Talking Points Newsletter *June Vol. #13*

TSIB's Talking Points Newsletter covers recent top industry articles in the following categories:

- Insurance Market
- Construction Industry
- Claims
- Trends

This newsletter is meant to be a guide to assist you on the most important events that are going on. We share insight on the importance around each topic and how it can affect you directly.

If you have any questions about any of these articles, other Insurance & Surety concerns, or have specific topics you've like to learn more about, please reach out to us directly at contact@tsibinc.com or visit our website.

Insurance Market

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Commercial Rates Continue To Rise Amid Hardening Market

The pandemic and catastrophic weather claims are continuing to push an already hardened market higher across most lines. In addition to pricing increases, we are also seeing a continuation of coverage pull backs and higher deductible levels.

- Property rates are still 5% to 20% or more depending on loss history and CAT Exposure. High loss exposure may see increases in excess of 20%.
- General Liability is up 10% to 20%.
- Excess Liability slightly higher, but still at 15% to 25%. Rate increases can be tempered by exposure to high hazard risks.
- Cyber Insurance has entered a market phase that is "historically hard" as rate increases are in the 50% to 100% range.
- D&O EPLI rates are still showing increases but coming off of their high rate of 100%.
- Workers' Compensation remains flat to 5% increase.

As the country normalizes after the pandemic, workers will face a new risk landscape both physically and culturally.

TSIB Talking Point: Insurers are still looking for rate increases across the board. However, clients with a good story and clean loss runs may see a break in the upward trends.

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Catastrophe Losses Running 30% Above Average After April

Analysts at Investment Bank Jeffries estimate that the year-to-date claims are in excess of 30% above the 10-year average. The average was slightly higher for the first three months of 2021 but a quiet April reduced the average increase from 33% to 30% above the norm.

Largest source of loss by far was the U.S. winter weather including the Texas freeze from the polar vortex that created winter storm Uri. The analyst at Jefferies is quoted as saying, *"Putting 2021 into perspective, winter weather losses this year are already higher than even the costliest full year in our model for this peril. "*

TSIB Talking Point: Severe weather will continue to plague Property & Casualty insurers forcing rates to continue to increase as well.

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Construction Industry

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Biden Team Restores Nearly $1B in Funding for California High Speed Rail

A court case brought by the State of California and the CHSRA has ended an agreement reversing a Trump Administration order to rescind the funding to the California High Speed Rail Authority (CHSRA). The funding was terminated in 2019 for failure to comply with the terms of the original agreement and that the project failed to make reasonable progress. However, there are currently 119 miles of track under construction at 35 sites. Dragados/Flatiron have one package and continue to work between Fresno and San Francisco.

"*Tonight's action by the federal government is further proof that California and the Biden-Harris Administration share a common vision – clean, electrified transportation that will serve generations to come,"* California Governor Gavin Newsom said. He added *"Restoring nearly $929M in grant funding back to California's High-Speed Rail project will continue to spur job creation, advance the project and move the state one step closer to getting trains running in California as soon as possible."*

TSIB Talking Point: The tone of the discussions changed as the CA High Speed Rail project is more in line with the priorities of the new Biden/Harris Administration.

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Obtaining the Benefits of a Performance Bond: Tread Carefully

Keeping the project moving forward is often the sole goal of General Contractors (GC) even in the wake of a subcontractor that is looking at a Performance Default.

A GC in Boston, Massachusetts found out the hard way by defaulting their subcontractor who installed faulty windows in a condominium project without, first terminating them. The GC put his ability to trigger the bond's obligation in jeopardy. The GC's decision allowed the Surety to deny the claim on the basis that there was no right to invoke the Performance Bond since the bond form stated that the Surety was only obligated if the GC terminated the subcontract.

The District Court agreed that the GC *"indisputably failed to comply with a condition precedent and, therefore cannot enforce the obligation of [the Surety] to indemnify."*

There may be grounds for appeal due to the fact that the court did not consider the GC's argument that regardless the Surety had an independent duty to indemnify the cost of the subcontractor's faulty work.

TSIB Talking Point: When dealing with subcontractor defaults, it is important to consider the ramifications and make sure that you are following the terms of the contract. Consulting the experts or failing to consider the terms may help avoid any serious effects.

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Insurer "Burned" by Illinois Supreme Court Decision Regarding Tanning Salon's Coverage for Biometric Information Disclosure

Krishna Tan found themselves in a class action lawsuit brought by the membership of their tanning salon. As a pre-requisite for membership the salon required the members to submit their bio-metric data (i.e. fingerprints) to the salon. The salon provided this information to a third party vendor without obtaining a written release from their members as required by Illinois statute 740 ILCS 14/15(b)(3). This is incorporated into the Illinois Biometric Privacy Act (BIPA).

The insurance Carrier, West Bend, acknowledged their duty to defend the action under a reservation of rights but admitted there is likely no coverage for damages under the Business Owners' insurance liability policies. The Carrier then filed a declaratory judgment action asking the court to opine on the applicability of coverage. The court deemed the case is covered under Part II of the Business Owners' insurance policy specifically under the personal and advertising injury clause(s).

TSIB Talking Point: The utilization of biometric data is increasing exponentially worldwide. With this will be increased litigation. It is important to review coverage and exposure with your Broker regularly. Precedent now is established with regard to the Carrier responding to this exposure under personal and advertising injury – Carriers will likely look to add exclusionary language to their ISO form to preclude coverage, similar to the "junk fax" class action litigation in the past. Carriers exclude coverage for unsolicited facsimiles and other business propaganda. Lastly, it is important to be aware of and ensure compliance with local and federal statutes.

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"Multiple Claims" Provisions on Contractor's Professional Liability Policy Creates a Trap for Policyholders

In the case titled Berkley Assurance Company v. Hunt Construction Group, Inc., 465 F.Supp.3d 370 (S.D.N.Y., 2020), the question of proper claim reporting and notice under a Professional Liability policy was the crux of this litigation. Simply, the insured received notice of a claim in 2016. The insured attempted to resolve the claim to no avail and reported the claim during the next policy period. The Carrier denied the claim for late notice. The insured contested that the claim was reported within the automatic extended reporting and as such still made the claim in the appropriate time frame. The Carrier won a declaratory judgement upholding the disclaimer and opining that the automatic extended reporting period is only applicable had the insured moved coverage to a new insurer entirely.

A counter claim was brought against the insured and the insured reported the counter timely under the appropriate policy. However, coverage was still denied and that decision was upheld as well. The rationale for the disclaimer is that the claims are related and as such, there is no coverage since the first claim was denied.

Claims

TSIB Talking Point: Reporting claims under a claims made policy has a few key factors to consider. The claim must be made during the policy period *"where the claim was first deemed to be made"* against the insured. These policies often contain a retro date. This date is the date that coverage for any act would be considered. For instance, claims made against an insured today for a liability that dates back to 2015 would be covered in the current policy period as long as the retroactive date precedes the time frame the allegations first occurred.

Lastly, related claims clauses which would hold any claim made subsequent to the original claim, but related to the initial claim, will be deemed one occurrence. This is typically favorable to the insured as it insulates the insured from multiple retentions. In this instance it was a detriment to the insured as the initial claim was denied.

Timely claims reporting is critical to secure the fullest breadth of coverage. Late reporting and related claims precedent has been established in this litigation. It will certainly be a basis for future Carrier denials. It is critical to understand your duties in the event of an occurrence or claim. Having a clear understanding of the forms and application of coverage is paramount when faced with a loss. When in doubt, report the claim.

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Trends

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Colonial Pipeline Lawsuit Alleges Hack Caused Higher Gas Prices

On May 7th the east coast of the United States was thrown into a panic as a group calling themselves the Darkside, hacked and seized the Colonial Pipeline's data and took over its systems. Colonial Pipeline, in an effort to limit the damage voluntarily shut down some of their systems and ceased their fuel deliveries.

Colonial paid the criminals $4.4M to release their pipeline and allow the company to resume their operations. The company now faces a class-action lawsuit alleging that their negligent cybersecurity practices left the pipeline open to ransomware attacks. These attacks adversely harmed millions of consumers causing a spike in gasoline prices and created a gas shortage.

TSIB Talking Point: This class-action lawsuit is an interesting twist to the current Ransomware Crime Spree since the suit seems to go beyond the triggers on a standard Cyber Liability policy. It will be interesting to watch how Colonial's insurance program responds since the lawsuit may trigger additional policies such as their D&O and General Liability.

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Ransomware Warning: White House Issues Advisory to Business Leaders

On June 3rd the Biden Administration issued an advisory to businesses to take action and shore up their systems against the rash of ransomware attacks against U.S. companies. Russian-based cybercriminals have been linked to two high profile ransomware attacks on the gasoline and food industries in the U.S.

Deputy National Security Advisor for Cyber and Emerging Technology Anne Neuberger called on the private sector to harden their systems and to implement controls such as Multifactor Authentication, Updating Patches, having a more robust backup system, and encrypting data.

In addition, the government is also recommending that companies that pay ransom may themselves be subject to Criminal Prosecution for violating U.S. and international restrictions on doing business with prohibited entities, violating anti-money laundering, know your customer, or money transfer agent statutes.

TSIB Talking Point: Clearly something has to be done to combat the rash of Ransomware attacks. This is a good step in signaling that the governments around the world are taking this threat seriously. However, at this point the U.S. government has not committed to sharing data about the ransomware threat attackers or their methods.

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