

URMIA Journal

2010



Pittsburgh

UNIVERSITY
RISK MANAGEMENT
AND INSURANCE
ASSOCIATION

**We can't cross that bridge until we come to it,
but I always like to lay down a pontoon ahead of time.**

—BERNARD BARUCH (1870–1965),
FINANCIER, STOCK MARKET SPECULATOR, AND POLITICAL CONSULTANT

Front Cover: Pittsburgh, seated at the confluence of three major rivers, is home to 446 bridges.

Host city for the 2010 URMIA Conference, October 9-13.

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University Risk Management and Insurance Association



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A Professional Non-Profit Forum for the Exchange of Information, Concepts,
Practices, and Developments Between Higher Education Risk Managers

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**There are some things you learn best in calm,
and some in storm.**

—WILLA SIBERT CATHER (1873–1947), AMERICAN AUTHOR

“In our country,” said Alice, still panting a little, “you’d generally get to somewhere else – if you ran very fast for a long time, as we’ve been doing.”

“A slow sort of country!” said the Queen. “Now here, you see, it takes all the running you can do to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!”

—LEWIS CARROLL (1832–1898),
“THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE”



From the President

Welcome to the 2010 edition of the University Risk Management and Insurance Association’s (URMIA) *Journal*, the latest issue geared toward providing the best in higher education risk management information.

I recently came across a quote from Franklin D. Roosevelt, the 32nd president of the United States. He said, “Never before have we had so little time in which to do so much.” When one considers that Roosevelt served as president during the early 1930s, a time that we perceive life moved much more slowly, what could possibly have prompted such a statement? Our current economic crisis, of course, displays certain similarities to the challenges President Roosevelt faced during his terms in office. Today, we are witnessing a persistent downturn with a heavy impact on higher education in the United States. However, if Roosevelt thought life was hectic during his presidency, he would reel when observing the fast pace of today. He would notice people racing around with high-tech gadgets, juggling meetings, responsibilities, family life, and other daily tasks. This is the reality of the world in which we function as higher education risk managers.

In these fast-paced times, it is comforting to know we can rely on resources that provide guidance and insight into risk management best practices, new approaches, and current information for our own continuing professional education. The *URMIA Journal* strives to be one such resource. In this issue of the *Journal*, you will find relevant articles on topics such as phishing and other online threats, international travel concerns for faculty and staff, enterprise risk management, the risks associated with going “green,” and much, much more. We know we cannot cover all pertinent topics, but I trust that you will find these articles an informative and valuable resource for your program.

I would like to give particular thanks to the authors who researched and wrote these articles, the volunteer Communications Committee members who assisted with editing and reviewing, and the URMIA National Office staff for their hard work in publishing this year’s *Journal* for our members. I hope you find this year’s *Journal* to be a valuable resource in the fast-paced higher education world in which we work.

Margaret Tungseth, CPA, MBA

Assistant Treasurer/Director of Risk Management, Concordia College (MN)
URMIA President, 2009-2010

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There are no passengers on Spaceship Earth. We are all crew.

—MARSHALL MCLUHAN (1911–1980),
CANADIAN EDUCATOR, PHILOSOPHER, AND SCHOLAR

Going Green: The Various Shades of Risk

| Leta Finch, Arthur J. Gallagher Risk Management Services, Inc.

Abstract: As the Earth's human population expands exponentially and use of energy resources grows, more colleges and universities are moving towards going green solutions in their operations, new construction, and retrofits.

However, what are the true costs of going green? How do green buildings potentially impact an institution's risk profile? This article makes a compelling argument for going green, but it also highlights the true costs of going green. It discusses the different green technologies available and how colleges and universities may select from those technologies as they move toward a greener future. Finally, the article describes the various risks that can be associated with some of these green technologies, as well as the policies and liabilities an institution may need to consider to protect itself from new exposures.

Introduction

It took all of humankind to reach 3.4 billion people in 1966. It took only 44 years to double that number by 2009. At the current growth rate, some believe we will double the current 6.8 billion people in another 40 years.¹ Some believe that it is not possible because the planet does not have the resources to sustain a population of 13.6 billion people.²

In 1992, 1,700 of the world's scientists, including the majority of Nobel Laureates in the sciences, signed a *Warning to Humanity*.³ In their report on environmental degradation, they concluded with this:

"The Earth is finite. Its ability to absorb wastes and destructive effluent is finite. Its ability to provide food and energy is finite. Its ability to provide for growing numbers of people is finite. And we are fast approaching many of the

Earth's limits.

"No more than a few decades remain before the chance to avert the threats we now confront will be lost and the prospects for humanity immeasurably diminished."

"The Earth is finite. Its ability to absorb wastes and destructive effluent is finite. Its ability to provide food and energy is finite. Its ability to provide for growing numbers of people is finite. And we are fast approaching many of the Earth's limits."

The biggest threat to global sustainability⁴ comes from greenhouse gas emissions and the subsequent potential for climate change. Greenhouse gases originate primarily from burning fuels, methane releases from agriculture, and industrial processes.

A combination of population growth and increased industrialization in many developing countries are increasing the speed of greenhouse gas production.

Climate change, as a consequence of greenhouse gas emissions, is wreaking havoc on weather and weather predictability. In the last five years, for example, there have been a record number of destructive hurricanes, more frequent deadly heat waves throughout the world, including the United States, and unprecedented flooding similar to what recently occurred in Nashville, Tennessee.

Anthony Knap of the Bermuda Institute of Oceanic Studies has said that "the world's oceans [are] becoming warmer, and that warming points toward increased hurricane activity. Hurricanes are efficient ways of moving the heat in the water around the world." When the temperature rises, we could well experience what he calls "super-canes," which will be "a magnitude above the current scale of what we have experienced."⁵

Dr. Knap further explained, "When the mean changes, so do the extremes, and when we are talking about the weather then that means we will see a change in the severity of the extremes."⁶

Combined, sustainability and going green⁷ make up one solution, and higher education is leading the way. Colleges and universities are reducing their carbon footprints, offering degrees in sustainability sciences, and researching green alternatives.

Neither sustainability nor going green, however, is inexpensive. Nor are they always environmentally benign or risk-free. Managing the financial risks, the operational risks, the worker safety risks, and insurance premium increases and potential liability are essential components to the success of sustainable green campuses.

Green Isn't Cheap

The expense involved in going green can be considerable. A large northeastern university, for example, has announced that it will spend \$74 million over the next 15 years in its efforts to reduce its greenhouse gas emissions.⁸ As reported in the *Chronicle of Higher Education*, a university in the Midwest is upgrading its 45 buildings to geothermal technology at a cost upwards of \$65 million.⁹

More common these days is the use of wind energy. According to the Association for the Advancement of Sustainability in Higher Education, there are approximately 60 colleges and universities with one or more planned or completed wind turbines on their campus properties.¹⁰

Carleton College in Northfield, Minnesota, was reportedly the first college in the United States to install a utility grade wind turbine on its property at a cost of \$1.8 million. The 1.65 megawatt turbine went online in September 2004. Carleton calculates a payback time of 10 to 12 years with a life expectancy of the turbine to be about 20 years.¹¹ Investing in adequate building insulation and installing other energy efficiencies prior to installing a turbine are necessary steps to assure desired energy savings.

The Cost of LEED Certification

A leading example of the cost of going green is Leadership in Energy and Environmental Design (LEED) building certification.

Campuses across the country are committing to LEED certified buildings for new and renovated buildings. Certification can be platinum, gold, or silver and is achieved by accruing points on a 100-point scale. Points can be obtained by showing evidence of various energy efficiencies and use of sustainable wood products, use of recycled materials, use of toxin-free materials, and more.¹² Categories include sustainable sites and site design, water efficiency, energy performance and atmosphere protection, materials and resources, and indoor environmental quality.

Students are beginning to expect new buildings to be LEED certified and, in some cases, boards of trustees have issued new green building policies and renovation standards that require all new projects strive for LEED gold certification whenever possible.

The added cost of a LEED constructed building can easily exceed \$50,000. There is also the time involved in completing the application and backup documentation. Some have estimated that the submission for certification can add another \$20,000 to \$100,000 to the cost of the project. It is expected that these added costs will, over time, reduce

the overall expense of maintaining a LEED certified building.¹³

On the other hand, the cost of maintaining LEED buildings can also be expensive and unanticipated. Monitoring systems to measure ongoing building efficiencies, for example, can be complex, and facilities personnel may need special training to learn how to maintain them.¹⁴

Routine inspections need to occur to catch and correct any system failures. With personnel turnover and/or lack of commitment to assure efficient operations of buildings designed for energy efficiencies, potential savings may begin to erode over time.

Managing the financial risks, the operational risks, the worker safety risks, and insurance premium increases and potential liability are essential components to the success of sustainable green campuses.

Green Isn't Cheap... But Is It Worth It?

The upfront costs associated with these ventures are high and, although a necessary financial risk, only time will tell if the return in cost savings is noteworthy.

In the overall scheme of things, though, these costs are minuscule when compared to what we are seeing spent in search of new oil reserves. Such expenditures are necessary in order to buy time for alternative fuels to be developed at sufficient levels to meet world demand, but the chance of an unaffordable risk is enormous.

The March 2010 edition of *Global Broker and Underwriter* reported on a meeting of the world's major oil companies held in Dubai the previous February. The article quoted a US attendee as saying, "It is important that oil, gas, and chemical companies make use of improved energy sector *mega projects*. The age of the \$50 billion project has arrived. And, the national oil companies are well-equipped to avoid the kind of catastrophic incidents that could do serious long-term harm."¹⁵

Two months later, on April 20, 2010, the Transocean *Deepwater Horizon* drill located 40 miles off the Louisiana coast exploded, leaving 11 workers dead and gushing hundreds of thousands of gallons of oil a day into the Gulf of Mexico. The cost was originally expected to be around \$1 billion. A month after the explosion, the well still had not been capped and the estimated loss had risen to \$10 billion.¹⁶

But here's the real news. At a value of \$560 million,¹⁷ the Transocean *Deepwater Horizon* rig does not come close to what is considered a "mega project of \$50 billion." As another delegate to the Dubai conference stated, "Any large loss from a \$50 billion mega project would be very costly."¹⁸

Unfortunately, the *Deepwater Horizon* catastrophe did result in a mega loss of property, death, injuries, and environmental damage.

The Road to Green Has Many Obstacles

Technology is lagging behind need. The new energy alternatives which are getting the greatest amount of attention all face enormous obstacles, including becoming commercially affordable, producing meaningful quantities, and not using more non-renewable energy and materials than the very energy sources they are meant to replace.

Nuclear Energy

For example, many people assert that nuclear energy is a green energy source because it doesn't emit carbon dioxide.

The age-old concern that has yet to be resolved is what to do with the radioactive waste. Also, some in the security business see a direct link between the waste materials and nuclear weapons.¹⁹

About 10,000 megawatts of new nuclear power is scheduled to go online by 2020, which comes with a loan guarantee of nearly \$9 billion.²⁰ According to the *Wall Street Journal*, that is about 10 percent of all current nuclear power produced in the United States and only 15 percent of the total additional capacity needed.

Biofuels

As promising as biofuels are, to grow enough corn and soy to meet worldwide energy needs would require at least 10 percent of the earth's landmass, or the rough equivalent of all of the land already

under cultivation.²¹

The algae or cellulosic biofuels industry is challenged by how to obtain needed water supplies and how to produce the needed amount of algae strains.²²

Technology doesn't exist to produce sufficient biofuels in quantities necessary to meet US needs. There is speculation that 10,000 barrels a day may be able to be produced by 2018, but technology has yet to demonstrate that the goal can be achieved. To put this volume in perspective, Saudi Arabia produces about eight million barrels a day of crude oil.

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Coal Plants and Carbon Capture

Carbon capture technology is a process that pumps carbon dioxide waste from coal smokestacks and fossil fuel plants underground for permanent storage. A demonstration plant is expected to start up by 2015 at an estimated cost of \$334 million. It will need to operate for several years to test safety, reliability, and effectiveness. If proven effective, it could more than double the cost of electricity and coal.²³

Wind Power

Wind has already produced enough power for about 13 million homes in the United States. Because of insufficient wind resources in many geographic areas, however, it is only expected to produce about 20 percent of the energy needed in the United States by 2024.²⁴

Electric Vehicles

Electric vehicles (EV) are popular for short distances at low speeds. The greatest downside is that energy from non-renewable sources powers them. Technology may improve upon these limitations in the future. In the meantime, the cost of electricity needed to recharge the batteries is expected to exceed the cost of gasoline. If owners want to recharge their car batteries at home, existing outlets can take as long as 24 hours for a full charge. Owners can upgrade an outlet to 240 volts, which will provide a full charge in approximately six hours.²⁵ In those communities where EVs are already popular and growing in numbers, the local utilities are getting worried about possible blackouts and grids breaking down because of greater demand outweighing the capabilities of those systems.²⁶

Among the affordability issues is the need for lithium for use in the battery. A lithium-ion battery today is approximately \$10,000. Lithium is sourced from only a few areas in the world. One mine in the Bolivian Andes appears to have sufficient lithium to meet automakers' demands for EVs for decades to come. However, as lithium is a metal, it is not a renewable energy source. Additionally, mining it is dangerous, and, similar to coal, it is strip-

mined, which destroys the physical environment. Further, negotiating with the Bolivian government to source as much lithium as is needed has, so far, been a complex process.²⁷

Solar Power

Solar power is gaining in popularity, but it currently produces less than one percent of the electricity needs in the United States and, per kilowatt, can cost three times more than conventional electricity sources.

The *New York Times* recently reported that there is strong interest in building concentrated solar projects in the deserts of the Southwest. Because the land is publicly owned, permitting will likely be a drawn-out process. Concerns about flora, fauna, and desert vistas have already interfered with some solar projects in California's Mojave Desert. To illustrate scale, one Florida university had to clear 15 acres of trees and wildlife for its solar panel array.²⁸ For solar power to equal the output of one nuclear power plant, one would need to build five square miles of solar panels.²⁹ Also, current storage facilities can only store the energy for several hours without sunlight. This creates a problem of dependency in geographic areas where there is little seasonal sun.

Green and Safe Are Not the Same

Green jobs may result in reducing energy consumption, greenhouse gas emissions, and waste but, according to Dr. John Howard, director of the National Institute for Occupational Safety and Health (NIOSH), "For a job to be called a 'green job,' it must also be one that can be performed safely and result in no material impairment to worker health."³⁰ Green jobs still include hazards similar to those found in working with any energy supply, recycling, transportation, agriculture, construction, mining, or manufacturing industry.

NIOSH is now beginning to address worker safety and sustainability initiatives, and it recently held a workshop titled, "Making Green Jobs Safe: Integrating Occupa-

Green jobs still include hazards similar to those found in working with any energy supply, recycling, transportation, agriculture, construction, mining, or manufacturing industry.

tional Safety and Health into Green and Sustainability.”³¹ In his opening remarks at the workshop, David Michaels, assistant secretary of labor for the Occupational Safety and Health Administration (OSHA), stated, “Most people instinctively see green jobs as safe. But at OSHA, when we hear weatherization and renovation, we see exposure to lead and asbestos. When we hear insulation, we think isocyanate exposure. When we hear rooftop solar power, we see fall hazards. When we hear wind energy, we see lockout hazards. Sustainable jobs must also be safe jobs.”³²

Examples of worker safety concerns include:

- Electric batteries used in small work site vehicles, like forklifts and golf carts, can cause electric shock if incorrectly set up for recharging. They can also emit hydrogen gas, which, in some circumstances, can be ignitable or explosive. Battery acid is corrosive and can cause bodily injuries.
- Energy efficient traffic lights often do not produce heat and in winter months can become encased with snow. When this happens, drivers are unable to make out the color of the lights. This results in driving hazards, which can lead to accidents. A Midwest police officer was reported by the *Associated Press* as stating, “Short of some kind of technological fix, all that can be done is to have crews clean off the snow by hand.”³³ As this is labor intensive, it creates another risk to manage, and the added labor cost may cut into otherwise expected savings.
- Biodiesel is a flammable liquid, including during the production process, and manufacturers must also use hazardous chemicals to produce the fuel. Handling heavy containers of biomass products can also cause ergonomic problems for those manufacturing the fuel.
- Construction materials made from recycled products may themselves be dangerous. For example, lead has been found in steel made from recycled metal.³⁴

Many campuses are researching innovative green alternatives and solutions and engaging undergraduate and graduate students in the process. Just as there may be new or increased worker safety risks, students may encounter

the same risks in conducting their research and field work. Experimenting in biofuels, for example, may create new chemical risk exposures that have been otherwise unknown.

To begin identifying workplace safety issues involved with green jobs, NIOSH has created a concept called Prevention through Design (PtD).³⁵ This is a framework used to identify where old and new hazards intersect as a result of new technologies and subsequent adaptations needed to perform green jobs. The NIOSH PtD process may be useful for college and university environmental, safety, and health professionals to adopt when evaluating green jobs and green research on campus.

Insurance and Liability

Many in the insurance industry see climate change as a threat to the industry’s survivability. In particular, Lloyd’s has taken a lead in warning about the insurance consequences of climate change. The Lloyd’s “360 Risk Report” stated, “We foresee an increasing possibility of attributing weather-related losses to man-made climate change factors. This opens the possibility of courts assigning liability and compensation for claims of damage.”³⁶

Lloyd’s goes on to state on their website, “The issue of climate change will be vital to the future of the insurance industry. So far the industry has coped with the huge costs of weather-related catastrophes. But it is by no means certain that we will continue to do so, and there is no doubt that we are not taking the issue of catastrophe trends seriously enough. We need to take action now and start discussing the steps we should take as an industry to prepare for the impact of climate change. It’s a case of adapt or bust.”³⁷

The site continues with these comments:

- “Recent events have shown capital and pricing models to be wanting. We must regularly update and recalibrate our models to keep pace with reality.”
- “Insurers must prepare for the impact of climate change on asset values. Underwriting for profit will be key.”
- “Effective partnership with business and government will be key to managing risk.”³⁸

These statements may be interpreted as warnings to risk managers that they can expect underwriting to be more aggressive in areas where climate change is expected to be exceptionally damaging to property risks.

The National Association of Insurance Commissioners (NAIC) has taken notice. In March 2009, they adopted a Climate Risk Disclosure Survey for insurers. Its aim is to identify risks that climate change will create for them. It also aims to report what underwriters have done to encourage policy holders to reduce their carbon emissions.³⁹

The NAIC has also created the Climate Change and Global Warming Task Force, which is intended to lead the association's ongoing analysis of climate change and the impact on "insurance consumers, insurance providers, and insurance regulators."⁴⁰

As a result, the insurance underwriters have recognized the need for sustainability actions.

As property risks are increased by LEED certification, in particular because of the added costs to attain and maintain it, insurers are beginning to take notice. A few now offer *green property endorsements*. These endorsements recognize the value of LEED certification and typically allow for green materials and additional costs necessary to regain LEED certification in the event of a property loss.

For example, FM Global has a policy called *sustainable select*. This allows for green materials to be used to upgrade construction in the event of a loss. Additionally, FM Global's new *green coverage endorsement* provides insureds an opportunity to more easily upgrade damaged property utilizing green materials and practices.

There are also other "green regulators."

- On January 27, 2010, the US Securities and Exchange Commission (SEC) established the Corporate Climate-Change Disclosure Standard. This standard requires companies to take into consideration the impact of climate-change laws and regulations when disclosing business risks to investors.⁴¹
- Effective December 29, 2009, the Environmental Protection Agency (EPA) issued the Mandatory Reporting of Greenhouse Gases Rule. This rule requires suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions to submit

annual reports to the EPA, with the first report due March 2011 and including measurements going back to January 1, 2010.⁴² Many colleges and universities with central heating and cooling plants find they must comply with this reporting rule.

- The International Organization for Standardization has produced ISO 14000, a series of international environmental management standards that address the impact of a company's "processes, products, and services on the environment."⁴³ Organizations like ISO create industry standards and "standards of care," which are often used as comparisons of how organizations operate.

As the issue of sustainability and the need to go green continue to heat up, insurance claims, changes in policy wording, premiums, laws, and liability will all follow in concert.

Conclusion

The ultimate challenge to working towards a more sustainable future is how to meet the increasing demand of a rapidly growing world population while at the same time reducing demand for finite and non-renewable energy sources. The search for alternative energy solutions in areas of solar, nuclear, biofuels, wind, electric vehicles, and carbon capture and storage technologies continues to hasten.

In an April 2010 NACUBO *Business Officer* article, author Karla Hignite reported that colleges and universities must contend with three different types of carbon:

- The carbon the institution owns and controls, such as that which they buy and use for power.
- The carbon that someone else owns but is indirectly controlled by the institution, such as an off-campus power plant. While the utility owns the carbon, the institution controls the emission.
- The carbon that might impact the institution but that the institution neither owns nor controls, such as emissions from campus commuters.⁴⁴

Colleges and universities are acutely aware of the risks we face. As of the writing of this article, nearly 700 colleges and universities nationwide had signed the American College and University Presidents' Climate Commitment.⁴⁵ This nationwide initiative commits each signatory institution to reducing its carbon dioxide emissions by 80 percent by mid-century.

Steps toward that goal include measuring CO² emissions, purchasing energy-efficient ENERGY STAR products, and reducing the consumption of purchased electricity.

Many colleges and universities are now offering degree programs in sustainability, as well as other resources on green technology and sustainability to the campus community. For instance, Yale University's environment360, or e360, website offers the latest information in environmental news, green technology, and other advances and risks associated with the environment.⁴⁶

In his book, *Corporate Survival: The Critical Importance of Sustainability Risk Management*, Dan Anderson concludes with a quote from Red Sky at Morning that reads, "...Marshal Lyautey of France debating with his gardener the wisdom of planting a certain tree, 'It will not bloom for decades,' the gardener argued. Lyautey replied, 'Then plant it this afternoon.'"⁴⁷

About the Author



As an executive director of Arthur J. Gallagher's Higher Education Practice, Leta Finch serves as a resource to the company's college and university clients. Prior to joining Gallagher, Ms. Finch was president of Champlain Captive Management, Inc., a Vermont and Hawaii firm managing captive insurance companies for national and international clients.

Ms. Finch's prior higher education experience includes serving as the founding director of risk management at the University of Vermont. She was the founding director of the Institute for Financial Services at Champlain College, where she was a member of Dean's Council, served as a member of the President's Task Force on International Programs, and taught as an adjunct instructor in the college's business administration division. Ms. Finch is a trustee emeritus of the board of trustees at Champlain College. She is an active member of the University Risk Management and Insurance Association (URMIA) and has served as its president. She is the recipient of URMIA's Distinguished Risk Manager Award and served as a founding board member of United Educators Risk Retention Group. Her international experience in

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Endnotes

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- ⁵ Jon Guy, "Energy to Succeed Despite Political and Geographical Climate Challenges," *Global Broker and Underwriter*, March 2010, 8.
- ⁶ Ibid.
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**When we are no longer able to change a situation,
we are challenged to change ourselves.**

—VIKTOR FRANKL (1906–1997),

AUSTRIAN NEUROLOGIST, PSYCHIATRIST, AND HOLOCAUST SURVIVOR

If we take as given that critical infrastructures are vulnerable to a cyber terrorist attack, then the question becomes whether there are actors with the capability and motivation to carry out such an operation.

—DOROTHY DENNING (1945–), INFORMATION SECURITY RESEARCHER

Fighting Phishing, Pharming, and Other Cyber-Attacks: Coverage for High Tech Liabilities

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Abstract: Much like any other business or organization, as universities rely more and more on electronic resources, they open themselves up to a new set of unique risks. The examples, case studies, and research highlighted here provide a glimpse into the many potential cyber risks facing higher education risk managers. This article focuses on risks related to usage of the Internet, e-mail, and electronic devices, as well as the potential impacts of cyber-crimes and data breaches. It also explores what professionals should look for in their insurance coverage and how the courts have interpreted whether the business or organization was liable when faced with a variety of different breaches or cyber-crimes.

Introduction

Technology has increased the productivity of universities and businesses, but it comes with potential risks and liabilities. As organizations rely more heavily on the Internet, e-mail, and electronic devices, “cyber-crimes” and catastrophic electronic mishaps loom as serious threats.

In the past year alone, universities frequently found themselves in the unwanted spotlight as victims of cyber-crimes and data breaches:

- In December 2009, hackers inserted a malware into Pennsylvania State University’s computers, exposing the Social Security numbers of about 30,000 people.
- Hackers accessed personal data of approximately 160,000 women who had enrolled in a mammography project conducted by the University of North Carolina at Chapel Hill. The school learned of this data breach in July 2009, but the intrusion may have occurred as early as 2007.
- In February 2009, the University of California, Berkeley announced that hackers infiltrated sensi-

tive databases that included Social Security numbers, birth dates, and medical records of 160,000 students and alumni. Some of the data reached back to 1999.

- A cyber-criminal hacked into Eastern Illinois University’s admissions database, exposing personal data of nearly 10,000 current, past, and prospective students dating back to almost a decade.

Cyber-crimes can cripple an organization’s daily operations. In the past year alone, universities frequently found themselves in the spotlight as victims of cyber-crimes and data breaches.

Businesses have also suffered data breaches in recent years. For example, cyber-criminals obtained credit card, driver’s license, and Social Security information from millions of customers of TJ Maxx and Marshalls. Hackers also targeted thousands of Monster.com users and stole their personal background information.

Cyber-crimes can cripple the day-to-day operation of organizations. Viruses from hackers or disgruntled employees can disable computers or overload the network, leading to business interruption. Organizations also risk the loss of valuable intellectual property if the security of their computer network is breached.

Other forms of cyber-crimes are directed at the companies’ consumers or the universities’ students or employees. These Internet crimes can range from “phishing” (where the culprit poses as a legitimate organization to obtain confidential information) to “pharming” (where the criminal redirects web traffic from a legitimate site to a sham site) to the hacking of the organization’s network to steal sensitive information.

Accidental exposure of data or loss of data from technological malfunctions can also lead to substantial economic losses and tarnished reputations. Numerous news stories have detailed potential disclosure of sensi-

tive information caused by the loss of employee laptops, wireless devices, USB memory sticks, and other portable storage devices.

Even as companies and universities work to reduce their vulnerability to technology-related risks, new technology advances can lead to new problems that arise more quickly than defenses can be geared up. In response, organizations have realized a heightened need for stringent risk management and insurance coverage for mishaps related to these technologies.

This paper briefly outlines significant practical and substantive issues in insurance coverage cases involving underlying technology-related liabilities. The first section of this paper provides a brief landscape of the potential liability issues. The next section analyzes the evolution of the ISO comprehensive general liability (CGL) policy language for data losses. The third section provides a brief summary of cases that have addressed whether the loss of electronic data and software is covered under first-party or third-party CGL policies. Finally, the last section discusses various other areas of potential policy coverage.

I. Increasing Risk, Increasing Losses

In 2009, the Ponemon Institute, a privacy management practices think tank, estimated that the average data breach will cost an organization in the United States \$204 per customer record.¹ Technology liability damages may include losses due to reputational damage, litigation and defense fees, notification expenses, and costs to restore or repair lost or corrupt data. Furthermore, a data breach can lead to costly governmental investigations and fines. For example, ChoicePoint—a company that collects personal data, such as credit histories and Social Security numbers—made national headlines in 2005 when it sold 145,000 customer records to criminals posing as a legitimate business. It paid a \$15 million fine to the Federal Trade Commission (FTC), and the incident led to a multimillion-dollar decrease in the company's market capitalization.²

First-party and third-party liabilities may arise from cyber-crimes and technology-related losses. First-party liability may include damages to the organization's computers, networks, and data; stolen or destroyed proprietary information; deletion or alteration of vital records; and business interruption due to a shutdown of a website or e-

commerce portal. Third-party liability may include claims arising from lost or stolen data. For example, a business may face lawsuits if a hacker or disgruntled employee steals confidential customer information.

Organizations may also face exposure to significant litigation and fines from federal and state agencies if confidential data is exposed due to a cyber-attack.

Federal Statutes and Regulations

Numerous federal statutes and regulations establish notification requirements if there is a release of protected information, and they also provide for enforcement action and/or fines. For example:

- The Gramm-Leach-Bliley Act requires financial institutions to safeguard confidential consumer information.³
- The Health Insurance Portability and Accountability Act (HIPAA) protects sensitive health care information of patients.⁴
- The Children's Online Privacy Act protects online information about children, creating reporting burdens.⁵
- The Counterfeit Access Device and Computer Fraud and Abuse Act (CFAA) provides a civil cause of action with standing for anyone who suffers damage as the result of a breach of the act.⁶
- The FTC has enforcement and administrative responsibilities arising from a number of laws, including the FTC Act and Fair Credit Reporting Act. In the past few years, the FTC has brought more than a dozen related enforcement actions. For example, in 2006, the FTC settled with Card-Systems and its successor, Soldius Networks, for a 2005 security breach that caused millions of dollars in fraudulent purchases. In 2005, pursuant to the Fair Credit Reporting Act, the FTC brought action against ChoicePoint for compromised data. BJ's Wholesale Club and others have also settled with the FTC.
- A securities fraud action could be brought, for example, under a 10b-5 claim arising from stock price drops following the disclosure of a database security breach or misrepresentation of security safeguards.

- Derivative suits could also be brought against directors and officers for gross mismanagement of security.

State Laws and Regulations

Due to the torrent of data breaches, states in the past decade began to enact notification laws. Today, 45 states and the District of Columbia have enacted such laws.⁷ California, for example, requires that all businesses, universities, and government agencies notify affected or potentially affected people when there is evidence that private information has been exposed.⁸

Many of these federal and state data privacy laws also provide private causes of actions. For example, CFAA allows affected consumers to bring civil actions, though it does not appear that any consumer class action suits have been successful to date. State laws vary in terms of defining who has standing to sue and establishing the pool of potential plaintiffs. A minority of states allow consumers to bring private statutory causes of actions alleging actual identity theft.⁹ So far, there have not been any large liability verdicts, though there have been settlements.

In states where there is no private right of action for identity theft, consumers must rely on state consumer protection laws. It is often difficult to determine liability under these laws because data breach negligence standards have not been clearly established. For example, in 2006, a financial analyst's laptop was stolen with unencrypted files of more than 550,000 mortgage loans. The court granted summary judgment for the defendant mortgage company, finding that it was not negligent and that the victims who lost data could not demonstrate any damages because of the conduct. The court reasoned that the defendant had complied with the pertinent statutory regulations because it had written security policies, risk assessment reports, and proper safeguards for its customers' personal infor-

mation.¹⁰ Nonetheless, organizations may still want to settle quickly in order to avoid bad publicity and potentially adverse precedents.

These exposures have led companies and universities to review their current insurance coverage and investigate the availability of new cyber-related insurance to cover the costs associated with data breaches, business interruptions, and damaged reputations. Some organizations are in for a rude awakening; there are often significant insurance gaps, and the issue of coverage for technology liability remains an open question.

II. Will Commercial General Liability Insurance Cover Technology-Related Liability?

A critical coverage question for many organizations is whether the technology-related loss falls within the definition of "property damage" under their third-party CGL policies. Recent post-2001 changes to the standard ISO policy form specify that electronic data are not "tangible property" and, therefore, that loss of such data does not constitute "property damage." This new language has yet to be interpreted by the courts, but it will likely be more difficult for the insured to obtain coverage for electronic data loss. Many organizations, however, may still have coverage under the pre-2001 ISO standard policy forms that do not contain such language.

ISO Pre-2001 Policies

Property damage has historically been defined in standard CGL policies as either (a) physical injury to tangible property, including all resulting loss of use of that property, or (b) loss of use of tangible property that is not physically injured.¹¹ Thus, the first question that needs to be addressed is whether the data breach or technology-related loss involves damage to a "tangible property." Courts consistently have held that hardware defects that cause physical injury to computer components constitute

Cyber exposures have led companies and universities to review their current insurance coverage and investigate the availability of new cyber-related insurance. Some organizations are in for a rude awakening; there are often significant insurance gaps.

physical injury to tangible property.¹² However, courts are not in agreement about whether electronic data are tangible property. As set forth in Section III, there is split authority with respect to pre-2001 ISO policies. Some courts have held that electronic data are not tangible, and thus that loss of data is not property damage.¹³ Other courts have found that loss of data constitutes property damage.¹⁴ And still other courts have avoided deciding what constitutes tangible property by granting or denying coverage based on other policy terms or exclusions.¹⁵

ISO Post-2001 Policies

In 2001, ISO amended the definition of property damage in the standard CGL policy (ISO Form CG 00 01 10 01) to expressly state that “electronic data is not tangible property.” The term “electronic data” is further defined as:

[I]nformation, facts, or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices, or any other media which are used with electronically controlled equipment.

Then in 2004, ISO created a new exclusion for electronic data (ISO Form CG 00 01 12 04). Exclusion p states:

p. Electronic Data: Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts, or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and application software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices, or any other media which are used with electronically controlled equipment.

Insurance companies will argue that the post-2001 ISO policies explicitly exclude coverage for claims involving corrupted, damaged, or lost computer data. However, no known court decision has yet opined on the meaning and scope of the post-2001 ISO policies, and indeed these policy language questions may raise additional interpretive questions. For example, although the 2001 ISO policy states that electronic data is not tangible property, it does not appear to exclude coverage for the *loss of use* of an undamaged computer caused by a data loss (i.e., loss of use of tangible property).

If a cyber-attack causes physical damage to servers or hard drives, there is no question that there has been direct physical damage. The thornier legal question is whether an insurer is liable if the damage occurs to software or data.

III. Overview of Case Law Interpreting Technology-Related Coverage Issues

If a cyber-attack causes physical damage to an organization’s servers or hard drives, the insurer must cover the losses because there is no question that there has been direct physical damage. The thornier legal question is whether an insurer is liable if the damage occurs to software or electronic data. Courts often attempt to resolve that question by determining whether or not software or data constitutes tangible property. There is a split of authority about whether the loss of electronic data is covered, and the decisions often hinge on the precise language of the policy.

Decisions Providing Coverage for Electronic Data

- The Texas Court of Appeals in *Lambrecht & Associates, Inc. v. State Farm Lloyds* held that the policyholder’s computer server, software, and data stored on the server were physical property, where a hacker invaded the computer system and installed a virus that rendered the server useless. The court avoided the abstract issue of whether electronic data and software can constitute tangible property and instead focused on the language of the first-party insurance policy. It held that the policy covered lost data because “electronic media

and records” was defined to include “data stored on such [electronic] media.” The loss of software was also covered because the policy offered coverage for replacing “prepackaged software programs.”¹⁶

- A federal district court in Arizona held that “physical loss or damage” in a first-party all-risk policy “is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality.”¹⁷ Three mainframe computers lost power due to an outage, causing the loss of data in the random access memory. The policyholder claimed that the loss was covered as a direct physical loss, but the insurer denied the claim on the grounds that there was no physical damage.¹⁸ Relying on federal and state computer fraud laws, the court interpreted “physical loss or damage” broadly and noted that “[a]t a time when computer technology dominates our professional as well as personal lives, the Court must side with Ingram’s broader definition of ‘physical damage.’”¹⁹
- The Minnesota Court of Appeals in *Retail Systems, Inc. v. CNA Ins. Co.* held that a computer tape and electronic information in the tape were tangible property within the meaning of a third-party liability policy covering physical injury or destruction of tangible property. The plaintiff, a data processing consultant, developed computer programs and processed data for other companies. A third-party gave the plaintiff a computer tape to process, but the tape was damaged. The third-party then sued the plaintiff, who then sought coverage under his policy. The court held that the data on the tape was of permanent value and was integrated completely with the physical property of the tape.²⁰ In finding coverage for the plaintiff, the court rejected a series of cases that had concluded that computer tapes are intangible property for tax purposes. It reasoned that computer tapes have little value for tax purposes, but they may have significantly greater value when used for storage of valuable data.²¹
- In *Computer Corner v. Fireman’s Fund Ins. Co.*, a New Mexico Court of Appeals held that lost data on a hard-drive “was physical, had an actual physi-

cal location, occupied space, and was capable of being physically damaged or destroyed” and that the lost data was therefore covered under a CGL policy.²²

Decisions Refusing to Provide Coverage for Electronic Data

- In *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.*, the California Court of Appeals held that the policyholder’s loss of information in a database was not covered under a first-party policy because the loss was not a “direct physical loss.” Ward, an insurance services company, was updating a software program when a programming error led to a crash of the database. All of the electronically stored data used to service Ward’s insurance policies were lost. The court held that there was no “direct physical loss” because electronic data did not have “material existence” and was not “perceptible to the senses.”²³
- Similarly, in *State Auto Property and Cas. Ins. Co. v. Midwest Computers & More*, the insurance company argued that it was not obligated to defend and indemnify a computer repair company which had negligently caused the loss of data of its client. A federal court in Oklahoma held that the computer was not damaged and that the data stored on a computer disk was not tangible property.²⁴ The court relied on the definition of “tangible” in Webster’s Ninth Collegiate Dictionary, which defined it as “capable of being perceived, esp. by the sense of touch...capable of being precisely identified or realized by the mind.”²⁵
- The US Court of Appeals for the Fourth Circuit held in *America Online, Inc. v. St. Paul Mercury Ins. Co.* that damage to computer operating systems and software does not constitute tangible damage.²⁶ America Online faced a spate of lawsuits after consumers claimed that the new software had bugs that made it incompatible with their computers’ operating systems and other software. The Fourth Circuit held that St. Paul did not have a duty to defend America Online under its CGL policy because computer data, software, and systems were not tangible. Relying on the purported

plain meaning of “tangible,” the court held that the computers’ operating systems and software were incapable of perception by any of the senses. As the Fourth Circuit put it, “The insurance policy in this case covers liability for ‘physical damage to tangible property,’ not damage to data, software, i.e., the abstract ideas, logic, instructions, and information.”²⁷ Perhaps highlighting the state of flux in this area of law, the Fourth Circuit’s America Online decision was issued only six months after a different Fourth Circuit panel in an unpublished opinion held that data destroyed by a hacker was “direct physical loss” under the policy.²⁸ The concurring opinion in *NMS Servs. Inc. v. Hartford* explained that the loss of electronic data constituted physical loss because “a computer stores information by rearrangement of the atoms or molecules of a disc or tape to effect the formation of a particular order of magnetic impulses, and a ‘meaningful sequence of magnetic impulses cannot float in space.’”²⁹

The Role of Policy Exclusions

Insurance companies may raise various policy exclusions to seek to bar coverage for underlying technology claims. However, the burden is on the insurance company to demonstrate that the exclusion applies.

In some cases, courts have used policy exclusions to deny coverage without reaching a decision as to whether the data was tangible property. For example, in *Magnetic Data, Inc. v. St. Paul Fire and Marine Ins. Co.*, the Minnesota Supreme Court declined to decide if erased data was intangible. Instead, the court said that even if data was tangible, a “control of property” exclusion in the policy applied because the property was damaged at the insured’s premises.³⁰

IV. Other Technology-Related Insurance Policies

New Insurance Products for Cyber-Liabilities

Due to gaps in traditional insurance policies, insurance companies have begun to market new insurance policies that address some of the cyber-liability issues. These new policies and endorsements are available from most of the major insurance companies. The policy forms are available with specific coverage or bundled in a multi-line policy.

These forms are commonly called network security liability, privacy liability, or data loss liability coverage.

Network Security Liability Policies

- Network security liability policies typically cover unauthorized access to databases, identity theft, or disruption of service.
- Defense costs are covered, but there may be a decrease in the limits of liability.
- Trigger is determined by whether the policy is claims-made or occurrence.
- There is no coverage for computer failure because of fire, explosion, electrical failure, or misappropriation of trade secrets.

Privacy Liability Policies

- These policies typically cover invasion of privacy, trespass, eavesdropping, and breach of a company’s privacy policy.

Data Loss Liability Policies

- Data loss liability policies typically cover virus attacks, information corruption, computer theft and fraud, security threats to networks, and claims arising from contractual liability or invasion of privacy.
- These policies do not usually cover both first- and third-party claims. Some policies cover first-party risks such as an interruption of the policyholder’s business due to a cyber attack, while others provide coverage only for third-party claims (e.g., damage due to sending a computer virus).

Other Technology Policy Forms

- There are additional technology-related policy forms that cover acts of negligence (e.g., policyholder’s mistaken transmission of information to another company that causes damage or breach of security) or unauthorized access to a computer network resulting in data theft or loss or invasion of privacy. A number of third-party technology policies provide some type of coverage for intellectual property liability.

Other Potential Sources of Coverage in Common Policies and Provisions

While companies and universities may benefit from these new cyber-liability forms, they should not overlook that their technology-related losses may already be covered by common insurance policies and provisions: (a) the personal and advertising injury clause in CGL policies, (b) directors and officers (D&O) policies, and (c) errors and omissions (E&O) policies.

Personal and Advertising Injury Clause in CGL Policies

Organizations facing privacy or data breach-related claims often do not consider the personal and advertising injury clause in their CGL policies.

An advertising injury occurs when a third-party suffers harm due to the policyholder's "advertising" activities. If the term "advertising" is read properly, the personal and advertising injury clause can provide coverage and defense for a wide variety of claims, including violation of privacy rights, misappropriation of advertising ideas or style of doing business, and infringement of copyright, title, or slogan. A number of decisions interpreting this clause in the context of technology liability claims have centered on whether the definition of advertising requires communication to a broad audience. Insurers may argue that a policyholder's technology-related claims do not constitute advertising because certain Internet-related activities may not reach a broad audience, but several courts have rejected insurers' attempts to narrow the definition of advertising.

For example, in *Zurich American Insurance Co. v. Fieldstone Mortgage Company*, the court held that claims made under the Fair Credit Reporting Act (FCRA) can trigger coverage under a CGL policy

and that the insurer had a duty to defend the policyholder under the personal and advertising injury clause.³¹ The underlying claim alleged that the policyholder had violated FCRA by improperly accessing the plaintiff's credit information to solicit their business for subprime mortgages. The court held that the policyholder's use of credit information in a written solicitation constituted a publication, and thus fell within the scope of the personal and advertising injury clause.

Similarly, in a case involving personal injury language, the Ninth Circuit, in an unpublished opinion, read the provision broadly to find coverage for a breach-of-privacy claim. In *Netscape Communications Corp. v. Federal Ins. Co.*, the underlying complaint alleged that AOL's subsidiary, Netscape, had collected and used information regarding Internet users' activities for technical support reasons, as well as opportunities for targeted advertising in violation of the Electronic Communications Privacy Act and Computer Fraud and Abuse Act. AOL's insurance policy provided indemnity and defense against losses sustained for personal injury, which was defined to include losses arising from "making known to any person or organization written or spoken material that violates a person's right to privacy." The Ninth Circuit acknowledged that the underlying claims were "not traditional breach of privacy claims" because the Internet users' activities had not been disclosed

to any third-party (other than AOL and Netscape). Nonetheless, the Ninth Circuit relied on the broad definition of personal injury to find coverage, holding that the Internet users' activities had been disseminated literally to "any person or organization."³²

Directors and Officers Liability Policies

Directors and officers (D&O) liability policies can also be invoked for potential coverage when directors and officers face technology-related liability unless

An advertising injury occurs when a third-party suffers harm due to the policyholder's "advertising" activities. The personal and advertising injury clause can provide coverage and defense for many claims, including violation of privacy rights.

the policies expressly exclude data breach claims. An organization's D&O insurance may cover certain costs associated with a data breach or service interruption. For example, directors and officers may be sued for their failure to make proper disclosures of inadequate security or technology-related damage that may have substantial impact on the company or institution. In one notable case, the credit card information of more than 130 million people was stolen.³³ The news of the data breach led to a severe decline in the company's stock price, leading to a shareholder derivative suit. Although the court dismissed the shareholder's complaint in this case, directors and officers may be subject to liability for exposure of sensitive data.

Errors and Omissions Liability Policies

Errors and omissions (E&O) coverage provides insurance for damages resulting from negligence, omissions, mistakes, and errors made by the insured in the course of providing professional services. A number of different types of E&O policies may cover technology-related liabilities. These include software designers' professional liability insurance, electronic data processors' professional liability insurance, and computer consultants' professional liability insurance. In at least one case, a federal court in California held that exclusions in an errors and omissions policy precluded coverage for an underlying lawsuit. However, this decision provides little guidance as to the scope of coverage under an E&O policy because the policyholder engaged in dishonest and illegal activity involving a phishing scheme.³⁴

Conclusion

In today's technological world, no organization is immune to technology-related claims. Accordingly, no university or company should remain in the dark about whether they have adequate insurance protection against such claims. University risk managers and counsel need to determine whether they have sufficient coverage, and, if not, determine what type of coverage they need to protect themselves against the rise of technology-related liability.

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Mr. Oshinsky focuses his practice on insurance coverage litigation on behalf of policyholders in federal and state courts throughout the country and on advising clients nationwide on insurance coverage-related matters. He represented Keene Corporation in *Keene Corp v. Insurance Co. of North America*, the landmark DC Circuit case establishing the "continuous trigger" principle in insurance coverage law. Mr. Oshinsky has litigated, and continues to litigate, many of the most significant, complex insurance coverage issues in the country. His sought after experience has touched numerous clients, including Fortune 100 companies, in a wide variety of industries—chemical, pharmaceutical, food, communications, education, financial, technology, and construction industries.

Mr. Oshinsky's insurance coverage litigation practice consists of cutting edge work on matters including advertising liability, asbestos, broker's liability, business interruption, construction defects, directors and officers, employment and discrimination issues, environmental liability, errors and omissions, fidelity bonds, professional indemnity, general liability, intellectual property, products liability, and first-party property policies.

Chambers recognizes Mr. Oshinsky as the "dean of the policyholder bar," and in 2009 was included in its top-tier "Band 1" national ranking based on feedback from corporate clients and peers. He was recognized by *Legal Times* in 2007 as one of the 10 best insurance attorneys in Washington, DC, in its "Leading Lawyers" honors and also selected as "The Leading Lawyer in Insurance" for Washington, DC, in October 2007. He is regularly cited in *Best Lawyers*, *Super Lawyers*, and in the *Lawdragon 500 Leading Lawyers in America*.

Mr. Oshinsky frequently lectures and publishes on a wide variety of insurance law topics. He is the lead author and editor of Aspen's multi-volume *Practitioner's Guide to Litigating Insurance Coverage Actions*. He has published articles in the *Insurance Coverage Law Bulletin*, *Journal of Insurance Coverage*, *The Corporate Analyst*, *The John*

Liner Review, Environmental Hazards, The Environmental Counselor, Chemical Waste Litigation Reporter, Asbestos Issues Magazine, Journal of Products Liability, Legal Notes & Viewpoints Quarterly, and Financier Worldwide, among others. He serves as an expert witness in insurance coverage litigation matters.

Mr. Oshinsky maintains an active pro bono practice. He is lead counsel in three pro bono immigration appeals, including a matter pending before the Board of Immigration Appeals and two matters before the US Court of Appeals for the Ninth Circuit. Also, he is handling an insurance coverage case for a veteran of the Armed Forces relating to health benefits and numerous matters relating to the 2008 California Tea Fire.

Mr. Oshinsky is a 1967 cum laude graduate of Columbia Law School, where he was a Harlan Fiske Stone Scholar and editor of the *Columbia Journal of Law and Social Problems*, as well as a 1964 cum laude graduate of Brooklyn College. He is admitted to practice in California, the District of Columbia, and New York, in addition to the United States Supreme Court and federal, district, and appellate courts throughout the country.



Lorelie S. Masters is a partner in Jenner & Block's Washington, DC, office. She is a member of the firm's Litigation Department and Climate and Clean Technology Law and Insurance Litigation and Counseling Practices. Ms. Masters is AV Peer Review Rated, Martindale-Hubbell's

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Prior to joining Jenner & Block, Ms. Masters spent 17 years at Anderson Kill & Olick, LLP, in its nationally recognized insurance coverage group. Since 1983, she has advised and represented companies and individuals seeking to enforce insurance coverage under general liability, directors and officers, first-party property, health, and other types of insurance. Ms. Masters also has extensive experience in e-commerce issues and related records management and electronic discovery issues that arise from the increasing reliance on technology and computers.

Ms. Masters has handled, tried, and settled cases in state and federal trial and appellate courts across the

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Ms. Masters served as lead trial counsel for policyholder Hoechst Celanese Corporation in its action enforcing general liability insurance coverage for hundreds of thousands of product liability claims against the policyholder in what the press called the largest property damage class action settlement ever. The *National Law Journal* called the jury's verdict in Hoechst Celanese's coverage case one of the "most significant jury verdicts of 1997." Most recently, Ms. Masters obtained an award of more than \$92 million to cover product liability claims against a major pharmaceutical and chemical manufacturer in an arbitration conducted in London under the English Arbitration Act, 1996.

Ms. Masters is co-author of *Insurance Coverage Litigation*, an in-depth legal treatise first published in 1997 and updated annually, and *Liability Insurance in International Arbitration: The Bermuda Form*. Ms. Masters serves on the Litigation Steering Committee for the District of Columbia Bar and on the Committee on Admissions, which administers and oversees applications and examinations for admission to the District of Columbia Bar. Ms. Masters was president of the Women's Bar Association of the District of Columbia from 2007-2008. She is a past policyholder chair of the Insurance Coverage Litigation Committee of the Section of Litigation of the American Bar Association and continues to serve in the Section of Litigation's Leadership. Ms. Masters serves on the American Bar Association's Commission on Women in the Profession. She chaired the Insurance Coverage Litigation Committee's Midyear CLE Meeting in 1999 and is a former editor of the committee's award-winning, bimonthly journal, *Coverage*. Ms. Masters is a member of the American Law Institute.

Ms. Masters received the National Association of Women Lawyer's 2005 Service Award for her work as chair of NAWL's Amicus Committee. Ms. Masters was also recognized in the 2007, 2008, 2009, and 2010 editions of *Washington DC Super Lawyers* for insurance coverage litigation and by *The Best Lawyers in America* for insurance law in 2008, 2009, and 2010. Since 2005, *Chambers & Partners USA* has named Ms. Masters one of

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His private practice experience includes serving as a member of the trial team that represented the leaseholder of the World Trade Center in a multi-billion dollar insurance coverage dispute in the aftermath of September 11th, defending Fortune 500 companies against securities fraud and shareholder derivative suits, and conducting internal investigations relating to accounting issues at large financial institutions.

Mr. Lee has an active pro bono practice. He has, in the past, won reversal of a drug conviction of an indigent client, filed a Second Circuit amicus brief on behalf of a slain police officer's widow, and written an amicus petition for certiorari in a capital criminal case.

He previously practiced for several years at Wachtell, Lipton, Rosen & Katz in New York and was also a clerk to Judge Emilio Garza of the US Court of Appeals for the Fifth Circuit. Mr. Lee has written widely for both legal and non-legal publications, including *The New Republic* and *The Weekly Standard*. He has also authored a book on immigration policy and law titled, "Huddled Masses, Muddled Laws," Praeger Publishers, 1998.

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Ms. Briggs graduated from William Smith College, receiving a BA in history. She received her MS in library science from Long Island University. She earned a Juris Doctor from New York Law School in 1982.

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Endnotes

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**There are no foreign lands.
It is the traveler only who is foreign.**

—ROBERT LOUIS STEVENSON (1850-1894),
SCOTTISH NOVELIST, POET, AND TRAVEL WRITER

A Global View of the University's Duty of Care Obligations

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Abstract: As more students, faculty, and staff members travel, work, and live abroad, higher education institutions face the question of what their responsibilities are to their constituents. Duty of care refers to the legal obligation of organizations and individuals to treat others and the public in such a way as to avoid the risk of foreseeable injury. Employers have a duty of care obligation for the health, safety, and security of their employees; likewise, colleges and universities have an obligation to all of their stakeholders who are traveling or studying internationally. This article highlights the many different risks and duty of care obligations that face colleges and universities specifically, including student versus faculty and staff risks, past international incidents, international campus risks, and reputational risk. The authors also outline steps that any institution can take to ensure it has processes in place to meet its duty of care obligations and protect its employees and students.

Introduction

Etymologically, the term “university” (from the Latin “*Universitas*”) connotes universality and a global mindset. To embrace this world view, university faculty exchange ideas and scholarship with others around the world. In the 17th century, Erasmus frequently traveled from his universities in Rotterdam (the Netherlands), Leuven (Belgium), and Basel (Switzerland) to other countries in Europe to visit his contemporary academic colleagues and students for discussions and lectures. Traveling on the roads in those days was more laborious and probably much more hazardous than today. However, 21st century globalization has brought new and increased risk for students and university employees who similarly travel for educational purposes. It also brings in a new set of challenges for the universities that must care for them.

The legal notion of “duty of care” implies that individuals and organizations have legal obligations to act toward others and the public in a prudent and cautious manner to avoid the risk of reasonable foreseeable injury to others.

Employers have a duty of care obligation for the health, safety, security, and well-being of their employees as they fulfill their work obligations and for their customers who use their products or services. The specific responsibilities of employers for the duty of care of employees who are traveling abroad have recently been documented for corporations.¹ In spite of the fact that universities have similar obligations as corporations to their employees, how the notion of duty of care applies to them and their stakeholders remains mainly unexplored to date. The purpose of this paper is to raise awareness and explore the pertinent issues associated with the duty of care responsibilities of universities for their students and employees, including faculty, staff, and administration, who are increasingly traveling abroad.

First, we identify who is generally traveling abroad on behalf of the university and the risks that this may entail.

Second, we elaborate on the special issues resulting from international campuses, whether a result of a partnership with a foreign university or a borderless campus. Third, we focus on how a university can assume its duty of care responsibilities. Finally, we make a number of practical recommendations for university administrators with regard to duty of care. The university's lack of awareness about this issue and its failure to understand and assume its duty of care obligations can have dramatic consequences for them in terms of legal liability, reputational risk, and even educational program continuity.

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At-Risk University Travelers

Travelers are exposed to increasing health, safety, and security risks as they leave their home country and find themselves in unfamiliar surroundings. Within a university context, travelers usually consist of students, faculty, administration, and staff. Students differ from faculty, administration, and staff in the sense that the former are customer stakeholders and the latter are employee stakeholders of the university. But when these constituents travel on behalf of the university, for whatever reason, the educational institution bears responsibility for the risks they may encounter. These risks are, of course, present in domestic travel, but can be more difficult to assume for international travel.

The major reasons for outbound international travel of students include participation in sport teams activities, cultural collegiate performances, study abroad, and international internship programs. International students pursuing a degree at a university outside of their home country make up the majority of the inbound international student travel. Reasons for international faculty travel consist mainly of faculty traveling with students as chaperones to university-related events, teaching abroad, conducting research abroad, conference attendance, and approved sabbatical leaves away from the university. University administration and staff mainly travel abroad for recruiting purposes, conference attendance, speaking engagements, university partnerships with schools abroad, and other general university business. The fact that the university deals with different traveling constituencies, who travel for different reasons and to different locations for short- or long-term periods of time, complicates the threat and risk profile and the university's duty of care responsibilities.

Employers have varied duty of care legal and moral obligations for their traveling employees and must plan accordingly. The risks encountered during international work-related travel range from "natural" to "human-made" situations and entail a wide range of exposures (see Figure 1). Although some of these risks are predictable because of the location, others are more uncertain. In either case, though, the unfamiliar environment encountered by the traveling person poses the greatest threat.

FIGURE 1: RISKS ASSOCIATION WITH INTERNATIONAL TRAVELERS²

- Terrorism, kidnapping, hijacking, and piracy
- Lawlessness, violent crimes, threats, opportunistic crime, organized crime, and imprisonment
- War, insurgency, political upheaval, coups, and civil unrest
- Natural disasters, such as hurricanes, floods, tornados, storms, mudslides, earthquakes, tsunamis, snowstorms, extreme weather conditions, and drought
- Infectious diseases and pandemics, such as influenza, SARS, and Avian flu
- Travel-related infections, such as malaria, respiratory infections, hepatitis, typhoid fever, dengue fever, and other medical emergencies
- Lack of air quality, rural isolation, language, and cultural estrangement
- Vehicle accidents and airline catastrophes
- Hotel fires
- Common travel problems, such as lost luggage, invalid/expired/forgotten passports, pickpockets, and scheduling delays
- Lack of legal/administrative compliance (i.e. immigration and visa challenges)

Contrasted with corporations, which mainly focus on the duty of care for their employees, universities seem to focus far more on their traveling students than caring for their employees. This may be the case because third-party payers, especially parents of students and scholarship organizations, put a much greater emphasis on the health, safety, and security of students when they are traveling abroad under the auspices of the university or when deciding where to send them to study at a foreign university. Because students tend to be younger (and often more impetuous and inexperienced) and third-party payers more demanding, the university usually has a process in place to pre-approve student trips and an insurance program to protect against certain risks. They also develop relatively clear and concise safety procedures for incoming international students. However, the university's duty of care obligation extends far beyond students. The university's employees—faculty, staff, and administration—also frequently travel abroad, whether for teaching, research,

sabbaticals, recruitment, or general university business. For these employees, the university seems rather unaware of the legal and fiduciary scope of its duty of care obligations. Nevertheless, the risk encountered by traveling university employees is great.

Risks of International Campuses

A special area of concern in terms of duty of care obligations is the safety and security risks associated with international branch campuses. Historically, students from developing countries have attended universities in Europe, Australia, and North America. In the past decade, many Western universities have opted to establish campuses in foreign countries in order to deliver their services to these students and study abroad opportunities for students from their home campuses. They have basically done so through international joint ventures with existing universities abroad or through the establishment of borderless campuses. The internationalization of universities has created additional risks for international and transnational students studying at a “foreign” university, students participating in a study abroad program, and faculty and staff (and their families) working as faculty, staff, and administrators in the host countries of these borderless campuses.³ It is estimated that US-based universities operating international branch campuses currently have about 2,000 expatriate faculty and staff working and living abroad, often in high-risk areas.⁴ These internationalization trends in higher education present new risks for students, employees, and their families who accompany them. In other words, universities can no longer ignore their duty of care obligations.

University-Related Duty of Care Issues

In general, there is a lack of awareness on the part of employers with regard to their duty of care obligations for employees who travel abroad. While certain industries, by the very nature of their activities, may be better prepared than others, such as financial institutions, construction and mining companies, and international non-governmental organizations (NGO), for many employers the duty of care obligation for employees who travel internationally does not appear on their radar screens. Once an incident happens, though, they can no longer operate with the hope that it can't or won't happen to them. This reason-

ing also seems to apply to universities. While universities provide insurance programs for the use of their students traveling abroad, they have shown far less understanding of their responsibilities for the duty of care of traveling faculty, staff, and administrators. It often takes an incident and the management of a crisis to take a closer look at their legal duty of care obligations. A few of these incidents are illustrated in Figure 2.

FIGURE 2: UNIVERSITY INCIDENTS

- 2010: A group of 12 students from Lynn University in Florida traveled to Haiti to work on a mission project. A massive earthquake hit, and the lines of communication were limited or unavailable. The school worked with a partner organization to airlift the students to safety. Nearly a week after the quake, the university could not account for several students; the earthquake took the lives of two faculty members and four students.
- 2008: An admissions representative from Willamette University traveled to India for recruitment fairs. A terrorist attack occurred in the hotel where the employee was scheduled to stay. Administrators quickly found her travel schedule, ensured she was safe, and flew her back to the United States as soon as possible.
- 2007: Eight University of Washington students were evacuated from Ghana due to an illness. The students cited poor planning by the trip advisors and lack of appropriate food as the cause of the illnesses and fatigue. The University of Washington investigated the trip, the faculty members, and the program/department.

Depending on the statutes and case law of the different countries, employer duty of care legal obligations are usually found in the countries of North America, Europe, Australia, and New Zealand. The general legal principle is based on the employer's obligation to protect the health, safety, and security of its employees even when they are working abroad. A negligent failure to plan—and to implement a risk management plan—can make an employer liable for foreseeable harm inflicted on the employee. Yet some employers in the Western world view their duty of care obligations towards their employees in a much larger corporate social responsibility framework. Socially responsible organizations view protecting their traveling employees, wherever they travel and work in the

world, as doing the right thing for their workforce. It is not that these employers are necessarily more moral than others, it is simply that they have come to understand that it makes good business sense to do so. In line with risk management practices, prevention is not only less expensive, it also protects organizations from damages to their reputation and threats to business continuity.

Such thinking has not yet infiltrated some universities with international programs. Some institutions remain focused on providing insurance against student and faculty risks rather than take on a more holistic, proactive view of risk management, mitigation, and prevention. With the exception of international students who study at the home campuses of universities (and are “in sight”), there is almost no assistance available for students and university employees when they are traveling and residing abroad for their educational and work purposes. This puts universities at great legal liability and reputational risk.

University Duty of Care Responsibilities

Universities, similar to organizations, have specific challenges when it comes to assuming their duty of care obligations. These range from lack of awareness, know how, a flawed view that they are not at risk, a focus on cost containment, and a lack of coordination among the university’s decisions makers to implement an integrated risk management model. Yet in order to assume their duty of care obligations, universities should develop an integrated risk management strategy with regard to duty of care. The duty of care integrated risk management strategy (see Figure 3) is comprised of eight steps in accordance with the “Plan-Do-Check” cycle.

- ♦ **Plan:** Key stakeholders are identified and the framework for the employer’s duty of care responsibilities is defined for the organization.
- ♦ **Do:** The duty of care plan is implemented and tools are deployed.
- ♦ **Check:** Duty of care implementation efficiency is measured through a set of performance indicators.

Universities face a number of specific challenges, including lack of awareness, a perception that they are not at risk, cost containment, and a lack of coordination.

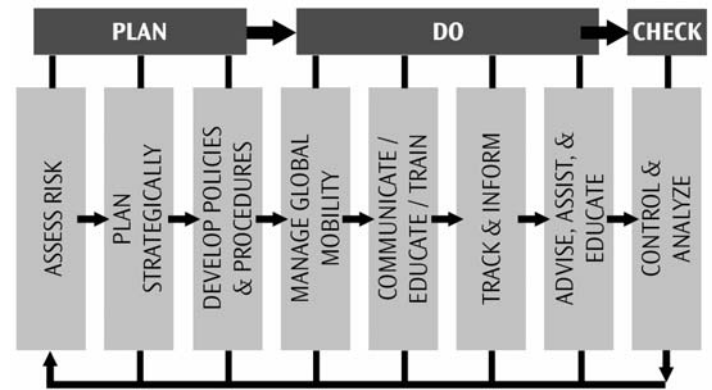


FIGURE 3: DUTY OF CARE INTEGRATED RISK MANAGEMENT STRATEGY

“Plan” Phase

The “Plan” phase of the duty of care integrated risk management strategy consists of three steps: assess the risks for the organization and the employees (step 1), plan strategically how to assume duty of care responsibility (step 2), and develop appropriate policies and procedures (step 3).

Step 1—Assess Risk: Assess organization-specific health, safety, and security risks in the different locations where employees are assigned or travel for work and understand the organization’s duty of care obligations.

Step 2—Plan Strategically: Develop an integrated risk management strategy, including both an incident management plan and an ongoing duty of care process, so that the organization effectively and efficiently can assume its duty of care obligations.

Step 3—Develop Policies and Procedures: Develop a clear policy that governs those who are traveling and working abroad, both short- and long-term, and consider how the organization’s international assignment and worldwide travel policies assist in keeping employees healthy, safe, and secure.

“Do” Phase

The “Do” phase of the duty of care integrated risk management strategy consists of four steps: manage employee mobility (step 4); communicate, educate, and train (step 5); track and inform (step 6); and advise, assist, and evacuate (step 7).

Step 4—Manage Mobility: Review how your organization oversees the international mobility of employees and their dependents crossing borders as part of their work as international assignees or international business travelers.

Step 5—Communicate, Educate, and Train: Ensure that the risk management strategy, including policies and procedures, is appropriately communicated to all managers and that employees are appropriately prepared for travel and international assignments before they leave. Share policies and procedures with your public relations and communications staff so they are prepared to answer questions and address concerns.

Step 6—Track and Inform: Know where your employees are at any given time and have ways to communicate proactively with them if a situation changes or in the event of an emergency. Identify key spokespersons at the institution who will communicate with both internal and external audiences.

Step 7—Advise, Assist, and Evacuate: Provide ongoing guidance, support, and assistance when employees are abroad and find themselves in unfamiliar and risky situations. Utilize media tools, including social media, to provide updates, and monitor the media for helpful information.

“Check” Phase

The “Check” phase of the strategy consists of control and analysis of the duty of care risk management plan (step 8).

Step 8—Control and Analyze: Ensure employer/employee compliance. Track and analyze data to improve the efficiency and effectiveness of the strategy.

Reputational Risk

As Benjamin Franklin once said, “It takes many good deeds to build a good reputation, and only one bad one to lose it.” From a public relations standpoint, international travel and the recruitment of international students provides new challenges for colleges and universities. Marketing efforts tout the “globalization” of campuses through study abroad options, percentages of international students and faculty, and opportunities for international travel, research, and study. In a 2001 assessment of Australia’s business programs, higher education was identified as one of the country’s “biggest and most important services exports.”⁵

The importance of international travel to the image of a college or university and the quality of the experience for faculty, staff, and students places a tremendous obligation on managers and communications professionals. International emergencies or missteps in communications can result in long-term or even permanent damage to the institution’s reputation and image.

Managing reputational risk goes beyond simply crafting reactive public relations campaigns should an event occur. True strategic planning involves a more proactive approach where the institution considers, tests, and plans for different scenarios through defined channels of communications. Coordinated action between senior administrators and their campus public relations or communications departments is the best way to manage and mitigate risk related to international travel and duty of care. Taking all key constituencies into account and planning for risks

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before they arise is the ultimate goal of administrators and managers.⁶

The first step in managing reputational risk involves an assessment of the campus' current reputation. What do key audiences—current students, faculty, staff members, members of the greater community, and even competitors—think about the institution? Does the perceived reputation among senior administrators reflect the reality of its audiences? This is known as the “reputation-reality” gap.⁷ Once a generally accepted reputation and image is established, decision makers can effectively weigh duty of care obligations with reputation management considerations.

Recommendations for University Administrators

This paper has focused on raising awareness of the university's duty of care obligations with regard to the international travel of their students and employees and recommends that university administrators develop and implement an integrated risk management strategy for international travel duty of care. Employers who become aware of their duty of care obligations are often at a loss as to where to start. Here are some guidelines:

1. Get the internal university stakeholders together.

Many different people on campus have a stake in the duty of care process due to their functional responsibilities. These internal stakeholders all play a role in the university's duty of care responsibility at certain times, whether during crisis management for an incident or the duty of care planning phase. Stakeholders include the heads of university administration, public relations, human resources, campus safety and security, international programs, campus travel, and the deans of the various schools or departments. Each of these stakeholders views duty of care responsibilities from the perspective of their own disciplinary function, and all have different decision-making authorities. Together, however, these stakeholders can elevate the duty of care protection to the level of the university president and the board of trustees.

2. Set up a university-wide duty of care task force.

The goal of this task force, made up of the internal stakeholders, is to raise overall awareness of the university's duty of care obligations for traveling students, faculty, and

administration and benchmark the status of its current processes. Before developing an integrated duty of care risk management strategy, the university must assess its risk profile, identify gaps and blind spots, and formulate strategic duty of care objectives that serve its specific needs.

3. Manage your reputational risk.

Universities should ensure that public relations professionals are part of the task force that evaluates duty of care obligations. It is up to these professionals to advise administrators and managers of the reputational risk involved in overseas travel and mitigate this risk with concrete public relations solutions. This includes defined communication channels for the media, the internal campus community, local and international authorities, and the families of those affected by an incident.

Proactive risk strategies revolve around the idea of coordinated action. Key questions to address include:

- Who is the designated spokesperson for the university if an incident occurs? If senior administrators are identified as spokespersons, have they been given appropriate media training to field questions and make important announcements?
- Are talking points defined for various scenarios and for different audiences? Can they be quickly referenced in a crisis situation?
- Does the college or university have a coordinated action plan for internal audiences, including the use of e-mail blasts, text messaging, designated web pages, and new media tools (like Twitter)?
- If the institution utilizes contracted insurance, risk management, or communications agencies, do senior administrators know who their primary contacts are at these organizations? Are roles clearly defined between them?

The ultimate objective is the development of a coordinated response should a crisis situation occur. Everyone should be on the same page to make the best decisions and provide the necessary information to ensure those affected receive the assistance they need.

4. Develop, implement, and evaluate your strategy.

Do not wait for an incident to happen with your students and university employees. Proactively develop a strategy with the assistance of your duty of care task force. Get the assistance of reputable vendors who can provide insurance as well as assistance and who have a track record of serving the traveling employees of corporations.

The failure of university administrators to understand and assume duty of care obligations can have dramatic consequences for universities in terms of legal liability, reputational risk, and even program continuity.

About the Authors



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We need to restore the full meaning of that old word, duty.

It is the other side of rights.

—PEARL BUCK (1892–1973), AUTHOR

**If you reject the food, ignore the customs, fear the religion,
and avoid the people, you might better stay at home.**

—JAMES MICHENER (1907–1997), AUTHOR

Foreign Travel: Risk and Response

| Frank D'Ancona and James Walloga, ACE USA Accident and Health

Abstract: While duty of care responsibilities for institutions of higher education may still be somewhat unclear, there are ways for institutions to both consolidate their coverage for foreign travel risks and ensure that faculty, staff, and students are covered. This article highlights the growing number of employees and students traveling overseas, as well as "hot spots" that may pose unique risks to travelers. The authors then discuss traditional foreign travel risk management practices and the problems that risk managers can face if they are using a piecemeal approach to cover these risks. Finally, the article focuses on how to develop a comprehensive, integrated coverage plan for foreign travel and what to look for in a carrier.

Introduction

The globalization of industry and commerce provides US multinational corporations with an increasing proportion of their revenue generated outside domestic borders, while assisting the production of goods and services at a lower cost. As more companies plant flags on foreign shores, the number of employees traveling to these locations on temporary work assignments or more long-term employment has multiplied. However, living and working in many far-flung locales is rife with risk. International travelers confront a range of threats, from political unrest and emergency medical care to transportation mishaps, environmental hazards, and kidnap and extortion schemes, to cite just a few. Language and cultural barriers exacerbate these personal and financial exposures.

Multinational corporations are not the only organizations dispatching more people abroad. Many non-profit organizations, such as sponsors of cultural and educational

programs and disaster response groups, are spreading their global reach. It is also far more common today for major colleges and universities to sponsor study abroad programs

for students. The volume of students traveling to both traditional study sites located in Western Europe and more non-traditional regions of the world has swelled in recent years. While experienced executives may be more cognizant of the inherent risks of foreign travel, a young, less seasoned individual may make imprudent decisions, thus potentially inviting trouble.

The myriad perils of foreign travel, work, and living are difficult to manage, much less insure. Traditional business travel insurance policies fall short of providing truly global coverage, in part because many countries require buyers to purchase insurance from local carriers. The customary insurance coverage for injured or sick travelers and others living abroad often fail to supply money when needed most—at a foreign hospital's patient admittance desk. Services beyond insurance, such as threat assessments (intelligence reports of emerging political instability, health crises, and natural disasters), pre-trip medical referrals and medical evacuation, advisories on transportation hazards, lost document assistance, and emergency transaction services, among other needed services, are difficult to acquire and often expensive on

an unbundled basis.

Small World Gets Smaller

More US multinational corporations are generating a greater proportion of their revenue outside the headquartered country. According to a survey by GMAC Global

The volume of students traveling abroad has swelled in recent years. While experienced executives may be more cognizant of the inherent risks of foreign travel, a young, less seasoned individual may make imprudent decisions, thus potentially inviting trouble.

Relocations, 41 percent of the total revenue of US multinational corporations in 2006 was generated outside domestic borders.¹ To serve global markets, customers, and manufacturing and technology needs, multinational companies are sending more employees abroad. Such trips can last from a few days to several months to several years for long-term assignments—the latter considered a key to career advancement. As consultancy PricewaterhouseCoopers stated in its report, *International Assignment Perspectives*, “Overseas assignments have become increasingly sought after by ambitious and high-performing employees.”²

Expectations are for these trends to increase in the future. Last year, GMAC produced its 16th consecutive annual global relocation trends survey, noting that in 2008, 68 percent of corporate respondents planned increases in their expatriate populations, despite alarms over terrorism and international monetary disruptions. An average 52 percent of current expatriates cited in the survey had children accompanying them while on assignment, yet 58 percent noted that their employers had reduced their expenses for international assignments in response to economic conditions. More employees abroad with less money for their shelter and other routine daily expenses is worrisome, given that the survey cites Russia, China, and India as the “most active emerging destinations” for expatriates, countries it also calls the “most challenging destinations” because of security concerns, cultural barriers, legal complexities, and travel safety.³

Similar trends are in play with regard to study abroad programs at universities and colleges. According to the Institute of International Education’s 2009 *Open Doors* report, a record number of US students are choosing to study in foreign lands for part of their academic experience, in preparation for “living and working in a more global society,” the Institute stated. In the 2007-2008 academic

year, the number of students studying in foreign countries increased 8.5 percent to 262,416 students—four times the number tabulated in the 1987-1988 academic year and more than 150 percent the volume recorded a decade ago. The report cited substantial increases in the number of US students studying in such emerging economies as

China (ranked number 5 on the list of destinations), Mexico (number 7), Costa Rica (number 10), South Africa (number 14), Czech Republic (number 15), Israel (number 22), and Russia (number 25). The percentage of students studying in India alone jumped 19.8 percent in the 2007-2008 academic year from the prior year. Altogether, 15 of the top 25 country destinations were outside Western Europe, and 19 were countries where English was not the primary language.⁴

While many emerging economies are politically stable, have invested in the development of modern infrastructures, and have enhanced the quality of their medical care facilities, many perceive the risks of living and working in such countries as higher than in the Westernized world. American expatriates who have lived and worked in various emerging economies recount tales of crumbling infrastructure, regulatory uncertainty from region to region, security and safety issues, unreliable transportation, and fear over the risk of infectious diseases like SARS, avian flu, and H1N1.

Beyond the moral obligations that both for-profit and non-profit employers naturally feel with respect to the

health, safety, and security of their employees and their dependents when they are abroad, legal duties also may be imposed on employers in the event of a mishap in a foreign land. Similarly, parents of students traveling abroad perceive that they have entrusted the sponsoring universities and colleges with the safety and security of their children. Courts in the United States and other countries are likely to take seriously, and consider carefully, claims that the sponsoring organization breached its duty of care, creating

A GMAC Global Relocations survey cited Russia, China, and India as the “most active emerging destinations” for expatriates, countries it also calls the “most challenging destinations” because of security concerns, cultural barriers, legal complexities, and travel safety.

the potential of significant liability exposure for colleges and other sponsoring organizations.

Managing and Mitigating Risks of International Travel

Organizations should develop a strategic framework for identifying, managing, and mitigating the risks inherent in international travel and living abroad. Such practices should address the proper care and treatment of employees and students in the event of accident or illness, as well as assistance for them in the event of transportation breakdowns, wrongful detentions, emergency cash needs, kidnap for ransom schemes, or more prosaic issues like a lost passport. Unfortunately, it is often the case for a large organization with a global footprint to have disparate worldwide travel and expatriate risk management policies, in addition to a hodgepodge of assistance providers and insurance programs with little if any coordination or integration.

Finding adequate care for a medical emergency may be problematic in many emerging economies and even more developed nations. Language and cultural barriers make communication difficult, inviting the prospect of wrongful diagnosis and treatment. Often, an employee requiring emergency medical care abroad learns that the foreign treatment facility will not accept his or her national health care provider, private medical program, or HMO. Insurance policies that do cover overseas medical treatment typically offer only reimbursement and not the upfront fees many foreign hospitals require before undertaking treatment. In such cases, it is common for the facility to deny hospital admission. While a measure of reciprocity exists between nations to provide emergency medical care to each other's traveling citizens, not all countries abide by them.

Medical care facilities in many foreign lands also may fall short of the skilled treatment expected in North America and Western Europe. In such cases, medical evacuation to a superior institution is a dire necessity, yet this presents logistical challenges and the need for aircraft supporting

an intensive care unit and staffed with doctors, nurses, and other trained personnel.

Hot Spots and Security Risks in Foreign Travel

Security threats are a constant hazard in many foreign countries, especially those perceived as politically or economically unstable. The risk of insurrection, violent protests, blockades, criminal acts, terrorism, and even war is higher in such insecure environments. A case in point is the coordinated grenade and machine gun attacks targeting foreign tourists in Mumbai, India, in November 2008.

More than 125 people were killed in the 10 separate attacks, considered one of the most brazen acts of terrorism in the country's recent history. Intelligence and other information alerting authorities of an imminent attack were available but were not widely disseminated.⁵

In foreign countries where organized crime is a problem, the risk of kidnap and extortion schemes creates ominous personal health and financial exposures. While many large corporations employ trained security professionals or retain outside consultants to evaluate and mitigate these risks, mid-size and smaller organizations often lack such resources. Obviously, it should be professionals who negotiate the release of a kidnap victim with his or her captors.

Students studying abroad incur many of the same threats, although the risks are perceived as higher because of their lack of experience and sometimes impulsive behavior. Taking a semester to study in regions like China, Chile, India, and other regions where censorship and political, legal, and economic unsteadiness are common gives pause for deep consideration. Natural disasters affecting regions with inadequate or antiquated infrastructure and emergency medical care facilities add to the risk. Following the recent devastating earthquakes in Haiti and Chile, organizations providing assistance to travelers in emergency situations evacuated numerous American students. While many universities and colleges offer a modicum of risk management assistance to students in study abroad programs, these services may be fragmented

Organizations should develop a strategic framework for identifying, managing, and mitigating the risks inherent in international travel and living abroad.

with one department having its own policies and another department a different set of options. This pronounced lack of coordination adds cost and deters the benefits of a more integrated approach.

Non-profit organizations, especially those predicated on assisting victims following a man-made or natural disaster, face greater risks as the threats are in play. Missionary groups and volunteer organizations, in their understandable zeal to assist others in dire need, may not be cognizant of unexpected risks, including criminal acts like looting in the wake of the disaster. As one organization that supplies security assistance to travelers stated, "Away from unfamiliar surroundings, [people] may encounter precarious environments that present increased and unfamiliar threats to their health, safety, and security."⁶

Traditional Business Travel Risk Management

Many corporations, non-profit organizations, and universities manage the risks of traveling, living, and working abroad in piecemeal fashion. With regard to insurance, they may buy a business travel accident insurance policy covering the insureds' loss of life and certain other injuries resulting from an accident while traveling on business. Sometimes, for added security, an institution or company might also purchase life insurance and/or accidental death and dismemberment insurance, a policy that pays additional benefits to the beneficiary if the cause of death is due to an accident. Often, the financial limits of these policies aren't enough dollar-wise to absorb the financial extent of risk.

Another problem is the need to have separate insurance policies in different countries covering employees and students traveling or living abroad. Many nations require the purchase of locally admitted insurance policies—insurance bought from licensed local insurers. Managing the related compliance considerations can be burdensome, given the constantly shifting regulatory landscape, and the various requirements for administering multiple policies can be quite burdensome. For employees on temporary work assignments that are extended, the original policies covering

them must be updated or renewed at a longer term, adding to the complications. Since foreign subsidiary managers generally are not insurance professionals, the possibility increases of not having adequate protection or too much insurance. With regard to risks like kidnap and extortion, it may be necessary to acquire separate insurance policies on a country-by-country basis.

When it comes to employee and student safety and security, the same fragmented approach prevails. Some organizations may produce and offer information on country risks or assist travelers requiring urgent medical treatment.

Others may provide a hotline in case of emergency or assistance with foreign language translations or lost documents. Very few offer transportation services for evacuation or repatriation for political or medical reasons due to perceptions of high cost.

In most cases, a cohesive approach to managing the risks of foreign travel is lacking. A more comprehensive approach to protecting an organization's most important asset—its people—is needed. Such an integrated package of benefits and services is now available.

How to Protect Employees and Students Abroad: An Integrated Approach

One way to manage the myriad of overseas risks is to develop an integrated package that covers the variety of needs for those living, working, or studying overseas. A comprehensive approach can involve bundling together a singular group of insurance products into a single, master accident and sickness insurance portfolio. In addition to developing a comprehensive insurance package for employees or students traveling abroad, organizations and institutions can also explore the wide range of foreign travel assistance services to help supplement insurance coverage in the event of an emergency where on the ground, specialized assistance is needed.

There are only a few global carriers with the capability to offer multinational corporations, non-profit organizations, and universities customized insurance solutions to manage and transfer the risks of foreign travel. The

One way to manage the myriad of overseas risks is to develop an integrated package that covers the needs of those living, working, or studying overseas.

foundation of these programs is found in a master policy that eliminates the need to rely solely on locally-admitted insurance policies on a country by country basis. Underlying the master contract are local policies, which conform to the respective regulatory requirements governing coverage, rates, taxes, and other considerations. The Controlled Master Program (CMP), as it is called, provides simplicity, stability, and uniformity of insurance protection globally, ensuring that employees, students, and others are appropriately covered when living, working, or traveling overseas.

Additionally, the centralized nature of the CMP eliminates the excessive costs typically resulting from a patchwork quilt of separate insurance policies and separate administrative schemes.

Creating the Right Plan for Your Organization

It is critical that a risk manager understand their institution's needs, including the demographics of travelers, where they are traveling, how much travel is planned, the location of their international operations, what level of benefits are needed, and their funding capabilities. For example, more and more students travel to less traditional areas of the world that are likely to present a greater need for benefits such as kidnap and extortion, political security, natural disaster evacuation, and other types of higher risk or emergency response benefits. Other coverage to consider is trip-related inconvenience benefits, such as trip interruption, cancellation or delay, program fee refunds, and lost baggage or other personal effects.

From an organizational perspective, risk managers may wish to consider data security and communication needs and the need to keep current on global health, climate, and security information from a planning and business-contingency standpoint. Understanding exposures and maintaining accurate travel data is key to developing a comprehensive travel program that best satisfies the needs of risk managers and the needs of travelers.

Choosing a Carrier

Working with a global insurance carrier with a broad portfolio of products designed for multinational organizations is key. Optimally, the carrier you choose will have a sizeable international license base with worldwide operations and physical presence. Because the nature of foreign risk is so complicated and the myriad of coverages available to help

manage that risk is extensive, it is important for a carrier to access providers of global travel intelligence and assistance services to supply emergency medical and security services. Other personal and enterprise travel risk management services compliment the organization's ability to help provide safety and security through insured programs for individual travelers. By securing insurance through one single point of service, organizations can be confident that they have done their best to enhance the level of care and security available for employees, volunteers, and students.

About the Authors



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I dislike feeling at home when I am abroad.

—GEORGE BERNARD SHAW (1856–1950), IRISH PLAYWRIGHT

Coming together is a beginning.

Keeping together is progress.

Working together is success.

—HENRY FORD (1863–1947), FOUNDER OF THE FORD MOTOR COMPANY

AND MODERN ASSEMBLY LINE PRODUCTION

ERM from the Ground Up: A Grass Roots Approach

Integrating Enterprise Risk Management into California State University San Marcos Athletics

| Bill Thomas, ARM, California State University, San Marcos

Abstract: After a number of high-profile scandals in the financial sector, the Sarbanes Oxley Act was created in 2002, putting into place a number of reforms to limit such scandals in the future. Additionally, prior to these scandals, the Committee of Sponsoring Organizations of the Treadwell Commission (COSO) had been charged with studying business failures and issuing guidance on how to prevent them. COSO's review highlighted the importance of organizations not only considering financial risks but managing business from a more holistic perspective. Enterprise risk management (ERM), which engages everyone at an organization in the management of those risks for which they are responsible, was born. This article focuses on the efforts of California State University San Marcos (CSUSM) in beginning implementation of ERM. CSUSM began by implementing ERM in the Athletics Department and provides helpful resources and information about its own process.

Introduction

If you are considering the introduction of enterprise risk management (ERM) in a small, medium, or even large university, you might be asking yourself, "How am I possibly going to introduce this subject, let alone be successful at integrating its principles into a departmental function?" If you are facing such a dilemma, the initial ERM efforts made by the California State University San Marcos (CSUSM) may provide you with some guidance.

While CSUSM is part of the California State University System, the largest university system in the country, it is a relatively small university with approximately 1,000 employees and 9,000 students. During the University Risk Management and Insurance Association's (URMIA)

Annual Conference three years ago, I was introduced to the concept of ERM. While I was excited by this new approach to risk management, I also questioned how I would go about initiating ERM into our institution.

While it is ideal to have leadership within an organization set the tone for implementation of ERM, neither the California State University (CSU) Board of Trustees nor individual campus presidents have introduced ERM as a mandate. However, the system has recognized the Athletics Department's exposures through an internal audit. In fact, the CSU Office of Internal Audit's athletics audit was based on the Committee of Sponsoring Organizations of the Treadway Commission (COSO) principles, which serve as a baseline for ERM principles. As such, when I decided to introduce ERM into the Athletics Department at CSUSM last year, I was actually reacting to the results of the CSU system-wide athletics audit.

To understand ERM's relevance at your institution, you must first understand COSO's genesis.

In 2002, the Sarbanes Oxley Act (SOX) was created to address financial improprieties, such as the ENRON and WorldCom scandals. The Act required a number of reforms to corporate financial reporting, disclosures, and responsibility.

The Sarbanes Oxley Act and the Committee of Sponsoring Organizations of the Treadway Commission

In 2002, the Sarbanes Oxley Act (SOX) was created to address financial improprieties, such as the ENRON and WorldCom scandals.¹ The Act required a number of reforms to corporate financial reporting, disclosures, and responsibility. Preceding these scandals, "COSO was charged with conducting a study of the business failures and issuing guidance on how to prevent reoccurrences. The outcome of COSO's review of internal control systems was the recognition and communication of the need

for managing organizations to shift from strictly a financial focus to a focus of managing all business risks.”²

COSO defines ERM as “a process, effected by an entity’s board of directors, management, and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.”³ ERM is a coordinated effort used to guide an organization’s risk performance through departmental risk assessment, accountability, applied controls, and ownership.

COSO’s “Internal Control – Integrated Framework” report provides a common language regarding controls and outlines an internal control system that can be used to manage business and operational risks. It aims to provide a standard against which business and entities of all sizes and types can measure the effectiveness of their control systems and improve them as needed. The framework identifies five risk drivers of business risks for higher education: strategic, operational, financial, compliance, and reputational risk. It also recommends five components that can impact the planning, prevention, and mitigation of those risk drivers:

1. Control environment
2. Risk assessment
3. Control activities
4. Information and communication
5. Monitoring to implement ERM in a university setting

The University of Regina, located in Saskatchewan, Canada, provides an example of how a university can begin integrating ERM into its policies and procedures.⁴ According to the university’s ERM policy, approved in 2006, “ERM through the application of the framework objectives aids in the achievement of the university strategic priorities and advances the management practices at the university. Specifically, the ERM framework objectives are to:

- Incorporate a consistent approach to risk management into the culture and strategic planning processes of the university, supporting the setting of priorities and making of decisions at the institutional level, as well as at the operational and administrative unit levels.
- Apply a consistent approach to risk response and control activities to support the university’s governance responsibilities for innovation and responsible risk taking, policy development, programs, and objectives. In all cases, appropriate measures will be put in place to address the unfavorable impacts from risks and favorable benefits from opportunities.
- Manage a transparent approach to risk through formal and informal communication and monitoring of all key risks, balancing the cost of managing the risk with the anticipated benefit. Risk management practices will be adapted to encompass best practices, specific circumstances, and mandate.”⁵

ERM engages everyone at the institution in the management of those risks for which they are responsible. Establishing ERM in a university setting assists in linking institutional governance, risk management, and the goals of the institution to strategically and financially benefit the institution.

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Initiating ERM Support

CSUSM intercollegiate athletics is an essential campus program that enriches the campus and the surrounding community. Students who participate in intercollegiate athletics gain multifaceted skills, such as discipline, perseverance, confidence, and the ability to work with a team, skills that will serve them well throughout their lives. CSUSM athletics is part of the National Association of Intercollegiate Athletics conference (NAIA) and is seeking to become part of the National Collegiate Athletic Association (NCAA). It is a small department with large goals and exposures and a committed administration. The Athletics Department reports directly to the university

president. There were many reasons to choose the Athletics Department as the initial department to undertake ERM implementation, but perhaps none as important as its place in the university's reporting structure.

During the year prior to working with the Athletics Department on ERM, I was working closely with the assistant director to address risk issues, including creating waivers and releases; addressing primary, secondary, and catastrophic insurance mechanisms; addressing travel exposures; and hiring a new athletics trainer. We discussed the fact that the CSU had just completed an athletics audit at a sister campus and was about to embark on a system-wide athletics audit that mirrored the COSO model. The Athletics Department chose to take part in the ERM process not only because of the connection to the impending athletics audit, but also to improve their communication, processes, and transparency. There was a sense that engaging the coaches and other athletic employees to participate and assess the department's risk would assist in creating a vested interest in any follow up recommendations or controls created to address those risks. Athletics was convinced that participating in ERM would also help them create a systematic approach to handling short- and long-term goals of the department. Being prepared for a potential audit was only considered a secondary benefit.

During this time period, the CSU Internal Audit Department asked that all CSU presidents identify the most relevant risks on campus using ERM's risk drivers as a guide:

- Strategic Risks – Risks that could impede the goals of the organization
- Financial Risks – Loss of assets and resources
- Operational Risks – Typical hazard risks that may interfere with processes that achieve goals
- Compliance Risks – Laws and regulatory risks
- Reputational Risks – Public image

Simultaneously, our campus president spoke candidly at a budget forum about the CSU's lack of funding and fiscal management and how it affects the university's ability to provide quality educational programs and sustain campus operations. Considering the current fiscal challenges presented to the State of California and the CSU, it was evident to me that the largest risk concern facing the university was an absence of funding to support its

mission and operations. During the president's closing remarks, she charged the campus community to strategically and creatively provide solutions that would lead to opportunities and rewards. Knowing the university would be looking inward to prudently manage its fiscal resources, I introduced ERM into the Athletics Department to strategically and creatively address the university's risk concerns. The success or failure of the university's ERM efforts would depend on the administration's value of ERM or risk appetite. With the department identified, I began to create the strategic goal to integrate ERM into athletics throughout the following year.

Creating a Strategic Goal

CSUSM's strategic goal was to integrate ERM into the Athletics Department. The goal was in line with the university's strategic priorities of academic excellence and campus climate to assist athletics in integrating ERM principles into its departmental functions. As a result of achieving this goal, the Athletics Department also benefited from improved transparency, processes, and communication. The return on investment is an enhanced risk management program and tools in support of athletics' programs (see Figure 1).

Creating a Dynamic Risk Assessment - Identifying Risk Drivers and Applying an Integrated Framework

To support the integration of ERM into athletics, I researched and analyzed numerous resources. These resources included:

- The Athletics Department's mission statement
- COSO's Enterprise Risk Management – Integrated Framework⁷
- University Risk Management and Insurance Association's (URMIA) ERM White Paper⁸
- National Association of College and University Business Officers' (NACUBO) report, "Taking the Right Path: Sarbanes Summit"⁹
- NACUBO's report, "Developing a Strategy to Manage Enterprise Risk Management in Higher Education"¹⁰
- A comprehensive review of the University of California and Auburn University ERM implementation processes
- NCAA's Excellence Management Self Audit

- CSU system-wide athletics audit, Generally Accepted Accounting Principles (GAAP) audit, and Federal Information Security Management Act (FISMA) audit

The risk management department merged information from these resources into a detailed draft risk assessment for review and input by the administration of the Athletics Department. A series of meetings followed where information was solicited to create a final risk assessment. I provided two introductory ERM PowerPoint presentations and a blank risk assessment to outline the risk assessment process. Athletics' administration and staff received sample topical categories for reference as they moved through the risk assessment exercise. The stakeholders provided relevant risk activities and assigned a risk rating to each activity, considering probability and impact. I then sorted the rated activities and redistributed the risk assessment to athletics to solicit control mechanisms. The Athletics Department administration received the completed risk assessment to use in making assignments of responsible individuals, implementation, and continuous review and prioritization of program risks (see Figure 2).

The Athletics Department's Top Three Risk Activities and Suggested Controls

In the final discussion with Athletics Department stakeholders, they identified their top three risk activities and controls. The details of those activities are listed below. The top three risks will help to shed light on some of the more high-profile areas of concern for athletics programs in general.

15-Passenger Vans

In November 2004, the National Highway Traffic Safety Administration (NHTSA) published the *NHTSA Action Plan for 15-Passenger Van Safety report*.¹¹ According to the

report, between 1990 and 2002, there were 1,576 15-passenger vans involved in fatal crashes with 1,111 fatalities. Broken down further, 657 of those crashes were fatal single vehicle crashes, with 349 rollovers. Furthermore, the report stated that most of the more highly publicized 15-passenger van crashes involved inexperienced drivers. Athletics recognized transportation of university athletes

in 15-passenger vans as their number one risk exposure. They collectively agreed that they needed to eliminate the use of 15-passenger vans to minimize the university's risk exposure. Athletics discussed alternative solutions, including purchasing more stable vehicles for transport, employing full-time drivers in athletics or facilities services, and establishing a contractual relationship with a bus rental entity.

Athletics noted many positive aspects of sub-contracting through a bus rental entity. The bus rental entity would provide a dedicated driver that is familiar with the everyday hazards of a large transportation vehicle, a vehicle that is well-maintained, and adequate insurance in case of an accident. The one large negative factor would be finding the operational funds to support renting vans from an outside source. Fortunately, athletics was able to garner support and funding for subcontracting an outside bus rental entity by evaluating its current and future use of vans for transport. Since athletics was the number one user of the campus' 15-passenger vans, the Athletics and Facilities Services Departments met often

both before and after making the decision to switch to rentals. The facilities services director noted that renting the 15-passenger vans had not been profitable and agreed to remove the vans from the fleet in the near future. This decision will impact other campus users wishing to use 15-passenger vehicles for various activities, and the facility services director will be sending a campus-wide notification to address other users' concerns.

In the final discussion with Athletics Department stakeholders, they identified their top three risk activities and controls. These will help to shed light on some of the more high-profile areas of concern for athletics programs in general.

Budget

Athletics noted the necessity to address budget needs and controls in a growing program. They have developed internal control mechanisms to address budgeting, program revenue, and expenses, such as programmatic budgeting request processes, financial schedules, and statements for all athletics' revenue and expenses. Athletics identified the specific funds to be used—general funds, student fees, and grants—and instituted internal controls for spending available funds. Athletics forecasted funds needed for program development and other expenses, such as 15-passenger van rental. They are also aware of the fundraising efforts needed to garner support for the Athletics Department's programs. The need for athletic fields has become one of the most recognizable budgetary concerns. In the last year alone, there were two moving vehicles struck by home run balls at off-site locations. Having a home field would reduce the exposure to spectators and passersby and would lessen the demands of student travel.

Athlete Transportation

Athletics has worked with risk management and the Office of General Counsel to develop the following forms. Additionally, the department is looking into creating automated registration to assist with the demands of collecting and maintaining these forms:

- ♦ Independent athletic travel forms
- ♦ Air travel waivers
- ♦ Sponsored and non-sponsored travel waivers
- ♦ Private vehicle request forms
- ♦ Attendance rosters
- ♦ Emergency contact forms that address the risks of student travel

Conclusion and Next Steps

CSUSM's Athletics Department has committed to continually reevaluate, prioritize, and reassign controls to the program's risks through risk assessment. Approaching risk assessment as a dynamic tool will allow athletics to successfully integrate ERM into their operations now and in the future.

The ERM process will only succeed if your university's campus administration both defines and communicates your institution's risk appetite. Once the campus risk appetite is truly understood, an ongoing effort must be made

through shared governance to assist the campus community in achieving the university's strategic initiatives, including its risk management initiatives. CSUSM can serve as a test case for implementing ERM as CSUSM's risk tolerance evolves and risk management attempts to integrate ERM throughout the university.

FIGURE 1: STRATEGIC GOALS FOR ERM IN ATHLETICS

RM&S—GOAL/DESIRED OUTCOME #1 – Responsible Management Sponsor/Leader: Bill Thomas, Risk Manager

Risk Management and Safety will contribute to the achievement of the university’s strategic priorities of academic excellence and campus climate by enhanced communication, collaboration, development, and implementation of risk management and safety programs and tools in support of the campus community. Achievement of this goal will result in improved transparency, processes, and communication.

RM&S GOAL 1: Action Item 1 - Create an ERM Plan for Athletics				Responsible Party: Bill Thomas, Risk Manager
Measure: Assist athletics in identifying and selecting controls for the top three risk activities in the athletics ERM risk assessment.				Completion Due Date: 6/29/09
Action Step	Responsible Party	Measures	Due Date	Status Update
a. Evaluate SDSU athletics and CSU system-wide risk management audits	Risk Manager	Identify audit risk topics and plot them on the athletics ERM risk assessment form	8/15/08	Completed 6/6/08 ahead of schedule. Reviewed SDSU athletics audit and CSU system-wide athletics audit. Identified audit risk topics for the ERM risk assessment form.
b. Merge criteria based in athletics and risk management audits into athletics risk assessment concerns	Risk Manager	Complete draft risk assessment topics for athletics	8/31/08	Completed 6/9/08 ahead of schedule. Merged criteria from the SDSU audit, CSU system-wide athletics audit, and other resources into the risk activities section of the draft risk assessment document for athletics.
c. Provide and review risk assessment criteria with stakeholders (accounting and athletics administration) and solicit their input	Risk Manager	Review draft risk assessment categories with athletics administration. Discuss upcoming meeting with athletics employees.	9/30/08	Completed 8/6/08 ahead of schedule. Provided and reviewed the ERM PowerPoint training and the draft risk assessment to stakeholders (accounting and athletics administration). Discussed planning for future meetings with athletics employees using the above mentioned tools.
d. Draft ERM plan with athletics employees (high, medium, low categories)	Risk Manager	Conduct meeting with athletics administration and employees. Create ERM risk assessment.	12/31/08	Completed 12/8/08 ahead of schedule; meetings held with athletics administration and employees on 10/20, 10/28, 11/10, and 12/8. 43 department risks and controls identified.

FIGURE 1 (continued): STRATEGIC GOALS FOR ERM IN ATHLETICS

e. Identify high risk activities and prioritize them with stakeholders	Risk Manager	Select top three ERM risk assessment concerns to develop risk controls	1/30/09	Completed 12/8/08 ahead of schedule. Prioritized athletics' departmental risks following the 10/28 meeting. Reviewed the risk activities (including the top three risks) and developed controls during the 11/10 meeting.
f. Identify controls for the top three risk activities with stakeholders	Risk Manager	Create and recommend controls to athletics	3/30/09	Completed 12/8/08 ahead of schedule. Identified additional risk assessment activity controls during the 11/10 meeting. Reviewed the top three recommended risk controls with management and employees during 12/8 meeting. A formal plan to address the top three athletics risks is forthcoming.
g. Draft final ERM plan	Risk Manager	Final draft plan created and forwarded to RM&S director and AVP for final review	5/29/09	Completed 5/13/09 ahead of schedule. Provided "ERM in Athletics" summary paper and risk assessment document to AVP, HRRM, and director of RM&S on 5/28/09.
h. Director and AVP review and provide feedback to risk manager	Director, RM&S; AVP, HRRM	All feedback on draft provided for final document	6/12/09	Completed 6/11/09 ahead of schedule. All feedback from director and AVP on ERM draft provided to risk manager for final draft.
i. Finalize the ERM plan	Risk Manager	Plan finalized	6/19/09	Completed 6/18/09 ahead of schedule. Finalized the athletics summary paper and risk assessment document.
j. Provide ERM plan to stakeholders	Risk Manager	ERM plan provided and distributed to athletics director	6/29/09	Completed 6/18/09 ahead of schedule. Provided final athletics summary paper and risk assessment document to athletics director, athletics assistant director, president's chief of staff, AVP, HRRM, director of risk management and safety, and BFS accountant.

FIGURE 2: ATHLETICS ERM RISK ASSESSMENT WORKSHEET

Athletics Mission:

- *Student emphasis:* To emphasize the student component of student-athlete, seeking not only successful teams for the university but also 100 percent graduation rates of its team members.
- *Lifetime sports:* To develop athletic programs in lifelong sports that students can take with them after graduation, providing benefits throughout a lifetime.
- *Academic enrichment:* To augment the academic programs of the university with experiential learning that takes place through sports, striving to develop confidence, discipline, perseverance, and teamwork in student-athletes.
- *Student recruitment:* To enhance the effectiveness of student recruitment, blending the appeal of quality athletic programs with the appeal of quality academic programs for the benefit and enrichment of the whole university community.
- *Community linkages:* To establish new linkages and strengthen existing linkages with all members of the surrounding communities.

Risk Drivers/Types:

- *Strategic Risks:* Risks that could impede the goals of the organization
- *Operational Risks:* Typical hazard risks that may interfere with processes that achieve goals
- *Financial Risks:* Loss of assets and resources
- *Compliance Risks:* Laws and regulatory risks
- *Reputational Risks:* Public image risks

FIGURE 2 (continued): ATHLETICS ERM RISK ASSESSMENT WORKSHEET

Risk Categories	Risk Activities	Activity Controls	Responsible Individual(s)	Risk Level Probability and Impact (Low, Moderate, High)
Athlete Academic Performance				
Hazing				
Athlete Supervision				
Injury Prevention and Treatment				
Travel and Transportation				
Facilities and Equipment				
Spectators				
Security				
Sport Camps and Clinics				
Employment Compensation and Benefits				
Program Revenues and Expenses	Fundraising, Budgeting, University and Auxiliary Accounts, Ticketing, Purchasing and Receiving, Vendor Discounts, and Trade Outs			
Cash	Collection, Accounting (Receivable/Payable), Transactions, Transfer, Security, Storage, Restrictions, Pro Cards			
Employer Liability	Recruiting, Title IX – Gender Equality, Discrimination, Sexual Assault/ Harassment, ADA Compliance, Background Checks			
Overall Risk:		Low	Moderate	High
Mark 'x' for overall risk remaining after controls are implemented				
Prepared by:			Date:	
Reviewed by:			Date:	
Authorized by:			Date:	

About the Author



Bill Thomas, ARM, is the university risk manager at California State University San Marcos. In this role, he manages the university's self-insured program and assists the campus community in integrating risk management principles into a variety of institutional applications. He has worked as a property/casualty loss control consultant for 10 years and has worked at the university for six years. Mr. Thomas holds a BS in safety studies from the University System of New Hampshire, Keene State College.

Acknowledgements

Mr. Thomas would like to thank Christine Eick and Grace Crickette for sharing information and resources that assisted him in promoting his ERM efforts at CSUSM and his colleagues for encouraging him to publish this paper.

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**Great discoveries and improvements
invariably involve the cooperation of many minds.
I may be given credit for having blazed the trail,
but when I look at the subsequent developments
I feel the credit is due to others rather than to myself.**

—ALEXANDER GRAHAM BELL (1847–1922),

INVENTOR OF THE TELEPHONE IN 1876

**Safety is something that happens between your ears,
not something you hold in your hands.**

—JEFF COOPER (1920–2006),

FATHER OF “THE MODERN TECHNIQUE” OF HANDGUN SHOOTING

Sudden Submersion Syndrome at School Pools:

Is Your Staff Prepared?

| Tom Griffiths, EdD, Aquatic Safety Research Group

Abstract: When a swimmer dies in the water, the coroner typically rules it a drowning. However, there are underlying medical issues that can cause even a strong, otherwise healthy swimmer to suddenly die in your pool. Some individuals have genetic triggers that can lead to water-related deaths, while seizure disorders and underwater blackouts also cause sudden death in swimming pools. Risk managers must be aware of the existence of these underlying, and sometimes unknown, medical issues and take action to protect swimmers in their pools. Additionally, the article highlights the importance of lifeguard training and implementation of additional rules and action plans to help protect the college or university from potential liability.

Introduction

Many school pool lifeguards are trained and prepared to prevent drowning, but not many lifeguards expect to respond to sudden deaths that occur in the water due to other circumstances. There are many different medical issues that can lead to death of even the strongest swimmers in the water. The United States Lifesaving Association (USLA) defines sudden submersion syndrome as “people in the water rendered unconscious, disabled, or dead who submerge quickly without a surface struggle.” Unlike many other aquatic facilities where a significant number of guests tend to be non-swimmers, school pools often attract good swimmers who are not prone to drowning. However, they may experience other major medical maladies while in the water, such as heart attacks, fainting, or seizures. With an aging population, many faculty, staff, or non-traditional students may be more likely to die in pools as opposed to the younger student population.

Sudden submersion syndrome is defined as “people in the water rendered unconscious, disabled, or dead who submerge quickly without a surface struggle.”

The bad news is that when someone dies in the water, the coroner often rules the death a drowning.

The bad news is that when someone suddenly dies in the water, the victim often aspirates water into the lungs, causing the coroner to rule the cause of death as a drowning. Drowning in school pools almost always leads to charges of negligence against the pool staff and some difficulty in defending the mishap. Lifeguards and pool staff must be reminded that deaths in the pool are not a matter of if, but when. As a result, the highest emergency response and resuscitation standards should be applied to lifeguards when someone dies on their watch.

Causes of Sudden Submersion Syndrome

These sudden submersions can be caused by heart attacks, strokes, seizures, head or neck injuries, trauma, alcohol or drugs, cold shock, shallow water blackouts, and more. Lifeguards and emergency response staff should know that individuals with seizure disorders are 20 times more likely to drown than those without seizure disorders. Because coroners most often declare drowning as the cause of death when water is aspirated, these sudden submersions resulting in death place the school and the pool staff

in a very vulnerable and defensive position.

Genetic Drowning Triggers

Some individuals have specific genetic drowning triggers, which have been documented to occur in pools. These include:

- Long Q-T Syndrome, a heart rhythm disorder¹
- RyR2, a rogue drowning gene linked to ventricular tachycardia and sudden death²
- Hypertrophic Cardiomyopathy (HCM)³

Long Q-T Syndrome

Long Q-T syndrome is characterized by an irregular electrocardiogram (EKG) highlighted by an elongated synapse between the Q and T peaks in the EKG strip. Some individuals with Long Q-T syndrome have no symptoms, while others may exhibit fainting or an abnormal heart rate or rhythm.⁴ Treatments for long Q-T syndrome vary depending on the type of syndrome the individual has, but all with the syndrome should seek special care from a cardiologist. According to the Mayo clinic, treatment can include medications, medical devices, surgery, or lifestyle changes to prevent the heart from beating out of control and to prevent sudden death.⁵ While the effect of long Q-T syndrome can claim the lives of swimmers, it can only be tested for and diagnosed with an EKG in the healthy state, not after death.

RyR2

RyR2 likewise kills good swimmers suddenly in the water without warning. RyR2 is a rogue “drowning gene” that can only be detected in the healthy state with DNA mapping. DNA mapping is very expensive and cost-prohibitive for most, so it is doubtful that swimmers know that they possess this genetic drowning trigger. In a Mayo Clinic study, researchers conducted genetic testing on victims of unexplained and unexpected drownings. Explained Michael Ackerman, director of the Sudden Death Genomics Laboratory at Mayo Clinic in Rochester, “On land, if you suffer from one of these genetic glitches that causes your heart to spin electrically out of control and you faint, you might wake up with bruises, but if this occurs in water, even if the heart regains control quickly, it may be too late; you’ve probably drowned.”⁶ In this case, the swimmer quickly and suddenly dies of cardiac arrest. Once again, if lifeguards are not timely and professional in their

response, they and their school could be mistakenly blamed for the “drowning.”

Hypertrophic Cardiomyopathy

Hypertrophic cardiomyopathy (HCM) is relatively common and is often referred to as “athlete’s heart.” This abnormally enlarged heart is not the result of exercise but is a genetically acquired abnormality. HCM causes thickening of the heart muscle, which makes it more difficult for blood to leave the heart and forces the heart to work harder.⁷ Some individuals have no symptoms, but others experience chest pain, dizziness, fainting, high blood pressure, shortness of breath, or palpitations. HCM often claims athletes in the prime of their adolescent and young adult lives and, again, can be misdiagnosed as drowning when it occurs quickly and quietly in the water.

Seizure Disorders

Those with seizure disorders do not fit into the same category as genetic drowning triggers, but seizures can be just as deadly. Those with seizure disorders actually do drown and don’t die first. Medical studies have found a significantly higher drowning rate in those with seizure disorders as compared to those who are seizure-free. According to the Centers for Disease Control, drowning is the most common cause of unintentional injury and death for people with seizure

disorders.⁸ Another study found that people with epilepsy had a 15 to 19 times higher risk of drowning than the general population.⁹ The American Epilepsy Society has numerous strong suggestions for those who swim with seizure disorders. Life jackets and the buddy system are easily the best protection for those with seizure disorders when visiting a swimming pool. For college and university pools, when it comes to seizure disorders, the best pool policy would be to simply advise those with seizure disorders that swimming can be dangerous and even deadly. Swimmers should follow the recommendations of

According to the Centers for Disease Control, drowning is the most common cause of unintentional injury and death for people with seizure disorders. Those with seizure disorders actually do drown and don’t die first from other causes.

the American Epilepsy Society, which could be included in onsite signage. However, pool staff cannot be too aggressive or limit access to ensure they do not violate the Americans with Disabilities Act.

Shallow Water Blackout

Shallow water blackout probably kills more swimmers than any other condition and may even trigger the genetic drowning conditions explained above.¹⁰

Shallow water blackout is caused by repetitive breath-holding and underwater swimming and is deceptively dangerous. The problem today is that military trainers and swim coaches have been promoting the fitness benefits of hypoxic training for years. Hypoxic training refers to swimmers using a low frequency breathing pattern while swimming, forcing their bodies to operate with less oxygen. Because Navy Seals and successful competitive swimmers are coached to do severe breath-holding swims and underwater exercises, lifeguards and the general public often believe that these dangerous practices are not only acceptable, but even enviable. Nothing can be further from the truth, however. All water safety agencies, including the American Red Cross and USA Swimming, now completely ban hypoxic training and underwater breath-holding for time or distance. Still, educating lifeguards and the public is difficult because television and other media outlets have glamorized the practice. For example, the Oprah Winfrey show recently featured stunt artist David Blaine holding his breath underwater for 18 minutes. Such practices make it extremely difficult to stop this dangerous activity.¹¹

Naturally, when the swimmer is suddenly rendered unconscious, the window of opportunity for effective resuscitation is usually less than two minutes. Typically, blackouts occur when a swimmer is swimming laps, and victims are often very difficult to detect. In other cases, some breath-holders may hold themselves down in the

corner of pools. Once under water, the surface ripples or the “ripple effect” of reflection and refraction can present the illusion that the victim is still moving, leading the lifeguard on duty to believe that they are still conscious and simply holding their breath. This causes a significant delay in rescue and resuscitation.

To limit the chances of shallow water blackouts, pools should ban the practice of breath-holding and prolonged underwater swimming and adopt this rule as part of their standard risk management for pool operations. Prolonged breath-holding, underwater swimming, and hypoxic training are now all banned by the YMCA, the American Red Cross, and USA Swimming. All lifeguards should also learn the mantras, “When in doubt, check it out,” and “If you don’t know, go.” The bottom line in all these scenarios is when a swimmer is holding his or her breath or is motionless on the bottom of the pool, the lifeguard must immediately check on the swimmer and stop them from performing this life-threatening act.

Emergency Action Plans

The only good news about these sudden scenarios is that if a rescuer uses an automated external defibrillator (AED) in a timely fashion, it is more likely to work than in traditional drownings by suffocation.

Emergency action plans for school swimming pools must be written site-specifically and be practiced often.

Proper pool equipment today includes an AED and the ability to provide supplemental oxygen through bag valve masks. Manual CPR alone has been shown to be terribly inefficient with only a two to 30 percent success rate when administered outside of the hospital.¹² Emergency buttons installed at swimming pools that go directly to 9-1-1 are also an excellent idea, along with radios, phones, or intercoms that directly link the lifeguards at the swimming pool with emergency medical care professionals.

Regardless of the cause of sudden submersion syndrome, once the victim aspirates water, you can be held liable. Many school pools have been charged with negligence for sudden deaths that were described as drowning or near drowning.

Lifeguards need to remain cool, calm, and collected when called on during these sudden catastrophes. Acting too quickly can lead to time-consuming mistakes. Lifeguards should learn to follow the advice of other emergency responders and be taught to stop, think, breathe, and react. The standard of care in the aquatics industry calls for a minimum of four hours per month of in-service training. Emergency action plan rehearsals are excellent ways to meet this minimum requirement.

The primary responsibility of a lifeguard is to prevent drowning. When these other medical events suddenly take place, a timely and professional response is required so that the medical malady does not turn into a drowning. Lifeguards must receive intensive in-service training in emergency protocols and must expect the unexpected to happen at the pool. Proper and frequent training of your pool emergency action plan can help prevent the lifeguards on duty from becoming victims when their worst nightmare occurs. Again, regardless of the cause of sudden submersion syndrome, once the victim aspirates water, *you can be held liable*.

Recent Cases Against School Pools in Drowning Deaths

Many school pools have been charged with negligence for sudden deaths that were described as drowning or near drowning. The six cases cited below took place recently and illustrate the importance of this issue for schools across the country. The author provided expert testimony for the defendant schools in each case:

- A private school in New England lost a stellar student athlete who was holding his breath repeatedly in their new swimming pool. This was a classic case of shallow water blackout, the leading cause of death to swimmers in the water. Even though he was practicing a dangerous activity, possessed possible genetic heart problems, and the pool had well-trained, adult lifeguards on duty, the school accepted responsibility for not responding fast enough. Lesson Learned: All swimming pools should ban extended or prolonged underwater swimming and breath-holding.
- A college in the Midwest lost a teenage boy attending a party. The boy was seeing how far he could swim underwater. The boy only spent 15

seconds underwater after attempting to swim one length of the pool. The lifeguards on duty reacted quickly, but because the AED was located away from the swimming pool, a large settlement was obtained. There was also medical evidence to suggest that the boy had genetic heart complications. Lesson Learned: All swimming pools should ban breath-holding and underwater swimming for both time and distance. AEDs should be located near the swimming pools.

- At a southwestern university, a teenage girl, who was a good swimmer and attending an enrichment program, died while swimming at the pool. She had a documented seizure disorder and actually seized several times during the summer school program. Although the university restricted her from all physical activities, including swimming, her parents demanded that she be allowed to swim to give her a normal life. A significant settlement was awarded to the family. Lesson Learned: Individuals with seizure disorders are 20 times more likely to drown than those without seizure disorders and require close in-water supervision or life jackets.
- A competitive female swimmer at a prestigious southern university suddenly died and/or drowned while attending swim team practice. The swimmer had a documented history of long Q-T syndrome, which often kills good swimmers in the water. Her parents received a major settlement, even though they knew of the pre-existing heart condition. The major claim of negligence in this case was that there were no certified lifeguards on duty. Lesson Learned: All school swimming programs should advise those with long Q-T syndrome against swimming. Certified lifeguards must be on duty at all water activities, including swim team practices and meets.
- A triathlete with a double major at a southeastern university was practicing hypoxic training and pushing the limits during an evening workout, as noted in his workout log book. He was hyperventilating between sprints and holding his breath during his sprints. No one ever noticed him slip to the bottom of the swimming pool. The life-

guards on duty closed the pool, locked the doors, and turned off the lights prior to leaving to watch Monday night football. The swim coach opening up the pool in the morning for early morning team workouts at 6 a.m. found the dead swimmer in the lane he had been swimming in the previous night. Lesson Learned: Don't allow hypoxic training. Remind lifeguards to check the pool bottom before closing the pool and every time they switch guarding positions in the swimming pool.

- A female student and former lifeguard at a southwestern university was also an epileptic. While swimming laps in the swimming pool, she nearly drowned while having an apparent seizure. Lifeguards recovered, rescued, and resuscitated the victim. The lifeguards and university are being sued for her experience. Lesson Learned: Those with seizure disorders should be reminded that they are at risk in the swimming pool and should take extra precautions while swimming.

Conclusion

While conducting lifeguarding audits in the United States, the author was surprised and chagrined to find the vast majority of lifeguards interviewed did not believe a catastrophic event would occur in their school pool. If lifeguards do not expect sudden drowning or deaths to occur, it is unrealistic to believe they will react appropriately and professionally when called on in an emergency. School officials must do a better job of preparing their lifeguards to respond effectively to unexpected tragedies in the swimming pool.

Finally, even the best of supervision can be spotty. People do not monitor other people well. Universities and colleges may choose to employ computer-assisted video drowning detection systems to supplement their lifeguards. While these systems are expensive, they do work. Poseidon Technologies, one such computer-aided system, has documented 16 real-life saves internationally. In each of those cases, the video system saved a victim that lifeguards missed. Remember, it's not a matter of if it will happen, it's a matter of when.

About the Author



Dr. Tom Griffiths has spent the last 38 years teaching, coaching, and managing aquatic facilities at the University of Maryland, Indiana State University, and Pennsylvania State University. Now retired from Penn State, he is president of the Aquatic Safety Research Group (www.aquaticsafetygroup.com) providing water safety services internationally.

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While the adjustments may be difficult for a time, these crises will pass. Stronger individual economies and a more robust and efficient international economic and financial system will surely emerge in their wake.

—ALAN GREENSPAN (1926–),
ECONOMIST AND PAST CHAIRMAN OF THE US FEDERAL RESERVE

Risk Management Lessons of the Australian Insurance Sector Following the Global Financial Crisis

| Harry Rosenthal, MBA, CPCU, ARM, Regis and Partners, the professional managers of Unimutual

Abstract: The financial crisis that has hit countries across the world has had a serious impact on many institutions of higher education, forcing budget cuts, furloughs, tuition hikes, and hiring freezes. Australia, however, has so far weathered the financial storm well. This article discusses how the Australian insurance market reacted to and learned from past crashes and other economic downturns. It also explains the important, unique role of regulators in the Australian insurance market. Finally, the Australian insurance sector is looking toward the future and has a number of current risk initiatives, including increasing financial reporting literacy, having brokers on risk teams, focusing on business interruption, examining new indicators of risk, and focusing on fraud.

Introduction

Every generation experiences a financial situation so large in scope that it deserves its own name. While newspapers regularly assign names to economic events, such as “Tech Wreck” or the “Asian Meltdown,” these are but mere blips on the radar compared to the rare, large-scale, macro-economic events which impact virtually everyone on the planet. In our grandparents’ day, it was “The Great Depression,” a 10-year period of economic stagnation, staining the planet’s financial health. In our parents’ time, it was the “Post-War Boom,” over 50 years of economic progress, an unprecedented lifting of the world’s economies. The current generation’s macroeconomic milestone appears to be the Global Financial Crisis (GFC), or “The Great Recession,” the aftershocks of which are still being felt and measured.

From my present role in a risk financing mutual of Australian universities, such events are rare opportunities

to witness firsthand the effectiveness of preparations of the past and to refine and update risk treatments to better manage the risks of the future. It is important that, even as the aftershocks of the GFC are still being felt, risk professionals examine the lessons this event has delivered.

How Did Australia Fare?

Overall, Australia is relatively small as the sixth largest country by land mass¹ in the world with a GDP per capita ranked 21st in the world (at \$48,252.78).² Australia is one of the success stories of the recent GFC as the only Organisation for Economic Co-operation and Development (OECD) country not to have entered into a period of prolonged recession. The Australian economy has proven more resilient than most other Western countries.

One example is the setting of interest rates. Currently, central bankers in Australia who are concerned about the possible effects of inflation, currently at 2.1 percent, have steadily increased interest rates to slow the national economy down. This is occurring at a time when other Western countries maintain interest rates close to zero percent to stimulate economic activity.

While housing, retail sales, and manufacturing data show fluctuating levels of demand, the Australian minerals and mining sector and the country’s proximity to China are providing a much needed boost to the economy, keeping the nation vital and active.

While witnessing the problems experienced by their United States and European counterparts, Australian risk managers are secretly asking themselves, “What did we do so right?” The answer to this question is complex and may include a certain amount of luck, but this tale

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of survival does include key lessons of risk management, which should be shared by all risk managers and insurance professionals.

Learning Lessons from the Past

Examining Investment Portfolios and the Dangers of Excessive Debt

A key axiom of risk management is that of learning lessons from the past. While the past is not always the best indicator of the future, we can examine adverse events in our past for potential lessons relevant to the future. Countries where the financial services sector closely studied and learned from past adverse experiences were better prepared to weather the GFC storm. Australia was a classic case in point.

Australia's laboratory for adverse events occurred during the period from 2000 to 2001 when several local and international critical incidents occurred, alerting the domestic financial sector to the potential perils of global interconnectivity and excessive use of debt. During that period, Australian risk professionals witnessed the bursting of the technologies bubble, Tech Wreck, in 2000-2001; the collapse of the London insurer, the Independent, in 2001; and finally the collapse of one of the nation's largest commercial insurer's, HIH, in 2001.

This sudden concentration of losses raised awareness of both internal and external risks facing the Australian insurance sector. By 2001, the sector had an understanding of the perils of interconnectivity of the global risk sharing mechanisms, which were designed to spread risk on a global scale, and which failed so spectacularly in 2008 and 2009. These events also illustrated the dangers of excessive leveraging and debt.

The lessons of the Tech Wreck showed the ethereal qualities of assets, such as shares in fast growth companies, which were held by many portfolio managers, including insurers. The sudden and unexpected volatility of assets illustrated how vulnerable investments could be, and the high levels of risk inherent in portfolios were beyond the

level of risk tolerance for Australian insurance portfolio managers. The resulting discomfort prompted many Australian insurance risk professionals to encourage their companies to move away from the classic 1980s view of insurance operations, where boom markets were viewed as opportunities to stretch some of the underwriting basics by using leverage gained in investment portfolios. The Australian risk professionals encouraged their companies to move away from management models in which combined ratios over 100 percent were regarded as acceptable. The Tech Wreck foreshadowed that it was not always prudent to rely only on the growing of investment portfolios to offset underwriting shortcomings.

In response and to better mitigate these risks, Australian insurers redefined their missions and operating models. They and their regulators recognized that the insurer's core business is not investment management but risk underwriting. Over the period following these corporate collapses, greater emphasis was placed on creating sustainable underwriting results and not relying on investment portfolios to balance the books. When the GFC struck, dramatically reducing the value of investment portfolios around the world, the Australian insurance sectors were still solvent and profitable, as they were back to focusing on underwriting basics. For example, Australian insurers, as a group, remained profitable during most of the GFC. Over 2008 and

2009, there were only a few quarters with underwriting losses, followed by strong underwriting results for most of 2009.

In addition to overseas experience, the HIH incident in particular illustrated the perils in drifting away from the core business, underwriting risk. Up until the GFC, many insurers in Europe and the United Kingdom followed the more classic view of insurance that Australia had once followed—using boom markets to gain leverage in investment portfolios. In this model, growing investment portfolios were used to offset underwriting shortcomings. As a result of HIH, though, Australian insurers and their

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regulators saw the importance of sticking to one's knitting, recognizing it is virtually impossible to be proficient with both professions, underwriting and investment management. Most Australian companies shifted their focus back to solid underwriting post-2001, keeping them solvent in poor financial times. It is interesting to note that many US insurers are, post-GFC, abandoning their portfolio management functions and outsourcing them to professional fund managers, allowing them to focus on insurance basics.

Building the Influence of the Australian Financial Regulator

The second risk management strategy which successfully served the Australian insurance sector was the increasing authority and influence of the regulator over the years following Tech Wreck. The Australian Prudential Regulation Authority (APRA) was established in 1998 as the prudential regulator of the Australian financial services industry, overseeing banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation fund, or Australian retirement program. Currently, APRA oversees a financial sector controlling approximately \$3.6 trillion in assets for 22 million Australian depositors, policyholders, and superannuation fund members.

As a regulator attuned to the lessons from the past losses, APRA evolved over the 11 years preceding the GFC to become a mature and effective regulator. It developed a close working relationship with its stakeholders, while better understanding the vulnerabilities and risks in the global community.

This is not to say increased regulation was universally accepted in Australia during the years leading up to the GFC. As a matter of fact, most strategic risk registers of the country's top insurance companies cited "over-regulation" as one of their 10 risks. This view was shared world-wide as evidenced in surveys by the Centre for the Study of Financial Innovation (CSFI) in 2007. During that year, "Too much regulation" was listed as the insurance industry's number one risk. It was reduced to number five by 2009.³

It is widely recognized (but not loudly vocalized) that prudent APRA oversight, solvency requirements, and

corporate reporting played a significant role in the sustainability of the Australian insurance sector during the GFC. It was also helpful having such a competent regulator on the scene for many years before the GFC. The Australian market has been working under APRA oversight for 11 years now, which is a generational change in the insurance industry. Over this time, a new generation of insurance professionals entered the discipline, who only knew the sector under the oversight of APRA. Australian insurers grew accustomed to this oversight following HIH and the Independent losses and, therefore, were in a stronger position to weather the GFC storm.

Risk Initiatives in the Australian Insurance Sector Today

Overall, direct Australian insurers experienced only two consecutive quarters of underwriting losses from July to December 2008 during the worst of the GFC. It was a wake-up call for the re-examination of underwriting models, and Australian underwriters have been critically examining and updating the sophistication of their underwriting tools, including models to help gauge the overall health and risk management of their insureds more accurately. These models are being expanded to include, for example, an insured's level of gearing, even for lines which are not financial in nature, such as general property and contents. The GFC taught them that models which clearly explain the past are not always the best for predicting the future, and investment in advanced modelling has increased across the sector. Why would this be important? A client with substantial debt may be less inclined to make recommended safety or property protection improvements than a client who is not as constrained for cash or has a significant debt to service. Some of the key risk control measures discussed in the sector today include:

1. Increasing Financial Reporting Literacy

Underwriters in Australia are increasing their skills in reading financial reports of their current and prospective clients. While detailed financial information has always been requested by insurers, they always received less scrutiny than photos or other tangible representations of the insured. In the past, underwriters often preferred pictures to balance sheets, reviewing photos of a risk rather than the numbers behind

it. Today, the level of financial reporting literacy has grown post-GFC. There is closer scrutiny of cash flows, debt levels, and revenue trends as underwriting decisions are made on individual risks and prospective clients.

2. Including Brokers on Risk Teams

Insurance brokers have always played a strong role as intermediaries in the risk financing equation. Australian insurers are forging a more functional relationship with brokers as partners, encouraging them to provide nuggets of information which will give them deeper insight into the nature of the risks they are underwriting. As a result, brokers are employing their expertise and intimate knowledge of the customers to a much higher level.

3. Focusing on Business Interruption

Following the GFC, the Australian underwriting market has become more significantly interested in risk mitigation through business continuity planning and management. Insurers with large corporate clients have witnessed how vulnerable their clients are to loss and how even a brief business outage could spell disaster for their clients. Insurers are aware of the competitive nature of the Australian environment. There are currently 111 direct insurers accepting insurance business for a population of 21 million people. However, many of these insurers are actually spin-off brands from one of the three large insurers, which control close to 60 percent of the total market.⁴ There is a clear, in-house understanding of the competitive environment and the need for organizations to be as resilient as possible in such times.

4. Examining New Indicators

In addition to gaining greater financial insight by way of financial reporting, Australian underwriters are also examining other indicators of risk profile. For example, some property underwriters are seeking greater insight into management systems through workers' compensation information, such as lost time injury (LTI) frequency rates. LTI is a classic workers' compensation metric which provides a measure of personnel loss experience compared to hours worked and may provide underwriters insight into the health and strength of the organization's risk management culture.

5. Focusing on Fraud

Finally, risk managers are increasing the robustness of fraud detecting technology and processes. Historic trends indicate that, during times of economic stress, organizations experience an increase in fraudulent claims activity. Economic pressures, cash-strapped insureds, and an increase in the whistle blower culture since the last economic downturn have motivated insurance risk professionals to improve their organizations' abilities to detect and deter fraudulent activities

Conclusion

In summary, Australia has weathered the GFC quite well, due to many complex factors, including population demographics, its natural resources and proximity to Asia, and even luck. Equally important, however, has been the ability of its risk professionals and regulators to recognize and incorporate the lessons learned from local, regional, and international losses into the operation of their organizations. Risk professionals in the Australia sector have had practice in making these lessons useful to their stakeholders and motivating them to implement operational changes to reduce risk exposures. Ultimately, the lessons described in this article resulted in Australia's unusual level of resiliency when faced with the GFC.

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This is not the time to rest on our laurels, though. There is evidence that the region is on the cusp of a period of large losses. In 2009, there were \$1.2 billion in catastrophic declared events in Australia with over 19,000 claims. So far in 2010, Australia has witnessed significant storm losses in both Melbourne and Perth, which may exceed these 2009 losses. The skills of trained risk professionals are in even greater demand, and Australia's future financial performance will depend on how successful risk management practices and plans are carried out in the future.

About the Author



Harry Rosenthal is the general manager of risk management services for Regis and Partners, the managers of Unimutual, a discretionary mutual of Australian universities and affiliates which provides a wide range of property and liability protections for its members. He is the former director of the Risk Management Unit of the University of New South Wales and Past President of the Australasian University Risk and Insurance Management Society (AURIMS). He has published numerous articles on loss control and risk management-related topics and is a frequent presenter at conferences and symposiums on risk, insurance, and higher education loss exposures.

He holds a master's of business degree from the Florida Institute of Technology, as well as an Associate in Risk Management (ARM) from the American Insurance Institute. In addition, he holds the professional designation of a Chartered Casualty and Property Underwriter (CPCU) with the American Insurance Institute, one of the highest professional titles in the American insurance industry.

Mr. Rosenthal began his professional career as an archaeologist working in the Mediterranean, Europe, the United States, and Mexico. Leaving archaeology in the late 1970s, he began a career in government administration and has over 25 years of experience in risk management and claims administration in the utility, government, and private sectors in both Australia and the United States. He has been an adjunct lecturer and facilitator in both

undergraduate and postgraduate programs at the University of New South Wales and University of Technology, Sydney, and he is active in the development of risk management education in Australia.

Endnotes

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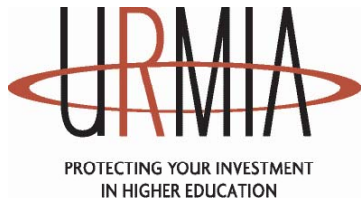
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—RALPH WALDO EMERSON (1803–1882),
PHILOSOPHER, POET, AND ESSAYIST

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