

Litigation Finance Investors Take Aim at Commercial Auto Claims

Boston CPCU Panel Discusses Commercial Auto and Emerging Industry Trends

BOSTON — Although litigation finance has been around for a number of years, it appears to be on the rise, according to panelists at the Boston chapter of the CPCU Society's annual business meeting. It may be one of the hidden factors driving up the costs of commercial auto claims.

There has been a fair amount of turbulence in the commercial auto line in

the last several years with rising claims frequency and severity. Litigation financing may be adding to the sector's woes. It is the practice of a third party providing capital to a plaintiff involved in a lawsuit in return for a portion of any financial recovery from the litigation.

Brian McCarthy, president and CEO of Energi and eServices Companies,

served as panel moderator. He explained that Wall Street firms have invested in finance companies, which provide lump-sum payments to injured plaintiffs while they are out of work and going through treatment. The payments are used to fund expenses, including legal costs, medical treatments and living expenses. Wall Street is charging high interest rates on these "loans," which

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Vermont Again Tops R Street's Insurance Regulation Report Card

WASHINGTON, D.C. — For the fourth consecutive year and the fifth time in six years, the R Street Institute has ranked Vermont as having the best insurance regulatory environment in the nation. On the opposite end of the spectrum, Delaware received the worst score in the country, narrowly finishing behind North Carolina, which had placed last the previous two years.

In its "2017 Insurance Regulation

Report Card," written by R.J. Lehmann, R Street's director of finance, insurance and trade policy, the annual report graded each state in multiple categories based on how effectively and efficiently they discharge their duties to monitor insurer solvency and to foster consumer choice and competitive, private insurance markets. The report mainly focuses on property-casualty insurance, particularly personal lines which have the "most

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are provided to the plaintiff with a lien on proceeds of settlement or verdict in favor of the plaintiff. (The financing of lawsuits is considered an asset purchase and not a loan by regulators.)

The finance company will pay plaintiffs' medical bills to take them out of managed care. By teaming up with law firms and certain doctors, some of these Wall Street investors are paying individuals to seek unnecessary treatments in an effort to exaggerate injury claims, increasing medical costs and the overall value of the case. It is estimated that 28% of law firms used alternative funding in 2015, noted McCarthy.

"We've seen time and time again where individuals — if they were in managed care for workers compensation and had their own private health insurance — would not have had these surgeries," said McCarthy.

In addition, sometimes plaintiffs lawyers won't communicate with the insurance company's adjuster. They will keep the claim quiet as long as they can, so the insurance carrier on the other side will not be able to employ resources to determine if it is a fraudulent claim, according to McCarthy.

While all lines of business are prone to investor funded claims, commercial auto appears to be the most vulnerable with general liability following close behind, noted McCarthy. Investor backed litigation is mainly targeting "low-impact accidents," such as minor impact, soft-tissue accidents where the total claim would be expected to be \$20,000 or less; however, litigation financing is inflating costs dramatically.

"We used to think claims had values based on certain criteria. What's happened through litigation financing is that they've taken cases that we might have planned on paying \$40,000 or \$50,000 for and now made those \$1 million cases, and they're doing this every day," said Robert Woods, SVP of

claims at Energi Insurance Services.

The Impact of Litigation Financing

Litigation financing has been used in multiple types of investment models. While some investors back a case or a book of cases for a plaintiffs' law firm, others pay money directly to plaintiffs. The longer the litigation takes, the more money the investor makes. Investors skirt usury laws by not calling the payment a loan, according to Timon Sullivan, who is a trial attorney at Ogden & Sullivan, P.A.

"The biggest problem with these investors is that they inhibit settlement," said Sullivan. He explained that if the defense can obtain the investor-plaintiff agreement, it may reveal the payment schedules. When certain dates are hit, the repayment amount goes up, so if the defense has that information at the beginning of the case, it may be able to push for settlement talks before the cost increases.

In some cases, the investor won't go to mediation, so there isn't a way to tell them what a bad case it may be, explained Sullivan. "They spread their risk over multiple cases, so they're not worried about one case. So, we'll end up trying cases you wouldn't otherwise try, and the plaintiff's lawyer wouldn't otherwise try, because the person who



Brian McCarthy, president and CEO of Energi and eServices Companies, and Michael Cox, SVP Eagle Insurance Group/People's United Insurance Agency.

has the biggest stake in the case isn't at the table at mediation. We advocate discovering at the beginning of the case if there is an investor, so we know who is calling the shots."

Legislation to Combat Litigation Financing

Much of litigation funding is based on fraud, according to Brian Kelly, partner at Nixon Peabody. "Taking people outside of the medical system and running up the cost for what may be spurious claims is a fraud on the system. Unfortunately, the answer to whether there will be legislation coming soon is no."

Kelly expressed concern about the damage litigation funding can do to the justice system. He pointed out that conflicts could arise between a judge or a juror and the plaintiff if they are invested in a Wall Street firm that is funding the litigation. "All of a sudden, you need

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a new judge or need to take the juror off the panel or it could undermine the verdict.”

There is currently no legislation barring litigation funding, and several state legislatures have okayed the practice. Kelly believes concrete examples of fraud on the system or a conflict of interest that derails a case are needed. “It needs some publicity about examples of where it is being abused, then perhaps our legislators will take action.”

RICO Actions

The Racketeer Influenced and Corrupt Organizations Act, commonly referred to as the RICO Act, is a federal law that provides for extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization. RICO actions have long been used in organized crime cases and have recently been used in civil cases. A civil RICO claim is one tool for fighting back against litigation financing, said Kelly.

“The [insurance] industry needs to go on the offensive to expose this, or there will be more frivolous suits against you. The only way to stop it is to fight back.”

Although civil RICO claims may not be appropriate in every situation, Kelly hopes they may help stem the tide of fraudulent lawsuits. “There’s so much money involved. All of the actors in the space have different incentives to misrepresent what the true claims are to keep pushing higher and higher medical bills, and the only way to stop it is to fight back and go on the offensive with a civil RICO claim.”

Critical Technology: Dash Cameras, Telematics and Side Guards

Technology can also help fight fraud in commercial auto. Approximately 13% of commercial vehicles are equipped with dash cameras, which Justin Russo, president eRisk Solutions, thinks is far too low. Acting as an extra set of eyes, dash cameras can accurately document the events before, during and after an accident, expedite settlement, reduce litigation expenses and mitigate fraudulent



Michael Cox, CPCU, president of the Boston chapter of the CPCU Society; Brian Kelly, Nixon Peabody; Timon Sullivan, Ogden & Sullivan P.A.; Michael Torrissi Sr., Samuel Coraluzzo Co. Inc.; Justin Russo, president eRisk Solutions.

claims. Russo said although there was initial pushback from commercial auto insureds who were concerned about the cost of the cameras and the potential invasion of privacy for the drivers, eRisk Solutions was able to overcome it by educating drivers about how the footage can act as a witness and installing cameras that only face the outside of the truck’s cab.

In the past two years, Russo has seen a number of cases that could have had an adverse impact on policyholders and resulted in substantially higher premiums and difficulties in obtaining insurance if it weren’t for the camera footage. For some claims, that potential adverse impact was reduced or eliminated because the insured had dash cameras installed.

“If your driver is not at fault, the camera can help you avoid trial, litigation and high jury awards. If your driver is at fault, the camera’s footage gives your insurance company the ability to make a decision regarding expedited settlement — reducing litigation expense,” said Russo.

Panelist Michael Torrissi Sr., VP of operations at large fuel hauler Samuel Coraluzzo Co. Inc., noted that dash cameras have been able to show what really happened in some accidents involving his fuel trucks.

Telematics: Another key technology for commercial auto insureds is the use of telematics, which gathers numerous

data points from vehicle speed to aggressive driving maneuvers like hard cornering and braking. Russo said once the telematics device or program generates a report, trends can be found and bad or dangerous habits can be addressed with drivers.

Side Guards: It is estimated that side underride crashes are responsible for 200 deaths a year. A basic but effective safety device commercial insureds could consider is installing side guards on tractor trailer trucks. These physical guards on the sides of trucks could help prevent pedestrians and bicyclists from being pulled under the wheels if hit, and they can stop another vehicle from sliding underneath the truck and having its roof sheared off. In an effort to control claims costs and help prevent injuries and deaths, Torrissi said that every new truck his company has is outfitted with side guards.

Risk Management Technology in Underwriting

Telematics holds the key to the future of commercial auto risk management in McCarthy’s opinion. He thinks telematics data will help to more accurately rate an individual risk because the insurance carrier knows with certainty where the vehicles are garaged and where they travel to. Currently, commercial auto is rated by territory, so a trucking company could be located in Georgetown, Mass., one of the state’s lowest rated territories, but the vehicles could be operating every day in Boston and Cambridge.

“The telematics data provides the ability to know where those vehicles are operating and whether they are operating in territories with higher risk exposure. That’s why the telematics data is so important — to get more accurate rating and pricing on an account basis,” said McCarthy.

In addition, telematics data will be used against insureds in the defense of claims. “We’re seeing that now in Texas, Florida and California, and it’s coming here. Plaintiff’s lawyers will be using it here in cases, so that’s why it’s important to get ahead of this and to educate policyholders.” ■

Weather Disasters Caused \$344B in Global Economic Loss in 2017

CHICAGO — There were 330 natural catastrophe events in 2017 that generated economic losses of \$353 billion — of which 97% (\$344 billion) was due to weather-related events, according to Impact Forecasting, Aon Benfield’s catastrophe model development team.

The weather-related events included Hurricanes Harvey, Irma and Maria in the U.S. and Caribbean as well as Typhoon Hato in China and Cyclone Debbie in Australia. For historical context, the report noted that 2017’s natural catastrophe losses were 93% higher versus the 2000-2016 average.

Insured losses to the private sector and government-sponsored programs were among the costliest ever incurred, reaching \$134 billion in 2017 — just behind the record \$137 billion in 2011. This is 139% higher than last year’s \$56 billion, primarily due to high insurance penetration in the U.S. that suffered a very active Atlantic hurricane season, other severe weather events (convective storms) and wildfires.

“While 2017 was an expensive year for the insurance industry, the reinsurance market had an estimated \$600 billion in available capital to withstand the high volume of payouts. Most critically, the U.S. weather and wildfire events in particular have demonstrated the value of reinsurance, with claims being paid in an average of eight days to augment the recovery process,” said Eric Andersen, CEO of Aon Benfield.

Additional key findings include:

- Roughly 36% (\$80 billion) of economic damage from Hurricanes

Harvey, Irma and Maria was insured.

- There were 31 billion-dollar events globally, with 16 alone in the U.S.
- Wildfires caused \$14 billion of insurance losses in 2017, the highest on record for the peril.
- About 10,000 human fatalities were caused by natural disasters, with the deadliest event being a massive landslide event in Sierra Leone when more than 1,100 died.
- Last year was the third warmest year on record since 1880 for combined land and ocean temperatures.

“The high cost of disasters in 2017 served as a reminder that we continue to face increasing levels of risk as more people and exposures are located in areas that are particularly vulnerable to major,

naturally occurring events. As weather scenarios grow more volatile in their size and potential impact, it becomes more imperative than ever to identify ways to increase awareness, improve communication and lower the insurance protection gap. We know natural disasters are going to occur. The question is how prepared are we going to be when the next one strikes,” said Steve Bowen, Impact Forecasting director and meteorologist.

Other significant events during the year included:

- An October wildfire outbreak, the most destructive ever recorded in California, caused nearly \$13 billion in economic damage.
- Substantial summer flooding caused more than \$12 billion in damage across China.
- Southern Europe endured an extended drought during the summer and autumn months that caused \$6.6 billion in damage across parts of Spain, Italy and Portugal.
- In Mexico, two powerful earthquakes led to nearly \$6.0 billion in combined economic losses, including major damage across Mexico City.
- The costliest thunderstorm event of the year affected central sections of Europe, particularly Poland, and left a damage bill of nearly \$800 million. ■

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