbitration proceeding commenced by the service of a complaint or charge, which is brought by any present, past or prospective 'employee(s)'.*

The Court did not find the policy definition ambiguous and, thereby, did not need to explore the sentence construction and comma placement in order to understand the intent of the definition. As such, the definition of "Claim" had a clear meaning that a covered proceeding must be brought by an employee. The fact that the charges on which the EEOC partially based its decision to file a lawsuit were brought by the insured's employees was deemed irrelevant. The complaint initiated by the EEOC against the insured was not brought by an employee, and therefore, was not a "Claim" in accordance with the bargained for definition in the policy.

An important distinction bearing on the Cracker Barrel policy's definition of "Claim" was the qualification that it must be brought by an employee thereby limiting covered claims. From the filings reviewed on this matter, it did not appear that the policy covered charges brought by the EEOC or similar government entities as a basis for a claim. As such, it is important to review your policies to ensure your policy does not contain limitations such as those contained in Cracker Barrel's EPL policy at issue in this matter. Also, more often than not, the definition of "Claim" is extended to include language providing for a notice of charges, formal investigative orders or similar documents or a complaint by the EEOC or similar government agency. Had that been the case for Cracker Barrel, it would have alleviated the need for coverage litigation. Cases such as this one give many insureds and brokers reason to review their coverage so that they do not find themselves battling not only with the claimant, but their insurer as well. ●

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The Insurance Broker's Duties and Potential Liabilities in the Insurance Coverage Dispute

by Michael J. Cawley, Esq.

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Increasingly, brokers are targets in insurance coverage litigation. It is critical that brokers are aware of the duties that, through litigation and legislation, have been defined and applied to them in their dealings with existing and new clients.

This trend is likely to continue as the need, and often the requirement, to carry insurance is not diminishing. The historical justification for maintaining insurance—protecting against risk, large losses and liabilities—remains as applicable as ever. Carrying insurance is already, or may soon be, mandated in several areas, including life and health insurance.

It is hornbook law that the insurance broker is considered the agent of the insured. Many of the claims that a broker will face, therefore, come from unhappy insureds who have experienced a loss and allege that the broker failed to obtain the proper insurance or adequate insurance, failed to notify of a cancellation, failed to place insurance with a financially stable insurer or in some other manner failed to protect the policyholder. But under certain circumstances, the insurance broker can also be deemed an agent of the insurer. Moreover, a dual agency can exist when the insurance broker is deemed to be the agent of both the insured and the insurer, possibly in the same transaction. See *Sylvan Learning Systems, Inc. v. Gordon,* 135 F. Supp. 2d 529 (D.N.J. 2000).

The insurance broker faces liability claims from several different parties, including additional insured and loss payees. This article briefly discusses the duties owed by the broker to the insurer, but the primary focus is the more prevalent area of claims: those brought by the insured against the broker.

Broker as Agent of the Insurer

The factual circumstances of the case determine whether the broker is considered the agent of the insurer. The broker may be deemed the agent of the insurer for limited purposes if the broker performs *any* of the following: collects insurance premiums from the insured and remits them to the insurer; delivers the policy; is affiliated with the insurer; or has been authorized by the insurer to solicit business and negotiate/execute contracts on the insurer's behalf.

However, if the broker acted as an appointed agent for the insurer, the broker can be held responsible for the following: (1) to act properly in the placing of coverage; (2) to act within its scope as the agent's delegated authority; (3) to properly represent the risk to the insurer (4) to notify the insurer of material information regarding the insured; and (5) to cancel the policy upon the insurer's request. The most common theory of liability that an insurer will assert against a broker who also acts as its agent is misrepresentation regarding placement of coverage.

Broker as Agent of the Insured

The broker is most commonly the "agent" of the insured, in the principal/agent sense, and it is within this relationship that most claims arise against the broker. A broker can be sued under several theories, including breach of contract, fraud or misrepresentation; but the two most common assertions are common law negligence and breach of fiduciary duty.

Negligence. Most courts start "from the basis that insurance agents have a duty to exercise the skill and care that a reasonably prudent person engaged in the insurance business would use under similar circumstances." Under this standard, a broker must act reasonably and in good faith with the skill of a reasonable broker.[1] *[Skall, Daniel,* (Note that for statute of limitations purposes, New York has held that insurance brokers are not held to a professional duty of care, only to a level of ordinary care.) *Chase Scientific Research, Inc. v. NIA Group, Inc.,* 96 N.Y.2D 20 (2001)].

Under the professional duty of care, "reasonable conduct" includes (1) securing the coverage sought by the insured within a reasonable period of time; (2) if no coverage can be obtained (i.e., none is available), the broker must notify the insured; (3) notifying an insured if and when the requested coverage has been denied; (4) securing adequate coverage for the risk, assuming that the broker was given sufficient information to understand the amount needed (However, a broker is not necessarily required to procure coverage for every conceivable loss.) [*See*, e.g., *Jones v. Grewe,* 189 Cal. App. 3d 950 (1987)]; (5) placing coverage with a carrier that the broker knows or should have known to be financially stable and not nearing insolvency, though there is California authority that insurance placements with admitted carriers that later become insolvent do not impose liability on the broker [*See, Wilson vs. All Services Ins. Corp.,* 91 Cal.App.3d 793 (1979)]; and (6) although different jurisdictions treat the following duties differently, a broker should notify the insured of cancellation, expiration and renewal or non-renewal of a placed policy.

Breach of fiduciary duty. The courts are split on whether a broker can be liable for breach of fiduciary duty. While most courts will recognize that a broker has many fiduciary-like duties, the majority of courts will not go so far as to impose a true fiduciary duty standard on a broker. For example, California has recently confirmed that an insurance broker cannot be sued for breach of fiduciary duty. [*Workman's Auto Insurance Co. v. Guy Carpenter & Co., Inc.,* No. B211660 (Cal. Ct. App. 2nd District May 4, 2011)] Likewise, New York does not recognize a cause of action for breach of fiduciary duty, but New York does follow the premise that under "special circumstance" a broker may acquire duties that go beyond those affixed under common law. [*Murphy v. Kuhn,* 682 N.E. 2d 972 (NY 1997)]

A majority of jurisdictions likewise conclude that a broker does not have duties higher than the "negligence" standard, such as a duty to advise or counsel, *unless* special circumstances exist that would then impose a higher duty. This concept is well established, with a discussion as early as 1961 in *Hardt v. Brink,* 192 F. Supp. 879 (W.D. Wash. 1961). The Court determined that there are factual circumstances when a broker should be considered a "professional" and as such assumes heightened duties and responsibilities to the insured.

Since *Hardt*, courts around the country have decided cases and addressed factual scenarios that have transformed a broker's traditional capacity under common law to that of a professional insurance counselor with a higher standard of care owed to the insured:

- "Thus, ordinarily the insurance broker's duty is to use reasonable care, diligence, and judgment in procuring the insurance requested by the insured." *(Jones,* at p. 954)
- "The rule changes, however, when—but only when—one of the following three things happens: (1) the agent misrepresents the nature, extent or scope of the coverage being offered or provided; (2) there is a request or inquiry by the insured for a particular type or extent of coverage; or (3) the agent assumes an additional duty either by express agreement or by 'holding himself out' as having expertise in a given field of insurance being sought by the insured" (*Fitzpatrick, supra,* 57 Cal. App. 4th at p. 927). See also, *Williams V. HRH,* 177 Cal. App. 4th 624, 635 (Ca. App. Ct. 2nd Dist.).

Whether the "special circumstances" standard will be applied in a particular case is based on the specific facts of the case and the actions of the broker. For example, in *Williams*, (1) the broker was specifically referred to the insured as the "go to" person for procuring coverage for his business, (2) the broker actually created specific insurance packages for other, similar franchises and (3) the broker declined to meet with the insured because she was familiar with the franchise and claimed to be "the expert on the products necessary to satisfy" the insured's insurance needs. [177 Cal. App 4th 624, 628] Moreover, the broker was aware that certain jobs with respect to the business were considered dangerous and that it would be important that the insured be covered for any injuries arising from the position. Further, the broker was aware that workers' compensation insurance was required by California law and yet the insured had no such coverage nor did the broker procure it. Based on these facts, the Court held that the broker did hold herself out as an expert, but failed to satisfy this higher standard by not procuring workers' compensation insurance. [*Williams*, 177 Cal. App. 4th at 641]

By way of further example, in *Murphy v. Kuhn, supra,* the Court held that a broker has a duty to advise when the agent expressly agrees to advise the client and accepts additional compensation. [682 N.E. 2d 972 (NY, 1997)] Additionally, in *Hardt, supra,* the Court concluded that the broker held himself out as an expert because (1) he selected insurance and settled claims for the insured, (2) the client placed great confidence in the broker and relied on his recommendations, and (3) the broker's letterhead contained notations representing him as an insurance expert. [192 F. Supp. at 881] It should be mentioned, though, that brokers are only liable for holding themselves out as experts when they make *specific* representations about their abilities, not simply when they engage in general "puffing" or advertising. [42 Ariz. L. Rev. 991, 999]

Documentation

At their core, most error and omission claims involve some form of alleged miscommunication. The best protection the broker has from such "miscommunication" claims are the actual written communications maintained by the broker on the account.

A recent and very demonstrative example of the importance of documentation is the *Williams*, *supra,* case. The agent in *Williams* claimed that she informed the insured about the need for workers' compensation insurance and that she was not securing it for the insured. Specifically, she claimed that (1) her staff calculated premiums for the coverage, (2) she called the insured to discuss the coverage (and informed the insured that workers' compensation insurance is required in CA), and (3) the insured "declined to purchase workers' compensation insurance." [177 Cal. App 4th at 630] However, the agent admitted that she (1) never provided the insured with a written quote for the insurance, (2) wrote no memorandum to the file or to the insured to indicate that workers' compensation insurance was offered and denied, and (3) made no written record of her telephone call about such insurance. The court found that absent any documentation, the broker's version of the facts was not credible. [177 Cal.App.4th at 641]

Because brokers are increasingly being sued by clients, it is more important than ever not only to document communications but also to retain such records as potential evidence of the relationship. As set forth above, many elements, and certainly the outcome, of the broker suits turn on the facts of the case. Documents are the best evidence of the events that took place, often months or years in the past.

Practices to Avoid Claims

In summary, brokers should consider the following practices to help avoid claims by the insured: (1) document *everything*, e.g., proposals submitted to the insured, telephone conversations, face-to-face meetings; (2) maintain records of all documents, including but not limited to, correspondence,

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The Evolving Healthcare Risk and Evolving Underwriter Strategy

by Paul Marshall

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Overview

"Scientia potentia est" is Latin for "knowledge is power."

This phrase could be linked to many different businesses and operations, but is especially relevant to the healthcare professional liability (HPL) industry. As HPL risk transfer becomes more and more prevalent, every bit of knowledge or "risk data" has to be exploited to its full potential in order to stay ahead of the curve. In this article we will look at the art of "risk analytics," and how it can be one of the most important weapons in a HPL underwriter's arsenal.

One HPL exposure that has evolved is now identified with a new name, Senior Care Long-Term Services and Supports (LTSS). It is currently one of the largest growth industries in the U.S., and Insurance carriers that learn how to underwrite and manage these risks will see exponential growth opportunity.

LTSS Data

Actual LTSS exposure and care data had been difficult and expensive to obtain in the past, requiring the use of consulting firms to harvest and organize the data into usable chunks. The utilization of now publicly available data will be a key differentiator in successfully underwriting LTSS insurance and programs in the foreseeable future.

An example of this new published data that would be valuable for a LTSS healthcare liability program risk analysis is the upcoming National Survey of Residential Care Facilities (NRSCF), to be released by the National Centre for Health Statistics (NCHS) by the end of 2011. Under this umbrella, the NSRCF would consist of three products: a methods report (describing how the NSRCF was conducted) a facility data brief (containing highlights of major findings on U.S. residential care facilities), and a facility public-use data file with documentation (containing data collected about the healthcare facilities).

By April 2012, the NCHS also plans to make available to the public a resident public-use file and a data brief, reporting selected characteristics of residents of U.S. residential care facilities. The NSRCF, the first nationally representative sample survey of residential care communities, was conducted between March and November 2010. Interviewers collected information on more than 2,300 facilities and over 8,000 residents. Reports like this can be invaluable for healthcare program underwriter's managers, giving them a real-time, all-encompassing perspective that will allow them to shape their insurance program to be right at the cutting edge of the market.

Using timely and informative LTSS data in a responsive and influential manner, when coupled with risk analytics modeling, helps to provide the insurance manager with answers to very important questions about the true exposures and gives them a much needed advantage. The reach of risk analytics is spreading through expert third-party service providers; and the advantages of sophisticated modeling tools are available to most, regardless of in-house technological expertise or available capital.

Underwriting insurance for the growing LTSS healthcare industry is becoming increasingly difficult as every day healthcare facilities tweak and evolve their operations to remain profitable under changing Medicaid / Medicare reimbursement policies and with evolving regulatory expectations. Over time, rising acuity, additional services, and diminished staffing ratios will lead to adverse incidents if not kept in check. It used to be that these fluctuations in underlying risk would go undetected, but with the utilization of modeling tools and effective risk analytics, even subtle changes in staffing, acuity, and services can be revealed. Healthcare modeling provides the insurance program underwriters with the knowledge of any change to risk drivers, thereby allowing the program leadership to make pre-emptive changes and to manage risk more effectively. For that reason, risk analytics is revolutionizing the processes and tools employed by insurers to more quickly and accurately market, price, and underwrite their products.

Once a change to a risk driver is detected, the underwriter can project how these changes will affect the overall portfolio of risk exposure. From that knowledge, the program manager gains deep insight into actual loss costs and can confidently adjust premiums, offer feedback regarding risk management, and continually monitor—preferably before any loss occurs. Without predictive modeling and risk analysis after an account is written, the policy is generally held in *status quo* with minimal consideration to any variation in underlying risk, until it's too late and a major loss develops.

With improved risk data management, insurers can lower overall costs, charge adequate premiums, reduce claims, gain competitive advantage, and increase their market share. It all starts with underwriting the data. Every exposure must be analyzed to establish the appropriate premium in order for the program to remain viable for the long term. For that reason, experienced industry-specific underwriters who understand the specific risk are critical. Historically the theory has been vetted. Throughout many risk industries, predictive modelling strategies, when measured against traditional underwriting approaches, were found to be more accurate. Essentially, predictive modeling can help eliminate the human and emotional response that naturally occurs in the underwriting, loss control, and claim handling process.

With risk analytics, potential claim incidents can be rapidly and cost-effectively analyzed. At this time, 'real' risk is identified sooner, triaged appropriately, and dealt with proactively. Effective risk analytics can accelerate the acquisition of knowledge, place claims into proper context, lower claims administration costs, and help improve overall outcomes. Moreover, predictive modeling can chart the course for improved negotiations with plaintiffs, and ideally, lower overall settlements. There are many variables that go into each case that ultimately determine how it is settled. Once a case proceeds to court, the deciding factor is people in the jury box. How they will decide is extraordinarily unpredictable. With the passage of time, the cost to settle any case may increase exponentially. Risk analytics and predictive modeling provide the insurer and the defense team with rapid access to the information needed to manage incidents proactively, triage claims effectively and settle claims before that critical window of opportunity closes.

A program underwriter has to play to the strength of risk analytics in order to benefit from it, which includes being savvy and quick enough to respond. This also includes being flexible enough with the tailoring and implementation of a predictive model to match the flexibility of risk analytics as predictive modeling tools are available for any step along the continuum, including marketing analytics, underwriting, risk management, and loss mitigation.

Another advantage of predictive modeling is the ability to establish more accurate actuarial reserves. With improved accuracy in identifying overall risk, carriers can establish and responsibly change reserves as needed. Such financial efficiencies allow an organization to direct their financial resources to the most effective point. This helps make great savings as the captive program is aimed specifically at the exact areas that require focus—enabled by risk analytics.

Historically, a large portion of an insurance program's expenses are consumed by the initial application and risk underwriting processes. Predictive "sales" modeling can assist in finding suitable accounts more efficiently than the traditional approach that requires underwriting to review and analyze 10-20 accounts before finding one that fits for the risk program's appetite. This can be viewed as a sales divining rod—finding the suitable risk with minimum marketing or sales expense outlay.

Conclusion

Risk analytics is not a "magic solution" for the insurance program and the actual underwriting of a profitable book of business still requires a great deal of work. While risk analytics and predictive modeling have tremendous advantages to offer insurers and risk management organizations, the ultimate value is derived when the experts interpret the information correctly and make the right decisions.

Reading the landscape through accurate data, analyzing trends and acting on them accordingly and efficiently helps insurance captive managers take out some of the risk of managing risk.

"Scientia potentia est"... or more simply, "in the land of the blind—the man with one eye is king." ●

PLUS Foundation Chapter Charity 2011

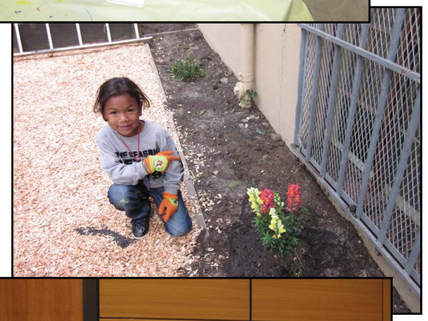
Chapter Charity Grant Program – 5 years and going strong

All thirteen North American chapters participated

Charities Supported: 29 ***Grants: $77,000***

Volunteer events (v): 14 ***Volunteers: 175+***

- Stephen Lewis Foundation – Canada
- MukiBaum Treatment Centers – Canada
- Directions for our Youth – Eastern (v)
- Simsbury A Better Chance House – Hartford (v)
- Wellpath Behavioral Health – Hartford
- Breathing Room – Mid-Atlantic
- Face to Face Germantown – Mid-Atlantic
- Need in Deed – Mid-Atlantic (v)
- DuPage PADS – Midwest
- Hooved Animal Rescue & Protection Society – Midwest
- The Women's Center –Midwest
- Cradles to Crayons – New England (v)
- School on Wheels – New England
- Boys & Girls Clubs – Northern California (v)
- Dress for Success – Northern California
- Special Operations Warrior Foundation – North Central (v)
- Missing GRACE Foundation – North Central (v)
- Special Olympics Minnesota – North Central (v)
- CaringBridge – North Central
- PROVAIL – Northwest (v)
- Ronald McDonald House – Southern California (v)
- LACBA Domestic Violence Project – Southern California
- Project Open Hand – Southeast
- North Fulton Community Charities – Southeast (v)
- Cradle of Love – Southeast
- Child Crisis Center – Southwest
- Mount St. Vincent – Southwest
- Bryant-Webster School – Southwest (v)
- Ovarian Cancer Coalition – Texas (v x 2)



Chapter Charities 2011

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IMPORTANT NOTICE TO RPLU/RPLU+ STUDENTS

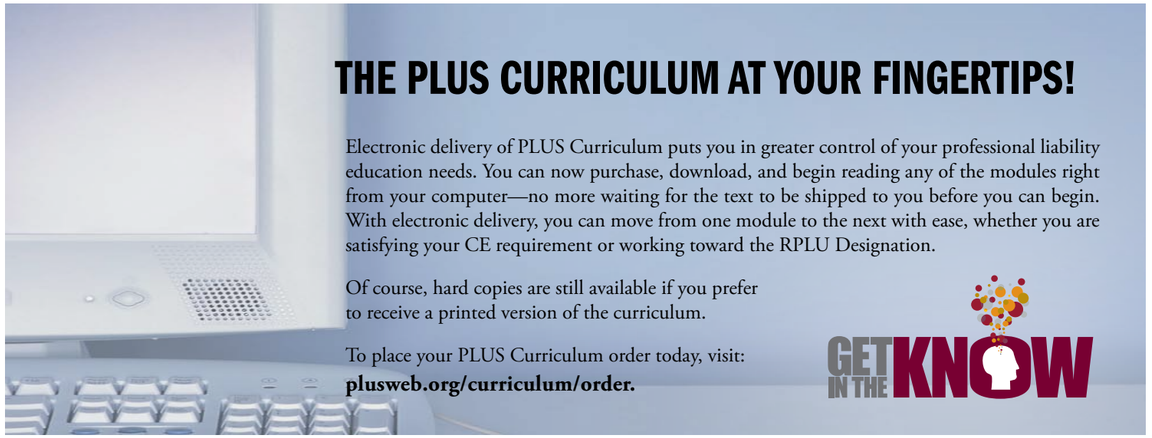
PLUS would like to give students advance notice of upcoming changes that will take effect on April 1, 2012. The good news is that exam fees for RPLU exams will remain unchanged through calendar year 2012.

Prometric, the company that administers RPLU Exams, will be making a change in the procedures for rescheduling exam appointments. Students will be allowed to reschedule a scheduled exam IF the transfer is within the same testing window as the original appointment AND within twelve (12) working days of the original appointment. Please note that working days include Saturdays. **EFFECTIVE APRIL 1, 2012**, students wishing to reschedule an appointment more than 12 working days from the initial exam date, or moving the appointment to another testing window, will be charged a $50 rescheduling fee from Prometric, billed directly to the student.

If you have questions about Prometric testing, the RPLU designations or the PLUS Curriculum, please contact Stephanie Johnson at sjohnson@plusweb.org.

RPLU

RPLU+



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GET IN THE KNOW

Broker's Duties continued from page 7

memoranda, emails and phone logs; (3) know the industry and investigate "possible" insolvencies (and document the investigation); (4) specifically define and document the relationship with the insured (Is the broker only filling an order for insurance? Is she analyzing coverage? Is she offering advice?); and (5) do not make promises that you may not fulfill or do not have the capacity to fulfill.

Insurance coverage disputes have become more costly and the financial exposure that insureds face if such a dispute is lost can be enormous. In years past, the insured and the broker were often teamed against the insurer. Today, the broker is often named in the dispute by the insured as an alternative source of recovery. The broker, therefore, is in the unenviable position of fidelity to the insured while simultaneously realizing that its actions will be scrutinized carefully after an uninsured loss by the very insured for whom it is working. ●

Endnote

1 "Can the Public Really Count on Insurance Agents to Advise Them? A Critique of the 'Special Circumstances' Test," 42 Ariz. L. Rev. 991 (2000), citing *Blackburn. Nickels & Smith. Inc. v. National Farmers Union Prop. & Cas. Co.*, 482 N.W. 2d 600, 605 (N.D. 1992); *Rawlings v. Fruhwirth*, 455 N.W. 2d 574, 577 (N.D. 1990).]

President's Message continued from cover

exploring the ideal way to bring additional professional liability insurance markets under the PLUS umbrella.

It has been an enormous privilege to serve as president of PLUS over the past year. I was constantly buoyed by an insightful and dedicated board of trustees, an exceptional staff led by Derek Hazeltine, and a host of volunteer leaders across the country. PLUS is also positioned for a tremendous 2012 under the helm of incoming president Jeff Lattmann, whose passion for the organization and its success is without bounds. I am confident that PLUS looks forward to a vital role in the industry for its next 25 years and beyond. ●

PLUS

D&O Symposium

February 8 & 9, 2012
Marriott Marquis, New York, NY

PLUS is pleased to announce the topics for the upcoming D&O Symposium!

As in past years, the Symposium will cover issues that are currently hot in the D&O insurance marketplace.

A sample of the topics to be presented at the 2012 D&O Symposium include:

- Latest Trends in Securities Litigation and Dodd-Frank
- What's New in M&A Litigation and How Did We Get Here?
- Financial Institutions Underwriting: Is It Safe To Come Out Now?
- Where in the Cycle Are We?!?!?
- Developments in D&O Coverage
- Private Company and Non-Profit D&O Claims Activity
- Foreign Exposures to U.S. Companies
- Cross-Fire

In addition, the keynote speakers will be **Peter Hancock**, CEO of Chartis, and the **Honorable Sheila C. Bair** who served as the 19th Chairman of the Federal Deposit Insurance Corporation.

Don't miss it!

Register now at:
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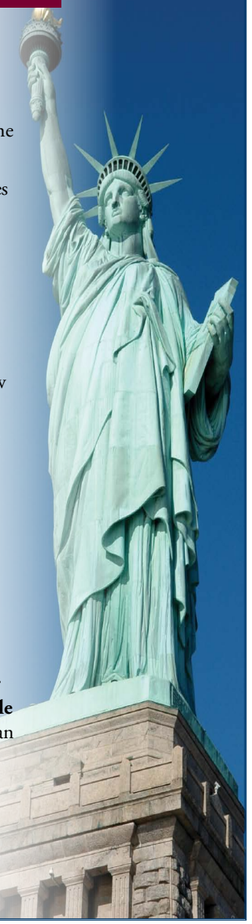

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Calendar of Events

Chapter Events*

Eastern Chapter
- February 16, 2012 · Industry Leader's Luncheon · New York, NY

Southeastern Chapter
- January 26, 2012 · Cyber Liability Workshop · Miami, FL

Many Chapter event dates will be finalized and reported in future issues. A full 2012 Chapter Schedule will be included in the next PLUS Journal. You can also visit the PLUS website to view the most up-to-date information.

International Events

PLUS Foundation Shots for Charity *(prior to D&O Symposium)*
- February 7, 2012 · Sky Rink Chelsea Piers, Pier 61 · New York, NY

D&O Symposium
- February 8 & 9, 2012 · Marriott Marquis · New York, NY

Medical Professional Liability Symposium
- March 29 & 30, 2012 · Sheraton Chicago Hotel & Towers · Chicago, IL

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- March 29 & 30, 2012 · Sheraton Chicago Hotel & Towers · Chicago, IL

25th Annual International Conference
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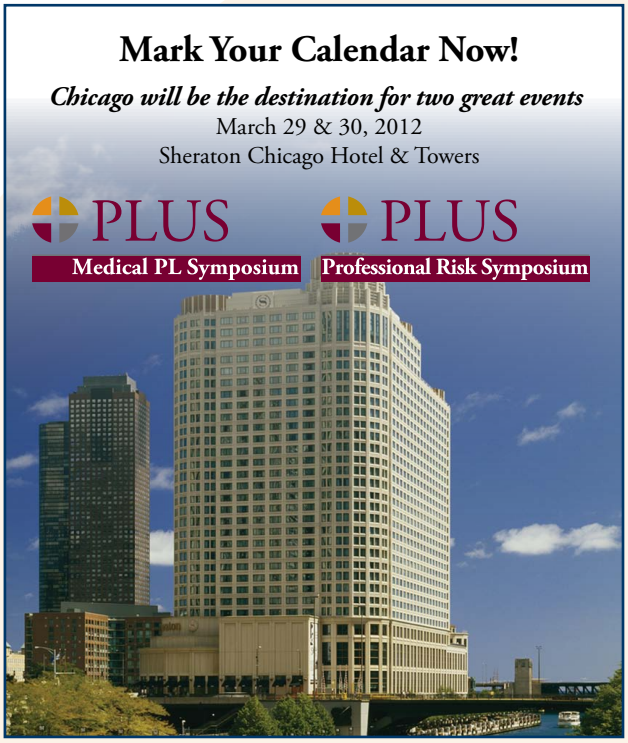

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