

# FINAL TRANSCRIPT

**Thomson StreetEvents<sup>SM</sup>**

**\*\*ACC - In-House Malpractice Insurance – Should you Consider It?**

Event Date/Time: Jul. 28. 2005 / 1:00PM ET

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### **Dennis Stryker**

*Rick Engineering Company - General Counsel*

### **Pam Bresnahan**

*Vorys, Sater, Seymour and Pease LLP - Partner*

### **Laurie Sablak**

*Chubb Specialty - Product Manager*

## PRESENTATION

### **Dennis Stryker** - *Rick Engineering Company - General Counsel*

Okay. I would like to welcome all who are participating in the webcast this afternoon or this morning, if you happen to be on the West Coast with regard to in-house malpractice insurance issues.

First, let me tell you that one, the speakers that you'll be listening to are speaking as individuals and not on behalf of their respective employers, whether it's a corporation or law firm. These are, as you would expect, the typical standard stipulations that those of us who have practiced any litigation law recall at the end of the deposition, the standards this far. With the disclaimer, we're speaking on behalf of our sales. We're not representing our entities in any way. And we're not providing legal advice with regard to the information we are providing to you today.

Another piece of information is that, if you have questions, you may e-mail those questions to me, Dennis Stryker, as the moderator. That e-mail address - it's rather long, but relatively easy - is dstryker - D as in Dennis, Stryker, S-t-r-y-k-e-r, @rickengineering. Rick is r-i-c-k-e-n-g-i-n-e-e-r-i-n-g - .com. Also keep in mind that this webcast will be available starting after 3:00 p.m. Eastern Time today and will be on the ACC website for one year following today's webcast.

With that, I want to give you a brief introduction of the two panelists today. In alphabetical order, Pamela Bresnahan, who is a partner with Vorys, Sater, Seymour and Pease. She is very active in the American Bar Association and, as her claim to fame represents, a number of in-house and outside counsel, both as an advisor and as litigation counsel in various malpractice claims and litigation. Laurie Sablak is with the Chubb Group of insurance companies. We was formerly with Executive Risk until that group and organization became part of the Chubb Group and has a tremendous amount of experience in the in-house malpractice coverage arena regarding claims and coverage issues as they've come up on behalf of both executive risk and Chubb Group.

I will be going through as the moderator, Dennis Stryker. I'm General Counsel with Rick Engineering Company in San Diego, California. I will prompt you as we go through with regard to the various frames we are utilizing as we are walking through the PowerPoint presentation. For those of you who are going to follow the PowerPoint presentation. In some respects, the PowerPoint is a general outline of the topics that we're going to be covering, but will not necessarily follow all of the information that the two panelists have to provide to you. This is in hopes of providing you as broad a coverage as possible in addition to the other information that's been provided on the website's additional materials.

The first part of our program, and it seems like it may be slightly out of order. But we've talked - if you go to the third slide of the PowerPoint presentation, as far as why or how, rather, did we do with claims in the protections (ph) as possible. It talks about indemnification from the business entity, to represent offices' insurance policies, employed lawyers professional liability policies, which is really part of the subject today and, obviously, out of our individual pocket.

The next slide, which would be slide four of the PowerPoint presentation, talks about the types of claims against in-house counsel.

With that, I'm going to turn this over to Pam Bresnahan, who's going to talk about, as she calls it, the dirty dozen.

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Pam?

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Thanks, Dennis. I'm going to talk about 12 areas of risk, which we kind of nicknamed the dirty dozen. I'm going to talk about it from an issue standpoint in the materials that are provided on the website. There are certain case laws cited, back patterns that both Laurie and I have provided for you to look at more closely. But I thought an overview of the areas of risk would be useful. The main - one of the main areas where we see claims and we try to give legal advice as - for risk prevention - is conflicts between employers and employees.

This is going to rise in several different ways, but the main way it arises is directors and officers have a conflict with the company. And the world of professional conduct, which all practicing words - and I think in just about all jurisdictions there are no more disciplinary rules. But in most jurisdiction, the rules of professional conduct have both a conflict of interest provision, which is Rule 1.7, and rules with respect to multiple representation and rules to - with the client as an organization.

So, what comes up is the conflict between you representing the company, which may have differing or adverse interest to either a director or officer or employee. It comes up in the context - many different contexts, but under the D&O context, which is generally the most expensive context. A director or officer will have done something that is in conflict with the company's vast interests and you are in the position of getting legal advice to the company that is adverse to the director and officer that you may or may not have been taking your orders from as general counsel.

Number two comes and is more the employment aspect, employee suits that arise out of layoffs or downsizing. A number of cases come from advice as in to (ph) employee benefits, advice given to employees that they then say, oh, general counsel is - was my lawyer for purposes of this and you get sued because you've given advice to individual employees.

It doesn't necessarily involve a conflict. It just may be advice on what to do about stock options, advice as to what to do about COBRA benefits, advice as to what to do about life insurance or health insurance or other employee benefits. The third sort of rising area, I would call it, would be opinions to regulators such as the SEC or the FTC or Federal Communications Commission under some circumstances.

If you give a legal opinion to a regulator and there's an enforcement arm of that commission or government agency and they can now - they are now, particularly at SEC, bringing causes of actions for enforcement actions against in-house counsel. There's some remarks in our materials, talking in more detail about this, but the basic idea is that if you're in-house counsel and you don't have outside SEC counsel involved and you can't rely on advice of outside counsel, you're sort of without a defense if you haven't done precisely the right thing in the regulator's eyes.

There is another sort of growing area, I'll call it. It would be conflicting advice to sub-companies and holding companies and affiliated companies. This generally comes out of transactional issues, either the structuring of companies or the - what assets go in what company when you create a new company, what assets are sold or tax advice that arises out of restructuring of companies.

And a number - on a number of claims, in-house counsel has been very involved in tax advice for how to structure these companies and it's turned out to be to the benefit of one company, but not to the other.

And obviously, under Rule 1.7, there are ways to ameliorate this by having a conflict of interest waiver and disclosure in writing. A lot of companies, if there are several sub-companies in a new company being set up, you designate people from each company to sign a waiver and disclosure that there may be a conflict by giving tax advice to the holding company about how funds flow from a sub-company to a holding company for tax purposes.

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Number five on my list is - I call it advice to officers and directors or no advice to officers and directors. A lot of times there is - a relationship arises, of course, not with "the company," but particular people in the company that they themselves comprise the company at the end of the day. And legal malpractice suits get filed against in-house counsel because of advice they gave to officers or directors or advice they failed to give when an officer or director says, well, she was my lawyer. She wasn't only the company's lawyer. She was my lawyer, too. And she should have told me that I shouldn't do this or I should have done that.

The next area is also a growing area and it involves, a little bit, the Internet and the increased communication over the Internet. Defamation cases - I've seen more defamation cases than the malicious prosecution cases against lawyers the last two years than I've seen in my entire 25 years as a practice of law. The defamation cases generally arise in three different ways. They arise from practical leases or information released to the public or they've arisen from peoples' public statements, either in lectures or on the Internet, about competitors or about people in the industry that people decide are derogatory or defamatory in nature.

And then, a lawsuit is filed against a lawyer for defamation, which is an intentional tort. When it gets to Laurie's talk, she's going to talk about exclusions and there's some very interesting issues that arise when a lawyer, any lawyer in-house or in a law firm is sued for an intentional tort, which is defamation or malicious prosecution.

Number seven on my list is advice to third parties, which is really a misnomer. Advice - what I really mean is that you give advice to your client and a third party relies on it. A lot of times - or you could give advice to a third party that's not your client, but is related to your client. This comes up in the context of franchisees, where in-house counsel for the franchiser gives wrong, negligent, bad advice to franchisees about purchase of land or what the deal is under the contract, the franchise contract or a licensing agreement or what the rights of franchisees are under contract. It sometimes also comes up with independent vendors that have a stake in whatever income is generated as an independent contractor or as a joint venture.

The idea is that - and I'll talk about this in a little more detail later, but the idea is in - when you have advice to third parties, that the traditional law said there was no duty except to your client. Because there is sort of a widening of that rule, in-house counsel have to be wary that they're not giving legal advice to people who are not their clients or people who would say, later on, in a lawsuit context, that they lied on advice from in-house counsel that had a relationship or some kind of fiduciary duty with in-house counsel for the franchiser.

Another new rising area is the role that in-house lawyers are taking in internal investigation. This has come up a lot in the context of Sarbanes-Oxley with SEC complaints and internal investigations, where there's both outside counsel and in-house counsel. And eventually, either the SEC or some outside director sues for fraud, breach of fiduciary duty and what I call up the ladder issues, that the in-house counsel failed to go up the ladder because they had knowledge of the fraud or they didn't do enough to prevent the fraud.

Number nine on my list is a very broad category. I sort of call it the trustee in bankruptcy problem, but really it is all the problems surrounding bankruptcy or insolvency issues in a company through general counsel for a small company or even a medium-sized company and that company starts to go bad. And you're giving advice on a sinking ship. And there's a very interesting case that's quoted in this side of materials called perara (ph) that talks about the personal liability of attorney when the company is in the zone of insolvency, but not actually insolvent. And it's just been reversed for other reasons and remanded for a jury trial by the Second Circuit.

But the interesting thing about bankruptcy cases is that the person who is alternately the plaintiff against the law firm or the in-house counsel is not the person you were dealing with. So, everything you do comes under more scrutiny because the trustee and bankruptcy has a fiduciary duty to the estate of the debtor and they say, well, I have a fiduciary duty to pursue all claims I can pursue. And John Doe has insurance or his law firm has insurance or in-house counsel has insurance and we don't think they gave the correct advice and it caused this company to go bankrupt.

Number 10 of my 12 is opinions regarding structuring of a startup company. A lot of these are sort of a mixed bag. They are business advice as well as legal advice. And Laurie's going to talk again when we get to her portion of the presentation about

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what the difference is between an office and director policy and an in-house employer and an in-house lawyers policy. But here, if you get opinions regarding the structuring of a startup company as an investment deal and you give wrong advice, a lot of those companies that fail, they look to the lawyers to structure the deal, whether they're in-house or outside law firms for recompense for liability if there was incorrect advice. And it's not always financial advice. It's the structuring or transactional advice that's given.

There - I alluded a little bit earlier to the third party - no duty to third parties. Back order law says there's no duty to a third party. There's only duty to your client. That is eroding, mostly because of a reliance issue that, in most jurisdictions, as we sit here today, if you know that somebody's going to rely on your advice, like a shareholder, like a minority shareholder, then there may be some duty that runs from you, the lawyer, to a third party who is not your client. Most of these lawsuits have gotten to it by fiduciary duty, either the in-house counsels, an officer or director or they stand in the fiduciary business - fiduciary position with a shareholder or outside director. You get it coming and going because you can't - outside directors now have heightened scrutiny and heightened responsibilities under Sarbanes-Oxley, so they're looking to the lawyers for independent advice and not to be part of the cabal, so to speak, of the company.

My final of the dirty dozen before I sort of talk a little about claims and the world of professional conduct is advice on intellectual property. There's been a number of cases where in-house counsel has given legal advice that is incorrect about uses of trademarks. And there's been two lawsuits that I know of in a couple of other claims about what is known as contributory trademark infringement, claims in saying that in-house counsel was part and parcel of diluting somebody else's trademark. So, the third party against who's not the company for the incorrect legal advice, but the theory is contributory trademark infringement as one of the people who have contributed to the bias user mark (ph) that ultimately would sound to infringe on the plaintiff's mark.

Last but not least, a number of years ago, there was very little relationship between the rules of professional conduct and their use in - excuse me - and their use in lawsuits. Now, the world of professional conduct have become part of the basis for a breach of fiduciary duty claims. Law differs jurisdiction to jurisdiction, but at least, in most jurisdictions, if you found by a jury to have violated a rule of professional conduct, it becomes evidence of negligence in some jurisdictions and evidence of breach of fiduciary duty.

So, it has brought the use of a breach of fiduciary duty tort, which you cannot use - you cannot use in all jurisdictions. But a breach of a duty of loyalty or one of the other breaches of fiduciary duty that's articulated in the law is - the subject matter that they use is you've breached Rule 1.7 because there was a conflict of interest and you've therefore breached your duty of loyalty to your client. And those rules of professional conduct - most often 1.7 or 1.6, which is confidences and secrets of a client, are used to make a lawyer look really bad before a jury. Here are these rules that lawyers have to abide by when they practice law and look - we find here that they've violated these rules. They've reached their fiduciary duty to their client.

It's very inflammatory before juries and it is a very difficult thing to answer because, in all the jury studies that we've done, you see, from time to time, that some jurors, not all, go right past. As soon as there's a violation of rules they run right past what we'd call the issue of approximate cause. They don't care if you've breached your fiduciary duty and whatever happened to the company and it went under or whatever happened to it had nothing to do with whatever the lawyer's conflict of interest was. They don't like the idea that there was a breach of fiduciary duty. There was a breach of one of the ethics rules.

So, my conclusion is and then I'm going to turn the floor over to Laurie, is that we're now seeing in-house lawyers more as a separate entity and, admittedly, with a separate pocket, than we did 10 years ago. This is partly because counsel are taking a much more active role, either because of financial reasons or because they've been in private practice they've run their in-house legal departments far closer to a law firm than they were 10 years ago.

And I don't - that ends my little talk and I'll turn the floor over to Laurie.

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**Laurie Sablak** - *Chubb Specialty - Product Manager*

Thank you, Pam. Good morning and good afternoon, everyone. I'm going to speak a little bit about claims from our perspective here and then get into more of the insurance protections that are available for in-house counsel. When I talk about claims, I do talk about what we see in the broader spectrum, both claims that we see out in the public, what we see in the submissions that come into our office for insurance, as well as what we see in our own employee lawyers book.

Pam identified very well the subject matters that are more regularly alleged in the claims that we're seeing here. And we see these types of claims as implicating severity more than frequency. So, they're likely to pay out higher and not be as commonly alleged. We also assume that claims are going to be more frequent. What we're seeing is claims are a little more frequent for public - for rise in the public companies than in private companies and also slightly more frequent of non-profit associations, with private entities, too.

We also see claims arising more often in the form of a lawsuit as opposed to a demand letter or an administrative proceeding. And occasionally, we are seeing grievances in class actions. Usually or more often than not, a claim will involve more than one policy. We'll see it under the employed lawyers, but there will also be claims alleged against the company or against the directors and officers. So, often we are working in conjunction with the D&O carrier to handle the claims here. Occasionally, we'll see a general liability policy implicated or other types of insurance policies that the entities might buy. But we are seeing a growing number of claims that are only alleged against the employed lawyers here.

So, that's kind of what we're seeing in our book right now and in the world generally. I'm going to move on to the projections available under the policies here. I'm going to start a little bit with D&O because the first question I tend to get asked, as a product manager, is why aren't I covered under the company's D&O policy. The directors and officers policy is intended to cover the officers and directors of the entity for breaches of their duty.

When I talk to employed lawyers about whether they might be covered under the D&O policy, I have them look at three areas of the policy. The first area is who is an insured? Policies will differ in terms of the scope of the coverage afforded and not afforded to employed lawyers. I'm speaking very generally here. You're looking at the definition of insured in a policy. In some policies, the general counsel will be identified outright. In some policies, there will be additional coverage for all employees as insured for SEC claims. Other policies won't identify a person from the legal department at all. So, the question arises, in these policies, officers are clearly covered in a directors and officers policy, but are non-officer attorneys covered? What about the legal department staff who might be implicated in a claim. So, who is insured is the first hurdle that you have to get across to see if you were covered under a D&O policy.

The second area I ask people to review in their D&O policies are what types of claims are intended to be covered? What types of (inaudible) are intended to be covered? Would your bar proceedings be covered? Will your informal investigations be covered under there? And the third area of D&O policies are the exclusions. Often times a D&O policy will include a professional services exclusion or, more specifically, a legal services exclusion. We see this more often in D&O policies that are reinforced (ph) service company because it is expected that a service company will have a separate E&O policy for the services provided to outside people. But the attorneys may not be covered under the D&O or the E&O policy there.

Other exclusions on D&O policies are an insured versus insured exclusion or what I call the internal claims exclusion. An employed lawyers policy will afford more coverage for claims that might arise within the company itself, (inaudible) policy will. Sometimes employed lawyers coverage is granted by endorsement to a D&O policy. Several years ago, when the D&O market was soft, we used to see this a little more often. But as the D&O market hardens and we saw corporate scandals, the D&O policy coverage has tended to narrow and the pricing was rising. So, the employed lawyers coverage was often jockeyed as an extension to the D&O policy. Occasionally, we see it from time to time. It's ordinarily a question that we hear or a request that we hear of watches (ph) from agents than from the attorneys themselves or the directors because each group has to watch their own policy for protection and not just share the limits with other parties.

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So, what about employed lawyers coverage? Employed lawyers policies are errors and omissions policies designed to cover in-house counsel of legal malpractice exposures. It's structured similarly to a D&O policy in that it has two interim agreements, side A coverage, for claims that are not indemnified by the employer and side B coverage for claims that are indemnified by the employer. Side A coverage generally has no deductible and side B coverage would require that the company first pay the (inaudible) local for the policy would come into play.

Employed lawyers policies are intended to overlap a little bit with D&O policies. We do assume that there may be some coverage available to employed lawyers under D&O. So, ELP is written specifically in excess of D&O and designed to fill in the gap that the D&O or related policies wouldn't cover. So, your professional services are covered under the ELP. It's a standalone policy where the terms and conditions are really designed and tailored to the in-house legal department experience. The structure I mentioned is more like a D&O policy, but the actual coverage reads like an errors and omissions policy, more similar to what a law firm might buy for lawyers professional liability.

The - we're seeing more often attorneys making insurance and being involved in the insurance purchasing decision in corporations and making - often making insurance a condition of their employment as they're moving from private practice to in-house or changing legal departments from one in-house position to another. So, it's a coverage that is growing and it's been a focus, in particular, since Sarbanes-Oxley. We're seeing a great deal more interest in it.

The coverage is designed to cover mainly claims by third parties. So, as Pam mentioned, anytime your legal services, provided to your company or for your company, affects third party. The third party may rely on your legal services. That is the main focus of what an ELP policy is designed to cover. There's also some coverage in the ELP policy for any internal claims - claims by the company and to be defended under the policy where the claims side the company would be excluded under a D&O. Also, claims by people from the company - employees and directors and officers. Some of those claims are covered in full under the policy. For example, if you are assigned to represent an individual in the company and that individual brings the claim - subsequently brings the claim from our practice - those types of claims tend to be covered in full. Other claims by employees or directors and officers might be defended under the policy.

Okay. So, ELP is intended to be broader than D&O coverage. It does cover the attorneys who would not be directors or officers of the corporation or your organization. It also covers additional legal department staff such as paralegals. You may have legal assistance covered under the policy, notary public, whatever the needs are for the legal department. An employed lawyers policy will also pick up pro bono legal service provided by you, more outside the scope of your employment. If you were covered under a D&O policy, it would be in your capacity. And some of the pro bono services you might be performing would be outside your capacity as an employee of the company.

Moonlighting coverage, if you're providing legal services to parties outside of your company, moonlighting coverage would also be provided pursuant (ph) in ELP policy. It may require some underwriting because the scope of your services outside might be different from what you're doing for the company. You can expect to, perhaps, provide a little additional information if you're applying for coverage there.

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**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Laurie ...

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**Laurie Sablak** - *Chubb Specialty - Product Manager*

Yes?

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**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

... why don't you explain a little bit when you say it requires some more underwriting.

**Laurie Sablak** - *Chubb Specialty - Product Manager*

Oh, sure. Companies - we tend to ask questions about the scope of the moonlighting services provided to outside parties, but not a ton it's taking. And what's the subject matter, what's the subject matter, who the clients are. If they're paid services, is it significant income? Those kinds of questions. So, we can be sure if we're tailoring the coverage to the attorneys' needs, that we're clear exactly on what we're covering. Does that answer your question?

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Yes.

**Laurie Sablak** - *Chubb Specialty - Product Manager*

Okay. Also, a D&O policy - it's unclear whether a D&O policy might provide coverage for bar proceedings. If you're being disciplined, if there's a disbarment action. Those types of claims are covered in an ELP policy designed for the lawyers. I mentioned the internal claims covered and also, of course, the terms and conditions are designed to cover the legal services and professional services that might be excluded under a D&O policy.

There's some business reasons. I think, too, the ELP is often a choice for in-house legal departments. It is a separate limit for the attorneys. It's less expensive than D&O coverage. Pam mentioned the costs involved in D&O coverage. So, in terms of having a separate limit, there's no delusion of the D&O limit when an employed lawyers policy is purchased. The terms and conditions, of course, are written for the in-house experience. So, it's really clear what's covered, what's excluded. If the policy needed to be modified to fit a department, specific areas of law, the practice or the business that the attorney is providing services for - the business looks a little different than what might need to be covered under a D&O policy. Policy can be further tailored to be customized for the employed lawyers in their experience.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Laurie, I just - I hate to interrupt again, but I think - can you please explain how the bar proceedings limits are different than the limits of liabilities for coverage? Do you know what I'm saying. Do you get what - let me ask it this way. Is there a separate limit for bar proceedings and for defense costs for costs for counsel for bar proceedings?

**Laurie Sablak** - *Chubb Specialty - Product Manager*

No, it would just be defense costs as opposed to defense and indemnity.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

So, there's no - so, there's no limit on the amount - different limit for the amount of defense costs.

**Laurie Sablak** - *Chubb Specialty - Product Manager*

In a separate limit - defense would be included in the overall limit.



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**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Okay.

**Laurie Sablak** - *Chubb Specialty - Product Manager*

But there's no separate limit for that. I think, sometimes with the other types of policies there may be a separate limit for that.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Okay. Which is a better feature for in-house - lawyers and most outside lawyers would get?

**Laurie Sablak** - *Chubb Specialty - Product Manager*

Right. Right. Outside lawyers, if their policy is limited, if it's like a five limit or a sub-limit.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Correct.

**Laurie Sablak** - *Chubb Specialty - Product Manager*

Then in-house (inaudible) in it would have an advantage. Okay. I was mentioning the terms and conditions tailored to the practice. I think also, in terms of claims handling, you will find that a carrier that seems to be handling employed lawyers claims under lawyers policy is going to be more well versed in the types of claims and the needs pursuant to those claims then, if a claim arises under D&O. I mean, the claims handling will just be different under that.

So, really, when we talk about employed lawyers coverage versus D&O coverage, some of the areas that we would say you should look at, first, is actual legal departments insurance needs. Who needs to be covered - the general counsel, you have other attorneys and staff, other people in the legal department that may need some coverage, too. What types of legal services are you performing? For whom? Are you working - are you performing legal services just for one entity? Are you performing legal services that may involve work with affiliates, work with non-wholly owned subsidiaries.

Pam mentioned the franchiser example. Oftentimes, the franchiser - the attorney for the franchiser is the only attorney involved in that situation. So, all parties are relying on the attorney's work product. Do you have any pro bono or moonlighting coverage that might not be addressed by a different type of policy. Become involved in the insurance purchasing decisions. Work with your board or your risk managers and your company to be sure that you are covered from all areas. Not just in the legal department, but the coverages blend well together.

Work with a qualified agent or broker who understands the dynamics of your company and legal department and can find you a good insurance fit. Consult with outside counsel to make sure that the terms and conditions of your policies are appropriate for what you need. When you're applying for insurance, communicate well on the application. If you need to explain an answer to a question - and obviously, the applications are designed for everybody, but you all work for different businesses that has different needs.

So, if you need to explain a question or add to it, please do so. If you have specific needs or questions, let the underwriters know so that they can be addressed in your policy. Again, ask your underwriter questions because we want you to be comfortable

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with the programs of insurance that you're buying. We also want you to understand the way that the contracts work. One question that comes up quite often is claims handling. What kinds of claims need to be reported under your various policies? How do you report them to the carrier? What types of communication are expected between the client and the carrier. How is events counsel selected? That's often a question.

If you could by D&O and employed lawyers coverage from the same carriers, different carriers, how will those carriers - if different carriers, how will those carriers work together on claims. So, really, those are the types of questions that we looked to (inaudible) with employed lawyers for determining what their insurance needs might be.

And that's what I had. I know Dennis had a few comments. And if anyone has further questions.

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**Dennis Stryker** - Rick Engineering Company - General Counsel

Okay. I - for those of you who are listening in, keep in mind that you can e-mail question to me. The e-mail address again is dstryker@rickengineering.com. And I'm going to add a few comments, based upon a couple of things that, in the past - both recent past and long-term past - I've participated in. First, so that all the participants understand, I and my department have been covered by an employed lawyers policy for a significant number of years.

And that was, in part, because of my coming out of private practice and wanting to have coverage in-house in some form. And interestingly, my, if you do the Andy Warhol 15-minutes of fame kind of thing, I've had, back in 1991, never have - I've been more glad that we had coverage around then, in that year. In that year, I provided guidance to the parent corporation here with regard to the termination of a senior executive who was also a member of the directors and also happened to be one of the shareholders in the corporation. In 1991, we were finishing up a recessionary problem and engineering firm issues with regard to - layoffs were running high. And when we made some terminations, we terminated several senior executives. One, in particular, filed a wrongful termination claim against the corporation.

And we thought we had resolved the issue when, low and behold, the settlement fell apart and as I and outside counsel were leaving the judge's chambers having told the judge that the case had to be back on the trial track and suddenly had fallen apart with plaintiff's counsel, the plaintiff's counsel turned to me and to outside counsel and said, by the way, you're going to receive a letter later this afternoon. I'm going to tell you that I'm going to seek an amendment to our complaint and file a complaint against the in-house counsel for providing bad advice to the organization for terminating my client.

And although the claim - the case was never - the claim, rather - the compliant, rather, was never amended to actually include me as a defendant, in the action, the claim had been made and we had to put on notice our ELP carrier and others to deal with the issue. And we eventually resolved the matter similar to the settlement that had fallen apart. But surprisingly, as far back as that, those issues do come up. And it's interesting to find out, when you're on the other side of that claim, what you're going to do. And my big thing is how do you finance or how do you deal with the defense costs associated with those?

A number of us looked to our bylaws and the articles for - to provide indemnification with regard to that. I will caution you that, currently, I just - as a member of the Association of Corporate Counsels Advocacy Committee, reviewed our amicus briefs that we just filed with the Tenth Circuit. And it is called The United States versus Lake and Wittick (ph). In that case, Mr. Lake and Mr. Wittick are both officers and directors of a corporation and they were recently denied by the federal district court, indemnification payments from the corporation. This has been an on again, off again claim by the U.S. attorneys prosecuting that claim. It had been brought up at the initial stages and the trial court denied the U.S. attorney's request that the indemnification payments be withheld.

The trial went forward. There was a deadlocked jury. The U.S. attorneys refiled and came back with the case again. And just prior to that, reintroduced the concept of blocking the payments for criminal defense under the indemnification provisions of the bylaws, even though both the State of Kansas and its corporation code approves and allows for those and had been previously

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allowed during the trial that went around. That case is currently on appeal in an emergency appeal to the Tenth Circuit. But those of us who are officers also in corporations, we have to deal with the fact that we may not be able to rely upon indemnifications, especially in the current circumstances that we're practicing under, as the U.S. attorneys and the Department of Justice are trying to find ways to find officers or directors who are going to be responsible for what they believe to be wrongdoings by corporations.

When we get to the issue of company versus employee claims, Laurie, Pam, what types of claims come up and how are those addressed by the policy?

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**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Well, they come up several different ways. I mean, they can come up because of legal advice actually given to the company that falls apart. I mean, like any other client scenario, they can come up with, as an outside director, while the - outside. And sometimes the shareholder files a derivative case on behalf of the company. There's also iterations - I'll leave it - I'll turn it over to Laurie to talk about the coverage issue.

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**Laurie Sablak** - *Chubb Specialty - Product Manager*

Misrepresentations or misinterpretations of the laws. Changes in the laws occur. Sometimes you're going to wage an hour contact or HIPAA or something. So, if the attorney (inaudible) has given negligent advice to the company. We've seen those types of claims arise. On the policy, the policy defends claims by the company against the employed lawyers up to a supplement. The rationale for defense coverage only is that, really, any claim against the company, the company could turn around and say, well, it was the lawyer's fault. And thereby, the company could just try any D&O exposure by just saying, oh, it was the lawyer's fault. And those claims are allowed to be covered in full under the employed lawyers policy. The employed lawyers policy would end up being more like a D&O policy and we don't charge for that.

Really, the big outside claim is designed to be covered under D&O. But the policy will defend those internal claims. We understand that they do happen. I think more often, when the company has an issue with the attorney's legal services, there's different results. Perhaps termination of the attorney's employment - but when those claims happen, there is defense coverage provided under the policies.

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**Dennis Stryker** - *Rick Engineering Company - General Counsel*

We have a question that came in. The question is from an individual who is the only attorney at a company with approximately \$400 million in revenues in 2004 and approximately 1,200 employees. It's a two-part question. The first part is how much does it cost per year for this type of insurance. Even a rough estimate would be helpful. And the second half of that is if we can't answer that question, specifically, then what are the metrics or how is it underrated? Is based on size of companies, is it based on revenues, employees, what are the factors that are used in underwriting?

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**Laurie Sablak** - *Chubb Specialty - Product Manager*

In one of the lawyers professional liability, certainly the size of the legal department is one of the things that we look at. There are three main areas - the size of the legal department, the scope of the legal services provided and also the industry of the company because there are different business exposures and, of course, legal exposures based on different types of companies - public versus private, certainly comes into play. So, the cost - other factors go into the underwriting as well, but those are the three big ones that go into the cost.

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It isn't appropriate for me to give a premium based on the information in the webcast. Certainly, if the caller wants to work through a broker with one of our local offices, I think that would work a lot better here. Does that ...

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**Dennis Stryker** - Rick Engineering Company - General Counsel

Yes, I think that - I will just add that - although I don't know that it's appropriate for me to disclose how much work injury company pays for my coverage, I'm willing to discuss at least what we fill out when we've had to complete the applications. As Laurie pointed out, the size of our company and the size of our department is important. What we do internally is important. We have to disclose the types of legal services we're providing. We have to disclose the types of legal services that we might providing with regards to moonlighting or the pro bono services that we undertake.

Interestingly, it's relatively easy to go to the insurance broker for the corporation and have that broker grab an application, whether it's the tread (ph) application or from AIG or any of the others that are out there providing this coverage and complete one application and have that broker actually shop that application to number of the carriers and get indications of what the premium would be. And then you can start to look at whether it does or doesn't make sense for the departments, the corporation and what you're doing and also get an idea of where the market is. The market, at least in our experience, has been relatively stable over the past, actually, probably six or seven years, regardless of how things have been slowly getting tighter in the marketplace overall with regard to insurance.

It still remains, in our view, very cost effective, especially when I compare it to the fact that we have Arizona Missions policy, our malpractice policy, if you will, for our engineers and architects (inaudible) which is equipped enormously despite almost everything else we pay. So ...

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

It's all by comparison.

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**Dennis Stryker** - Rick Engineering Company - General Counsel

Correct.

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Well, and also there's a - and also to the person who asked the question, there is a very big range, depending on what the coverages are, which is another reason not to - I mean, the range can be - you can also do a lot of tailoring of the coverage and if it's a cost - the idea is cost sensitivity. The limits affect that and the deductible affects that also. I mean, is that fair, Laurie? I mean, you didn't really say that, but that's also what everybody looks at when they go in to try to get coverage.

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**Laurie Sablak** - Chubb Specialty - Product Manager

Definitely. I mean, if we know an insured is on a budget, we can sometimes use limits management or develop - use a higher deductible to defray the cost of the coverage.

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

And also, the underwriting takes into account whether you've been - well, at least I've not seen the Chubb application, but at least some policies - half of the applications take into account the number of years of experience in private practice, outside

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counsel, what you've done as a lawyer before you became an in-house counsel and sort of your awareness of risk management and risk management factors. So, it's also the individual that's applying for insurance as well as the legal department itself.

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**Laurie Sablak** - Chubb Specialty - Product Manager

Definitely. Those are among the finer points that we look at in the application. I mean, the three that I gave were the broad factors.

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Right.

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**Laurie Sablak** - Chubb Specialty - Product Manager

And we also look at the experience of the attorney and the risk management procedures that may be in place.

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**Dennis Stryker** - Rick Engineering Company - General Counsel

Okay. I don't have any other questions from outside right now. What types of claims, Pam, have you actually - or Laurie - have you actually dealt with or seen, other than the human resource-type claim that I just described that happened to Rick Engineering Company a number of years ago?

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Transactional ones are the biggest ones with the - and conflict of interest are the ones that are the greatest in severity, both for inside (ph). In that, I include deals that fall apart, companies that go under, restructurings that fail, anytime an in-house lawyers takes a significant position that affects the company's balance sheet. Those are the cases that have brought up the total dollars paid as this line of insurance matures. The smaller ones are generally employment issues that Laurie already mentioned.

But the ones that involve Sarbanes-Oxley, involve structuring of a company, involve tax advice, involve a transaction failed, franchisee, franchise or transaction, if it's big dollars. A lot of these claims aren't brought unless there's a bad act because that's what really brings in the jury verdict. And the bad act is generally somebody lies, somebody steals, somebody has a conflict and doesn't disclose it. Somebody looks like they're lying kind of thing. Those are the sort of - the plaintiff's bar that does this were - loves those kind of cases because they have such a bigger opportunity to ring a bell.

And Laurie is that - have I covered it?

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**Laurie Sablak** - Chubb Specialty - Product Manager

Yes, the only thing that I would add is that the conflict, in particular, the one area where we may tend to see claims solely against the employed lawyer and not ...

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Right.

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**Laurie Sablak** - *Chubb Specialty - Product Manager*

... necessarily involving claims against the company or against the directors and officers.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Right. And the advice of outside counsel used to be a complete defense. And now it's really not because the claims - more recent claims have differentiated between the kind of advice given by the in-house lawyer and what the outside lawyer was tasked to do. A lot of these have to do with economic constraints that the company is under, that they use in-house counsel for most things and outside counsel sparingly because of cost factors. And so, the reliance on outside counsel advice has been eclipsed pretty much because they say, well, that wasn't really what they hired the outside lawyers to do. Or they didn't disclose this to the outside lawyers, so that - the reliance on that advice of outside counsel was in error because their in-house lawyer was negligent in the way he handled it or she handled it.

**Dennis Stryker** - *Rick Engineering Company - General Counsel*

And Laurie or Pam, how about the claims of the guide to intellectual property. I know, Pam, you talked briefly with regard to issues concerning trademarks. But on the patent side, we see issues frequently coming up because we're an engineering firm. And a problem will be presented and solutions will be created and then the question always is, as you're looking around, have we stepped on someone's toes with regard to our solution? We may unwittingly have come up with an idea, but, especially in the arena of environmental cleanup and that area. All these - lots of people are running around with lots of patents on lots of strange and crazy things. And engineers think that they're just out there doing stuff.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

Well, and I did nothing but IP litigation before I started representing Vorys and that's exactly what happens is that somebody thinks they have a new idea and a patent application gets filed and all this money gets spent on drawings or whatever and it turns out that the patent application only gets one claim allowed. And then, somebody leaves the company and wants to get the rights and then you end up with a legal malpractice case against the outside lawyers and the inside lawyers for the advice they gave on the patent policy or the advice they gave on the patent prosecution or whatever.

I think that part of that has gotten bigger as technology has - as there's become more and more patents solved (ph) for certain areas of technology. Certainly, in environmental engineering, the number of patents in 1970 was probably two and how it's probably a thousand. And as the technology gets closer and closer and the values of patents gets less and less because there's really not that much to - not that much new under the sun, you end up having really big fights over the patents that are valuable for the current technology. And I've only seen two claims that revolve around patent prosecutions. I've seen a couple claims involving licensing deals. I've seen one claim involving litigation advice in the IP area.

So, I mean, pretty much at any place that you can go and be sued as an outside IP firm, if you're given IP advice, it's probably just about the same as in-house counsel. I don't think it's that different.

**Laurie Sablak** - *Chubb Specialty - Product Manager*

From an earnings perspective, IP is in the area that we do look at with a little more scrutiny, in terms of practice areas. Given what we've seen occurring with (inaudible) professional liability with outside law firms and IP exposures, we feel it does warrant a little additional scrutiny on the employed lawyers. And when we do see high - very high percentage of that type of patent work in particular, it may mean a conference call for certain types of accounts and that we can kind of flush out what's being done in-house, what's being outsourced.

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**Dennis Stryker** - Rick Engineering Company - General Counsel

Okay. There's a question that came to me. The question is the person assumed the policy is typically made, like directors and officers insurance or is it occurrence based. If it is claims made, is post-employment tail coverage available? Pam, first. Claims made.

**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

I think it is. They're all claims made as far as I know. Laurie, I don't know about the tail coverage, so you'll have to answer that.

**Laurie Sablak** - Chubb Specialty - Product Manager

Yes, it's generally claims made - claims made and recorded, so ...

**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Right.

**Laurie Sablak** - Chubb Specialty - Product Manager

So, it's the same as opposed to a current, it's the same, but the recording would be a little different on - depending on who the carrier is.

**Dennis Stryker** - Rick Engineering Company - General Counsel

Okay. And what about the concept of post-employment tail coverage?

**Laurie Sablak** - Chubb Specialty - Product Manager

It's - if the coverage is written in the name of the company, the - assuming that the company carries the coverage going forward, if individual attorneys depart and the company they have worked on it is still covered under the policy. Is the attorney who is departing is the only attorney there, that would still be the case.

But we've had some instances where attorneys have left companies with only in-house counsel and the company has decided not to retire. Then that presents a different situation. And it might be that the attorney pays for the tail, but the tail would still be written in the name of the company.

**Dennis Stryker** - Rick Engineering Company - General Counsel

But tail coverage is available.

**Laurie Sablak** - Chubb Specialty - Product Manager

For the account. Not necessarily for each individual. But the coverage still may be under an ongoing policy.

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**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

The only - this is true also of outside law firms that sometimes if you leave a company and the company does not have - cuts off the coverage for the one person who's leaving, you have - some companies do not offer you the option of finding tail coverage as an individual. I don't know what Chubb's policy is, but sometimes - because the account is in the name of the company. And it covers former employees, but sometimes there's issues about prior acts coverage and that sort of thing. And it's probably best to inquire on an individual basis.

**Dennis Stryker** - *Rick Engineering Company - General Counsel*

Okay. Are there some closing comments both of you want to make? And then, I have one other question that's come up.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

The only things I want - I would add is just one other thing I thought of about IP. IP - in-house lawyers that manage litigation and manage affidavits from in-house people and do what would be called traditional trial work in - or support, like a solicitor to (inaudible) support trial work - have very - have varying risk depending on whether you're getting information from former employees or information from the patent and trademark office or information from present employees.

I have seen a couple of claims arise that involve both inside and outside counsel because the employees did not give a document for full information to the in-house counsel, which then caused sanctions in the litigation and sanctions against the in-house lawyer. We didn't really talk about sanctions. It's not - there's - some policies don't cover sanctions because they don't cover fines or restitution or return of legal fees. But it is something to look out for that you're getting full documentation or the full story from people who are in charge of inventions in the company that are non-lawyers.

**Dennis Stryker** - *Rick Engineering Company - General Counsel*

Okay. The question that has been sent is - is there any guess as to what percentage of in-house lawyers have employed lawyers coverage? Laurie, do you have any idea?

**Laurie Sablak** - *Chubb Specialty - Product Manager*

We estimate that about 5% of the eligible insureds out there - companies or organizations purchase the coverage. I was just reading that the ACC estimates about 10%.

**Pam Bresnahan** - *Vorys, Sater, Seymour and Pease LLP - Partner*

That's what I would think.

**Laurie Sablak** - *Chubb Specialty - Product Manager*

And it is growing. It's definitely growing and our submission flow has increased - increases every quarter. I think it's - liability and protection against claims is an area of great concern right now in the in-house community, given the additional duties of scrutiny in various industries and by the SEC, generally, over the last couple of years. I think there are more resources out there to help in-house attorneys and corporations determine what is the best insurance fit or other fit to protect their companies. And certainly, we've provided some material - both Pam and I have provided materials, as we mentioned before, for this webcast.



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Additionally, Chubb has a number of resources available online. All of our forms and application materials are online. I would encourage anybody who has questions about the coverage to speak with an insurance broker, get one of our branch office underwriters on the phone. We can arrange conference calls with our claims professionals as well. Because you really should be comfortable with the decision.

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**Dennis Stryker** - Rick Engineering Company - General Counsel

Great. And there are - you probably talk with a broker - not to the (inaudible) Chubb, since Chubb happens to be the industry that's currently writing Rick Engineering Company's legally (inaudible) employed lawyers policy. But there are other carriers that are writing as well. And you ought to take a look through a broker as to what those policies are that are available and types of coverage and those kinds of things. It's the same as you'd be purchasing any other coverage for your entity.

I'm not certain that the 5% or 10% is accurate. I think it's somewhere around that. It's based upon the kinds of things that I hear anecdotally as I go to the ACC annual meeting or other brokers. We have another question that came in and this is a good question. How much coverage is appropriate? And how do you determine the amount of coverage that the policy should be in? Laurie?

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**Laurie Sablak** - Chubb Specialty - Product Manager

As with any product, it's hard to say. It's ordinarily a personal decision. We can certainly give information as to why departments of the same size might buy. And then taking into account that you could have a three attorney department for a smaller company versus a larger company. You can take revenues into account. You can take what types of legal - the legal services provided might have more or less potential exposure, similar to how you would think about coverage when - if you were working in a law firm.

I will tell you the ranges. I think the smallest limit that I hear about or that we see is a 500,000 limit. Chubb can write up to 15 million in limits and we do have clients that layer limits. As with directors and officers insurance or lawyers professional liability, you might buy five million from carrier and stack additional limits on top of that. So, that's where that goes. It's ...

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

And it also depends on how much you rely on outside counsel and how much work you actually do in-house rather than supervision of outside counsel services.

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**Laurie Sablak** - Chubb Specialty - Product Manager

Yes. And a broker and agent can also help ...

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**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Right.

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**Laurie Sablak** - Chubb Specialty - Product Manager

... determine what level might be appropriate.

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**Dennis Stryker** - Rick Engineering Company - General Counsel

You also might want to compare sort of a list - undertaking, as Pam described, with regard to how much supervision you're doing with outside counsel versus work that's being done in-house and what some of your outside law firms are carrying in terms of how they sort of arranged their malpractice coverage. And they maybe will give you some guidance as to how they came up with where they're at. And they may not want to disclose all the fine details and I wouldn't blame them, but they could certainly help you understand how it is they chose their limits and that would give you an idea of where you want to be with regard to what you're doing, depending upon how much is outside versus inside.

**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Well, and a lot of clients require that outside law firms disclose to them their limits of coverage.

**Dennis Stryker** - Rick Engineering Company - General Counsel

Correct.

**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

I mean, as part of doing business with clients. So, I mean, you take that into account when you're determining what your coverage is going to be as an in-house lawyer.

**Dennis Stryker** - Rick Engineering Company - General Counsel

Correct. Laurie, were there any closing comments you'd like to make?

**Laurie Sablak** - Chubb Specialty - Product Manager

Only that there are a lot of resources available to help people determine their coverage needs and that we would encourage new people to consult websites, the information out there, the information on the ACC. Talk with agents, brokers. We've even hooked up companies that are similar. Employed lawyers from one company talked to employed lawyers from another company to discuss coverage and their needs. So, certainly, we're very willing to help anybody with information, et cetera.

**Dennis Stryker** - Rick Engineering Company - General Counsel

Okay. And with that, I see no further questions having been sent to me, I will conclude the webcast by thanking both Pamela Bresnahan and Laurie Sablak, who did most of the work with regard to this program. And if you have other questions that have not been answered, feel free to use the e-mail address that I gave to you - dstryker@rickengineering.com. To the extent that I don't have the answer, I will see if Pamela or Laurie do and we'll, in the next little while, try to answer those questions. With that, I thank you, both Pamela and Laurie. And this will conclude the webcast.

**Pam Bresnahan** - Vorys, Sater, Seymour and Pease LLP - Partner

Thank you. Bye-bye.

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**Laurie Sablak** - Chubb Specialty - Product Manager

Thank you.

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