

MARKET CHANGE STILL ON HOLD

The first quarter of 2011 has flown by, and the good news is that the Willis Real Estate and Hotel Practice continues to see economic progress with more asset transactions and improvement in the metrics of most real estate sectors. The bad news is that March 11 brought one of the most powerful earthquakes and tsunamis to ever hit Northern Japan, and the 112th Congress continues to provide federal budgetary uncertainty - which could spill over to the financial markets. Therefore, progress and uncertainty remain our companions as we journey deeper into 2011.

We still see the markets as soft with hints of firming. Market changes are easier to explain after they happen, but our market outlook has yet to see an upward turn, despite recent natural disasters and the geographic anomalies revealed in RMS version 11.0. The 2011 hurricane season with higher than normal activity predicted could add a wild card to the mix depending upon severity.

Once again, we have an issue full of practical and, we trust, relevant information: articles on shopping mall security; environmental liability pertaining to mold, *Legionella* and bedbugs; changes to the Fair Labor Standards Act; real estate leases; and RMS version 11.0.

We invite you to stop by the Willis booth (#1621) located in the Vancouver Convention Center to discuss your risk management needs or to participate in several workshops we'll be conducting there. At the end of this newsletter you'll find booth hours, workshops and Willis speakers of interest to real estate and hotel owners and managers.

While many challenges lie before us, we believe that the Willis Real Estate and Hotel Practice and our Associates have the resources to successfully meet these challenges and respond to our customers' needs.

Brian Ruane & Steve Sachs
National Practice Leaders
Real Estate & Hotel Practice
Willis North America



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MARKET TRENDS UPDATE

We are now well into the second quarter of 2011. At the beginning of this year, because of what many believed was excess capital in the industry, we suggested insurance pricing would remain soft. We qualified that statement by indicating this could change as a result of a surplus depleting event or series of events.

This year we have witnessed floods in Australia, an earthquake in New Zealand and most recently the earthquake/tsunami in Japan. While these are tragic events, we do not believe that they will result in a market shift to higher pricing across the board. What we are hearing on an anecdotal basis is that accounts with a significant percentage of catastrophe exposure and/or adverse loss development are beginning to sustain price increases. In addition there is some belief that the utilization of the new RMS 11.0 Model for Catastrophe Modeling, which is beginning to be used routinely, will result in higher rates for some clients.

The upcoming hurricane season will be particularly important to market direction. While last year had an above-average number of storms, none crossed the U.S. coastline. Predictions for the coming season suggest a higher number of storms. The question will be the intensity of the storms and if and where they make landfall.

We wanted to share comments from four reputable sources that suggest our prediction about market direction is accurate. Robert Hartwig, the president of the Insurance Information Institute, stated, “the markets seem positioned for a firming in 2012 to 2015. By firming I mean a stabilization. Right now, there is not a catalyst for an across the board hard market.”¹

AM BEST “does not expect a turn in the property and casualty market in the near term.”²

FITCH RATINGS, commenting on the earthquake in Japan, stated, “the insurance and reinsurance companies should be able to absorb losses without widespread solvency problems or undue financial strain.”³

MARKET SCOUT, which tracks the direction of rates for the commercial insurance industry reported that for January “for the 3rd month in a row average rates decreased 5 percent.”⁴ We

have not seen any evidence that this rating tendency has changed materially in the subsequent months.

THE ECONOMIST, in their March 19 issue, states, “Global insurers apart from those in Japan itself, were not heavily exposed to catastrophe risk in the country... The semi-public Japan Earthquake Reinsurance Company will bear the brunt of the losses.”

It is early to predict the total amount of insured losses from the earthquake in Japan and how this may impact pricing. History may be a guide. According to Fitch, “insured losses totaled \$ 3.5 Billion from the Kobe earthquake of 1995, although economic losses were close to \$ 100 Billion.”⁵ Questions

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surrounding the insurability of losses directly related to the tsunami, the amount of earthquake insurance carried and the business interruption loss all will determine the final tally which, while substantial, will not, by itself, be a market turning event.

OWNER BEWARE! REDUCE YOUR MALL SECURITY EXPOSURES

How well are you protected, and how well are you protecting those who access your property? No matter how many ways you approach this question, the answer always rests with you and your liability exposure.

Families, tenants, kids, shoppers, parking lots, restaurants, retail stores, banks, children’s play areas and crime – any of these security exposures can lead to huge legal costs, damaged reputations, loss of confidence in the marketplace and, most significantly, serious injury or even loss of life.

The national averages for settlements and verdicts for civil litigation involving premises liability and negligence are:

Assault/Battery	\$1.4M Verdict	\$900K Settlement
Rape	\$1.5M Verdict	\$1.2M Settlement
Robbery	\$800K Verdict	\$500K Settlement
Wrongful Death	\$2.8M Verdict	\$1.4M Settlement

Source: *liabilityconsultants.com*

One of the largest negligent security lawsuits in history was awarded in Florida for \$102.7 million in which a mall owner was found solely liable.⁶ Furthermore, in November 2010, to help ensure that people remain safe in malls and stores during large holiday retail sales events, the Occupational Safety and Health Administration (OSHA) issued a strongly worded **letter** to merchants.

While there is no basic agreement or national standard on what is “enough” or even “adequate” security (because no level of protection is absolute), mall owners must, at a minimum, afford “reasonable protection” to their occupants and invited guests for risks that are foreseeable and probable.

To help you reduce mall security exposures, we offer the following five suggestions.

#1 SECURITY AUDITS

Annually assess your security risks and vulnerabilities. This process is educational and will help determine what risks to reduce and/or eliminate and what security measures and practices are needed to

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provide a level of “reasonable protection” against your most likely and foreseeable exposures. This is often one of the first questions a plaintiff’s attorney will ask, “Mr. Jones, when was the last time you reviewed the security risks that impact your mall and the patrons that visit your property?” or “Mr. Jones, what have you done to identify and address the various security risks that affect your property?” A General Security Risk Assessment (GSRA) will place you in a strong position to answer both of these questions.

All security risks cannot be prevented. Therefore, it is vital to have adequate risk coverage in place. Review and adjust your policies as needed based on your changing risk conditions and the steps you have taken to mitigate your exposures.

#2 SECURITY TECHNOLOGIES

Ensure that all of your security technology (CCTV, intrusion alarms, duress alarms, lighting, access control, etc.) is properly maintained and functioning according to system specifications. Quite often security technology is found to be functioning improperly or not at all. If a security risk event were to occur that resulted from or could be attributed to the faulty equipment, you

could find yourself with a severe liability exposure.

#3 GUARD FORCE

Review guard force hiring practices, post orders and policies, procedures and training to ensure that all are current and that your guard force is properly equipped to respond to a crisis (i.e., workplace violence, fire, evacuation, riot) both operationally and procedurally.

#4 PARTNERSHIPS

Strengthen external and internal partnerships with local law enforcement and tenants. These partnerships can yield powerful results, from uniting tenants in crime prevention and awareness efforts to enhancing the lines of communication and information sharing with local law enforcement. These cooperative efforts all come together to create a strong anti-crime environment, resulting in safer, more secure conditions for your mall community.

#5 INSURANCE

All security risks cannot be prevented. Therefore, it is vital to have adequate risk coverage in place. Review and adjust your policies as needed based on your changing risk conditions and the steps you have taken to mitigate your exposures. The last thing you want to hear is that you have been found solely liable for a \$102.7 million judgment. It can happen, as we have seen in Florida, if you don’t take steps to prevent it.

Owners beware! Assess your vulnerabilities from a security perspective. This will substantially improve your ability to protect yourself and those who occupy or visit your properties.

For more information contact Kevin C. Wilkes, Practice Leader, Willis Security Risk Consulting, Strategic Outcomes Practice at 412 645 853 or kevin.wilkes@willis.com.



MOLD, LEGIONELLA & BEDBUGS - THE EXPANDING DEFINITION OF ENVIRONMENTAL RISKS

Most property owners, purchasers/sellers, managers and developers are familiar with the more traditional environmental exposures: historical/pre-existing contamination, brownfields, construction/renovation exposures, lead/asbestos/PCBs and storage of hazardous materials. Environmental insurance is used to address these exposures in many instances and often used to facilitate a property transaction that might otherwise have been held up because of environmental issues or concerns. However, new operational exposures – Legionnaire’s disease, mold and bedbugs – have emerged over the years and have moved to the top of the growing list of risks facing our real estate and hotel clients. Encounters with these exposures can be, not only damaging financially, but devastating from a reputational perspective. There is no debating the countless events, large verdicts and unfortunate media attention given to these issues of late. Fortunately, insurance can play an important role in insulating your operations from the risk or limiting the concern.

MOLD & LEGIONELLA

The environmental insurance market has responded favorably to these exposures and

risks. In the case of *Legionella* and mold, most environmental carriers will provide affirmative coverage grants and have specific provisions built into their policies to address these exposures.

BEDBUGS

In the case of bedbugs, no affirmative coverage grants exist in the environmental insurance markets, and it is not the intent of these policies to address the removal or eradication of bedbugs, vermin, insects or other pests. These exposures are not covered under the definition of “pollutants,” nor is the infestation considered a “pollution condition,” and there’s been no legal precedent to date to our knowledge to challenge or test this position. However, there are policies to potentially protect against third-party exposures for the owners and operators of buildings where chemicals have been applied (and also policies to address the operations of contractors performing the actual chemical applications). Consider the following coverage scenarios for bedbugs:

- **Site Pollution Legal Liability policies** – If the facility owner or manager applies a chemical treatment themselves (or even in scenarios where a tenant applies a chemical) or hires a contractor to apply a chemical (or a heat/steam treatment) and that chemical is considered a pollutant, then a Site Pollution Liability policy (facility owner or manager as named insured) could possibly be triggered for third-party claims for bodily injury, property damage, cleanup costs. An insured may also be able to obtain some coverage for first-party business interruption/loss of rents (if those coverage grants/enhancements were offered/purchased).

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- **Contractor’s Pollution Liability policies** – Any chemical treatment by the contractor at the infested location could introduce environmental exposures should that application lead to third-party liability claims for bodily injury, property damage or cleanup costs, where the chemicals are determined to be “pollutants.” Utilization of a licensed contractor using a permitted chemical product is not a panacea against liability claims. Another consideration is that any heat or steam treatment by a contractor at the infested location could introduce an element of environmental exposure should that treatment lead to conditions creating mold or fungus growth, which could lead to third-party liability claims for bodily injury or property damage or cleanup costs, where the microbial matter is covered on the policy as pollutants. While contractors, such as exterminators, crop applicators, fire/water restoration contractors, have been covered on CPL policies for many years, bugs, vermin, insects and other pests have never been considered pollutants in these contexts.

As you can see, Environmental insurance policies generally fall into two categories – coverage designed to address the pollution legal liability exposures at the actual property/premise itself (i.e., *Site Pollution Liability* policies) and coverage designed to address the exposures brought out of the contractor’s operations at the property/premise (i.e., *Contractors Pollution Liability* policies).

There are plenty of best practices, guidelines and websites publically available for preventing, controlling and treating bedbug and other general pest infestations (for additional information, please also refer to the February, 2011 edition of *VIEWS* for the article, “Bedbug Awareness”). However, when it comes to hiring and management of a contractor utilizing any chemicals or pollutants on the premises, one should always consider the requirement of a CPL policy (on an occurrence basis) along with your other general insurance requirements and prudent risk management practices.

Environmental insurance continues to evolve not only in providing meaningful coverage for emerging risks but also in developing significant enhancements to address such areas as Emergency Response, Crisis Management and Media/Public Relations, which is key to maintaining many of our clients’ cherished reputations.

For more information, please contact Rick Hawkinberry, Environmental Practice Leader at 412 586 3530 or rick.hawkinberry@willis.com.

However, new operational exposures – Legionnaire’s disease, mold and bedbugs – have emerged over the years and have moved to the top of the growing list of risks facing our real estate and hotel clients. Encounters with these exposures can be, not only damaging financially, but devastating from a reputational perspective.

PROPOSED CHANGES TO THE FLSA

The Fair Labor Standards Act (FLSA) is the federal law generally governing how an employee is paid based upon their classification. The FLSA exempts broad categories of white-collar jobs from minimum wage and overtime requirements if they meet certain tests regarding job duties and responsibilities and are paid a certain minimum salary. These categories are commonly deemed “exempt” and include executive, administrative and professional employees. The FLSA also provides exemptions for outside sales personnel, certain specialized computer personnel, certain highly compensated employees, certain retail sales employees and employees covered by the Motor Carrier Act. Non-exempt employees are those who are subject to minimum wage and overtime requirements.

Current FLSA record-keeping regulations require covered employers to keep specified payroll records and other information but do not require that such information or information regarding a worker’s employment or exemption status be disclosed to the worker. This is an issue of transparency and is critical to workers’ understanding of their legal rights and responsibilities. Recently, the Department of Labor’s (DOL) Wage and Hour Division (WHD) proposed to update current regulations under the FLSA in order to enhance openness and transparency, disclose the rights of workers under the Act, and provide information wage computation as it

relates to hours worked. The proposed rule is titled the “Right to Know Under the Fair Labor Standards Act.”

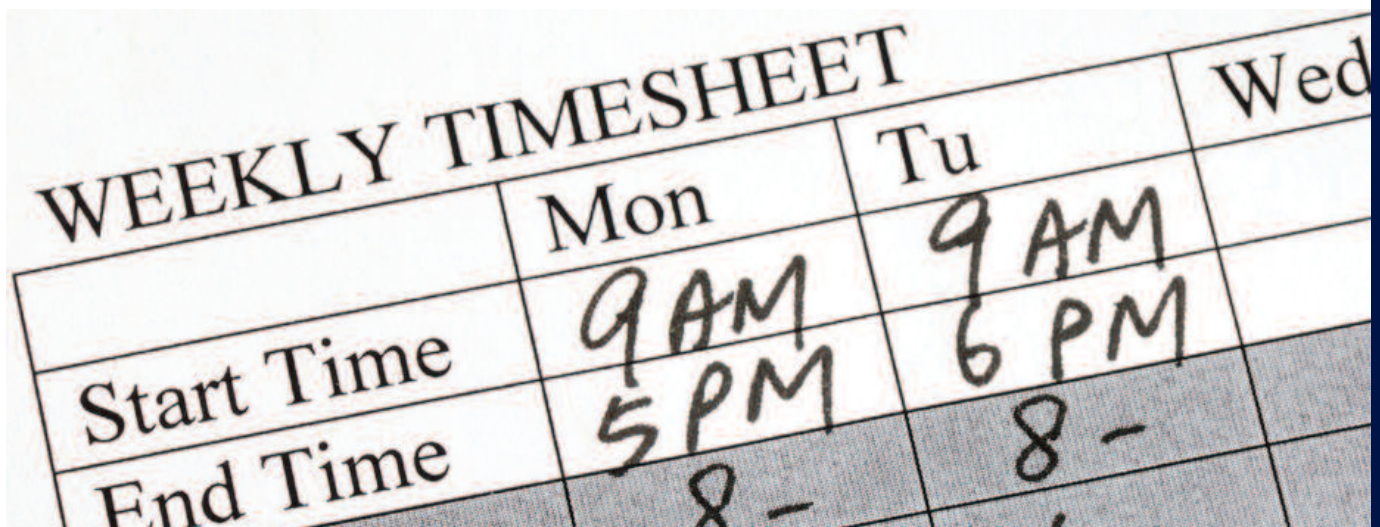
Under the proposed rule, any employer seeking to exclude a worker from FLSA coverage must perform a classification analysis, disclose the analysis to the worker and provide it to any WHD enforcement personnel upon request. The proposed rule will also address an employer’s failure to comply with record and notice requirements. The proposed rule will not affect an employer’s current obligation under the Act to provide notice regarding the FLSA and to keep records on wages, hours and other items, as specified in its record-keeping regulations. The required records generally include the employee’s name, address, date of birth (if under 19), hours worked per day and per week, regular rate of pay (non-overtime rate) when overtime is worked, amount of straight time earnings and overtime pay for each workweek, and deductions from or additions to pay.

By updating the FLSA’s record-keeping requirements, the DOL expects to promote transparency and encourage compliance by employers to enhance awareness among workers of their status as employees and their rights and entitlements to minimum wage and overtime pay, and to facilitate DOL enforcement.

For additional information about the FLSA, please click on the DOL’s **Handy Reference Guide to the Fair Labor Standards Act.**

The Willis Human Capital Practice offers an array of health care reform-related tools, publications and presentations. We invite you to **click here** to review the archive of available information.

Our site will be updated regularly as new developments occur and new guidance published; please check back often.



REAL ESTATE LEASES: TENANT IMPROVEMENTS AND BETTERMENTS DEFINED

When dealing with issues regarding the responsibility for property damage losses to real property, as well as improvements and betterments, two documents are key to a successful resolution notwithstanding your interest as the landlord/owner or tenant. The first is, of course, the lease agreement between landlord and tenant. Besides laying out the contractual terms applicable to the financial and operating aspects of the tenancy, a properly written lease should clearly indicate which party is responsible for obtaining and maintaining the insurance and which party is responsible for effecting repairs once a loss occurs. The other document is, of course, the insurance policy.

Some of the confusion we have sometimes seen relates to the actual definition of the real property or the building. A thoroughly written lease should define what is considered ‘building’ and what is considered ‘tenant’ improvements and betterments. Although some leases refer to a building as an “improvement and betterment to the land,” traditionally, the building is considered to be the core shell and major systems while the improvements and betterments are considered as work done to customize for the tenant’s usage of the building. In adjusting practice in lieu of specifically worded lease agreements, improvements and betterments are considered not to be building if they can be relatively easily removed by the tenant when the tenant terminates the lease and vacates the premises.

Improvements and betterments installed by either the owner or the tenant need to be appropriately defined in the lease. Equally important is agreement on who is insuring the improvements, who

will repair the improvements in the event of loss and, equally important, who is considered the owner of the improvements at the conclusion of the term of the lease. It is also crucial for the party insuring the improvements and betterments to clearly identify them on the statement of values submitted to the insurer

Although you should always leave the writing of the lease to professionals (e.g., your attorneys and property managers), clauses describing the required coverages and limits, deductibles and who is responsible for the deductibles and who has what interests in which property and repairs do not need to be overly complex or complicated. The insurance section of most leases is the appropriate place to describe the required insurance and the party’s obligations to maintain such insurance. The maintenance or return-to-owner section, is usually the place to describe which party is responsible for effecting repairs following an incident. Carefully define the different roles and responsibilities (if there are any) of normal maintenance as compared to repairs following an insurable event.

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Some policies recognize that even with a carefully worded lease, following a loss there can be disagreement about who is responsible for insuring and repairing the improvements and betterments. Some manuscript policies give the insured the right to claim and be paid for the improvements notwithstanding any lease wording to the contrary. This wording exists in some policies to avoid the occasional pain following a loss even if the lease requirements are clear (or appeared clear at the time the lease was written prior to a loss).

Similar to many of the other topics we discuss in this column, some of this clearly falls into the realm of preparing for a loss and understanding what your responsibilities will be once the loss occurs. You may think there is a big difference between maintaining your normal loss prevention practices and checking your lease agreements. They are, in fact, both important ways to understand and manage your risk on a pre-loss as well as post-loss basis.

For more information contact David J. Passman, National Director National Property Claims, Strategic Outcomes Practice at 212 915 8330 or david.passman@willis.com.

RMS VERSION 11.0 OUTLOOK

RMS is advising there will be increases in Probable Maximum Losses (PML) and Average Annual Losses (AAL) to the majority of hurricane exposed locations reflected in their release of RMS version 11.0 while there will be minimal impact on earthquake results.

- New forensic analysis of industry loss data showing roofs fail at much slower wind speed; evidence of construction quality being poorer than expected

Reasons given for the increases in the wind losses include:

- Terabytes of new data collected from the national weather services and other hurricane researchers
- Onshore observational data showing that hurricanes weaken less rapidly than previously thought
- Updates to the national historic database bring a new view to hurricane landfall frequency in a small number of areas

Due to the new understanding of coastal and inland hazards, distance to coast is a significant driver to the changes in loss results relative to the previous model. Portfolios with strictly a coastal exposure will see smaller increase than those with exposures further inland. Commercial portfolios will see higher increases than residential.

CHANGES BY REGION

The largest increase will be in Texas due to the increases in inland exposures and the claim data showing that construction quality was not up to expected standards. Losses will increase less in coastal regions than those inland.

*AEP Gross Loss Results	Line of Business	% Change	% Change PML by Return Period	
		**AAL	250 year	500 year
Texas	Residential	80 to 85	85 to 90	75 to 80
	Commercial	120 to 125	115 to 120	95 to 100

Florida portfolios will be seeing the smallest increases in the new model release. This is due in part to the new understanding of sea surface frictions reducing wind speed and a reduction of landfall rates in the Panhandle region.

*AEP Gross Loss Results	Line of Business	% Change	% Change PML by Return Period	
		**AAL	250 year	500 year
Florida	Residential	5 to 10	0 to 5	0 to 5
	Commercial	15 to 20	0 to -5	0 to -5

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Gulf state portfolio increases are based on an analysis of claim data showing poorer construction practices than previously expected.

*AEP Gross Loss Results	Line of Business	% Change	% Change PML by Return Period	
		**AAL	250 year	500 year
Gulf	Residential	30 to 35	40 to 45	45 to 50
	Commercial	50 to 55	55 to 60	55 to 60

Southeast portfolio increases are due to the increased inland wind hazard.

*AEP Gross Loss Results	Line of Business	% Change	% Change PML by Return Period	
		**AAL	250 year	500 year
Southeast	Residential	20 to 25	45 to 50	50 to 55
	Commercial	25 to 30	50 to 55	60 to 65

Portfolio increases for the mid-Atlantic are due to the greater inland exposure, the slower inland weakening of storms after landfall and the many hurricanes making landfall in southern regions and then tracking through this region.

*AEP Gross Loss Results	Line of Business	% Change	% Change PML by Return Period	
		**AAL	250 year	500 year
Mid-Atlantic	Residential	105 to 110	90 to 95	80 to 85
	Commercial	110 to 115	105 to 110	100 to 105

Northeast states portfolio increases are due to the inland wind speeds and transitioning storms.

*AEP Gross Loss Results	Line of Business	% Change	% Change PML by Return Period	
		**AAL	250 year	500 year
Northeast	Residential	25 to 30	25 to 30	25 to 30
	Commercial	25 to 30	30 to 35	30 to 35

These numbers reflect only the changes to the wind portion of the model as the effects of storm surge have not been released. Portfolio make-up and distance to shore will have major influence on the modeled results.

RMS v11.0 is currently being tested and evaluated by property insurance carriers. Based on our preliminary modeling results, we are seeing significant increases in PMLs under the new model. How these modeling changes will impact future insurance rates has yet to be fully determined. However, the impact on inland properties which were

previously viewed as low risk by insurers could be negatively affected in the coming months.

* Aggregate Exceedance Probability (AEP) measures the probability that one or more occurrences will combine in a year to exceed the threshold.

** Average Annual Loss (AAL): The expected annual loss on a long-term average basis. Mathematically, it is the expected value of the aggregate loss distribution, or alternatively, the area under the AEP curve.

For more information contact Ben Philips, Manager, CAT Modeling, at 650 349 4010 or ben.philips@willis.com.

WILLIS AT RIMS 2011

ANNUAL CONFERENCE & EXHIBITION

We invite you to stop by the Willis booth (#1621) located in the Vancouver Convention Center.

BOOTH HOURS

Monday, May 2	10:00 AM to 5:00 PM
Tuesday, May 3	10:00 AM to 5:00 PM
Wednesday, May 4	10:00 AM to 3:00 PM

BOOTH WORKSHOPS

A complete list of booth workshops can be found at www.willis.com/events/RIMS.

Monday, May 2, 2011

Start	End	Workshop Topic	Contact to reserve a seat
12:00 PM	12:30 PM	Distressed Assets Workshop	steve.sachs@willis.com
2:00 PM	2:30 PM	Distressed Asset Environmental Risks Workshop	rick.hawkinberry@willis.com
2:30 PM	3:00 PM	Risk Management Information System Workshop	lisa.guthrie@willis.com
3:30 PM	4:00 PM	Global Environmental Liability Workshop Managing Multinational Risk in International locations	rick.hawkinberry@willis.com

Tuesday, May 3, 2011

Start	End	Workshop Topic	Contact to reserve a seat
10:00 AM	10:30 AM	Security Risk Management Workshop "Envisioning the Future: Predicting Tomorrows Most Challenging Security Risks"	kevin.wilkes@willis.com
12:30 PM	1:00 PM	Distressed Assets Workshop	steve.sachs@willis.com
1:00 PM	1:30 PM	Distressed Asset Environmental Risks Workshop	rick.hawkinberry@willis.com

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WILLIS SPEAKERS AT RIMS

The following is a partial list of sessions that should be of interest to real estate and hotel owners and managers. A complete list of Willis speakers with detailed session information can be found at www.willis.com/events/RIMS.

Monday, May 2

1:45 PM – 4:15 PM

Casino – IND913

Speaker: Christian Ryan

1:45 PM – 4:15 PM

Real Estate – IND915

Speaker: Steven W. Sachs, ARM,
Director, National Real Estate
& Hotel Practice

Tuesday, May 3

10:45 AM – 12:15 PM

Effective Contracts: A Cornerstone of Every Successful Risk Management Platform – RMG210

Coordinator: Abraham C. Freeland,
Account Executive

Wednesday, May 4

9:00 AM – 10:30 AM

An Owner's View: Construction for Non-Construction Majors – RMG105

Speaker: Joseph Russo, ARM

CONTACTS

For additional information on the topics discussed in this issue, or any others for which our Real Estate & Hotel Practice might provide assistance, please visit our [website](http://www.willis.com) at [willis.com](http://www.willis.com).

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Willis is an insurance consulting and brokerage firm. We are not attorneys and this publication is not to be considered legal advice. Please consult with your attorneys prior to incorporating any of our suggestions into an actual contract or agreement.

¹ *National Underwriter*, p. 24, Feb 14, 2011

² *National Underwriter*, p. 10, Feb 21, 2011

³ Advisen FPN Alert March 14, 2011

⁴ *National Underwriter*, p. 7 Feb 14, 2011

⁵ Advisen FPN Alert March 14, 2011

⁶ *Barrak v. Report Investment Corporation Inc.* Miami-Dade Co., Fla.; Cir. Ct.; No. 2002-26271-CA