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LUG Conference 2021

Overview of Risks Facing the Casualty Market

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Amanda Catron
Technical Underwriting Officer
UK Casualty
American International Group UK
Amanda.Catron@aig.com

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Agenda

The state of the market

A review of some emerging risks;

- Climate Change
- Air Pollution
- Cyber (affirmative)
- Gig Economy

Policy coverage issues, particularly in relation to emerging risks

Legal updates impacting Liability business



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The State of the Market

Key features

- Consolidation of the market on a global scale
- M&A Marsh and JLT
- Global Carriers exiting tough business
- New markets and capacity looking to build books
- Rates continue in an upwards trend; hardest market since 2011
- Market remediation
- Focus on reinsurance wordings



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ESG

Environmental

- What commitment have you made to reducing the carbon footprint of your operations and your products in line with the Paris Agreement?
- What commitment have you made towards reducing the carbon footprint of your customers and suppliers?
- What assessments of climate transition and physical risk have you conducted on your business?

Social

- How do you ensure there are no human rights violations in your business operations?
- How do you monitor health and safety of employees, customers, contractors, suppliers and the general public?
- What is your process for community and other stakeholder engagement?

Governance

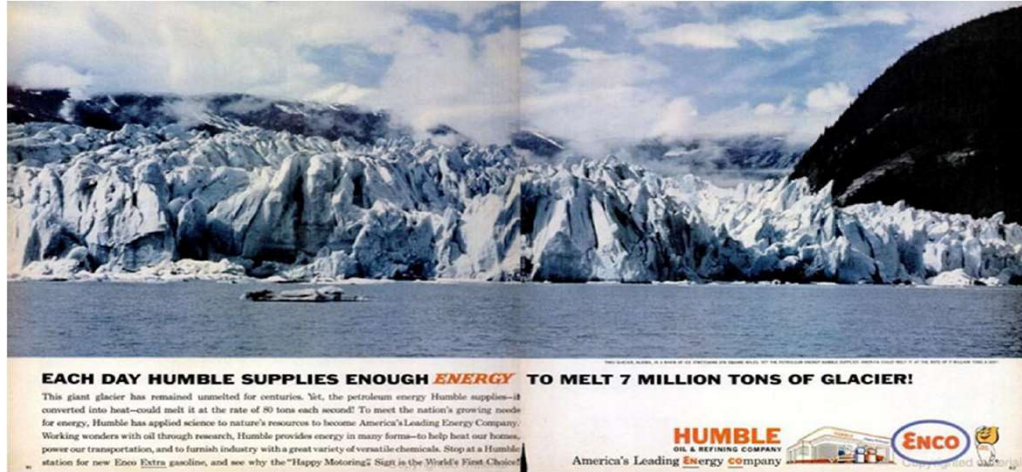
- How is your governance structure set up to ensure no corruption, bribery, or unethical work practices?
- What portion of your board are independent directors or women/minorities?
- Are board members trained on climate and other ESG related issues?



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"Code Red for Humanity"



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Catastrophic Scenes – Storms and Flooding

GERMANY, INDIA, CHINA, BELGIUM, NETHERLANDS, UK



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Wild Fires

- World has warmed by 1.2 °C since the industrial era
- Steep climb since 1975
- Temperatures will continue to rise unless governments across the world steeply cut emissions
- Spain reports 47.2 °C, highest temperature on record
- Wild fires and mass destruction: Turkey, Greece, Spain, Canada and USA/California
- Life threatening, dangerous high temperatures being recorded globally
- UN researchers publish report (Aug 2021) – strongest statement yet on the science of climate change



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Climate Risk – Impact on Insurers

More frequent occurrence of extreme natural catastrophes

2020 Insured Losses

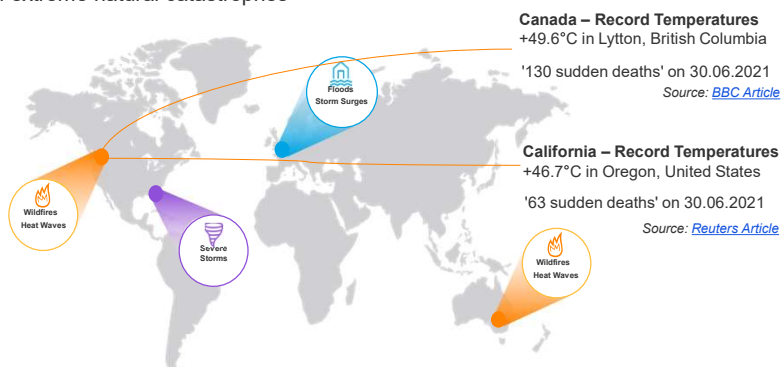
Total
USD 89 billion

10-year average: USD 79 bn

Insured Natural Catastrophes

2020
USD 81 bn

2019
USD 56 bn



Droughts / Wildfires

Increase in the duration and intensity of droughts. This will lead to increased crop damage, water scarcity and wildfires (California, Australia).



Heatwaves

Increase in the frequency and severity of heatwaves could lead to an increase in damage to infrastructure and the associated business interruption.



Tropical Cyclone / Flooding

Increase in the frequency of extreme precipitation events and associated flooding, causing damage to property and crops.



Heavy Rainfall / Flooding

Increase in the frequency of extreme precipitation events.



Windstorms

Changing patterns of atmospheric circulation, could lead to higher or lower frequencies of windstorm events in certain regions, and the potential for increased severity.



Freezing

Changing climate patterns may introduce more extreme freeze events in some localities.

Source: [Sigma Research](#), March 30, 2021

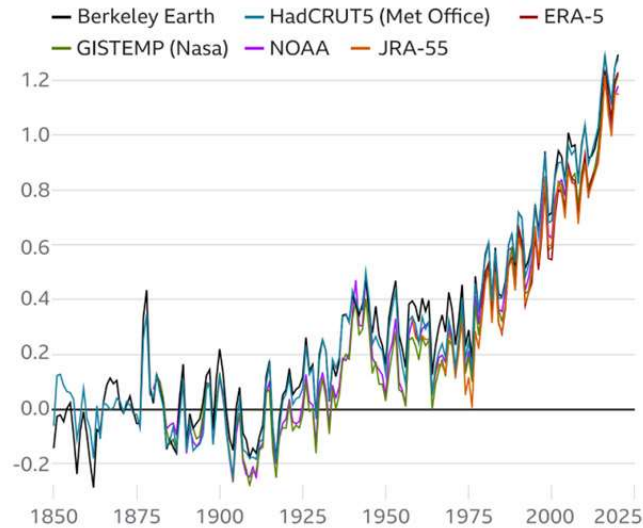
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Temperature Rise since 1850

Global mean temperature change from pre-industrial levels, °C



Source: Meteorological Office

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Climate Change – Litigation

What keeps you awake at night?

- Climate change at the head of all CEOs' agendas
- Energy and utility companies targeted with climate change litigation
- Okpabi v Royal Dutch Shell
- Luciano Lliuya v RWE AG – Peruvian farmer suing RWE Germany's largest electricity producers
- Notre Affaire a Tous and Others vs TOTAL
- Claims against states – Europe
- Norway – Environmentalists claimed against future Arctic oil and gas exploration by State
- Netherlands – Urgenda v Netherlands 2019 – Supreme Court of Netherlands – state has a duty of care to protect citizens from "dangerous climate change" (per European Convention on Human Rights).



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Air Pollution

- December 2020 – Coroner determined that air pollution made a material contribution to the death of Ella Adoo-Kissi-Debrah (died age 9)
- First person in the UK for whom air pollution listed as a cause of death
- The Coroner found the cause of Ella's death to be:
 - **1A** Acute Respiratory Failure
 - **1B** Severe Asthma
 - **1C** Air Pollution
- Ella's mother was not given information about the health risk of air pollution and its potential to exacerbate asthma. If she had been given this information she would have taken steps which might have prevented Ella's death
- Air pollution exceeds WHO recommended levels in many UK urban areas
- In 2019 Public Health England reported that air pollution was the biggest environmental threat to health in the UK, with between 28,000 and 36,000 deaths a year attributed to long-term exposure.



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Air Pollution – Impact

- Potential risk facing employers/duty holders (and their insurers) – Duty to manage the risk of air pollution
- Asthma
- COPD
- Other respiratory disease
- Delivery drivers, road workers, gardeners, construction workers, local authority workers, teachers and school children
- Employers must inform workers of the risks of high levels of air pollution
- Failure of the State to provide Ella's mother with information on the risks of air pollution



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Cyber



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Affirmative Cyber position

- PRA determines Silent Cyber is Material
- Lloyds and UK Market responds
- Affirmative Cyber – a work in progress
- LMA Cyber clauses numerous
- LMA 5469 and LMA5470



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GIG Economy

- Britain's GIG economy accounts for approx. 4.7 million workers
- Numbers rose during the lockdown
- February 2021 – Supreme Court rules Uber Drivers are 'workers' NOT self-employed
- Uber drivers recognised under union GMB May 2021
- Paves way for gig economy workers to receive benefits, pensions, holiday pay and national minimum wage

Other potential impacts

- Gig economy operator on construction sites – subcontracting hazardous activity
- Result of Supreme Court ruling these gig operators are considered workers
- Lack of disclosure to EL Insurer – fall foul of Insurance Act – believed they were Independent Contractors
- Fluid approach to employment leads to businesses having additional legal responsibilities



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Legal Updates



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Occupiers Liability and volenti non fit injuria

The White Lion Hotel v James (Deceased) (2021) EWCA Civ 31

- Appeal judgement in favour of claimant, widow of the deceased
- Deceased aged 41, fell from a second floor hotel window
- Reduction of 60% made for deceased contributory negligence
- Claim brought under S2 Occupiers Liability Act 1957
- Defendant appealed
- Was the duty breached?
 - I. Was there a danger due to the state of the premises;
 - II. Was there a breach of duty in respect of that danger to the deceased;
 - III. Was that breach of duty the cause of the deceased's fall;
 - IV. Should a finding have been made pursuant to S2(5) that the deceased was not owed the duty by reason of his voluntary acceptance of the risk created by the danger?



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Volenti non fit injuria

- Defendants appealed pursuant to S2(5) of the 1957 Act – defence of volenti non fit injuria
- A person of full age and mental capacity chose to run an obvious risk to their safety
- They had consumed some alcohol
- Pertinent – the defendant who owned and managed the hotel did not appreciate the risk prior to the accident
- It was not reasonable to make a finding that the deceased, a visitor, should possess greater knowledge than the occupier
- Appellate court – Health and Safety at Work Conviction and guilty plea should be taken into account
- The defendant's guilty plea in the criminal proceedings represented an admission that a risk assessment would have resulted in measures being taken which would have addressed the risk and thus prevented the accident
- Conclusion – deceased was 'blameworthy' – failed to take care of his own safety – 60% Cont.Neg.



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Vicarious Liability - Legal Updates

- Chell v Tarmac Cement and Lime Limited (2020) – practical joke by employee – claimant suffered perforated ear drum, NIHL and tinnitus. First instance claim dismissed – Company not vicariously liable
"horseplay, ill-discipline and malice are not matters that I would expect to be included within a risk assessment".

The actions of Mr Heath were considered to be "unconnected to any instruction given to him in connection with his work" and he was acting "on a frolic of his own".

Two stage test for determining vicarious liability;

An employer-employee relationship between that party and the tortfeasor.

A sufficiently close connection between that employment and the tort committed.

- High Court Appeal – Mr Justice Spencer

Judgement – the first instance decision was upheld - **Tarmac Cement and Lime Limited not vicariously liable**



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Modern day slavery and non-disclosure

- Komives v Hick Lane Bedding Limited & Anor (2020)
- Modern day slavery and non-disclosure
- Claimants trafficked and suffer severe psychiatric illness and one, severe, injury
- Insurer not unreasonably (in common law) avoids the Employers' Liability policy
- Risk is uninsurable – Criminal activity and working practices
- Claimants action against Company and Insurer (Company liquidated in 2015)
- Court sympathetic to those injured but Insurer contractually entitled to avoid the policy and that it did not act unreasonably in doing so
- Judge – Master Davison

"I reach this conclusion with regret because the statutory scheme which has permitted that result is defective and unfair".



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In Summary

Key to the next 12 months

- Climate Change – Progression to net zero
- Environmental Social Governance ESG
- Affirmative Cyber
- Evolution of the Gig Economy
- Game-changing and thought-provoking verdicts



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