

Talking Points Newsletter *Volume #29*

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

- Insurance Market
- Construction Industry
- Claims
- Trends

This newsletter is a guide to assist you on the most important current events. We share insight on each topic and how it can affect you directly.

If you have any questions about any of these articles, other insurance and surety concerns, or have specific topics you would like to learn more about, please reach out to us directly at contact@tsibinc.com or visit [our website](#).

Reinsurers Press for More Rate Hikes

At the September Rendez-Vous meeting, which traditionally marks the start of the reinsurance renewal season, the largest reinsurance companies reaffirmed that despite the significant rate increases they received during the last renewal, they are going to be looking for additional rate increases.

The CEO of SCOR, Jean Paul Conoscente commented that the pricing increases on property will not be as steep as the 40% to 50% rate increases they saw last year. However, he does expect increases in the low double digits.

Market capital remains tight as reinsurance market capital stands at \$461 billion, compared to last year's level of \$475 billion, while alternate capital ([insurance-linked securities](#)) remains flat.

Cat losses due to climate change and high inflation rates continue to be blamed for the need for more rate increases. In addition, attachment points and a tightening of the terms and conditions will also contribute to a deleterious market impact.

TSIB Talking Point: Reinsurance renewals are an indicator for the Retail Insurance Market. The discussions during the Rendez-Vous meeting signal that rate increases for clients will persist in 2024.

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Auto Insurance Sector Continues to be Unprofitable

With the exception of a pandemic-impacted 2021, the [Combined Ratio](#), for the U.S. Commercial Auto market has been over 100% for 11 of the last 12 years. In 2021, the Combined Ratio fell over 25% due to the impact that the lock down had on traffic levels, as well as the decline in judicial activity, and the ability to develop the reserves.

The claims costs for automobile liability increased 18% in 2022 and a total of 72% since 2013. Much of the increases are directly attributable to the issues affecting all liability lines, such as social and economic inflation but these claims are also being impacted by the lack of skilled labor, supply chain shortages, and more complex vehicles. This has driven up the replacement costs impact by over 40%.

TSIB Talking Point: Despite the rate increases, the auto market continues to struggle to be profitable. The annual growth rate in claim severity from 2013 to the present has hovered around 6.3%. In 4 of the last 5 years, this average exceeded the median increase and may show an accelerating severity.

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Defining Labor: How the Miller Act continues to shape the industry

The [Miller Act](#) is a federal law enacted to require Contractors to provide a Payment & Performance bond for public (federal) construction contracts in excess of \$100K. All states have a version of this law and are referred to as “Little” Miller Act statutes.

The act requires that the contractor must supply a bond “for the protection of all persons supplying labor or materials”. Should payment not be made before 90-days after the last day of providing the labor or materials, then a claim can be filed. The claim must be filed within one year of the last day of providing labor.

The wording is very specific, as the Fourth Federal Court of Appeals recently stated that not all work is “labor.” The court stated that labor must either be physical toil or direct supervision of others physical toiling.

The Department of Defense engaged a prime contractor to work in the Pentagon. The prime in turn hired the claimant, an engineer, to manage the project and directly supervise the workers. When the government cancelled the contract, it ordered the prime to prepare a materials inventory which was the final task of the claimant. The claimant’s efforts to prepare the inventory continued after their last day as a supervisor for the labor. This is an important distinction, since the claimant filed a claim against the bond, citing the Miller Act to obtain payment for their work. The claimant filed within a year of when they finished their inventory work, which was over a year since their supervisory tasks ended.

The court held that the claim was not valid since the claim was filed a year after the supervision of labor ceased but less than a year after the supervisory work ended. The court stated that supervisory work (on its own) is not labor and did not constitute a duty to supervise.

TSiB Talking Point: The court relied on a pre-Miller Act interpretation of the Heard Act which stated that supervisory work was labor since it involved physical exertion but mental labor, such as administrative work, is not labor. It is incumbent on the contractor to understand these definitions and create a process so that there are no issues when looking for protection.

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Court Rules Exxon Owed Additional Insured Coverage

Risk Transfer is a tool utilized to shift financial loss to a contractually responsible other party. In order for risk transfer to be successful there needs to be well-worded contracts between the two parties and well-crafted insurance cover on behalf of the downstream party accepting the risk.

In a recent case, Exxon hired Savage Refinery Services (“Savage”) to work at one of Exxon’s refineries in Baytown, Texas. Two of Savage’s employees sustained severe burns performing their work. Exxon transferred the risk to Savage’s liability insurer (National Union) who accepted Exxon as an additional insured and paid out the \$2M policy limit. The loss settled for \$24M. This left Exxon to seek coverage under Savage’s excess insurance.

Nine years of coverage litigation took place to determine whether Exxon qualified as an additional insured (“AI”) under the umbrella policy (also issued by National Union). The dispute centered around the contractual language between the parties and the verbiage in the umbrella policy. The contractual language simply required Savage to maintain a minimum of a \$2M GL policy or greater. The contract was silent as to required limits above the \$2M.

National Union argued Exxon was not an additional insured under the umbrella policy because Exxon's and Savage's service agreement "expressly limit[ed] additional insured coverage for Exxon to insured Commercial General Liability coverage."

National Union posited that its umbrella policy "incorporate[d] the coverage limitations" of the National Union GL policy by including as an "[i]nsured" any organization included as an additional insured under the [National Union GL policy] but not for broader coverage than would be afforded by [the National Union GL policy]."

The Texas Supreme Court ruled in Exxon’s favor. It applied a three-point rule when determining duties owed which will be relied upon in future cases:

- Begin with the text of the policy at issue (i.e., the umbrella policy).
- Refer to extrinsic documents *only if* the policy language incorporates these extrinsic documents; and
- Refer to such extrinsic documents only to the extent of the incorporation and no further.

The umbrella policy contained two instances where it incorporated the GL policy and service agreement, which the court analyzed separately. The court opined that broader coverage language simply meant coverage not provided in the underlying policy, which was not at issue. The court also stated that solely relying on limits contained in the GL was contrary to the intent of the umbrella policy.



TSiB Talking Point: It is important to scrutinize your contractual obligations to downstream parties. For instance, if the contract stipulated Savage would carry at least \$2M in GL limits and carry commercial umbrella or excess insurance with policy limits of at least \$30M this 9-year coverage dispute could have been avoided.

It is equally important to review the downstream insurance policies, both excess and underlying, to verify they are mirroring the contractual obligations and AI requirements as established.

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Most Businesses Fall Short in Cyberattack Prevention

Travelers Insurance Company recently released a survey that sheds light into the way businesses are dealing with their cyber risks. The survey suggests that most businesses have not taken any preventive measures to defend against cyberattacks, even though they feel that they have implemented best practices. The survey revealed that 23% of the respondents have already experienced a cyberattack.

According to the survey, 25% of the 1,200 respondents are not implementing the most basic defenses such as firewall/virus protection, data backups and password updates. In addition:

- 64% do not use endpoint detection and response
- 44% do not use multifactor authentication for remote access
- 57% do not conduct cyber assessments of their vendors or customers assets

Yet, 58% of respondents worry about cyber security.

TSIB Talking Point: The costs of suffering a cyberattack can have disastrous effects on a company, potentially even putting it out of business. This survey by Travelers highlights the lack of security measures and should be a cautionary tale for all businesses. Cyber Insurance should be part of any solution. However, without first implementing the most basic security measures, it would be very difficult to obtain coverage.

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Authors Sue OpenAI for Copyright Infringement

The introduction of Artificial Intelligence (AI) platforms has triggered a slew of lawsuits by writers concerned about their copyrighted materials being used without their permission. 17 Authors, including John Grisham, George R. R. Martin, and Jody Picoult, have filed a lawsuit that was organized by the Writer's Guild, against [OpenAI](#) for "systematic theft on a mass scale".

This lawsuit cites specific ChatGPT searches for each author. As an example, a ChatGPT search produced "an infringing, unauthorized, and detailed outline for a prequel" to a Game of Thrones story that used the same characters from the author's books.

Other authors and artists have filed separate lawsuits for the same copyright infringement issues. As a precautionary measure, Amazon will limit self-published books on their Kindle platform and will ask authors to confirm that their works do not include AI generated content.

TSIB Talking Point: Concerns over AI are going to only increase in the coming years. This will result in debates around the application of copyright law and the notion of "fair use."

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