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SUPREME COURT OF CANADA LIMITS DISCLOSURE DUTIES FOR COMPANY OFFICIALS / PAGE 3

In Brief

House panel OKs bar on sex orientation bias

The House Education and Labor Committee has approved the Employment Non-Discrimination Act, which would extend nondiscrimination protections to gay, lesbian, bisexual and heterosexual individuals. The bill that the committee approved on a 27-21 vote would prohibit employers from using an individual's sexual orientation as the basis for employment decisions, including hiring, firing, promotion or compensation. The protections would not be extended to transgender workers, though.

Nonfatal injuries down in 2006

Nonfatal workplace injuries and illnesses in the private sector declined to a record low in 2006, according to the Bureau of Labor

See **IN BRIEF** page 26

SECTOR BRIEFING

CONSTRUCTION

Partnerships improve project performance; builders and designers may face liability for climate change; tunnel design may reduce losses; and the surety market appears stable for now. **PAGE 11**

Senate panel OKs backstop renewal

Seven-year extension for TRIA program wins Bush support

By JERRY GEISEL

WASHINGTON—Legislation to extend the federal backstop for terrorism coverage for seven more years is on its way to the Senate floor, with a much greater chance that it will win final congressional approval this year.

The prospects for another extension of the Terrorism Risk Insurance Act, which was first passed five years ago, received two big boosts last week when the Senate Banking, Housing and Urban Affairs Committee overwhelmingly approved a bipartisan TRIA extension bill and Secretary of Treasury Henry Paulson said the Bush administration would not oppose the committee bill.

The administration's new position came three weeks after a warning by the Office of Management and Budget that senior administration officials would recommend that President Bush veto any bill that resembled the House's version of a TRIA extension bill.

In the wake of that warning, Banking Committee Chairman Sen. Chris Dodd, D-Conn., and ranking minority member Sen. Richard Shelby, R-Ala., worked together to fashion a bill that would win bipartisan support and eliminate the presidential veto threat, observers say.

Sen. Chris Dodd, D-Conn., helped craft a bill to extend the backstop for terrorism losses.

"Sen. Dodd has been a longtime leader on TRIA. His leadership has been key. He knew what had to be done to get the measure approved on a bipartisan basis and to get the administration to go along," said Leigh Ann Pusey, chief operating officer of the American Insurance Assn. in Washington.

With the strong backing of Banking Committee bill—the panel approved the measure on a 20-1 vote—and the Bush administration withdrawing its veto threat, congressional approval of legislation to extend TRIA now is likely, Wash-

See **TRIA** page 24

REUTERS

Relatives aid an Iraqi man injured in a recent shooting incident in Baghdad, Iraq, involving bodyguards working for Blackwater Worldwide.

Blackwater faces suit over conduct in Iraq

Insurance coverage for earlier claims in dispute

By DOUGLAS McLEOD

WASHINGTON—Security contractor Blackwater Worldwide is facing wrongful death claims from a mass shooting of Iraqi civilians last month even as it wrestles with liability insurers over coverage of claims in the 2004 deaths of four Blackwater guards in Fallujah, Iraq.

A Philadelphia law firm and the New York-based Center for Constitutional Rights, a civil rights legal organization, sued Blackwater last week on behalf of the estates of three men who were killed and one who was wounded in a Sept. 16 shooting at the Nisoor Square traffic circle in Baghdad.

In the incident, a convoy of Blackwater bodyguards employed by the U.S. State Department opened fire in the square, killing 17 people and wounding more than two dozen others. Erik Prince, Blackwater's owner and chief execu-

See **BLACKWATER** page 25

N.Y. to ease reinsurer collateral requirements

By ROBERTO CENICEROS

NEW YORK—Insurance regulators in New York last week appeared to take the lead among U.S. states by announcing that it would relax collateral requirements for non-U.S. reinsurers operating in the state.

The move, which New York regulators hope other states will follow, comes as the National Assn. of Insurance Commissioners continues to formulate a model law changing reinsurance collateral requirements that could be adopted by all states.

The New York Insurance Department's proposal, which would eliminate collateral requirements for highly rated non-U.S. reinsurers and impose a sliding scale for collateral on other reinsurers, drew quick condemnation from U.S. insurer groups. The proposal would do little to increase reinsurance capacity and likely make it harder for U.S. insurers to collect on their reinsurance coverage, they say.

But London-based insurance organizations praised the proposed regulation, saying it would eliminate an unnecessary burden on many non-U.S. reinsurers.

The U.S. regulatory system's complex approach to credit for reinsurance creates uncertainty about the impact New York's plan could have. The regulation, which faces few hurdles, has a proposed July 1, 2008, effective date.

With the information available last week, it was difficult to determine whether New York's plan would benefit policyholders, said Beaumont Vance, director of external affairs for the Risk & Insurance Management Society Inc. in New York and senior enterprise risk manager for Sun Microsystems Inc.

But it appears the proposal might reduce transactional costs and potentially impact policyholders

See **COLLATERAL** page 25

INDEX

Are you ready to discuss the opportunities created by climate change?

Ask Aon.

PETER BREITSTONE

chief executive officer
Aon Risk Services'
Environmental Services Group

While there may be debate about causes of climate change, there is little dispute that global warming is happening. As the physical, financial, regulatory and legal risks associated with climate change evolve, are you ready to capture the developing opportunities?

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On the Web

SECTOR BRIEFINGS

Sector Briefing on construction now online

The Construction Sector Briefing, which covers best practices, climate change liability, tunnel design and surety bond market trends, is now available online. Go to *www.BusinessInsurance.com/sectorbriefings* to see the entire collection of stories about this sector.

BI VIDEO

Re Views video on reinsurance renewals

Business Insurance's Re Views video series features Simon

Gander, chairman of Gallagher Re Inc.'s global management group, discussing Jan. 1 renewals and the role of regulation on enterprise rise management. Go to *www.BusinessInsurance.com/video*.

ONLINE EXECUTIVE FORUM™

Workers comp webinar on terrorism risk

Business Insurance will present "Workers Compensation: Protecting People in the Age of Terrorism," a live online discussion, at 11 a.m. EST Nov. 14. Join *BI* Senior Editor Roberto Ceniceros and a panel of industry experts as they speak about workers comp exposures in the face of the continuing threat of terrorism. Go to *www.BusinessInsurance.com/webinars*.

ERM webinar archived until Oct. 30

An archived version of *Business Insurance*'s free webinar "Enterprise Risk Management the Real World" is available until Oct. 30. Produced earlier this year, the discussion features a panel of experts discussed ways to implement ERM. Go to *www.BusinessInsurance.com/webinars*.

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REPORTING ON CORPORATE RISK AND EMPLOYEE BENEFIT MANAGEMENT NEWS

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Judge bars Arch from using Gen Re secrets

Former managers used propriety information for fac business: Ruling

By DOUGLAS McLEOD

STAMFORD, Conn.—A state judge has dealt a setback to Arch Capital Group Ltd. in its battle with General Re Corp. over the mass defection earlier this year of Gen Re facultative underwriters to Arch.

Connecticut Superior Court Judge Taggart Adams last week issued a temporary injunction against Arch, finding that several of the defecting executives misappropriated Gen Re trade secrets in setting up a property facultative reinsurance operation at Arch.

Judge Adams ordered Arch not to use or divulge any Gen Re proprietary information or trade secrets, including loss cost data that the judge concluded Arch officials were using to compete with Gen Re.

The dispute began in April when four of Gen Re's top property facultative underwriting executives—Steven Franklin, Jennifer Apgar, Philip Augur and Kenneth Vivian—quit to start a new facultative unit in Farmington, Conn., at Arch. Within a week, 26 other Gen Re facultative employees followed suit.

Gen Re discovered later that Mr. Franklin had discussed job possibilities for himself and the other executives—and outlined business plans—with at least five other reinsurers starting in 2005, court filings say.

By August, the new Arch facultative operation had written a "sub-

See **GEN RE** page 24

GEN RE'S BATTLE WITH ARCH

Major events so far this year in the yet-to-be-resolved legal battle between the reinsurance companies:

APRIL—Four top General Re Corp. facultative officials quit to join Arch Capital Group Ltd. Twenty-six other fac employees join them soon afterward.

MAY—Gen Re sues Arch and the four executives for misappropriating trade secrets, and obtains a temporary restraining order.

JUNE—The TRO is replaced with an agreed order under which Arch consents not to use Gen Re proprietary information.

AUGUST—Arch files counterclaims charging Gen Re with misusing the court to block competition and with libeling Arch in communications with clients.

OCTOBER—A Connecticut state judge enters a temporary injunction against Arch after finding that it misappropriated Gen Re trade secrets.

Canada ruling may limit D&O liability lawsuits

Deterrent to plaintiffs added, but court also bars a type of defense

By GLORIA GONZALEZ

OTTAWA—A Supreme Court of Canada ruling that limits the disclosure obligations of directors and officers and allows them to recoup defense costs if they prevail in securities litigation could minimize the number of D&O claims filed in Canada, insurance experts say.

The decision, however, is not a total victory for Canadian companies because the Supreme Court also said directors and officers may not use a business judgment defense when they fail to make legally required disclosures of material changes to their business, operations or capital.

> **'Taken as whole, I guess it's more of a positive decision than a negative one.'**
>
> Brian Rosenbaum, Aon Reed Stenhouse

"Taken as whole, I guess it's more of a positive decision than a negative one," said Brian Rosenbaum, a member of the legal and research practice of the financial services group of Aon Reed Stenhouse in Toronto. "Had it gone the other way, it probably would have had a more profound effect."

In May 1998, Toronto-based Danier Leather Inc.—a designer, manufacturer and retailer of leather and suede clothing and accessories—made an initial public offering of its shares through a prospectus, which contained projected revenue and earnings for its 1998 fiscal year.

An internal company analysis prepared a few days before its IPO closed on May 20, 1998, showed revenue and earnings lagging the forecasted figures due to unseasonably warm weather across much of Canada. The company did not disclose the lagging results until after the IPO closed; when Danier did revise its forecast in June 1998, its stock price dropped sharply, and shareholders went to court and received class action status in accusing the company and its officers of prospectus misrepresentation.

Disclosure obligations

A trial judge found in May 2004 that Danier should have disclosed the results before closing the IPO and awarded substantial damages, but the Ontario Court of Appeal overturned the ruling in 2005.

In *Douglas Kerr vs. Danier Leather Inc.*, the Supreme Court ruled that after filing an IPO, Ontario's securities statute limits the disclosure obligations of directors and officers to material changes to an organization's business, operations or capital. Since its revenue shortfall was caused by unusually warm weather—a material fact rather than a material change—Danier did not breach its statutory obligation to disclose, the Supreme Court ruled.

"They made it fairly clear that a material fact that could affect revenues was not in and of itself a material change," said Eric Dolden, an insurance attorney with Vancouver-based Dolden Wallace Folick L.L.P.

The decision affirmed the Court of Appeal's finding that the trial judge erred in ruling that Danier had an obligation to disclose material facts during the distribution phase of an IPO—the time between filing a

See **DISCLOSURE** page 24

AP

Equipment maker Caterpillar is suing its broker of record, Aon, charging it steered business and manipulated pricing. Aon calls the charges "meritless."

Caterpillar accuses Aon of steering, misconduct

By SALLY ROBERTS

PEORIA, Ill.—Chicago-based Aon Corp. is once again facing fraud and anticompetitive charges relating to its business practices—this time by longtime client Caterpillar Inc.

Similar to allegations made in 2005 by attorneys general in Connecticut, Illinois and New York, Peoria, Ill.-based Caterpillar charges that Aon steered business to favored insurers, tied the placement of retail insurance business to the purchase of reinsurance brokerage services and manipulated pricing on client placements.

But unlike the 2005 suit that charged the Chicago-based brokerage with fraud and unjust enrichment, and the simultaneous settlement, Caterpillar accuses Aon and units Aon Risk Services of Illinois Inc. and Aon Re Global of five counts of violating federal and state antitrust laws in addition to various other fraud and unjust enrichment allegations.

The suit, filed in U.S. District Court in Peoria, Ill., seeks damages, attorneys fees, restitution and disgorgement.

In March 2005, Aon agreed to pay $190 million in client restitution and to change various business practices in its settlement with the three state attorneys general (*BI*, March 4, 2005).

According to Caterpillar's complaint, the heavy equipment maker, before and after the 2005 settlement, asked Aon to review documents and information relating to its policies in an attempt to determine whether the alleged business practices affected Caterpillar and, if so, to what extent. Aon, however, failed to respond with adequate information, the suit charges.

Because Aon remains Caterpillar's insurance broker, Caterpillar faces continued injury from the alleged improper business practices, the suit alleges. Caterpillar has been an Aon client since 1981, the suit notes.

An Aon spokesman said the lawsuit is "utterly meritless" and that it intends to defend itself "vigorously."

Mental health parity bill advances to House floor

Current law differs significantly from House, Senate bills

By JERRY GEISEL

WASHINGTON—Mental health care benefits parity legislation is headed to the House floor—and a future showdown with the Senate.

Last week, the House Energy and Commerce Committee approved—on a 32-13 vote—legislation that would require group health care plans to offer the same coverage for mental disorders as they do for other medical conditions. H.R. 1424 also would require coverage for all mental health care services listed in the most recent edition of a diagnostic treatment manual published by the American Psychiatric Assn.

It isn't known when the full House will take up the measure, which earlier was approved in similar form by two other House committees. But House passage of the measure is considered certain, which then will set the stage for a conference committee to try to work out differences between the House bill and a measure passed last month by the Senate that has been endorsed by numerous employer and insurer groups.

While both the House and Senate bills require parity for treatment of mental health care disorders, the Senate bill would leave it to employers to decide which mental health care conditions they would cover. If a condition is covered, though, coverage would have to be on the same basis as coverage for other health conditions.

Both the House and Senate versions represent a big change from the current federal parity law. That 1996 law, which legislators have renewed several times, bans discriminatory annual and lifetime dollar limits for mental health care expenses.

AP

A failed amendment proposed by Rep. Heather Wilson, R-N.M., would have replaced the House measure with a more modest bill passed by the Senate.

However, the law allows employers to discriminate in other ways. For example, it is legal for a health care plan to limit the number of annual outpatient visits for treatment of mental health disorders it will cover, while not imposing a comparable limitation for other medical conditions.

The 1996 law also permits such designs in which group health care plans will reimburse 80% of medical expenses but only 50% of expenses related to treating a mental disorder.

Prior to passing the measure, House Energy and Commerce Committee members unsuccessfully tried to win passage of a substitute, proposed by Rep. Heather Wilson, R-N.M., that essentially would have replaced the panel's bill with the measure passed by the Senate.

Rep. Wilson warned that if Congress passes the House bill—requiring coverage of all mental health care conditions listed in the psychiatric industry's compendium—the likely result would be less coverage.

Rep. Wilson said the cost of expanding plans would be so great that some employers simply would stop covering mental health care services.

Additionally, Rep. Wilson said the Senate bill has a far better chance of winning final congressional approval and being signed into law.

Rep. Joe Barton, R-Texas, said he didn't see how the House bill would be accepted by the Senate, adding that he didn't understand why health plans should be required to cover a mental condition just because it is listed in a manual.

But Rep. Frank Pallone, D-N.J., said the approach taken by the Senate, in which employers would retain the ability to decide which mental health care conditions they would cover, "would not accomplish much. It would be practically no coverage at all."

Rep. Anna Eshoo, D-Calif., said the Senate bill discriminates by diagnosis. "If you want to gut the bill…go for the substitute," she said.

Marsh acts to step up shareholder protection

Provision to restrict exec compensation kicks in after takeover

By DAVE LENCKUS

NEW YORK—Marsh & McLennan Cos. Inc. has adopted two new policies that could reduce executive compensation should there be a change in control of the company and after corporate financial restatements, the company informed securities regulators last week.

Marsh announced its "double-trigger" provision for equity-based awards and its "clawback" of incentive compensation after financial restatements in an 8-K filing with the Securities and Exchange Commission.

The changes are "something that is growing in popularity every single day" throughout corporate America, said Dan Moynihan, a principal with executive compensation consultant Corporate Resources Inc. in Upper Saddle River, N.J.

Companies increasingly are attempting to protect shareholders from executives who previously could have become unduly enriched after management changes that do not threaten their jobs or when their own misdeeds led to financial restatements, he said.

The double-trigger provision for equity-based awards granted after March 15, 2007, addresses when executives should be able to draw their severance pay after a change in control of the company. Previously, executives would have fully vested in any equity-based award plan—unless specifically stated otherwise—upon a change in control of Marsh.

Under the new double-trigger provision, full vesting could occur during the first 24 months after the change in control only if the executive was terminated without cause or resigned "for a good reason."

Without the change, executives who were not fired or demoted or did not see their offices moved far away after a change in control at the company could have enriched themselves by collecting their severance benefits, even though they faced no substantial change in their lives, Mr. Moynihan explained.

Under the 'clawback' policy, Marsh has reserved its right to cancel an officer's incentive compensation award or recover portions of compensation it paid any officer after July 19, 2007, if that executive engaged in misconduct leading to restatement of financial results.

Under the clawback policy, Marsh reserved its right to cancel an officer's incentive compensation award or recover portions of compensation it paid any officer after July 19, 2007, if that executive engaged in misconduct leading to restatements of financial results. Marsh would be able to recover the difference between the amount the officer received and the amount that Marsh would have paid the officer under the restated financial results.

Marsh said it would not try to recover incentive compensation paid more than three years prior to the date the applicable restatement is disclosed. It also said it knows of no reason it would have to invoke the policy against any officer.

Patient safety tops priorities of health care risk managers

ASHRM panel: Organizational support backs shift in thinking

By KRISTIN GUNDERSON HUNT

CHICAGO—Patient safety is at the forefront of health care risk management—a shift from years ago, a group of expert panelists said.

Communicating patient safety across health care institutions is the No. 1 priority of health care risk managers, according to panelists speaking at the 2007 American Society for Healthcare Risk Management conference held Oct. 10-13 in Chicago.

Geri Amori, a panelist and senior director of the Lansing, Mich.-based Risk Management & Patient Safety Institute, said the increasing institutionwide focus on patient safety parallels the shift in thinking regarding health care risk managers' responsibilities.

Ms. Amori, who is based in Shelburne, Vt., said health care risk management has historically been perceived as a reactive function, but the industry is starting to accept the idea that proactive action can prevent loss.

"It's very easy in health care to see the risk manager as a person of last resort—someone we go to when something is wrong," Ms. Amori said.

See **SAFETY** page 6

Clinical trials pose set of risks as well as institutional rewards

Risk managers advised to take an active role in oversight

By KRISTIN GUNDERSON HUNT

CHICAGO—The abundance of clinical research taking place coupled with today's increasingly litigious society have made clinical trials an area that U.S. health care risk managers cannot afford to ignore.

Experts made that point while speaking on managing clinical trial risks at the American Society for Healthcare Risk Management annual conference held Oct. 10-13 in Chicago.

Panelists said risk managers must be aware of and involved with clinical trials, which test the safety and effectiveness of medical treatments or devices, taking place at their institutions.

"As a risk manager, your job is to help lower the cost of risk by mitigating exposure. Any clinical trial has the risk of exposure," said Chicago-based panelist Frank Dodero, senior vp for Aon Healthcare and chairman of Aon Healthcare Executive Management Committee in Chicago.

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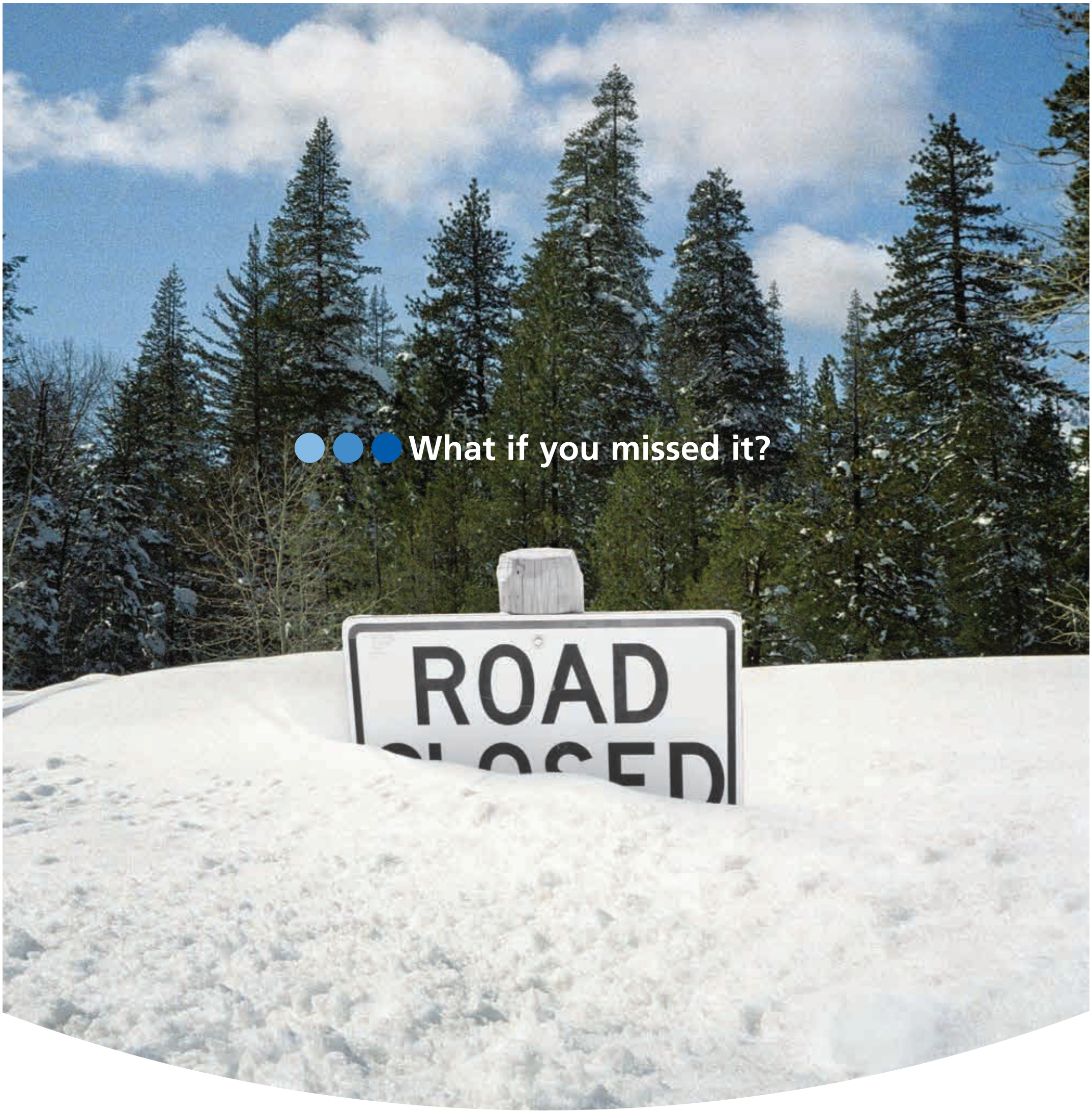

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Trials: Review boards subject to lawsuits

CONTINUED FROM PAGE 4

Lawsuits stemming from clinical trials have increased, the panelists said.

The panelists reported that complaints filed against clinical trial investigators alone increased from 11 in 1992 to 131 in 2001, according to the Food & Drug Administration Office of Compliance, Center Watch.

Mr. Dodero said the increase in lawsuits is a result of more companies performing clinical trials in areas such as biotechnology and pharmaceuticals. He also said plaintiffs' attorneys are more active and getting more familiar with these areas.

The most common complaints appearing in lawsuits include medical professional liability or product liability negligence, financial conflict of interest when patients aren't told about a provider's stake in the testing, inadequate informed consent, violation of state or federal regulations, breach of right to be treated with dignity, fraud and breach of confidentiality, according to the panelists.

Defendants often named in such lawsuits are clinical investigators, such as the participating hospital or physician, the trial sponsor that manufactures the drug or device being tested, the clinical research organization, the FDA and the Department of Health and Human Services, and institutional review boards.

Mr. Dodero said getting acquainted with an organization's institutional review board is a crucial step risk managers should take to mitigate risk. Institutional review boards or independent ethics committees review and monitor biomedical and behavioral research involving human subjects.

Such boards have the authority to approve, modify or disapprove research in accordance with FDA and DHHS regulations. They are made up of at least five members who are scientists, lawyers, ethicists, administrators and lay people.

> 'Institutional review boards are leaving themselves open to be named in lawsuits. There is a precedent for it. It's an obligation that must be taken seriously.'
>
> Frank Dodero, Aon Healthcare

Their responsibilities include protecting individuals and their privacy, overseeing research activities, ensuring studies comply with federal rules and that principal investigators are competent, enforcing proper informed consent, monitoring ongoing research, and suspending or terminating a study if deemed necessary.

With such far-reaching responsibilities, institutional review boards can be sued, which is why risk managers need to be involved with their institution's boards, Mr. Dodero said.

"Institutional review boards are leaving themselves open to be named in lawsuits," he said. "There is a precedent for it. It's an obligation that must be taken seriously."

Some risk managers at the conference said they are a member of their organization's institutional review boards. However, more risk managers said they weren't entirely familiar with their review boards and certainly didn't know of every clinical trial taking place at their institution.

Mr. Dodero said risk managers also should ask about the studies taking place and evaluate the research being conducted.

In addition, risk managers should evaluate whether the board is overwhelmed with studies and if an additional board is needed.

Missteps usually occur when a board is overworked and doesn't have the means to be cautious, he said. Taking on less research is not usually a consideration institutions prefer, Mr. Dodero added.

"No one wants to take on less research because it generates revenue," Mr. Dodero said, "and beyond that, it certainly is nice visibility for the institution if it's involved in a successful clinical trial and involved in the development of a new therapy."

ASHRM conference draws nearly 1,800 attendees

CHICAGO—The American Society for Healthcare Risk Management held its annual conference and exhibition Oct. 10-13, attracting about 1,800 paid attendees.

The Chicago gathering offered 57 educational sessions and 166 exhibitors.

Topics covered during the sessions included patient safety, retail clinics and health care security, managing technology and information risks, and managing risks in clinical trials. ASHRM is a personal membership group of the American Hospital Assn.

The 2008 ASHRM conference and exhibition will take place Oct. 2-5 at the Hynes Convention Center in Boston.

For more information, contact Chicago-based ASHRM at 312-422-3980 or by e-mail at *ashrm@aha.org*.

—By Kristin Gunderson Hunt

Safety: Proactive action can help prevent losses

CONTINUED FROM PAGE 4

She said while risk managers have long been concerned about patient safety, they didn't have the organizational support they needed to make patient safety a priority across their institutions.

That changed, she said, when the Institute of Medicine in Washington released the report "To Err is Human: Building a Safer Health System" in 1999 and when the Oakbrook Terrace, Ill.-based Joint Commission developed patient safety standards in 2001.

The Institute of Medicine report revealed preventable medical errors have cost hospitals nationwide between $17 billion and $29 billion per year. It also indicated errors caused patients to lose trust in the health care system and diminished satisfaction by both patients and health care professionals.

Ms. Amori said the Joint Commission standards also launched an emphasis on patient safety and helped create a system in which risk managers and their institutions could rely to proactively manage risks.

In support of the changing role of the health care risk manager, the panelists presented results from a 2006 national job analysis survey, which was distributed exclusively to ASHRM members.

The survey was a collaborative effort by the Chicago-based American Hospital Assn. Certification Center, Chicago-based ASHRM and Olathe, Kan.-based psychometric consulting firm Applied Measurement Professionals Inc.

The analysis was based on 562 health care risk managers' responses, in which they rated their job tasks for frequency of performance and importance. It followed a similar analysis of 381 health care risk managers in 1999, in which the results varied.

In 2006, health care risk managers ranked their most important tasks as communicating patient safety, followed by maintaining relationships and communication with nurses and high-risk clinical departments, overseeing investigations of adverse events, notifying insurers of actual or potential claims, maintaining incident report data, and facilitating educational programs for nursing and clinical staff, among other items.

While the 1999 survey revealed similar concerns regarding notifying insurers of claims and facilitating educational programs for nursing and clinical staff, it also ranked health care risk managers' most important tasks as ensuring leadership was informed in high-exposure cases and tracking trend data or lawsuits. Patient safety was not ranked as a top priority.

> 'The best risk management is proactive risk management. When we are not proactive, we really are not living up to our mission of providing safe and trusted health care.'
>
> Geri Amori
> Risk Management & Patient Safety Institute

Ms. Amori said the switch to a patient safety culture has been a welcome one to many risk managers. She said the environment is more collaborative, and the risk manager should be viewed as a resource with knowledge the organization can utilize, not someone to solely rely on when a complaint comes up or a lawsuit is filed.

"The best risk management is proactive risk management," she said. "When we are not proactive, we really are not living up to our mission of providing safe and trusted health care."

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Business Insurance OPINIONS

Bipartisanship shines in TRIA extension bill

WHAT LEGISLATIVE STRATEGY is most likely to be successful?

The answer—an obvious one, but one congressional leaders of both political parties have increasingly ignored in recent years—is a bipartisan approach to crafting legislation.

Happily, party leaders—at least in the Senate—have taken a bipartisan approach in the drafting of legislation to extend the Terrorism Risk Insurance Act, which is set to expire at the end of this year.

As we report on page 1, the Senate Banking, Housing and Urban Affairs Committee last week passed a measure to extend TRIA for seven more years with just one dissenting vote.

Simultaneous with the committee action, Secretary of Treasury Henry Paulson said the administration could live with the panel's bill. Only weeks before, following the passage of a different TRIA bill in the House of Representatives, administration officials put out the word that the House measure would likely be vetoed if it made it to President Bush's desk.

Politics is the art of compromise.

The Senate committee action did not just happen in a vacuum. It was the result of Banking Committee members, most notably Committee Chairman Sen. Chris Dodd, D-Conn., and ranking minority member Sen. Richard Shelby, R-Ala., working together to find a common ground.

Sen. Dodd has supported a very long or even permanent TRIA extension, while Sen. Shelby has been, from the beginning, a TRIA opponent. But politics is the art of compromise and that is what these two political leaders have done.

We think the case for a TRIA extension is overwhelming—the federal backstop is essential to ensure the availability and affordability of coverage from insurers against terrorist attacks.

Now, we hope the Senate acts quickly on the Banking Committee bill, with legislators then following to promptly resolve differences with a House-passed TRIA measure so that a final bill can be sent to President Bush that he will sign into law.

New York takes lead on reinsurance collateral

NEW YORK'S PROPOSAL to ease collateral requirements on foreign reinsurers is drawing praise and criticism.

As we report on page 1, some U.S. insurers and reinsurers say the move won't increase reinsurance capacity and will make reinsurance harder to collect. European reinsurers welcome the proposal, which will put them on a more even footing with U.S.-based reinsurers.

We think New York's action is commendable for several reasons. Firstly, the state insurance department is not waiting for consensus from the National Assn. of Insurance Commissioners, which has been gathering support for relaxing collateral rules over the past two years. While New York isn't exactly breaking rank with the NAIC, it isn't afraid to take the lead from an organization that makes molasses look speedy. Secondly, New York realizes that it will attract reinsurance business through sensible regulation that makes doing business easier.

New York Insurance Superintendent Eric Dinallo noted that the proposal applies to highly rated reinsurers, not those with marginal financial security, and U.S. cedents are welcome to negotiate their own collateral arrangements directly with foreign reinsurers. Rightly so, though we acknowledge that smaller ceding insurers don't necessarily have the clout to demand full collateral.

Not having to post collateral equal to 100% of expected liabilities through funds on deposit or credit facilities means reinsurers can deploy more capital to help insurers strengthen their own balance sheets. That seems sensible to us.

Letters

ARRC ready to battle 'red light states'

TO THE EDITOR: We in the self-insurance community appreciate your coverage of the conflict among states regarding the legal rights of risk retention groups that operate under the federal Liability Risk Retention Act ("Risk Retention Groups Criticize Overzealous States," Oct. 8).

While in the political world, news media have identified so-called "red" and "blue" states, in the self-insurance world regarding risk retention groups we have "green light" and "red light" states. The "green light" states are those that abide by the federal law that allows risk retention groups that are licensed in any state to operate in all other states. The "red light" states are those that ignore federal law and apply their own regulatory challenges or taxation on RRGs.

This situation has become confrontational among the states because the federal Liability Risk Retention Act of 1986 did not assign enforcement responsibility to any federal government agency. So, we are left with the situation of states that open-

See **LETTERS** page 26

Write us

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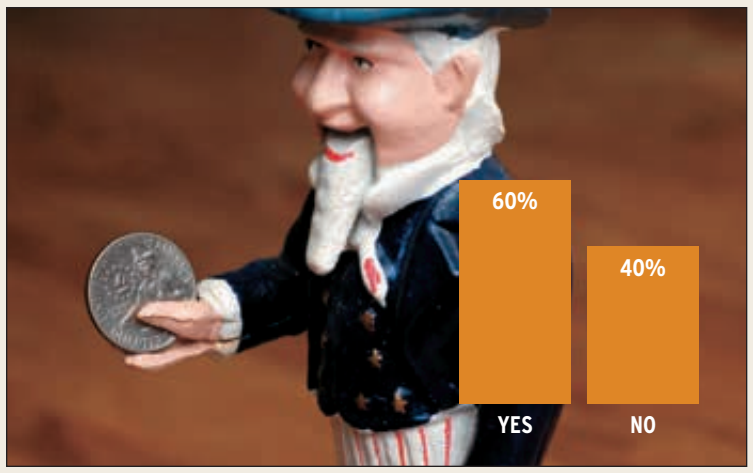
Online Poll at www.businessinsurance.com

Is the proposed partial match of lower- and middle-income workers' 401(k) contributions by the federal government good retirement policy?



NEXT WEEK'S POLL: *Will New York's move to relax collateral requirements for highly rated foreign reinsurers benefit insurance buyers?*

***BI* Online Poll tool sponsored by Wausau Insurance Cos.**

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GETTY IMAGES

Best practices improve project performance

Client, contractor partnerships key to a successful construction project

By BEN NORRIS

With cost and time overruns a key risk for major construction projects, organizers of the 2012 Olympics can learn from best risk management practices of successful buildings such as Terminal 5 at London's Heathrow Airport.

Since London celebrated its successful bid for the 2012 Olympic Games, the estimated cost of the event has risen from an initial £2.4 billion ($4.9 billion) to the current £9.35 billion ($19.09 billion). The construction budget is now set at £5.3 billion ($10.82 billion) with a £2.7 billion ($5.51 billion) contingency fund.

"The main risks for the 2012 Olympics are time and cost overruns, which are always an issue for construction projects," said Birmingham, England-based Stuart Pemble, partner at London-based law firm Mills and Reeve L.L.P.

Time will prove a particular complication for the 2012 Olympics, which has a "drop dead date" or finite completion date. This will mean that the Olympic Delivery Authority will need to be flexible in other areas, said Paul Hopkin, technical manager of the London-based Assn. of Insurance and Risk Managers.

"In other projects, you can have some flexibility on the three main issues of budget, time scale and specification. In the case of the

See **PRACTICES** next page

Inside

WATCH FOR OUR SECTOR BRIEFINGS in 2008

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Land acquisition was completed during the summer for the more than 750-acre London site, shown under construction last November, that is to host the 2012 Olympic Games. Some 200 businesses and more than 400 residents had to move to make way for building the Olympic stadium, athletes' village and other sports facilities. "By helping businesses find new sites we have so far safeguarded 98% of jobs and in every case we will continue to offer support as people settle into their new homes and premises," Manny Lewis, chief executive of the London Development Agency, said in a July statement.

Practices: Heathrow terminal points positive path for 2012 Olympics

CONTINUED FROM PREVIOUS PAGE

Olympics, one of those—time—is absolutely fixed, and so you need to scrutinize the project all the more and have flexibility on the other issues," Mr. Hopkin added.

To avoid these risks, the London-based Olympic Delivery Authority—the public body responsible for developing and building the new venues and infrastructure for the games on behalf of the London Organizing Committee of the Olympic and Paralympic Games—should concentrate on construction project procurement, Mr. Pemble said.

"Partnering," which attempts to move away from traditional "adversarial" relationships between clients and contractors in favor of a more homogenous approach, is crucial to the success of the project, noted Laurence Gilmore, construction and account director of London-based Aon Ltd., a unit of Chicago-based brokerage Aon Corp. "With any project nowadays, particularly major projects, the partners involved have got to work together. The days of employer contractual fighting on-site has gone. There is now the need to work together in some form of partnering," Mr. Gilmore said.

Terminal 5 at Heathrow Airport is seen as an example of good project risk management in the construction industry. The Terminal 5 agreement, a legally binding contract between the client, BAA Ltd., and its key suppliers, states that BAA highlighted two key areas that undermine progress, "cultural confusion and the reluctance to acknowledge risk." It recognizes that "traditional arrangements can result in a highly unproductive culture of blame and risk."

Project principles

The Terminal 5 agreement was based on project management principles set out in two mid-1990s government-commissioned reports: Constructing the Team by Sir Michael Latham in 1994, and Rethinking Construction by Sir John Egan in 1998.

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An Olympic inspection team visits the O2 Arena in April 2006. O2, which opened in July of this year, is to host gymnastic and basketball finals in the 2012 London Olympic Games.

As laid out in the Terminal 5 agreement, BAA "accepts that it carries all of the risk for the construction project" and a "premium is placed on delivering solutions and results," according to the agreement.

This is done by way of a project incentive fund that aims to balance the successes and failures of individual contractors. It rewards contractors for completing work on time and within budget, experts say.

"What was different about the Terminal 5 agreement—its success—is that the time and cost consequences were borne by the client in the form of project insurance policy. Also, the project pool proved successful and worked well with the incentives given to the contractors," noted Mr. Pemble.

Had BAA followed the traditional contract approach, Terminal 5 would have been two years late and 40% over budget. This is according to Mathew Riley, BAA's commercial director for Terminal 5, in an interview published in the issue 31 newsletter from Turner & Townsend, a construction management consultant based in Leeds, England.

The ODA's aim "will be to make sure that contracts are suitably drafted to ensure that a spirit of 'partnering' takes place together with defined levels of retained risks and triggers for reward for defined performance levels in the execution of the works according to the contract," Robin Baines, director of construction risks at London-based Willis Insurance Holdings Ltd., said in an e-mail.

The form of contract used on the Wembley Stadium project—in which the time and cost overruns led to litigation between clients and contractors—was a "fixed price" agreement, which places the contractor at higher risk and can encourage a culture of blame. It is one of the major reasons why the project ended in litigation between the client and supplier, experts say.

"Trying to transfer risk is fraught with difficulties," said Jeremy Ure, business director of Aon Ltd. "Designing a commercial (contract) that allows one party to win over another just gets you into court." Mr. Ure added.

If disagreements over contractual obligations do occur, it is vital to have evidence to back up any claims, noted Mr. Pemble. "With big contracts and big projects, the paper trail is vast, so claims get complicated. It often becomes a battle of who has (kept a better) record with claims. A problem for the Olympic organizers is that regular users of the system are more used to playing this game. This is perhaps one area where the experienced project partners could help." Mr. Pemble said.

Constant involvement

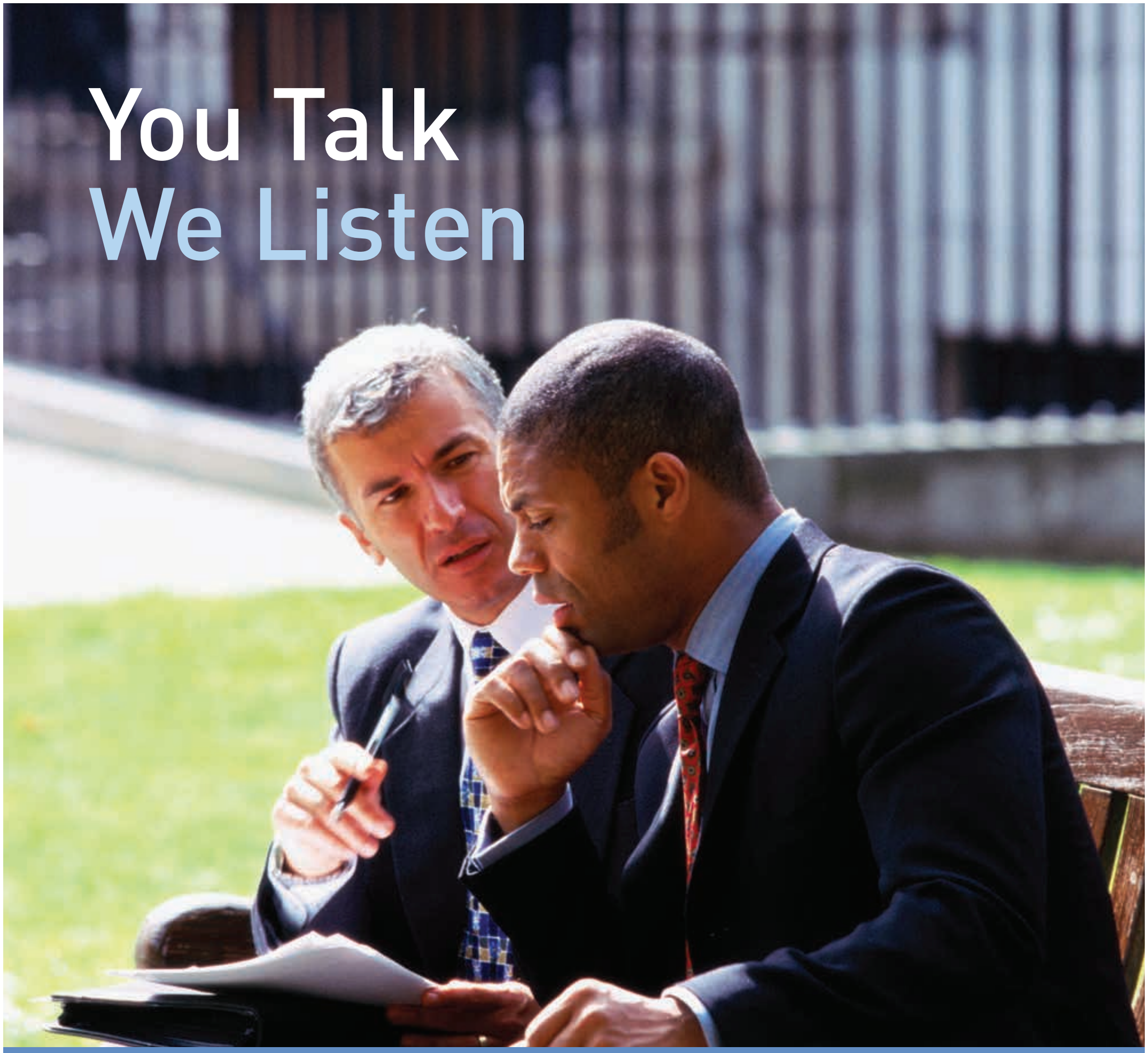
High levels of expertise on the client side and continual assessments, through constant involvement in the project, were also key to the success of BAA's Terminal 5 project, said Mr. Ure.

"BAA appears to invest strongly in a lot of expertise in order to manage and be heavily involved in each of the individual subprojects," Mr. Ure noted.

"They have constructed a good partnership model, but this is underpinned by their great involvement and continuing ownership of the project. They had to recruit more project managers on the BAA side, which reflects their continual reviewing of requirements and needs of their involvement," added Mr. Ure.

Although the organizers of the 2012 Olympics have yet to finalize their contracts, they have agreed to the 2012 construction commitments, which were drafted by the Strategic Forum for Construction, a U.K. construction industry body.

"The Olympics commitment charter is a good framework, which encourages good practice for a large construction project," said a spokesman for the Strategic Forum.



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Buildings' carbon emissions pose potential liability

Risks arising from climate change spark move to improve energy efficiency within construction sector

By STACY SHAPIRO

Someday, building owners, contractors and designers could be held liable for climate change and heat exhaustion. These types of risks should be considered today by building owners, developers and contractors to avoid claims in the future, legal experts say.

Right now, however, no such litigation exists involving the carbon dioxide emissions of buildings contributing to climate change, although the liabilities may be stacking up, according to legal experts.

"It is the sort of liability issues that are arising, which are similar to those seen in tobacco and asbestos litigation some time ago," said Jose Cofre, London-based associate with New York law firm LeBoeuf, Lamb, Greene & MacRae L.L.P. "It is the question of who caused the climate change."

Although litigation already exists against power companies and automobile manufacturers seeking damages for their contribution to climate change, there is no known litigation involving the carbon dioxide emissions of buildings, legal experts agree. "This type of litigation is probably not imminent in the next 10 or 20 years, but when you look at the litigious nature in the United States, who knows," Mr. Cofre added.

"When you consider carbon emissions, usually the focus is on power producers or machines. But I do not believe anyone has considered litigation involving buildings even though buildings are big carbon contributors," said attorney Peter Roderick, a director of the London-based Climate Justice Program, which is under the auspices of the Amsterdam, Netherlands-based environmental pressure group Friends of the Earth International.

Commercial and domestic buildings produce significant amounts of carbon emissions that are blamed for the accelerated changes in the earth's climate, according to environmental experts.

Carbon emissions

In London alone, existing commercial and domestic buildings contribute approximately 73% of the capital's carbon emissions, said Mr. Cofre in an article on "The Rise and Rise of Green Buildings" published in Scottish Planning and Environmental Law earlier this year. Up to 50% of the United Kingdom's overall energy consumption is associated with buildings, including the energy used to heat buildings and to power the equipment inside them, he stated.

The situation is similar in the United States, where emissions from residential and commercial buildings accounted for 38% of total U.S. carbon emissions in 2004—more than either the transportation or industrial sectors, Mr. Cofre added.

'When you consider carbon emissions, usually the focus is on power producers or machines. But I do not believe anyone has considered litigation involving buildings, even though buildings are big carbon contributors.'

Peter Roderick,
Climate Justice Program

Worldwide, experts estimate that 40% of carbon emissions stem from buildings.

A looming legal question is therefore emerging, said Mr. Cofre. "Given the scientific evidence as to climate change, can governments, employers, developers, company directors or others be held liable for failing to adapt buildings to climate change risks?" he asked in his article. "The risk of liability, particularly in tort, and in some cases criminal liability under health and safety laws, is another impetus for adaptation and for the emergence of greener commercial properties," he said.

Today, owners, designers and developers already aim to construct "green" buildings. But whether the technology can keep up with the change in climate is another matter.

A 2005 report titled "Beating the Heat" published by the United Kingdom's Department of Trade and Industry (now the Department for Business, Enterprise and Regulatory Reform) concluded that

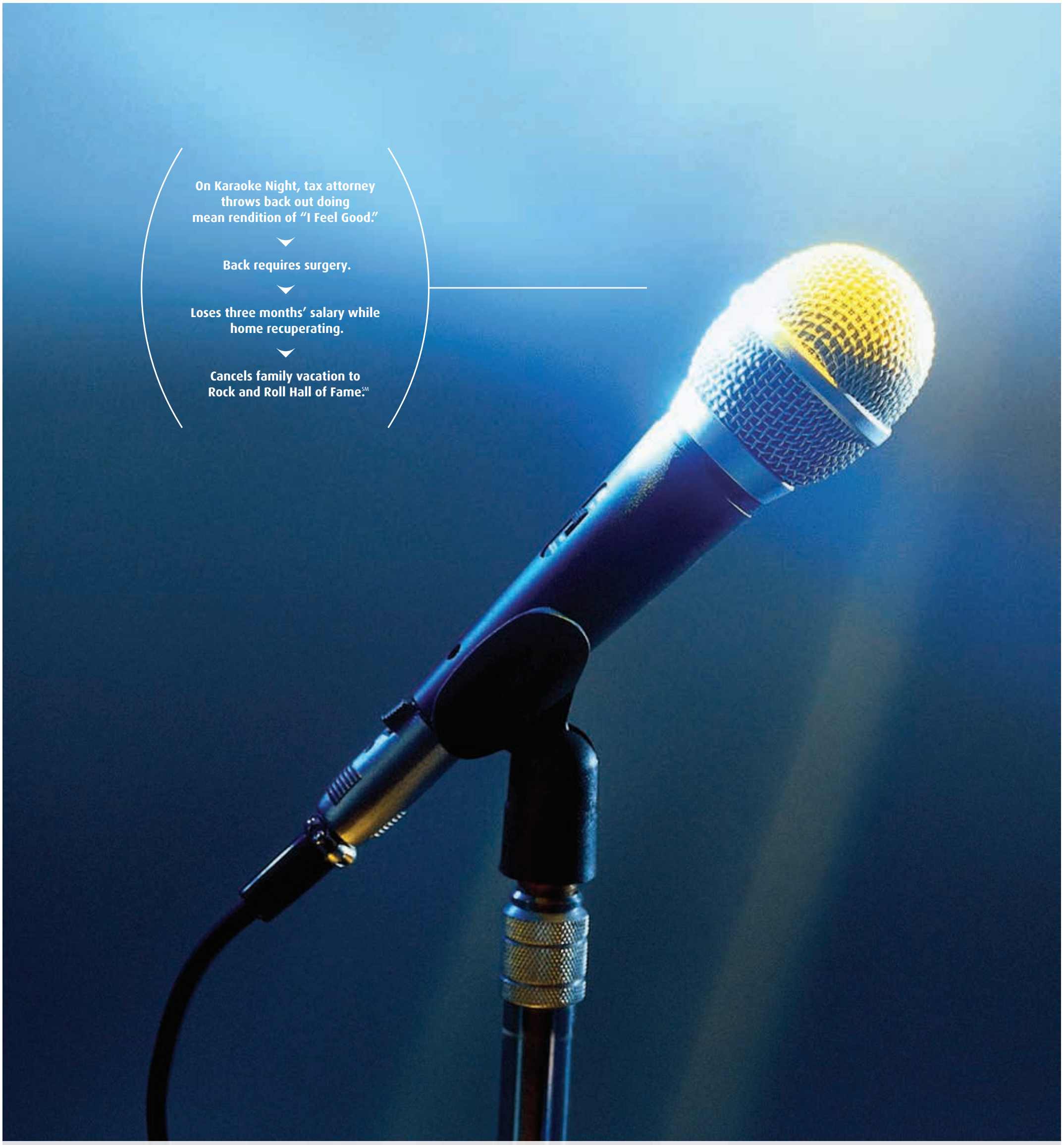
See **BUILDINGS** page 16

On Karaoke Night, tax attorney throws back out doing mean rendition of "I Feel Good."

Back requires surgery.

Loses three months' salary while home recuperating.

Cancels family vacation to Rock and Roll Hall of Fame.℠



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The former Swiss Re tower in London was designed to be a low-energy building. Because of its shape, it's able to harness wind and minimize use of artificial air conditioning and lighting. Swiss Re sold its London headquarters in February.

Buildings: Emissions could create liability

CONTINUED FROM PAGE 14

simple passive measures, such as opening the windows, could stop most homes in London from overheating well into the 2080s, and most offices and schools until the 2050s.

After that, mechanical cooling such as air conditioning would be necessary even though this would contribute to carbon emissions. If passive cooling and mechanical cooling systems are combined "with careful design and system management, such buildings can provide high levels of indoor comfort while still operating in a relatively energy efficient manner," said the report. However, in London, the report found that increased thermal discomfort is likely to be a major problem for many existing buildings unless they are adapted for the expected change in climate.

"Buildings which are designed using historic climate data may overheat," Richenda Connell, one of the authors of "Beating the Heat," said. "These buildings may start to fail with the expected strong increase in temperatures," said Ms. Connell, who is development director for climate risk management consultant Acclimatise in Southwell, England.

Thinking about climate change and reduced carbon emissions when constructing or refurbishing a commercial or domestic building could ensure a lasting legacy of sustainable development and possibly reduce future liability costs, experts add.

Stringent limitations

Such actions are likely to be spurred on by a European Union directive on energy performance of buildings (2002/91/EC) that imposes new and more stringent limitations on allowable carbon dioxide emissions from new and refurbished buildings. The directive was introduced after European Commission research indicated that by improving energy efficiency, carbon emissions from buildings could be reduced by 22%.

This will help the European Union to meet its climate change objectives under the Kyoto Protocol commitments, as well as improve the energy performance of new and existing buildings, U.K. government sources say.

Though the directive was passed in 2003, it did not become law until January 2006. Member states have 36 months, or until the end of 2008, to implement the directive into national law and another three years to form regulations for energy performance certificates.

Come April next year, the United Kingdom will introduce new regulations to require energy performance certificates for commercial buildings and display energy certificates at public buildings. "Their effect is to treat buildings in much the same way as electrical appliances assessing and showing their energy efficiency rating," stated Cardiff, Wales-based law firm Clarkslegal L.L.P. in a statement.

These certificates will be issued by qualified energy assessors as part of compliance with building regulations. If a building does not perform to these certificates, however, and office workers suffer heat stroke as a result, it is not clear who would be liable for damages.

From an insurance indemnity point of view, if a building gets too hot and office workers suffer, "my initial claim would be against my employer who might sue the building's owner for a breach of contract depending on the lease," said Andrew Garvey, an associate with Clarkslegal in Cardiff.

"The owner could then look to the building contractor or the air conditioning engineer for not having the building working to standard," he said.

The owner also might consider legal action against the energy performance assessor if a certificate has been issued, Mr. Garvey agreed. Or, health and safety regulators may have jurisdiction as a breach of the energy performance certificates might violate building regulations, he said.

"But does a building owner have a duty of care to the employers leasing the offices for the consequences of a hot summer?" asked Mr. Garvey.

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Series of tunnel losses prompts risk management code

Construction industry teams with insurers to improve safety

By CAROLYN ALDRED

A joint effort by insurers and the construction industry to improve risk management of major tunnel projects has been successful and should help ensure that one of the sector's most complex activities remains insurable, market executives say.

After a spate of deadly and costly tunnel construction disasters during the 1990s (see box), insurers were on the verge of withdrawing from the market. However, a code of practice for risk management of tunnel works, drawn up by insurers and civil engineers, has reassured underwriters and put risk management at the forefront of tunnel design and construction, they agree.

London underwriters and representatives of the tunneling industry developed the code, which was launched in the United Kingdom in 2003 and now is being extended internationally.

"In 2002, the British Tunneling Society received representations from the insurance industry who advised the society of their concerns regarding the cost of claims of tunnel projects," according to a spokesman from the London-based society. "The Assn. of British Insurers were so concerned that they advised us that they were actually considering not offering insurance on tunnel projects until something could be done to improve the situation."

The ABI proposed that, together with the BTS, it prepare a joint code of practice that set out guidance for owners, designers and contractors on the management of risk on tunnel projects that, if followed, would allow insurers to provide insurance coverage, according to the BTS statement.

For almost two years, a team of representatives from international insurers and reinsurers—Allianz S.E., Swiss Reinsurance Co., Zurich Financial Services Group, SCOR S.E., ERC Frankona A.G. (acquired by Swiss Re in 2005), Munich Reinsurance Co. and Royal & SunAlliance Insurance Group P.L.C worked on the project. The resulting Joint Code of Practice for Risk Management of Tunnel Works was published in September 2003.

Crossroads reached

"The tunneling guidelines were initially developed in response to the large losses that the industry was experiencing," said Ronan Gallagher, regional manager for engineering, Pacific region, with Allianz Global Corporate & Speciality, part of Munich, Germany-based insurer Allianz S.E.

At the time, "the level and frequency of claims made was extremely high and it became clear to insurers that a crossroads had been reached. Either an attempt (had to be) made to analyze and correct the root cause of the problem, or insurers would be forced to step out from providing cover," said Mr. Gallagher, who was involved in developing the code.

The close cooperation between underwriters and client engineers was essential to a successful code, he said. "Tunneling is a very complex procedure, meaning that careful consideration of all the various elements was required. We had to make sure that all the right people from a broad range of disciplines were involved," Mr. Gallagher said.

"In order to get the full picture, insurers had to get closer to the end user at every stage of the entire process—from design and planning, to construction and operation. Adopting this development model meant that all affected parties could contribute to the content of the guidelines. This ensured that the finished guidelines were both comprehensive and readily acceptable to the industry," Mr. Gallagher said.

The tunneling code covers projects from development through design, contract procurement and construction. It describes procedures to help identify risks and assign them to the companies and insurers involved, as well as ways to improve the monitoring and management of tunnel construction risks.

Implementation of the code in the United Kingdom encouraged an international version of the code—the Code of Practice for Risk Management of Tunnel Works—to be developed by members of the International Tunneling Insurance Group, said Heiko Wannick, a construction underwriter for Munich Reinsurance Co. ITIG was formed to develop the international code and includes Swiss Re, Zurich Financial Services, Allianz S.E., Munich Re and Assicurazioni Generali S.p.A.

The international code was launched at last year's International Tunneling Assn. conference and has been translated into German, Spanish and Chinese. French and Italian versions were being prepared.

"The Joint Code of Practice is applied in all tunneling projects in the United Kingdom nowadays, while forerunners of the international version have been implemented in the Kowloon Canton Railway project in Hong Kong, the Circle Line in Singapore and the Marmaray Tunnel in Turkey," said Munich, Germany-based Mr. Wannick.

Application of the code has become a standard condition for large construction projects placed on the international reinsurance markets, including projects where a tunnel is just part of the overall project, he noted.

Tim Healey, a director of civil engineering for engineering contractors Capita Symonds Ltd. in East Grinstead, England, agreed that banks, insurers and financiers of tunnel projects now require evidence of adherence to the Code of Practice.

The code was developed at the initiative of insurers, but involved close collaboration with tunneling experts and has been embraced by the industry, said Mr. Healey.

The code "has become a reality of the market for tunneling projects today and it is unlikely that a placement for a major tunnel risk can be completed without the code being incorporated in the placement," said Robin Barnes, a London-based director with Willis Construction Risks, part of brokerage Willis Insurance Holdings Ltd.

Projects that have used the code to date have not been subject to any large losses, suggesting that the code is effective, said Mr. Wannick, adding though that it is too early to judge its lasting impact.

Prior to the code's introduction, tunneling produced the largest number of major losses in the construction industry—costing the insurance industry more than $600 million since 1994, according to Munich Re.

"The nature of the tunneling industry means that it is too early to quantify exactly how successful the introduction of these guidelines has been. Large tunneling claims used to arise approximately once every five years," said Mr. Gallagher. "To make a meaningful quantification of the guidelines' effectiveness, the track record of claims should be looked at over a 10-year period," he said.

"However, it is possible to qualify the effectiveness of these guidelines by looking at their levels of acceptance. There is a tremendous appetite for the guidelines, not just in the United Kingdom, but on a global level as well. Both insurers and tunneling contractors have chosen to adopt these guidelines as standard," Mr. Gallagher said.

"The introduction of the guidelines should help everyone better understand the risks involved. While it is impossible to completely negate all risk from a project, thanks to the guidelines it is easier to identify, manage and mitigate those risks that remain," said Mr. Barnes.

SELECTED TUNNEL LOSSES 1994-2005

1994: Heathrow Express Link, London
Three tunnels forming part of the Heathrow Express Link, connecting central London and Heathrow Airport, caved in and took several buildings with them. **$141 MILLION**

1994/95: Metro, Taipei, Taiwan
When the Metro was being built in Taiwan in the 1990s, several serious tunnel collapses occurred, causing major property damage to adjacent buildings as well as serious liability losses. **$41 MILLION***

1999: Bolu Tunnel, Turkey
An earthquake caused the collapse of a section of the Bolu tunnel, part of the Anatolian highway, even though the tunnel had been designed to withstand earthquakes. **$115 MILLION**

1999: Tunnel in Hull, England
During one of the tunnel drives for a 6.5 mile underground sewer in Hull, England, a deformation in the floor of the tunnel shell led to flooding of the tunnel and subsidence at the surface, resulting in substantial damage to buildings, roads and utility lines. Machines and the tunnel were abandoned. **$55 MILLION**

2000: Taegu underground, South Korea
Part of a station excavation pit caved in, burying a bus, killing three passengers and damaging neighboring buildings. The accident was caused by a load not considered in the design phases and due to unforeseen soil conditions. **$24 MILLION**

2002: SOCATOP tunnel, Paris
A fire aboard a service train damaged the tunnel built to accommodate two decks of three-lane traffic. **$8 MILLION**

2003: Shanghai's underground Pearl Line, China
Tunnel collapse caused several high-rise office blocks to be damaged or collapse. **$80 MILLION**

2004: Circle Line, Singapore
Collapse of a construction pit resulted in the death of four workers plus the collapse of an adjoining highway.

2005: Orange Line, Kaohsiung, Taiwan
With only a few inches left to be excavated to complete a two-line underground system, a massive inflow of water and sand resulted in the collapse of a large part of the tunnel.

Source: Munich Reinsurance Co.
**$12 million in 1994, $29 million in 1995*

Prices remain stable in construction surety bond market

But subprime crisis may cause problems within months

By STEVEN TUCKEY

The construction surety bond market is stable for most large risks, with little movement in price or coverage terms, though there could be some problems on the horizon, experts say.

While ample capacity remains for most risks, the credit crunch stemming from the U.S. subprime mortgage crisis may overflow into some areas of the surety market within the next year, some say.

The surety market is "solid on all three" in terms of pricing, availability and underwriting profitability, said Geoff Heekin, executive vp and managing director of Aon Construction Services, a division of Chicago-based Aon Corp.

Lynn Schubert, president of the Washington-based Surety & Fidelity Assn. of America, agrees that the sector has been profitable for underwriters for the past couple of years after a rough patch seven or eight years ago. "While there have been some gigantic losses, the industry has for the most part remained profitable," she said.

John Iten, a director at Standard & Poor's Corp. in New York, said surety remained one of the few lines that has maintained pricing in the current soft market for property/casualty insurance.

And construction companies appear to be enjoying the relative stability in the line.

Don Greenland, chief operating officer for Nabholz Construction Co., in Conway, Ark., said his 40-year relationship with his surety provider without a loss has helped keep his surety program off his list of problems.

"But I have heard some concerns, mainly from my subcontractors, that there has been a tightening of requirements such as personal indemnification signatures," he said. In such cases, the personal assets of a contracting company officer are pledged as collateral.

David Hammargren, founding partner of Hammargren & Meyer P.A, an Edina, Minn., law firm that specializes in representing sureties, said most large and established surety buyers can obtain coverage at competitive prices.

"For the more attractive customers who are financially sound, the pricing (of) their bonds is attractive. Those bonds are readily available from a number of standard surety markets," Mr. Hammargren said.

However, smaller, less established contractors may be forced to look into what he termed the nonstandard market, meaning outside the roughly dozen major providers of sureties.

"In those instances, they are facing lower limits and are having to offer collateral in terms of letters of credit and the like," Mr. Hammargren said, which would supplement the limits.

Rick Kinnaird, senior executive-surety at Westfield Insurance Co. in Westfield Center, Ohio, had another perspective. He said competition is heating up in the surety and construction market in general. "This will bring new players to the table with different ideas on how to gain market share," he said.

Some loosening in terms may follow as additional capacity enters the market, Mr. Kinnaird said. But overall, surety underwriting remains much more stringent than five years ago. "For this reason, surety loss ratios in 2006 were the lowest in industry history and should remain good in 2007 and probably into 2008," he said.

Bill Krumm, area vp, bond manager, for Itasca, Ill.-based Arthur J. Gallagher Risk Management Services Inc., said the appetite for surety bond underwriters to cover mid-size contracts—which he defines as between $20 million and $50 million—remains strong.

REUTERS

While there is ample capacity for most risks in the construction surety bond market, broader economic trends could soon affect the availability and price of coverage, some experts say.

It is the larger contracts where problems are arising, he said. "It is the big contracts where we are seeing some problems in terms of aggregating bonds," Mr. Krumm said.

The 2004 merger of St. Paul Cos. Inc. and Travelers Property Casualty Corp. eliminated one large player that could be counted by construc-

See **SURETY** next page

Surety: Prices remain stable, but subprime crisis could cause losses

CONTINUED FROM PREVIOUS PAGE

tion firms involved in projects ranging up to $500 million.

Wider issues facing the surety market include the credit crunch that hit following the subprime mortgage crisis, said Aon's Mr. Heekin.

Despite the "great underlying dynamics over the next 10 years for the residential housing market, near-term concerns are that if there is continued inventory sitting on shelves, there could be a liquidity crisis resulting in defaults," he said.

The largest of the home builders will have options to stave off default, but second- and third-tier builders could find themselves caught in a vise, "and this could translate into losses for surety as well," Mr. Heekin said.

Surety companies likely won't raise prices in the event of defaults, but they could stop providing coverage or "they could also start making collateral calls," he said.

But so far, no defaults tied directly to the recent credit crunch have resulted.

"I don't think we will see any uptick in defaults, if there is any, until the first or even the second quarter of '08. After all, it takes time for defaults to translate into claims and ultimately, losses," Mr. Heekin said.

Ms. Schubert of SFAA is also concerned about the credit crunch and notes that contractors may have trouble obtaining loans, which could put some projects at risk of default. But so far, she has yet to see any evidence of that happening.

David Rhodes, executive vp for the Insco Dico Group, an Irvine, Calif., surety bond provider, said the main housing slowdown-related exposure for the industry is that large developers may have difficulty in selling large tracts of land. In states such as California, developers must put up bonds for all improvements at the outset of a project before selling to other builders, he said.

"But there is a phenomenon that a lot of the cities and towns do not pressure the developer to finish the improvements because they don't want the city streets turned over to them," Mr. Rhodes said. Thus, municipalities often will allow extensions, "so this tends to reduce the exposure to the sureties," he said.

David Carey, chief operating officer of Liberty Mutual Surety, a division of Boston-based Liberty Mutual Group, sees an overall booming construction industry with any contractors suffering from any residential slowdown able to pick up work in some of the lower-end commercial projects.

Mr. Carey sees some sporadic loosening of underwriting standards as competition for surety heats up, but the main threat to the surety industry today remains a severe economic slowdown that could dry up funding for projects now under way, he said.

International NEWS

Asbestos lung plaques not compensable

U.K. high court ruling, however, may open new legal path

By SARAH VEYSEY

LONDON—In its long-awaited ruling on so-called pleural plaques, the United Kingdom's highest court, the House of Lords, last week upheld an appeals court ruling that such claims are not compensable.

Pleural plaques are scarring of the lung membrane caused by exposure to asbestos fibers.

People with lung membranes scarred by asbestos are not compensable for anxiety, the House of Lords ruled.

The Law Lords upheld a 2006 Court of Appeal ruling that the condition has no adverse physical effects and that claimants should not be compensated for anxiety caused by the condition. The ruling was welcomed by insurers, and could reduce future claims by up to £1.4 billion ($2.9 billion), according to accounting firm Deloitte & Touche L.L.P in London.

But labor unions and personal injury lawyers expressed disappointment at the House of Lords decision.

The ruling came at the end of the test case begun in 2004 by Zurich Financial Services and Norwich Union, a unit of Aviva P.L.C.

"Proof of damage is an essential element in a claim of negligence and in my opinion the symptomless plaques are not compensatable damage," Lord Leonard Hoffmann said in the House of Lords' judgment.

The insurance industry is not stepping back from its responsibility to pay out to claimants with genuine injury, said Steve Thomas, technical claims manager at Zurich U.K. General Insurance. Pleural plaques, though, previously represented a situation where the industry was "compensating an asymptomatic condition," he said, adding that the ruling brings finality and clarity.

The London-based Assn. of British Insurers also welcomed the ruling and said that "the insurance industry is fully committed to paying compensation to claimants who suffer from mesothelioma and other asbestos-related diseases."

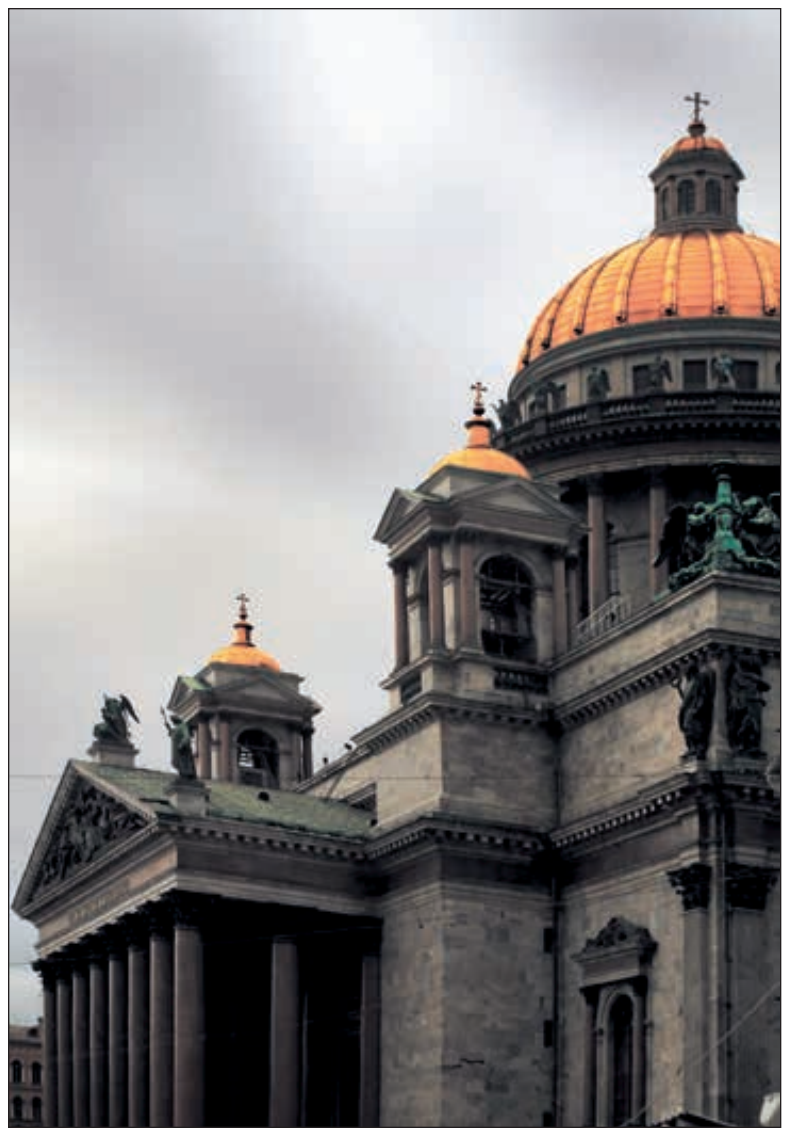
Labor union Unite, which represented employees in the case with London-based law firm Thompsons Solicitors, said in a statement it believed workers had been let down by the House of Lords.

"Unite will continue to fight to recoup damages for those people who have developed mesothelioma and other asbestos-related conditions," Derek Simpson, joint secretary general of Unite, said in a statement.

The London-based Assn. of Personal Injury Lawyers described the ruling as a "final, devastating blow for pleural plaques victims."

"I am absolutely staggered the Lords have dashed the hopes of these men who have been negli-

See **PLAQUES** next page



The insurance market in Russia is projected to grow into a $41 billion business by 2010 in part because of the introduction of compulsory coverages, a Lloyd's of London report concludes.

Russia market rising at 16% annual clip

Regulatory regime improving, though talent in short supply

By RICHARD MILLER

ST. PETERSBURG, Russia—The value of the Russian insurance market is set to double to $41 billion over the five-year period from 2006-2010, according to a Lloyd's of London market intelligence report published last week.

The factors driving a 16% a year growth rate are market consolidation, an improved regulatory regime, increased broker involvement, the development of the Russian reinsurance market and the introduction of compulsory business classes, the report finds.

However, among the market's "significant challenges" are residual public distrust of financial services, inadequate capitalization, low levels of reporting transparency and a lack of qualified insurance professionals, it said.

Massive change

The report, "Russia 2010: A Lloyd's View," was produced in collaboration with Olga Rakhmanina, head of development and consulting at Oslo Marine Group, headquartered in St. Petersburg.

"In common with other sectors, the Russian insurance industry has

See **RUSSIA** next page

London lagging in electronic claim filing

By BEN NORRIS

LONDON—The London-based Market Reform Group said use of the Insurers Market Repository for claims in the London market is behind its usage target and Lloyd's of London has warned businesses that action will be taken against them if they are slow to adopt the electronic processing of claims.

While use of the system by managing agents and brokers currently stands at 45% of the total market volume of in-scope claims, up from 5% at the start of the year, the figure is behind the MRG target of 60% for the end of the third quarter.

> Use of the system stands at **45%** of the total market volume of in-scope claims, up from **5%** at the start of the year. The figure is behind the MRG target of **60%** for the end of the third quarter.

Acknowledging that significant progress has been made, the group said in a statement that the figures will make the year-end aim of 100% electronic notification more challenging.

In reaction, Sue Langley, director of Lloyd's market operations and North America, said in a statement that Lloyd's "shares the disappointment."

Ms. Langley said that "businesses that are slow to adopt (Electronic Claims Files) and (Accounting and Settlement) are letting down the market and could potentially undermine the progress that we are making and poor performance will be acted upon."

"Reforming our processes remains essential to ensuring our future success and competitiveness. We simply have to change," she added.

Ms. Langley announced that she will start to visit the worst-performing managing agents to review why they are not using Electronic Claims Files and ask how they plan to increase use of electronic filing.

Use of the new system, an electronic filing cabinet that enables claims and premiums to be handled quickly and efficiently without paperwork, is a key priority for market reform said the MRG in the statement.

Commentary

E-mail ban encourages cubicle communications

RODD ZOLKOS

Senior Editor Rodd Zolkos can be reached at: rzolkos@businessinsurance.com or 312-649-7784

I've read several stories in the past week or two about an interesting new policy being implemented at a number of companies: e-mail-free Fridays.

It used to be that Friday was "casual day" in many offices, a day on which workers could lose the ties and other accoutrements of "business attire" and dress down a bit. Ultimately, many offices—like ours—adopted full-time business casual, unless some appointment or other business requirement mandates more formal dress.

Like casual day, could e-mail-free Fridays be the thin edge of the wedge toward offices' full-time abandonment of e-mail? Probably not.

But, such initiatives could get people to rethink their use of e-mail, and I guess that's the reason for the Friday e-mail prohibition at many of the companies that have adopted it.

By all indications, the trend started a few years ago. At several companies that adopted the policy, it was born of a desire to deal with overcrowded inboxes short of "e-mail bankruptcy"—deleting the full contents of one's inbox and starting fresh.

Clearly there's more and more e-mail coming in all the time. Information technology market research firm IDC estimated earlier this year that more than 97 billion e-mails will be sent daily around the world this year, with 40 billion of those being spam. That's up from 15.1 billion daily e-mails sent worldwide in 2000.

Besides reducing the contents of the inbox, though, the e-mail-free Friday movement has had a bigger benefit, according to some who've embraced it. It's gotten people at those companies to actually talk to one another, by phone or even, gasp, sometimes face to face.

Most recently it was 150 engineers at Santa Clara, Calif.-based Intel Corp. who planned to embrace "Zero E-mail Fridays."

Announcing the move in a post earlier this month on Intel's IT@Intel blog, Nathan Zeldes, a principal engineer in Intel's information technology group, said the aim is to address a problem Paul Otellini, Intel's president and CEO, set out in a Financial Times interview, "the fact that engineers two cubicles apart send an e-mail rather than get up and talk."

At Intel, like most companies that have adopted similar e-mail policies, the Friday e-mail initiative isn't meant to forbid using e-mail on Fridays as much as it's intended to get people to think about how they use it and modify their behavior.

"We encourage the members of an organic group to focus each Friday on direct conversation—face to face or by telephone—for interpersonal communication within the group," Mr. Zeldes blogged. "Processing e-mail from other groups is OK; sending e-mail within the group is also OK—when it is necessary. But as much as possible, they will try to walk across the aisle or pick up the phone."

There could be a variety of benefits in this new trend toward occasionally 'exploring communication with the human voice.'

The kicker, to me, was this thought in the Intel engineer's post: "While this may seem like a small thing, experiments done in other companies showed a great impact once people started exploring communication with the human voice."

I would think there could be a variety of benefits in this new trend toward occasionally "exploring communication with the human voice." One could certainly envision benefits in terms of company culture and fostering collaboration rather than a sense of working individually.

And, while some things are best put in writing, at times communicating solely by e-mail introduces a real risk of miscommunication and misunderstanding, particularly without the benefit of information that can be communicated in the tone of voice or body language, or in the immediate give and take of an actual conversation.

Thoughts? Send me an e-mail. Or give me a call.

Products & Services

PERI launches program to train local leaders

FAIRFAX, Va.—The Public Entity Risk Institute, a nonprofit risk management training and educational organization, has developed a training program designed to provide local government leaders with a foundation for implementing risk management practices.

Created in partnership with St. John's University in New York, the online training program, Risk Management Basics for Local Government, features a series of nine courses on essential risk management topics: overview of the risk management process, workplace roles in risk management, law and risk management, risk control techniques, claims management, insurance basics for local governments, understanding the insurance industry, how to read an insurance policy and negotiating risk financing arrangements.

Individual courses are available for $29 each and the entire series can be purchased for $203. Bulk discounts may also be available to public sector associations, risk pools and others interested in making the courses available to their members.

The first course, Overview of the Risk Management Process, can be accessed free on the PERI Web site to preview the training program.

For additional information on the Risk Management Basics for Local Government program, visit the PERI Web site at *www.riskinstitute.org*.

Willis introduces D&O coverage model

NEW YORK—Willis Group Holdings Ltd. has launched an analytical tool to help its clients design directors and officers insurance programs.

Working in conjunction with two research firms, Los Angeles-based Audit Integrity Inc. and New York-based Advisen Ltd., the Willis Integrated Solutions D&O Model draws from a large database of historical D&O losses, accounting and corporate governance metrics, high-risk events and stock price volatility to generate loss probability distributions showing the magnitude and likelihood of future losses.

The WISDOM tool then integrates client-specific information relating to risk capacity and risk appetite to determine the D&O insurance program structure.

For more information, contact Alexis Scott, chief operations officer of Willis Executive Risks practice, at 212-915-8238 or by e-mail at *alexis.scott@willis.com*.

Chubb offers business travel accident program

WARREN, N.J.—Chubb Corp. has introduced BTA 360, a new business travel accident insurance program to help companies ensure the well-being of employees traveling on business domestically and abroad.

Although specific coverages for traveling employees depend on the state in which a policy is issued, BTA 360 may include:

- Up to $500,000 for evacuation expenses when a U.S. employee enters a country prior to the U.S. State Department issuing a travel warning for that country.
- Up to $500,000 for the emergency treatment and transportation of a seriously injured or ill U.S. employee to an appropriate medical facility.
- Up to $250,000 for the costs of a ransom demand, hostage negotiation and other expenses when an employee is kidnapped.

BTA 360 also can include reimbursement for lost baggage, items damaged in checked baggage and the emergency purchase of essential items for travelers whose bags have been delayed.

Identity Travel Assistance 911, an identity theft mitigation service, may be included as well. The identity theft service helps employees recover or re-create personal identification documents that have been lost or stolen during business travel.

BTA 360 is being rolled out nationally and is already available to employers in 33 states.

More information can be found at *www.chubb.com/businesses/accident/chubb4688.html*.

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Plaques: Ruling may create new claims

CONTINUED FROM PREVIOUS PAGE

gently exposed to asbestos," said Martin Bare, president of APIL, in a statement. "This ruling effectively tells them they have not been injured, yet their bodies have been invaded by asbestos and each day the clock is ticking," he added.

While in some instances the government previously has stepped in to alter legal rulings on asbestos, it remains to be seen whether it will have any appetite to do so in this case, noted Matthew Hibbert, senior associate in the dispute resolution practice of London-based law firm Lovells L.L.P.

The Law Lords' ruling may, however, open a new "window" of

'This ruling effectively tells them they have not been injured, yet their bodies have been invaded by asbestos and each day the clock is ticking.'

Martin Bare
Assn. of Personal Injury Lawyers

claims, according to Brendan Baxter, an attorney at London-based law firm Reynolds Porter Chamberlain L.L.P.

In their ruling, the Lords may have given claimants another avenue "by unexpectedly flagging up a potential new line of argument—that claimants could sue for breach of contract," he said.

"There is an implied term in employment contracts that staff will have a safe working environment. Exposing them to asbestos dust would breach this term," he said. "Claimants may well decide to go down this route rather than fight on with their existing cases," he said.

Johnston vs. NEI International Combustion Ltd.; Rothwell vs. Chemical and Insulating Company Ltd.; Topping vs. Benchtown Ltd. (formerly Jones Bros Preston Ltd.); 2007 UKHL 39.

Russia: Insurance market sees growth

CONTINUED FROM PREVIOUS PAGE

undergone massive change since 1991," said Ms. Rakhmanina. "We believe if the market is to continue to develop responsibly to meet risk mitigation demands thrown up by the economy's unrelenting growth, it's important for us to establish a bridge between the Russian insurance community and the strategically important London market."

Meanwhile, Trieste, Italy-based Assicurazioni Generali S.p.A. may invest in a Czech private equity firm to become a shareholder of Ingosstrakh, one of Russia's leading insurers.

PPF Investments in Prague, an investment arm of Czech financier Petr Kellner, owns 38.46% of Ingosstrakh through its PPF Beta Ltd. subsidiary.

PPF said last week that it was in "positive negotiations" with Generali Worldwide Insurance Co. Ltd. to acquire a 49% stake in PPF Beta Ltd.

In July, Generali reorganized its central and eastern European operations through a joint venture with Mr. Kellner's PPF Group N.V., which owned Ceska Pojistovna a.s., the largest life and non-life insurance group in the Czech Republic.

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Disclosure: Canadian Court limits directors, officers obligations

CONTINUED FROM PAGE 3

prospectus and closing an IPO, lawyers say.

"It stands for the fact that the language of a statute governs and you don't add to the language," said Alan J. Lenczner, a partner with Lenczner Slaght Royce Smith Griffin L.L.P. in Toronto, who represented Danier in the case. "Businesses can have certainty that they can rely on the statute. They don't have to worry about a judge saying they have to do more."

"I think it means if they comply with the disclosure obligations, they can't be successfully sued," said Ben Zarnett, a partner at Goodmans L.L.P. in Toronto, who represented Danier President, Chief Executive Officer and Director Jeffrey Wortsman and Chief Financial Officer and Secretary Bryan Tatoff in the case.

"Companies and officers should take this as a positive message as long as they're playing by the rules," Mr. Zarnett said.

From a risk management perspective, directors and officers are likely to seek legal advice on what constitutes a material change that requires disclosure, which could lead to increased or earlier disclosures, said Murn Meyrick, vp of the executive risk practice of Willis Risk Solutions in Toronto.

While the Supreme Court had been widely expected to affirm the Court of Appeal's ruling, it "shocked" D&O industry experts with its award of costs to Danier and its officers, experts said.

"I think that the best thing for the D&O industry is that the plaintiff was ultimately held responsible for the costs," said Jordan Solway, regional vp, claims and legal for Arch Insurance Canada in Toronto.

IMPLICATIONS FOR D&O MARKET

The Supreme Court of Canada's ruling in the case of Douglas Kerr vs. Danier Leather Inc. has critical implications for the directors and officers liability insurance market:

- Canadian companies and their directors and officers do not have an obligation to disclose new material facts before the completion of an initial public offering, unless those facts constitute a material change.
- The business judgment rule—when courts defer to the reasonable business judgment of directors and officers—does not supersede legally required disclosure obligations.
- Successful defendants are entitled to recover their legal costs in class action securities claims, barring limited exceptions that did not apply in this case.

Canada's legal system generally operates on a "loser pays cost" basis, meaning that the losing party is responsible for reimbursing the costs of the successful party, although the amount of reimbursement varies by province.

Danier was a dispute between private commercial interests, the Supreme Court said. Under Ontario's class action legislation, a court may award costs in limited situations to ensure parties are not denied access to justice because of a lack of financial resources, including cases that involve a matter of public interest. The Court of Appeal properly determined that the public interest exception did not apply in this case, meaning the defendants are entitled to recover their legal expenses, the Supreme Court ruled.

There had been the expectation that the Supreme Court would rule the case was of significant public importance and the company should pay its defense costs regardless of the outcome, a common view in securities cases, Mr. Dolden said.

The decision will impose some discipline on class action plaintiffs because companies and directors and officers will be eligible for reimbursement of their substantial legal expenses if they prevail in the courts, Mr. Zarnett said.

The Supreme Court, though, also said that the business judgment of directors and officers does not trump their legal obligations to disclose material changes. "It is for the legislature and the courts, not business management, to set the legal disclosure requirements," the Supreme Court said in its ruling.

The Supreme Court clarified the Court of Appeal's position that the trial judge paid insufficient deference to company management's expertise by saying the business judgment rule did not apply in this case and could not be used in this context to determine whether a director or officer had a disclosure obligation, said Ian Rose, a lawyer with Lavery, de Billy L.L.P. in Montreal who practices in the D&O field.

"That's on the negative side for directors and officers, because they cannot use (business judgment) as a shield," Aon's Mr. Rosenbaum said.

Several insurance experts said the ruling could minimize frivolous litigation, leading to fewer D&O claims.

The ruling is unlikely to have an immediate impact on pricing for D&O coverage in Canada, which has been soft this year due to an influx of capacity from foreign insurers, brokers and insurers say.

"If the decision had gone the other way, there's a good chance it would have made the market more unstable," said Garth Pepper, a principal and national leader of the management risk practice for Integro (Canada) Ltd. in Toronto.

In the long-term, pricing could be affected if there are fewer D&O claims being filed, although that could be offset by higher legal costs incurred by defendants who think they will win securities claims and decide to proceed to trial rather than settle, Mr. Pepper said.

Douglas Kerr vs. Danier Leather Inc., Supreme Court of Canada, 2007 SCC44, Oct. 12, 2007

TRIA: Senate to consider 7-year extension

CONTINUED FROM PAGE 1

ington observers say.

"I think the odds are dramatically improved," said Ben McKay, senior vp-federal government relations with the Property Casualty Insurers Assn. of America in Washington.

"We are thrilled with the progress that has been made and now have good reason to be optimistic," said Bradley Wood, senior vp-risk management for Marriott International Inc. in Bethesda, Md.

Still, while last week's developments increase the chances of TRIA being extended before the current law expires at the end of this year, obstacles remain.

"We still have a number of controversial issues left to be reconciled between the House and the Senate, and the coming weeks may be difficult," said Joel Wood, senior vp-government affairs at the Council of Insurance Agents & Brokers in Washington.

Indeed, the Banking Committee bill and the measure approved by the House of Representatives contain several key differences (see box).

While the differences are not insignificant, observers say they can be worked out. "These are issues in which compromises can be found," Mr. McKay said.

Indeed, the risk management community is prepared to accept certain compromises, such as the shorter TRIA extension provision in the Senate panel bill.

"Obviously, a 15-year extension would be better, but a seven-year extension is a perfectly reasonable alternative," said Risk & Insurance Management Society Inc. President Janice Ochenkowski, who also is a managing director at Jones Lang LaSalle Inc. in Chicago.

HOUSE VS. SENATE

Key differences in the TRIA extension bills passed by the House of Representatives and the Senate Banking, Housing and Urban Affairs Committee:

- **LENGTH OF TRIA EXTENSION.** The Senate committee bill would extend TRIA for seven years through the end of 2014, while the House bill calls for a 15-year extension.
- **TRIA TRIGGER.** Under the Senate committee bill, the trigger for the federal backstop would be set at $100 million, the same level in which it currently stands. The House bill would set the minimum trigger for the backstop at $50 million.
- **COVERAGE EXPANSION.** The House bill would require insurers participating in the program to offer coverage for acts of nuclear, chemical, biological and radiological terrorism. The Senate bill calls for a Government Accountability Office study on the feasibility of such an expansion.

Passage of the legislation by the Banking Committee came after several panel members said a TRIA extension was essential to ensure the availability of coverage.

After the Sept. 11, 2001, terrorist attacks, coverage for protection against terrorist attacks "virtually disappeared," said Sen. Dodd. But the federal backstop has assured the availability of coverage, which is vital to the nation's economy, he said.

TRIA is "absolutely essential," said Sen. Bob Bennett, R-Utah, another panel member.

But one panel member—Sen. Wayne Allard, R-Colo., who was the sole panel member to vote against the bill—was not convinced.

"I'm here to say enough is enough," Sen. Allard said, noting that when TRIA was first passed in 2002 insurers said that future extensions would be unnecessary. The original law expired in 2005, but at the end of that year Congress extended it through the end of 2007.

Sen. Dodd countered that such extensions, while not initially contemplated, have been necessary because the private market has not developed.

Gen Re: State judge issues injunction against Arch

CONTINUED FROM PAGE 3

stantial amount" of fac business, with about a third of it coming from what Mr. Franklin had identified to Arch as Gen Re's five largest clients, court papers say.

None of the four officials had employment contracts or noncompete agreements with Gen Re. Nevertheless, the Stamford-based reinsurer sued Arch and the executives variously for breach of fiduciary duties, tortious interference with business contracts and violations of a state trade secrets law.

A temporary restraining order against Bermuda-based Arch was replaced in June by an agreed order under which Arch consented not to use any Gen Re proprietary information.

In August, Arch filed counterclaims against Gen Re, charging that Gen Re has misused the courts to stifle competition from Arch and that it had libeled Arch in communications with clients.

Trade secrets

Last week's injunction, which replaced the earlier agreed order, does not deal with the Arch counterclaims or Gen Re's demand for damages, which are yet to be resolved.

In his ruling, Judge Adams noted that Gen Re had withdrawn initial charges that its former employees physically took proprietary material when they quit.

The judge concluded, however, that the defecting executives made a "concerted effort" to tap their collective memories for loss cost data that Gen Re had developed to price facultative accounts. These memories proved "exceedingly accurate," and Arch was able to replicate Gen Re's loss cost figures in at least a dozen fire risk categories, Judge Adams found.

Arch's use of this information amounted to a misappropriation of trade secrets under state law, the judge concluded. "The lack of both a covenant not to compete and confidentiality agreement does not entitle a former employee to use a former employer's trade secrets in a competing business," he also noted.

In a statement, Arch said Judge Adams has simply required it to "obey the existing law."

"We are pleased that the court made clear that Arch may continue to build its property facultative reinsurance business and compete freely in the market," the statement said.

A trial on the issues is expected to begin next year.

Blackwater: Suing insurance companies over coverage issues

CONTINUED FROM PAGE 1

tive officer, has said the convoy had been fired upon and the guards' response was "appropriate." Iraqi officials, though, have charged that the shooting was unprovoked.

The FBI, the State Department and the Iraqi government are investigating.

The lawsuit, filed in U.S. District Court in Washington, names Mr. Prince; Blackwater's McLean, Va.-based holding company, Prince Group L.L.C.; and various Blackwater divisions engaged in security services, military and police training, aviation, armored vehicle construction and real estate development.

Blackwater's main clients are U.S. government agencies, which have awarded it more than $1 billion in contracts since 2000, according to congressional documents.

Plaintiffs in the suit are the estates of Saed Atban, Usama Fadhil Abbass and Oday Ismail Ibraheem, Iraqi citizens who were killed in Nisoor Square; and Talib Mutlaq Deewan, who was wounded. Each has a family with several children, according to the suit.

The complaint says the Blackwater convoy had already dropped off the State Department official it was protecting before it arrived in Nisoor Square, where the guards fired indiscriminately at civilians without provocation.

Blackwater guards have a record of recklessness in using deadly force, the suit alleges, citing three previous fatal shooting incidents that include one in which an allegedly drunken Blackwater guard killed a bodyguard of the Iraqi vice president.

Two of the lawsuit's seven counts—alleging extrajudicial killing and war crimes—are brought under the Alien Tort Statute, a 1789 law that has been used increasingly in the past two decades by non-U.S. plaintiffs to pursue charges of human rights abuses in U.S. courts.

Other charges in the complaint allege assault and battery, wrongful death and intentional infliction of emotional distress.

Blackwater has not responded to the suit, and a company representative could not be reached for comment.

Blackwater is already in a fight with several insurers over coverage for claims related to the slayings of four Blackwater contractors in Fallujah in 2004.

In that incident, assailants shot the four contractors and the bodies of two of the men were then hung from a nearby bridge.

The families of the four men sued Blackwater for wrongful death and breach of contract for allegedly failing to provide protective gear they should have had. Blackwater, in turn, is suing four insurers for defense and indemnity costs in the litigation under policies in force over various periods between 2003 and 2005.

AP

Blackwater Worldwide faces wrongful death claims over shootings in Iraq.

The insurers named in the suit, filed in U.S. District Court in Philadelphia, are:

- ACE Ltd.'s Westchester Surplus Lines Insurance Co., a Roswell, Ga.-based unit that wrote a general liability policy with limits of $1 million per occurrence and $2 million aggregate.
- Deerfield, Ill.-based Evanston Insurance Co., which wrote a professional liability policy with a $1 million per claim and aggregate limit.
- Continental Insurance Co., a Chicago-based CNA Financial Corp. unit, which wrote workers compensation coverage required under the federal Defense Base Act to insurer employees working under government contracts outside the United States.
- Liberty International Underwriters Inc., a New York-based unit of Liberty Mutual Group Inc., which wrote an umbrella liability policy with a $15 million per occurrence limit.

Westchester and Continental agreed to defend Blackwater under reservations of rights to deny coverage, and have paid more than $1 million to date to the company's principal law firm, the insurers say in their court filings. Blackwater, though, has demanded coverage for an additional $4 million in billings by another 13 law firms, according to Continental, and both insurers have questioned the reasonableness of these demands.

The insurers have also cited various policy provisions that they say exclude coverage in the underlying case.

Continental, for example, argues that its policy covers only Blackwater employees and that the four men killed in Fallujah were contractors working for the company rather than employees.

Evanston cites an exclusion in its policy barring coverage of claims brought against Blackwater by any of its contractors or subcontractors, an exclusion that Evanston says applies to the Fallujah killings.

Westchester and Liberty both have cited the war risk exclusions in their policies. In its latest filing, Liberty points to Mr. Prince's testimony earlier this month before the House Committee on Oversight and Government Reform in which he described Iraq as a "war zone."

Blackwater has filed motions for partial summary judgment, asking the court to rule that Westchester, Continental and Evanston have duties to defend it. Westchester and Continental have asked the court to order discovery on the defense cost dispute, while Evanston and Liberty have asked for rulings that their policies provide no coverage for the Blackwater claims.

The motions are all pending.

Collateral: New York eases requirements

CONTINUED FROM PAGE 1

favorably, said Mr. Vance, who stressed he was speaking on behalf of RIMS and not Sun Microsystems.

The proposal would eliminate an existing New York mandate that reinsurers that are neither authorized nor accredited to conduct business in the state must post collateral equal to 100% of their share of insured claims.

Reinsurers with the highest rating from two of the approved rating agencies would have equal footing with New York-domiciled reinsurers and not have to post any collateral. Reinsurers that are not as financially strong would post collateral based on a sliding scale from 10% to 100%.

The ratings could be obtained from A.M. Best Co. Inc., Fitch Ratings, Moody's Investors Service, Standard & Poor's Corp. or "any other rating agency recognized by the Securities Valuation Office of the NAIC," according to the proposal.

Reinsurers also would have to meet solvency standards and other criteria set by New York's Insurance Department.

While the regulation would apply equally to U.S. reinsurers domiciled in states other than New York, it would mainly affect non-U.S. reinsurers, a spokesman for the Insurance Department said.

New York's plan also would affect policyholders in other states because an insurer conducting business in New York could purchase reinsurance from an insurer operating there under the lowered collateral requirements. The insurer then would be free to apply that capacity to risks underwritten in other states, the spokesman said.

The Insurance Department said its proposed regulation would attract more reinsurance capital to New York, which in turn should help lower costs for businesses purchasing insurance.

Current regulations require a strongly capitalized non-U.S. reinsurer to tie up capital, but does not impose a similar burden on a New York-domiciled reinsurer, even if it is financially weaker, the spokesman said.

Nationwide, non-U.S. reinsurers paid about $500 million in transaction costs to post $120 billion in collateral during 2005, the latest year for which data was available, New York's Insurance Department said.

U.S. insurer groups say New York is shifting risk from reinsurers to insurers. They also argue that reducing or eliminating collateral requirements may reduce capacity rather than increase capacity.

"Nowhere has anybody ever shown that a reduction in collateral will ever increase capacity," said Mike Koziol, assistant vp and counsel for the Property Casualty Insurers Assn. of America in Des Plaines, Ill.

New York's proposal would make it harder for insurers to collect reinsurance if collateral is not available to back a reinsurer, said Steven Bennett, assistant general counsel for the American Insurance Assn. in Washington. "If insurers believe that reinsurance becomes more problematic and more difficult to recover, they limit their purchasing of reinsurance and if you limit your purchasing of reinsurance, you limit what you can underwrite," he said.

But New York's proposal would not prevent insurers from negotiating their own collateral requirements or from choosing reinsurers willing to put up collateral, New York's Superintendent of Insurance Eric R. Dinallo said in a statement.

The move to change New York regulations drew praise overseas.

"It appears to be a significant step forward towards U.S. and non-U.S. reinsurers being treated equally," Sean McGovern, general counsel for Lloyd's of London, said in a statement.

The International Underwriting Assn., which represents insurance and reinsurance companies operating in London, said in a statement that it "wholeheartedly agrees with Insurance Superintendent Eric Dinallo's view that removing unnecessary collateral burdens will make New York a more attractive market to reinsurers leading (to) better quality of cover for the state's residents and businesses."

"This initiative provides a further option to reform and maintains the momentum for change on this important issue for the global reinsurance industry," the IUA's statement continued.

The New York Insurance Department spokesman said the unveiling of its proposal was timed to coincide with the Oct. 16-19 meeting of the International Assn. of Insurance Supervisors in Fort Lauderdale, Fla., which was hosted by the NAIC. New York's initiative could help build momentum for modernizing U.S. reinsurance regulation, he said.

The NAIC has been considering a proposal that would create a two-step process for non-U.S. reinsurers from "equivalent" jurisdictions to become licensed in a U.S. state.

Speaking theoretically, NAIC Reinsurance Task Force Chair John Oxendine said, "The only way a state—like New York—could make it stick is if the transactions were 100% purely intrastate," meaning that the ceding insurer, reinsurer and risk were all based in New York, he said.

If the New York-based ceding insurer wrote business in any other state, it would open the door for that state's regulator to conduct an independent financial analysis of the ceding insurer and possibly disallow credit for the reinsurance, said Mr. Oxendine, the Georgia insurance commissioner.

"Such multiple exams would be burdensome," he said.

Mr. Oxendine said such additional examinations by other regulators would be prudent exercise of their authority to protect ceding companies and consumers within their jurisdictions, and should not be considered a "sanction" against New York. It is "completely premature" discuss whether there is support among commissioners to sanction New York for its proposal, which will have "no impact" on the NAIC task force's deliberations, he said.

However, "It is preferable to work together…and not have states take different paths," which could lead to a "patchwork" U.S. approach to regulating reinsurers, he said.

The Washington-based Reinsurance Assn. of America said it would prefer broad reform that would apply across all states rather than a state-by-state approach, said President Frank Nutter. The NAIC's plan provides a broader approach than New York's because it would set uniform "port of entry" standards whereby a single state could regulate a reinsurer that then could conduct business in all other states.

To adopt the regulation, New York's Department of Insurance must merely publish its proposal, then hold a formal 45-day comment period after completing its current informal comment period, the spokesman said.

Meg Fletcher contributed to this story.

ADVERTISER

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News In Brief

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Statistics. The BLS reported 4.1 million cases of injuries and illnesses in the workplace in 2006, a rate of 4.4 incidents per 100 full-time workers. In 2005, there were 4.6 cases per 100 full-time workers, for a total of 4.2 million incidents, the report said.

House can't override veto of kids' health bill

The House of Representatives last week failed to override President Bush's veto of a bill to expand a government health insurance program for children. The Children's Health Insurance Program Reauthorization Act of 2007 would have increased notification and disclosure requirements and extended the Family and Medical Leave Act for employees with family members injured during military service, among other changes.

Measure would delay pension funding rules

Tougher pension funding rules laid down by last year's sweeping pension reform law set to go into effect on Jan. 1, 2008, would be delayed one year under legislation introduced last week. The lawmakers who introduced the bill said a delay is needed to give the Treasury Department more time to provide guidance to employers on how to comply with the new funding requirements. The PPA, among other things, requires employers to fund their pension plans faster, and creates a new methodology to value plan liabilities.

Japanese rail company securitizes quake risk

East Japan Railway Co. has transferred its earthquake risk to the capital markets through a $260 million catastrophe bond structured by German reinsurer Munich Reinsurance Co. The securitization provides the railroad company with coverage for losses from a major earthquake in Tokyo. East Japan Railway is protected under the bond for property and business interruption losses, according to a statement by Munich Re. The bond, with a term of five years, was issued by MIDORI Ltd., a special purpose vehicle domiciled in the Cayman Islands. It is triggered according to earthquake magnitude values within about a 45-mile radius of a central point in Tokyo.

Munich Re pays $1.3B for U.S. insurer Midland

Munich Reinsurance Co. last week agreed to buy specialist insurer Midland Co. for $1.30 billion. Cincinnati-based Midland had a 2006 premium volume of $832 million, with $112 million of that total representing commercial lines including excess and surplus lines, long-haul trucking, auto rental, and dealer property and inventory, according to a spokeswoman for Munich Re.

Watson Wyatt spins off multiemployer practice

Watson Wyatt Worldwide is spinning off its multiemployer retirement plan consulting practice in the United States and Canada, with the business being taken over by two new firms comprised of current Watson Wyatt employees. Currently, U.S. and Canadian multiemployer retirement consulting is only a small portion of Watson Wyatt business, generating about $15 million in revenues, roughly 1% of the company's total. Watson Wyatt has about 70 multiemployer retirement clients in the United States and Canada. Watson Wyatt executives say operating the practice did not fit with corporate objectives.

Noted

Doctors Co. has agreed to buy **SCPIE Holdings Inc.**, a Los Angeles-based health care and liability insurer for physicians, medical groups and health care facilities has agreed to be bought by Doctors Co., for $281 million.... Linda A. Watters, commissioner of the **Michigan Office of Financial and Insurance Services**, will resign Oct. 31 to join the risk management division of KPMG L.L.P. in Chicago. Ken Ross, deputy commissioner for OFIS policy, will serve as acting OFIS commissioner beginning Nov. 1....The China Insurance Regulatory Commission has endorsed **Chubb Corp.**'s request to convert its Shanghai branch into a wholly owned insurance subsidiary....**James J. Schiro**, chief executive officer of Zurich Financial Services Group, has been named the 2007 Insurance Leader of the Year by the School of Risk Management, Insurance and Actuarial Science at St. John's University.

Schwarzenegger vetoes health cover mandate

By JOANNE WOJCIK

SACRAMENTO, Calif.—California Gov. Arnold Schwarzenegger has vetoed Assembly Bill 8, a measure passed during the regular legislative session that would have required employers to provide health insurance to their employees or pay a tax to the state.

In a statement announcing the veto, the governor said, "This bill does not achieve coverage for all—a critical step needed to reduce health care costs for everyone."

"Instead, A.B. 8 puts more pressure on an already broken health care system and places an unreasonable financial burden on businesses. A 7.5% fee would force employers to shoulder the entire burden of health care reform—a devastating blow to small business in California," the governor said.

Among other things, A.B. 8—which was co-sponsored by Assembly Speaker Fabian Nuñez, D-Los Angeles, and Senate President Pro Tem Don Perata, D-Oakland—would have required all employers to offer coverage to their workers equal to 7.5% of payroll or pay an equivalent tax to the state, which would provide health care coverage to their workers for them.

The veto followed Gov. Schwarzenegger's introduction of his own health reform plan in bill form.

Meanwhile, Gov. Schwarzenegger has vetoed two bills that would have expanded California family leave laws.

Senate Bill 727 would have expanded California's paid family leave program to cover grandparents, grandchildren, parents-in-law and siblings, while A.B. 537 would have expanded the California Family Rights Act to cover the same family members plus adult children who are covered under the current Paid Family Leave program, but not under the California Family Rights Act.

Judy Greenwald contributed to this article.

Letters

CONTINUED FROM PAGE 8

ly flout federal authority, fearless of any penalty.

Protection of the federal rights of RRGs is one reason that the Self-Insurance Institute of America Inc. established the American Risk Retention Coalition. Other objectives of ARRC include modernizing the federal act to allow RRGs to provide property and other coverages to their members.

We are making progress in convincing members of Congress that the LRRA should be modernized to help solve the current crisis in availability of property insurance in many areas of the country, particularly along the Atlantic and Gulf coasts.

If Congress leaves to our industry the enforcement of our rights, ARRC is prepared to sue recalcitrant states in the federal courts to end the "red light" states' obstructionist tactics.

James Kinder
Chief Executive Officer
Self-Insurance Institute of America Inc.
Simpsonville, S.C.

RIMS by any other name

TO THE EDITOR: As a longtime subscriber to *Business Insurance* (starting with your first issues in 1967), I found your 40th anniversary issue (Oct. 8) fascinating reading. However, I found an error of historical importance in the first question in the "Test Your Knowledge of Risk Management" quiz. You asked: "What was the original name of the Risk & Insurance Management Society Inc.?" None of the four options was correct.

The answer you were looking for was the American Society of Insurance Management, but the predecessor name of ASIM was the National Assn. of Insurance Buyers. NAIB was organized shortly after World War II and later morphed into ASIM.

The various names of RIMS mirror the professional evolution of insurance buyers to insurance managers to risk managers.

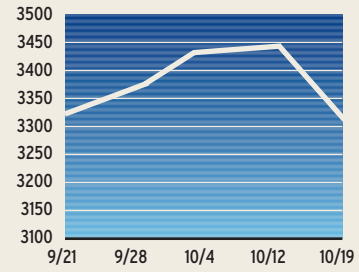
Donn McVeigh
Managing Director
Creative Risk Concepts International
Oakland, Calif.

Stock Index

[10/15- 10/19]

Up-to-the-minute data for all 82 companies that comprise the BI *Stock Index can be found at www.BusinessInsurance.com.*

***BI* STOCK INDEX**



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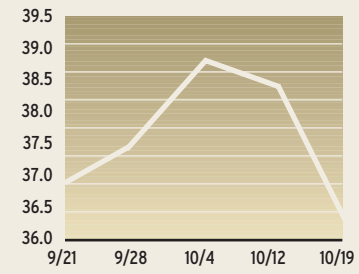

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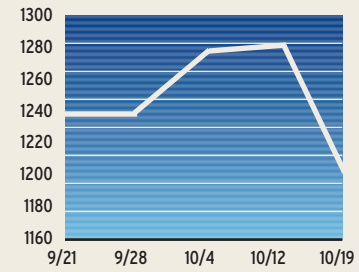
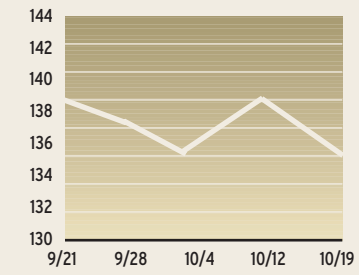


***BI* MANAGED CARE ORGANIZATIONS INDEX**



Percentage change of BI *Stock Index vs. key indicators*

***BI* STOCK INDEX**	
3304.18	-4.18%
DOW JONES	
13522.02	-4.05%
S&P 500	
1500.63	-3.92%

LARGEST GAINS

SCPIE Holdings Inc.	20.32%
Allmerica Financial Corp.	4.04%
UNICO American Corp.	2.58%
Sierra Health Services Inc.	0.61%
Humana Inc.	0.58%

LARGEST LOSSES

Ambac Financial Group.	-16.71%
MBIA Inc.	-14.65%
Old Republic International	-13.34%
Citigroup Inc.	-11.51%
EMC Insurance Group Inc.	-10.24%

Source: Financial Content Inc. http://financialcontent.com

Contributing: Jeff Casale, Louise Esola, Judy Greenwald

Dentistry goes DIY to fill void in English health care

Are you skilled with a sickle probe and mouth mirror? You might have to be if you live in England these days.

A report released by England's Commission for Patient and Public Involvement in Health last week showed that declining numbers of state-funded dentists in England have led some people to resort to self-dentistry. One person surveyed claimed to have used pliers to pull out 14 teeth, while others said they've used Super Glue to replace crowns.

A lack of public funding has forced many dentists in England to go private, the study concluded. As a result, 78% of private patients said they had to go to private dentists because they could not find a National Health Service dentist. Furthermore, 35% of those surveyed said that currently they were not using dental services because

there is not an NHS dentist near where they live.

The commission surveyed 5,000 patients in England and found that 6% have resorted to self-dentistry, while a fifth have gone without treatment altogether because of the cost.

Of the several dentists surveyed, one said that they were not accepting new patients who have a "large amount of work to do" as they do not get paid any more than they do for a patient who has a routine check-up. This seemed to be somewhat of a common theme among the dentists who responded, with one adding that the NHS system is "unfair to some patients and too restrictive to the operator."

The commission plans to share the study's findings with officials from the U.K.'s Department of Health and the British Dental Assn. to see if reforms can be made.

Business Insurance
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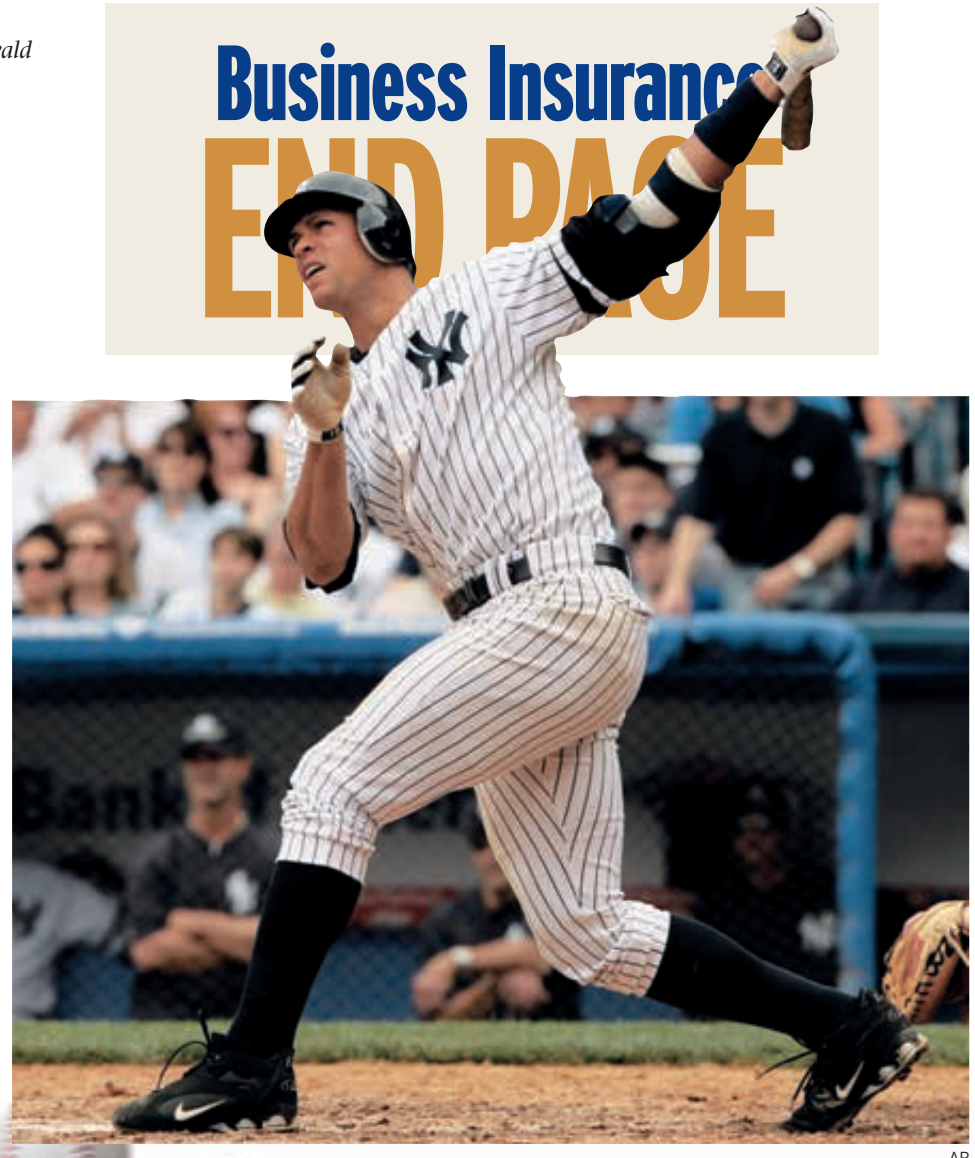

AP

Fantasy baseball leagues have just as much right as Major League Baseball to use the stats of players like fantasy stud and real life superstar Alex Rodriguez of the New York Yankees, a federal appeals court ruled in a case over First Amendment rights.

MLB strikes out in bid to limit use of stats

New York Yankees third baseman Alex Rodriguez's name and booming home run statistics are as much a part of the world of fantasy sports as they are Major League Baseball, a federal appeals court has ruled.

The 8th U.S. Circuit Court of Appeals in St. Louis ruled in favor of fantasy sports league operator C.B.C. Distribution and Marketing Inc., ruling that fantasy leagues have a First Amendment right to use MLB players' names and statistics for free.

Last week's ruling was a big win for the fantasy sports business, which has 125 member companies and an estimated U.S. market of about 19 million adults, according to the Fantasy Sports Trade Assn.

In its February 2005 federal court complaint, St. Louis-based C.B.C. claimed it had the right to use, without license, the names and information of MLB players in connection with its fantasy baseball products.

In a counterclaim, MLB's interactive media and Internet company, Major League Baseball Advanced Media L.P., maintained that C.B.C.'s fantasy baseball products violated rights of publicity belonging to players, who had licensed those rights to Advanced Media through the Major League Baseball Players Assn.

Last year, U.S. District Judge Mary Ann Medler sided with C.B.C. in holding that First Amendment rights "favoring the full and free exchange of ideas" trumped Missouri law on players' publicity rights.

The appeals court upheld the lower court ruling on the First Amendment issue.

Other major sports leagues ranging from the NFL to the NHL to NASCAR unsuccessfully weighed in on behalf of the MLB.

F-bombs in the office help improve some worker relationships

Allowing employees to let loose with some on-the-job swearing can actually benefit employers, a British study concludes.

Regular use of profanity expresses and reinforces solidarity among staff, which enables employees to express their feelings such as frustration, and develops social relationships, concludes the study by Yehuda Baruch, a professor of management at the Norwich Business School at the University of East Anglia in England, and a graduate student.

"We hope that this study will serve not only to acknowledge the part that swearing plays in our work and our lives, but also to indicate that leaders sometimes need to 'think differently' and be open to intriguing ideas," said Mr. Baruch in a statement issued by the university.

"The primary issue for management is whether or not to apply a tolerant leadership culture to the workplace and deliberately allow swearing," he said.

The study, "Swearing at work and permissive leadership culture: When anti-social becomes social and incivility is acceptable," was published in the Leadership & Organization Development Journal.

Video game used to wean little couch potatoes off junk

Can a video game help curb the childhood obesity crisis in the United States? Kaiser Permanente seems to think so.

The Oakland, Calif.-based health maintenance organization, in partnership with Scholastic Inc., last month launched the "The Incredible Adventures of the Amazing Food Detective," a free online video game that challenges its young players to fix the eating and exercise problems plaguing a cast of eight video characters.

For example, players can help 10-year-old Cole, a junk food addict, choose healthy snacks at the virtual school cafeteria. Upon completing the first challenge for Cole, players can play mini-games, like "Whack a Snack," which challenges players to punch out unhealthy snacks, like soft drinks and sundaes.

In a recent television interview on NY1 news station in New York, Ray Baxter, Kaiser Permanente's senior vp for community benefit, said the game was created to shape young minds.

"We've got about 9 million young people right now in this country who are overweight; 75% of them are going to be obese adults and they are going to be at high risk for diabetes, cancer, heart attack, stroke and other chronic diseases," he said. "We need to get to them while their behaviors are being shaped."

The game is available at *www.amazingfooddetective.com* and to ensure players don't spend too much time in front of the computer, the game automatically shuts off after 20 minutes and stays off for an hour.

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