What's News Now? A Continuing Education Course

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Agenda

1. Five Trends to Watch
2. Why is the Market So Hard?
3. NAIC Update – Artificial Intelligence
4. Employment Law Update
5. Corporate Transparency Act Issues
6. Federal Issues
7. Case Law Developments

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Five Trends to Watch

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Trend Number One: From Increased Premiums to Increasing Prevention

According to McKinsey & Company | Global Insurance Report 2025

- Profitability challenges exist despite higher premiums.
- Hurricanes Helene and Milton caused an estimated $27 to $45 billion in losses
- "Equally important, what were once considered 'secondary perils'—including major winter storms, floods, wildfires, and severe convective storms—have become a priority concern for insurers due to their increased frequency and severity."

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Trend Number One: From Increased Premiums to Increasing Prevention

According to McKinsey & Company | Global Insurance Report 2025

"In this environment, insurers are focused on making policyholder locations more insurable. They will continue to adjust premiums, deductibles, and coverage limits. Some may exit specific high-risk geographies (such as Florida) or unprofitable business segments. **In some businesses, such as builder's risk and high-net-worth homes, we will see an overarching trend accelerate: insurers making sensor technology an option or even a requirement for coverage**."

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Trend Number Two: Some Not-So-Good News

From Docusign's *"6 Insurance Trends to Watch in 2024"*

- "Backfilling institutional knowledge gaps in highly specialized areas like underwriting and claims adjusting will not be easy, and carriers should look to digital technology and task automation as ways to support the next generation of employees.
- "Millennials and Gen Z are attracted to companies that are digitally savvy, offer flexible work arrangements and allow for career growth."

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Trend Number Three: Workers' Comp

On a related point…From PropertyCasualty 360

- Roughly one in four U.S. workers will be 55 or older by 2033, the BLS reported. Just over 15% of U.S. workers were 55 and older in 2003. During the next 20 years, the BLS predicts a 117% spike in both the 65 and older and 75 and older age groups."
- "'As the average age of workers increases, there is a higher incidence of chronic health conditions and comorbidities, along with an increased likelihood of workplace injuries and longer recovery times…"

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Trend Number Three: Workers' Comp

What's the significance of this?

- According to Kurt Kluempers of Arlington/Roe, the workers' compensation market has been dormant for 4 years now
- "That dormancy is getting ready to change. 2024 will be more of the same but we are starting to see pressure on the [workers' compensation] line."
- Why the lag behind the rest of the market? Two reasons:
  - "Workers' Compensation has a buffering factor in the residual market, which allows writings in a market of last resort when carriers will no longer write at the filed rates."
  - "Medical cost inflation as well as wage growth (part of the indemnity cost of the claim) are trending up rather rapidly post-Covid. This generally has a 2-3 year lag on impacting the rate filing."
- "The next rate filing will likely be moderate in the 3-5% increase range. However, the 2026 rate filing is likely to be a significant double digit increase. The trend after that will be increases for the longer term…"

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Trend Number Four: A Peculiar Risk

Intellectual Property Risks, Especially for Nonprofits, remain significant
"Top Ten Current Key Copyright Issues and Pitfalls Affecting Nonprofits" from Venable, LLP (April, 2024)

- "A copyright automatically exists upon creation
- "Copyright registration is not required but registration can have strategic benefits
- "Nonprofits do not automatically own copyright for works created by non-employees
- "There is no blanket nonprofit fair use exception
- "Open-source material often has restrictions
- "Photos and music should be used with care"

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Trend Number Five: Cannabis Rescheduling

DEA Agrees To Reschedule Marijuana Under Federal Law In Historic Move Following Biden-Directed Health Agency's Recommendation –
Marijuana Moment, April 30, 2024

- As recommended by the US Dept of Health and Human Services, DEA proposed moving cannabis from Schedule I to Schedule III under the Controlled Substances Act (CSA)
- Comes more than 50 years after cannabis first listed as a strictly prohibited drug, in the same class as heroin, with no known medical value and significant abuse potential

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Trend Number Five: Cannabis Rescheduling

DEA Agrees To Reschedule Marijuana Under Federal Law In Historic Move Following Biden-Directed Health Agency's Recommendation –
Marijuana Moment, April 30, 2024

- "Today, the Attorney General circulated a proposal to reclassify marijuana from Schedule I to Schedule III," Justice Department Director of Public Affairs Xochitl Hinojosa said in a statement to Marijuana Moment on Tuesday evening. "Once published by the Federal Register, it will initiate a formal rulemaking process as prescribed by Congress in the Controlled Substances Act."

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Trend Number Five: Cannabis Rescheduling

Marijuana Rescheduling Would Not Bring State Markets 'Into Compliance' With Federal Law, Congressional Researchers Say –
Marijuana Moment, May 3, 2024

- Rescheduling would allow state-licensed businesses to take federal tax deductions and remove barriers to research
- Without other legal changes, state-legal operations would not be in compliance with federal controlled substances law
- Manufacture, distribution, and possession would remain illegal under federal law and potentially subject to federal prosecution regardless of their legality under state law

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Trend Number Five: Cannabis Rescheduling

Marijuana Rescheduling Would Not Bring State Markets 'Into Compliance' With Federal Law, Congressional Researchers Say –
Marijuana Moment, May 3, 2024

- "Some criminal penalties for CSA violations depend on the schedule in which a substance is classified. If marijuana were moved to Schedule III, applicable penalties for some offenses would be reduced. However, CSA penalties that apply to activities involving marijuana specifically, such as the quantity-based mandatory minimum sentences discussed above, would not change as a result of rescheduling. DEA is not required to set annual production quotas for Schedule III controlled substances."

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Trend Number Five: Cannabis Rescheduling

Marijuana Rescheduling Would Not Bring State Markets 'Into Compliance' With Federal Law, Congressional Researchers Say –
Marijuana Moment, May 3, 2024

- Schedule III drugs are defined as having "an accepted medical use and may lawfully be dispensed by prescription," but only if the FDA approves a specific product – of which there are currently 3 derived from cannabis
- Botanical cannabis available in state markets is unlikely to meet the FDA's standards for widespread approval

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Why is the Market So Hard?

From Retrocession to Wildfires to a Tool Kit

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As Home Insurance Bills Go Up, Owners' Coverage Is Going Down

Emily Flitter, New York Times, February 16, 2024

- "Robert Shiver's bill for his homeowner insurance jumped from $3,800 in 2022 to $8,000 in July."
- He lowered the estimate to rebuild from $710,000 to $560,000

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As Home Insurance Bills Go Up, Owners' Coverage Is Going Down

Emily Flitter, New York Times, February 16, 2024

- "Insurers' losses from natural disasters topped $100 billion for the fourth straight year in 2023, and they are passing those costs on to property owners. High inflation has also forced insurers to raise rates to cover claims."

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As Home Insurance Bills Go Up, Owners' Coverage Is Going Down

Emily Flitter, New York Times, February 16, 2024

- "Mark Friedlander…said:
  - "home insurance premiums had cumulatively risen 32 percent from 2019 to 2023,
  - "while rebuilding and replacement costs had gone up 55 percent.

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A Sampler of Where We Are

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A Sampler of Where We Are

According to Jencap:

- "Inflation has risen dramatically in recent years, climbing from 3.2% in 2011 to its highest level of 9.1% in 2022, driving up prices on both goods and services.
- "This has had a direct impact on insurance cost drivers such as property valuations, construction costs, and labor."

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A Sampler of Where We Are

According to Jencap:

- "Reinsurers are mitigating those losses by passing costs down to primary insurance companies…"
- "Half the limit, double the premium, and double the retention."
- "January 2023 renewals saw an average price increase of 40 to 60%"

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As Home Insurance Bills Go Up, Owners' Coverage Is Going Down

Emily Flitter, New York Times, February 16, 2024

- "Analysts for the group estimated that in 2023, home insurers experienced their biggest underwriting loss — the difference between collected premiums and paid-out claims — since 2011.
- "Behind the loss were huge storms that caused more than $50 billion in damage that insurers had to pay for."

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But the Biggest Driver…

YEAR	$Bn At Time	$Bn in 2022
2013	$24.1	$31.0
2014	23.2	29.2
2015	22.9	28.8
2016	31.6	39.3
2017	130.9	158.7
2018	60.4	71.6
2019	38.8	45.2
2020	81.0	93.3
2021	93.3	102.7
2022	98.8	99.9

Estimated Insured Property Losses, U.S. Natural Catastrophes, 2013-2022

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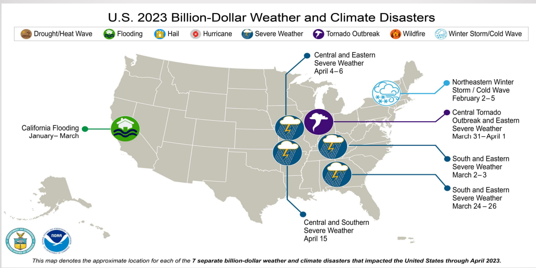
National Association of Insurance Commissioners



https://www.ncei.noaa.gov/access/billions/

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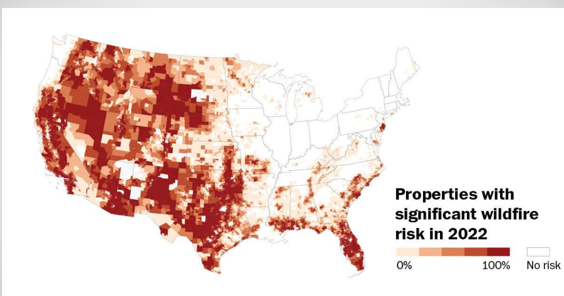
Introduction – Where Are Fires?



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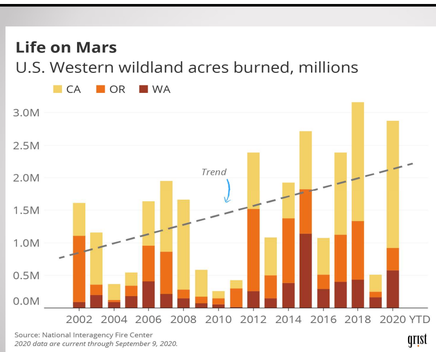

How Many Fires?

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Causes of Fires

- Climate change is affecting the severity and frequency of drought and wildfires
- In the far northern boreal forests, "zombie fires" are occurring – when a fire will smolder all winter deep underground, reemerging in the spring near previous burn sites to burn fresh fuel
- Greenhouse gases rising from the soils during the hotter summers will lead to more frequent occurrences of these previously rare fires

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Causes of Fires

- More than half the West is experiencing extreme drought
  - Worst drought period in centuries
- Droughts don't have immediate effect, but can cause significant damage to crops, the environment, and the economy
- The West, Southwest, and Midwest are most prone to droughts
- 88% of the Western states are experiencing drought conditions, with 26% being in "extreme drought"
- Reservoirs far below normal levels, some as much as 30% below average

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How Much Do Wildfires Cost?

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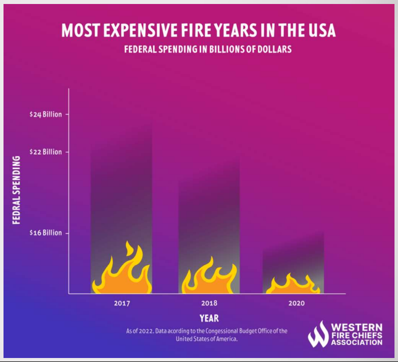
How Much Do Wildfires Cost?



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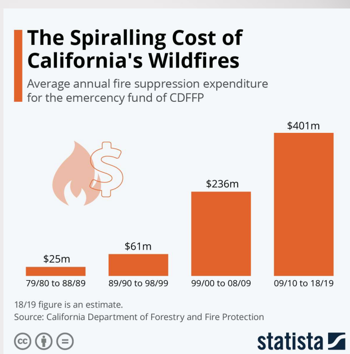
How Much Do Wildfires Cost?



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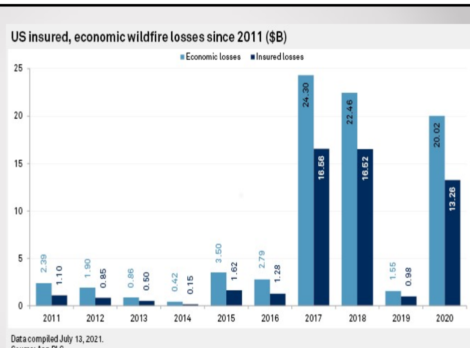
How Much Do Wildfires Cost?



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The Basics of Reinsurance

- **Reinsurance:**
  A form of insurance whereby one insurer (the reinsurer) indemnifies another insurer (the reinsured) for losses under insurance policies issued by the reinsured to the public.

- **Retrocession:**
  Reinsurance of Reinsurance

AXIS Slides Courtesy of Mr. Andrew M. Weissert, Esq.
Chief Legal Officer, Axis (Re)Insurance

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Functions of Reinsurance

The most common reasons for purchasing reinsurance include:

Capacity Relief
Allows the reinsured to write larger amounts of insurance.

Catastrophe Protection
Protects the reinsured against a large single, catastrophic loss or multiple large losses.

Stabilization
Helps smooth the reinsured's overall operating results from year to year.

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Functions of Reinsurance

Surplus Relief
Eases the strain on the reinsured's surplus during rapid premium growth

Market Withdrawal
Provides a means for the reinsured to withdraw from a line of business or geographic area or production source

Market Entrance
Helps the reinsured spread the risk on new lines of business until premium volume reaches a certain point of maturity, can add confidence when in unfamiliar coverage areas

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Providers of Reinsurance

Expertise/Experience
Provides the reinsured with a source of underwriting information when developing a new product and/or entering a new line of insurance or a new market.

Direct Writers
Reinsurance enter into reinsurance relationships directly with the ceding company. The collection of premiums and payment of claims are handled directly by the reinsurer.

Broker-Market Reinsurers
Assume business through reinsurance intermediaries (i.e. brokers) who typically negotiates reinsurance contracts between the ceding company and the reinsurer(s), and provide the production or sales support.

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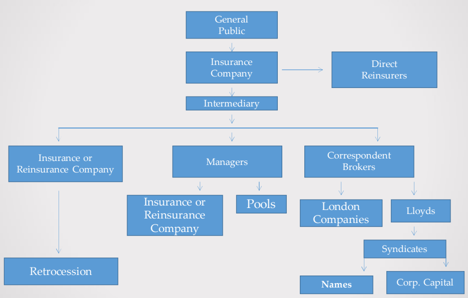
Parties to the Reinsurance Transaction



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Types of Reinsurance

TREATY

- A Block or Class of Business
- Usually Obligatory
- Reinsurer Not Involved in Risk Decisions
- Long Term Relationship

FACULTATIVE

- One Risk at a Time
- Underwriter Can Accept or Reject
- Risk Underwriting
- Short Run (Usually one Year)

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Forms of Reinsurance

Pro Rata ("Proportional")
- Quota share
- Surplus share

Excess of Loss ("Non-Proportional")
- Per Risk/Per Policy/Per Insured/Per Location
- Per Occurrence (catastrophe)
- Aggregate Stop Loss

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Pro Rata (or Proportional) Reinsurance

- Insurer shares with the reinsurer all of the premiums and losses in a certain percentage
- Two forms of pro rata:
  - Quota Share
  - Surplus Share
- Pricing is a percentage of premium in amounts equal to the cede

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Excess of Loss Reinsurance

- Reinsurer indemnifies reinsured (up to a stated limit) once a loss(es) exceeds a pre-determined level (i.e., the deductible or retention)
- Excess of Loss reinsurance is expressed as, for example, $400,000 excess $100,000. (If the insurer incurs a $500,000 loss, it is responsible for the first $100,000 of paid loss, and is reimbursed for the next $400,000)
- Pricing: Percentage rate applicable to insurer's original premium (i.e., "subject premium") for polices covered by reinsurance

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Excess of Loss Reinsurance – Types

Three types of Excess of Loss Reinsurance

Per Risk
Retention and limit apply to each and every policy, individually (usually subject to an occurrence limit)

Catastrophe (or Occurrence)
Retention and limit apply to one or many policies in the same event

Aggregate (or "Stop Loss")
Retention and limit apply to all losses from all covered polices, in the aggregate, over a specified timeframe – usually no more than one year

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Insurance experts define a hard market as a time when coverage premiums **increase by more than 5%** for two or more years.

Due to rising claims frequency and severity, this has been the case for several years, which is being driven by several factors:

- → Insurers recorded a $26.5 billion net underwriting loss in 2022, up from $21.5 billion in 2021 (AM Best).
- → Climate change made 2022 one of the costliest years on record for natural disasters, with more than $120 billion in insured losses. This was also significantly higher than the previous five-year insured loss average of $97 billion (Munich Re).
- → Rising litigation costs are increasing claims payouts and insurer loss ratios, also referred to as social inflation (Triple-I).
- → Economic challenges, including supply chain issues and record inflation, have made it more expensive for insurers to pay claims.

The effect of all this is that premiums have been steadily climbing across nearly all segments of the personal and commercial lines of business. Higher insurance costs are a top concern among consumers, and many are responding by cutting back on or eliminating coverage to save money.

A Nationwide Insurance survey found:

26% of consumers plan to decrease their coverage limits on existing policies or have already done so.

23% are looking for a new insurance agent or have already switched.

20% have removed a coverage from their policy or will do so in the next six months.

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This Trusted Choice® Hard Market Toolkit provides information and resources independent agents can use to navigate the current market conditions successfully.
This resource is exclusively for Big "I" members.

INCLUDED IN THIS TOOLKIT ARE:

1. Expert Advice for Surviving a Hard Market from Savvy Independent Agents
2. Talking Points for Clients
3. Client Email Templates
4. Frequently Asked Questions from Clients
5. A General Communication Timeline to Keep Your Agency on Track
6. Remarketing Strategy & Remarketing Standards Document (Fill-in Template)
7. Renewal Process Outlines
   - Personal Lines, Farm and Commercial Lines Renewal Forms
8. Creative Assets to Help Your Agency Stand Out (Customizable Videos and Graphics)

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Talking Points

"Know your markets. If there are opportunities [for your client] to save money then be proactive, but if you know you have a good product and competitive price, then don't waste people's time."

— **Mike J. McCartin**
Joseph McCartin Insurance, Inc. Statland & Katz Ltd. | Maryland

Learn what to say, and more importantly, NOT to say…

- Toolkit includes descriptions of verbiage for face-to-face meetings, client newsletters, social media and other means of communications
- Note that it is critical to communicate early and often with clients to inform them of the difficult market conditions
- Helps prepare them for potential coverage or price changes prior to renewals

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Expert Advice

Toolkit contains strategies to navigate the current market and position itself for future growth, including:

- Be Proactive About Renewals (retention)
- Focus on Growth Through New Business
- Do Market Homework
- Seek Internal Efficiencies
- Build Strong Relationships (client and carrier)
- Focus on Risk Management
- Adapt and Innovate
- Diversify Your Portfolio
- Simply…Do What You Can to Survive

"This is your time to shine. You need to have a defensive and offensive strategy in your office — defensive in that you need to set up processes to retain clients. Your offensive strategy is to increase your marketing. When the market is disrupted, it is an ideal time to make sure you are very visible. Whatever strategies work for your agency — double down."

— **Michelle O'Connor, President**
O'Connor Insurance Associates | North Carolina

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Client Scripts

Toolkit includes multiple template emails and other communication media to help you stay in constant communication with clients

- May be the Most Valuable Tool in the Kit
- Many Big I Members Use Templates Almost Verbatim
- Some Subject Templates Include:
  - What a "Hard Market" Means for your Insurance
  - How Our Agency Can Help You Navigate Rising Insurance Premiums
  - Hard Insurance Market and Rising Rates: How Our Agency Can Help

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Client FAQs

Toolkit provides you with the questions that are inevitably coming from your clients. *Examples*:

- I've had no claims, why are my premiums increasing?
- What is a hard market, what causes it and how long will it last?
- How can an independent insurance agent help me in a hard market?
- How can I get a better rate on my policy?
- And, many more…

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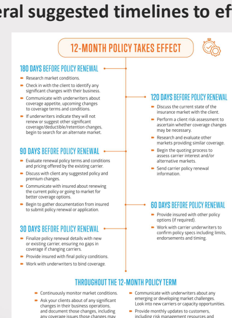
Timelines

The Toolkit has several suggested timelines to effectively manage client renewals



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Strategic Remarketing

Remarketing may seem like the best option to help some clients in the hard market, but it also may not be

- Toolkit helps you determine which clients are and are not good remarketing candidates and how to do it through several tools :
  - Outline Remarketing Challenges
  - Determine Annual Remarketing Risk
  - Remarketing With Outdated Information:
  - Directives From the Agency Can Vary
  - Qualify and Prioritizing Remarkets
  - How to Present a Remarket
  - Template Remarketing Checklist

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Renewals

Proactively address the hard market with renewal reviews

- Learn the Difference Between Reacting and Responding
- Determine if Your Agency is Remarketing too Much
- Develop Renewal Strategies
- Establish a Renewal Review Process
- Determine How to Address Pushback on Renewal Reviews by Staff

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Branded Creative Resources

Leverage branded and customizable video, digital display, social graphics and more to highlight your value as an independent agent in this market

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NAIC Update – Artificial Intelligence

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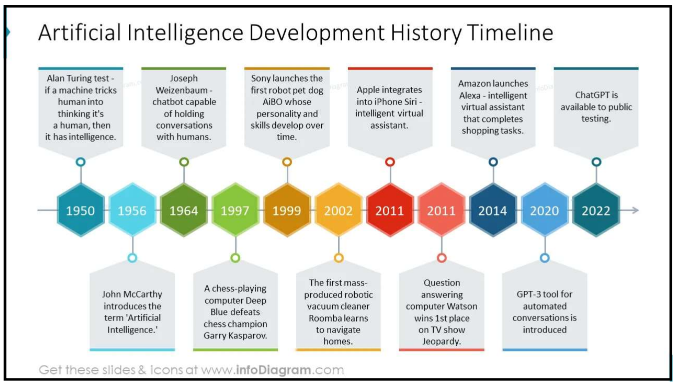

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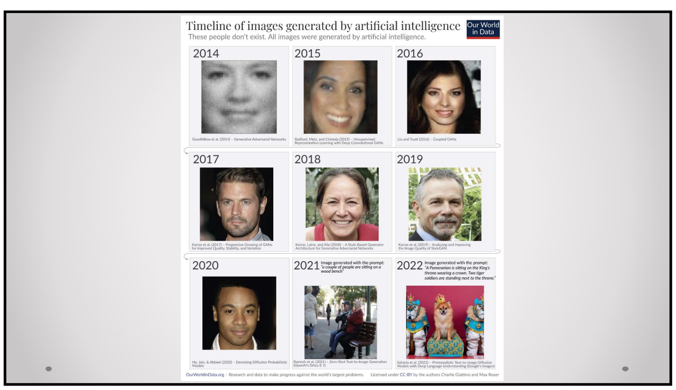

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Getting Started with Gen AI in Insurance: Benefits and Use Cases

(Appian, December 12, 2023)

Top use cases for generative AI

- **Underwriting**. Generative AI can assist underwriters in evaluating potential risks by analyzing vast amounts of data, including historical claims, customer information, and external factors to generate risk profiles and recommend appropriate coverage levels, helping underwriters make more informed decisions quickly.
- **Claims processing and fraud detection**. Generative AI can streamline the claims process by automating the assessment of claims documents. It can extract relevant information from documents, summarize claims histories, and identify potential inconsistencies or fraudulent claims based on patterns and anomalies in the data.

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Getting Started with Gen AI in Insurance: Benefits and Use Cases

(Appian, December 12, 2023)

Top use cases for generative AI

- **Quote and policy generation**. Generative AI can automate the generation of insurance quotes, policies, and associated documentation. It can create quotes, policy documents, invoices, and certificates based on predefined templates and customer information, reducing manual administrative tasks.
- **Customer support and engagement**. AI-powered chatbots reduce the workload on human agents and provide 24/7 customer support to offer immediate answers to policy, coverage, and claims questions. Generative AI can also automate personalized communication with policyholders by sending reminders for premium payments, providing policy updates, and delivering relevant content to enhance customer engagement and retention.

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How Is AI Used In Business? Decrypting AI for Insurance

(SwissRe, March 14, 2023)

1. AI applications should protect **human dignity,** rights and fundamental freedoms. Create an AI policy that ensures compliance with requirements including driving fairness and transparency.
2. Ensure AI governance that is consistent with **laws and regulations**. Including responsibilities and frameworks to assess and review them throughout the entire life cycle of AI, e.g. with model monitoring.
3. Mitigate the risks of AI applications– by setting up an adequate analytics and **AI risk management** framework and related processes.

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How Is AI Used In Business? Decrypting AI for Insurance

(SwissRe, March 14, 2023)

4. Internal and external transparency to the extent permissible under applicable laws and regulations. Foster explainability, where applicable to help stakeholders make informed decisions while protecting privacy, confidentiality and security. Provide options for recourse.

5. Solid data protection standards, cyber security, data foundations and standardized systems are paramount. Consent to use the data, data quality and quantity are among the key factors to succeed with AI.

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How Is AI Used In Business? Decrypting AI for Insurance

(SwissRe, March 14, 2023)

6. Clarity on where and how AI in combination with human processes has a positive impact on the value chain – be it to increase efficiency or enable new solutions and on its costs.

7. Understanding the limitations of AI in the customer journey. Human input might remain invaluable in some critical decisions to ensure digital trust.

8. Foster and commit to upskilling existing workforce on the use of new analytics and AI technologies.

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How Is AI Used In Business? Decrypting AI for Insurance

(SwissRe, March 14, 2023)

9. To ensure that the ongoing validation of the algorithms and adjustments is performed independently, an additional independent internal or external control function is recommended.

10. The use of AI will likely have profound effects on the insurance industry and society. Therefore, it is necessary to ensure a continuous dialogue with all stakeholders to be able to respond to changing needs and views.

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AI In Insurance: The Good, the Bad, and What Worries Regulators

(LexisNexis, December 11, 2023)

Class Action Suits Over Insurers' AI Use

- State Farm was sued in 2022 in the U.S. District Court for the Northern District of Illinois over claims that its AI discriminates against Black customers. The class-action suit claims State Farm's algorithms are biased against African American names.
- Cigna was sued in July 2023 in California over allegations its AI algorithm used to screen claims was faulty and Cigna denied claims without having a human review them

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NAIC Model: Use of Artificial Intelligence Systems by Insurers

(Adopted 12.1.2023)

Artificial Intelligence Systems (AIS) Program Guidelines

1.0 General Guidelines

1.1 The AIS Program should be designed to mitigate the risk that the Insurer's use of an AI System will result in Adverse Consumer Outcomes.

1.2 The AIS Program should address governance, risk management controls, and internal audit functions.

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NAIC Model: Use of Artificial Intelligence Systems by Insurers

(Adopted 12.1.2023)

1.3 The AIS Program should vest responsibility for the development, implementation, monitoring, and oversight of the AIS Program and for setting the Insurer's strategy for AI Systems with senior management accountable to the board or an appropriate committee of the board.

1.4 The AIS Program should be tailored to and proportionate with the Insurer's use and reliance on AI and AI Systems. Controls and procedures should be focused on the mitigation of Adverse Consumer Outcomes and the scope of the controls and procedures applicable to a given AI System use case should reflect and align with the Degree of Potential Harm to Consumers with respect to that use case.

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NAIC Model: Use of Artificial Intelligence Systems by Insurers

(Adopted 12.1.2023)

1.5 The AIS Program may be independent of or part of the Insurer's existing Enterprise Risk Management (ERM) program. The AIS Program may adopt, incorporate, or rely upon, in whole or in part, a framework or standards developed by an official third-party standard organization, such as the National Institute of Standards and Technology (NIST) Artificial Intelligence Risk Management Framework, Version 1.0.

1.6 The AIS Program should address the use of AI Systems across the insurance life cycle, including areas such as product development and design, marketing, use, underwriting, rating and pricing, case management, claim administration and payment, and fraud detection.

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NAIC Model: Use of Artificial Intelligence Systems by Insurers

(Adopted 12.1.2023)

1.7 The AIS Program should address all phases of an AI System's life cycle, including design, development, validation, implementation (both systems and business), use, on-going monitoring, updating and retirement.

1.8 The AIS Program should address the AI Systems used with respect to regulated insurance practices whether developed by the Insurer or a third-party vendor.

1.9 The AIS Program should include processes and procedures providing notice to impacted consumers that AI Systems are in use and provide access to appropriate levels of information based on the phase of the insurance life cycle in which the AI Systems are being used.

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Employment Law Update

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Where We Were & Are: FTC Promulgates Rule to Ban Noncompete Clauses

(April 23, 2024)

- Since January of 2023, the Federal Trade Commission (FTC) has been considering a ban on noncompete agreements.
- As originally contemplated, and as the enacted rule states, employers would be and are banned from imposing noncompetes on their workers
- Why? Noncompetes are said to:
  - Suppress wages
  - Hamper innovation
  - Block entrepreneurs from starting new businesses

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FTC Enacts Rule to Ban Noncompete Clauses

The FTC's new rule makes it illegal for an employer to:

- enter into or attempt to enter into a noncompete with a worker;
- maintain a noncompete with a worker; or
- represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

- Under the original proposal, existing noncompetes would be required to be rescinded and actively inform workers they are no longer in effect – more in a bit

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The Upcoming Fight: Where We Were Last Year

- Big "I" and almost 100 other trade associations urged the FTC to extend the deadline for public comments until May 19
- FTC asserts that a 1914 law that has never been used to issue such sweeping regulations grants them the power to do so now
- Many legal observers (and one member of the FTC itself) vigorously challenge that the agency has the authority to act in this manner

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The Upcoming Fight: Where We Were Last Year

- Wes Bissett, Big "I" government affairs senior counsel, noted that the value of insurance agencies is rooted in the goodwill, customer relationships and confidential knowledge they develop over many years, and that the proposed rule will erode that value.
- He went on to point out that this is a subject that should be addressed by Congress and states.
- Wes recommended multiple revisions if the FTC moves forward with a final rule, at least two of which were incorporated in part: high earners and clarification of the sale-of-business exemption.

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The Upcoming Fight: Where We Were Last Year

- By April 30 – just a week after the rule was announced – at least three major lawsuits were in the works, *writes Coleman, Hart and Reid for Seyfarth.*
- The lawsuits argued, in general:
  - The FTC exceeded its statutory authority
  - Congress needed to act to support a rule like the Noncompete Rule
  - The Rule in its final form is arbitrary and capricious

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The Upcoming Fight: Where We Were Last Year

Coleman, Hart and Reid for Seyfarth conclude:

"Ultimately, we believe that the answer to each of these questions above is likely to be a resounding 'yes,' and that the FTC's Noncompete Rule is unlikely to be upheld in its current form. Further, we expect more lawsuits to come and that a successful court challenge on any of the bases outlined above would result in an injunction, at a minimum, staying implementation of the Noncompete Rule pending further court order or agency action. Such injunctive relief is likely to occur at the outset of litigation and prior to the Noncompete Rule's Effective Date."

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"On Tuesday, August 20, 2024, employers throughout the country breathed a sigh of relief when a federal trial judge in Dallas struck down the FTC's rule banning non-competes. It brought to a conclusion a tumultuous and chaotic summer that had turned employers and workers into court-watchers."

G. Scott Fiddler and Michael A. Drab of Jackson Walker (August 28, 2024)

WHERE WE ARE … FOR NOW

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Overtime Law Changes

McDonald, Kopplin and Zagger of Ogletree Deakins:

- The Fair Labor Standards Act entitles employees, unless specifically exempted, to overtime pay for all hours worked in excess of forty hours in one workweek.
- There are exemptions to the requirement of overtime. Two of the most frequently used are:
  - Highly Compensated Employees (HCEs) and
  - White-Collar Employees in executive, administrative, or professional positions (EAPs)

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Overtime Law Changes

McDonald, Kopplin and Zagger of Ogletree Deakins:

On HCEs, " [The rule will] Increase the HCE exemption total annual compensation to $132,964 per year on July 1, 2024 (calculations based on the 2019 methodology). That threshold will then increase on January 1, 2025, to $151,164, equivalent to the 85th percentile of full-time salaried workers nationally."

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Overtime Law Changes

McDonald, Kopplin and Zagger of Ogletree Deakins:

On EAPs, " [The rule will] Increase the minimum weekly salary to $844 per week, equivalent to $43,888 per year, on July 1, 2024 (calculations based on the 2019 methodology). That threshold is then set to increase on January 1, 2025, to $1,128 per week, equivalent to $58,656 per year, which is tied to the 35th percentile of salary in the lowest-wage census region (the South)."

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Overtime Law Changes

The Implications? Rebecca Rainey, Senior Reporter for *Bloomberg Law*, writes:

- "Roughly 4 million workers will take home more money when they work more than 40 hours a week under a new US Labor Department rule…"
- "[The] threshold will apply to a large swath of industries, but is expected to have the broadest impacts in the retail and hospitality sectors."
- " But business groups have warned the policy change will unreasonably drive up payroll costs, with some already saying they plan to challenge the rule."

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Overtime Law Changes – Part Two

- "On January 10, 2024, the U.S. Department of Labor published a final rule, effective March 11, 2024, revising the Department's guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA)."
- "The misclassification of employees as independent contractors may deny workers minimum wage, overtime pay, and other protections. This final rule will reduce the risk that employees are misclassified as independent contractors while providing a consistent approach for businesses that engage with individuals who are in business for themselves."

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Overtime Law Changes – Part Two

"The final rule applies the following six factors to analyze employee or independent contractor status under the FLSA:

✓(1) opportunity for profit or loss depending on managerial skill;

✓(2) investments by the worker and the potential employer;

✓(3) degree of permanence of the work relationship;

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Overtime Law Changes – Part Two

✓(4) nature and degree of control;

✓(5) extent to which the work performed is an integral part of the potential employer's business; and

✓(6) skill and initiative."

"The final rule provides detailed guidance regarding the application of each of these six factors. No factor or set of factors among this list of six has a predetermined weight, and additional factors may be relevant if such factors in some way indicate whether the worker is in business for themself (i.e., an independent contractor), as opposed to being economically dependent on the employer for work (i.e., an employee under the FLSA)."

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On Nov. 15, the U.S. District Court for the Eastern District of Texas vacated the 2024 Overtime Rule nationwide, ruling the agency exceeded its statutory authority. With the decision, the thresholds revert to the amounts established by the 2019 Overtime Rule.

WHERE WE ARE … FOR NOW

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Corporate Transparency Act Issues

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What is the Corporate Transparency Act?

Kevin Granahan and Lauren Stahl of Fox Rothschild (December 31, 2023):

- "The CTA is a new law that requires certain business entities – referred to as 'reporting companies' – to submit reports to the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). These reports require disclosure of certain information about the reporting companies themselves, their 'beneficial owners' and their 'company applicants.'
- "The stated purpose of the CTA is to protect the U.S. financial system from illicit activities, such as money laundering, fraud and terrorism."

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What Needs to Be Reported? Generally…

FOR THE REPORTING ENTITY:

- Legal Name
- Trade Name
- Street Address
- Jurisdiction (what state were you formed in)
- Tax Identification Number

FOR THE BENEFICIAL OWNERS AND REPORTING ENTITY:

- Full legal name of reporter
- Date of Birth
- Residential Street Address
- Identification Number
- Passport or license image

Kevin Granahan and Lauren Stahl of Fox Rothschild (December 31, 2023)

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When Is Compliance Required?

<u>Brownstein Client Alert, July 24, 2023:</u>

FinCEN will begin accepting reports electronically on Jan. 1, 2024. All reporting companies created or registered before Jan. 1, 2024, are required to report by Jan. 1, 2025. Reporting companies created or registered on or after Jan. 1, 2024, are required to file within 30 calendar days of receiving an actual or public notice from the secretary of state or similar office that the company has been created or registered.

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Does My Agency Have to Do This?

From IIABA National, *Insurance News and Views*
(with thanks to Nathan Riedel)

- "This new, burdensome requirement was originally meant to cover nearly all small businesses, including insurance agents."
- "However, the Big 'I' was successful in securing an exemption for independent agents and brokers by successfully arguing that insurance producers already provide this beneficial ownership information to state regulators and that the additional burden of providing it to the federal government would be duplicative and unnecessary."

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Does My Agency Have to Do This?

From IIABA National, *Insurance News and Views*
(with thanks to Nathan Riedel)

- That advocacy – done with out any other producer groups – helped craft the law favorably.
- IIABA also advocated for a consistent, and broad, exemption in the regulations implementing the new law and was successful in doing so.
- "FinCEN went on to note that they were persuaded by the argument that the Big 'I' made, accepting that this limitation did not advance the policy underlying this exemption and risked unduly burdening certain insurance producers."

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Federal Issues

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National Flood Insurance Program

Background

- NFIP is a needed program, but is flawed
  - Bleeding money
  - Rates are not actuarially sound
  - Hurricane and flood losses in recent years put program upside down
  - Coverage is often inadequate
  - Not a priority for Congress
  - Latest short-term extension set to expire on September 30, 2024

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National Flood Insurance Program

Big I NFIP Priorities

- Secure a long-term extension of a modernized program

- Proposed program improvements
  - Improve rating, underwriting & mapping
  - Enhanced private market participation
  - Allow private market flood insurance to satisfy continuous coverage requirements
  - Protect Write-Your-Own Program

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National Flood Insurance Program

Write-Your-Own (WYO) Program

- Public private partnership that utilizes agents and carriers to sell and service NFIP policies
- Agents are uniquely qualified to sell and service these policies
- Big I opposes any policies that would:
  - Harm the WYO program, including compensation reductions
  - Make the program more complex
  - Limit the program that would negatively impact NFIP take-up rates

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National Flood Insurance Program

Big I Supports One Bill Alive in Congress

- H.R. 900 – Continuous Coverage for Flood Insurance Act
- Would allow private flood insurance to satisfy continuous coverage requirements
- Would allows consumers to leave NFIP for private market, but not be penalized if they choose to return to NFIP

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National Flood Insurance Program

What's Going to Happen?

- Many in Congress (both parties) understand the importance of the program
- General gridlock in both houses on all issues is a major stumbling block
- With political turmoil – not much will get done before the next congress
- Prediction: another short-term extension is passed in late September, and we start this all over again

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Oppose Tax Increases on Main Street America

It's All About Protecting and Maintaining

- Oppose any attempts to increase taxes on small businesses in general
- Strongly oppose any effort to eliminate or phase out the 20% pass through deduction
- Also oppose efforts to:
  - raise individual or corporate taxes
  - boost capital gains rate
  - increase the social security payroll tax cap

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Oppose Tax Increases on Main Street America

Big I is looking for opportunities to pass legislation that would make the current 20% small business deduction permanent (set to expire in December 2025)

- Critical to pass-through businesses that employ 66 million workers (55% of private sector workforce)
- Two-thirds of Big I members are organized as pass-through entities
- All have seen significant tax savings – critical during the pandemic and as agencies emerge from it and reinvest the savings to grow their businesses

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Oppose Tax Increases on Main Street America

The Main Street Tax Certainty Act (S. 1706 & H.R. 4721)

- Both bills would make the 20% small business tax deduction permanent
- Many Big I members have benefitted from this cut
- If it is allowed to expire at the end of 2025, it is in essence, a tax increase on all of these entities
- 40% of US Representatives and 33% of US Senators are cosponsors
- Nothing likely to happen this year, but bills set the stage for education and a major push in 2025

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Address Insurance Market Crisis

- Insurance market is cyclical, so don't want to legislatively overreact in Congress
- Market is unprecedented – what can be done?

Two avenues that the Big I is pursuing

- Cracking down on lawsuit abuse
- Encouraging risk mitigation

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Address Insurance Market Crisis

Cracking down on lawsuit abuse

- Foreign Manipulation Act (S. 2805 & H.R. 5488)
  - Requires disclosure from any foreign person or entity participating in litigation funding as a third-party investor
  - Also, would prohibit sovereign wealth funds and foreign governments from participating in litigation funding
  - Legislation likely will not pass, but sets stage for possible movement during next Congress

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Address Insurance Market Crisis

Encouraging risk mitigation

- Theory: make properties more resistant to storm damage on the front end, rather than repairing on the back end
- FEMA says: Every dollar spent on preventative mitigation measures saves $6 in future losses
- Some states are establishing mitigation grant programs to achieve this, but those funds are subject to federal taxation
- Disaster Mitigation & Tax Parity Act (S. 1953 & H.R. 4070)
  - Simply eliminates federal taxation of state risk mitigation grant funds
  - Will hopefully encourage the implementation of more widespread mitigation measures

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Case Law Update

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City of Aurora, Indiana v. Nat'l Fire & Cas. Co

- Aurora had a "Computer and Funds Transfer Fraud" with a limit of $100,000.00 per occurrence and a deductible of $250.00.
- Aurora was renovating the city's pool which lead to a series of emails between the contractor and the Clerk-Treasurer.

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City of Aurora, Indiana v. Nat'l Fire & Cas. Co

- An imposter impersonated the pool contractor by using an email address that closely resembled the pool contractor's email.
- The Imposter asked for the next partial payment for the pool restoration work by Automatic Clearing House ("ACH") although Aurora usually paid via paper checks. The Imposter provided a bank account and routing number to the Clerk-Treasurer. Because the Imposter explained that the company was trying to eliminate paper checks, Aurora was not suspicious of the change in payment type. Id. Eventually, Aurora's Clerk-Treasurer sent an ACH of $233,585.04 to the Imposter.

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City of Aurora, Indiana v. Nat'l Fire & Cas. Co

- National Fire denied coverage on the grounds that there was no "fraudulent entry" on Aurora's computer or a "fraudulent instruction" directed to Aurora's bank.
- The Federal District Court concludes that there is sufficient allegation of action that would meet this definition at least at this preliminary stage in the litigation.

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City of Aurora, Indiana v. Nat'l Fire & Cas. Co

- The real crux of the case, though, is the bad faith claim.
- Aurora argues that the denial of coverage was wrongful because it was unfounded in the policy language.
- NFCC argues that it gave a well-reasoned letter based on policy language to support its denial.

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City of Aurora, Indiana v. Nat'l Fire & Cas. Co

<u>The Court rules in favor of NFCC</u>:

"Aurora does not present evidence that NFCC denied the claim without a rational or principled basis, and there is no evidence that NFCC acted with a dishonest state of mind. Even so, NFCC argues that an insurance company's incorrect interpretation of the law is not evidence of bad faith."

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City of Aurora, Indiana v. Nat'l Fire & Cas. Co

The Court rules in favor of NFCC:

- "Aurora has presented the Court with a copy of the emailed letter from NFCC denying coverage and its analysis for doing so. While this letter is evidence of denial, it is not evidence that NFCC lacked a reasonable basis for denying the claim."
- "The letter demonstrates NFCC denied the claim based on its understanding of the Policy and interpretation of the stated definitions. Because NFCC promptly denied payment while providing an explanation for its decision, the allegations brought forth by Aurora are insufficient to support a claim of bad faith."

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So, What's the Big Deal?

Two big deals, actually.

- First, the question is not whether there is better coverage – like social engineering – for events such as this. Rather, the question is whether the policy in force covers the loss.
- Second, the loose use of "bad faith" by an insured is likely to backfire and slow, rather than speed up, claim settlement.
- There are instances in which the "bad faith" label may be attached, but they are likely rarer than your insured thinks they are.

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Riverback Farms, LLC v. Saukville Feed Supplies, Inc.

- Riverback is a dairy farm in West Bend, Wisconsin, with approximately 1,000 Holstein cattle, 400 of which are milked.
- Riverback purchased feed mix (rations) from Saukville Feed Supplies, Inc.
- In 2015, Riverback's nutritionist recommended a change in the rations.
- Saukville Feed did not include what Riverback requested and instead substituted a different additive.
- Saukville contends it as discussed with Riverback.

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Riverback Farms, LLC v. Saukville Feed Supplies, Inc.

- “All parties agree that Saukville Feed's substitution was intentional.”
- “…Saukville Feed reviewed the request to include Min-Ad and determined in-house that Barnlime would be an adequate substitute.”
- “Saukville Feed did not intend, foresee, or expect that the substitution would have an adverse impact on the cattle.”
- Secura, Saukville’s CGL carrier, denied coverage because there was no “occurrence,” among other things.

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Riverback Farms, LLC v. Saukville Feed Supplies, Inc.

- “While it is undisputed Saukville intentionally substituted the feed component, the record shows that the resulting magnesium deficiency that allegedly caused physical harm to the cattle could have been ‘without…foresight or expectation,’ and thus an accident/occurrence.”
- Also, the impaired property exclusion does not apply to bar coverage.

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So, What’s the Big Deal?

- Unintended consequences cases are always difficult to predict.
- This can even happen in a business setting.
- The same is true of the applicability of the business pursuits exclusions.
- Claims should always be submitted – even if there is grave doubt as to the coverage being present.

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Citizens Ins. Co v. Wynndalco Enterprises, LLC

- Two class action lawsuits allege that Wynndalco violated the Illinois Biometric Privacy Act ("BIPA")
- "Broadly speaking, BIPA codifies an individual's right of privacy in and control over his or her biometric identifiers and biometric information."
- Citizens denied coverage, in part, due to an exclusion carving out exposures for CAN-SPAM, the Fair Credit Reporting Act, and

  (4) Any other laws, statutes, ordinances, or regulations, that address, prohibit or limit the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

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Citizens Ins. Co v. Wynndalco Enterprises, LLC

The Court rules in favor of Wynndalco

- "[A] plain-text reading of the exclusion gives rise to an ambiguity with respect to what the policy does or does not cover."
- "Reading the exclusion's catch-all provision literally and broadly would essentially exclude from the policy's coverage injuries resulting from all such statutory prohibitions…"
- "[W]e agree with the district court that this conflict between the competing policy provisions granting and excluding coverage gives rise to an ambiguity: the broad language of the catch-all exclusion purports to take away with one hand what the policy purports to give with the other in defining covered personal and advertising injuries."

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So, What's the Big Deal?

- Although the court does not use the phrase, this logic is known as the "structural ambiguity" problem.
- The insuring clause cannot be squared with the exclusionary language.
- Hence, the use of the term "illusory coverage," a promise (here) of personal and advertising injury coverage that is taken almost completely away by the catch-all exclusion.

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