

HOSPITALITYLAWYER.COM PRESENTS

**2013** THE **HOSPITALITY LAW**  
**CONFERENCE**  
FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 11-13, 2013 • HOUSTON, TEXAS

**“Crime Pays”  
A Conversation of Fraud  
and Recovery**

*Hospitality Law Conference*

February 11, 2013



- **CAMERON SHIRLEY**
- Director of Claims Management, Starwood Hotels & Resorts Worldwide, Inc.
- Responsible for development and management of Starwood's comprehensive global claims management programs
- Over 23 years of claims management experience



- **ROBERT GLASSER**
- Partner at Dempsey Partners, LLC leads East Coast PD and BI practice
- Prepares and substantiates BI, PD and fidelity claims worldwide
- CPA, CFE, CIRA, CFF over 30 years of diverse experience



- **CHRIS GIOVINO**
- Partner in Charge of Forensics with Dempsey Partners, LLC
- Past 6 years oversees all crime and fidelity investigations and claims
- Formerly 28 years US criminal investigator



- **DAVID P. BENDER**
- Shareholder and co-chair Anderson Kill's Hospitality Practice Group
- Leads the firm's policy enforcement practice
- Co-founded Wood&Bender
- Longtime advocate for policyholder's rights

# MARKET OVERVIEW

- Study conducted by the Association of Certified Fraud Examiners
- \$3.5 Trillion in losses based on estimated '11 Gross World Product
- ACFE's estimate that occupational fraud amounts to 5% of gross revenues
- Median loss caused by occupational fraud was \$140,000
- 20% involved losses of at least \$1 million
- Typical fraud lasted two years
- Detection typically by tip 43% and 51% from "Hotlines"
- Anti-fraud controls significantly reduced loss exposure
  - Hotlines, surprise audits, anti-fraud training

# WHO ARE THE PERPETRATORS?

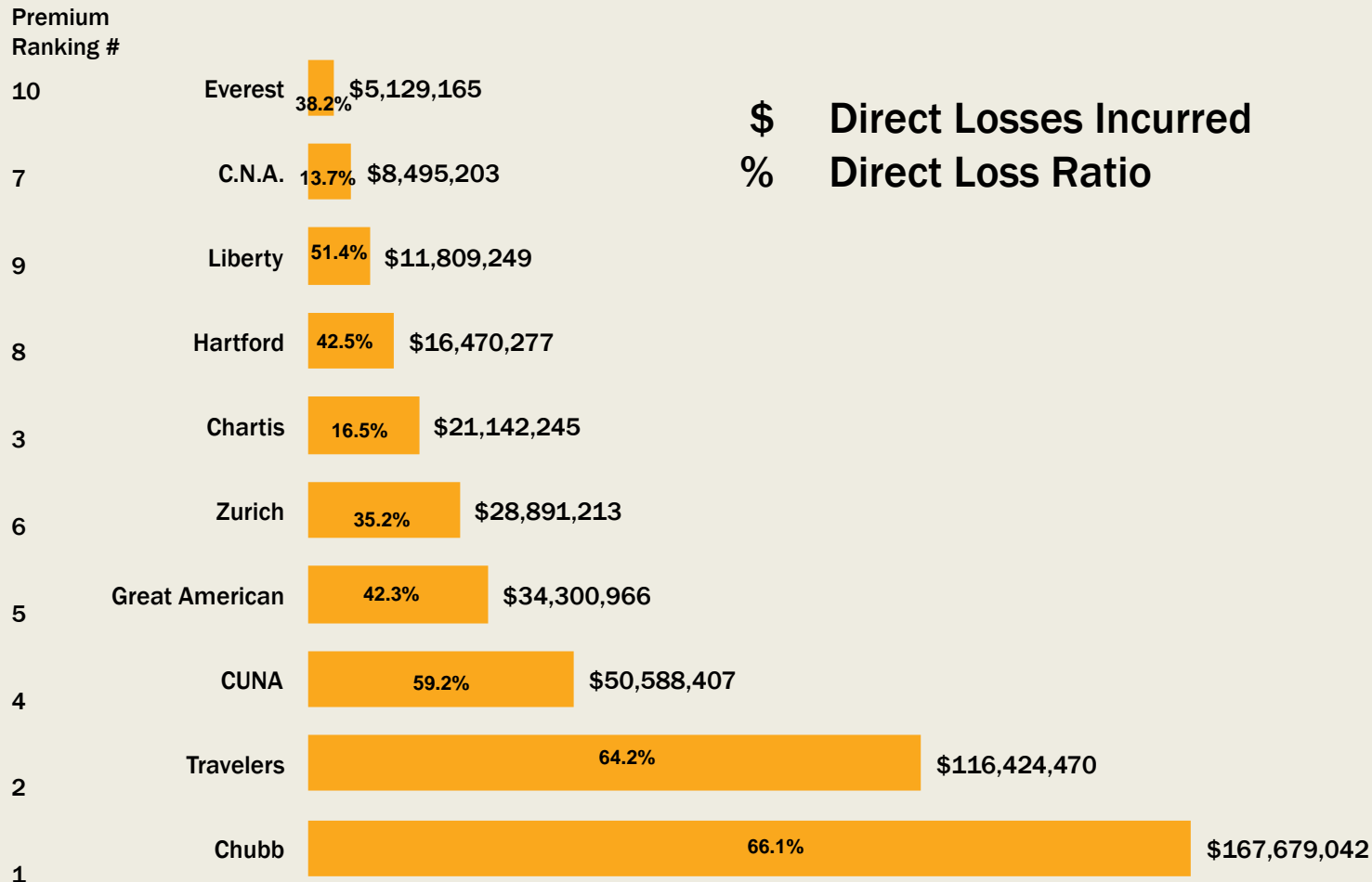
- Of the reported domestic cases
- 46% committed by employees (\$60k)
- 37% committed by managers (\$180k)
- 17% committed by owners/executives (\$485k)
- 65% men; 35% women (Canada is the only country with more women; Men-48/Women-51)
- Size of loss correlates with annual income level, tenure, age, education, level of collusion
- 87% were first-time offenders
- 36% judged as “living beyond their means”
- 27% experiencing financial difficulties

# THE INSURANCE MARKETPLACE

- **\$1.128b net written premium**
- **54.2% loss ratio**
- **57.8% loss + DCCE ratio**
- **Top three carriers write 49.42% of total premium**
- **Top ten carriers write 85.01% of total premium**
- **Historically:**
  - **Low premiums**
  - **Low deductibles**
  - **Limited Coverage**
  - **Profitable business**

Note: DCCE Ratio = Refers to defense and cost containment expense incurred. DCCE covers most but not all of the expenses ascribed to loss adjustment expenses

# CRIME INSURANCE 2011 DIRECT LOSS RATIO

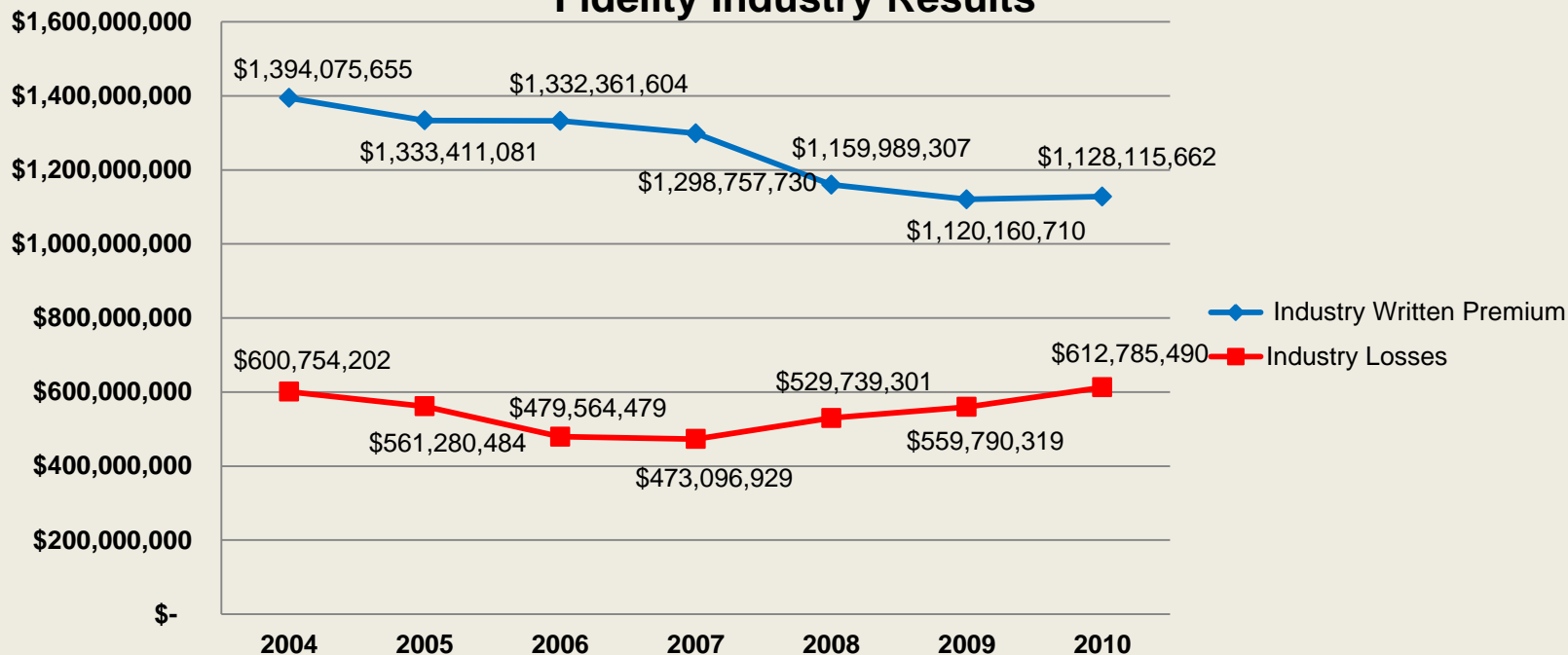


# CRIME INSURANCE MARKET OVERVIEW

Actual Fidelity results for the period 2004 through 2010 show relatively stable premium levels and consistent loss results as reported by the Surety Association of America. Written premium in 2004 was \$1.394 Billion and this premium declined to \$1.128 for the year 2010 due to the competitive rate environment.

Claims have increased and from the period 2007 to 2010, you will note an uptick in claims from \$473MM or an average industry loss ratio of 36.3% to \$612MM in 2010 or an average industry loss ratio of 54.2%. The 2010 results are, however, consistent with losses paid in 2004, and premiums continued to decline from that time, although not drastically.

### Fidelity Industry Results





# RISK FACTORS

- Incentive or pressure to perpetrate a fraud
  - Business (making the “number”)
  - Personal (usually financially motivated)
- Opportunity to carry out a fraud
  - Access to assets
  - Inadequate or nonexistent controls
  - Authority to dissuade detection
- Attitude and ability to rationalize fraudulent action
  - Management culture
  - Financial aggressiveness

# THE PLAYERS

- **The Risk Manager's Team**
  - In-house and outside counsel
  - Security and internal audit teams
  - Investigative specialist and forensic accountant
  - Broker claims advocate
  - Business representatives
- **The Insurer's Team**
  - In-house adjuster (usually an attorney)
  - External counsel (acts as adjuster and potentially litigation counsel)
  - Forensic accountant (usually represents only insurers)

# WHAT TO DO WHEN SUSPICIONS ARISE

- Locate and read the policy
- Conduct pre-notice investigation
- Give notice to crime and property carriers
  - Note time to file Proof of Loss
  - Note time to file suit against carrier
- Conduct thorough internal investigation
- Deal with employee issues
- Consider civil litigation
- Consider criminal prosecution

# THE ADJUSTMENT PROCESS

## ■ The Path Forward

- Preliminary Investigation
- Notice of potential claim
- Establish facts (liability) and quantum (damages)
- File sworn Proof of Loss
- Insurer investigation and audit
- Reconciliation of issues and differences
- Negotiation and settlement
- Potential subrogation

# THE INTERNAL INVESTIGATION

## ■ Leadership Roles

- Risk Manager oversees process and communicates with brokers and carriers
- In-house counsel manages internal audit, investigation, litigation, law enforcement activities, and controls costs
- Investigator and forensic accountant conduct investigation under external counsel (privilege) umbrella, working with in-house resources like internal audit

# MANAGING LAW ENFORCEMENT

- **Advantages of Close Cooperation**
  - They may conduct your investigation
  - \$ savings
  - The power of immunity
  - Restitution may be obtained
- **Potential Disadvantages**
  - Lose control
  - Witnesses clam up
  - Unfavorable publicity

# WHO ARE WE GONNA CALL?

- Andy of Mayberry
- CSI
- Navy Seals
- Steve McGarrett and Hawaii Five O
- That cool US Marshall guy from “Justified”
- Gibbs from NCIS

# MANAGING CIVIL LITIGATION

- **Discovery can be a valuable tool to establish existence and amount of loss**
  - Vendor business records
  - Employee bank accounts
  - Shell company documents
- **Typically, civil litigation follows the investigation in the form of a subrogation action by the carrier**
  - If litigation is inevitable, sooner may be better



# THE SWORN PROOF OF LOSS

- **Policy requirement**
  - Note time to file Proof and suit against carrier
  - Tolling is usually not a problem
- **When is “enough” evidence enough?**
  - Recognize that the insurer will incur considerable expense to validate and develop facts
  - Proof must be objective, credible, and persuasive
  - However, a comprehensive recitation of all facts is not required
  - Applicable standard of proof is “preponderance”

# DAMAGES QUANTIFICATION AND PROOF

- Calculate -- do not estimate
  - Insurers have no incentive to pay “estimates”
  - Find creative ways to quantify damages
    - Use historical trends
    - Identify statistical anomalies
    - Prepare to defend any assumptions

# EXPECT PUSHBACK

- **Typical Conditions Defenses**
  - Failure to give prompt notice of loss
  - Prejudice subrogation rights
  - Failure to disclose prior acts of fraud or dishonesty
  - Involvement of officers in the fraudulent scheme
  - Failure to prove “manifest intent”
- **Typical Damages Defenses**
  - Loss not fully documented or proven
  - Claim includes indirect, consequential, or excluded losses (e.g., potential income)
  - Loss does not reflect credits for recovery