# Table of Contents

**Claims journal**
- Cyber ........................................................................................................................................................................... 5
- Employment Practices Liability ......................................................................................................................................... 8
- Executive Liability ............................................................................................................................................................. 12
- Financial Institutions ........................................................................................................................................................ 14
- Insurance Coverages ......................................................................................................................................................... 17

**Trend Report**
- Construction ..................................................................................................................................................................... 21
- Environmental .................................................................................................................................................................. 28
- Life Sciences .................................................................................................................................................................... 31
- Management and Professional Liability .......................................................................................................................... 33
- Merger and Acquisition Risk Solutions .......................................................................................................................... 45
- Real Estate ....................................................................................................................................................................... 47
- Financial Institutions ........................................................................................................................................................ 54
- Contacts ............................................................................................................................................................................. 55
On August 16, 2021, the U.S. Securities and Exchange Commission (SEC) announced that Pearson PLC, a publicly traded British multinational educational publishing and services company, agreed to pay a $1 million civil penalty in a settlement related to charges that Pearson misled investors about a 2018 data breach resulting in the theft of millions of student records. The SEC's order found that Pearson made material misstatements and omissions about the data breach in a report furnished to the SEC and in a media statement.

The SEC's order alleges that on March 21, 2019, Pearson learned of a 2018 cyber intrusion that affected data stored on the server for one of its web-based software products. The server was accessed and downloaded by a "sophisticated threat actor" taking advantage of an unpatched vulnerability on the server. In September 2018, the software manufacturer notified Pearson of the vulnerability, but the SEC's order alleges that Pearson did not patch the vulnerability until after it learned of the attack in March 2019 even though a patch was available in September 2018. On March 21, 2019, Pearson received a copy of the stolen data showing that all school district personnel usernames and passwords and 11.5 million rows of student data had been exfiltrated, which included students’ birth dates and email addresses. In July of 2019, Pearson mailed a breach notice to all of its customer accounts whose data was exfiltrated but did not inform them that their usernames and passwords had been exfiltrated.

The SEC's order found that in its semi-annual report filed in July 2019, Pearson referred to a data privacy incident as a hypothetical risk, when the 2018 cyber intrusion had already occurred. Further, in a July 2019 media statement, Pearson stated that the breach may have included birth dates and email addresses, when Pearson knew that birth dates and email addresses were in fact stolen. Pearson’s media statement also said that Pearson had “strict protections” in place, when it had failed to patch the vulnerability after it was notified by the software manufacturer. The SEC’s order also alleged that the media statement omitted the fact that millions of rows of student data were breached.

“As the order finds, Pearson opted not to disclose this breach to investors until it was contacted by the media, and even then Pearson understated the nature and scope of the incident, and overstated the company’s data protections,” said Kristina Littman, chief of the SEC Enforcement Division’s Cyber Unit. “As public companies face the growing threat of cyber intrusions, they must provide accurate information to investors about material cyber incidents.”

The SEC's order found that Pearson violated the antifraud provisions of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933; the reporting provisions of Section 13(a) of the Securities Exchange Act of 1934 and Rules 12b-20 and 13a-16 thereunder; and the disclosure controls provisions of Rule 13a-15(a). The SEC accepted Pearson’s settlement offer, which included a cease-and-desist order and a $1 million civil monetary penalty.

This case reflects the SEC's position that personnel responsible for information technology and information security should be in regular communication with their colleagues overseeing financial reporting and SEC disclosure to ensure the accuracy of SEC reports with respect to cybersecurity.

Case No. 3-20462 (August 16, 2021)
Comcast Wins 9th Circ. Bid to Arbitrate Data Privacy Suit

Brandon Hodges v. Comcast Cable Communications, LLC

Whether blocking arbitration provisions that waive the right to seek “public injunctive relief” apply to Comcast’s collection of subscribers’ video viewing activity for targeted advertising without obtaining their consent.

A plaintiff accused Comcast in February 2018 of running afoul of the Cable Communications Policy Act and California’s Invasion of Privacy and Unfair Competition Law by collecting the personal identifying data of millions of unwitting households, including which channels and programs viewers watch, the ads they see and the time spent watching.

The suit also accuses Comcast of collecting demographic data and using the data packages to attract advertisers without notifying subscribers or seeking consent.

Writing for the majority, U.S. Circuit Judge Daniel P. Collins agreed with Comcast that Hodges’ push to require the cable giant to notify future customers about the demographic and video activity data it collects — and to allow users to opt out — is not “public” because it only affects Comcast subscribers rather than the public-at-large.

Arbitration provisions that protect the privacy rights of millions of customers do not constitute “public injunctive relief” and may be upheld.

Flagstar Bank Agrees To Pay $5.9M To Settle Data Breach Lawsuit

Beyer v. Flagstar Bancorp, Inc. et al.

In late 2020 and early 2021, software vendor Accellion began disclosing to its file transfer appliance (FTA) clients that certain cyber criminals had breached Accellion client data via vulnerabilities in the FTA software. As part of this data breach, hackers accessed Flagstar Bank’s files containing customer and employee information. The data breach also impacted other Accellion clients, including corporations, law firms, banks, universities and other entities.

As part of Flagstar’s investigation of the attack, it confirmed that the personally identifiable information (PII) of over 1.47 million Flagstar customers and employees was compromised in the breach. The affected PII included names, email addresses, dates of birth, home addresses, phone numbers, Social Security numbers, passport information and account information.

On March 30, 2021, lawsuits were filed against Accellion and Flagstar. Plaintiffs alleged that Flagstar and Accellion: a) failed to implement and maintain adequate data security practices to safeguard plaintiffs’ PII; b) failed to prevent the FTA Data Breach; c) failed to detect security vulnerabilities leading to the FTA Data Breach; and d) failed to disclose that their data security practices were inadequate to safeguard plaintiffs’ PII.

With respect to Flagstar, plaintiffs alleged that Flagstar had a duty to, and implied a promise to plaintiffs that it would, protect their sensitive PII from unauthorized disclosure and handle this data securely. Plaintiffs also alleged that Flagstar failed to do so by entrusting the PII to a third-party file transfer vendor whose products and services were prone to security vulnerabilities that left PII exposed.

In early September, plaintiffs and Flagstar filed a motion to approve a $5.9M settlement related to the data breach lawsuits. The settlement terms call for three years of credit monitoring services for any Flagstar customer impacted by the breach or a cash payout of $632 – $199 for California customers and $316 – $99 for all other customers, or a payment for reimbursement of documented losses of up to $10,000 per customer. Class counsel seek attorney fees up to $1.48 million, plus expenses, which will be paid out of the $5.9 million settlement fund.

Costco’s Recordings Do Not Run Aftoul of Florida’s Wiretapping Statute

Jason Goldstein, et al. v. Costco Wholesale Corporation

A federal judge permanently dismissed a proposed class action against Costco over its “session replay” software that tracks web users’ activity amid what he called an “outbreak of litigation” from litigants who have “seized on a novel reading of Florida’s decades-old wiretapping statute.”

In his opinion, Judge Ruiz said Goldstein attempted to “redefine key terms in the FSCA” in the face of changing technology — and that a textual analysis of the statute’s scope was warranted, given the rash of “virtually identical cases” piling up across the state.

Under the FSCA, the act of “interception” is defined as “the aural or other acquisition of the contents of any wire, electronic, mechanical, or other device,” wrote Judge Ruiz. The question before the courts in many of the FSCA cases is how “contents” is defined.

The trend of class actions has targeted dozens of online retailers that use so-called “session replay” technology to observe and record actions taken by individual visitors to their websites. In this case, Goldstein characterized the session replay tech as “spyware” and claimed it “intercepted” his and other users’ data communications with the Costco website, according to the order — “including how they interacted with the website, their mouse movements and clicks, keystrokes, search terms, information inputted into the website, and pages and content viewed while visiting the website.”

The opinion drew a comparison to a 2010 case in which a Florida district court found that hidden security cameras in doctors’ offices were not an interception. The “silent surveillance videos of the doctors’ physical movements had no contents,” Judge Ruiz explained because they didn’t “convey the substance of any particular communication” by the physicians.

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Employment Practices Liability

California Employers May Screen Applicants Based On Pre-Employment Drug Tests

Espinola v. Wismettac Asian Foods, Inc

Unlike Nevada and New York, employers in California may screen applicants on the basis of a failed pre-employment drug test. In Espinola v. Wismettac Asian Foods, Inc, the U.S. District Court for the Central District of California granted summary judgment in favor of the employer on claims of disability discrimination, failure to engage in an interactive process and accommodation, failure to prevent discrimination and retaliation in violation of FEHA made by a job applicant who was a medical marijuana user.

The plaintiff applied for a position with the defendant through a placement agency and was offered the job. As part of his background check, he was required to undergo a pre-employment drug screen. However, at plaintiff’s request, the drug test was postponed. A few days before his scheduled first day of work, plaintiff, who was a Florida resident, obtained a Florida medical marijuana card. Although he stated that he was not disabled in his employment paperwork, he later informed the defendant that he had chronic back pain for which he had been prescribed medical marijuana. However, he did not provide any supporting medical documentation. The plaintiff eventually took the drug test and tested positive for marijuana, and the defendant terminated his employment. The plaintiff thereafter sued the employer.

The court granted summary judgment in favor of the employer, holding that plaintiff’s disclosure that he had chronic back pain, without supporting documentation, was insufficient to prove his case. The court concluded that plaintiff’s chronic back pain did not qualify as a disability under FEHA, and held that even if the plaintiff could prove that he had a qualified disability, he could not prove that he was terminated from employment for anything other than the failed drug test, the employer’s legitimate, nondiscriminatory reason to terminate his employment.

The court explained that where an employer has a uniform pre-employment drug test policy, “the fact that the employee has notice of that condition, coupled with the result of the test, is determinant.” Therefore, the employer had a legitimate, nondiscriminatory reason for terminating the plaintiff’s employment.

The EEOC Backs Employer-Mandated Vaccination Policies

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov)

On May 18, 2021, the EEOC released an updated guidance to their FAQs and clarified its previously nebulous position on employer-mandated vaccination policies. The EEOC now makes it clear that mandatory COVID-19 vaccination policies are permissible if they are job-related and consistent with business necessity based on safety concerns arising from COVID-19.

The new guidance expressly states that “federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to reasonable accommodation provisions of Title VII and the ADA…”

An employer is required to accommodate an employee’s sincerely held religious belief, practice or observance under Title VII, as well as an employee’s disability under the ADA. However, an employer is not required to grant an accommodation if it would pose an “undue hardship” on the employer’s business operations.

The U.S. Supreme Court has defined “undue hardship” under Title VII as imposing “more than a de minimis cost” on the operation of the employer’s business. An “undue hardship” under the ADA is based on several factors, including but not limited to, the nature and cost of the accommodation, the financial resources of the employer and the impact of the accommodation on the employer’s business. Accommodations such as wearing a mask, physical distancing and weekly testing will likely not be viewed as undue hardships.

Georgia Court Finds That Covid Is Not A Disability Under The ADA

Jaquishala Champion v. Mannington Mills, Inc

While this is an issue of first impression for courts, a Georgia federal court judge recently held that contracting COVID-19 is not a disability under the ADA. In the case of Jaquishala Champion v. Mannington Mills, Inc., a United States District Court judge dismissed a lawsuit where the plaintiff claimed her brother’s case of COVID-19 amounted to a disability.

Ms. Champion and her brother both worked for defendant Mannington Mills in Madison, Georgia. After her brother tested positive for COVID-19, the Company attempted to conduct a contact trace. During her interview, the plaintiff denied having contact with her brother, later claiming that she had forgotten about the conversation. However, other employees reported that they had seen the plaintiff speaking to her brother in person a few days before he tested positive. Mannington Mills thereafter terminated plaintiff’s employment, accusing her of dishonesty because she did not initially disclose her conversation with her brother.

Ms. Champion subsequently sued Mannington Mills asserting a claim of association disability discrimination in violation of the Americans with Disabilities Act, arguing that COVID-19 is considered a disability under the ADA. Plaintiff alleged that her brother’s condition fell within the “physical or mental impairment that substantially limits one or more major life activities of such individual” element § 12102 of the ADA.

First, she alleged that he left work to go to the emergency room when he began experiencing COVID symptoms. She argued that this showed that his ability to work, which is a major life activity under the ADA, was substantially limited, and therefore, he was a disabled person as defined by the ADA. Second, she argued that her brother was substantially limited in his ability to communicate because he was unable to maintain in-person communications.

The defendant filed a motion to dismiss arguing that the Plaintiff failed to state a claim because she failed to allege that her brother was “disabled” as defined by the Americans with Disabilities Act. The Court agreed with the employer, stating that it disagreed with plaintiff’s “legally-flawed position that anyone alleged to have COVID-19 is ‘disabled’ under the ADA.” The court noted that the ADA considers a person to be “disabled” if that person has a “physical or mental impairment that substantially limits one or more major life activities…” 42 USC § 12102(1). The court held that even though plaintiff’s brother may have missed several days of work due to his infection, “that bare allegation, without more, does not rise to the level of a ‘disability’ under the ADA,” and that a plaintiff must also explain how the alleged ailment substantially limits a major life activity. While the court acknowledged that a detailed description of plaintiffs’ brother’s condition was not necessary, it did find that her failure to allege even a single symptom that her brother suffered showing why he was physically and mentally unable to work was detrimental to her argument.

The court further stated that if plaintiff’s argument was correct, “then employers across the nation will be shocked to learn that if any of their employees are sick for just a few days, then those employees are ‘disabled’ and now protected by the ADA.” The court also held that plaintiff’s second argument that her brother was substantially limited in his ability to communicate was also deficient. The court stated that if that were true, then “any of the millions of Americans who quarantined, including those without COVID-19, those infected by asymptomatic, and those who were seriously ill, were suddenly ‘disabled’ under the ADA.”

Finally, the court held that plaintiff’s association discrimination claim relying on the “regarded as” element of §12102(1) also failed. The court noted that “an association discrimination claim like [plaintiff’s] cannot be based on a plaintiff’s association with a person merely regarded as disabled,” because “association discrimination consists of discrimination based on one’s association with a person who has a ‘known disability’. Because plaintiff was unable to successfully prove that her brother was ‘disabled,’ then her argument that she was discriminated against because she associated with him must also fail. The court held that “[just because [plaintiff’s brother] stayed home after testing positive for COVID-19, as did millions of other Americans, does not mean that [the defendant] regarded him as disabled, or more importantly, discriminated against [plaintiff] because she was associated with him.”

Case No. 5:21-cv-00012-TES (M.D. GA May 10, 2021)
Keeping An Eye On California Employment Decisions - Los Angeles

Jurisdiction Awards $7.6M To Plaintiffs In A Disability Discrimination Case


A Los Angeles jury recently awarded a verdict of $7.6M to two Plaintiffs in a wrongful termination lawsuit. In Albert Garcia, et al v. Gresham Apartments Investors, Plaintiffs Albert and Stephanie Garcia ("the Garcias") were hired by Sierra Management, a management company formed to manage real estate owned by two individuals, Gerald Doren and Sheldon Seltzer. Doren and Seltzer owned several residential apartment buildings through various entities, one of which was Gresham Apartment Investors. The Garcias were hired as live-in managers at Gresham. Albert Garcia was subsequently diagnosed with cancer, and Doren and Seltzer thereafter terminated the Garcia's employment, which also resulted in the loss of their apartment. The Garcias sued both Sierra Management and Gresham, alleging disability discrimination in violation of the CA Fair Employment and Housing Act ("FEHA") and wrongful termination. They alleged that they were wrongfully terminated shortly after Mr. Garcia was diagnosed with thyroid cancer, and that Gresham failed to grant reasonable accommodations.

After six hours of deliberation, the jury found in favor of the Garcias, awarding Albert Garcia $2.35 million in compensatory damages for lost wages and emotional distress, and $4 million in punitive damages. The jury also awarded Stephanie Garcia $30,725 in compensatory damages and $1.25 million in punitive damages, for a total verdict of $7,633,650.

This is yet another example of how claims brought by hourly, low-wage earner employees can result in multi-million-dollar verdicts in California.

Case No. 2015-CV-03205 (C.D. Cal Aug. 3, 2021)

BIPA Voiceprint Litigation On the Rise

While early Biometric Information Privacy Act ("BIPA") litigation focused largely on an employer's use of fingerprints in the workplace, voiceprint BIPA litigation is gaining traction, with a handful of class action lawsuits filed in 2021, most notably against Amazon and McDonald's.

In Carol Cooper, et al v. Amazon.com, Inc., Case No. 1:21-cv-04633 (W.D. Wash.), the plaintiff, on behalf of herself and a class of consumers, filed a class action lawsuit against Amazon alleging violations of BIPA through Amazon's collection, storage and use of voiceprints in connection with its Amazon "Alexa" service. "Alexa" is Amazon's voice-based virtual assistant, which is embedded in Amazon devices, as well as integrated into thousands of other smart devices, such as telephones, cameras, security systems and automobiles. The plaintiff is an Amazon Prime member who owns an Amazon Echo equipped with Alexa services. She alleges that on numerous occasions, after she spoke into her Alexa device located in her home, Amazon then collected and captured her voiceprint and transcription without obtaining a written release.

Similarly, in Shannon Carpenter v. McDonald's Corporation, Case no. 1:21-cv-0290706 (N.D. Ill.), the plaintiff, on behalf of a class of consumers, alleges that the McDonald's chain of restaurants violated BIPA through the use of drive-thru artificial intelligence voice assistants in Illinois which captures and stores customers' biometric voiceprints. The plaintiff alleges that McDonald's violated BIPA by failing to notify its customers that when they interact with the AI voice assistant, their voiceprint biometric information is used, and collected, and that McDonald's failed to obtain the customers' written consent to do so.

As with the initial wave of early BIPA fingerprint litigation, we can also expect to see a significant uptick in voiceprint litigation over the next several months.

Wendy's Settles Employee BIPA Suit For $5.85 Million

Kelly O'Sullivan et al v. WAM Holdings, db/a All-Star Management Inc

An estimated class of 9,722 individuals from 39 Wendy's fast-food franchises accused the ownership company of violating the Illinois Biometric Information Privacy Act.

A former employee claimed the owner of the franchise had breached the state's unique biometric privacy law by scanning employees' fingerprints for time-keeping purposes when they clocked in and out without first getting their consent.

The parties settled for $5.85 million, of which $2.05 million were plaintiff's counsel fees. The expected payout was approximately $600 gross/$384 net per class member. It was brought to the court's attention that the notice rate to potential class members was extremely high at 98.7%.

The owner of the franchises did not admit liability as part of the settlement.

This case continues to show the staying power of these cases since the Illinois Supreme Court's 2019 ruling, where the court held that people suing under the Biometric Information Privacy Act are not required to allege any separate real-world harm in connection with the violations.

Significant settlements such as these will only encourage plaintiff's attorneys to pursue this type of litigation. In addition, the designated lead plaintiffs were awarded an additional $7,500 award.

The high response rates seem to show that the Illinois workforce is well aware of this litigation, and are keen to join these efforts.

Case No. 2019-CH-11575 (Circuit Court of Cook County, Illinois Sept. 2, 2021)

Delaware County Court Rejects Sincerely Held Religious Belief Exemption Argument

Dominic Beck v. Williamson College of Trades In Media, et al

In a case that is likely to be instructive on issues of first impression resulting from the COVID-19 pandemic, a Delaware County Court of Common Pleas Judge ruled that merely having a "sincerely held religious belief" is insufficient to prove discrimination based on the denial of a religious exemption argument to a mandatory vaccination policy.

In Dominic Beck v. Williamson College of Trades In Media, et al., the plaintiff, a student at the private Williamson College, challenged the school's failure to provide him a lawful, non-discriminatory reason for the [vaccination] policy to protect the health and safety of its students and staff during a global pandemic and to better ensure the continued operations of the school during the 2021-22 school year) and demonstrated that it applied the policy in the same fashion, regardless of the identity or faith of the applicants who requested to exception. The court also denied the plaintiff's petition on a procedural basis holding that he failed to exhaust administrative procedures.

In May 2021, the plaintiff requested an accommodation to the vaccination policy based on his sincerely held religious belief, arguing that the COVID-19 vaccine was developed from aborted fetal cell lines, and as such, obtaining the vaccine would be in violation of his Catholic teachings. However, because he failed to show that the Catholic faith expressly prohibits practitioners from obtaining the COVID-19 vaccine, his request was summarily rejected, and he was prevented from further attending classes until he was vaccinated. In his petition for preliminary injunction, the plaintiff argued that in denying his request for an exemption and preventing him from continuing to attend classes, the school discriminated against him because of his religion, in violation of the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

In the September 14 ruling denying his Petition, Judge Eckel held that to establish a religious discrimination claim under the PHRA and/or PFEA, whether under Title II (public accommodations) or Title VII (employment), a plaintiff must "establish – not merely recite or aver – that the belief he holds, from which his objection to the vaccine requirement derives, is sincerely held and religious. He must also show that the non-discriminatory reason for defendants' adverse action against him is a pretext for intentional discrimination against him." The court held further that "the school's failure to provide him a religious belief exemption from the mandatory COVID-19 vaccination policy. Before the COVID-19 pandemic, the school had an immunization policy requiring students to obtain certain vaccinations prior to matriculation, with the same ability to request an exemption from the policy for certain reasons. Plaintiff, who identifies as Catholic, complied with the school's vaccination policy prior to matriculating in Fall 2019 and obtained vaccines for meningitis, measles-mumps-rubella, tetanus and hepatitis B. When the COVID-19 vaccine became available, the school included the vaccine in its vaccination policy, with the same ability to request an exemption. If an exemption was requested, a small group of school executives evaluated each request and issued a determination.

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Executive Liability

Enforceability Of Limitations On Indemnification Agreements
Online Healthnow Inc. and Bertelsmann Inc. v. CIP OCL Investments LLC

Bertelsmann Inc. and Online Healthnow Inc. filed a lawsuit against CIP OCL Investments LLC, CIP Capital Fund LP and four executives of misrepresenting or concealing millions in OnCourse tax liabilities in connection with the acquisition of the latter's business.

The court ruled that the indemnification limitations in the purchase and sale agreement were not enforceable. In allowing the Bertelsmann claim against CIP to proceed against the sellers, the court ruled sellers cannot invoke a clause in a contract allegedly procured by fraud to eviscerate a claim that the contract itself is an instrument of fraud.

Case No. 2020-0654 (DE Court of Chancery Aug. 12, 2021)

Federal Forum Provision Upheld By NY Court
Hook v. Casa System Inc.

Casa Systems, which is organized under the laws of Delaware and has its sole U.S. office in Massachusetts, is a broadband service provider. The company completed an IPO in December 2017. Securities class action litigation was filed in New York state court against the company and individual directors and officers in 2018 after announcing disappointing financial results, alleging violations of sections 11 and 15 of the Securities Act of 1933.

Casa Systems moved to dismiss the litigation from state court based on the Federal Forum Provisions in its corporate charter, which dictate that Claims under the 1933 Securities Act be brought in federal court.

While initially upheld in the Delaware Supreme Court ruling in the Sciabucchi v. Salzburg case, it had only been upheld in three California cases since that time. As such, it was questionable as to whether other states would consider the Federal Forum Provisions valid and enforceable.

The judge in the NY Supreme Court upheld the Federal Forum Provision and granted Casa Systems’ motion to dismiss the litigation. While the NY judge pointed out that Casa Systems was incorporated under the laws of Delaware, giving more weight to the validity of the provision and precedent of Sciabucchi, she would likewise have upheld the provision had Casa Systems been incorporated under the laws of New York state.

Federal Forum Provisions have now been upheld in Delaware, California and New York, signaling that plaintiff’s attorneys will find it difficult to avoid having to file their ’33 Act claims in federal courts.

Being able to limit jurisdiction of these lawsuits to federal courts, which have greater experience and more sophisticated jury pools, is advantageous for companies and their boards. Companies should review their corporate charters and consider including Federal Forum Provisions.

Case No. 19-16483 (N.Y. Sup. Ct. Sept. 12, 2021)

SEC Initiates First Suit In Connection with Crowdfunding

The SEC launched its first enforcement action involving crowdfunding regulations.

At issue were two cannabis companies which used the Crowdfunding platform to raise money that would purportedly fund the businesses. The SEC is alleging that the two companies raised close to $2,000,000 each, but that the money was funneled elsewhere by the owners, and that investors have not received any returns on their investments. The principals of the companies have prior records involving fraud.

The SEC is also pursuing claims against the crowdfunding platform, TruCrowd, and its founder and CEO, Vincent Petrescu. The SEC is charging the firm with failing to investigate known red flags and customer complaints regarding the companies and their fundraising. The SEC said such failures violated the Securities Act and Regulation Crowdfunding.

The SEC is showing that investor protection remains a key focus, even in nontraditional fundraising efforts like crowdfunding. It comes as no surprise that the SEC will look to keep investors protected from parties who have committed fraud on the past.

The claims made against the platform likewise show that the SEC will enforce the “bad actor” disqualification and that issuers are required to conduct a factual inquiry to determine whether any covered person has had a disqualifying event, such as criminal convictions, SEC disciplinary or cease-and-desist orders, or orders from state or federal regulators. Failure to investigate these issues may land the issuers in violation of Regulation Crowdfunding, and threaten their own license to operate.

Will generally disqualify the offering from reliance on Regulation Crowdfunding. Those who fail to do so may be in violation of the provision.

Case No. 21-cv-12193 (E.D. Mich Sept. 20, 2021)
Wells Fargo Fined $250M By OCC For Home Lending Loss Mitigation Program

In the Matter of Wells Fargo Bank, N.A.

The Office of the Comptroller of the Currency fined Wells Fargo Bank NA $250 million for “unsafe or unsound practices” with respect to its loss mitigation activities and violations of the OCC’s previous 2018 order against the bank. The OCC previously fined Wells Fargo $500 million in 2018 for deficiencies in its compliance risk management program. A 2018 consent order agreed to at the time ordered Wells Fargo to make a series of improvements to its enterprise-wide compliance risk management program. The announcement of the $250 million fine on September 7, 2021, indicated that bank had not met those improvement requirements.

In a statement issued by the OCC related to the penalty, Acting Comptroller of the Currency Michael J. Hsu stated that "Wells Fargo has not met the requirements of the OCC's previous 2018 order against the bank. The OCC will continue to use all the tools at our disposal, including business restrictions, to adequately address. The OCC will continue to use all the tools at our disposal, including business restrictions, to ensure that national banks address problems in a timely manner, treat customers fairly, and operate in a safe and sound manner.”

Case No. AA-ENF-2021-30, Order #2021-035 and #2021-036 Sept. 7, 2021

SEC Charges Twenty-Seven Financial Firms for Disclosure Documents and Reg BI Deficiencies

The SEC charged and fined twenty-one investment advisers and six broker-dealers after they failed to timely file and deliver their client or customer relationship summaries – known as Form CRS – to their retail investors.

On June 5, 2019, the SEC adopted Form CRS and required SEC-registered investment advisers and registered broker-dealers to file their respective Forms CRS with the SEC, begin delivering them to prospective and new retail investors by June 30, 2019, and deliver them to existing retail investor clients or customers by June 30, 2020. The SEC also required firms to prominently post their current Form CRS on their website, if they had one.

According to the SEC’s orders related to these twenty-seven firms, each of the firms failed to meet those deadlines. The firms failed to file or deliver their Form CRS, or post it to their website, until being reminded twice of the missed deadlines by their regulators — in the case of investment advisers, by the SEC’s Division of Examinations, and in the case of broker-dealers, by the Financial Industry Regulatory Authority.

“Registration with the SEC as an investment adviser or broker-dealer comes with mandated filing and disclosure obligations,” said Gurbir S. Grewal, Director of the SEC’s Enforcement Division in a press release related to the fines.

Without admitting or denying the findings, the firms agreed to be censured, to cease and desist from violating the charged provisions, and to pay civil penalties.

Sonic Cannot Escape Data Breach Class Action Trial Brought By Financial Institutions

Sonic Corp. Customer Data Security Breach

In 2017, hackers used VPN credentials stolen from Infor, the company that provided software for cash registers at Sonic franchises, to access cash registers and collect unencrypted payment card data. The theft continued for a period of more than six months, undetected.

The Judicial Panel on Multidistrict Litigation centralized five potential consumer class actions against Sonic in the Northern District of Ohio, which settled for $4.3 million in 2018. Financial institutions then filed suit later the same year.

American Airlines Federal Credit Union, Redstone Federal Credit Union and Arkansas Federal Credit Union said they had to reissue credit cards and reimburse customers after hackers breached the payment system and stole personal financial information — a breach they insist would not have occurred had Sonic acted in compliance with its own policies and security auditor. The companies represent a class of financial institutions that may include thousands of banks, Judge Gwin found last year.

Sonic has said that Infor was solely responsible for all the factors that contributed to the breach, and that the credit unions failed to show that Sonic either owed them a duty of care or caused the alleged damages under Oklahoma law.

But according toJudge Gwin’s order, Sonic did multiple things to expose the credit unions to a “high degree of risk.” The parties agree on two of Sonic’s actions, Judge Gwin wrote: First, Sonic left Infor’s remote access permanently enabled, without blocking foreign IP addresses, “meaning that a hacker who obtained the Infor credential could connect to the VPN at any time” and access each franchise point-of-sale system. Second, Sonic created a weak remote access password for the VPN, and did not enable multifactor authentication.

US District Judge Gwin agreed with three credit unions suing Sonic that “genuine fact questions remain” for a jury to determine, rejecting the restaurant chain’s argument that the compliant fell short of standards for a negligence claim under Oklahoma law relating to a 2017 data breach in which hackers used VPN credentials stolen from Infor, the company that provided software for cash registers at Sonic franchises, to access cash registers and collect unencrypted payment card data. The theft continued for a period of more than six months, undetected.

Defendants in data breach litigation cannot avoid responsibility if plaintiff’s claimed injuries cannot be proven to have been a foreseeable risk of their own negligence.

Case No. 1:17-md-2807, MDL No. 2807 (N.D. Ohio Sept. 7, 2021)

Flagstar Bank Agrees To Pay $5.9M To Settle Data Breach Lawsuit

Beyer v. Flagstar Bancorp, Inc. et al.

In late 2020 and early 2021, software vendor Accellion began disclosing to its file transfer appliance (FTA) clients that certain cybercriminals had breached Accellion client data via vulnerabilities in the FTA software. As part of this data breach, hackers accessed Flagstar Bank’s files containing customer and employee information. The data breach also impacted other Accellion clients, including corporations, law firms, banks, universities and other entities.

As part of Flagstar’s investigation of the attack, it confirmed that the personally identifiable information (PII) of over 1.47 million Flagstar customers and employees was compromised in the breach. The affected PII included names, email addresses, dates of birth, home addresses, phone numbers, Social Security numbers, passport information and account information.

On March 30, 2021, lawsuits were filed against Accellion and Flagstar. Plaintiffs alleged that Flagstar and Accellion: a) failed to implement and maintain adequate data security practices to safeguard plaintiffs PII; b) failed to prevent the FTA Data Breach; c) failed to detect security vulnerabilities leading to the FTA Data Breach; and d) failed to disclose that their data security practices were inadequate to safeguard plaintiffs PII. With respect to plaintiffs, plaintiffs alleged that Flagstar had a duty to, and implied a promise to plaintiffs that it would, protect their sensitive PII from...
unauthorized disclosure and handle this data securely. Plaintiffs also alleged that Flagstar failed to do so by entrusting the PII to a third-party file transfer vendor whose products and services were prone to security vulnerabilities that left PII exposed.

In early September, plaintiffs and Flagstar filed a motion to approve a $5.9M settlement related to the data breach lawsuits. The settlement terms call for three years of credit monitoring services for any Flagstar customer impacted by the breach or a cash payout of $632 – $199 for California customers and $316 – $99 for all other customers, or a payment for reimbursement of documented losses of up to $10,000 per customer. Class counsel seek attorney fees up to $1.48 million, plus expenses, which will be paid out of the $5.9 million settlement fund.

SEC Allowed to Pursue Enforcement Actions Beyond Five Years
SEC v. Fowler

In a precedential opinion, the Second Circuit found that the SEC may toll the five-year statute of limitations period for enforcement actions. This allows the SEC to bring and enforce actions beyond five years when agreed to by the defendant.

The SEC alleged that Donald Fowler, a registered representative for J.D. Nicholas, engaged in event-driven and margin trading that resulted in excessive trading fees. The SEC alleged that Fowler’s fraudulent scheme began in 2011, meaning that the statute of limitations would ordinarily have expired in 2016. However, the SEC and Fowler entered into agreements that tolled the statute of limitations for a year - from March 1, 2016, to February 28, 2017. The SEC ultimately sued on January 9, 2017, within the tolled statute of limitations period.

After losing the enforcement trial and being ordered to pay a $2 million fine, Fowler argued that the statute of limitations was jurisdictional and not subject to tolling. The Second Circuit found this was done in two ways: first by publishing and exposing the customers’ credit-card data to hackers and second, the Paymentech complaint alleged that the hackers published the credit-card data by using it to make fraudulent purchases. Both disclosures “exposed [the credit-card information] to view.” The court found that either one standing alone would constitute the sort of “publication” required by the policy.

Fifth Circuit Rules Insurer Must Defend Policyholder In Data Breach Litigation
Landry’s Inc. v. Insurance Company of the State of Pennsylvania

The Fifth Circuit ruled that an insurance company must defend its policyholder for a $2 million data breach lawsuit, finding coverage under the insurance company’s CGL policy.

Landry’s is a Houston-based company that operates retail properties like restaurants, hotels and casinos. A branch of JPMorgan Chase, Paymentech, processed credit card payments to those properties and in 2015 discovered a data breach that occurred across fourteen Landry’s locations. Landry’s then initiated its own investigation, and it discovered that the data breach involved the unauthorized installation of a program on its payment-processing devices. Over approximately a year and a half, the program retrieved personal information from millions of customers’ credit cards. And at least some of that credit-card information was used to make unauthorized charges. Visa determined that the total amount of Paymentech’s liability for the data breach was $12,678,367.13 and MasterCard determined that the total amount of Paymentech’s liability was $7,383,839.75. In May 2018, Paymentech filed suit against Landry’s to indemnify Paymentech for those losses. Landry’s, in turn, sought coverage for the suit under its CGL policy with ICSOP.

The Fifth Circuit found that the CGL policy will certainly have an impact on the ongoing debate around “silent cyber.”

Court Finds Coverage for Social Engineering Claim Under D&O Policy
HMI International v. Twin City Fire Insurance

HMI was a provider of accounting and financial services. They fell victim to a social engineering scheme, and transferred $1,000,000 of client money before discovering the fraud. HMI ultimately settled with their clients pre-litigation for $470,000, and sought coverage for the settlement under their D&O policy.

The insurer, Twin City Fire Insurance, denied coverage on various grounds, including that the settlement was not covered as it was not the result of an adversarial process and that the professional services exclusion barred coverage for the claim.

The district court found in favor to Twin City, and HMI appealed to the Fifth Circuit.

The Fifth Circuit found the district court erred on several fronts. As regards the mentioned issues discussed above, the Fifth Circuit turned to the policy language to rule in favor of the policyholder.

The Fifth Circuit found that no litigation was required to trigger coverage under the policy. Rather, the demand that HMI received from their customers was sufficient to trigger coverage under the policy, and allow the insured to try and resolve the matter. The Fifth
Circuit ruled that Twin City could attempt to contest the amount and validity of the settlement, but not the insurer's right to settle. Here, in an instance where liability was clear and the amount of the settlement was lower than the actual loss, we presume Twin City was unable to do so.

As regards the professional services exclusion, the policy excluded loss “in connection with any Claim based upon, arising from, or in any way related to any actual or alleged . . . rendering of, or failure to render, any services for or on behalf of others for a fee.” The testimony in the case showed that HML routinely wired money for their clients free of charge. As such, the qualification that the service be “for a fee” rendered this exclusion inapplicable to this matter.

The wording in insurance policies can be critical, and it is important to make sure the language matches the risk a policyholder faces. In these examples of “silent cyber coverage,” it is also important to review the language in your policies as you may find coverage where you did expect to.

Prior Knowledge Exclusion

James River Ins. Co. v. Inn-One Home, LLP

In 2015, Ms. Kelly was admitted to a residential care facility operated by Inn-One in Rutland, Vermont, because she suffered from dementia. While at Inn-One’s facility, Ms. Kelly allegedly received inadequate care and supervision by an Inn-One staff member, who was later terminated by the facility and criminally prosecuted for the assault.

In Dec 2017, her estate and children filed suit against Inn-One for negligence, breach of contract, wrongful death, negligent hiring, and violation of state laws arising from the facility’s negligent care of the resident and the assault. Inn-One sought coverage under their CGL and professional liability policies, which denied coverage. Inn-One had not previously disclosed the assault against Ms. Kelly or the subsequent termination and criminal prosecution of the staff member in its application for insurance.

In coverage litigation, the issue turned on the prior knowledge exclusion in the professional liability policy and whether Inn-One knew or could have reasonably foreseen that the assault against Ms. Kelly could give rise to a claim and whether Inn-One reported the assault under any prior policy. The court stated that prior-knowledge conditions “are common in claims-made policies because they ensure that only risks of unknown loss are potentially incurred and prevent an insured from obtaining coverage for the risk of a known loss, which would be unfair to the insurer.”

The court applied a two-part test to determine if a prior knowledge condition precludes coverage. Asking first, whether the insured had actual knowledge of a suit, act, error or omission, a subjective inquiry; and second, whether a reasonable professional in the insured’s position might expect a claim or suit to result, an objective inquiry. The court found that both parts of the test were satisfied. The first part was satisfied as Inn-One did not dispute it had knowledge of the assault through both its termination of the employee and her criminal prosecution. Even though Inn-One asserted that it did not believe that the assault was a potential claim, the court stated, “[i]t is not necessary that the [insured] have actually formed an expectation that a claim would be filed for the exclusion to be triggered.

The court also found that the second part of the test was triggered in that it was objectively reasonable for Inn-One to expect a claim or lawsuit to result. As such, the court found the prior knowledge exclusion was triggered and there was no coverage under the policy.

D&O Insurer Has Duty To Defend Insured Executives In Counterclaim


Plaintiffs were executives of Aegis and shareholders of Hestia, Aegis’ parent company. National Union issued a D&O policy to Aegis. The plaintiffs were involved in the sale of Hestia to GardaWorld Consulting (UK) Limited. Plaintiffs thereafter sued GardaWorld regarding earnout provisions related to the sale. GardaWorld asserted counterclaims against the plaintiffs for misrepresenting the financial condition of both the Hestia and Aegis, causing GardaWorld to purchase Hestia at an inflated price.

The plaintiffs demanded that National Union fund their defense costs, as required by their D&O insurance policy. National Union refused, arguing that the plaintiffs had acted in their capacity as shareholders of Hestia and not in their capacity as executives of Aegis. As such, National Union stated that plaintiffs’ conduct was not covered by its policy. National Union also argued that, at the very least, the plaintiffs acted in a dual capacity, triggering a provision that excluded coverage under the policy for losses arising from acts taken by them in any role other than as executives of Aegis U.S. Coverage litigation followed and the court found that the counterclaims could be read to allege that the plaintiffs committed a “Wrongful Act” under the Policy, triggering the duty to defend. “Wrongful Act” was defined in the National Union policy as follows:

with respect to any Executive or Employee of a Company, [a Wrongful Act is] any breach of duty, neglect, error, misstatement, misleading statement, omission or act by such Executive or Employee in their respective capacities as such, or any matter claimed against such Executive or Employee of a Company solely by reason of his or her status as an Executive or Employee of a Company . . .

As explained by the court, the definition is separated by the disjunctive conjunction “or.” The court stated there is a reasonable possibility that the conduct alleged in the Counterclaims constitutes a “Wrongful Act” as described in the first clause of the definition of the term. The alleged misrepresentations made by the plaintiffs to GardaWorld were related to the Aegis business. The misrepresentations were included in the financial statements of Aegis and the Counterclaims specifically alleged that the misrepresentations were made by Aegis.

Further, the court found that the “fact that the counterclaims were interposed in response to a suit brought by shareholders of Hestia does not imply that the counterclaims must be limited to claims against the plaintiffs in their capacity as shareholders of Hestia.” The Counterclaims did not name all of the shareholdes of Hestia who brought suit against GardaWorld; they named only the shareholders who were also executives of Aegis US.

The policy also contained an exclusion which stated:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured: . . . [g] alleging, arising out of, based upon or attributable to any actual or alleged act or omission of an Individual Insured serving in any capacity, other than as an Executive or Employee of a Company . . .

The court found that it could not conclude from the facts pleaded in the counterclaims that the exclusion must apply to those counterclaims and that “[i]f issues of fact preclude a determination that defense costs are not available in this case.” For example, the court stated that plaintiffs’ conduct alleged in the counterclaims may have been undertaken by the plaintiffs solely in their capacity as officers of Aegis. As such there remained “legitimate questions of fact” regarding the capacity in which the plaintiffs acted, the court found “there is therefore a reasonable possibility that the exclusion does not apply.”

The court stated that since it could not conclude with certainty that the policy does not provide coverage, National Union had a contractual duty to defend the plaintiffs against the counterclaims and granted the plaintiffs’ motion for declaratory judgment to that end.

Chapter 11 and Insurer Liability

Continental Casualty Co. et al. v. Carr et al

CNA provided insurance between 1973 to 1996 to W.R. Grace’s asbestos mining facility in Montana. A group of workers filed claims in Montana state court against CNA, among others, alleging they had a duty to protect and warn the workers of the dangers when it conducted its safety inspections and implemented the hygiene programs.

W.R. Grace sought Chapter 11 protection in 2001 to handle billions of dollars in liability related to its asbestos operations. In establishing a trust to make payments to victims, the plan barred any future claims against the company directly and a limited number of third parties, including CNA.

Two bankruptcy court and the Third Circuit have wrestled with CNA’s liability and whether or not it was excused as part of the Chapter 11 filing.

The Third Circuit held that there needs to be additional examination of the services provided by CNA beyond the mere provision of insurance to W.R. Grace.

The court is examining if the services provided went beyond insurance coverage, and if so, does that lead to additional liability on the part of CNA?

While CNA contributed $84 million into the trust to respond to workers’ claims, this could open their liability further.
As we approach Q4, there is much uncertainty throughout the construction insurance space. The hard market, which has added additional strain to already stressed balance sheets, continues to moderate but at a gradual pace. The federal infrastructure plan should lead to opportunity in the months and years to come. We are optimistic that the resiliency of the construction industry will continue to impress as we finish out 2021 and look towards 2022.

Many factors will weigh on the insurance markets, which will warrant monitoring moving forward. COVID-19 remains front of mind as the youth of America return to academia and the Delta variant dominates headlines. An active East Coast storm season, exacerbated by the warmest meteorological summer (June – August) on record in the United States according to NOAA and the eighth wettest on record, has resulted in devastating storms ravaging the US from the Gulf through the Tennessee River Valley, North Carolina and into the Northeast. A drastically different scenario developed in the west with the Pacific Northwest experiencing record high temps and as of August; 99% of the US West of the Rockies was in a drought. Wildfires continue to be problematic with major burns in California, Oregon, Washington, Idaho and Montana.

How these factors weigh on the construction insurance space remains to be seen and we will continue to monitor and provide insight as the market develops.

The Q3 construction insurance market witnessed continued moderation of rate increases in the primary space, with target increases in the low to mid-single digits on low loss activity accounts. Accounts with severity losses and accounts operating in unfavorable geographic areas continue to bear the brunt of the hardened market and can expect rate increases in the 7% – 12% range. A positive development in the primary space has been the increased appetite for primary markets to write lead excess over themselves.

The excess market continues to be difficult to navigate with many markets still looking to increase rates on shorter limits. Excess towers which once took three to five market participants to fill out are now taking seven to ten or more in certain instances, with quota share becoming ever more prevalent. The relief provided by primary market lead excess has been welcomed and assists in filling the void created by the excess markets pushing up their desired attachment points.

The Builders Risk market continues to be dynamic. Rates have gradually begun to moderate but may accelerate in the aftermath of the active storm and fire seasons. Something we have witnessed, and discussed with several markets, is the shift in underwriting to increased emphasis on site security/protection (fencing, lighting, 24-hour manned security, etc.) as well as thorough review of the general contractor managing the work. Markets are assessing the general contractor’s ability to deliver projects of the proposed type and magnitude, and pricing accordingly.

Wrap-Ups
We may finally be seeing some leveling off of pricing and excess layer challenges. The past 18 months have been quite a ride for insurance and construction. COVID-19 challenges are well known and these challenges were coupled with one of the hardest markets we have seen for the last 30 years. It hasn’t been just increased rates; the construction and wrap-up marketplace has experienced limitations in coverage and stricter subjectivities from underwriters that far exceeded any plans that anyone had in place. Add to this an average 28% increase in commodity pricing, and you have a perfect storm of challenges for owners, developers and contractors. So while we can say that rates and layer adjustments have leveled off for commercial business, understand that we are at a new level of insurance pricing and carrier participation overall. This means that insurance costs are upwards of 20% higher than what we saw in 2019, and you could have at least twice as many insurance carriers in your excess towers.
2021 has been a great year for NFP's Construction Group so far and we look to close out the year strong. We are excited to release our Construction Spotlight Series, which will encompass specific topics affecting the construction space such as alternative dispute resolution, contractors professional, subcontractor default insurance, and more this October. And we hope to see many of you at the IRMI conference this November, in San Diego.

From NFP’s Construction Group, we look forward to building together.

A more helpful time frame in today’s market is 4 – 6 months for most commercial and residential projects. For large mega (over $500M) planning should start a year ahead. Submission development and discussions with the underwriters should be underway 6 months out. Today’s market requires full submissions, and that is more than just an application. Underwriters need proof that a wrap-up program has the controls in place. Owners and general contractors need to make sure contracts and safety/claims management are also coordinated. Risk managers need to evaluate all technologies that are available and incorporate them in their strategies.

In summary, while we are seeing the construction space start to slowly rebound, risk managers need to be cognizant of the new environment we are in. Underwriters are looking for those risks that are the cream of the crop and looking to improve their risk controls. It’s never too early to start planning your projects and controlled insurance programs.
## Excess Casualty

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 YOY CHANGE</th>
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<th>12 MONTH FORECAST</th>
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</tr>
</thead>
<tbody>
<tr>
<td>PRICE</td>
<td>5% to 25%</td>
<td>Rates will begin to moderate over the next 6 – 12 months. Auto will continue to be the most problematic due to severity losses from distracted drivers and nuclear verdicts. Weather-related losses may impact pricing.</td>
<td>5% to 15%</td>
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<tr>
<td>LIMITS</td>
<td></td>
<td>Excess markets have raised their standard attachment points and they continue to reduce layer exposure by taking smaller layer positions. More market partners are needed to meet tower limit requirements.</td>
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<tr>
<td>RETENTIONS</td>
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<td>Wildfire exclusions, geographic exclusions and height exclusions (NY- Labor Law) are the most problematic. Excess markets have limited the underlying markets they will write over (predominantly non-admitted markets).</td>
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<tr>
<td>COVERAGE</td>
<td></td>
<td>Capacity remains abundant but protected and carrier appetites are normalizing. Auto remains difficult to build towers over, especially for heavy commercial fleets (e.g. red-mix, material haulers, etc.)</td>
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<tr>
<td>CLAIMS</td>
<td></td>
<td>Limit losses continue to be an issue, especially in the auto space. Wildfire remains an issue with many primary markets including wildfire exclusions in their policies.</td>
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### Builders Risk

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<tr>
<th>METRICS</th>
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</tr>
</thead>
<tbody>
<tr>
<td>PRICE</td>
<td>3% to 7%</td>
<td>Rate increases have started to moderate. Capacity for natural catastrophe exposure is decreasing which is driving rate for the markets that will still participate.</td>
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<tr>
<td>LIMITS</td>
<td></td>
<td>Limits are an issue on larger more complex projects and/or cut exposes. Markets are offering lower limits which has resulted in multiple markets participating to meet the limit requirements. Risk sharing, such as quota share, is utilized to increase market participation in difficult placements. Wood frame continues to have limited capacity.</td>
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<tr>
<td>RETENTIONS</td>
<td></td>
<td>Retentions are seeing volatility in certain coverages. Flood, windstorm and hail are seeing the largest increases.</td>
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</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td>Warranties have become stricter with a focus on site security (e.g. Fully fenced, 24-hour lighting, and maned security in some cases) Underwriters are using these to enhance the risk profile of the specific location/jobsite.</td>
<td></td>
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</tr>
<tr>
<td>CLAIMS</td>
<td></td>
<td>Interior water damage claims continue to increase in both frequency and severity. Technology solutions designed to monitor water flow and mitigate water hazards are becoming sought after.</td>
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Excess Casualties and Builders Risk are both impacted by increasing severity losses, particularly due to natural catastrophes such as wild fires. The markets are adjusting their capacities and pricing strategies to reflect these changes. For both sectors, there is a focus on enhancing risk management practices and utilizing technology solutions to mitigate losses.
Wrap-Ups (OCIP and CCIP)

2021 Third Quarter Overview

**METRICS** | **Q3 2021 YOY CHANGE** | **Q3 2021 COMMENTARY** | **12 MONTH FORECAST** | **12 MONTH FORECAST COMMENTARY**
--- | --- | --- | --- | ---
**PRICING** | 0% to 5% | Primary and excess layer rates have begun to level out for the majority of OCIP and CCIP programs in states outside of NY and FL. However, it should be noted that while we are seeing rates moderating, it is at levels upwards of 20% higher than rates were in 2019. “For Sale” rates have also begun to moderate, but at high levels.
--- | 0% to 5% | Rates are expected to continue to moderate, but at these new higher levels. While we expect rates to remain stable, it is still important to be conservative with estimates as you are planning your projects.
**LIMITS** | Limits for primary layers continue to stay consistent. Excess capacity is still available but additional time and effort is needed to place coverage as more carriers may be needed to place the same limits. Expect longer periods to place your layers.
--- | | Excess capacity is expected to remain an issue from both a pricing and capacity standpoint. Increasing lead time is needed to place the coverage.
**RETentions** | Retention levels available have remained consistent. Many customers with strong safety programs are looking at raising their retentions as a way to offset rate increases and lower overall insurance costs.
--- | | There are no anticipated changes to retention levels.
**COVERAGE** | Residential coverage remains the most challenging to place as there are limited markets for “For Sale” coverage. Commercial market coverage remains consistent.
--- | | No anticipated changes. But more carriers are wary of overextending themselves. With COVID-19 still active, carriers are both conservative and looking at ways to grow business. Expect communicable disease exclusions on all policies.
**CARRIER** | In general there have not been any changes with carriers in the levels of support and lines of coverage they are supporting. Residential, particularly in FL, is an exception where overall support is becoming even more challenging as several markets have had serious claims and have leveled off their support in the residential space.
--- | | Except for residential, carrier participation is expected to continue to stay consistent. We do expect several additional firms to offer new programs that will be open to many construction risks. Several of these markets are focusing on technology as a differentiator in establishing rates.
**CLAIMS** | Overall claims for construction continue to escalate. Both medical inflation and with completed operations.
--- | | As we hope to come out of COVID-19 soon, we should see additional claims as construction opens up. Claims activity will remain strong.

Professional Liability

2021 Third Quarter Overview

**METRICS** | **Q3 2021 YOY CHANGE** | **Q3 2021 COMMENTARY** | **12 MONTH FORECAST** | **12 MONTH FORECAST COMMENTARY**
--- | --- | --- | --- | ---
**PRICING** | 5% to 10% | Most contractor renewals will present moderate rate increases. Certain classes, esp. heavy civil or residential, realizing larger increases. Aggressive marketing can mitigate to some extent. Project policies for heavy civil impacted by substantial rate increases.
--- | 0% to 10% | A&Es are experiencing moderate rate increases. Increases are higher in London, and this is starting to impact US pricing. Real estate professionals realizing moderate increases, especially for certain venues (CA and NY).
**LIMITS** | Limits offered are consistent with the insureds actual revenues. Outlined limit offerings are given special review.
--- | | Markets continue to restrict limit deployment for certain contractor exposures. Sub-limits starting to be imposed by some markets for certain contractor coverages, such as rectification and protective.
**RETentions** | Retentions for most contractors, A&Es and real estate remained unchanged. Specific classes are seeing higher self-insured retentions (SIR).
--- | | Retentions are expected to remain static for most classes, with notable exception for certain contractors.
**COVERAGE** | Markets continue to restrict limit deployment, total available capacity, pricing and coverage for project policies as well as practice policies for heavy civil contractors and projects, as well as impacts to the design professional market.
--- | | Markets will continue to offer competitive premiums for renewals in most classes, with notable exceptions for heavy civil exposures.
--- | | Adverse claims trends impacting contractor professional liability policies on heavy civil projects. Poor loss development also affecting rectification coverage in particular.
--- | | We expect continued claim development for heavy civil projects. We will continue to monitor impact on limit deployment, total available capacity, pricing and coverage for project policies as well as practice policies for heavy civil contractors and projects, as well as impacts to the design professional market.
The environmental market space continues to see some hardening across all product lines with renewal premiums up between 3% and 10%. A growing number of markets are favoring shorter policy terms, and while 10-year options are still available for most transactional and some redevelopment deals, many carriers continue to steer away from offering a full 10-year option. Limits remain abundant, and ample capacity exists in the marketplace. Retentions are static, but it is likely we will see carriers beginning to look for higher entry points over the course of the year.

Emerging contaminants such as PFOA/PFAS and 1,4-Dioxane continue to cause concern for carriers and are being underwritten on a case-by-case basis. We anticipate more tightening around coverage for PFOA/PFAS and 1,4-Dioxane as claims frequency tied to these emerging contaminants continues to increase. Broad COVID-19 exclusions as well as more restrictions associated with disinfection costs are now the norm in the marketplace. Mold claims also continue to increase and legacy policies without these exclusions are increasing in value.

There have been no new entrants into the market in the last quarter. However, carriers continue to roll out new products. Great American recently announced a new online tank platform which will allow brokers to quote tank policies from their desktops.

Looking forward we expect the marketplace to remain competitive, but markets will approach business selectively, preferring the low risk, low premium placements. Longer-term policies are likely to see increased pressure on rates, limits and retentions.

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<tr>
<td>PRICING</td>
<td>3% to 5%</td>
<td>Abundant capacity continues to pressure rates downward. Practice policies are experiencing slight increases ranging from 3% to 5% on average.</td>
<td>3% to 5%</td>
<td>We expect the rate on CPL to maintain a 3% to 5% increase over the next 12 months.</td>
</tr>
<tr>
<td>LIMITS</td>
<td></td>
<td>Limits remain abundant with most carriers offering up to $25M in the aggregate. Additional limits at competitive pricing is rampant.</td>
<td></td>
<td>We expect limit and capacity to remain strong as this product is desirable for carriers.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td>Wide range of retentions available. Lower retentions available through online portals for practice policies.</td>
<td></td>
<td>We do expect retentions to slowly creep upward over the next year with carriers starting to favor increased entry points.</td>
</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td>Coverage remains broad for Contractors Pollution Liability (CPL) and exclusive coverages are available to NFP including delay expense which results from work stoppage caused by known or unknown pollution events.</td>
<td></td>
<td>We do not expect significant pull back in coverages over the course of the next 12 months.</td>
</tr>
<tr>
<td>CARRIER</td>
<td></td>
<td>No new entrants into the market in the last quarter. Existing carriers are increasing their appetite for smaller recurring policies. Zurich has exited the site market but remains committed to the CPL market.</td>
<td></td>
<td>We do not foresee any markets exiting the CPL space as it remains very profitable.</td>
</tr>
<tr>
<td>CLAIMS</td>
<td></td>
<td>Claim activity continues to remain flat, however, we do expect an uptick over the next quarter as projects ramp up.</td>
<td></td>
<td>We anticipate that claim frequency will increase over the next 12 months with project restarts and more contractor activity.</td>
</tr>
</tbody>
</table>
Site Pollution Liability (PLL)

**Pricing**
- **Q3 2021 YOY Change**: 9% to 10%
- **12 Month Forecast**: 5% to 10%

**Limits**
- **Retrenchment in remediation coverage continues.**
  - Handling remediation coverage knowns vs. unknowns and capping coverage accordingly is becoming increasingly difficult. We expect to see increasing focus on excluding all expenses within the boundaries of remedial action work plans. Broader coverage remains for purchasers of brownfields.
- **COVID-19 created much coverage angst and continues to do so from a third-party liability and business interruption perspective.**
  - Mold cover for hospitals and habitual is becoming increasing challenging.

**Coverages**
- **12 Month Forecast**: No new carriers entered or exited the market in Q3.

**Retentions**
- **Retrenchment in remediation coverage continues.**
  - Less environmentally exposed risks are not seeing changes in retentions. Other more complex risks such as redevelopments, are being challenged by insurers to accept higher retentions.
- **We expect increases in mold retentions across the board.**

**Carriers**
- **COVID-19 continues to bring increasing awareness to mold and legionella claims from buildings sitting idle for extended periods without evacuating systems. Mold claims are on the rise.**

**Claims**
- **COVID-19 continues to bring increasing awareness to mold and legionella claims from buildings sitting idle for extended periods without evacuating systems. Mold claims are on the rise.**

The Life Science Product Liability market remains consistent. Pricing is staying firm with slight increases if there have been losses. Several new insurers have entered the space over the past few years, increasing the options for the insured in both limits and pricing. Overall, capacity is stable with carriers still willing to offer high limits and increase their capacity up the tower. Retentions remain stable, carriers are not asking insureds to retain more risk. Except for certain high hazard risks, (i.e., orthopedic implants, opioids, other litigated classes) most insureds should have several insurers willing to offer cover.

Product Liability continues to be the most common legal and reputational risk for life sciences companies. Mergers and acquisitions reached a high point prior to the pandemic and experts are predicting there will be an even greater occurrence as companies have had to reassess their operations following the global pandemic. There can often be hidden risks during a merger and acquisition opening the door to claims activity that happened prior to the transaction being completed. There have also been several large class action lawsuits over the past few years for all types of health and life science accounts — from invasive medical products to shampoo.

Life Science Product Liability insurers in the US have also been brought into more traditional healthcare liability claims, like medical malpractice, as of late. With the limits of the current policy held by the facility or provider being lower than the damages desired, the manufacturer is being brought into litigation to address the higher damage awards.

More than half of US states have legalized some form of medical or recreational marijuana, and the demand for cannabis insurance is increasing dramatically. State and federal status remains divided, making it difficult for businesses to receive inclusive, affordable coverage. This often leaves policyholders with restrictive plans. Cannabis-infused products, such as edibles, increases the risk of Product Liability and safety recalls. The psychoactive effects of cannabis raise the risk that products may be deemed mislabeled, misrepresented or harmful. Standard general liability plans account for these claims in non-cannabis related businesses. But most insurers are hesitant to provide such coverage for cannabis related businesses due to the legal uncertainties. Policy language specifically tailored to the cannabis industry is crucial in providing adequate coverage.

**Product Liability**
- **12 Month Forecast**: No significant changes forecasted in the next 12 months.

**Availability of limits is expected to increase for long term placements** — five years or less, for example. Handling remediation coverage knowns vs. unknowns and capping coverage accordingly is becoming increasingly difficult. We expect to see increasing focus on excluding all expenses within the boundaries of remedial action work plans. Broader coverage remains for purchasers of brownfields.

**Mergers and acquisitions reached a high point prior to the pandemic and experts are predicting there will be an even greater occurrence as companies have had to reassess their operations following the global pandemic.**

**Life Science Product Liability insurers in the US have also been brought into more traditional healthcare liability claims, like medical malpractice, as of late.**

**With the limits of the current policy held by the facility or provider being lower than the damages desired, the manufacturer is being brought into litigation to address the higher damage awards.**

**Due to the considerable cost of replacing invasive products, product recall capacity is often not available on its own for life sciences. However, the litigation may hold a product manufacturer liable for the product to be replaced and be forced to pay these costs.**

**Longevity is the main concern in this field: a hip that should last 20 years and is implanted in a 65-year-old would have served the host until they are deceased, but this may no longer be the case as life expectancy continues to rise.**

More than half of US states have legalized some form of medical or recreational marijuana, and the demand for cannabis insurance is increasing dramatically. State and federal status remains divided, making it difficult for businesses to receive inclusive, affordable coverage. This often leaves policyholders with restrictive plans. Cannabis-infused products, such as edibles, increases the risk of Product Liability and safety recalls. The psychoactive effects of cannabis raise the risk that products may be deemed mislabeled, misrepresented or harmful. Standard general liability plans account for these claims in non-cannabis related businesses. But most insurers are hesitant to provide such coverage for cannabis related businesses due to the legal uncertainties. Policy language specifically tailored to the cannabis industry is crucial in providing adequate coverage.
### Product Liability

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 YOY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pricing</strong></td>
<td>3% to 5%</td>
<td>Pricing has remained static with slight increases in rate where claims have occurred. New products and emerging companies are experiencing higher rates due to potential higher risk profiles where risk are less known and untied. More mature organizations are realizing moderate to flat rate increases.</td>
<td>Flat rates are expected as there is an abundance of carriers in the marketplace helping to keep pricing competitive. Those with loss history will likely see slight increase at renewal.</td>
<td></td>
</tr>
<tr>
<td><strong>Limits</strong></td>
<td>No change in capacity. Carriers are still willing to offer $10m in limits, or more dependent on risk. Client demand for higher limits exists and continues to develop in this pandemic and post pandemic environment.</td>
<td>Retentions continue to follow the risk appetite, adjusting only for loss history. Negative loss history is influencing larger deductible retention structures.</td>
<td>We expect limit and capacity to remain strong as Product Liability coverage remains desirable for carriers.</td>
<td></td>
</tr>
<tr>
<td><strong>Retentions</strong></td>
<td>Retentions continue to follow the risk appetite, adjusting only for loss history. Negative loss history is influencing larger deductible retention structures.</td>
<td>Coverage remains broad with no significant coverage retractions. New pandemic provisions are being introduced.</td>
<td>We anticipate retentions to remain stable, fluctuating depending on product line and loss history.</td>
<td></td>
</tr>
<tr>
<td><strong>Coverage</strong></td>
<td>New entrants and MGAs have entered the space, mostly looking for transactional business, but helping to keep pricing low due to the increase in competition, with a number of those creating solutions for a specific subsegment.</td>
<td>We do not expect any pull back in coverages over the course of the next 12 months.</td>
<td>We anticipate a limited number of carriers entering the marketplace.</td>
<td></td>
</tr>
<tr>
<td><strong>Carrier</strong></td>
<td>Claims activity remained flat for Q3, but we’ve observed some significant class action settlements. There has been a heightened level of sensitivity in protecting the consumer, influencing litigation activity and outcomes.</td>
<td>Claims activity remained flat for Q3, but we’ve observed some significant class action settlements. There has been a heightened level of sensitivity in protecting the consumer, influencing litigation activity and outcomes.</td>
<td>We may potentially see an uptick in claims activity due to the increase in mergers and acquisitions activity over the last year especially with regards to unforeseen products losses occurring after the acquisition. Larger class actions are projected to be observed on a go forward basis.</td>
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</tbody>
</table>

### Management and Professional Liability


Individual product line claims trends within the Management and Professional Liability market have driven a broad spectrum of results, carrier appetite and coverage across the portfolio in the third quarter of 2021. Client differentiation remains key to beating market outcomes with a focus on industry, financials and governance driving those results.

Three key current events that have continued to weigh on the management and professional liability markets are as follows:

- The Delta variant of COVID-19 reversed the forward progress of return-to-work trends and the broader reopening of our local and global economies.
- Inflationary pressures across a broad spectrum of industries and the impact on the personal consumer with questions remaining on whether it will remain transitory or have longer lasting implications.
- The cyber (and fiduciary to a lesser extent) market hardening continues at an exponential rate with no near-term relief in sight.

In the privately held and not for profit company space, we still anticipate annual average rate increases of 5% to 20% compared to the 10% to 30% in Q2 2021. Carriers have been reducing their average limits deployed over the prior 2 years and we believe that most of the portfolio has now had limit deployment rightsized and anticipate insurance limits remaining relatively consistent on a go-forward basis. The carriers continue to monitor retention levels and adjust those on an account-by-account basis.

The GPL market is beginning to show signs of stabilizing but remains in a hardened state with primary and excess pricing increasing 10% - 20% versus Q3 2020. Capacity still remains strong although there is still a limited number of insurers that are willing to write primary GPL. Retentions and coverage have remained stable with regulatory investigations coverage being a key item for insureds as the SEC increases its focus on disclosures of investment risks and conflicts of interest, fees and expenses, liquidity, valuation of assets, and controls around material non-public information for alternative asset managers. Portfolio related litigation arising to the fund level continues to be the main driver of claims frequency and severity for GPs, specifically PortCo bankruptcies, while employment practices issues such as discrimination based on sex and race continue to become more prevalent.

The SPAC D&O market continued to harden in Q3 with primary rates up 10% - 20% versus Q2 while excess layers are beginning to show signs of diminished rate pressure due in part to an increase in excess only market capacity. The marketplace of insurers willing to write SPACs remains very tight with only a select few willing to write primary as insurers still lack tangible settlement data with which to evaluate the severity of SPAC D&O claims. Nuisance claims alleging inadequate disclosures within the proxy filing, and breach of fiduciary duty on behalf of the sponsor teams, continue to be prevalent but have yet to result in material litigation. We have, however, seen an increase in more serious post-close 10b-5 securities fraud claims made against SPAC sponsor teams as the SEC, short sellers and the plaintiffs bar continue to focus on disclosures of investment risks and conflicts of interest, fees and expenses, liquidity, valuation of assets, and controls around material non-public information for alternative asset managers. Portfolio related litigation arising to the fund level continues to be the main driver of claims frequency and severity for GPs, specifically PortCo bankruptcies, while employment practices issues such as discrimination based on sex and race continue to become more prevalent.
and portfolio corrections. Excessive fee cases target the diligence of a company ensuring that the investment options being offered, and 3rd party providers being utilized, have favorable fee structures when compared to alternatives and that there must be consistent review of these metrics by the plan administrators. We are seeing meaningful percentage increases on fiduciary plans (due to the low premium) and the introduction of excessive fee retentions that can range from $500,000 to over $2,500,000.

The long-term impacts of COVID-19 on the workforce is now playing out in the courts as it relates to employment litigation. The first wave of work from home implementation across exempt and non-exempt employees and layoffs has introduced a new exposure of employee management that had not previously been contemplated amongst companies and EPL Insurers. In 2021 the focus shifted to returning to work safely, accommodating all classes of employees and whether to implement vaccine mandates. Increased employment litigation related to the COVID-19 pandemic is expected and differences between states stances on these matters has only made it more difficult to ensure compliance.

Overall, breadth of coverage remains relatively stable for the terms and conditions in most of these lines of business.

Cyber continues to be a very challenged line of business and consistent with the prior quarter, we are continuing to see rate increases, in most cases, in excess of 75% or greater. Limits, retentions along with tightening in terms and conditions have all been negatively impacted by the frequency of claims activity, disruptions in supply chain and ransomware activity that has been impacting the cyber market. Like last quarter, we expect these trends to continue for the foreseeable future and certainly into the next 12 months.

Professional Liability lines continue to see upward pressure on rates, and the sector impacted the most is Tech E&O with MSP’s, data migrators and cloud storage software companies bearing the brunt of the hard market. SaaS in banking and gaming are in a particularly hard market with most markets non-renewing or leaving the space altogether. Increased frequency and severity of ransomware, phishing and social engineering attacks are driving the market further into a frenzy. We believe that this trend of pricing adjustments, higher retentions and decreased coverages will continue through the next 3 years.

We remain optimistic that the challenging market we have experienced over the past 18 months to two years is starting to show some easing with the exception of cyber, Tech E&O and companies with challenged risk profiles. Again, while this is not captured in some lines (like cyber) the overall trend is that the market adjustments noted over the last two years may have plateaued and we anticipate a moderation of those rate increases and more reasonable terms and conditions coming from carriers over the next 12 months. We hope you find this report informative and useful for your upcoming renewals in these lines of business.

Please don’t hesitate to reach out to us with any questions or concerns.

### Public Company Directors & Officers Liability

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 YOY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PRICING</strong></td>
<td>10% to 20%</td>
<td>The market is beginning to show signs of stabilizing but remains in a hardened state. Market conditions continue to support 10%-20% primary rate increases. Excess layers are beginning to show signs of diminished rate pressure due in part to an increase in excess only market capacity.</td>
<td>5% to 20%</td>
<td>We expect little to no deviation in the primary rates for the balance of the year except for highly favorable risk profiles. Primary underwriters continue to evaluate risk with a post-pandemic view and are taking a measured approach in response to other economic, political volatility and regulatory environmental factors.</td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td>Insurers continue to push capacity management initiatives, especially on difficult risk profiles, IPOs and SPACs.</td>
<td>Carriers have been reducing their average limits deployed for over two years and we anticipate a stabilization over the next 12 months.</td>
<td></td>
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</tr>
<tr>
<td><strong>RETENTIONS</strong></td>
<td>Carriers will continue to require greater commitment and assumption of risk by clients by increasing the self insured retention levels.</td>
<td>We expect to see a flattening out of retention increases as the carriers complete the 24 month cycle of book correction on their existing portfolios.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>COVERAGE</strong></td>
<td>Breadth of coverage is stable in comparison to prior year and quarters.</td>
<td>Subject to an unexpected event driven occurrences we expect the breadth and scope of coverage to remain unchanged.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>CARRIER</strong></td>
<td>Capacity continues to enter the public D&amp;O market which has started to increase the creativity of both new and traditional markets.</td>
<td>The entry of new capacity into the excess market will result in the introduction or reshuffling of carriers onto multi-layered programs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>CLAIMS</strong></td>
<td>We have seen an increase in claims volume, particularly in connection with COVID-19 related impacts on businesses as well as in the SPAC space. Social inflation has made it more costly to defend these matters, and plaintiff’s attorneys are seeking larger fee awards.</td>
<td>We expect claims volume to increase as there are a variety of issues boards must concern themselves with, including increased SEC scrutiny, new regulations in the Insider Trading Prohibition Act, increased focus on ESG and board diversity. The plaintiff’s bar has been very opportunistic in these areas.</td>
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</table>
### Private and Not for Profit Company Directors and Officers Liability

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 YOY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRICING</td>
<td>$</td>
<td>5% to 20%</td>
<td>Charging will be consistent with what we have seen over the last quarter. There will continue to be a larger variability in the renewal outcomes in our private and not-for-profit book based on individual account risk attributes.</td>
</tr>
<tr>
<td>LIMITS</td>
<td></td>
<td></td>
<td>Insurers continue to manage limit capacity. We are seeing some stabilization due to corrective action taken over the last 12 months.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td></td>
<td>Carriers continue to monitor the adequacy of retention levels across all industry sectors which has resulted in increases in retentions.</td>
</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td></td>
<td>The retraction of coverage terms is trending towards leveling. Portfolio corrections appear to be plateauing.</td>
</tr>
<tr>
<td>CARRIER</td>
<td></td>
<td></td>
<td>We are beginning to see the emergence of new market capacity in the private company sector as capital is being redirected toward downstream client profiles. The post pandemic appetite for technology and API enablement. We will begin to see significant efficiencies and increased competition as carriers strive to be first to market with technology.</td>
</tr>
<tr>
<td>CLAIMS</td>
<td></td>
<td></td>
<td>Claims volume remains flat while defense costs and other claims elements are in an upward trajectory, which is increasing overall claims activity and expense trends.</td>
</tr>
</tbody>
</table>

### General Partnership Liability

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 YOY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRICING</td>
<td>$</td>
<td>10% to 20%</td>
<td>Pricing will increase 10% - 20% versus Q3 2020. The excess layers are beginning to show signs of diminished rate pressure due in part to an increase in excess only market capacity.</td>
</tr>
<tr>
<td>LIMITS</td>
<td></td>
<td></td>
<td>Capacity still remains strong within the GPL marketplace. The market of insurers willing to write primary is still limited but broad enough to generate steady competition. Insurers continue to push to maintain strict capacity management and are generally unwilling to offer more than $5M on new programs. Existing towers are able to maintain $10M tranches.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td></td>
<td>Retentions have generally remained stable year over year with some GPLs seeing material increases in response to significant fundraising or claims activity.</td>
</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td></td>
<td>Breadth of coverage is stable in comparison to Q3 2020 with a focus on broadening regulatory and investigations coverage.</td>
</tr>
<tr>
<td>CARRIER</td>
<td></td>
<td></td>
<td>The market of primary insurers in the US remains stable. New excess capacity has entered the market but has not materially impacted pricing.</td>
</tr>
<tr>
<td>CLAIMS</td>
<td></td>
<td></td>
<td>New capacity is expected to enter the excess market which will result in the introduction or reshuffling of carriers onto multi-layered programs.</td>
</tr>
</tbody>
</table>

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36 | 2021 Third Quarter Overview

2021 Third Quarter Overview | 37
**Fiduciary Liability**

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 QOY CHANGE</th>
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<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRICING</td>
<td>Flat to 10%</td>
<td>Insurers have reduced overall and per-layer limits made available for risks across the board—even in historically consistent and solid client relationships given the claims environment for this line of coverage.</td>
<td>Flat to 30%</td>
<td>We have not seen reason to believe that limits profiles are increasing for carriers.</td>
</tr>
<tr>
<td>LIMITS</td>
<td></td>
<td>Carriers are increasing retentions substantially due to the claim's environment mostly driven by excessive fee litigation. Depending on the size of plan assets, retentions are often in the high six figure to seven figure range for this exposure.</td>
<td></td>
<td>We expect a consistent monitoring of regulatory and legal trends resulting in retention adjustment to persist throughout the year. This will all depend on where the expiring retention currently is.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td>We expect this trend to continue toward more restrictive policy wordings and coverages based on all the recent claims activity.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td>There is no expectation in the shift in market leadership among the carriers.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CARRIER</td>
<td></td>
<td>Given the increase in frequency and severity of these excessive fee cases and total settlements during the period from 2015 to 2020 totaling more than $1B, the expected total cost of projected settlements is likely to increase by hundreds of millions. Legal defense costs associated with these lawsuit will even further increase the burden.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CLAIMS</td>
<td></td>
<td>Claims volume is expected to continue its steady increase.</td>
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</tbody>
</table>

*Fiduciary Liability rates are up 5% to 35%+ driven by Excessive Fee litigation. Insurance carriers are focused on plans with assets greater than $100M where previously the threshold was much higher. ESGs will see even greater rate increases along with those that have challenged risk profiles.*

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**SPAC**

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 QUARTERLY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRICING</td>
<td>$5M per claim.</td>
<td>Breadth of coverage is stable in comparison to prior year and quarters.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LIMITS</td>
<td>Retentions for indemnifiable loss and Entity Securities Claims have remained stable, averaging $5M per claim.</td>
<td>There is still capacity in the marketplace to support insureds that wish to obtain higher than average limits ($10M+). Insurers continue to push to maintain strict capacity management and are unwilling to offer more than $5M on each program. The number of carriers willing to provide primary limits is fixed.</td>
<td></td>
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</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td>We have not seen reason to believe that retention profiles are increasing for carriers.</td>
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<td>COVERAGE</td>
<td></td>
<td>Subject to an unexpected event driven occurrences we expect the breadth and scope of coverage to remain unchanged.</td>
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<tr>
<td>CARRIER</td>
<td></td>
<td>We expect new capacity is expected to enter the excess market which will result in the introduction or reshuffling of carriers onto multi-layered programs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CLAIMS</td>
<td></td>
<td>We have seen an increase in claims volume, particularly in connection with de-SPAC transactions as the SEC, short sellers and the plaintiffs bar continue to focus on the representations made within SPAC proxy filings. Nuisance claims alleging inadequate disclosures made in proxy filings continue to be prevalent but are not resulting in significant defense costs or settlements at this time.</td>
<td></td>
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</tbody>
</table>

*The market is beginning to show signs of stabilizing but remains in a hardened state. Pricing for Side A and Full Cover D&O has increased 10% to 20% versus Q2. The excess layers are beginning to show signs of diminished rate pressure due in part to an increase in excess only market capacity.*

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2021 Third Quarter Overview
Employment Practices Liability

**METRICS**

<table>
<thead>
<tr>
<th>Q3 2021 YOY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRICING</td>
<td>10% to 20%</td>
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</table>

Employment Practices Liability is relatively unstable at this time due to the impact of COVID-19. Concerns over RFUs continue to impact the environment. This is coupled with the increased concerns with "return to the workplace" policies and procedures beginning to be implemented.

**COVERAGE**

Markets will continue to monitor the news and trends and will make adjustments accordingly. Social and political pressures coupled with shifting priorities will create a volatile and uncertain market response.

**LIMITS**

Employers have reduced overall and per-layer limits made available for risks across the board—often in historically consistent and solid client relationships.

**RETENTIONS**

We have not seen reason to believe that limits profiles are increasing for carriers.

**CARRIER**

Carriers are and will continue to make adjustment on a state-specific basis (NY, NJ, CA) primarily influenced by legislation and loss trends.

**CLAIMS**

There is no expectation in the shift in market leadership among the carriers. We do however expect to see a slight uptick in capacity especially with carriers that offer EPLI as a blended product with the Directors and Officers Liability.

**FSC**

Trend continues toward more restrictive policy wordings and coverages based on state and industry segment.

**FSC**

There has been increased volume in connection with employee claims and third-party discrimination claims. Vaccine hesitancy has resulted in some employees being suspended or not reinstated, and they are challenging these decisions. Defense costs and other elements are in an upward trajectory, which is increasing overall claims activity and expense trends.

**FSC**

Some developing appetites are likely to emerge as insurers being to see opportunity by increase in market capacity and technology.

**FSC**

Claims volume is expected to continue its steady increase. As offices re-open, employees may seek accommodations to work remotely, which may be in conflict with company plans. The new administration is looking to expand civil rights protections which may lead to increased claims volume.

Cyber

**METRICS**

<table>
<thead>
<tr>
<th>Q3 2021 YOY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRICING</td>
<td>50% (Minimum)</td>
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</tbody>
</table>

Increases in claims activity, including continued increase in ransomware events has forced the carriers to adjust their rates. Rates are expected to continue to increase throughout 2022 as more claims are submitted.

**COVERAGE**

Carriers continued to manage their capacity to $5M or below across their portfolios. Sub-limits are becoming more common and should be expected especially for ransomware and Dependent Business Interruption.

**LIMITS**

Carriers continued to seek retention increases on tougher industry classes, companies lacking control, or with claims activity. Waiting periods are also rising on the Business Interruption coverages. In some instances, between 24 and 48 hours. Consentrance is becoming a standard clause for ransomware.

**RETENTIONS**

Carriers continued to reduce or exclude ransomware coverage when controls are less favorable. MFA has become a mandatory control to secure coverage.

**CLAIMS**

Significant increase in frequency and severity of cyber claims, especially ransomware continued. Social Engineering/Financial Fraud claims continue to target companies in all industries. Large ransomware events such as those affecting Colonial Pipeline and JBS demonstrate the likelihood these attacks will continue in all industry classes.

**CARRIER**

Carriers will continue to strategically deploy capacity for accounts that maintain favorable cyber hygiene. Cyber Extortion/Ransomware limits will continue to be sublimated with a potential co-insurance.

**CARRIER**

Carriers will emphasize the requirement for quality ransomware and cybersecurity controls. Use of non-invasive scans (BitSight, Security Scorecard and Cyence) during the underwriting process will continue and questions about findings/potential issues (i.e. open ports) will need to be remediated. Additional questions around vendor management will become part of the underwriting process.

**FSC**

Continued tightening of underwriting guidelines including the mandatory need for favorable ransomware responses. Coverage will be pared down when controls are lacking. MFA has become a critical component in the underwriting process. Emergence of several new MGA/MGUs in the marketplace which could help replace capacity or markets which are pulling out of specific industries.

**FSC**

Cyber claims activity is expected to continue to increase. The impact of large headline cyber events will impact carriers capacity and underwriting changes well into 2022. The continued work from home environment and return to work will continue to test cyber infrastructure across various industries leading to increased claims activity.
### Tech E&O

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q3 2021 YOY CHANGE</th>
<th>Q3 2021 COMMENTARY</th>
<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRICING</td>
<td>$100% to 400%+</td>
<td>Markets have been and will continue to adjust for rate. Carriers are re-evaluating due to increased claims frequency and severity of malware/ransomware attacks, especially for Tech E&amp;O firms and those with cyber coverage on their E&amp;O policies. This trend will continue through 2022.</td>
<td>Markets are seeing substantial increases due to ransomware attacks and other cyber breaches. Some carriers have pulled out of the marketplace altogether and others have increased pricing to try to get to a break even point. Medicare, cloud storage and other platforms are finding placement extremely difficult or the price is extremely high.</td>
<td></td>
</tr>
<tr>
<td>LIMITS</td>
<td>Higher than $5M in limits are increasingly hard to get and towers need to be built in $5M increments. Many carriers are only doing $1M or $2M primary offers for any client with a claim. Ransomware and E-crime sublimits are also the norm and cannot be bought up in many cases.</td>
<td>Carriers are looking for insureds to retain more risk and we’ve seen higher retentions come in on renewal offers at 5 or 10 times expiring.</td>
<td>Carriers are looking for insureds to retain more risk and we’ve seen higher retentions come in on renewal offers at 5 or 10 times expiring.</td>
<td></td>
</tr>
<tr>
<td>RETENTIONS</td>
<td>Many traditional carriers have exited the marketplace or changed appetites to distance themselves from smaller operations that do not have a sophisticated tech team.</td>
<td>Markets continue to seek higher retentions from new business as well as in their renewal options. Once the adjustments have been made, retentions should remain static.</td>
<td>We will continue to see primary limits capped at $5M on major accounts and less for primary on smaller risks. Capacity will continue running low and markets will look to ask much higher on towers than their current positions.</td>
<td></td>
</tr>
<tr>
<td>COVERAGE</td>
<td>Many traditional carriers have exited the marketplace or changed appetites to distance themselves from smaller operations that do not have a sophisticated tech team.</td>
<td>Coverage will remain tight but still be negotiated as far as contract-requested wording is concerned.</td>
<td>For Tech E&amp;O, updated security, such as MFA, must be evidenced. No MFA = No coverage. Companies of all sizes must comply with the carrier requested controls. It was more difficult to negotiate language options.</td>
<td></td>
</tr>
<tr>
<td>CARRIER</td>
<td>We continue to see claims related to malware/ransomware attacks, especially targeting Tech firms.</td>
<td>We expect to lose some markets as well as gain new carriers with greater technology platforms for Tech.</td>
<td>We expect to lose some markets as well as gain new carriers with greater technology platforms for Tech.</td>
<td></td>
</tr>
<tr>
<td>CLAIMS</td>
<td>We don’t see this trend flattening and continue to watch new and evolved cyber attacks happening on a regular basis. Tech firms where such attacks shut down their operations and effect their customers operations may experience a higher rate of E&amp;O claims.</td>
<td>We don’t see this trend flattening and continue to watch new and evolved cyber attacks happening on a regular basis. Tech firms where such attacks shut down their operations and effect their customers operations may experience a higher rate of E&amp;O claims.</td>
<td>We don’t see this trend flattening and continue to watch new and evolved cyber attacks happening on a regular basis. Tech firms where such attacks shut down their operations and effect their customers operations may experience a higher rate of E&amp;O claims.</td>
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### Licensed Professionals – Accountants / Lawyers / Allied Medical

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<tbody>
<tr>
<td>PRICING</td>
<td>10% to 25%</td>
<td>We are beginning to see smaller (1-5 partner) firms get increases at renewal as carriers look to pick up some rate. 25% increase is the average. Firms with up to 20 partners will see more modest increases at about 15%. Larger (20+) members licensed Prof. E&amp;O have seen flat to low single digit rate increases. Some firms were able to achieve slight decreases when thoroughly marketed.</td>
<td>Primary limits have been capped at $5M for most lines, and will continue to be restricted with excess options reasonably attainable. Available limits unchanged for Med-Mal and Allied Med.</td>
<td></td>
</tr>
<tr>
<td>LIMITS</td>
<td>Limits offered are consistent with the insureds assets/revenues. Med-Mal will continue their mandatory limits. Other classes have seen less access to larger primary limit offerings.</td>
<td>Primary limits have been capped at $5M for most lines, and will continue to be restricted with excess options reasonably attainable. Available limits unchanged for Med-Mal and Allied Med.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RETENTIONS</td>
<td>Carriers continue to increase retention levels for certain risks. Law firms seeing $10K average retentions as business consultants raised from $5K to $10K and $15K+.</td>
<td>Carriers continue to increase retention levels for certain risks. Law firms seeing $10K average retentions as business consultants raised from $5K to $10K and $15K+.</td>
<td>Carriers continue to increase retention levels for certain risks. Law firms seeing $10K average retentions as business consultants raised from $5K to $10K and $15K+.</td>
<td></td>
</tr>
<tr>
<td>COVERAGE</td>
<td>Coverage terms have remained steady with a soft push back on defense outside the limits options.</td>
<td>Coverage terms have remained steady with a soft push back on defense outside the limits options.</td>
<td>Coverage terms have remained steady with a soft push back on defense outside the limits options.</td>
<td></td>
</tr>
<tr>
<td>CARRIER</td>
<td>We have seen changes in appetite for Med-Mal Professional marketplace but the carriers remain in play. The other classes have not seen much activity.</td>
<td>We expect to see defense costs options decrease in availability and policies for larger firms will get tougher on subsidiary and acquisition activity. We saw lots of M&amp;A activity and carriers are not wanting to wait until the renewal to pick up premium for additional operations.</td>
<td>We expect to see defense costs options decrease in availability and policies for larger firms will get tougher on subsidiary and acquisition activity. We saw lots of M&amp;A activity and carriers are not wanting to wait until the renewal to pick up premium for additional operations.</td>
<td></td>
</tr>
<tr>
<td>CLAIMS</td>
<td>Claims activity is on a slight rise as professionals continue to work remotely and navigate the back to office scheduling. Telemedicine claims are on the rise as well as misinterpretation of diagnosis and prognosis; exam are given/taken.</td>
<td>Claims are expected to rise in severity for mismanagement of clients cases and for CPA’s dealing with PPP loan repayment penalties and filings for their clients.</td>
<td>Claims are expected to rise in severity for mismanagement of clients cases and for CPA’s dealing with PPP loan repayment penalties and filings for their clients.</td>
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<tr>
<td><strong>PRICING</strong></td>
<td>$</td>
<td>1% to 25%</td>
<td></td>
<td>We expect to continue to see slight increases in premium until technology allows the MPL space to automate the underwriting and reduce costs.</td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td>R</td>
<td>Limits offered are consistent with the insureds assets/revenues. Outsized limit offerings typically needed a 3rd party contract request to be considered.</td>
<td>We will continue starting to see primary limits capped at $5M for many lines, with excess options reasonably attainable.</td>
<td></td>
</tr>
<tr>
<td><strong>RETENTIONS</strong></td>
<td>S</td>
<td>Small businesses have maintained lower retentions and as you move up the revenue scale we see more requests from carriers to raise the retentions.</td>
<td>Markets continue to seek higher retentions from new business as well as in their renewal options. Once the adjustments have been made, retentions should remain static.</td>
<td></td>
</tr>
<tr>
<td><strong>COVERAGE</strong></td>
<td>C</td>
<td>Coverage remained strong as there is a lot of competition in this space at the moment.</td>
<td>Coverage will continue to be solid and competitive. More favorable language will be easier to win on the MPL forms.</td>
<td></td>
</tr>
<tr>
<td><strong>CARRIER</strong></td>
<td></td>
<td>We have seen more availability in the market as carriers seek to write more MPL for its profitability.</td>
<td>We expect more opportunity in this space with more entries into the market.</td>
<td></td>
</tr>
<tr>
<td><strong>CLAIMS</strong></td>
<td></td>
<td>Claims activity remained stable and we only saw a slight uptick with M&amp;A consultants.</td>
<td>We should see more claims coming in from COVID-19 consultants as well as return to office safety consultants.</td>
<td></td>
</tr>
</tbody>
</table>

### Metals

**Pricing**

Start-up businesses rated higher than in recent years. Certain classes of MPL are seeing moderate pricing increases, but may see slight decreases if marketed at renewal.

**Limits**

Limits offered are consistent with the insureds assets/revenues. Outsized limit offerings typically needed a 3rd party contract request to be considered.

**Retentions**

Small businesses have maintained lower retentions and as you move up the revenue scale we see more requests from carriers to raise the retentions.

**Coverage**

Coverage remained strong as there is a lot of competition in this space at the moment.

**Carrier**

We have seen more availability in the market as carriers seek to write more MPL for its profitability.

**Claims**

Claims activity remained stable and we only saw a slight uptick with M&A consultants.

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### Merger and Acquisition Risk Solutions

**R&W Insurance**

Following a brief disruption in 2020 due to COVID-19, the M&A market showed strong recovery through year-end. Deal activity has continued at elevated levels through 2021, which year-to-date is on pace to meet or surpass record highs.

Representations and warranties (R&W) insurers have made strides to add capacity and underwriting staff to address increased demand for R&W policies. However, the insurance market is still struggling to keep pace with R&W insurance submission volume. The imbalance in demand and capacity has led to a significant hardening of the R&W insurance market.

The most obvious impact on policy terms has been a significant increase in premium pricing over the last 12 months. Many insurers are reporting 50% or higher increases as compared to just a year ago. It has also become more difficult to insure smaller transactions and acquisitions of target companies in highly-regulated industries, such as financial services and healthcare. We expect current trends to continue over the coming months.
R&W Insurance

Q3 2021 TOT \% CHANGE

Despite an abundance of capacity, an extremely active M&A environment and significant R&W submission volumes have led to the first hardening of the R&W insurance market since the product’s inception. Pricing for a customary policy has increased another 10% to 15% since Q2, continuing a trend that began in Q4 of 2020.

12 MONTH FORECAST

Pricing over the next 12 months will depend on the state of the broader M&A market. If deal volume continues at current levels or increases through Q4 2021, which we believe is likely, we expect pricing to increase further.

COVERAGE

There has been no meaningful change to the limits being offered by insurers. Most primary R&W insurers are able to offer a $10M limit (or larger) policy for any particular transaction.

12 MONTH FORECAST

We do not have reason to believe that carrier limit profiles will change.

LIMITS

Initial retentions on R&W policies have remained stable at 1% of transaction enterprise value for most transactions. Lower initial retentions continue to be available in larger transactions and in certain circumstances. Some insurers have increased their minimum retention thresholds for smaller transactions.

12 MONTH FORECAST

We do not have reason to believe that policy retentions will change materially. Policy retentions have remained stable on R&W insurance in recent years.

RETIJENTS

As a general matter, breadth of coverage has been stable in comparison to Q3 2020. For target companies in highly-regulated industries (including healthcare), some insurers have been more selective to quote opportunities and have been more rigid in requiring deal-specific exclusions or other limitations in their quotes.

12 MONTH FORECAST

We do not have reason to believe that policy coverage will change materially over the next 12 months, though we note that many insurers are paying greater attention to potential cyber exposure and may be more likely to impose cyber exclusions or other coverage limitations.

COVERAGE

Over the past year, several new insurers began writing R&W insurance, bringing the total number of insurers to 24.

12 MONTH FORECAST

We are not presently aware of insurers planning to enter or leave the R&W insurance market. Insurers favorable pricing and current market capacity constraints, however, could attract additional insurers to the market over the next year.

CARRIER

Over the past several years, R&W insurance claim severity has increased steadily. With respect to claim frequency, however, we have not observed a clear trend. Some market reports suggest a slight increase in claim frequency, while others report that frequency has not changed materially.

12 MONTH FORECAST

We do not have reason to believe that claims volume or severity with change significantly over the next 12 months.

CLAIMS

Real Estate

Auto Liability Conditions, General Liability, Workers’ Compensation, Umbrella Liability, Property

Casualty

The overall primary general liability market continues to suffer from a lack of robust competition for new and renewal business, with hospitality and habitational risks bearing the brunt. The continued lackluster response from the market except for the most favorable of risk profiles (newer construction, good loss history, superior management practices) has left many, if not most, insureds with few choices other than incumbent insurers. Non-renewals by admitted markets often force insureds into the non-admitted marketplace with little leverage over price and terms/conditions. Larger accounts (particularly with significant workers’ compensation premiums to add ballast), commercial real estate (retail, office and industrial/warehouse) have fared better.

The hospitality space continues to be primarily impacted in the insurer world by COVID-19-related concerns. While widespread vaccinations and the resulting increase in business/leisure travel have alleviated some financial pressures for insureds, full recovery continues to be tempered by the resurgence of the Delta strain and resultant pullback. Insureds continue to avail themselves of alternative uses of facilities (particularly in large urban centers), which continue to present consistent and very positive cash-flow opportunities. While still a little early for confident predictions, anecdotally it seems that alternative uses of facilities and potential guest claims have not materialized into significant sources of new claims — but insurers are likely still at least 12 months away from openly welcoming hospitality business in general.

The habitational market also continues to suffer significantly as markets struggle to correct profitability due to severe losses sustained over the past decades with insufficient premium. This has driven many markets to withdraw entirely and those remaining to offer limited capacity. Nearly all admitted markets have severely curtailed their appetite for new risks, considering only above-average risks in terms of age, construction, fire/life safety protection and favorable geographies. Incumbent insurers are willing to remain on risk if the account has performed well, but if non-renewed, the options become extremely limited with a marked percentage of insureds finding coverage only in the non-admitted market.

The umbrella/excess liability market continues to be unsettled. Factors contributing to the volatility in the umbrella/excess liability over the past two years (social inflation; claims severity/frequency; trends around wrongful eviction, assault/battery, sexual abuse/ molestation and human trafficking) are still driving contraction in terms of capacity offered, non-renewals, and often significant premium increases. While habitational and hospitality risks are disproportionately adversely impacted, other real estate occupancies have experienced increased and competitive engagement albeit with increased underwriting and short limits, signaling the slightest sense of improvement to come. Each insured continues to be impacted both globally by the wider market trends yet with specificity around its own risk profile, making confident trend prediction at this time difficult.

The workers’ compensation market continues to be largely competitive, with ample capacity and generally favorable pricing — single digit increases/decreases for insureds with positive loss experience. Outside of poor loss experience, there are not significant market trends that are adversely impacting pricing for this line of coverage.

Automobile liability rates have been correcting for some time now, with the most significant increases passed on to businesses involved with transporting goods and/or heavy auto exposure beyond private passenger vehicles. Real estate insureds generally do not have large, owned auto exposure, and if so, most fleets tend to be private passenger vehicles and/or light trucks used locally for general maintenance. While rates continue to increase and auto risks to be carefully underwritten, this line of business is not normally a driver for the real estate sector.

Overall, Q3 renewal results were mixed. Some accounts experienced relative stability, but most continued to suffer at
least some degree of disruption. Insurer predictions 90 days in advance of expiration have often been unsupported once renewal underwriting commences, and it’s still common to face significant restructuring of excess liability towers. While a developing positive trend seems possible in 2022, it seems more likely that the first six months will continue to pose a struggle for all but the best-performing insureds.

Property
The property market continued to be demanding throughout Q3, further stressed from substantial industry losses from various tropical storms and hurricanes along with other significant loss events, particularly wildfires in the West and flooding in the Northeast. The true impact of these losses on the industry, specifically those related to extended business interruption claims, may be immediate for those insureds renewing during Q4, 2021, but may continue into 2022, depending on loss tails. However, despite these pressures, pricing and contract change volatility continued to temper in certain industry classes over others; the outliers to this trend being Florida and Texas residential in particular.

Residential
Residential exposed accounts outside of Florida and Texas continued to stabilize during Q3; market capitalization remains healthy and more stable than in previous quarters, giving insureds’ more control over their program selection of carrier participants. However, consistent concerns linger around low valuations and continue to trouble underwriters that are trying to find a balance between acceptability relative to increased product/labor costs vs. penalizing the insured with coverage restrictions. Business interruption values also continue to be unpredictable given many businesses are still trying to recover financially from local, state and/or federally mandated COVID-19 shut-downs. As well, the structures of programs placed in this region has shifted to more shared/layered very much dominated by excess and surplus lines carriers.

Commercial
Commercial real estate remains a highly desirable class of business targeted by underwriters. The general appeal to underwrite this soft occupancy is low loss ratios and medium/high profit margins. As such, this market segment continued to rebound with more stable capacity and predictable pricing and renewal terms than what other market segments are experiencing.

Throughout the first three quarters of 2021, the property industry has seen significant loss activity from weather-related events from a variety of perils but remains well capitalized heading into the last quarter of 2021. Niche market segments like those aforementioned in this article along with hospitality (in general) continue to remain difficult with capacity constrictions, coverage restrictions and pricing concessions making placements more turbulent. Conversely, more desirable industry classes are seemingly rebonding and recovering more quickly and we view these trends to continue into Q4, 2021 and the near future.

Hospitality
This market segment remains heavily distressed with insureds continuing to face steep challenges with capacity, pricing and coverage restrictions, including almost entire market exclusivity of supporting special peril coverage from covering business interruption loss irrespective of a (non) physical loss trigger. The COVID-19 pandemic has arguably hit this class of business the hardest with prolonged low occupancy rates continuing to hinder market recovery coupled with high attritional loss activity, limited capacity options keeping rates inflated and concerns with underwriter comfortability to insure restaurant exposure.

Similarly, the Texas residential market, still reeling from the effects of Storm Uri along with hailstorm losses, remains extremely challenged with reduced capacity and adverse appetite from carriers willing to write new business. To help-manage exposure accumulation issues (aided from non-renewing or drastically reducing capacity at renewal while hiking rates), underwriters are continuing to shift standardized convective windstorm deductibles to those that are typically seen for named windstorm – a single, mid-range digit percentage subject to a high monetary minimum. As well, the effects of programs placed in this region has shifted to more shared/layered highly distressed with coupled with high attritional loss activity, limited capacity options keeping rates inflated and concerns with underwriter comfortability to insure restaurant exposure.

The auto liability market has continued the hard cycle for the last 5 – 6 years for difficult risks. RE clients’ owned auto exposure tends to be limited to private passenger vehicles and light trucks used for local maintenance purposes. The exception is hospitality, where shuttle vans used for guest transport are often present. Rates have steadily increased for years and are now relatively stabilized for favorable accounts at under 20%.

The property market continued to be demanding throughout Q3, further stressed from substantial industry losses from various tropical storms and hurricanes along with other significant loss events, particularly wildfires in the West and flooding in the Northeast. The true impact of these losses on the industry, specifically those related to extended business interruption claims, may be immediate for those insureds renewing during Q4, 2021, but may continue into 2022, depending on loss tails. However, despite these pressures, pricing and contract change volatility continued to temper in certain industry classes over others; the outliers to this trend being Florida and Texas residential in particular.

Auto Liability Conditions

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<tbody>
<tr>
<td>PRICING</td>
<td>Good</td>
<td>Steady rise</td>
<td>Rate increases are anticipated to continue, although only to a mild to moderate degree in the next 12 months. Hired and non-owned auto exposure also continues to be specifically underwritten and rated, although premiums are not generally significant.</td>
</tr>
<tr>
<td>LIMITS</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
</tr>
<tr>
<td>COVERAGE</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
</tr>
<tr>
<td>CARRIER</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
</tr>
<tr>
<td>CLAIMS</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
</tr>
</tbody>
</table>

###テーブルの説明

#### PRICING

- **Standard limit offering of S1M/2M/2M has not changed.** However, more umbrella markets are requesting attachment point of S2M/S4M/S4M which some insurers are not able to provide, which may necessitate the placement of a buffer layer for umbrella/excess liability placement.

#### LIMITS

- Retentions for automobile liability are not common for the light fleet exposure presented by real estate clients. If an insured suffered significant liability losses, a small retention could be considered based on individual risk characteristics. Some insurers have sharply increased physical damage deductibles as the cost of repair/replace automobiles continues to steady rise.

#### RETENTIONS

- Available of reasonably broad automobile liability and physical damage coverages are anticipated to continue over the next 12 months.

#### COVERAGE

- Automobile liability is usually quoted without issue by the insurer writing the other casualty lines. If monoline automobile coverage is needed or for clients with adverse loss experience or other risk peculiarities, the market is severely limited, mainly to insurers access in the non-admitted market.

- Nonlinear auto markets will continue to be scarce due to the lack of additional casualty premium needed to balance the potential for severe losses.

- Trend of requiring $2M/$4M/$4M attachment points from the umbrella market is expected to continue and increase in the reinsurance, although still far from becoming the new norm.

#### CARRIER

- Automobile liability claims continue to present very significant exposure to insurers. Severe claims can result from a single occurrence, both from owned and non-owned auto exposure.

#### CLAIMS

- No widespread change expected in next 12 months.

- Exceptionally positive underwriting conditions continue for favorable accounts at under 20%.
### General Liability

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<tr>
<td><strong>PRICING</strong></td>
<td>$0% to 30%</td>
<td>Insureds generally are still experiencing at least some level of rate increases, although, there have been a few pockets of relatively flat renewals and/or reduced rates where competition could be successfully introduced (generally on non-habitational risks). Well-performing and favorable classes of RE clients may obtain flat to 10% increases — power performing insureds can expect 30%+ increases.</td>
<td>$0% to 30%</td>
<td>As more markets exit the habitual and lower-end hospitality space, they are becoming hungrier for the remaining favorable real estate portfolios. We anticipate more competition in some sectors, which should lower the level of the rate increases and, in some cases, provide potential reductions, dependent on account performance.</td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td></td>
<td>Standard limit offering of $1M/$2M/$2M has net changed. However, more umbrella markets are requesting attachment point of $2M/$4M/$4M, which eliminates some otherwise competitive GL markets or necessitates the placement of a buffer layer. Reduction in overall limits offered via renewal or reduction of aggregate limits per location and/or policy cap for same. Quoting separate limits for sexual abuse/ molestation (as opposed to remaining silent) is being utilized by some markets to curtail risk to this exposure.</td>
<td></td>
<td>Trend of requiring $2M/$4M/$4M attachment points from the umbrella market is expected to continue and increase into the next year, although still far from becoming the new norm. Limiting overall capacity deployed via expansive aggregate limits is also expected to continue. Curtailing exposure to sexual abuse/molestation by affirmatively quoting specified limits may be a tool that more insurers will utilize going forward.</td>
</tr>
<tr>
<td><strong>RETENTIONS</strong></td>
<td></td>
<td>Retentions generally continue to follow the risk appetite of a particular account aligning with loss history. However, there are higher retentions being deployed regardless for some classes of business, such as habitual or alternative use in hospitality.</td>
<td></td>
<td>As insurers continue to struggle with re-establishing healthy profitability margins, pressure against accepting first dollar exposure for riskier profiles is expected to continue for the next 12 months.</td>
</tr>
<tr>
<td><strong>COVERAGE</strong></td>
<td></td>
<td>We are seeing reductions in coverage induced by more liberal use of adverse exclusions (communicable disease; abuse/molestation; assault/battery; New York Labor Law; human trafficking, etc.) particularly for habitational and hospitality risks. These exclusions can be successfully negotiated away in some instances, but only in competitive situations.</td>
<td></td>
<td>Reducing coverage via exclusions, driven primarily by class of business or specific loss profiles, is expected to be a continuing trend.</td>
</tr>
<tr>
<td><strong>CARRIER</strong></td>
<td></td>
<td>Insurers have steadily been withdrawing from the habitational risk market, leaving fewer and fewer admitted carrier solutions. COVID-19 concerns have left many insurers with a moratorium on hospitality business. What insurers remain for these classes are increasingly particular about new business risks, which is extending to other classes of RE as well. The desire for only the &quot;best of the best&quot; in various classes is forcing continued heavy use of the non-admitted marketplace.</td>
<td></td>
<td>While there have been some new insurer capacity entering the market (e.g., RGX for habitationals risks), overall, the trend is likely still to be more challenging than not. There may be some increase of market participation in the hospitality class as COVID-19 vaccinations increase and with the decrease of alternative use by hard-hit smaller hospitality risks. Insureds that desire to continue and increase into the next year, although still far from becoming the new norm. Limiting overall capacity deployed via expansive aggregate limits is also expected to continue. Curtailing exposure to sexual abuse/molestation by affirmatively quoting specified limits may be a tool that more insurers will utilize going forward.</td>
</tr>
<tr>
<td><strong>CLAIMS</strong></td>
<td></td>
<td>General liability claims and insurer combined ratios are continuing to be driven by adverse litigation trends exacerbated by long-term inadequate pricing. Claims arising from new and unknown COVID-19 related losses are of concern for hospitality risks.</td>
<td></td>
<td>While there are some signs that insurers are beginning to get a handle on profitability, via a combination of shedding poor performing business and healthy rate increases over the past 2 – 3 years, a return to widespread market softening is still likely 12 months away.</td>
</tr>
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### Workers’ Compensation

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</thead>
<tbody>
<tr>
<td><strong>PRICING</strong></td>
<td></td>
<td>The workers’ compensation market has remained stable over the past few years, subject to state of operation, industry and loss experience.</td>
<td></td>
<td>Trend is anticipated to continue through the next 12 months.</td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td></td>
<td>Workers’ compensation limits are statutory, so not defined by the broker or insurer. The standard limit of $1,000,000 for the Employer’s liability component of coverage has remained available without issue.</td>
<td></td>
<td>No changes foreseen.</td>
</tr>
<tr>
<td><strong>RETENTIONS</strong></td>
<td></td>
<td>Guaranteed cost workers’ compensation policies are common in the real estate sector and widely accessible. Larger and more sophisticated clients interested in controlling claims costs and possessing the wherewithal and appetite to take on risk continue to pursue large retention programs. “Hybrid” or structured programs (Sompo, Strategic Camp) are also attractive options that provide certainty in ultimate cost while providing potential for return premium during well-performing years.</td>
<td></td>
<td>No changes foreseen.</td>
</tr>
<tr>
<td><strong>COVERAGE</strong></td>
<td></td>
<td>Workers’ compensation coverages are standard regardless of insurer; with few broadening endorsements, e.g., blanket waiver of subrogation and voluntary compensation. Coverages for workplace related injuries and loss of income are set by state statute and exclusions are common across the marketplace. There have been no significant coverage changes or trends developing over the last 12 months.</td>
<td></td>
<td>No changes foreseen.</td>
</tr>
<tr>
<td><strong>CARRIER</strong></td>
<td></td>
<td>There is robust insurer participation in this line of coverage. Many insurers look to lead with sizable WC exposures/premiums in the real estate sector, to bolster the often more challenging general liability performance.</td>
<td></td>
<td>Workers’ compensation has remained a largely profitable line of business and we anticipate continued strong insurer support.</td>
</tr>
<tr>
<td><strong>CLAIMS</strong></td>
<td></td>
<td>The impact of COVID-19 related worker’s compensation claims is limited in the real estate sector given that these employees are not in the “front line” category of employment. Industry-wide, however, COVID-19 related claims were off-set by reduced non-COVID-19 incurred losses due to shutdowns due to the pandemic. This resulted in net favorable insurer loss ratios.</td>
<td></td>
<td>Given the extraordinary nature of the pandemic, the full impact of the changes in workplace will continue to unfold throughout the next year. Lingering questions around working remotely and safe return to work will continue, creating potential for increased claims activity.</td>
</tr>
</tbody>
</table>
Umbrella Liability

This line has experienced volatile premium increases over the last 15 –21 months as insurers are correcting historical underpricing against severe increase in claims payout. Commercial risks (retail, office and light industrial) are experiencing the lowest increases. Residential and hospitality risks carry the largest industry rate increases due to poorer performance in claims and COVID-19 concerns. Rating emphasis is on capacity. While exposure certainly directly pricing, carriers are underwriting to limit and attachment point more than seen in previous years. Risk purchasing groups are making significant adjustments in premiums at time of master program renewals.

Last quarter’s projection remains unchanged; premium increases show no sign of leveling out in the next 12 months. However, as renewal towers are restructured to meet market restrictions, we expect go forward increases to become less severe.

We expect current trends to continue for the next 12 months.

Coverage restrictions will persist and become more common throughout the year. Formal safety and risk management plans around assault and human trafficking will be key in negotiating exclusion removal. Account specific claims including violence and bodily injury will drive introduction of new exclusions.

We expect current trends to continue for the next 12 months.

Two major claim trends contributing to current market pressures:

1. Social inflation has led to rising claim payouts, loss ratios, and insurance costs.
2. Significant increase in claim severity, settlement awards, and verdicts.

Property

While we expect pricing to be more stable heading into Q4 for many insurers despite recent large loss events, we do anticipate recent lose events such as Hurricane Ida and California wildfires to materially impact localized pricing pressure for upcoming renewals with exposure in loss affected states (FL, LA, MS, TX, CA).

Many carriers operating in states such as Florida and Texas are (significantly) reducing loss limits, resulting in single carrier programs now being restructured into shared and layered placements. Carrier’s continue to tighten terms, conditions and coverage sub-limits, particularly around flood (introducing new moderate flood sub-limits).

While many insurers have seen corrections to various coverages mandated by carriers through previous renewal cycles (cyber, communicable disease etc.), the purchasing decisions of some insureds are still being impacted by COVID-19 ranging from lower business interruption sub-limits and/or higher replacement cost valuation driven by labor shortages/higher supply costs. More carriers are introducing new moderate flood sub-limits with higher deductibles.

This trend is expected to continue, particularly as accounts burdened with heavy water damage related loss activity and/or exposure in states deemed “high-risk” from convective storm activity.

While the market continues to be well capitalized, many carriers operating in states such as Florida and Texas have either exited completely or significantly reduced their afforded line size to limit their risk exposure in loss affected states.

We expect over-subscription and more carrier participation selection for insureds heading into Q4 2021 and beyond for most property types. However, it’s anticipated that certain challenging classes of business such as hospitality and residential along with accounts with predominately exposure in certain high risk states will continue to test carrier resolve.

While the market continues to be well capitalized, many carriers operating in states such as Florida and Texas have either exited completely or significantly reduced their afforded line size to limit their risk accumulation in these areas. London and Bermuda continue to be viable capacity options outside of domestic retail and/or S&L solutions.

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At the end of 2021, the Financial Institutions Group (FIG) will be publishing a year-end review highlighting yearly pricing, carrier/capacity and legal trends in the global insurance markets: US, Bermuda and London. The report will cover the trends for subclasses: banks, investment management firms and insurance company clients – analyzing data from our portfolio of 550+ financial institution client renewals throughout the year.

**Banks**
- FIG’s bank clients range from community banks, bank holding companies, national money centers and investment banks.
  - Pricing stats will include the full suite of financial lines: directors and officers, bankers professional, employment practices, fiduciary, crime and cyber liability, in addition to the general property and casualty lines, and the loan portfolio products such as mortgage impairment and hazard (auto, flood, liability).
  - Carrier/capacity stats will be specific to the carriers actively underwriting banks – their deployment of limits, structure appetite and retention/deductibles.
  - Legal stats will range from case law impacting the market to specific claim trends seen in NFP’s banking portfolio.

**Investment Management**
- FIG’s investment management clients range from registered investment advisors, hedge/alternative investment funds, mutual funds and private equity firms.
  - Pricing stats will include general partnership liability and fund specific directors and officers/ errors and omissions, cybercrime, and general property and casualty.
  - Carrier/capacity stats will be specific to the carriers actively underwriting investment management firms – their deployment of limits, structure appetite and retention/ deductibles.
  - Legal stats will range from case law impacting the market to specific claim trends seen in NFP’s investment management portfolio.

**Insurance Company**
- FIG’s insurance company clients range from regional and mutual insurance companies to multinational global insurance and reinsurance companies, insur-tech companies and managing general agencies.
  - Pricing stats will include the full suite of financial lines: directors and officers, insurance company professional liability, employment practices, fiduciary, crime, cyber liability; and general property and casualty lines.
  - Carrier/capacity stats will be specific to the carriers actively underwriting insurance company related clients – their deployment of limits, structure appetite and retention/ deductibles.
  - Legal stats will range from case law impacting the market to specific claim trends seen in NFP’s insurance company portfolio.

Early review of our data during the first half of 2021 shows, while the hard market continues to prevail, rate increases in premiums for financial institutions are narrowing for most property and casualty lines. Financial lines continue to be the most volatile, with cyber being the most difficult line to place with the highest yearly increases. Through the first half, we now have clear evidence of the new carrier entrants over the past two renewal cycles directly impacting these pricing trends. Additionally, COVID-19 liabilities, return to work issues, ESG, D&I, ransomware, cyberattacks and event-driven litigation continually make the overall global insurance market challenging for financial institutions.

Following FIG’s year-end review of 2021, our team will update our financial institution clients and prospects quarterly in 2022.
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