QUARTERLY CLAIMS JOURNAL AND TREND REPORT
Quarterly Claims Journal

Financial Services and Management Liability

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Meta's Facebook to Pay $90 Million to Settle Lawsuit Ending Decade-Long Tracking Litigation Suit
Jane Peddicord et al. v. Facebook, Inc.
The suit, filed in 2012, contained allegations of violating federal and state privacy and wiretapping laws by using plug-ins to store cookies that tracked when they visited outside websites containing Facebook “like” buttons. Facebook was then alleged to have compiled users’ browsing histories into profiles that it sold to advertisers. The social media giant had permission to track users while they were logged in but promised to stop when logged out of the social media platform. Such conduct was said to be in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as amended by the Electronic Communication Privacy Act of 1986.

The lawsuit was dismissed in 2017 by a federal judge who said the plaintiffs failed to show they had reasonable expectation of privacy or that the suffered economic harm. This ruling was appealed, and in 2020, a federal appeals court resurrected the case, saying economic harm existed. Facebook’s subsequent effort to persuade the US Supreme Court to take up the case was unsuccessful.

Facebook parent company Meta has agreed in principle to pay $90 million to settle this decade long class action lawsuit, pending court approval. If approved, it would be one of the 10 biggest data-privacy class-action settlements. The social media platform has denied any wrongdoing but settled to avoid the risk and costs of a trial.

Data Breach Leads to Class Settlement
Cochran et al. v. The Kroger Co. et al.
A data breach at a grocery and pharmacy chain in December 2020 occurred when Kroger Co’s third-party vendor Accellion, a file-transfer service, was breached.

The data breach exposed personally identifiable information on current and former employees, pharmacy customers and money services customers. The plaintiffs in the class action suit alleged that Kroger was aware and had full knowledge that Accellion’s data security was lax and a move to a more secure transfer platform should have been completed. Therefore, Kroger did not adequately protect the personal information collected.

Kroger has not admitted to any wrongdoing but has agreed to settle. Under the settlement, Kroger has agreed to establish a $5 million Settlement Fund to pay for two years of credit monitoring services and identity theft insurance or provide cash payments of up to $5,000 per class member for reimbursement of certain documented losses or provide cash payments to class members.

The Settlement Fund will also be used to pay for the costs of the settlement administration, court-approved attorneys’ fees and expenses and Service Awards for named plaintiffs. In addition, Kroger has agreed to undertake certain remedial measures and enhanced security measures that it will continue to implement. The Motion for Final Approval of the settlement is scheduled for March 24, 2022.

BiPA Claims Not Preempted by the Illinois Workers’ Compensation Act
Marquita McDonald v. Symphony Bronzeville Park, LLC, et al.
In a decision issued on February 3, 2022, the Illinois Supreme Court held that statutory violations of the Illinois Biometric Privacy Act (Privacy Act) are not preempted by the Illinois Workers’ Compensation Act (Compensation Act). The issue before the court on interlocutory appeal was whether the exclusivity provisions of the Compensation Act bar a claim for statutory damages under the Privacy Act where an employer is alleged to have violated an employee’s statutory privacy rights under the act.

Plaintiff Marquita McDonald was employed by defendant Bronzeville from December 2016 to February 2017. During the course of her employment, Bronzeville utilized a biometric time-keeping system, which required McDonald to scan her fingerprint as a means to track her time. She alleged, however, that she was never provided with, nor did she sign, a release consenting to the storage of her biometric information, and was never informed of the purposes or length of time for which her biometric information would be stored. In her putative class action, McDonald alleged that by negligently collecting, storing and using employees’ biometric identifiers and biometric information, Bronzeville violated employees’ rights to privacy as set forth in the Privacy Act. In its motion to dismiss, Bronzeville argued that the claims were barred by the Compensation Act, which is the exclusive remedy for accidental injuries occurring in the workplace, and that an employee does not have a common law or statutory right to recover civil damages from an employer for injuries that occurred in the course of her employment.

In a decision issued on February 3, 2022, the Illinois Supreme Court held that the exclusivity provisions of the Compensation Act bar a claim for statutory damages under the Privacy Act for interlocutory appeal.

The Illinois Supreme Court found in favor of the plaintiff, holding that the Compensation Act does not preempt statutory violations of the Privacy Act. The court construed the plain language of both acts, noting that when construing a statute, it must ascertain and give effect to the intent of the legislature. The court recognized that “[t]he most reliable indicator of legislative intent is the plain and ordinary meaning of the statutory language.” In so doing, the Supreme Court outlined at length the relative provisions of the Privacy Act, and cited one of the seminal BiPA decisions, the Rosembach v. Six Flags Entertainment Corp., determining that the provisions of the Privacy Act are enforceable through private rights of action, and specifically, that “section 20 of the Privacy Act provides that ‘[a]ny aggrieved person by a violation of this Act shall have a right of action in a [s]tate circuit court or as a supplemental claim in federal district court against an offending party.” Additionally, “[t]he arguments that the Privacy Act is non-preemptive rest with the [Privacy Act], no other enforcement mechanism is available.” The court then distinguished the language of the Compensation Act, determining that it provides the exclusive means by which an employee can recover against an employer for a work-related injury.

The Supreme Court then contrasted the types of injury sustained under both acts, clarifying the parameters of the Compensation Act:

Whether the exclusivity provision bars an employee’s civil claims depends upon the nature of the injury because the exclusivity provisions (of the Compensation Act), by their express language, only apply if the injury is one that is covered by the ... Act ... The Compensation Act’s main purpose is to provide financial protection for injured workers until they can return to the workplace, (setting forth a) compensation schedule corresponding to death, to injuries to specific body parts, and to inability to work ... These are injuries that affect an employee’s capacity to perform employment-related duties, which is the type of injury for which the workers’ compensation scheme was created.

The Supreme Court stated that the test for whether an employee suffers a compensable injury under the Compensation Act is “whether there was a harmful change in the human organism.” This was found not to apply in the McDonald case.

The personal and societal injuries caused by violating the Privacy Act's prophylactic requirements are different in nature and scope from the physical and psychological work injuries that are compensable under the Compensation Act. The Privacy Act involves prophylactic measures to prevent compromise of an individual’s biometrics.

Cyber/Privacy

Case No. 12-md-02314 (N.D. Cal Feb. 14, 2022)
Case No. 21-cv-01887 (N.D. Cal)
BIPA Continues to Present Significant Risk

Figueroa et al. v. Kronos Inc.

Kronos Inc., which manufactures biometric timekeeping devices, agreed to pay $15.3 million to settle a putative class action lawsuit alleging they violated Illinois Biometric Information Privacy Act. Charlene Figueroa and Jermaine Burton accused Kronos of improperly collecting and storing the fingerprints or palm prints of workers at companies that use Kronos' biometric timekeeping devices.

A significant aspect of the settlement with Kronos is that it will not affect the class members' current or future claims against their employers who used fingerprint time clocks. The anticipated $290 – $580 recovery for each member of a class that numbers over 170,000 will encourage those individuals to seek additional recoveries against their employers. As such, employers who have not notified and/or receive written permission from their employees to collect and store their information may be in violation of BIPA and a target for litigation.

Illinois is not the only state with codified protections for biometric information privacy. Kentucky and Maryland have also passed legislation intended to protect an individual's biometric information privacy. Kentucky and Maryland have also passed legislation intended to protect an individual's biometric information privacy. Recognizing the significant risk at hand, insurers have limited or attempted to outright exclude coverage for BIPA-related claims. Employers who implement such biometric technology should be mindful of the required notices and disclosures under this type of legislation.

Second Circuit Establishes Test for “Joint Employer” Liability in Federal Employment Discrimination Claims

Felder v. United States Tennis Association

While the Second Circuit has previously noted that the “joint employer doctrine” is applicable in the context of Title VII, it had not yet fully analyzed or described a test for what constitutes joint employment in the context of Title VII. On appeal from the United States District Court, in a decision rendered on March 7, 2022, the United States Court of Appeals for the Second Circuit held that a joint employer relationship exists under Title VII when two or more entities, according to common law principles, share significant control of the same employee. Additionally, while most of the joint-employment factors presume an existing relationship between two parties, the court found that where the relationship has not yet commenced in any meaningful way, the analysis should be the same. The crux of the relevant factors is “the element of control.”

Defendant-appellee, the United States Tennis Association (USTA), contracts with security firms that employ and assign guards to work at USTA events. In 2016, AJ Squared Security hired pro se plaintiff-appellant Sean Felder as a security guard and assigned him to work at the 2016 US Open. However, when Felder attempted to pick up his security credentials, the USTA refused to issue his credentials, thereby preventing him from working at the US Open. Felder thereafter sued the USTA alleging race discrimination and retaliation under Title VII and 42 U.S.C. § 1981, alleging that it denied his credentials in retaliation for the lawsuit he filed against his former employer, and because he represented that he could plausibly allege that the parties intended to enter into a joint-employer relationship, a plaintiff must allege that the entity would have exercised significant control over the terms and conditions of his employment by, for example, training, supervising, and issuing his paychecks. The Court found that because Felder’s complaint was devoid of any such allegation, his Title VII claim must fail.

However, the Second Circuit vacated the District Court’s dismissal of Felder’s Title VII retaliation claim finding that Felder had plausibly alleged that the USTA denied his credentials in retaliation for the lawsuit he filed against his former employer, and because he represented that he could plausibly allege that the parties intended to enter into a joint-employer relationship. To that end, the Second Circuit remanded that issue to the District Court with instructions that Felder be permitted to amend his complaint as to that claim.

The Second Circuit first looked to the meaning of the terms “employee” and “employer” in Title VII, but found them to be unhelpful in deciding whether an employment relationship exists because they are circular. The Court found that “in determining Congress’ intended meaning of the terms ‘employer’ and ‘employee’ in statutes mirroring the circular definitions provided in Title VII, the Supreme Court has ‘relied on the general common law of agency.’” Accordingly, the Second Circuit held that the common law of agency governs the meaning of “employer” and “employee” in Title VII. To that end, the court applied a

Felder appealed the dismissal of his amended complaint, arguing that he adequately alleged that the USTA was his joint employer, and therefore subject to Title VII’s prohibitions on discrimination and retaliation. The Second Circuit affirmed the lower court’s dismissal of Felder’s Title VII discrimination claim finding that an entity can only be liable under Title VII as a joint employer for rejecting the temporary assignment of a contractor’s employee if the entity would have been the employee’s joint employer had it accepted his assignment.

The Second Circuit found that:

To plausibly allege that the parties intended to enter into a joint-employer relationship, a plaintiff must allege that the entity would have exercised significant control over the terms and conditions of his employment by, for example, training, supervising, and issuing his paychecks. The Court found that because Felder’s complaint was devoid of any such allegation, his Title VII claim must fail.

The Supreme Court affirmed the circuit court’s reasoning that McDonald’s loss of the ability to maintain her privacy rights was not a psychological or physical injury that is compensable under the Compensation Act. The Supreme Court also affirmed the Appellate Court’s holding that a Privacy Act violation is not the type of injury that categorically fits with the purview of the Compensation Act and is thus not compensable under the Compensation Act.

Case No. 2022 IL 126511 (Ill. Feb. 3, 2022)
set of non-exhaustive factors set forth by the Supreme Court in other cases that, when present, may indicate the existence of an employer-employee relationship under the common law (i.e., the right to control the manner and means of an employee's work, location of the work, and whether the entity, hires, fires or pays the employee's salary). The Court noted that it would therefore find a joint employer relationship when two or more entities, according to common law principles, share significant control of the same employee. This means that an entity other than the employee's formal employer has power to pay an employee's salary, hire, fire, or otherwise control the employee's daily employment activities, such that we may properly conclude that a constructive employer-employee relationship exists.

Turning then to how the “joint employer doctrine” applies in this case, where the employment relationship has not yet begun, the Second Circuit held that the joint employer analysis should be the same. A plaintiff who has never been employed by the defendant must prove that he or she was an applicant for employment, and not for an independent contractor position, and to do this, the plaintiff must successfully allege that if they had been hired, their relationship with the alleged employer would have been more like a traditional employee rather than a traditional independent contractor. To determine whether an employee would be more like a traditional employee, the plaintiff must plead, under common law agency principles, share significant control of the same employee. This means that an entity other than the employee’s formal employer has power to pay an employee’s salary, hire, fire, or otherwise control the employee’s daily employment activities, such that we may properly conclude that a constructive employer-employee relationship exists.

Uptick in COVID-19-Related EEOC Charges

According to Bloomberg, “Since April 2020, the US Equal Opportunity Commission has received roughly 6,225 Covid-related charges of discrimination filed under federal civil rights laws and more than 2,700 vaccine-related charges, most of which were in 2021 when vaccine requirements were introduced.”

The report notes that “[c]harges filed to the agency are the first step for workers bringing discrimination lawsuits, including under the Americans with Disabilities Act (“ADA”), Title VII of the 1964 Civil Rights Act, and other anti-bias laws,” otherwise known as exhausting administrative remedies. The report further found that “Covid charges not related to the vaccine were relatively steady between 2020 and 2021, with nearly 3,150 in the first year of the pandemic, and 3,075 the following year. About 66% of the Covid-related charges raised ADA violations, totaling around 4,215. Meanwhile, the ADA was cited in 300 of the 2,700 complaints tied to the vaccine.”

EEOC charges may be viewed as a fair indicator of expected litigation, as claimants are required to exhaust their administrative remedies prior to filing a civil suit in court. In many instances, claimants request an immediate right to sue letter, which allows them to immediately file a civil action after filing an EEOC charge, without undergoing the EEOC investigation stage and avoiding attempts at conciliation.

No Right to Jury Trial in PAGA Suits in California

LaFace v. Ralphs Grocery Company

Deciding an issue of first impression, the California Court of Appeals for the Second Circuit ruled that a plaintiff who has filed a representative action under the State's Private Attorneys General Act (PAGA), seeking civil penalties for alleged labor violations, is not entitled to a jury trial. PAGA, codified at Ca. Lab. Cod. §2698, et seq., allows employees to bring actions for penalties against their employer for Labor Code violations. Penalties recovered are divided between the state and the aggrieved employees, with 75% going to the state, and the remaining 25% divided amongst the employees.

Plaintiff-appellant Jill LaFace, now deceased, worked as a cashier at a store owned by defendant Ralphs. She filed a PAGA action against Ralphs on behalf of herself and other cashiers, alleging that Ralphs violated an Industrial Welfare Commission (IWC) Wage Order that required employers to provide suitable seating when the nature of the work reasonably permitted the use of seats, or for a job where sitting was required, when the employee’s use of the seat did not interfere with the work duties. The trial court scheduled the matter for a jury trial but later granted Ralphs’ motion for a bench trial after finding that PAGA actions are equitable in nature, and therefore not triable before a jury. At the conclusion of the bench trial, the court found in favor of Ralphs. Plaintiff thereafter appealed the decision arguing that she was entitled to a jury trial, because, among other reasons, PAGA actions are for civil penalties, which historically have been deemed actions at law that were tried by juries; that they are qui tam actions, which traditionally are tried by juries; and that they arise out of the employment relationship, and are therefore akin to common law causes of action for breach of contract. Plaintiff also made several arguments on the merits.

In its February 18, 2022, ruling, the Appellate Court held that plaintiff was not entitled to a jury trial, finding that PAGA actions are administrative enforcement actions conducted on behalf of the state by an aggrieved employee who possesses “the same legal right and interest” as the state. That legal right and interest does not include the right to a jury trial. The Court noted that PAGA plaintiffs act as proxies for the state’s labor law enforcement agencies, and as such, they represent “the same legal right and interest” as those agencies: “the recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency.” The nature of that right is administrative regulatory enforcement.

Additionally, the court found that the Labor Code’s penalty provisions may be reviewed by way of administrative mandate or by a trial de novo following an informal hearing process, both of which occur without a jury. The Court further found that PAGA penalty awards are subject to several “highly discretionary” equitable factors, the consideration of which are traditionally performed by judges rather than a jury.

California Appellate Court Rules that Derivative Injury Doctrine Does Not Bar Third-Party COVID-19 Claims

Matilde Ek, et al. v. See’s Candies, Inc., et al

The California Court of Appeal, Second Appellate District, will allow a case filed by a See’s Candies worker against See’s Candies to proceed, finding that the deceased husband’s death was not derivative of his wife becoming sick, but was instead directly caused by the COVID-19 virus, for which his wife served as a conduit.

Plaintiffs Matilde Ek and her two children allege that Mrs. Ek, defendant’s employee, contracted COVID-19 at work because of defendant’s failure to implement adequate safety measures. They claim that Mr. Ek subsequently caught the disease from Mrs. Ek and died a month later. They filed suit alleging general negligence and premises liability. Defendants filed a demurrer asserting that plaintiffs’ claims were preempted by the Workers’ Compensation Act, and specifically, that plaintiffs’ claims were barred by the “derivative injury doctrine,” which provides that “the WCA’s exclusivity provisions preempt not only those causes of action premised on a compensable workplace injury, but also those causes of actions premised on injuries ‘collateral to or derivative of’ such an injury.” Defendants argue that among other things, the derivative injury doctrine preempts third-party claims “based on the physical injury or disability of the spouse,” such as loss of consortium or emotional distress.

Mandatory Arbitration No Longer Enforceable in Sexual Harassment Claims

On February 7, 2022, the US House of Representatives passed H.R. 4445, the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,” which was subsequently approved by the Senate on February 10, 2022. President Biden thereafter signed it into law on March 3, 2022. Amending the Federal Arbitration Act, the act invalidates pre-dispute arbitration agreements that prevent a party from filing a civil suit alleging sexual assault or sexual harassment. This means that employees who were previously subject to mandatory arbitration agreements may now pursue their claims in court if they so choose. The legislation takes effect immediately, nullifying any existing pre-dispute arbitration agreement. However, if the dispute has already occurred, the resolution must still proceed through arbitration.
Defendants also argued that a claim is derivative if it would not exist absent injury to the employee, and because Mr. Ek contracted COVID-19 from Mrs. Ek, who contracted it at work, Mr. Ek’s death would not have occurred absent Mrs. Ek’s work-related injury.

The trial court rejected defendant’s argument and overruled the demurrer. Defendants thereafter petitioned for a writ of mandate ordering the trial court to vacate the overruling of the demurrer. The CA Appeals Court denied the writ, finding that the facts of this case do not support applying the doctrine, because it is possible for a person without symptoms to transmit the disease, and Mr. Ek could have contracted the disease even if Mrs. Ek hadn’t suffered any injury herself. The Court reasoned that even if Mrs. Ek’s infection is considered an injury for the purposes of the WCA, the doctrine would only apply if Mr. Ek’s injury was “logically” or “legally” dependent on hers, and not just casually linked. The Court noted that “a construction of the derivative injury rule premised solely on causation would bar civil claims by any person injured as a result of the employee’s injury, family member or not.”

Case No. 21-21779; 21-2566 (Cal. App. 2d. 2021)

California Court Finds in Favor of Hyatt in Former Workers’ COVID-19 Layoffs Suit

Karen Hartstein v. Hyatt Corporation, et al

A California District Court has ruled in favor of defendant Hyatt Corporation finding that COVID-19 pandemic-related layoffs and furloughs were not permanent terminations, and as such, employees who are laid off or furloughed were not entitled to the payment of Vested Vacation Wages (earned vacation wages, floating holiday wages and PTO). The Court further found that furloughed/layed off employees were also not entitled to be paid the value of unused hotel stays under the Colleague Complimentary Rooms Program. The Court also found that the complimentary hotel rooms were not unpaid wages within the meaning of the California Labor Code, and therefore the Class was not entitled to waiting time penalties.

Case No. 2:30-cv-04874 (C.D. Cal Feb. 14, 2022)

Due to the COVID-19 pandemic, in March 2020, Hyatt implemented a “furlough/temporary layoff” of many Hyatt employees in California, and notified employees by letter that they were furloughed/temporarily laid off due to the pandemic. Hyatt did not provide a date when furloughed employees would return to work, not did it guarantee those employees would ever return. The furlough/temporary layoff was indefinite. To ease the financial burden, Hyatt offered to pay employees accrued vacation, if requested, although they were not separating any employees’ employment at the time, up to a maximum of 40 hours per week. During the furlough/layoff, employees continued to accrue vacation time. Thereafter, in June 2020, Hyatt sent a letter to most of the furloughed employees advising them that the temporary layoffs were now permanent. At that time, Hyatt paid out any remaining Vested Vacation Wages.

In the Class Action Complaint, the plaintiffs argued that they earned wages from Hyatt in the form of Vested Vacation Wages and floating holidays, but that they were not paid those wages upon termination of the employment relationship, i.e. during the layoff. The Class argued that the indefinite furlough/temporary layoff amounted to a termination, and that they were due Vested Vacation Wages at that time. The Class also argued that the hotel room bonus was considered a wage that could be considered overtime wages.

The Court found in favor of Hyatt, holding that there was no complete severance, and that Hyatt’s pandemic-related furlough/layoffs were not considered a separation of employment as contemplated by the California Labor Code. As evidence of this fact, the court noted that during the furlough/layoff, Hyatt continued to pay health insurance premiums, plaintiffs continued to accrue vacation time, and plaintiffs were still eligible to take advantage of the Colleague Complimentary Rooms Program. The Court also found that the complimentary hotel rooms were not unpaid wages within the meaning of the California Labor Code, and therefore the Class was not entitled to waiting time penalties.

The proposed rules are in the following five areas:

- Climate-related risks and their actual or likely material impacts on the registrant’s business, strategy and outlook;
- The registrant’s governance of climate-related risks and relevant risk management processes;
- The registrant’s greenhouse gas emissions, which, for accelerated and large accelerated fliners and with respect to certain emissions, would be subject to assurance;
- Certain climate-related financial statement metrics and related disclosures in a note to its audited financial statements; and
- Information about climate-related targets and goals, and transition plan, if any.

The required information about climate-related risks would also include disclosure of a registrant’s greenhouse gas emissions, which have become a commonly used metric to assess a registrant’s exposure to such risks.

The SEC released these proposed new rules along with a 500-page document supporting and reviewing the new rules. The SEC believes that the disclosure of this information would provide “consistent, comparable, and reliable – and therefore decision-useful – information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investment.”

SEC Announces Landmark Climate-Related Disclosure Rules

On March 21, the SEC announced proposed new disclosure rules that would require registrants to provide certain climate-related information in their registration statements and annual report, including certain information about climate-related financial risks and climate-related financial metrics in their financial statements. The proposed rules would require information about a registrant’s climate-related risks that are reasonably likely to have a material impact on its business, results of operations or financial condition.

The SEC further stated:

We are proposing to require disclosures about climate-related risks and metrics reflecting those risks because this information can have an impact on public companies’ financial performance or position and may be material to investors in making investment or voting decisions. For this reason, many investors – including shareholders, investment advisers, and investment management companies – currently seek information about climate-related risks from companies to inform their investment decision-making. Furthermore, many companies have begun to provide some of this information in response to investor demand and in recognition of the potential financial effects of climate-related risks on their businesses.

We are concerned that the existing disclosures of climate-related risks do not adequately protect investors. For this reason, we believe that additional disclosure requirements may be necessary or appropriate to elicit climate-related disclosures and to improve the consistency, comparability, and reliability of climate-related disclosures.

The SEC also stated that it has broad authority to promulgate disclosure requirements that are “necessary or appropriate in the public interest or for the protection of investors” as stated in Sections 13 and 15 of the Exchange Act and Section 7 of the Securities Act. The SEC stated it has considered this statutory standard and determined that disclosure of information about climate-related risks and metrics would be in the public interest and would protect investors. In making this determination, the SEC also considered whether the proposed disclosures “will promote efficiency, competition, and capital formation” as mandated under Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act.
SEC Proposes More Timely Notifications of Cybersecurity Breaches

The SEC proposed that public companies report cybersecurity incidents within four days after they determine such a breach is material. The proposal would also require companies to disclose more about prior incidents and describe their risk management strategies in greater detail. SEC officials advised the proposal does not require companies to disclose technical details about cybersecurity breaches. Rather, the intent is to keep investors abreast about incidents that result in business interruption, extortion, repair expenses, lost revenue, legal risks, or reputational harm and stock declines.

The four-day deadline proposal is the first time the commission has identified a deadline, as prior disclosure rules did not specify timelines for doing so. The disclosures would be made through Form 8-K. Foreign issuers would also be subject to the deadline under the proposal’s terms, and they would disclose such events under a Form 6-K.

This proposal comes on the heels of the rules proposed in February 2022 that mandate that investment advisors bolster their cybersecurity preparedness, requiring that they develop written cybersecurity policies and report significant cybersecurity breaches confidentially to the SEC.

The short deadline will likely require companies to enhance protocols for the prompt escalation and assessment of cybersecurity incidents.

California Board Diversity Law Getting Critical Eye in Litigation

Crest et al. v. Padilla

California Assembly Bill 979, passed and signed into law in 2020, requires publicly held corporations to include at least one person from an “underrepresented community” on their boards by the end of 2021, and two to three, depending on the size of the board, by the end of 2022. A member of an “underrepresented community” is defined in the law as anyone “who self-identifies as “Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, gay, lesbian, bisexual or transgender.”

Upon passage of the bill legal challenges have been mounted, and the litigation has matured to the point where we’re getting a glimpse into the judge’s analysis as the two sides argue their positions.

Judge Terry Green has challenged defenders of the law on several aspects of it: Is the legislation seeking to enforce quotas? There are other minority groups in CA that are not addressed in the law, so it appears that the focus was arbitrary. Is relying on statistical analysis of board makeup enough to prove discrimination?

The judge also wondered why the state did not pursue, via the Department of Fair Employment and Housing, discrimination claims against companies for discrimination. With the judge’s comments favoring the arguments put forth by the plaintiff’s, members of the conservative group Judicial Watch, Inc., there was little more they had to say.

The respondents, represented by the CA Dept of Justice Civil Rights Enforcement Section, addressing the judge’s concerns over whether this law amounted to quota-setting pointed out that the judge is presuming that the number of board members would need to remain static, while they argued that boards could be expanded to include members of underrepresented communities. Additionally, they advised that the legislature did not rely on statistical analysis of corporate boards to justify the need for the law. Rather, they pointed to testimony regarding and a wealth of examples of discrimination at multiple levels that impede minorities’ ability to rise up the ranks and ultimately be considered for corporate board appointments.

The legal challenge to the law is ongoing and will be monitored closely. To the extent the law is upheld, some corporations may find themselves scrambling to find suitable candidates before the deadline at the end of the year.

Case No. 20ST-CV-37513 (Los Angeles County, Cal. April 1, 2022)
Fiduciary Liability

The Supreme Court Clarifies Obligations of Fiduciaries, but Also Reminds Courts to Mind Context

Hughes v. Northwestern University

As discussed previously, participants in the University-sponsored retirement plan alleged Northwestern breached their fiduciary duty in that it did not do enough either to reduce the fees it pays for recordkeeping related to the plan, that the fiduciaries did not ensure that the choices it offers for investment have reasonably low fees, and that there were too many options for the participants to chose from and it was likely to result in confusion.

Northwestern, other plan sponsors and their advisors hung their hopes on a decision from the court that would lay out clearer, tighter pleading standards that would make it harder for specious cases to be brought.

The Supreme Court, with Justice Barrett abstaining, unanimously remanded the lawsuit back to the Circuit Court after clarifying the standards on which claims against ERISA fiduciaries must be judged. The standard to which fiduciaries will be held will include the monitoring of plan investments and removing imprudent investment options from the plan’s investment menu, and the failure remove such within a reasonable time constitutes a breach of fiduciary duty under ERISA. In addition, offering a broad array of options still must be done in light of a fiduciary’s continued obligation to review and removing imprudent investment options from the plan’s investment menu, and the failure remove such within a reasonable time constitutes a breach of fiduciary duty under ERISA. In addition, offering a broad array of options still must be done in light of a fiduciary’s continued obligation to review and determine which investments should be included in the plan options.

In advising lower courts on how such claims should be considered, the court instructed that the analysis of whether or not a fiduciary breached their ERISA-mandated duties requires a context-specific inquiry of the fiduciaries’ continuing duty, but also recognizes the range of reasonable judgments a fiduciary may make based on their experience and expertise.

This decision is a mixed bag for both sides. While the court did not bolster the pleading standards as fiduciaries had hoped, it also sent the message that some deference must be given to fiduciaries as they consider the investments to be included in plans. We will continue to monitor this litigation as it wends its way through the courts.

141 S. Ct. 2882 (US Jan. 4, 2022)

DOL to ERISA Plan Fiduciaries: Think Twice Before Adding Cryptocurrencies

On March 10, 2022 the Department of Labor issued a compliance assistance document raising concerns about adding cryptocurrency options to 401(k) plans’ investment menus for plan participants.

The DOL expressed “serious concerns about the prudence of a fiduciary’s decision to expose a 401(k) plan’s participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies.” The Department listed four concerns as to why they think cryptocurrency presents a significant risk to a member’s retirement account:

• Cryptocurrency investment is highly speculative & volatile.
• It would be challenging to make actual informed investing decisions given how atypical cryptocurrency investing is from traditional plan investments.
• There are custodial and recordkeeping concerns, where the loss of a password can result of the assets forever.
• There are concerns about the reliability and accuracy of cryptocurrency valuations.

In addition, the SEC has also issued risk alerts about the potential for fraud in cryptocurrency investments.

The takeaway for plan fiduciaries is that the failure to heed the DOL’s warnings about cryptocurrencies in 401(k) plans may subject them to liability should they opt to add cryptocurrency investment options for members. That said, interest and investment in cryptocurrencies is extremely popular, for those investors who want to place their money in those vehicles, plan fiduciaries who want to provide these options may need to clearly provide full disclosures as to the characteristics of cryptocurrencies and their volatility and other risk factors.

Excessive Fee Litigation Pays with Another Seven-Figure Settlement

Parmer et al. v. Land O’Lakes Inc. et al.

Employees Mark Laurance and Craig Parmer sued Land O’Lakes alleging that the company violated ERISA by failing to ensure that every investment option in its $1.4 billion plan had a reasonable cost. Instead, the workers argued, the company picked and held onto investments that ended up costing more than necessary and in doing so violated their fiduciary duties to the plan.

Land O’Lakes’ position was that they managed their investments properly and Laurance and Parmer lacked standing to pursue their claims. The court denied Land O’Lakes motion to dismiss, though it did dispense with the plaintiff’s claims involving third-party recordkeepers.

With the Supreme Court’s decision in Hughes v. Northwestern not providing any clarity on the excessive fee issue, the parties were facing the continued uncertainty of liability and exposure this litigation presented. With both sides recognizing the risk and expense going forward, the sides were able to negotiate a settlement. The parties have asked the judge to approve a $1.8 million amount, which represents at least 20% of the estimated $9 million in maximum damages to the retirement plan. In addition, counsel for Lauren and Parmer will be seeking petitioning the court for $600,000 for their fees and expenses.

Significant excessive fees settlements are continuing to have a material impact on the fiduciary/pension trust liability insurance market. Combined with an incentivized plaintiff’s bar, we expect insurers to be very thorough when scrutinizing a company’s plan, its fiduciaries and their decision-making. Insureds should anticipate an exhaustive underwriting/renewal process.

Case No. 20-cv-01253 (D. Minn March 4, 2022)
Shareholder Derivative Action Filed and More Firms Under Investigation for Unapproved Messaging After JPMorgan Fined $200 Million for Failure to Preserve Texts and Personal Emails

In the Matter of J.P. Morgan Securities, LLC

Financial institutions take heed — the SEC is conducting multiple investigations of record preservation practices at financial institutions and, based on prior penalties, consequences could be severe. The first of these investigations was against JPMorgan Chase and resulted in a $200 million fine to the SEC and CFTC regarding its employees’ use of unapproved email, texts and WhatsApp — and JPMorgan’s failure to preserve those communications. It has also now resulted in a shareholder derivative action filed against JPMorgan on March 10, 2022.

The SEC has not stopped with JPMorgan. Citigroup has now joined Goldman Sachs and HSBC Holdings in announcing in recent weeks that it is responding to federal investigation regarding their employees’ use of unapproved messaging channels to discuss business.

Employees’ use of texts and other apps to communicate on personal devices is now routine, especially as traditional work models continue to shift. Companies should recognize this change dynamic and recognize that the technology is here to stay. Most importantly, companies must ensure that they have developed oversight policies and procedures to ensure they are compliant with recordkeeping rules.

In December 2021, JPMorgan acknowledged that its conduct violated federal securities laws, including the Commodity Exchange Act, and agreed to pay a $125 million penalty to the SEC and $75 million penalty to the CFTC. It also agreed to implement robust improvements to its compliance policies and procedures to settle the matter.

Per the SEC order, there was a widespread and longstanding failure of JPMorgan employees throughout the firm. From at least January 2018 through at least November 2020, JPMorgan employees often communicated both internally and externally about securities business matters on their personal devices. This includes using personal text messaging, WhatsApp messages and personal email accounts. None of these records was preserved by the firm.

The failure was firm-wide and involved employees at all levels of authority, including those at senior levels. Dozens of managing directors across the firm and senior supervisors responsible for implementing JPMorgan’s policies and procedures, and for overseeing employees’ compliance with those policies and procedures, also failed to comply with firm policies by communicating using non-firm-approved methods on their personal devices about the firm’s securities business.

Critically, JPMorgan received and responded to SEC subpoenas for documents and records requests in numerous SEC investigations during the same time period that it failed to maintain required securities records relating to the business. In responding to these subpoenas and requests, JPMorgan frequently did not search for records contained on the personal devices of JPMorgan employees relevant to those inquiries. The SEC stated that JPMorgan’s recordkeeping failures impacted its ability to carry out its regulatory functions and investigate potential violations of the federal securities laws across these investigations, and that the SEC was often deprived of timely access to evidence and potential sources of information for extended periods of time and, in some instances, permanently.

The SEC brought the failure to produce text messages in an ongoing matter to JPMorgan’s attention, and JPMorgan identified other recordkeeping failures that it subsequently reported. JPMorgan now has engaged in a review of certain recordkeeping failures and begun a program of remediation.

On March 10, 2022, plaintiff Lase Guaranty Trust filed a shareholder derivative suit in a New York federal court against the ten members of JPMorgan’s board of directors, including CEO Jamie Dimon. The complaint states that as a consequence of the individual defendants’ utter failure to fulfill their fiduciary duties and implement and maintain an internal control system ensuring compliance with laws, rules and regulations, the company was substantially damaged. The complaint also states that JPMorgan has spent untold amounts responding to investigations and its reputation has been damaged.

In addition to seeking damages, restitution and disgorgement on behalf of JPMorgan, the complaint also requests the court direct JPMorgan to “take all necessary action to reform and improve its compliance, internal control systems and corporate governance practices and procedures to protect the company and its stockholders from a repeat of the damaging events described herein.”

SEC Administrative Proceeding File No. 3-20681; CFTC Docket 22-07; Case No. 22-cv-1331 (E.D. NY March 10, 2022)

Capital One Hit with Derivative Suit Over Data Breach
Reiter v. Fairbanks

A Capital One stockholder has filed a derivative suit claiming the company’s directors and officers failed to maintain adequate controls leading up the Capital One 2019 data breach and certain defendants disposed of $60 million of Capital One Stock while in possession of material, nonpublic information. The suit, filed in Delaware Chancery Court, brings claims for breach of fiduciary duty and unjust enrichment against the directors and officers, including founder and CEO Richard Fairbank.

The complaint states that the directors and officers failed to establish appropriate operational risk management processes, failed to identify numerous control weaknesses and gaps in the company’s cloud operating environment, and failed to take effective actions to address concerns regarding critical internal control gaps and weaknesses.

The suit seeks monetary damages against all the individual defendants, who are also accused of making false and misleading public statements about the company’s data security efforts. It also asks the court to order the bank to pursue a range of reforms to its corporate governance and internal procedures, including strengthening controls over information technology operations, inside trading and financial reporting, as well as giving stockholders greater input.

In August 2020, Capital One entered into consent orders with the Federal Reserve and OCC and paid a $80 million penalty relating to the breach. Capital One also recently agreed to settle pending consumer class actions consolidated into MDL in Virginia for $190 million.

Case No. 2021-1117 (Del. Ch. Jan 11, 2022)

New Bad Faith Law Enacted in New Jersey

New Jersey policyholders now have a statutory bad faith cause of action for UM/UIM claims against their insurance companies. New Jersey Governor Phil Murphy recently signed into law the New Jersey Insurance Fair Conduct Act. In summary, the Act affords a claimant seeking UM/UIM coverage, who is either 1) “unreasonably denied a claim for coverage or payment of benefit” or 2) “experiences an unreasonable delay for coverage or payment of benefits,” a civil cause of action in court against the responsible insurance company.

The act further authorizes a claimant to seek redress for related violations to the New Jersey Unfair Claims Settlement Practices Act. Such violations by a carrier include, among others:

- Failing to promptly communicate and investigate a claim.
- Failing to issue a coverage determination within a reasonable time.
- Refusing to pay claims without conducting a reasonable investigation based upon all available information.
- Compelling policyholders to institute litigation in pursuit of their claims.

In addition to actual damages – not to exceed three times the coverage limit – the act entitles claimants to reasonable attorney fees and reasonable litigation expenses.

The act also prohibits carriers from imposing rate increases on policyholders as a result of the act.
SEC Settles with Investment Adviser for $30M Regarding Fee Disclosure Issues

In the Matter of: City National Rochdale, LLC

The SEC announced on March 3 that it had reached a $30 million settlement with investment adviser City National Rochdale LLC regarding claims that it had defrauded clients when it failed to disclose conflicts of interest tied to fees it earned on proprietary mutual funds.

From at least 2016 through 2019, the adviser failed to tell clients that it was investing their assets in proprietary mutual funds in order to generate fees for the firm and its affiliates, when competitor funds may have had lower fees. This conflict of interest resulted because as the proprietary funds’ assets under management increased through clients’ investments, so did the fees that the adviser and its affiliates received. The more the adviser invested its clients’ money in proprietary funds, the more fees it and its affiliates receive.

As an investment adviser with a fiduciary duty to its clients, the adviser was obligated to disclose all material facts to its clients that could affect the advisory relationship, including any conflicts of interest between itself and/or its associated persons (including its affiliates) and its clients, and how those conflicts could affect the advice the adviser gave clients.

The SEC stated that in order to meet this obligation, the adviser was required to provide its clients full and fair disclosures that are sufficiently specific to allow them to understand all material conflicts of interest concerning the investment adviser’s advice and to have an informed basis on which they could consent to or reject the conflicts.

The SEC Order states that as a consequence of these breaches of fiduciary duty, the investment adviser “willfully violated” Section 206(2) of the Advisers Act and Section 206(4) of the Advisers Act and Rule 206(4)-7 by failing to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its use of proprietary funds and its disclosures of related conflicts of interest.

Case No. 3-20789 (SEC March 3, 2022)

Beware the Flip Side of Forum Selection Clauses

Nippon Shinyaku v. Sarepta Therapeutics

The Federal Circuit Court of Appeals ruled that held that a broadly worded forum selection clause can end up waiving companies’ rights to America Invents Act reviews. The language at issue in this matter was found in a confidentiality agreement between the companies.

Sarepta Therapeutics and Nippon Shinyaku had entered into a mutual confidentiality agreement while working on a marketing deal for a gene therapy process, and that agreement called for any patent infringement disputes or validity cases to be brought in Delaware, including a provision that prohibited the parties from bringing suit in connection with the arrangement for two years.

A dispute between the two firms arose, and Sarepta attempted to challenge the patents. The Federal Circuit upheld the forum selection language in the confidentiality agreement and ruled that Sarepta was unable to file its patent challenges for two years, as per the terms of the agreement. The ruling set new precedent that contracts can be used to sign away the right to AIA reviews.

Forum selection clauses are common in civil litigation, and when drafted correctly, are enforceable. In this instance, the Federal Circuit held the same holds true for matters which involve inter partes reviews under the America Invents Act, which sought to modernize United States patent law. Parties should pay particular attention to forum selection clauses in any agreements they are entering into, lest they unintentionally waive rights to seek redress via otherwise available venues.

Case No. C.A. 21-1015-LPS, (D. Del.)

Insurance Coverage

Ninth Circuit Overrules Lower Court in Crime Insurance Coverage Fight

Ernst & Haas Management Co. v. Hiscox Inc. et al.

A three-judge panel in the Ninth Circuit overturned a lower court decision in connection with a crime claim submitted under a Hiscox policy involving a wire transfer based on fraudulent instructions. The lower court had previously ruled that since the fraudulent instruction was received by an employee of the policyholder, and not received by the policyholder’s bank, the coverage was not triggered. The employee of the policyholder directed their bank to make the $200,000 payment.

Hiscox’s denial of coverage was based on the fact that the funds transfer fraud portion of Ernst’s policy didn’t cover Ernst’s loss as it was an Ernst employee directed the bank to make the wire transfer. Hiscox argues that since the alleged loss didn’t result directly from fraudulent emails, coverage wasn’t triggered.

The panel noted that the fraudulent email directed the Ernst employee to transfer funds, and offered wire details and fraudulent authorization for the transfer. As such, they said the lower court was wrong in saying the funds transfer fraud provision didn’t apply. The panel found that the policy wording was not limiting, and that there was “direct loss” to the insured as there was no intervening event between the employee receiving the fraudulent instruction via email and her instruction to the bank to make the payment.

The Ninth Circuit’s broader interpretation of the policy language is obviously favorable to the policyholder, and saves them from instances where circumstances skirt between coverage sections under crime policies but don’t exactly match the language.

Case No. 20-56212 (9th Circ. March 7, 2022)

Case No. 3-20789 (SEC March 3, 2022)
One of These Things Is Just Not Like the Other: The Architecture of Language

State Automobile Mutual Insurance Co. v. Tony’s Finer Foods Enterprises Inc. et al.

In a case citing the familiar Sesame Street tune, a federal court examined the “architecture of language” in ruling that an employment-related practices exclusion did not extend to BIPA claims. In a case replete with quotable citations, the court stated that “context sheds light on the meaning” and that “[n]eighboring words shed light on the meaning of other words in the neighborhood.” In examining the list of words, the court cautioned “[y]ou can tell a lot about words, like people, by who they hang out with.”

The insured was sued under BIPA due to their requirement for its employees to use their fingerprints to clock in and out of work. The insured tendered the claim to their CGL insurer, who denied the claim under the employment-related exclusion. The exclusion stated that the insurance did not apply to:

This insurance does not apply to:
“Personal and advertising injury” to:
(1) A person arising out of any:
(a) Refusal to employ that person;
(b) Termination of that person’s employment; or
(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person; . . .

The court found that a BIPA claim did not fall under any of the three sub-categories, most notably para. 1(c). The court reasoned that when there is a list, as in the CGL policy, the individual components of the list should be read together. That is, the collection of words helps to inform the meaning of any individual word. The court stated that under the insurer’s reading, the exclusion would cover just about any and all claims by employees. “And if that’s the case, one wonders why the text did not take the direct approach. It would have been easy to write an exclusion saying that it does not cover any claims by employees, period.” But instead, the policy included a list with three subparts. And the third subpart includes a list of examples that share a theme. The crafting of the language suggests that it covers a subset of claims brought by employees.

Case No. 20-cv-06199 (N.D. Ill March 8, 2022)

Adding fingerprinting to the list calls to mind the line from a classic Sesame Street tune: “one of these things is not like the others / one of these things just doesn’t belong.” See Sesame Street, One of These Things (Is Not Like the Others) (Columbia Records 1970).
Downstream Energy – Q1 2022

Summary

Downstream energy has found itself in years of a hardening market, but now the market has begun to stabilize. Q1 showed minimal rate increases, but clear distinctions are being made based on quality of risk. Terms offered were quite different on those risks that were deemed above average. Overall, 2022 is appearing to be more stable for clients, as carriers yield profitable results. Carriers have benefited from a reduction in COVID-19 related losses and a decrease in frequency of losses, has enabled carriers to report combined ratios under 100%.

As downstream energy rebounds, the capacity in this sector is increasing. New markets are trying to grasp market share and existing markets are looking to recoup their previous lost share. OIL, the Bermuda based energy mutual, has increased their offering to $450M (up from $400M) and like the rest of the markets, is looking to utilize their new capacity in 2022. Current estimated available capacity is $4 billion for international programs and $2.5 billion for North American programs. Even with this capacity, full limit quota share programs are tough to fill completely, and layered structures are still common for larger more complex risks.

Given the increase in profits, underwriting discipline is still in full effect for clients with nat/cat exposures. Senior management will expect underwriters to manage their aggregates, which will rely heavily on analytics. Clients need to provide detailed and accurate data in order to obtain the best possible terms from underwriters. Extreme weather events are unpredictable and can deteriorate an underwriter’s combined ratio quickly. This will continue to be a key item for those in the downstream sector. Selection of risks will remain essential to underwriters, as they seek to maximize capacity on risks with clean loss history, minimal nat/cat exposure and adequate terms.

Those with distressed assets, should start the renewal process early to obtain the most favorable terms and conditions.

In view of the recent increases in commodity prices, it is imperative that clients report accurate BI values. New business interruption volatility clauses are emerging to protect carriers from the uncertainty in BI swings. This includes monthly and annual percentage caps of the declared values and includes premium adjustments.

Many markets are now relying on LMA 5515 wording to limit the amount recoverable due to declared values vs. sustained loss. It’s not only important to declare accurate BI values at inception but to re-declare values when it is applicable.

Carriers will continue to be selective on their deployment of capacity and will focus on underwriting discipline to remain profitable in the future years. New entrants might offer relief for those markets who are pushing rate rises outside of the norm ranges.

Clients should look to work on their renewals early and to engage with their markets to help differentiate themselves.

Given the ongoing political unrest and lingering pandemic effects, many are being quietly optimistic that the hardening market is fading away.

Power Generation – Q1 2022

Summary

Thermal power clients find themselves in a somewhat fragmented market. Many predictions are stating that rates are stabilizing, but many still see this sector as delicate. A major nat/cat event could erode profitability. While those who have continued to differentiate their assets from their peers should expect to find more relief in their rate rise, those with aging assets and unindexed values can expect harsher rate rises and less favorable terms. As scrutiny for ESG increases, many underwriters are looking to distance themselves from these risks. Lack of capacity forces these clients to self insure or bind terms that are not desirable.

The focus on profitability and underwriter discipline will continue throughout 2022. Underwriters will be expected to properly manage their nat/cat aggregations. Clients should be prepared to provide detailed information on their asset locations. Accounts will be modelled prior to deployment of capacity and the more accurate the data, the higher comfort level the underwriter will have when providing terms. Underwriters are unlikely to provide terms that appear to be undercutting lead markets to increase their market share.

As cost of raw material and lead times continues to increase, so does the claim quantum submitted. Clients who present values without any increase or consideration for inflation can expect larger rate rises to offset the difference. Aging assets that are near the end of their life or are using technology that is deemed antiquated will require a deeper dive into formalizing a proper replacement value. Clients should understand how their policy will respond in the event of a total and partial loss. This understanding will guide the renewal strategy, which may provide rate relief. Each client’s situation and portfolio varies, so the policies should be structured accordingly.

Lack of maintenance and aging assets is an area of concern for carriers, who have seen attritional losses erode their earnings.

Carriers are seeking clients who are engaged in their risk mitigation. They want to receive meaningful responses to recommendation and timely solutions to open recommendations.

These clients are able to differentiate themselves from peers and are likely to have more options during their renewals. Clients should engage with their carriers early to ensure that proper timing is afforded to discuss potential engineering/technical concerns.
## Downstream Energy

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## Commentary

### Power Generation

- **Carriers** are looking to increase their market share which will help offset higher priced quotes. Guide One’s future is uncertain, so traditional markets may help offset set this void. MGAs are still regarded as being unreliable in the marketplace.

### Downstream Energy

- **Clients** will continue to see a push for rate, but this can be mitigated by expanding quota share layers and removing layered towers with higher rates.

- **ESG compliance may impact rates**, as carriers non-renew or refuse to insure non-compliant clients.

- **EU and London** carriers are looking to increase capacity on existing portfolios that meet their ESG requirements.

- **Clients** with attritional losses may see increases in their retentions, but we are expecting these to remain flat for the remainder. Focus remains on rates versus retentions.

- **Increased political volatility may make this sector a target.** Lack of resultant damage protection makes them vulnerable. Standalone cyber and wraps may help insulate clients, but these are expensive options. Coal clients will need diversify their portfolio in order to achieve broader coverage.

- **Carriers** are willing to deploy more capacity.

- **Clients** will continue to benefit from the entrance of new carriers. OIL increased limit offering by $50M for 2022.

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The Russian invasion of Ukraine has accelerated macro-economic factors that were already placing strain on the world economy. Inflation is at a 40-year high in the United States, which, combined with the already concerning labor shortages and supply chain issues, is further straining the economy and driving changes in the construction space.

The Omicron variant of COVID-19 seems to be under control and many mask mandates and restrictions implemented to combat the surge in Omicron cases have been rolled back. The Russian invasion of Ukraine has accelerated macro-economic factors that were already placing strain on the world economy. Inflation is at a 40-year high in the United States, which, combined with the already concerning labor shortages and supply chain issues, is further straining the economy and driving changes in the construction space.

Contractors are experiencing price escalation on everything from building materials to fuel and labor. Supply chain delays and shortages are extending project durations and placing extreme pressure on projects with delay in start-up exposure. This is driving change in the industry with an increased emphasis on price mitigation and project delivery methods. Changes such as the increased use of progressive design build and alternative dispute resolution (ADR) on major infrastructure projects, a hyper focus on risk mitigation using technology adaptation/implementation, and the overhaul of company processes and procedures with an emphasis on reducing incidents and controlling losses, are a few examples of strategies being utilized.

The complexity of this environment will create opportunities that will need to be approached cautiously to ensure profitability targets are hit.

Wrap-Ups – Q1 2022 Summary

It appears that things have finally started to turn the corner. We have had two long years of rate hikes, limit reductions, project delays and climate concerns, all of which have resulted in the hardest market we have seen in many years. These challenges have put continued pressure on risk managers to look long and hard at the insurance they are buying to make sure they are getting the best bang for their buck. This has spurred a renewed interest in alternative forms of risk management programs like captives, large deductibles and wrap-up programs.

Here is the great news: over the past 12+ months, we have actually seen close to 15 new markets enter the wrap-up space. This includes primary and excess markets, as well as new MGAs. This increase in capitalization has increased the competition among carriers, and while we are not yet seeing a full reduction in rates across the board, we are seeing a more positive turn, particularly on the layers above $10M. In the coming months we would fully expect to see more competition continuing to hit the primary markets as well. Underwriters are still going to look for the best risks, but those that approach their controls well should enjoy the best rates available.

In addition to more market capital, we are also seeing traditional underwriting being more open to alternative approaches. In the past you could only get admitted markets to consider full wrap (WC and GL) programs. They would be very conservative with any GL-only option. This left the GL-only market completely open to only E&S considerations. For larger projects (above $200M), that mindset is changing. Admitted markets realize the project size controls can be in place and are more willing to quote GL only business and give better terms and more competitive prices. This means owners and developers can expect more options on their larger projects.

Words of Caution

Large cases are starting to be heard. With COVID-19 many open claims have been shelved for quite a while. Those are now being put back on the docket. Many of these claims are very sizeable and may be another wake up call to the industry that large claims happen and more insurance is needed. Wrap-up limits of $50M and $100M have been the norm for many years. Owners should be looking to increase those limits to protect their assets.

The war in Ukraine is obviously very unsettling in every aspect, and we still don’t know how this may play out across the globe. This news only underscores the challenges of our current times. From a risk management perspective this means that we have to really continue to think long term. We still feel one of the best ways to do that is through wrap-ups and extended project coverage.

What this information means for your next capital expenditure project:

1. Make sure you speak to your broker early and discuss what will make your project best-in-class. Be open to making changes and evaluating how improving you overall risk can influence ever bottom line.
2. Ask your broker for multiple options! Full wrap, GL only wrap, OCIP vs. CCIP should all be on the table. If you start early enough, and your projects is of substantial size, you can obtain options for every option.
3. Limits, limits, limits. Claims are still happening and medical inflation continues to increase along with inflation as a whole. We highly recommend considering larger layers of umbrella coverage. The large claim verdicts we expect to see over the next 12 months are a result of projects many years prior. Thinking long term can help ensure you project remains successful.
4. Be open to meeting your underwriter face to face. With COVID-19 mandates receding, more business is being done face to face. While video conference technology has been a business savior the last two years, we all recognize that it can’t replace every face-to-face discussion. With new wrap-ups, many new programs, face-to-face meetings will only have a positive benefit.
5. Plan for a longer marketing placement. Being earlier to the game is a good play and will only help your overall underwriting review and pricing.
**Primary Casualty (WC, GL, Auto)**

<table>
<thead>
<tr>
<th>METRICS</th>
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<th>12 MONTH FORECAST</th>
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</thead>
<tbody>
<tr>
<td><strong>Pricing</strong></td>
<td>0% to 15%</td>
<td>Rate increase moderation slowed in GL with expected rate increases in the 3% to 8% range. WC saw mostly flat to 3% increases while AL continued to drive rate increases with expected increase targets in the 10% to 15% range. Firms with frequency and/or severity loss experience should expect higher rate increases and reduced market participation.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Limits</strong></td>
<td></td>
<td>capacity continues to be protected.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Retention</strong></td>
<td></td>
<td>Firms may reengineer their reinsurance program to look for ways to reduce expenses. Interest rate increases to counter inflation will add to the cost of capitalizing the financial risk associated with deductible programs and should be part of the conversation regarding a transition to a deductible program structure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Coverage</strong></td>
<td></td>
<td>Coverage has normalized with most markets being transparent and consistent with what they will and will not cover.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Carrier</strong></td>
<td></td>
<td>Carriers posted record profits for the year 2021. hikes in inflation, most notably on claims for escalations, has been noticeable with key factors being increased material costs on the property side and higher jury awards on the casualty side.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Claims</strong></td>
<td></td>
<td>Claim cost escalation will directly impact loss-sensitive buyers and indirectly impact guaranteed cost buyers but will impact every insurance buyer in the construction sector. Firms should seek partners (brokers and law firms) with dedicated claim services and a commitment to managing claims files and closing cases.</td>
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</tbody>
</table>

**Excess Casualty**

<table>
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<tr>
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</thead>
<tbody>
<tr>
<td><strong>Pricing</strong></td>
<td>5% to 50%</td>
<td>Rate increases have stabilized with construction firms seeing mid to high single digit rate increases in their XS placements. Those with loss activity in the underlying will result in 15% to 50% renewal rate increases. Severity loss activity in the primary layers is increasing rates drastically (50% to 75%) and reducing market interest/ participation.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Limits</strong></td>
<td></td>
<td>XS markets are maintaining their desired attachment points. Quota share remains common. Most markets are targeting $10M to $20M layer limit positions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Retention</strong></td>
<td></td>
<td>Retention and attachment point levels will remain consistent. Auto will continue to strain placement appetite.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Coverage</strong></td>
<td></td>
<td>Coverage has normalized with most markets being transparent and consistent with what they will and will not cover.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Carrier</strong></td>
<td></td>
<td>Carriers have become or are approaching profitability in the XS Space. New carriers have entered the market increasing capacity.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Claims</strong></td>
<td></td>
<td>Increased focus on incident investigation, fraud mitigation techniques such as surveillance and social media searches, aggressive settlement strategies, and claim file management will be more common.</td>
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</table>

**Q1 2022 Overview**

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- Carriers have become or are approaching profitability in the XS Space. New carriers have entered the market increasing capacity. |
- Increased focus on incident investigation, fraud mitigation techniques such as surveillance and social media searches, aggressive settlement strategies, and claim file management will be more common. |
**Builders Risk**

### Q1 2022 YOY CHANGE
- **Pricing**: 3% to 10%
- **Limits**: 0% to 15%
- **Retentions**:
- **Coverage**:
- **Carrier**:
- **Claims**: Claim cost escalation continued into Q1 2022 following what many believe to be the second costliest nat/cat year for the insurance sector (estimated US $120B insured losses, worldwide). Material costs, supply chain shortages/delays, labor shortages and general inflation are cost escalation leaders.

### 12 MONTH FORECAST COMMENTARY
- **Rate increases normalized in Q1 of 2022 with similar pricing targets as Q4 2021 in low hazard areas. Nat/cat, wood frame and high hazard (flood) zones continue to push rate increases as claim cost escalation continues to be problematic.**
- **Many leading indicators of claim cost escalation continue throughout the year. Material costs, supply chain shortages/delays, skilled/unskilled worker shortages, general inflation and socio-political fears will all weigh in on incurred costs, expenses and pricing. Increased frequency of large nat/cat occurrences continue to destabilize the market.**
- **Strategies regarding capacity deployment and program structure have remained static quarter over quarter. The utilization of short limits and quota share was consistent throughout the quarter. Wood frame and high hazard areas continue to be difficult placements.**
- **Capacity deployment and program structure will continue to be utilized to control exposure profiles. Nat/cat events may lead to price increases and changes in underwriting appetite if claim cost escalation continues.**
- **Attachment points, retentions and layer targets remained consistent.**
- **Warranties remain consistent quarter over quarter. Warranties continue to shape coverage and technology adoption will begin to increase in utilization and requirement.**
- **Builders risk market participants remained static. No significant changes in markets offering builders risk.**
- **Claim cost escalation continued into Q1 2022 following what many believe to be the second costliest nat/cat year for the insurance sector (estimated US $120B insured losses, worldwide). Material costs, supply chain shortages/delays, labor shortages and general inflation are cost escalation leaders.**
- **Cost escalations are monitored closely and will impact underwriting appetite and pricing towards Q4 of 2022.**

### 12 MONTH FORECAST

### Wrap-Ups (OCIP and CCIP)

### Q1 2022 YOY CHANGE
- **Pricing**: Primary and excess layer rates have finally leveled out for the majority of OCIP and CCIP programs. Please note that pricing is still high comparatively speaking to early 2020. Make note when looking to update your proformas and indications.
- **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.
- **Retentions**: Retentions and sub-limits will be utilized to control exposure profiles.
- **Coverage**: Coverage is stable, but still challenging for certain risks. Residential coverage remains the most challenging to place as there are limited markets for ‘for sale’ coverage. Commercial market coverage remains consistent.
- **Carrier**: No anticipated changes. But more carriers are wary of overextending themselves. Look for enhanced underwriting requirements and carriers willing to walk away from business that doesn’t meet best-in-class evaluations.
- **Claims**: Overall claims for construction continue to escalate particularly with severity. Risk managers should think about increasing their umbrella limits.

### 12 MONTH FORECAST

- **Pricing**: Rates should continue to hold for 2022, barring major catastrophes and continual COVID-19 shutdowns. While we expect rates to remain stable, it is still important to be conservative with estimates as you are planning your projects. Larger, well-controlled projects may actually enjoy a pricing decrease.
- **Limits**: While capacity is holding, we do see the additional market options as a positive sign. This should have a positive influence on rates.
- **Retentions**: Retention levels available have remained consistent.
- **Coverage**: Coverage is stable, but still challenging for certain risks. Residential coverage remains the most challenging to place as there are limited markets for ‘for sale’ coverage. Commercial market coverage remains consistent.
- **Carrier**: For the most part, individual carrier capacity has remained consistent. New carriers have entered the market and while individual carrier capacity hasn’t increased, we are enjoying more competition.
- **Claims**: More talk is coming from carriers regarding higher claim payout. As COVID-19 recedes, many cases that have been on the back burner will now be heard. Expect larger verdicts and settlements.

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Professional Liability

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<tbody>
<tr>
<td>PRICING</td>
<td>5% to 10%</td>
<td>Most contractor renewals present moderate rate increases. Certain classes, esp. heavy civil or residential, continue to realize larger increases. Project policies for certain project types (heavy civil, stadiums) impacted by substantial rate increases. A&amp;Es are experiencing moderate rate increases, especially in the London market. Real estate professionals realizing moderate increases, especially for certain venues (CA and NY).</td>
<td>Markets will continue to offer competitive premiums for renewals in most classes, with notable exceptions for heavy civil exposures.</td>
<td>Restricted limit deployment will continue to impact pricing for larger towers as they progress through the renewal cycle.</td>
</tr>
<tr>
<td>LIMITS</td>
<td></td>
<td>Limits offered are consistent with the insureds’ assets/revenues. Outside limit offerings are given special review. Markets continue to restrict limit deployment for certain contractor exposures. Continued imposition of sub-limits by some markets for certain contractor coverages, such as rectification and protective.</td>
<td>Primary limits will continue to be capped by some markets at 55M for contractors, especially in heavy civil. Excess options will remain reasonably attainable. Available limits mostly unchanged for other lines, with some exceptions for certain classes.</td>
<td></td>
</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td>Retentions for most contractors, A&amp;Es and real estate remained unchanged. Some carriers continue imposing SIR for contractor’s protective coverage, where previously there was none.</td>
<td>Expect increased scrutiny on retention levels.</td>
<td></td>
</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td>Rectification coverage being incorporated into forms for A&amp;Es. Some insurers continue to restrict this coverage for contractors due to poor loss development. Limited appetite continues for residential projects, as well as stadiums. Other policy wording remained consistent, with flexibility to negotiate certain enhancements.</td>
<td>Options will remain limited for certain project types. Coverage can still be negotiated, but we will see continued push back on certain contract-requested wording.</td>
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</tr>
<tr>
<td>CARRIER</td>
<td></td>
<td>Appetites evolving with respect to project policies and primary layer participation for certain contractors. No substantial changes to carrier participation in other lines.</td>
<td>Continue monitoring appetite changes for contracting exposures.</td>
<td></td>
</tr>
<tr>
<td>CLAIMS</td>
<td></td>
<td>Adverse claims trends impacting contractor professional liability policies on heavy civil projects. Poor loss development also affecting rectification coverage in particular.</td>
<td>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.</td>
<td></td>
</tr>
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</table>

Environmental

Environmental – Q1 2022 Summary

Emerging contaminants such as PFOA/PFOS/PFAS and 1,4-Dioxane continue to take center stage in the environmental market and will for the foreseeable future. While many carriers are reviewing sites on a case-by-case basis some carriers are beginning to place broad exclusions on risks in certain states due to increased scrutiny from regulators. We anticipate continued tightening around coverage for PFOA/PFAS and 1,4-Dioxane as claims frequency tied to these emerging contaminants continues to increase. We also expect claims associated with environmental justice issues to increase in the coming year.

We anticipate premiums to continue to trend up anywhere from 3% to 10% depending on the line of environmental coverage.

Markets continue to favor shorter policy terms for certain classes of operation risk, and while 10-year options remain available for most transactional and some redevelopment deals, many carriers continue to steer away from offering a full 10-year option.

Carriers and clients alike are beginning to express greater concern for the risk of environmental claims associated with climate change and how issues such as sea level rise and flooding may reopen once closed environmental cases. This will be another area to pay close attention to throughout 2022.

Lastly, The American Society for Testing and Materials (ASTM) has put the new standard for Phase I Environmental Site Assessments into effect (ASTM 1527-21) This is the fifth revision of the environmental professional industry standard governing the practice and process for conducting Phase I Environmental Site Assessments.

Environmental Site Assessments.
### Contractors Pollution Liability (CPL)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>PRICING</td>
<td>3% to 5%</td>
<td>Renewal policies continue to see modest increases in pricing. Transactional placements are experiencing an uptick in pricing when meaningful coverage is provided.</td>
<td>5% to 10%</td>
<td>Markets will continue to approach business selectively and actively pursue low risk/low premium placements which will have a downward pressure on renewals. Market interest for long-term transaction placement is decreasing, causing upward pricing pressure.</td>
</tr>
<tr>
<td>LIMITS</td>
<td>Limits remain abundant with most carriers offering up to $25M in the aggregate. Additional limits at competitive pricing are rampant.</td>
<td>We expect limit and capacity to remain strong as this product is desirable for carriers.</td>
<td>Ample limits available for most risks. Abundant capacity in the marketplace with new entrants entering into marketplace. Heavily contaminated sites posed for redevelopment have ample but smaller market interest. Quota share arrangements provide most limits for complex placements.</td>
<td>Availability of limits is expected to increase for shorter term placements — five years or less, for example. Arranging higher limits for long term placements will become increasingly difficult.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td>Wide range of retention levels are available. Lower retentions available through online portals for practice policies.</td>
<td>Retentions remain stable for practice policies. We are beginning to see a slight uptick in retention levels for project specific policies.</td>
<td>Retentions have remained generally static. Less challenging risks have smaller retentions. More complex remediation and redevelopment risks are north of $100,000 per pollution event.</td>
<td>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.</td>
</tr>
<tr>
<td>COVERAGE</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>We do not expect significant pull back in coverages over the course of the next 12 months.</td>
<td>Carriers continue to extract coverage associated with emerging contaminants including PFOS/PFOA/FFAS and 1,4-Dioxane. Carriers are placing broad exclusions for these contaminants in states that have more restrictive policies such as New Jersey.</td>
<td>Handling remediation coverage knowns vs. unknowns and crafting coverage accordingly is becoming increasingly more 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.</td>
</tr>
<tr>
<td>CARRIER</td>
<td>Balance Partners has entered the CPL marketplace and is offering coverage on Lloyd’s paper. Existing carriers continue to increase their appetite for smaller recurring policies.</td>
<td>We do not foresee any markets exiting the CPL space as it remains very profitable.</td>
<td>Balance Partners is offering a limited site pollution program which may be favorable for clients seeking basic coverage.</td>
<td>No significant changes forecasted in the next 12 months.</td>
</tr>
<tr>
<td>CLAIMS</td>
<td>Claim frequency continues to increase as projects come online.</td>
<td>We anticipate that claim frequency will continue to increase over the next 12 months with project restarts and more contractor activity.</td>
<td>Mold, lead-based paint and asbestos claims are on the rise. There is continued pressure on emerging contaminants as states are setting their own regulations. Damages to the environment and environmental justice initiatives are trending upward.</td>
<td>We expect environmental claims activity to continue to rise through the year as more people re-emerge from COVID-19.</td>
</tr>
</tbody>
</table>
2022 First Quarter Overview

Legal – Q1 2022 Summary

Lines of business particular to the practice and the business of law have shown a bit of stabilization to begin 2022. While the overall market for lawyers’ professional liability (LPL) was stable to slightly up, cyber and employment practices liability continue to experience significant adjustments.

Lawyers’ Professional Liability

The LPL market remained relatively stable in Q1 2022 with pricing largely dependent on specific risk factors, including size of firm, geography and areas of specialization. Carrier partners are reporting book-wide rate increases between 4% and 8%, with our clients averaging about a 2% increase. Smaller firms continue to enjoy mostly stable rates with middle market and larger firms seeing modest increases. Certain areas of practice are seeing more significant rate increases, including estate probate and family law practitioners. Many carriers are putting an increased emphasis on firm revenues to determine pricing and retentions, instead of relying solely on headcount to determine rate. Excess pricing remains competitive, capacity in the market space continues to expand.

Employment Practices for Law Firms

Law firms are seeing increased rates in employment practices liability insurance ranging from 20% to 30%. This is being driven by concerns over COVID-19 related claims, vaccination requirements and return-to-work policies. As the workforce begins the “return to work” phase of COVID-19, it will be interesting to see if claims frequency rises. There continues to be an uptick in claims relating to gender discrimination and pay equity in the law firm space. Reduced limits on primary, particularly in historically problematic states such as CA, NY and NJ, are common. Increased retentions are often common in these states as well.

Other Management Lines for Law Firms (D&O, Fiduciary and Crime)

Claims relating to COVID-19, vaccination requirements and work-for-home continue to increase, driving pricing in all these lines higher. Limits and retention structures are being closely monitored to insure sharing of the risk. Social engineering and business email compromise are also generating claims activity in these segments. Pricing increases are ranging from 10% to 30%.

Lawyers’ Professional Liability (E&O)

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<tr>
<td>$ PRICING</td>
<td>4% to 8%</td>
<td>Overall rates have begun to stabilize, but varies greatly depending on the size, location and specialty of the firm. Small firms may see flat to slight increases, where middle market are seeing 4% to 8% increases. Larger firms that do not specialize or specialize in higher risk areas of practice such as estate probate and trust, collection, high end corporate and family law are seeing even greater increases.</td>
<td>3% to 15%</td>
<td>Pricing is expected to continue to rise in specified segments due to expected increases in claims activity. Some pricing increases could be mitigated, particularly in the excess markets with carriers entering the line of business.</td>
</tr>
<tr>
<td>LIMITS</td>
<td>✓</td>
<td>Most carriers are capping primary limits at $5M, with a few still willing to offer $10M. Quota share options continue to rise in popularity. Excess limits are still widely available up to $10M in capacity, depending on attachment point.</td>
<td>✓</td>
<td>A conservative approach to primary limits is expected to continue and the increased utilization of quota shares to manage insurer risk.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td>✓</td>
<td>Carriers have increasingly focused on matching the size of the retention with revenues and size of firm, particularly in the middle market to large firm space.</td>
<td>✓</td>
<td>More carriers are expected to shift their focus to revenue and attorney count to determine adequate retention for firms.</td>
</tr>
<tr>
<td>COVERAGE</td>
<td>✓</td>
<td>Coverage remained relatively stable throughout 2021. Some increased add-in coverages with low sublimits (subpoena, crisis management) are becoming standard.</td>
<td>✓</td>
<td>Increased exclusions related to silent cyber and social engineering are expected as these claims continue to rise.</td>
</tr>
<tr>
<td>CARRIER</td>
<td>✓</td>
<td>No significant carrier exits from the line with a few new carriers/MGAs entering the space. The market is still heavily dominated by a half dozen carriers.</td>
<td>✓</td>
<td>Many carriers that entered the market to take advantage of hardening cyber and D&amp;O prices are beginning to explore professional lines. We expect more carriers to enter this segment in 2022.</td>
</tr>
<tr>
<td>CLAIMS</td>
<td>✓</td>
<td>Severity of claims continues to rise driven by higher defense costs and larger deals with more sophisticated clients. Frequency has stabilized or decreased due to the slowdown in litigation and related areas.</td>
<td>✓</td>
<td>Carriers are expecting an increase in the number of claims as a result of COVID-19 and economic downturn. Severity of claims is expected to continue to increase.</td>
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Some carriers are beginning to exclude social and engineering silent cyber, making the coordination of E&O and cyber coverages more important than ever.
# Cyber for Law Firms

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<tr>
<td><strong>PRICING</strong></td>
<td>30% to 200%</td>
<td>30% to 200%</td>
<td>Pricing is likely to continue to increase due to increases in claims activity and historically inadequate pricing as compared to exposures.</td>
<td></td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Many insurers decreased limits available on primary or refused to increase limits to meet law firm demands. This resulted in the need for more participants to meet client demand for limits.</td>
<td></td>
</tr>
<tr>
<td><strong>RETENTIONS</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Retentions will continue to rise, as well as requirements for co-insurance or other risk sharing techniques.</td>
<td></td>
</tr>
<tr>
<td><strong>COVERAGE</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Ransomware coverage is closely scrutinized and often sublimited or eliminated. MFA is a standard requirement for coverage and firms unwilling or unable to implement will see reduced coverage.</td>
<td></td>
</tr>
<tr>
<td><strong>CARRIER</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Underwriting guidelines tightening and reduced carrier appetite for the class of business was common as activity targeting law firms became more common.</td>
<td></td>
</tr>
<tr>
<td><strong>CLAIMS</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Increased ransomware and social engineering claims against law firms continue to become public. Several hacking incidents involving large firms heightened concern about increased claims.</td>
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# Employment Practices for Law Firms

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<td><strong>PRICING</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>COVID-19 concerns, including issues respecting vaccination requirements and return to work, are driving rates higher. High profile wage disparity and gender discrimination claims have specifically impacted law firm pricing.</td>
<td></td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Many carriers are reducing limits available due to ongoing severity concerns.</td>
<td></td>
</tr>
<tr>
<td><strong>RETENTIONS</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Retentions are increasing, particularly in difficult geographies (CA, NY and NJ).</td>
<td></td>
</tr>
<tr>
<td><strong>COVERAGE</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Carriers without specific law firm targeted forms are pulling back on coverages such as failure to make partner. Other restrictions in coverage, including sublimits for wage and hour claims, are becoming more prevalent.</td>
<td></td>
</tr>
<tr>
<td><strong>CARRIER</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Shifts in capacity are expected as carriers become more conservative about providing specific coverages for law firms. Loss of American Bar Association endorsement may narrow Chubb's leadership in line of business.</td>
<td></td>
</tr>
<tr>
<td><strong>CLAIMS</strong></td>
<td>20% to 30%</td>
<td>10% to 30%</td>
<td>Claims activity and severity are on the rise as firm's struggle with return to work issues and historical gender/racial disparity.</td>
<td></td>
</tr>
</tbody>
</table>

Note: The above information is a summary of market conditions and trends in the cyber and employment practices sectors for law firms as of Q1 2022.
The life science product liability market has remained fairly consistent. New insurers continue to enter the life science space offering different options for the insured in both limits and product offerings. The pricing in this area has increased slightly due to an increase in frequency and severity of claims. Renewal rates have been stable, though increases are becoming more frequent. There is ample capacity and competition for both primary and excess layers in the domestic market, with a handful of aggressive London syndicates entering the market. However, clients are not purchasing the limits that they once used to, due to overall portfolio pricing increases.

Life science companies have had to be nimble and adjust how they do business since the onset of the pandemic. Adjustments have included increased digitization of virtually every aspect of their business, increased collaboration with companies and organizations they may not normally have done business with, adjusting how they handle their supply chains, as well as getting products to market. With all of these adjustments comes an increased need for product and product recall coverage capacity, which continues to be an issue.

The legalization of medical and recreational marijuana has been steadily gaining headway at the federal level, as more than half of US states have legalized some form of medical or recreational marijuana. But coverage for dispensaries and other cannabis related business remains difficult with fewer options and higher premiums than your typical business.

Life Science – Q1 2022 Summary

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Management and Professional Liability – Q1 2022 Summary

As we started to see at the end of 2021, client differentiation remained key to mitigate the effects of the hard cyber market and take advantage of the stabilizing D&O market. Carrier focus continues to be on the quality of the client’s risk profile. Several factors that are considered in this assessment are industry, financials, loss history, risk mitigation and corporate governance. Pricing and retention adjustments are being made directly in response to the underwriting of these factors.

Three key trends we saw in Q1 2022 in the management and professional liability line of business are as follows:

- **D&O rate increases have stabilized in the first quarter of 2022 and we are now starting to see low single digit increases and, in a few cases, decreases. Excess capacity is plentiful and is driving downward pressure and is usually the sign that the hard market will be coming to an end.**

- **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. ESOPs will see even greater rate increases along with those that have challenged risk profiles. This line of business continues to be challenging for insureds.**

- **The cyber market continued to be challenged in the first quarter of 2022 and we see this trend continuing in the second quarter. Capacity and retention management continue to be the theme for all carriers that write this business. Significant pricing and retention increases coupled with some coverage pull backs, continued to be the trend in the quarter.**

The D&O marketplace continued to show signs of stabilization. In the privately held and not-for-profit company space, we saw rates range from flat to 15% compared to 5% to 20% in the second half of 2022. Carriers for the most part have achieved their limit management/rightsizing goals and we 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.
In employment practices liability, COVID-19 related claims increased and we expect this trend to continue. Industry, employee count and corporate governance are the key underwriting criteria in this line of business.

Ransomware continues to be the driving factor of rate and underwriting concerns for the Cyber insurance market. While there is hope on the horizon that ransomware attacks may decrease in frequency and severity due to the markets push for stringent cyber controls (as well as government focus to curb ransomware threat actors), Insurers have yet to feel the effects.

As a final point, Carriers have scaled back on capacity offerings for dependent business interruption. In short, it will be important for clients to work with their broker to mitigate any reductions of coverage where possible.

Sources:
* 2022_DSIR_Report.pdf (datasrvr.com)
* Law enforcement pressure forces ransomware groups to refine tactics in Q4 2021 (coveware.com)
* IBM Security X-Force Threat Intelligence Index | IBM

The average ransom payment for Q4 of 2021 was $322,168, up 130% from the previous quarter, and the average cost of a data breach was $9.05M for 2021, up 5% from 2020.*

Further, systemic risk (a single event affecting multiple Insureds) continues to be an underlying factor regarding capacity deployment and carrier appetite. In short, the concerns and trends we saw in Q4 of 2021 have carried over to Q1 of 2022 and are expected to continue through Q2 of 2022.

A client’s ability to procure cyber coverage continues to be heavily based on the cyber controls implemented across the company’s network. Clients that want to mitigate market increases and/or have access to comprehensive coverage need to ensure key cyber controls are in place such as multifactor authentication, endpoint detection and response, emailing filtering tools, privileged access management, as well as having detailed action plans for employee training and threat response. Clients should also prepare for Underwriters to review not just internal security controls but conduct vulnerability scans of public facing domains.

Scope of coverage at renewals will not just be determined by a client’s controls but may be influenced by current events and a client’s dependence on third party vendors. Another trending topic for Q1 2022 was around the events occurring in Ukraine and Russia. These events highlighted the lingering concerns around aggregation and systemic risk causing some Carriers to broaden exclusionary language regarding infrastructure, government actions, natural perils, and war. In addition, certain widespread events such as Solarwinds and Log4j have caused some markets to implement vulnerability related exclusions.

### Public Company Directors & Officers Liability

<table>
<thead>
<tr>
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<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
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<tbody>
<tr>
<td>Pricing</td>
<td>0% to 15%</td>
<td>The market shows signs of stabilization but remains in a hardened state. Market conditions continue to support 5% - 15% 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. IPO renewals will continue to be more challenging versus the traditional public company renewal.</td>
<td>0% to 15%</td>
<td>We expect little to no deviation in the primary rates for 2022 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 factors. Environmental, Social and Governance (ESG) will continue to play a large part in the underwriting of policyholders. Those policyholders with strong ESG will ultimately have better outcomes.</td>
</tr>
<tr>
<td>Limits</td>
<td>v</td>
<td>Insurers continue to push capacity management initiatives, especially on difficult risk profiles, IPOs and SPACs.</td>
<td></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>
</tr>
<tr>
<td>Retentions</td>
<td>v</td>
<td>Carriers will continue to require greater commitment and assumption of risk by clients by increasing the self insured retention levels.</td>
<td></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>
</tr>
<tr>
<td>Coverage</td>
<td></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>
</tr>
<tr>
<td>Carrier</td>
<td></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>
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<tr>
<td>Claims</td>
<td></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 continues to make 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 SEO 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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The average ransom payment for Q4 of 2021 was $322,168, up 130% from the previous quarter, and the average cost of a data breach was $9.05M for 2021, up 5% from 2020.*
Private and Not for Profit Company Directors and Officers Liability

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<tr>
<td>PRICING</td>
<td>0% to 15%</td>
<td>Pricing 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 attribute and the overall market.</td>
<td>0% to 15%</td>
<td>We expect these claims trends to continue into the balance of 2022.</td>
</tr>
<tr>
<td>LIMITS</td>
<td></td>
<td>Insurers continue to manage limit capacity. We are seeing some stabilization due to corrective action taken over the last 24 months.</td>
<td></td>
<td>Capacity will remain strong within the GPL marketplace. The market of insurers willing to write primary is still limited but broad enough to generate steady competition.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td>The retraction of coverage terms is trending towards leveling. Portfolio corrections appear to be plateauing.</td>
<td></td>
<td>We expect rate increases to continue to come down over the balance of the year as the market levels off after 8 straight quarters of double digit increases.</td>
</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td>Trend continues toward maintaining the status quo with diminished appetite for coverage expansion.</td>
<td></td>
<td>We expect rate increases to continue to come down over the balance of the year as the market levels off after 8 straight quarters of double digit increases.</td>
</tr>
<tr>
<td>CARRIER</td>
<td></td>
<td>We continue 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 established business with less than $100M in revenues is becoming a Carrier focus.</td>
<td></td>
<td>We expect these claims trends to continue into the balance of 2022.</td>
</tr>
<tr>
<td>CLAIMS</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>
<td></td>
<td>We expect rate increases to continue to come down over the balance of the year as the market levels off after 8 straight quarters of double digit increases.</td>
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General Partnership Liability

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<tr>
<td>PRICING</td>
<td>10% to 15%</td>
<td>The market continued to stabilize in Q1 but remained in a hardened state. Primary and excess pricing has increased 10% to 15% versus Q1 2021. 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 10%</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>
<tr>
<td>LIMITS</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 $15M on new programs. Existing towers are able to maintain $10M tranches.</td>
<td></td>
<td>We expect rate increases to continue to come down over the balance of the year as the market levels off after 8 straight quarters of double digit increases.</td>
</tr>
<tr>
<td>RETENTIONS</td>
<td></td>
<td>Retentions have generally remained stable year over year with some GPs seeking material increases in response to significant fundraising or claims activity.</td>
<td></td>
<td>We expect rate increases to continue to come down over the balance of the year as the market levels off after 8 straight quarters of double digit increases.</td>
</tr>
<tr>
<td>COVERAGE</td>
<td></td>
<td>Breadth of coverage is stable in comparison to Q1 2021 with a focus on broadening regulatory and investigations coverage.</td>
<td></td>
<td>Subject to an unexpected event driven occurrences we expect the breadth and scope of coverage to remain unchanged.</td>
</tr>
<tr>
<td>CARRIER</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>
<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>
<tr>
<td>CLAIMS</td>
<td></td>
<td>The SEC continued to focus on the disclosures of investment risks and conflicts of interest, fees and expenses, liquidity, valuation of assets, and controls around material non-public information. Portfolio company bankruptcy and employment practices litigation remain the core drivers of GPL paid claims.</td>
<td></td>
<td>We expect these claims trends to continue into the balance of 2022.</td>
</tr>
</tbody>
</table>
Fiduciary Liability

**Pricing**

Fiduciary liability rates are up 5% to 35%+ driven by excessive fee litigation. Insurers are focusing on plans with assets greater than $100M where previously the threshold was much higher. E&O policies will see even greater rate increases along with those that have challenged risk profiles.

**Limits**

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.

**Retention**

Carriers are increasing retentions substantially due to the claims environment 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.

**Coverage**

Carriers are trying to reduce their potential exposure to these excessive fee and expense claims. This is usually attempted or achieved by adding a sublimit, separate retention,coinsurance and using exclusionary wording for these claims.

**Carrier**

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.

**Claims**

There is no expectation in the shift in market leadership among the carriers.

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

We expect this trend to continue toward more restrictive policy wordings and coverages based on all the recent claims activity.

There is no expectation in the shift in market leadership among the carriers.

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 lawsuits will even further increase the burden.

**12 Month Forecast**

Markets will continue to monitor developments and trends with excessive fee litigation and other exposures that are challenging their profitability. Size of plan assets is a key factor that will impact pricing. E&O policies and those companies with challenged risk profiles will continue to see even greater rate increases.

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**SPAC**

An increase in the frequency of securities class action litigation against SPACs in 2021 leveled off in Q1 2022 leading to pricing stabilizing for teams viewed by the market as qualified. Teams with targets in high risk sectors such as de-SPAC transactions are maintaining average pricing. Excess price remains competitive due to an increase in excess only market capacity.

There is still capacity in the marketplace to support insureds that wish to obtain coverage with 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.

Retentions for indemnifiable loss and entity securities claims have remained stable, averaging $5M per claim, while limits focused on targets in emerging markets and Asia can expect above average retentions.

The market of primary insurers in the US and London remains very limited. The excess market has seen new entrants in both the US and Bermuda. Capacity for insured domiciled outside of the US and Europe, specifically those from Asia, is limited.

SPAC securities class action filings dropped off in Q1 2022 due mostly to the fact that less De-SPAC transaction occurred. New direct actions suits being brought in Delaware state court, alleging breaches of fiduciary duty similar to the pleadings made in the MultiPlan case, are concerning underwriters who will now need to contemplate the risk of funding defense costs in both federal and state courts simultaneously.

The SEC has voted to propose a number of new rule changes intended to treat De-SPAC transactions the same as IPOs from a regulatory perspective. This would remove certain protections for issuers while increasing the potential avenues to bring suits against both the SPAC and target company teams.
### Employment Practices Liability

#### METRICS

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<td><strong>PRICING</strong></td>
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<td>▪</td>
<td>10% to 20%</td>
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<td>0% to 20%</td>
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Employment practices liability has remained relatively stable at this time despite the pandemic and global lockdowns have not yet materialized like we initially thought might happen.

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.

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

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

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

We expect a consistent monitoring of regulatory trends resulting in retention adjustment to persist throughout the year.

Focused event-driven restrictions have been introduced (BIPA) in response to COVID-19 (U.S.). Carriers are beginning to present uniformity in approach as well as restricting the scope of coverage countrywide.

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

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 EPL as a blended product with the directors and officers liability.

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

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.

Claims volume is expected to continue its steady increase. As offices reopen, 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

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<td>▪</td>
<td>100% Minimum</td>
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<tr>
<td>▪</td>
<td>100% to 250% Minimum</td>
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While there was a small drop of ransomware events the first two months of the year (which many commentators correlate to the refusals of major threat actors to incidents occurring in Ukraine/ Russia), cyber events and claims have not slowed down. Business email compromise continues to be a source loss driver and ransomware claims remain frequent. All industries can expect increases due to rate corrections; however MSPs, manufacturers, and other large data aggregators may see the largest upswings in premiums.

Carriers continued to manage their capacity to $5M or below across their portfolio. Sublimits are becoming more common and should be expected particularly for dependent business interruption. Insurers’ desire for dependent Business Interruption as a coverage area lacking proper underwriting and are therefore scaling back the once considered “throw-in” coverage. Sublimits or co-insurance may be applied to ransomware related loss when cyber controls are not optimal.

Carriers continued to seek retention increases on tougher industry classes, companies lacking controls, or with claims activity. Waiting periods are also rising on the Business Interruption coverage. In some instances, between 24 and 48 hours.

Carriers continued to reduce or exclude ransomware coverage when controls are less favorable. Many insurers are looking to address aggregation concern by amending policy language. Notable changes include Chubb’s inclusion of “widespread event” coverage and other Carriers tightening of extra-ordinary wording, particularly around war and infrastructure loss. Media and BIPA concerns seem to have temporarily taken a backseat to bigger concerns around potential causes for widespread loss.

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 correlation for high risk industries or if controls are sub-optimal. Clients that want to mitigate decreases to Dependent Business Interruption should prepare to demonstrate strategic initiatives to mitigate vendor dependency and risk.

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Carriers will emphasize the requirement for quality ransomware and cybersecurity controls. Use of non-invasive scans (Bitbright, Security Scorecard and Covenant) during the underwriting process will continue and questions about findings/potential issues (i.e. spot tests) will need to be remediated. Additional questions around vendor management, business continuity plans and employee training will continue to be part of the underwriting process.

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Cyber claims activity is expected to continue to increase. The impact of large headline cyber events will impact carrier 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

We anticipate continued increases due to malware/ransomware attacks and especially for tech E&O firms and those with cyber coverage on their E&O policies. This trend will continue through at least mid-2022, as the new baseline started to be set during the second half of 2021. We recommend caution, but acknowledge the potential for renewals during Q4 of 2022 to realize more reasonable increases as the market stabilizes relative to recent quarters.

Higher than $5M limits continue to be hard to obtain, 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 a-crime sublimits are also the norm and cannot be bought up in many cases.

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. Co- insurance on e-crime, social engineering and contingent business interruption will become more common.

For Tech E&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. We have seen some carriers rolling out new forms and endorsements, with restrictions on coverage and recommend careful review.

Many traditional carriers have exited the marketplace or changed appetites to distance themselves from smaller operations that do not have a sophisticated tech team.

We continue to see claims related to malware/ransomware attacks, especially targeting tech firms.

Licensed Professionals – Accountants / Allied Medical

We are continuing to see smaller (1 - $5 partner) firms get increases at renewal as carriers look to pick up some rate. 10% increase is the average. Firms with up to 20 partners will see more modest increases at about 5%.

We expect to 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 sit much higher on towers than their current positions.

Markets will continue to offer competitive premiums for renewals in most classes with slight rate increases continuing. Excess options will still be readily available and priced well.

We expect to continue seeing rates increase for new business as well as in their renewal options. Once the adjustments have been made, retentions should remain static as well as in their renewal options. Once the adjustments have been made, retentions should remain static.

Limits offered consistent with the insureds assets/revenues. Med-mal will continue their mandatory limits. Other classes have seen less access to larger primary limit offerings.

Carriers continue to increase retention levels for certain risks. Allied medical is seeing $15K average retentions as business consultants raised from $5K to $10K & $15K+.

We will see this trend continue through the quarter of 2022 as 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 in the second half.

Coverage terms have remained steady with a soft push back on defense outside the limits options.

There have been changes in appetite on the accountants professional marketplace but the carriers remain in play. Other areas have not seen much activity.

We expect to see defense costs options decrease in availability and policies for larger firms will get tougher on subsidiary and acquisition activity. We see lists of M&A activity and carriers are not wanting to wait until the renewal to pick up premium for additional operations.

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 are given/baked.

Claims are expected to rise in severity for mismangement of clients cases and for CPAs dealing with PPP loan repayment penalties and filings for their clients.

Sevita
tion of diagnosis and prognosis are given/baked.
Private Equity – Q1 2022 Summary

Following the busiest quarter on record in Q4 2021, representations and warranties (R&W) submission flow has normalized somewhat in Q1 2022. While there still remains a high level of submissions from a historical basis, Q1 2022 saw a mixed bag from a bandwidth and rate on line perspective. While some markets are still experiencing bandwidth issues, others seem to have normalized their operations. Pricing varied somewhat from market to market. Some markets are trying to maintain the higher rates from Q4 2021, while others have returned to rates closer to Q1 and Q2 2021 levels.

The greatest 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.

Contributing to the higher pricing has been an increase in claims severity over the past several years. Smaller transactions (under $50M in enterprise value) have also become more difficult to insure as have acquisitions of target companies in highly-regulated industries, such as financial services and healthcare.

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.

We expect current trends to continue over the coming months.

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<td><strong>CARRIER</strong></td>
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<td><strong>CLAIMS</strong></td>
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### Private Equity

**R&W Insurance**

- 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 offered consistent with the insureds assets/revenues. Outsized limit offerings typically needed a third-party contract request to be considered.

- Small business kept the lower retentions and as you move up the revenue scale we see more requests from carriers to raise the retentions.

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

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

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

- We'll continue to see slight increases in premium until technology allows the MPL space to automate the underwriting and reduce costs.

- We will continue starting to see primary limits capped at $5M for many lines, with XS options reasonably attainable.

- 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.

- Coverage will continue to be solid and competitive. More favorable language will be easier to win on the MPL forms.

- We expect more opportunity in this space with more entries into the market.

- We should see more claims coming in from COVID-19 consultants as well as return to office safety consultants.
The R&W insurance market normalized somewhat in Q1 2022. Pricing varied from market to market. Overall, pricing for a customary policy remained flat or decreased by ~10% to 15% since Q4 2021. However, those rates would still be +25% to 30% over Q1 2021.

There has been no meaningful change to the limits being offered by insurers. Most primary R&W insurers are able to offer a $50M limit (or larger) policy for any particular transaction.

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.

As a general matter, breadth of coverage has been stable in comparison to Q4 2021. For target companies in highly-regulated industries (including healthcare), some insurers have been more selective to quote coverage in recent years.

There continues to be new insurers (MGA) beginning to write R&W insurance. There have been 3 new entrants in the last 6 months. Currently there are 23 insurers.

Over the past several years, R&W insurance claim severity has increased steeply. 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.

Casualty – Q1 2022 Summary

The first quarter of 2022 saw the market shift in a slight but perceptible fashion in some respects, giving a much-needed breather in what has been an unrelenting two years of steady rate increases for nearly all insureds. While incumbent markets continue to push for at least single-digit primary casualty rate increases, most have been charged with significant new business goals for 2022. A stabilization trend that had begun six months ago seems to be cautiously gaining a foothold, at least for favorable classes of real estate and well-performing insureds. There is a sense that at least the possibility of negotiation has returned, even if not fully realized.

Still, the market remains solidly in a conservative stance, with incumbent markets still holding considerable advantage on renewals and limited competition, especially for habitation risks.

With incumbents more willing to commit to firm pricing earlier in the renewal process we expect that the heavy marketing efforts during the last two cycles may taper off, especially since these efforts have generally confirmed whatever potential viable competitors are available for any given risk. Targeted marketing to viable carriers instead of exhaustive blanket efforts for little return may prove to provide adequate and satisfactory results, as we are far from a robust market competition phase. Agreeing on primary pricing early will allow for more time spent in marketing the excess tower, where the largest increases in premium continue.

COVID-19 concerns have somewhat subsided over the last quarter, as variants such as Omicron did not result in significant business pull-back.

Challenging risk aspects continue:

- Limited competition – certain geographies with adverse litigation and/or crime profiles have limited competition, whether entire states (GA, NY) down to specific counties (Miami-Dade).
- Increased coverage restrictions – upick in coverage restrictions such as:
  - Assault/battery
  - Habitability
  - Firearms
  - Human trafficking
  - Cannabis or controlled substances
  - Animals
  - Sexual molestation/misconduct
- Continued concerted underwriting with more prevalent focus on crime scores, human trafficking training/protocols and confirming adequate contractual risk transfer practices.

Commercial real estate risks (retail, office, industrial/warehouse) remain the most attractive class, garnering the most interest and potential competition, particularly if there is significant support of workers’ compensation premium. On the other end of the spectrum, nonrenewed risks continue to be extremely challenging — very often, the only option to replace coverage is found in the non-admitted marketplace, with insurers commanding healthy rates paired with bare-bones coverage and often significant exclusions.
Insurers remain cautious on taking on new hospitality risks, as alternative use of facilities (particularly in large urban centers) still present attractive income options to some insureds. Incumbent insurers are still easily retaining profitable larger and/or upscale hospitality accounts, although there are a few markets actively providing competition in this sector. Mixed portfolios with a few hotels are not declined as quickly as in prior quarters, signally the potential for continued market thaw in this class—particularly if there are attractive supporting assets.

The habitational market has not improved during the last quarter as far as finding competitive markets to challenge incumbents, which continue to collect at least modest increases on rate at renewals. Frustratingly, incumbent insurers continue to hold all the cards if willing to remain on risk. Nonrenewals continue for poorly performing risks and/or more stringent underwriting guidelines. Options are extremely limited for nonrenewed accounts, with a marked percentage of insureds finding coverage only in the non-admitted market. 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. The use of crime scores as underwriting criterion has increased, with declinations, restricted coverage or coverage sublimits resulting.

The umbrella/excess liability market continued to be unsettled, with the slimmest glimmer of moderation seen from incumbent markets and only on upper tower layers as incumbent lead insurers continue to easily hold onto favorable renewals. Factors contributing to the volatility in the umbrella/excess liability over the past two years (social inflation; claims severity/frequency; and trends around wrongful eviction, assault/battery, sexual abuse/molestation and human trafficking) are still driving contraction in terms of capacity offered, nonrenewals and often significant premium increases. The lack of market participation for habitational and hospitality risks continue to be disproportionately adversely impacted, but there is a brightening spot of competition in layers excess of the first $15M to $20M for commercial/industrial/office real estate.

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 for real estate are continuing to have rate increases, although generally 10% or less, as insureds in this sector 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. This line of business is not normally a driver for the real estate sector.

Overall, there are signs of a moderating market on the horizon, particularly in the primary layer. With insurers being challenged with hefty new business revenue goals in 2022, this pressure is encouraging underwriters to be more open to dialogue and exploration of opportunities for some classes of business. Mild to moderate competition is returning in the excess liability market, but only excess of $15M attachment points and only for the most favorable classes of real estate and best-performing insureds. We anticipate strict underwriting guidelines and restrictions to continue where warranted, but for markets to be opportunistic in advantageous pockets.

Property – Q1 2022 Summary

After a prolonged period of turbulence in the property market throughout 2021 that saw significant changes to account rates, policy terms and conditions, the first quarter of 2022 brought stability for some clients and further uncertainty for others. Soft occupancy accounts—such as those comprised of primarily class A highly protected office buildings—as well as those performing with few or no losses continued to see less severe rate increases ranging from flat to mid/high single digit; this was driven, in part, from higher market competition due to healthy local and international industry capitalization putting pressure on incumbents to retain attractive risks. However, underwriters continue to pull back the reins on the broad coverage terms and conditions normally expected for softer occupancies, even for accounts with excellent loss history.

Conversely, accounts such as those with adverse loss activity, less desirable occupancy class (i.e. habitational and hospitality), or significant exposure in natural catastrophe-prone geographical areas are seeing premium increases and heightened restriction of terms and conditions, with single carrier programs faring worse than shared and layered due to limited single carrier capacity. Convective storm, again highlighted from the recent devastation from tornadoes in the Midwest, continues to be a peril in the spotlight due to frequent and severe loss events. Following the 1/1 treaty reinsurance renewals, accounts with heavy Florida wind exposure have seen at minimum double digit increases to pricing and accounts placed with AmRisc (also known as Waypoint Wholesale) have been instructed by their management to expect increases in the 25% to 75% range and significant reduction in wind capacity offered at renewal. Some carriers traditionally writing heavy Florida accounts are even imposing 10% deductibles for named windstorm.

A contraction of capacity of markets writing in these states, particularly single-carrier capacity, continues to challenge an already distressed market which is clearly evident with more shared and layered programs and alternative market capacity (particularly E&S) participation. Further, high claims activity from other climate-related losses such as wildfires, flooding and hurricanes has continued to impact capacity, retentions and pricing throughout Q1.

Underwriter scrutiny remains high around reported contingent business interruption values as supply chain issues continue to complicate the conducting of normal business activities; this knock-on effect also results in business interruption values being more closely analyzed with more questions asked, especially when done in conjunction of values (in general) trending upwards due to COVID-19 recovery efforts.

Valuation and water-related losses continue to be at the forefront of key concerns highlighted by markets. Benchmarking data, high labor costs and supply chain issues coupled with significant loss creep have been cited as critical reasons for underwriters to identify under reported values. To help offset this, margin clauses and coinsurance subjectivities continue to be the norm, particularly in the habitational occupancy class. Every insured will be expected to trend replacement cost values upwards to keep on par with inflation, and if it is not done, carriers will do that on their own. Higher and separate water damage deductibles are also widely used on loss sensitive accounts; underwriters are advocating loss control initiatives, both physical and human-element, as a measure to help insureds control this exposure.
Auto Liability Conditions

**Pricing**

- 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 heavily underwritten and rated, although premiums are not generally significant.

**Limits**

- 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.

**Retention**

- 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/replacing automobiles continues to steady rise.

**Coverage**

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

**Carrier**

- 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 accessed in the non-admitted market.

**Claims**

- The automobile liability claims front continues to present very significant exposure to insurers. Severe claims can result from a single occurrence, both from owned and non-owned auto exposure. Distraught and/or stressed driving contributes considerably to accidents. While RE clients overall generally have less vehicle exposure than do other auto-heavy risks, hospitality risks using shuttle vans carry the risk of multiple passenger injuries.

General Liability Conditions

**Pricing**

- Insureds in office/retail/industrial sectors continue to sustain relatively stable renewals as competition for these risk profiles is more robust. Well-performing and favorable classes of RE clients may obtain flat to 15% increases — poorer performing insureds can expect 30% to 50% increases. Nonrenewed habitual accounts continue to struggle to keep rate increases under 30% to 50%.

**Limits**

- 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.

**Retention**

- Retentions generally continue to follow the risk appetite of a particular account along with loss history. However, there are higher retentions being deployed regardless for some classes of business, such as habitational or alternative use in hospitality.

**Coverage**

- 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 or hospitality risks. These exclusions can be successfully negotiated away in some instances, but only in competitive situations.

**Carrier**

- Insurers have steadily been withdrawing from the habitual risk-market, leaving fewer and fewer admitted carrier solutions. Insurers have not completely returned to the hospitality sector although COVID-19 concerns have lessened. 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 “best of the best” in various classes is forcing continued heavy use of the non-admitted marketplace. While there has been some new insurer capacity entering the market (e.g., RISE for habitational risks), overall, primary market capacity has not increased. While COVID-19 variants prove to be less detrimental than feared, inflation and conflict in the finance sector continues to limit competition. Insurers that desire to stay on risk are nearly always the most competitive even with significant rate increases.

**Claims**

- General liability claims and insured combined ratios are continuing to be driven by adverse litigation trends exacerbated by long-term inadequate pricing. Concern over high payouts for violent crimes or the potential for same is forcing continued heavy use of the non-admitted marketplace.
### Workers’ Compensation

<table>
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<th>METRICS</th>
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<th>Q1 2022 COMMENTARY</th>
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<tbody>
<tr>
<td><strong>PRICING</strong></td>
<td>-1% to 1%</td>
<td>Trend is anticipated to continue through the next 12 months.</td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td>-1% to 1%</td>
<td></td>
</tr>
<tr>
<td><strong>RETISSIONS</strong></td>
<td>-1% to 1%</td>
<td></td>
</tr>
<tr>
<td><strong>COVERAGE</strong></td>
<td>-1% to 1%</td>
<td>Workers’ compensation coverages are standard regardless of insurer, with few broadening endorsements, e.g., blanket waiver of subrogation and voluntary contribution. 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>
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<td><strong>CARRIER</strong></td>
<td>-1% to 1%</td>
<td>There is robust insurer participation in this line of business. 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>
</tr>
<tr>
<td><strong>CLAIMS</strong></td>
<td>-1% to 1%</td>
<td>The impact of COVID-19-related workers’ compensation claims is limited in the real estate sector given that employees are not in the “front line” category of employment. However, with the increase in business/leisure travel, more workers have returned to the hospitality space, and claims are likely to increase.</td>
</tr>
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</table>

#### COMMENTARY

Workers’ compensation limits are statutory, so not defined by the broker or insurer. The standard limit of $1M for the employer’s liability component of coverage has remained available without issue. 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 processing the whenever and appellate to take on risk continue to pursue large retention programs. “Hybrid” or structured programs (camps, strategic comp) are also attractive options that provide certainty in ultimate cost while providing potential for return premium during well-performing years. Workers’ compensation coverages are standard regardless of insurer, with few broadening endorsements, e.g., blanket waiver of subrogation and voluntary contribution. 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. Workers’ compensation coverages are standard regardless of insurer, with few broadening endorsements, e.g., blanket waiver of subrogation and voluntary contribution. 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. Workers’ compensation claims are limited in the real estate sector given that employees are not in the “front line” category of employment. However, with the increase in business/leisure travel, more workers have returned to the hospitality space, and claims are likely to increase.

#### RETENTION

- Workers’ compensation/retention is becoming frequent. New carrier guidelines are prioritizing return premium during well-performing years. There is robust insurer participation in this line of business. Many insurers look to lead with sizable WC exposures/premiums in the real estate sector, to bolster the often more challenging general liability performance.

#### CARRIER

- As the hospitality industry continues to recover from the pandemic shut-down, claims activity will increase. Labor shortages of experienced hospitality workers may also contribute to an increase in claims as we move into 2022. Lingering questions around working remotely and safe return to work will continue, creating potential for increased claims activity.

#### LIMIT

- Workers’ compensation/retention is becoming frequent. New carrier guidelines are prioritizing return premium during well-performing years. There is robust insurer participation in this line of business. Many insurers look to lead with sizable WC exposures/premiums in the real estate sector, to bolster the often more challenging general liability performance.

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### Umbrella Liability

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<td><strong>PRICING</strong></td>
<td>30% to 75%</td>
<td>While percentage pricing increases continue to be the most extreme for umbrella coverage, there is a sense that we are behind the worst corrective actions. Commercial risks (retail, office and light industrial) still experience the lowest increases. Rating emphasis is on cost of capacity. While exposure certainly directs 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.</td>
</tr>
<tr>
<td><strong>LIMITS</strong></td>
<td>30% to 75%</td>
<td>Increased lead attachment points of 12/25/50/100 are now common for residential and hospitality risks. However, in response to this limit increase requirement, we are seeing more primary carriers provide larger limits in quotes or lead umbrella options. Clients are reevaluating total limits purchased as risk purchasing groups become more restrictive, carriers reduce capacity and overall cost of limits increase. Quota sharing limits is common and frequently leads to more competitive outcomes. Carriers are restricting per location aggregate limits through the excess tower.</td>
</tr>
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<td><strong>RETISSIONS</strong></td>
<td>30% to 75%</td>
<td>No changes foreseen.</td>
</tr>
<tr>
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#### COMMENTARY

Last quarter’s projection remains relatively unchanged; premium increases will not subside completely, but carriers will be more ambitious to retain premiums and write new business. We expect most markets to have purged risks outside their appetite and will have aggressive new business goals. This will drive competition; however, general price expectations will persist.

#### RETENTION

- Increased lead attachment points of 12/25/50/100 are now common for residential and hospitality risks. However, in response to this limit increase requirement, we are seeing more primary carriers provide larger limits in quotes or lead umbrella options. Clients are reevaluating total limits purchased as risk purchasing groups become more restrictive, carriers reduce capacity and overall cost of limits increase. Quota sharing limits is common and frequently leads to more competitive outcomes. Carriers are restricting per location aggregate limits through the excess tower.

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#### SUMMARY

- Workers’ compensation/retention is becoming frequent. New carrier guidelines are prioritizing return premium during well-performing years. There is robust insurer participation in this line of business. Many insurers look to lead with sizable WC exposures/premiums in the real estate sector, to bolster the often more challenging general liability performance.

- Umbrella liability is becoming frequent. New carrier guidelines are prioritizing return premium during well-performing years. There is robust insurer participation in this line of business. Many insurers look to lead with sizable WC exposures/premiums in the real estate sector, to bolster the often more challenging general liability performance.

#### future outlook

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There were hopes that pricing would flatten in Q4/Q1. CAT reinsurance treaties on 1/1/22 put a damper on that. Profitable accounts with no/low loss activity along with desirable occupancy classes mostly experienced mid/high single-digit rate increases. Conversely, less desirable occupancy classes, less profitable accounts and those located in higher loss prone states (FL, LA, MS, TX) are still experiencing distressed pricing conditions (15%+).

Increased competition fueled, in part, by more capacity options offered from foreign insurers (i.e. London and Bermuda) will continue to help general pricing trend downward. We’re expecting challenging conditions specific to certain occupancy classes/accounts to somewhat continue, albeit tempered as general market conditions improve through the course of 2022.

Generally, program limits/sublimits saw little change although accounts in states prone to higher loss face greater scrutiny such as new/lower sublimits related to convective storm (wind/hail) and wildfire. Contingent business interruption values for certain account types (i.e. retail) are typically seeing a more detailed underwriting review due to supply chain issues.

Expect scrutiny on contingent business interruption values to continue until local/national/international supply chain resolutions are found. Less interest from clients to “trade” sublimits for premium savings due to market conditions improving.

As insureds have now gone through multiple renewals in a prolonged turbulent market, underwriters in general have a better level of comfort with current retentions, having seen them revised in previous renewals. However, pressure for new/higher water damage deductibles on accounts with water related loss activity is still evident, as is adequacy of retentions for insureds with heavy convective storm exposure. Even accounts without water-related losses are experiencing carriers pushing higher deductibles, which are company mandated.

With improved and less stressed market conditions predicted going forward, underwriters will have less leverage to implement adverse retention changes on insureds than in prior renewal cycles. The knock-on effect of more favorable trading conditions is less interest from clients to “trade” higher retentions for premium savings.

Overall capacity continues to be healthy — incumbent carriers are offering expanded capacity and/or new markets are offering new capital, particularly from London and Bermuda. However, we’re predicting prolonged challenges to continue to exist in higher loss prone states (TX) which may now require a shared/layered program solution rather than a traditional single-carrier approach. Strata, a big property writer in Texas recently announced they would not offer any renewals after 3/15/22.

With rates stabilizing and coverage changes somewhat tempered, we’re predicting increased competition amongst carriers for profitable and desirable target classes of business resulting in over-subscription of capacity offerings. This is further emphasized by London and Bermuda continuing to offer competitive capacity for shared/layered programs.

Carrier claims advocacy continues to be challenged, a lot of which can be attributed to increasing loss estimates and reported losses from previous loss events (i.e. loss creep).

This trend is expected to continue, which is why underwriters are continuing to heavily target accounts and certain occupancy classes where significant concerns exist around low/poor valuation.
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