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COVER STORY

When it comes the diversity and inclusion, businesses in the insurance industry have made headway during the past few decades. But women, people of color and other minority groups are still underrepresented at senior levels within the sector. *BI's* annual D&I survey results reveal more. **PAGE 16**

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Risk managers have a role to play during mergers and acquisitions; representations and warranties coverage gains traction as deal-related lawsuits increase; legacy workers comp claims can complicate transactions. **PAGE 22**

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Wary of U.S. juries, foreign insurers are insisting on arbitration provisions in more insurance contracts. **PAGE 4**

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Many policyholders do not understand their rights with respect to the selection of defense counsel, says Lynda A. Bennett of Lowenstein Sandler LLP. **PAGE 27**

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BRUCE CARNEGIE- BROWN

Bruce Carnegie-Brown was appointed chairman of Lloyd's of London in February 2017 and is helping to lead the more than 330-year-old market as it seeks to transition to a new era. In this issue, he discusses the challenges facing Lloyd's in light of recent harassment allegations at some London-based organizations, market developments and plans for a digital future at Lloyd's. **PAGE 15**

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Alien-abduction insurance is on trend in advance of the Storm Area 51 event. **PAGE 30**



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Insurers push arbitration clauses

BY JUDY GREENWALD

jgreenwald@businessinsurance.com

More foreign insurers are insisting on arbitration provisions in their insurance contracts rather than taking the risk of facing U.S. juries, say experts.

Non-U.S. insurers often propose arbitration, which can frequently be utilized more quickly and cheaply, for cyber and representation and warranties policies as well as directors and officers liability and professional liability policies, they say.

Policyholders may be concerned, though, about the arbitrators' objectivity and the inability to appeal their rulings, and believe a jury would be more inclined to view their positions sympathetically. They may, however, be able to negotiate arbitration provisions (see related story).

The Bermuda insurance policy form has always required London-based arbitrations that follow New York law, and it is commonly used in reinsurer-insurer disputes, experts say. But there is more of a push for similar provisions among other non-U.S. insurers.

"They are being used more frequently in London and continental placements," said Stephen Fraser, San Francisco-based managing director with Marsh LLC's U.S. claims practice.

Policyholder attorney Scott N. Godes, a partner with Barnes & Thornburg LLP in Washington, said, "I'm seeing a lot of cyber insurance policies" from insurers outside the United States that have alternative dispute resolution language.

Jeremy M. King, a policyholder attorney with Olshan Frome Wolosky LLP in New York, said he also sees it in arbitration provisions frequently in reps and warranties deals, which involve complex transactions.

"Insurers would rather have arbitrators address their dispute rather than put it to a jury," said policyholder attorney Michael F. Sharkey, a partner with Perkins Coie LLP in Washington.

"It's probably a feeling that juries don't like insurance companies, which is probably why



insurance companies don't like juries. It's probably mutual," said policyholder attorney Vincent E. Morgan, a partner with Pillsbury Winthrop Shaw Pittman LLP in Houston.

"Certainly, you can see non-U.S. insurers for large policyholders" seeking arbitration provisions because "they're constantly scared about the U.S. legal system and the 'judicial hellholes,'" said Larry P. Schiffer, a partner with Squire Patton Boggs in New York.

Mr. King said he believes the appeal of arbitration provisions is that arbitration is cheaper and faster, and gives access to the equivalent of judges who "have expertise in the subject matters" and "know the issues going in, and can do sophisticated dispute resolution," rather than a trial court judge who deals with a "whole range of things."

Observers also say an arbitrator will seldom award bad-faith damages.

But policyholders and their representatives are not always happy with the idea.

"As a policyholder attorney, I always want to be able to enforce my rights in court and make the decision whether arbitration is the right move," Mr. Godes said.

Donna Ferrara, Chicago-based senior vice president and managing director at Arthur J.

Gallagher & Co., said, "I'm a little jaded on the whole concept of arbitration because the ones I've been involved with," directly or tangentially, "took forever, they cost a fortune and the resolutions were not all that favorable."

"At bottom, there's a fundamental belief in the jury system, and if you have a claim that needed to be decided on facts, then a lot of companies trust juries," said Mr. Morgan.

Michael Gallagher, senior vice president and general counsel at New York-based Corporate Risk Solutions LLC, a consulting firm, said in arbitration, rules may be set up so "you don't get the same level of discovery you get in a judicial proceeding," and the number of documents submitted may be limited.

And while an arbitrator may make a decision "on the fly," Mr. Gallagher said he has also been involved in arbitrations that have taken three years.

One issue policyholders may face is a preponderance of arbitrators who are former claims executives, which creates concern about their objectivity, experts say.

As a policyholder advocate, "it was always a concern that the policyholder had access to both a group of potential arbitrators that weren't preinclined to go the insurer's route, and that they weren't current or former insurance executives," and that "in essence" there would be a balanced panel and a fair hearing, said Peter Rosen, a former policyholder attorney who now works as an arbitrator with Irvine, California-based JAMS, which provides mediation services.

The other concern is an inability to appeal an arbitration ruling, said Mr. King. "If you're stuck with somebody whom you feel may not be completely neutral on the issues, you're bound by that decision and have very little recourse in having someone else look at that decision," he said.

Insurers contacted on this issue either had no comment or did not respond to queries.

NEGOTIATE DISPUTE RESOLUTION RULES EARLY

Although non-U.S. insurers are seeking arbitration provisions in their policies more frequently, policyholders may still be able to negotiate for better terms, say observers.

Michael F. Sharkey, a partner with Perkins Coie LLP in Washington, said "There are insurance companies that take a hard line and say they're not going to budge," but he has had some success negotiating the issue and making it optional on the policyholder's part.

Policyholders should bring it up with their brokers early in the process when they are shopping the coverage, he said.

"Typically, the best time for policyholders to address this issue is when negotiating a policy, and so it's something insurance brokers and lawyers who are advising policyholders should be aware of, and focus on, because once your arbitration provision is in your contract, it's not easy to get that set aside," said K. James Sullivan, a policyholder attorney with Calfee, Halter & Griswold LLP in Cleveland.

"We vet each and every single arbiter," said Mark E. Miller of Miller Friel PLLC in Washington. "We check into their background, we understand where they came from, what type of experience they have, and we look into everything about them before we suggest them as a possible arbitrator," he said, adding his firm has achieved good results with such an approach.

Peter A. Halprin, a partner with Pasich LLP in New York, said he prefers "a clear choice of law," such as New York's, that would apply to an insurance policy's interpretation.

In addition, "You want to make sure you've got fair procedural rules, which means allowing both sides to present the evidence necessary to the case" without rushed time limits, Mr. Halprin said.

Judy Greenwald

SHOULD POLICYHOLDERS AGREE TO ARBITRATION?

PROS:

- Often quicker resolutions
- Can be cheaper
- Results are confidential
- Arbitrators are generally knowledgeable about, and comfortable dealing with, complex insurance transactions

CONS:

- Possible bias of arbitrators with insurance industry backgrounds
- Juries may be more sympathetic to the policyholder
- No appeal mechanism
- Rulings do not establish legal precedents or develop case law for future reference because they are private

Source: Business Insurance interviews

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Habitational rates surge amid storm of risks

BY CLAIRE WILKINSON

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Owners, managers and operators of habitational real estate properties such as apartment buildings are facing sharply increasing rates, shrinking capacity and higher deductibles as property insurers look to correct course after mounting weather-related losses compounded an already distressed risk.

Years of low prices and rising losses from wind, hail and tornadoes are finally coming to a head, and the disruption is making it harder to complete insurance programs, experts say.

Multifamily properties can be problematic for insurers due to their 24-hour exposure, experts say. Market capacity for multifamily accounts may have declined by as much as 50%, said Eric Schake, Dallas-based real estate and hospitality leader, corporate risk and broking, Willis Towers Watson PLC.

"It's a very limited marketplace now. You can still get deals done...you can get the capacity, but it comes at a price and with higher deductibles," said Mr. Schake.

The situation has become a "perfect storm" for owners of apartment complexes, most of which are wood-frame construction, said Barry Whitton, managing director, Burns & Wilcox Brokerage, based in Atlanta.

"Habitational is one of those ugly words in the marketplace right now. They're seeing more drastic changes in terms, conditions and premiums in most occupancies," Mr. Whitton said.

From a combustibility standpoint, frame habitational risks require a higher rate and smaller limit, said Mark Reisig, New York-based executive vice president and chief underwriting officer, property at WKFC Underwriting Managers, part of Ryan Specialty Group LLC.

"These risks tend to be unprotected without sprinklers and close to the next building nearby," Mr. Reisig said.



Convective storm losses and fires, many of which are tenant-caused, are driving loss ratios in habitational, said Paul Smith, vice president at AmWINS Brokerage of Georgia LLC in Atlanta.

Even noncatastrophe exposed apartment complexes are seeing rate increases, Mr. Smith said.

"If you're a clean account and have not had a loss, you're still looking at 10% to 20% increases, coupled with deductible changes right now," he said.

"If you've had a loss or poor performance, in some ways all bets are off. We've seen those accounts go for 30% to 50% increases, and it can be more. They're difficult placements. The capacity in the primary layer is much harder to put together," said Mr. Smith.

"When you're used to seeing flat rates over an extended period of time and suddenly it's going up 10% to 15% every six months or so, it's compelling," said Mark Humphreys, vice president of litigation and risk management for real estate developer Watt Cos. in Santa Monica, California, and vice chair of the Risk & Insurance Management Society Inc.'s external

affairs committee.

"We're looking at breaking out our multifamily assets and devising a separate stand-alone insurance program that will probably carry less coverage for a price that would not have been considered two or three years ago," Mr. Humphreys said.

Along with rate increases, insurers are raising deductibles for multifamily properties, experts say.

Even deductibles for perils other than wind and hail have increased, while insurers are also implementing percentage wind/hail deductibles, said Mr. Whitton.

All-other-peril deductibles for apartment complexes have increased to \$100,000 from around \$10,000 a few years ago, he said.

Higher deductibles present a challenge for multifamily owners and operators because lenders may require them to have a lower deductible or retention than insurers are offering, and it's not cost-effective to buy down the deductible, said Mr. Schake.

"They're out of compliance because of the fact that retentions and deductibles have increased ... so they need to get exemptions and waivers to the original loan documents," he said.

Owners and operators are unprepared for the level of increases being charged by insurers, said Marc Reisner, Boston-based multifamily practice leader at Marsh LLC.

"Every one of their investments is at the individual asset level which needs to support its own profit and loss statement. Within a budget there's an expectation of increases in line with inflation at 2% to 3%, but these budgets keep seeing huge swings in expenses when an insurance portfolio is increased 20% to 50% in a given year," Mr. Reisner said.

"It's problematic because it hits the profitability of the asset and it also affects its market valuation," he said.

Record catastrophe losses the last two years mean insurers are paying closer attention to how owners and operators value their buildings for insurance purposes.

"Insurers are now pushing back for increased valuations. They're requiring a longer historical loss experience," said Mr. Reisner.

Multifamily property owners are also experiencing increased rates for casualty insurance due to higher claims, experts say.

Habitational real estate risks are generating more litigation, especially in plaintiff-friendly jurisdictions, said Brian Davidian, Los Angeles-based executive vice president and casualty and habitational expert at R-T Specialty LLC, a unit of Ryan Specialty Group.

"In California, for example, there are favorable laws for tenants, alleging things like habitability and wrongful eviction. It's very easy to sue here and win," said Mr. Davidian.

"It's racking up a lot of expense dollars and insurers are finding it very difficult to defend ... As a result, they're pulling out of the class," he said.

Liability insurance prices are increasing for multifamily assets, but not as much as for property insurance, said Mr. Humphreys. "First party insurance is where I'm seeing a very skittish underwriter class through the industry," he said.

OWNERS, LANDLORDS MUST DO PART TO MANAGE RISKS WITH TOUGH TENANT RULES

Implementing risk management plans is difficult given the 24-hour exposure of multifamily properties, experts say.

"The problem with risk management as it relates to habitational is it's different...because you have a third party living on your property," said Barry Whitton, managing director, Burns & Wilcox Brokerage, based in Atlanta.

Tenant-friendly laws interfere with a landlord's ability to manage risks because

"depending on where properties are located, a landlord has limited rights to enter the apartment," said Mark Humphreys, vice president of litigation and risk management for real estate developer Watt Cos. in Santa Monica, California.

To offset the risks, property management firms are building a renter's insurance program into their leases, he said.

Good risk management protocols involve having the right rules

for tenants, experts say.

"Milk no-smoking policies to the extent you can, no barbecues or grills on decks. Have a good tenant screening process, and make sure your maintenance of properties is sufficient," said Marc Reisner, Boston-based multifamily practice leader at Marsh LLC.

Risk management steps such as having and implementing a maintenance check list or contracting an ice removal and

snow plowing service in winter help tell a narrative to liability insurers, said Brian Davidian, Los Angeles-based executive vice president and casualty and habitational expert at R-T Specialty LLC, a unit of Ryan Specialty Group LLC.

"It's easy to stop someone tripping over a carpet if you give good customer service in maintenance. People sue because owners and landlords are neglecting them," he said.

Claire Wilkinson



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Risks fluctuate for seasonal enterprises

BY MATTHEW LERNER

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With summer in full swing, seasonal businesses such as resorts and theme parks face heightened exposures, but the variety of risks the facilities face across the year require a specialized approach to risk management, experts say.

Keeping underwriters and brokers informed of risk profiles and training for seasonal employees are significant concerns for seasonal businesses, they say. Tailoring insurance programs to provide property and liability coverage that covers the busiest periods also is key, they say, and can be achieved through risk transfer mechanisms such as parametric coverage.

“It’s critical for these types of operations to have an underwriter that completely understands the uniqueness of their operation and really grasps all the different aspects of the business,” said Dallas-based Evan Simmons, senior vice president and regional property/casualty leader for USI Insurance Services LLC.

“I’ve got to be really proactive. I’ve got to put together a statement of values that is very sophisticated,” said Dave Harman, area vice president, Arthur J. Gallagher Risk Management Services Inc., a unit of Arthur J. Gallagher & Co. in Bellevue, Washington. “If I can give the underwriter more information than he ever thought he’d get,” this helps remove uncertainties in the writing and pricing of the coverage.

Properly training the swell of seasonal employees can be a challenge.

“Seasonal businesses must be prepared to train employees around all the important emergency and incident procedures as well as making sure they communicate with those employees, including making sure they have crisis communications that can be quickly executed,” said Jack Holt, risk control consulting director for business resiliency at CNA Financial Corp. in Chicago.

While business volume may vary between vacation seasons and other months for seasonal businesses, insurance is still largely bought on an annual basis.



“Overall values will remain the same and be consistent throughout the year,” Mr. Simmons said.

“There’s still some exposures that remain in the off-season,” said Calvin Sugiyama, risk service specialist for Allianz Global Corporate & Specialty SE in Portland, Oregon. “You still have to protect the building year-round. That space is still someone’s responsibility.”

There are, however, some variations.

A jewelry shop in a casino, for example, could place primary and excess coverage for its inventory, but the excess limits can vary depending on the time of year, Mr. Simmons said. A policyholder can buy \$5 million primary coverage, “and then it will start to ramp up at certain periods and it’s understood through the policy and the underwriting that it will go to \$25 million one month and then \$35 million the next, cap at \$50 million for the peak periods and then drop back off,” he said.

Trov Insurance Solutions LLC offers “on-demand insurance” mainly for personal lines risks for “microdurations,” according

to a San Diego-based Trov spokeswoman.

For example, if a traveler wants to insure a camera during a specific trip, he or she could access the Trov app and secure coverage for any duration, the spokeswoman said. Trov has also expanded its operations and provides insurance for sectors such as ride-sharing, with Waymo and Groupe PSA as partners, he added.

Waymo LLC, a subsidiary of Alphabet Inc., is a self-driving technology development company. It originated as a project of Google before it became a stand-alone subsidiary in December 2016. Groupe PSA is a French multinational manufacturer of automobiles and motorcycles sold under the Peugeot, Citroën, DS, Opel and Vauxhall brands and the second-largest car manufacturer in Europe.

Business interruption insurance can be a key consideration for seasonal businesses to mitigate against lost periods of operation during peak periods, sources said.

“I see contingent business interruption as being a very critical component of the property coverage,” Mr. Simmons said.

“Something really important that I think a lot of business resiliency professionals don’t understand is something called extra expense,” he said, which can be part of business interruption coverage and helps mitigate costs associated with resuming operations, such as temporary building space after a loss.

Business interruption coverage can be extended to cover business income lost due to negative publicity; coverage can be extended to help manage the crisis. For example, if a policyholder has “an event that generates media attention,” such as a resort where a shark bite occurs, lost income and reputational coverage can be secured together with crisis management services, possibly in partnership with a public relations firm, and does not require a physical damage trigger, Mr. Sugiyama said.

Parametric, or index-based coverages, are another tool seasonal businesses can use to transfer risk, said Mr. Harman.

A one-day or weeklong event such as a concert at a theme park can secure coverage for business lost due to bad weather or other interruption, with the trigger linked to an index such as rainfall or temperature.

Parametric coverage can be used “as an additional layer in the tower,” Mr. Simmons said. “This coverage will kick in simply as a result of that weather event.”

Mr. Harman said he has seen interest in a product using an “airborne particulate matter” index as a trigger connected to the closing of some amusement attractions due to smoke from wildfires.

Preparing for named windstorms and making sure Florida projects have hurricane insurance during the hurricane season is important to the construction industry, said Doug Ware, vice president of risk management in Boston for Suffolk Construction Co. Inc., a national contractor.

U.S. AMUSEMENT AND THEME PARKS REVENUE

In millions of dollars



Source: Statista

PLAN FOR NEXT YEAR’S RISKS DURING OFF-SEASON BREAKS

While businesses with seasonal operations may face heightened challenges during busy months, the off-season can provide needed time for maintenance and repairs as well as planning for the next period of operations.

“Do everything you can in the off-season to go into that peak season prepared with business resiliency

planning,” said Jack Holt, risk control consulting director for business resiliency for CNA Financial Corp. in Chicago.

“In the off-season, these parks are planning for the future, they’re planning for their next season and doing maintenance,” said Dave Harman, area vice president, Arthur J. Gallagher Risk Management Services Inc. in Bellevue, Washington.

The off-season also affords repair time, which helped East Coast businesses that suffered losses during Superstorm Sandy in October 2012, he said. Amusement parks and other operations hit by Sandy largely had the entire off-season to rebuild, he said.

“If you have a water park which operates 120 days,” a claim at the end of that

period allows the operation more repair time than a claim at the beginning or middle of the period, Mr. Harman said.

“From the risk management side, it’s all preplanning, way before the season starts,” said Calvin Sugiyama, risk service specialist, for Allianz Global Corporate & Specialty SE in Beaverton, Oregon.

Matthew Lerner

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Infectious disease risks stump employers

BY GLORIA GONZALEZ

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With measles cases increasing more than tenfold in the past three years, employers face a conundrum when dealing with infectious disease outbreaks creeping into the workplace.

Employees sick with a contagious disease may create a health and safety hazard by coming to work, but most employers can only encourage workers to have vaccinations rather than mandate them.

Workplace interactions could also give rise to workers compensation claims if employees can prove they contracted an infectious disease at work, experts say.

Measles is one of the most contagious of all infectious diseases — up to nine out of 10 susceptible persons with close contact to an infected individual will develop measles, according to the U.S. Centers for Disease Control and Prevention. Measles incidents have surged in 2019 (see chart). Current outbreaks are linked to travelers who brought measles back from other countries such as Israel, Ukraine and the Philippines, where large measles outbreaks are occurring, according to the CDC.

The disease can quickly spread in the workplace if employees have not been vaccinated, experts say.

In May and June 2016, for example, a measles outbreak at a U.S. Immigration and Customs Enforcement detention center in Arizona sickened 22 detainees and nine staff, according to a May 2017 CDC report. Staff participation in on-site vaccination clinics initially was low, in part due to federal personnel policies and contractual agreements that do not require staff to be vaccinated. But reports of illness from personnel who had developed measles might have prompted other staff to get vaccinated because by Aug. 4, 2016, 445 staff — 87% — were considered to have evidence of immunity.

“The most important measure for prevention of measles transmission is vacci-



DISEASES ON THE JOB

Work-related infectious diseases in the United States from 2006 to 2015 appeared to be concentrated in specific industries and occupations, especially in health care.

- **66 investigations** of infectious disease occurred in U.S. workplaces
- **12 industry sectors** ranging from agriculture, forestry, fishing and hunting to public administration were affected by infectious diseases
- **14 infectious diseases** including measles, mumps and Ebola were investigated in the health care and social assistance sector

Source: National Institute for Occupational Safety and Health

nation,” said Dr. Marie De Perio, medical officer at the National Institute for Occupational Safety and Health and an infectious disease physician in Cincinnati.

The current measles outbreak caught many employers off guard, and they are scrambling to figure out what they can and should be doing to prevent its spread in the workplace, experts say.

“From the point of view of the employer, their situation is they don’t really know which of their employees are vaccinated and which ones are not,” said Dr. Adrian Hyzler, chief medical officer for Esher,

England-based Healix International Ltd., which offers health care, assistance and risk management solutions to companies in the insurance industry and other sectors.

“If they have a workforce who are working closely together, at a factory for instance, and one of their employees has measles ... people around them who are not vaccinated are very likely to get measles,” he said.

Employers can encourage workers to receive infectious disease vaccinations by offering vaccines on-site or paying for vaccines, but they generally cannot mandate vaccination, except potentially in the health care sector — although even that authority has limitations (see related story).

“They cannot require their employees to get the (measles, mumps, rubella vaccine),” Dr. Hyzler said. “That’s one step too far. If you’re a health care employer, then you can. Say you run a clinic. You can say that all your health care providers must have the MMR and perhaps the hepatitis B (vaccine). They’re able to do that because they come into contact with patients and could transmit the infection.”

Most other employers, however, could be found in breach of employment law if they mandate vaccinations, experts say.

For example, a 2012 informal discussion letter from the U.S. Equal Employment Opportunity Commission’s Office of Legal Counsel stated that an employer covered by the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 cannot compel all employees to get flu shots regardless of their medical conditions or their religious beliefs during a pandemic. The employer must provide a reasonable accommodation for employees who do not wish to be vaccinated, unless doing so would pose an undue hardship under Title VII.

The EEOC has sued several health care employers over their vaccination policies. In June, Memorial Healthcare, which operates a hospital in Owosso, Michigan, agreed to pay \$74,418 to settle a religious discrimination lawsuit in which the EEOC alleged that Memorial violated federal law by refusing to hire a medical transcriptionist who refused flu shots on religious grounds. The transcriptionist offered to wear a mask during flu season, which had been determined an acceptable alternative for those with medical problems with the flu shot, but which the hospital allegedly refused to extend to her, according to an EEOC statement. A Memorial Healthcare spokesperson could not be reached for comment.

“They can certainly educate employees about the safety of vaccinations and why it might be prudent to get the vaccination, but they cannot force employees to get the vaccination,” said Glenn Grindlinger, a New York-based partner with Fox Rothschild LLP, which has represented employers dealing with infectious diseases.

Other infectious diseases can present similar legal or regulatory challenges. In March, the 8th U.S. Circuit Court of Appeals in St. Louis sided with the U.S. Occupational Safety and Health Administration in a lawsuit filed by Wal-Mart Stores East LP, a Walmart distribution center in Alachua, Florida, over two purported violations of OSHA’s bloodborne

MEASLES OUTBREAK COULD POSE REGULATORY CHALLENGES FOR EMPLOYERS

The U.S. Occupational Safety and Health Administration does not have a specific standard covering measles, but agency requirements or regulations could come into play if employers fail to protect their employees from such hazards.

OSHA has used the Occupational Safety and Health Act’s general duty clause to cite employers when no specific standards exist for certain workplace hazards.

To prove a violation of the clause, the secretary of Labor must establish:

- A condition or activity in the workplace presented a hazard
 - The employer or its industry recognized the hazard
 - The hazard was causing or likely to cause death or serious physical harm
 - A feasible and effective means existed to eliminate or materially reduce the hazard
- “Typically for infectious diseases, if OSHA were to get interested — and that’s kind of a big if — they have the power to cite under the general duty clause,”

said Bernard Tisdale, office manager shareholder of Ogletree, Deakins, Nash, Smoak & Stewart P.C.’s Charlotte, North Carolina, office who advises and defends employers on OSHA compliance issues.

The agency could use the clause if measles presented a workplace hazard because there is a known risk involved, but with measles, “I don’t see OSHA getting involved” other than receiving and responding to an employee complaint or investigating a serious outbreak, he said.

Other OSHA requirements may also apply to preventing occupational exposure to measles, according to the agency. OSHA’s personal protective equipment standards in general industry and construction require the use of gloves, eye and face protection and respiratory protection, while OSHA’s bloodborne pathogens standard applies to occupational exposure to some human body fluids, including saliva in dental procedures, which can transmit measles.

The agency is examining a potential

pathogens standard, according to *Wal-Mart Stores East LP v. Acosta*. The standard aims to prevent the transmission of hepatitis B in the workplace by directing employers such as Walmart Inc. to make the vaccine available to all employees with occupational exposures. OSHA alleged the distribution center failed to comply with regulations pertaining to providing hepatitis B vaccinations to employees on a serious injury response team at one of its facilities. An administrative law judge of the Occupational Safety and Health Review Commission ruled the agency met its burden to establish the company had committed both violations and imposed \$26,000 in total penalties, with the 8th Circuit declining to vacate the citations.

"We have thorough bloodborne pathogen safety processes in place at all of our facilities in the country," a spokesperson for parent company Walmart based in Bentonville, Arkansas, said via email. "While we disagree with the court's ruling related to execution of our program at this individual distribution center, we have reinforced the need to comply with these processes at that facility."

Employers can also get into serious legal trouble if they breach the confidentiality of sick employees, experts say.

"When an employer learns that an employee has an infectious disease and could have possibly exposed individuals in the workplace to that infectious disease, there is often a knee-jerk reaction to let employees know about that," Mr. Grindlinger said.

But employers could be found in violation of the ADA, the Health Insurance Portability and Accountability Act and state and municipal privacy rules, he said.

"That is why it's so important to work with your public health authorities, because they will help guide the employer on how to and in what matter to notify individuals that may have been exposed to the infectious disease, including other employees," Mr. Grindlinger said.

Educating employees about infectious diseases is the primary function of an employer during disease outbreaks, and they can access critical information on the CDC website and through local health departments, said Gregory Wilson, Houston-based Southwest regional risk control manager for USI Insurance

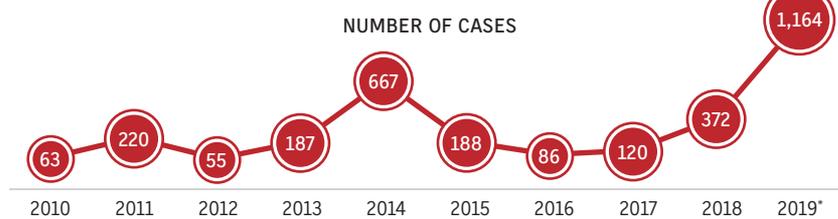
standard for protecting employees in specified industries, such as health care, from measles and other infectious diseases. But it is lingering on the longterm action list, meaning no agency action is expected for 12 months following its publication in the Unified Agenda of Federal Regulatory and Deregulatory Actions, which was last released in May.

"That's not going to get anywhere," Mr. Tisdale said. But "OSHA's website is a fantastic information source," he said.

For example, the agency recently published a new measles safety and

ELIMINATED? NOT SO MUCH

Measles outbreaks have spread across 30 U.S. states to date this year, with the number of individual cases surging past the 1,000-case threshold — the largest number of cases reported in the United States since measles was declared eliminated in 2000.



*As of July 25

Source: Centers for Disease Control and Prevention

Services LLC. Employers can dedicate safety meetings normally geared toward common workplace hazards to discussing infectious diseases, he said.

The level of risk for an infectious disease outbreak in the workplace is tied to factors such as a specific pathogen and how it is spread, as well as specific work environments, said Dr. Ronald Leopold, chief medical officer for Lockton Cos. LLC. For example, a hepatitis A outbreak would be a more troubling risk in a food service or health care environment than it would be in a call center, he said.

"If you're in a white-collar environment, the risk level is rather low," he said.

NIOSH has outlined a hierarchy of controls framework to determine how to implement feasible and effective control solutions for occupational hazards, with hazard elimination being "the most preferred measure" although it is not always possible for infectious agents, Dr. De Perio said.

"The use of personal protective equipment is the least preferred method of prevention and control because it's pretty highly dependent on the employees to use it and to use it correctly," she said, referring to equipment such as face masks.

Employers should immediately put employees sick with a contagious disease on a leave of absence and can require them to stay home from work until they are medically cleared by their physicians — even if they want to work, experts say.

"To an employer, it's a horrible disadvantage to have a contagious employee come to work," said Katherine Dudley Helms, office managing shareholder for the Columbia, South Carolina, office of Ogletree, Deakins, Nash, Smoak & Stewart P.C. who advises employers on ADA and other employment issues.

health topics page that provides an overview of the disease and information on developing infection control plans and prevention measures for workers in general and for those who may be at higher risk, including health care and dental workers, childcare and school workers, and employees traveling abroad.

"What we've tried to do ... not just for measles, but for infectious diseases in general, is try to be ahead of the curve," Amanda Edens, director, OSHA's directorate of technical support and emergency management, told members of

Claiming measles

The spread of measles and other infectious diseases could potentially trigger a workers comp claim, experts say.

"In a location that does not have exposure to infectious diseases ... a claim submitted for an employee that got measles would probably be denied," Mr. Wilson said. "In a health care setting, the workers comp carrier would want to have additional information to conclude that, yes, the employee did contract the infectious disease in the workplace."

An employee would have a hard time proving they contracted measles at work because of the nature of the disease, lawyers say.

"How the person contracted it would be a significant factor in whether workers comp is applicable," Mr. Grindlinger said. "At least in New York, if the individual contracted measles or any other infectious disease from the workplace and they can prove they contracted it from the workplace, which may be difficult to prove, there may be a viable workers comp claim. But in most circumstances that I have dealt with, the individual did not contract the disease in the workplace. They contracted it outside the workplace or they don't know how they contracted because there is an incubation period for most infectious diseases."

"For the disease to be compensable, it has to be something that you aren't going to be in contact with as a member of the public," said Bernard Tisdale, office managing shareholder of Ogletree's Charlotte, North Carolina office. "On the flip side, they might have an argument if the employer knew about it ... and you had more than one person affected. I could see an argument under some state statutes that it might be compensable."

the Advisory Committee on Construction Safety and Health in Washington last month.

"We did the same thing when we started to see Zika cases in the Caribbean. We did the same thing with Ebola even though Ebola never fully got here. OSHA and our federal partners have really ramped up to figure out what would we do if a lot more of these (measles) cases started getting into our health care system and how can we plan to protect our workers," she said.

Gloria Gonzalez

VACCINE MANDATES PROMPT LAWSUITS

Health care employers have a tricky route to navigate in their efforts to mandate employee vaccinations, experts say.

In December, a three-judge panel of the 8th U.S. Circuit Court of Appeals in St. Louis unanimously affirmed the dismissal of a disability discrimination case filed by a health care worker who was fired after she refused to get a measles, mumps and rubella vaccine, according to the ruling in *Janice Hustvet v. Allina Health System*. In 2013, a unit of Minneapolis-based Allina Health System merged with Courage Center in Minneapolis, where Ms. Hustvet worked as an independent living skills specialist. Allina, which declined comment, required Courage Center employees who had patient contact to be vaccinated, but she refused because of allergies and chemical sensitivities.

In June 2018, the 3rd U.S. Circuit Court of Appeals in Philadelphia reinstated disability and retaliation charges filed by a nurse who was terminated after she refused to get a mandatory tetanus, diphtheria, and pertussis vaccine because of anxiety, according to the ruling in *Aleka Ruggiero v. Mount Nittany Medical Center; Mount Nittany Health System*.

Ms. Ruggiero, who worked for State College, Pennsylvania-based Mount Nittany Medical Center, suffers from severe anxiety and inflammation of the esophagus and asked to wear a mask instead of receiving the vaccine. But she was formally terminated in July 2015 and filed suit alleging her former employer violated the Americans with Disabilities Act by failing to reasonably accommodate her and retaliating against her for requesting an accommodation.

The U.S. District Court in Scranton, Pennsylvania, granted the medical center's motion to dismiss the case, but Ms. Ruggiero appealed, with the U.S. Equal Employment Opportunity Commission filing an amicus brief on her behalf.

"EEOC is very anti-mandatory vaccination right now," said Katherine Dudley Helms, office managing shareholder for the Columbia, South Carolina, office of Ogletree, Deakins, Nash, Smoak & Stewart P.C. "They take the position that in most instances there are viable accommodations."

Employers should utilize a free consultation tool provided by the federal government called askjan.org, set up to help determine when and whether reasonable accommodation is available and how to navigate the process, said Adrianna Shannon of Minneapolis-based Shannon Law LLC, who represented Ms. Hustvet but also represents employers.

"If the person could potentially have a disability, you have to go through that reasonable accommodation process," she said, calling the website "a great failsafe to rely on" that could discourage future litigation by employees. "If they're really taking those steps to try to do it right and try to work with the employee, the case will be dead in the water."

Gloria Gonzalez

Broker mergers surge in first half

BY TIMOTHY J. CUNNINGHAM
AND DANIEL P. MENZER

Insurance agency and brokerage acquisitions in 2019 started with a bang in January and finished the quarter ending March 31 with the second-most active first quarter on record. That trend continued in the second quarter with 169 announced transactions, the most of any second-quarter period, and puts the first-half total at 328 transactions, second only to 2017's 333 transactions.

The private equity-backed/hybrid, or PE-hybrid, buyer group — which includes privately owned buyers with material internal or external acquisition financial support in addition to traditional PE-backed firms — far outshined all the other buyer groups, accounting for 214 transactions, or more than 65% of the transactions for the year thus far. There were 66 acquisitions by privately owned firms and 33 by the public brokers.

Caledonia, Michigan-based Acrisure LLC reported the most activity for the first six months of the year with 39 closed transactions, down slightly from the 42 transactions completed during the first half of 2018. Chicago-based Hub International Ltd. was second, completing 26 transactions, down from 33 in 2018. The third-most active buyers this year, Lake Mary, Florida-based AssuredPartners Inc. and Fort Washington, Pennsylvania-based Patriot Growth Insurance Services LLC, a new PE-hybrid buyer this year with a very strong start, both completed 21 transactions through the six months.

The growth trend in sales has been dramatic since 2008 in spite of individual periods of activity pullback, while all but one quarter in the past nine have fallen above the trend line. In fairness to the historical information, like many other activities in the world today, the reporting and capturing of information on agency acquisition activity is better today than it was in the past. But there is no doubt the trend of agency and brokerage M&A activity continues to grow across virtually all sectors of the buyer community.

Property/casualty brokers continued to dominate the sell-side M&A landscape, with 169 of the 328 transactions, or 51%. Employee benefits brokers were the next largest group of sellers, coming in with 82 transactions, or 25%.

Agencies based in Canada continue to grow in count and percent of total, now representing over 8% of the reported transactions. We're seeing more Canadian firms buying up Canadian agencies, as well as several of the larger U.S. firms making concerted efforts in the Canadian marketplace. Second only to the 39 agencies from

TOP BUYERS

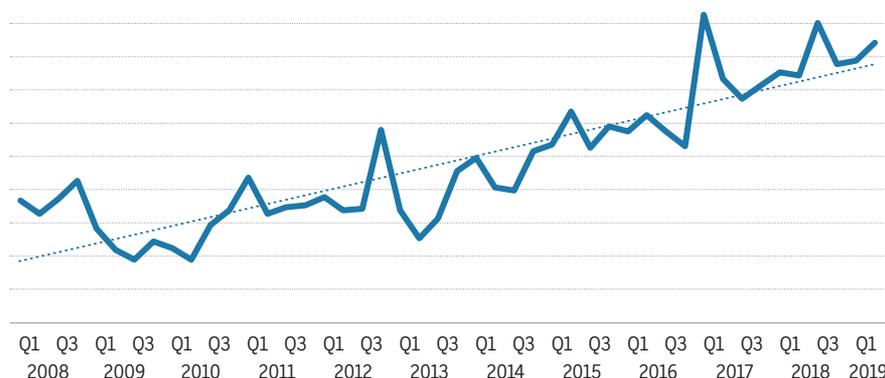
The top 10 most acquisitive buyers of insurance agencies and brokerages in the U.S. and Canada during the first half of 2019 with comparable totals for 2018 and 2017

Buyer	Company type	2017		2018		2019
		1ST HALF	2ND HALF	1ST HALF	2ND HALF	1ST HALF
Acrisure LLC	Private equity/hybrid	48	44	42	59	39
Hub International Ltd.	Private equity/hybrid	21	28	33	26	26
Patriot Growth Insurance Services LLC	Private equity/hybrid	—	—	—	—	21
AssuredPartners Inc.	Private equity/hybrid	12	14	19	18	21
BroadStreet Partners Inc.	Private equity/hybrid	18	14	14	20	18
Arthur J. Gallagher & Co.	Publicly held	19	11	15	21	16
OneDigital Health and Benefits	Private equity/hybrid	5	8	13	11	15
Brown & Brown Inc.	Publicly held	3	5	8	15	11
Alera Group	Private equity/hybrid	27	11	15	13	10
The Hilb Group LLC	Private equity/hybrid	6	8	3	9	9
TOP 10 TOTALS		159	143	162	192	186
ALL OTHER		174	135	138	145	152
TOTAL ALL TRANSACTIONS		333	278	300	337	328

Source: Optis Partners LLC

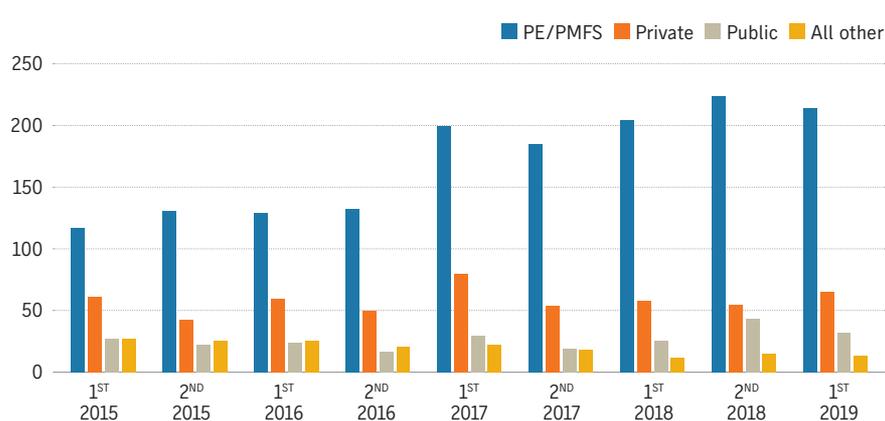
HISTORY OF DEALS TOTALS (2008 – JUNE 2019)

Insurance agency and brokerage acquisitions by quarter



Source: Optis Partners LLC

SEMI-ANNUAL DEALS BY BUYER TYPE (2015 – JUNE 2019)



Source: Optis Partners LLC

California that have sold this year, Canada had 27 sellers, followed by Texas with 25, New York with 23, and Florida rounding out the top five with 15.

So far in 2019, there have only been a

couple of Top 100 agency sales:

- Clearwater, Florida-based Bouchard Insurance Inc. sold to Marsh & McLennan Agency LLC in January.
- Phoenix-based Lovitt & Touché Inc.

sold to Marsh McLennan Agency in April.

- Dallas-based U.S. Risk Insurance Group LLC was acquired by USI Insurance Services LLC during the second quarter.

Current valuations of agencies has made the prospect of internal perpetuation transactions significantly more difficult for agency owners to justify, given the spread between internal value and third-party valuations. Even the most die-hard privately owned agencies are being tested on whether they really want to remain private if an outside buyer is willing to pay 50% to 75% more than owners can get from an internal succession plan. With the agency owner population still creeping up in age, more and more owners are facing the dilemma of wanting to remain private but seeing the kinds of returns that are available in the marketplace today.

Acquisition activity in the insurance distribution field continues to reach new peaks every year. A combination of available and willing sellers and a growing and aggressive group of buyers has made this a very competitive arena for both buyers and sellers. What was once dominated by a few publicly traded firms and a large group of privately owned firms, the PE-hybrid firms with almost unlimited financial backing have radically changed the face of agency owner exit strategies over the past five-plus years. With an industry that is low on capital needs and high on recurring revenue and profitability, where the economy is strong and money is cheap, there really is no end in sight for this dynamic M&A world we're all living in.

But don't fool yourself. It will return to some measure of normalcy, albeit likely not what it was 10 years ago or even five years ago. As the saying goes, whatever goes up must come down at some point, and we are certainly riding high in the market today.



Timothy J. Cunningham and Daniel P. Menzer are principals at Optis Partners LLC, a Chicago-based investment banking and financial consulting firm that serves the insurance distribution sector. Mr. Cunningham can be reached at 312-235-0081 or cunningham@optisins.com; Mr. Menzer can be reached at 630-520-0490 or menzer@optisins.com.

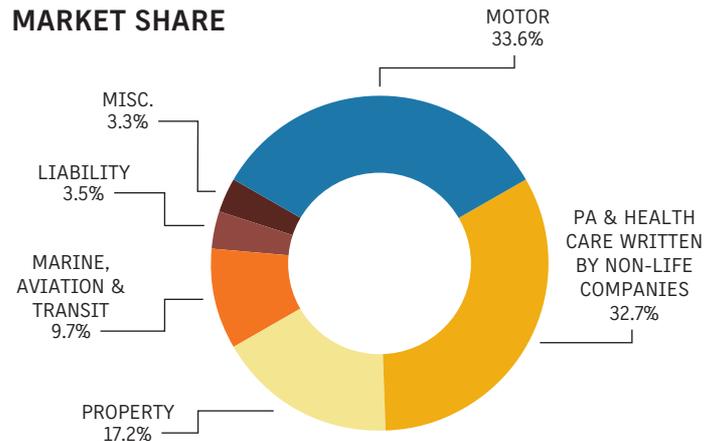
PROFILE: IVORY COAST

103

GLOBAL
P/C MARKET
RANKING

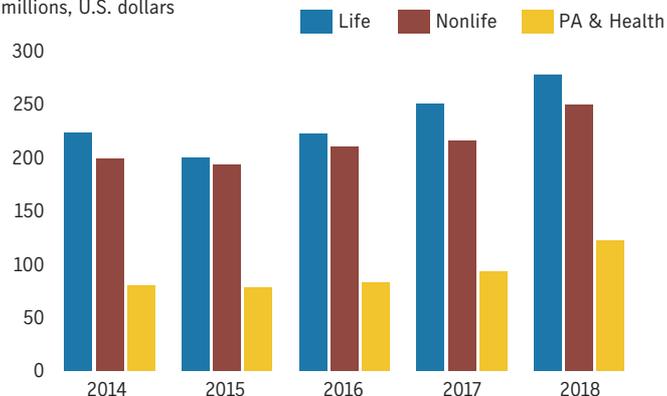
Ivory Coast has the largest economy in the West African Economic and Monetary Union, and the insurance sector is regulated and supervised by the Inter-African Conference of Insurance Markets, or CIMA. The country is the leading market in the CIMA region, with several local and foreign-owned insurers. It has well-developed broking and bancassurance segments and digital-only intermediaries are emerging. A reasonably stable political situation and improving economy with ongoing and planned construction projects could create new insurable risks. In North Africa, insurance tends to be limited to insurers and reinsurers from those countries, and coinsurance among the top five insurers is used for the major risks in the market. Per capita spending on property/casualty insurance remains low, however, with auto insurance being the dominant class.

MARKET SHARE



MARKET GROWTH

In millions, U.S. dollars



Source: Axco Global Statistics/Industry Associations and Regulatory Bodies

COMPULSORY INSURANCE

- Auto third-party liability
- Marine cargo imports
- Professional indemnity for insurance brokers
- Shipowners liability for marine oil pollution
- Workers compensation insurance

NONADMITTED

Nonadmitted insurance is not permitted in Ivory Coast because the law provides that insurance must be purchased from local authorized insurers with the exception of companies that provide specialized insurance services to one or more CIMA member states, although this is subject to supervisory approval.

INTERMEDIARIES

Intermediaries must be authorized to do insurance business. They are not allowed to place business with nonadmitted insurers.

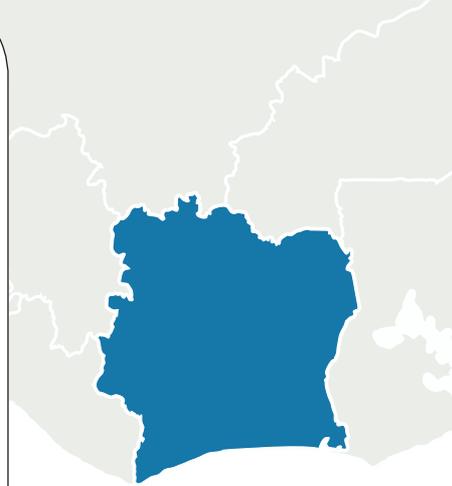
MARKET PRACTICE

There is a concerted effort across the CIMA region to reduce fronting and encourage coinsurance as a means to provide extra local market capacity and retain as much premium as possible locally. Increasingly, European-owned multinational groups operating in Africa have been turning to the larger African insurance groups, as these insurers operate in much of the region and can offer many of the advantages associated with multinational insurance programs.

MARKET DEVELOPMENTS

Updated June 2019

- The insurance brokers association of the Ivory Coast, ANCARCI, joined forces with the Association of Insurance Companies of Ivory Coast, or ASA-CI, in May 2018 to push back on plans announced unilaterally by the insurance supervisor to reduce the maximum commission rates for certain classes of insurance, including auto, health, personal accident, general third party liability and property.
- In May 2018, insurers signed an agreement to rigorously apply the auto third-party liability tariff. Some doubt whether all insurers are respecting the tariff, preferring perhaps to pay any fine if their misdemeanor is discovered.
- The ASA-CI has commissioned consultants to help it develop a five-year strategic plan which, among other things, will consider how to increase insurance penetration and improve the reputation of insurers and understanding of the benefits of insurance.
- Beginning Jan. 1, 2020, regional reinsurer CICA Re's compulsory share of all reinsurance treaties will be reduced to 10% from 15%, but it will receive a compulsory 5% share of all direct premiums.



AREA

122,780

square miles

POPULATION

25.5

million

MARKET CONCENTRATION

64.4%

market share of top five insurers

2019 GDP CHANGE (PROJECTED)

6.6%

Information provided by Axco Insurance Information Services.
www.axcoinfo.com



AIG off the hook in flood dispute

■ A flood sublimit in a property policy applied to all losses arising out of a flood, not just property damage, the 6th U.S. Circuit Court of Appeals in Cincinnati ruled in *Federal-Mogul LLC v. Insurance Company of Pennsylvania*, reversing a lower court's ruling against the American International Group Inc. unit.

Southfield Michigan-based Federal-Mogul LLC operates an automobile parts factory in the Rojana Industrial Park in Thailand. Federal-Mogul bought an insurance policy from the AIG unit in 2010 that provided property damage coverage, which covered direct physical loss or damage to insured property; and "time element" coverage, which covered economic losses directly resulting from property damage. The policy limited liability for losses for "flood for high hazard zones" to \$30 million.

A year later, the factory was damaged in a flood, which caused about \$39 million in property damage and \$25 million in time-element losses. Federal-Mogul filed a claim with AIG, which refused to pay more than \$30 million because, in its view, the flood had occurred in a high hazard zone, according to the ruling.

Federal-Mogul sued AIG in U.S. District Court in Detroit, arguing the \$30 million limit applied only to property damage and that AIG remained liable for the full time-element loss. The District Court granted Federal-Mogul summary judgment in the case, which was overturned by a unanimous three-judge appellate panel.

"The question here is whether the \$30-million sublimit for 'Flood for High Hazard Zones' applies only to the policy's 'Flood' coverage for property damage or rather to all loss or damage arising out of a flood," said the 6th Circuit ruling.

The latter is the case, it concluded. The sublimit "does not expressly say what losses it limits. But in the absence of language restricting the sublimit only to property damage, we read the sublimit — like the general limit — to apply to all losses or damage" arising out of a flood, "regardless

of the number of 'locations' or coverages involved," said the ruling, in quoting the general limit description in the policy.

Needle-stick suit can proceed

■ A woman who was stuck in the buttock by the tip of a hypodermic needle found under the covers of her hotel bed shortly after she checked into her room can proceed with litigation against the hotel, the 4th U.S. Circuit Court of Appeals in Richmond, Virginia, ruled in *Donald Baruch; Emily Baruch v. Starwood Hotels & Resorts Worldwide Inc. et. al.*, reversing a lower court.

Ms. Baruch was pricked by the needle, which was underneath multiple layers of bedding, within five minutes of entering her hotel room. The couple sued Stamford, Connecticut-based Starwood in U.S. District Court in Alexandria, Virginia, charging the chain with negligence. The District Court granted the hotel chain summary judgment dismissing the case, which was overturned by a unanimous three-judge appellate panel.

The hotel failed to demonstrate "that a jury could not reasonably find that the failure to detect and remove a sharp, dangerous object from a hotel guest's bed constitutes a breach of the innkeeper's duty of care," said the ruling, which remanded the case for further proceedings.



Willis cannot be sued in Ponzi scheme

■ Further litigation against Willis Group Holdings Ltd. — a precursor company to Willis Towers Watson PLC — in the \$7 billion Ponzi scheme run by Allen Stanford is barred under an order issued by a lower court in connection with the broker's \$120 million settlement, the 5th U.S. Circuit Court of Appeals in New Orleans ruled in *Antonio Jubis Zacarias, Roberto Barbar v. Stanford International Bank Ltd., et al.*

Mr. Stanford and his associates sold

investors certificates of deposits in Stanford International Bank, according to a 2014 ruling by the U.S. Supreme Court. The investors expected the bank would use the money to buy "highly lucrative" assets, but instead Mr. Stanford and his associates used the money provided by new investors to "repay old investors, finance an elaborate lifestyle and to finance speculative real estate ventures." Mr. Stanford was sentenced to a 110-year prison term.

Defendants in the Supreme Court case included Willis of Colorado Inc. and related Willis companies. The brokers were accused of helping to promote the Ponzi scheme. The Supreme Court held in its ruling that investors in the scheme could sue defendants in the case.

In subsequent proceedings, Stanford's receivership released claims against the Willis defendants in exchange for a \$120 million settlement that was approved by the U.S. District Court in Dallas in August 2017, according to the 5th Circuit. Willis conditioned its agreement on the court issuing a bar order enjoining Stanford-Ponzi scheme related claims against it.

A three-judge panel of the 5th Circuit affirmed the bar enjoining further claims against Willis.

No cover for unnamed business

■ The owner of two businesses who described one on his insurance policy but not the other is not entitled to coverage for litigation filed against the undescribed firm, the 10th U.S. Circuit Court of Appeals in Denver ruled in *Benjy D. Smith v. The Burlington Insurance Co.*, upholding a lower court ruling.

Benjy D. Smith owns and operates both a courier service and security service. In 2015, one of his armed security guards allegedly shot Monroe Bird III while on duty at a Tulsa, Oklahoma, apartment complex, according to the ruling. Mr. Bird later died from his injuries, and his mother filed a wrongful death lawsuit against the security firm.

At the time of the shooting, Mr. Smith had a commercial general liability policy with Burlington, North Carolina-based Burlington Insurance Co. that identified "courier service" as his business.

After the insurer denied coverage for the wrongful death litigation, Mr. Smith sued Burlington in state court, which the insurer removed to U.S. District Court in Muskogee, Oklahoma. That court concluded "the plain language of the policy unambiguously covered only Smith's courier business," said the ruling.

A unanimous three-judge appeals court panel upheld the lower court ruling. The "policy is unambiguous: Smith was the insured, but only with respect to the conduct of his business ... and that business was his courier service," said its ruling.

DOCKET



BAR ON PURSUING RIVAL'S CLIENTS STANDS

Alliant Insurance Services Inc. failed to persuade the Delaware Chancery Court to lift a bar on it pursuing various customers of rival brokerage Lockton Cos. LLC in connection with the alleged poaching of more than two dozen Lockton staff. "Although Alliant's arguments in the Stay Motion were marginally more specific than its broad theme of customer choice, the margin was slim," said the order. "Alliant should not have held these arguments in reserve to deploy in a second bite at the apple if it lost."

JURY AWARD UPHELD IN DRIVER'S DEATH

Ford must pay the widow of a delivery driver who died at Ford Motor's Kansas City assembly plant nearly \$80 million in compensatory and aggravating circumstances damages, a three-judge panel of the Court of Appeals of Missouri, Western District, held in *Ford v. Ford Motor Co.*, affirming a jury award against the Dearborn, Michigan-based automaker. The jury had rejected its argument that David Ford was trespassing in the area where he was killed while delivering vehicle seats. The court noted that Mr. Ford "was not acting in excess of the invitation he had been given."

GRENFELL INSURER LOSES MUNICH RE DISPUTE

An arbitration panel sided with Munich Reinsurance Co. in a dispute over a reinsurance contract covering the property loss related to the Grenfell Tower fire in London. The panel decided against Oslo, Norway-based insurer Protector Forsikring ASA's understanding of the contract, which means the company's 2019 second-quarter results will include a £6.9 million (\$8.6 million) loss related to the fire, but did not award legal costs, according to the insurer's filing with the Oslo Stock Exchange. The fire killed 72 people in 2017.



Bruce Carnegie-Brown

LLOYD'S OF LONDON

Bruce Carnegie-Brown was appointed chairman of Lloyd's of London in February 2017 and took up his role in June of that year following the retirement of former Chairman John Nelson. Mr. Carnegie-Brown, who is also vice chairman of Banco Santander SA, was chairman of price comparison website Moneysupermarket Group PLC from 2014 to May of this year and prior to that was a nonexecutive director of Jardine Lloyd Thompson Group PLC. Mr. Carnegie-Brown recently spoke with *Business Insurance* Reporter Claire Wilkinson about the challenges facing the Lloyd's market, including recent allegations of sexual harassment at London-market companies, and its plans for a digital future. Edited excerpts follow.

Q What is Lloyd's doing about the harassment issues that have happened?

A We didn't know what was going on in the marketplace, so part of the plan is to try to call out the behaviors. The two principal levers for that are a culture survey across the market and a manned helpline that we set up. In many cases, the challenge will be that if we are successful, more of this bad behavior gets called out. It'll feel like issues are getting worse before they get better, but that will be part of the improvement process, that people will be brave enough to call out these issues. The other part is how you deal with it when you find bad behaviors. Because we are a regulator of the market, we have quite a lot of powers to deal with these things. We have beefed up our policies around this, trying to make sure people are on notice both that we have the powers, that we will exercise the powers, and what the scope of our powers is.

Q How do you manage the risk of harassment across a marketplace?

A It's a two-level test. Each of these individuals is an employee of somewhere else. Of course, when bad activity happens, most of it is put in the context of the Lloyd's brand so we've got to have a view on overall standards in the marketplace. While it is the first duty of care of the employer to deal with these issues, what we now are saying to employers is first they must share their data with us. We're asking them to report the number of complaints and how they've dealt with them. One of the challenges is that even when complaints are raised, they often don't go public. I think you have to call these issues out in public if you really want behaviors to change, so we have intervened and now we will see the data from the underlying companies in the market and we can exercise our own judgment on whether the penalties are appropriate.

Q How much of this is embedded in the historic city culture of harassment and daytime drinking?

A There's a reasonable challenge around London — not just insurance,

not just Lloyd's — in terms of whether there's more of a drinking culture in the London market. To me, the right answer is not how do we compare with others, but to set the right standards for the marketplace and have ambition about what those standards should be. We want to create an environment which is attractive for people to come and work in; and if we don't get the best and brightest talent, that's a very poor outcome for the industry and for Lloyd's specifically.

Q What are the various control procedures Lloyd's is putting in place to improve profitability?



A It's easy to default to a view that in 2017 and 2018, the losses are derived from extraordinary natural catastrophe risks. They were above average in terms of their claims over that period, but that disguises two things: one is underwriting discipline and the other is the expense base in the marketplace. We started to tackle the first at the end of last year with a much more stringent performance review of everyone's 2019 plans. There was a reasonable amount of noise around that because many market participants didn't expect us to hold the line as strongly as we did. In the event, we chased out over \$4 billion of what we think of as bad business but at the same time created capacity for more than \$10 billion of potentially new higher-value business in the marketplace. We didn't get out of any lines of business, but we imposed some quite draconian plans on individual syndicates where we couldn't see a path

to profitability in their current strategies. Underwriting discipline is key to improving the performance of the marketplace.

Q What role are rate increases playing in improving profitability?

A It's very hard to say at this point, because so much of 2019 was already written in 2018. The benefits of price rises will only come over time through the years. We point to a small rise in premiums in the first quarter, but it's probably not a good indication of the average rise we would expect through the year. When I talk anecdotally to underwriters in the marketplace in several lines of business, they are experiencing some quite strong rate appreciation. But you've got to analyze that because people don't necessarily tell you everything that's happening in their book, they tell you about the pieces they want to. Much more importantly to me is not the size of the price rises but the consistency of it over time, because that gets to this discipline point. If you have sharp spikes in the market, they typically fade quite quickly, but what we've seen now in Lloyd's is seven quarters of average rate increases to the end of March 2019. That's not in every line and every quarter but on average over the marketplace.

Q What does Lloyd's hope to achieve through the digitization plan?

A This is ultimately about the customer. On average, too much of a premium is lost in placing the business instead of going towards buying the risk protection. We could make this a better deal if we reduced the cost of execution. The best way to do that is through a digital distribution model as an alternative to the traditional distribution model. The digital distribution model does not eliminate the manual or day-to-day interaction of individuals around complex claims. But what we know in the financial services industry is that complex products commoditize over time. Insurance products are commoditizing at a faster and faster pace. In order to be competitive for longer we must provide insurance at a cheaper cost.

We want to create an environment which is attractive for people to come and work in; and if we don't get the best and brightest talent, that's a very poor outcome for the industry and for Lloyd's specifically.

DIVERSITY EFFORTS MAKE HEADWAY

The insurance sector has made progress on diversity and inclusion, but companies still fall well short of equality in several areas

ANGELA CHILDERS

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The insurance industry is more diverse and inclusive than it was 20 years ago, but women, people of color and other minority groups are still significantly underrepresented at senior levels in the sector.

Reach out to potential recruits even earlier

Recruiting a diverse group of future insurance professionals needs to start early, say experts.

“From a recruitment perspective, I think the industry could do a lot more at reaching out to underrepresented groups earlier ... even at the high school level,” said Susan Johnson, chief diversity and inclusion officer for The Hartford Financial Services Group Inc. “We need to put more diverse people out in front of diverse students to show them, this is an industry you want to join and people in this industry look like you.”

According to a 2018 Deloitte Millennial Survey, just a little over a quarter of millennials working in nondiverse workplaces said they would stay beyond five years, but 69% of those working in diverse workplaces said they planned to stay in their positions.

In insurance, internships and entry-level jobs historically have gone to family and friends already in the industry, said Shelley Yim, San Francisco-based managing director at Aon PLC. She is working with a nonprofit charter school in Oakland, California, to expose a broader

base of students to the insurance industry and its opportunities by conducting a career day for the students at the Aon office this fall.

“When we’re talking about talent development with people who are underrepresented, we have to reach them with something that interests them,” said Ms. Yim, who will share her experiences working with Fortune 50 technology firms in the San Francisco Bay Area and traveling the world. Students also learn the role insurance has in evolving businesses like cryptocurrency and gig

economy startups.

“I think there are a lot of things that are sexy about the industry that younger kids would love,” said Liz Walker, director of enterprise risk and global insurance at Chicago-based Groupon Inc., who also believes recruitment should start before college. “I think at its most altruistic, the industry is here to make people and companies more resilient, helping people get through hard times. That social responsibility component ... speaks to what younger people care about.”

Angela Childers

Unconscious bias training, mentorship programs and more recently technological tools help companies develop effective diversity and inclusion strategies, but more work is needed to help the sector attract talent and become more representative of wider society, experts say.

In the early 1980s, when Shelley Yim, San Francisco-based managing director at Aon PLC, began her career, she said women were treated differently than men in the insurance industry, and that “minority women were treated even more differently.”

Diversity and inclusion initiatives were questioned, with conversations revolving around whether these types of programs and initiatives “were worth it,” says Monica Ningen, president and CEO of Swiss Re Canada and the English Caribbean, when she entered the business.

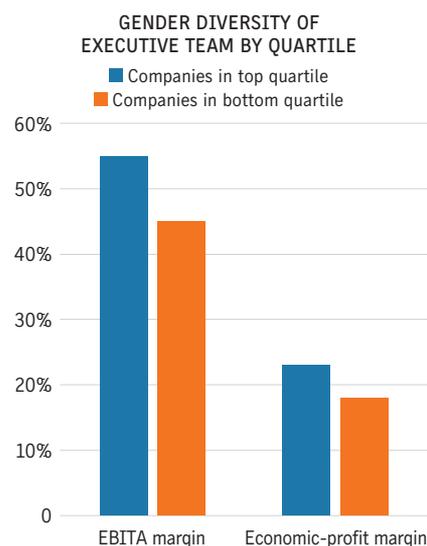
More recently, when Susan Johnson, chief diversity and inclusion officer for Hartford Financial Services Co. Inc., joined the insurer six years ago, she was “taken aback” by the lack of minority representation in the insurance industry.

Jonathan Wheat, middle market account executive in the Los Angeles office of Zurich North America, had a similar experience when he walked into his first day at an insurance training program in Philadelphia about five years ago. As a black recent college graduate, he said he’d never seen a more “homogeneous” group of trainees. “But I think the focus has really shifted ... not just pushing different ethnic groups, but finding the best candidate regardless of where they came from, and trying to see candidates as more than just their grades and schools have allowed a broader group of individuals to be brought in.”

There’s also enough research today showing the advantages of creating a diverse and inclusive work environment has led to its widespread acceptance, said Ms. Ningen. A McKinsey & Co. study found that companies with the most ethnically diverse executive boards had a 33% greater likelihood of increased profitability than companies with the least diverse leadership. “The conversation has con-

GENDER ADVANTAGE

Gender diversity on executive teams is strongly correlated with profitability. In a study in which companies were divided into four equal groups based on their level of gender diversity, those in the quartile with the most gender diverse workforce were more likely to have higher margins, including calculating opportunity cost, compared with those in the least diverse quartile.



verted more to, ‘how do you achieve it?’ and recognizing that it’s not an easy thing to achieve as an outcome.”

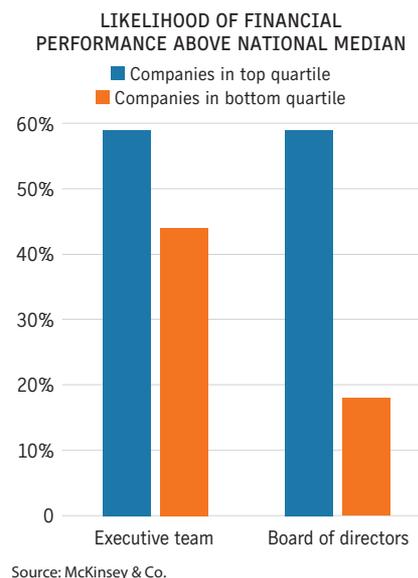
While statistics show that the industry has made strides in gender diversity, people of color make up a small amount of insurance professionals at senior levels.

In a 2017 study conducted by Philadelphia-based St. Joseph’s University, women on insurance boards increased from 12.6% in 2013 to 18.7% in 2017, and more than half of insurers had two or more women on their board. While women comprised more than half of all underwriters, claims adjusters, appraisers and examiners in 2016, according to the U.S. Bureau of Labor Statistics (see chart), and some minorities have significant representation in the industry, many insiders say women and minorities are still disproportionately absent from management jobs.

The representation in insurance is still very much majority white male,

THE BOTTOM LINE BENEFITS

Ethnic diversity in executive teams and boards correlates to stronger profitability. In a study in which companies were divided into four equal groups based on ethnic diversity, those in the quartile with the most ethnically diverse workforce showed a higher percentage of profitability than those with less diverse boards and executive teams.



said Liz Walker, director of enterprise risk and global insurance at Chicago-based Groupon Inc. The broker teams she works with all include women, but there’s little racial diversity on the teams, she said.

“A lot more work needs to be done there,” Ms. Walker said. “I don’t think it’s because of a lack of effort.”

“I don’t think it’s a surprise to anyone across the insurance industry that we have some legacy blind spots that we’ve had to work through over the last decade,” said Alex Amonett, Seattle-based global leader of inclusion, diversity and colleague experience for Marsh LLC. “As we look at the landscape now, we’ve never had a stronger army of leaders and colleagues who understand not only the business case for inclusion and diversity, but are truly embracing their individual responsibility and accountability for moving that dial forward.”

Middle management ranks can cause

roadblocks for diversity strategies, some experts say (see related story).

One strategy being used to create a more diverse workforce is unconscious bias training, said Amy Waninger, founder and CEO of McCordville, Indiana-based Lead at Any Level, a diversity and inclusion consulting firm. Unconscious, or implicit, bias is prejudice in favor of one thing, person or group that is triggered by quick judgments made by the brain.

There’s a significant relationship between implicit bias and real-world behavior, according to an analysis of more than 150 studies published in the Journal of Personality and Social Psychology.

Swiss Re introduced diverse sets of both interviewers and interviewees as a way of removing unconscious bias during the interview process several years ago, said Ms. Ningen. When the company is interviewing candidates, human resources is tasked with making sure that candidates come from a variety of different backgrounds.

“It’s really to ensure that we have a good, diverse slate of applicants ... it doesn’t supersede hiring the best candidate,” she said. “When it comes to interviewers, people have the tendency to like and hire people like them. We look at the panel that’s interviewing and bring diversity into that. We have found that it yields better diverse outcomes.”

Blind resume screening is another strategy for reducing unconscious bias during the hiring process, said Margaret Resce Milkint, managing director of The Jacobson Group, an insurance executive search and staffing company based in Chicago.

“With unconscious bias, everybody knows what it is, everybody knows everybody has it, it’s how do you combat it?” she said. “You do it with intentionality. Being able to educate and create awareness and openness goes hand in hand with belonging.”

Marsh recently introduced an approach to reducing bias through customized diversity and inclusion toolkits. Mr. Amonett said the kits contain information on issues such as creating diverse and inclusive client-facing teams, how to be

COVER STORY

INSURANCE WORKFORCE

In insurance, women comprise a significant percentage of underwriters and claims representatives, but racial and ethnic minorities continue to be underrepresented.

Occupation	Total workers	Women	African Americans	Asians	Hispanics
Insurance underwriters	119,000	59.7%	13.7%	5.3%	6.2%
Insurance sales agents	619,000	51.4%	8.7%	5.3%	11.6%
Claims adjusters, appraisers, examiners and investigators	344,000	57.4%	19.1%	3.7%	10.9%
Insurance claims & policy processing clerks	244,000	82.5%	14.9%	2.6%	14.8%
Total employed in US age 16+	155,761,000	49.9%	12.3%	6.3%	17.3%

Source: U.S. Bureau of Labor Statistics, 2018

cognizant of D&I issues when answering a request for proposal, information on fluency and consistency in inclusive language and tips and competencies that employees can apply to their day-to-day jobs.

Creating mentorship opportunities

Helping underrepresented professionals find a career path and a mentor to help pull them up through ranks remains a challenge in insurance, said Ms. Waninger.

“If we’re only connected to people like us, we pull people like us up and we’re perpetuating the cycle,” she said. “We want to find the next generation of C-suite leaders and help them diversify their networks today, so that over the next 10 or 15 years, they’re bringing people with them from all walks of life. If we just keep mentoring and having coffee with the same people over and over ... the same people who look like us, we’re never going to change this.”

When Bonnie Boone, executive vice president at Arthur J. Gallagher & Co., was rising in the ranks in the industry, she was inundated with requests from women seeking direction. At the time she worked for Marsh, and eventually she created an outreach group for black women in insurance called the African American Female Network for Commercial Insurance. Each month, except during the summer, she hosts a lunchtime phone call with women employed at insurance agencies, brokerages and other companies across the country and in Canada, Bermuda and London. About 225 women participate in the calls, and the network has no dues or prerequisites, other than a phone call with Ms. Boone herself and the verbal pledge to help out others in the group.

What Ms. Boone, who in July was named one of the most influential women in corporate America by Savoy Magazine, would like to see more of is accountability on the part of the industry to work to bring up people of color.

While working for Mountain View, California-based LinkedIn Corp., Charu Sharma noticed a similar lack of mentorship and sponsorship opportunities for women and underrepresented minorities.

“I wanted to make it more accessible for all professionals to get the same access through mentoring,” she said, which led to the development of San Francisco-based NextPlay.Ai, an app that helps pair mentors and mentees. Individuals create profiles and answer a series of questions, which allows the software to create a mentor/mentee match and provides resources to help facilitate conversations. A mentee may request to be matched with a leader who is a woman of color, a working parent, or someone in another area of business that the worker desires to learn about. Currently, NextPlay has about 30 client companies.

Businesses are looking into how to create opportunities for underrepresented groups, and Mr. Wheat said he hopes to see more projects that enable workers to prove their capabilities or low-level leadership roles available to create opportunities for those workers to prove themselves and move up, which will then later broaden the diversity of organizations in upper management.

The key question is how to get executives “not part of ethnic groups to be mentors to younger, underrepresented groups to allow them to build those skill sets?” he said. “I think everyone is trying to figure out that right now.”

“We’re all facing similar challenges ... everyone is concerned about the mass of intellectual capital that will be leaving the industry in the next five to 10 years due to retirement,” said Ms. Yim. “You have to demonstrate that ... you really want to have the best talent, and it has to be diverse because the client base is diverse and becoming more diverse.”

Encourage middle managers to step up

Many insurance executives have embraced diversity and inclusion strategies, but that enthusiasm doesn’t always trickle down the ranks to middle management making day-to-day decisions on who to hire or promote, experts say.

Creating ways to engage middle managers more systemically is a chronic problem in this field, said Susan Johnson, Hartford, Connecticut-based chief diversity and inclusion officer of The Hartford Financial Services Group Inc. “Middle managers always have gazillions of things being asked of them from all stakeholders. Our opportunity in diversity and inclusion is to continue to demonstrate both overtly and covertly that ... this is how to attract the best talent.”

Middle managers often don’t see the need “to be part of the conversation,” said Amy Waninger, a diversity and inclusion expert based in McCordsville, Indiana, who started her career at Boston-based Liberty Mutual Insurance Co.

“From the perspective of a lot of managers, (D&I) looks like one more thing they have to do and it’s not necessarily something that’s a priority for them, either because they’re not being measured on it, they don’t see the value, or there’s a failure to articulate a good business case as to what’s in it for them,” she said.

“It’s sometimes the middle management guy that you work for that won’t give you the opportunity because people by nature like to do business with people that are like themselves,” said Bonnie Boone, executive vice president at Arthur J. Gallagher & Co.. “I’d like to see the industry take some accountability about keeping minorities once they have hired them. We need someone to shepherd them and guide them through the system.”

Shelley Yim, managing director of San Francisco-based Aon PLC, said companies need to demonstrate to newer managers that if they want to “demonstrate that they’re willing to make a personal investment to attract and retain top talent” that may not look just like them.

Angela Childers

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Diversity in the workplace

What women want, how minorities feel

BY ANDY TOH
 atoh@businessinsurance.com

If your company is thinking of embarking on a diversity and inclusion program, your top three priorities, based on the 2019 *Business Insurance* diversity survey, should be to demonstrate fairness in performance and compensation decisions, increase the focus on retention and development of diverse talents, and ensure diversity at all levels of management.

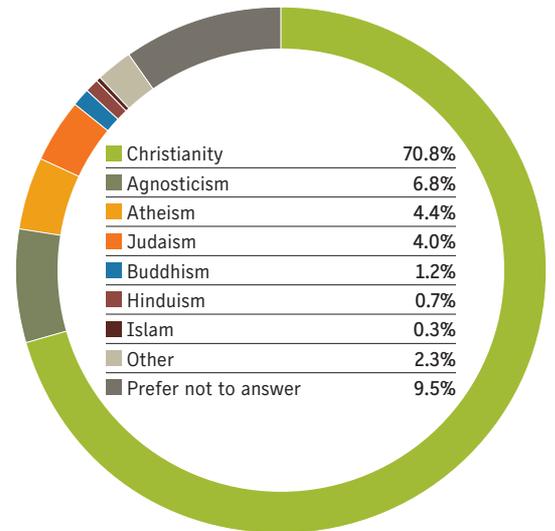
However, priorities may differ depending on who you ask. In the age of the #MeToo movement, *Business Insurance* thought it would be interesting to look at what women want compared with their male colleagues and how minority groups feel differently from their white/Caucasian co-workers.

As in years past, *Business Insurance* commissioned Signet Research Inc. to conduct this year's survey.

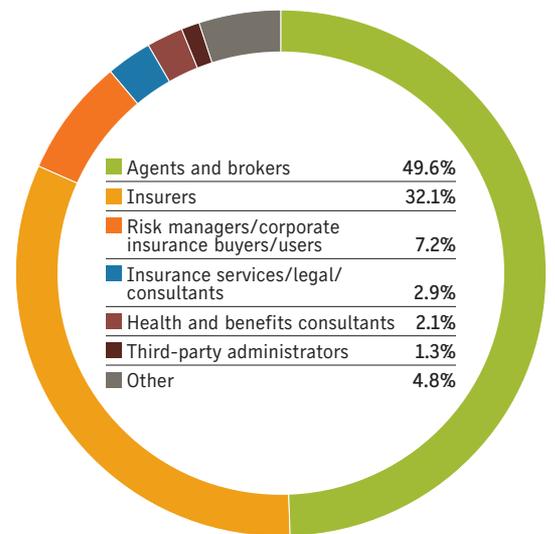
To reach a more diverse sample pool, *Business Insurance* also reached out to its partners, including the National African-American Insurance Association, the Women's Insurance Networking Group, Women in Insurance & Financial Services and members of the *Business Insurance* Diversity and Inclusion Institute to send out the survey link to their respective members. A total of 897 responses were received during the survey period between May 29 to June 20, 2019, including 120 from members of our partners. The base used is the total answering each question from U.S.-based insurance and risk professionals.

Following is the profile breakdown of this year's survey respondents (some percentages may not total 100% due to rounding):

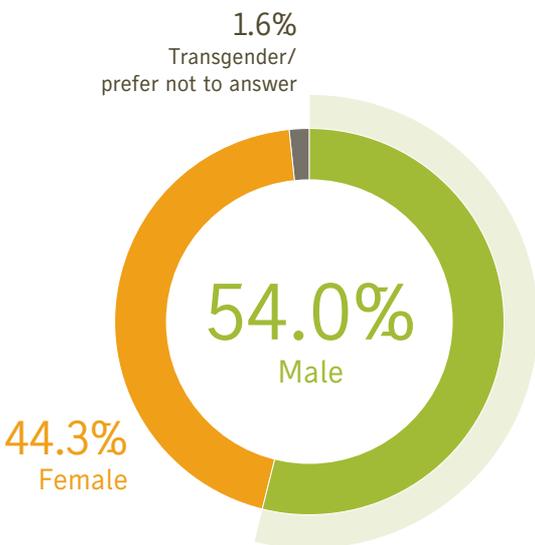
BREAKDOWN BY RELIGION



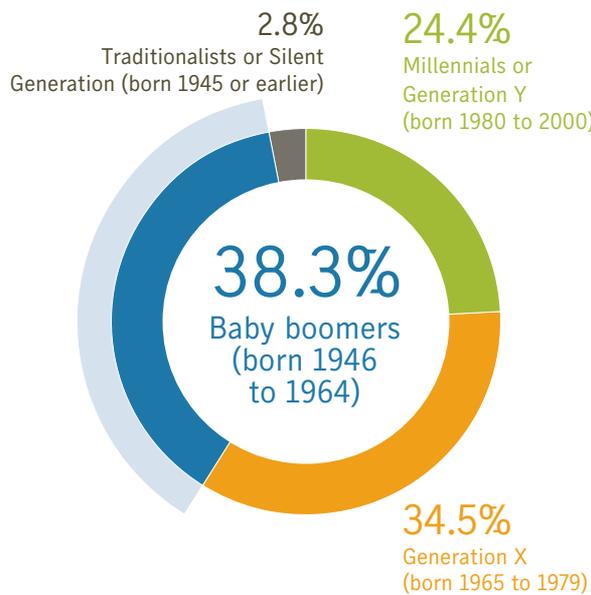
BREAKDOWN BY CATEGORY



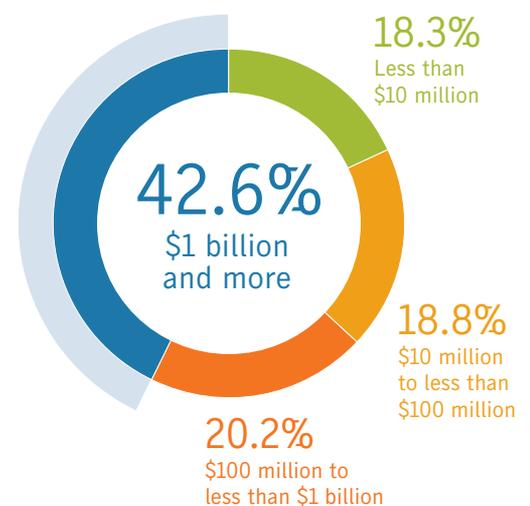
BREAKDOWN BY GENDER



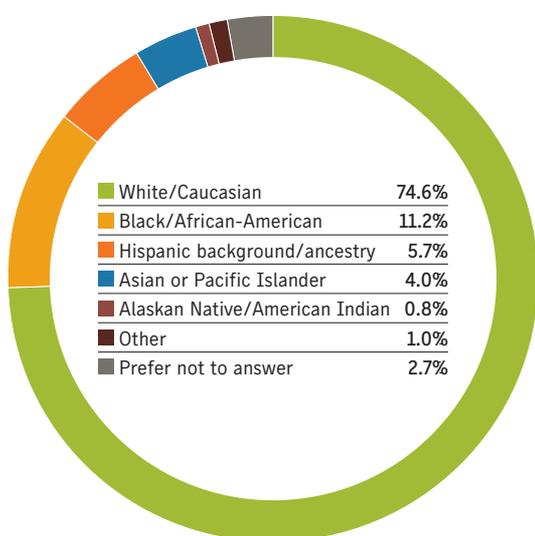
BREAKDOWN BY GENERATION



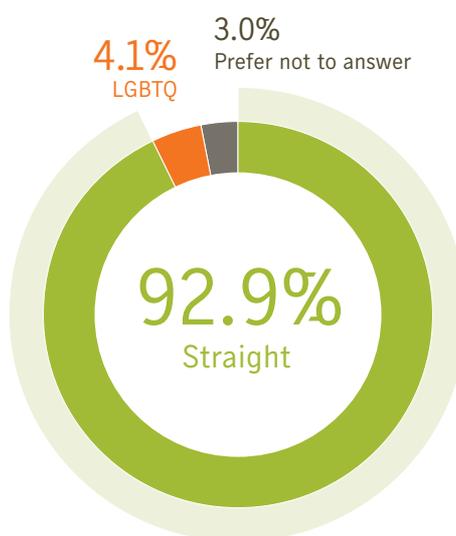
COMPANY SIZE BY ANNUAL REVENUE



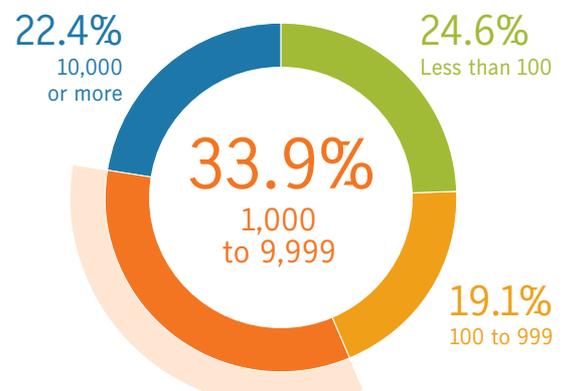
BREAKDOWN BY RACE AND ETHNICITY



BREAKDOWN BY SEXUAL ORIENTATION

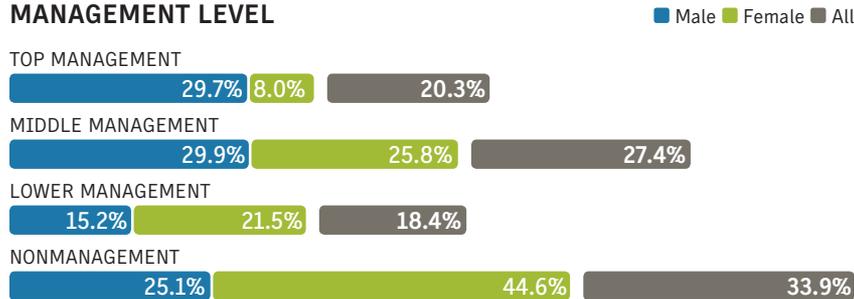


COMPANY SIZE BY FULL-TIME EMPLOYEES

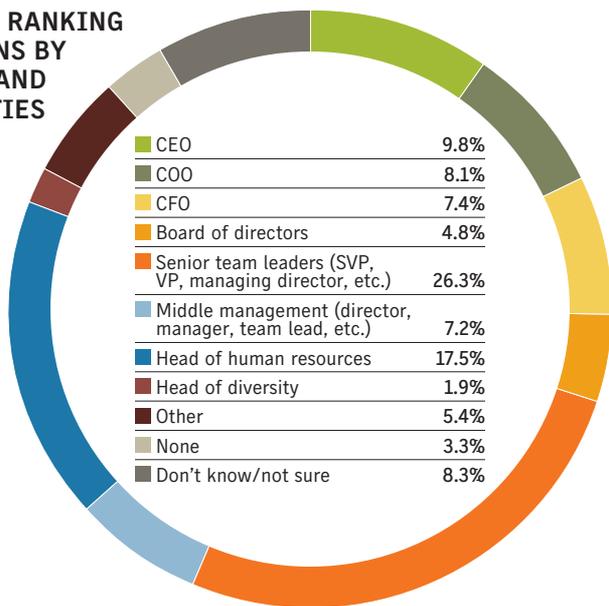


Over 20% of survey respondents said they are in top management positions. However, male respondents were three times more likely than female to respond that they are in top management. Considering that male respondents have been working in the insurance industry for an average of 23.09 years vs. female respondents at 19.57 years, it may take a while longer for more women to reach top management positions. Conversely, 44.6% female respondents said they are in nonmanagement positions compared with 25.1% of male respondents. Almost 10% of survey respondents said the top job in their company, the CEO, is held by a woman or minority person. About 78.5% said women hold top management positions in their organizations, and 13.3% said African-Americans hold some management positions in their companies, making them the highest percentage among minority groups holding management positions.

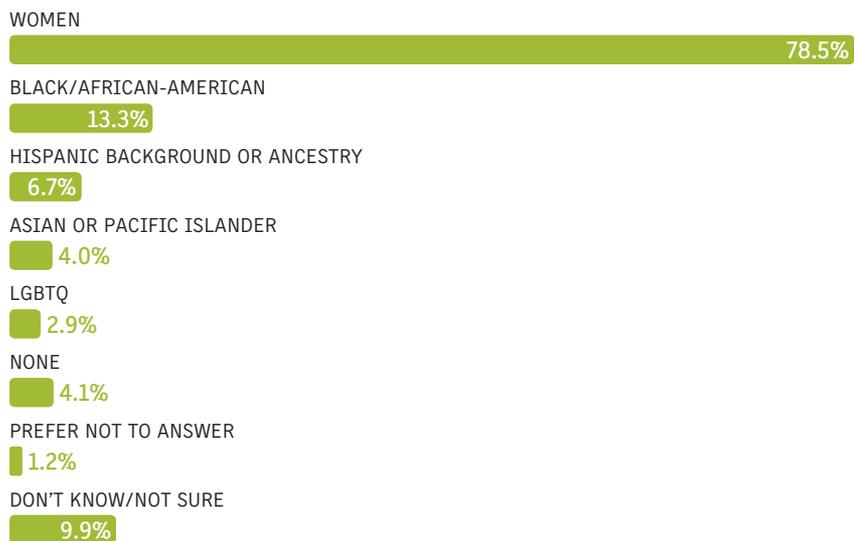
MANAGEMENT LEVEL



HIGHEST RANKING POSITIONS BY WOMEN AND MINORITIES



WOMEN OR MINORITIES IN MANAGEMENT POSITIONS



The top challenges to diversity included the lack of diverse job candidates, lack of understanding of what diversity can do for the industry and lack of consistent leadership on the issue.

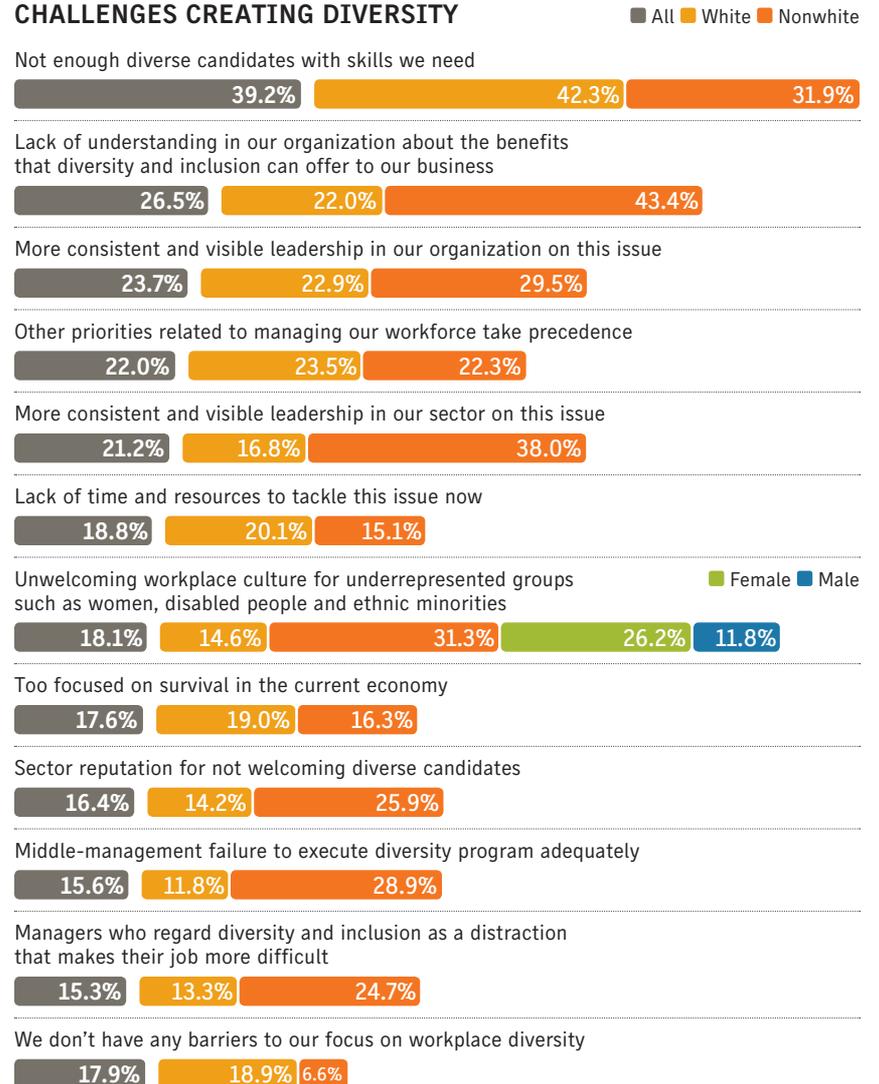
However, among nonwhite minority groups, which include black/African-Americans, Hispanic background/ancestry, Asian or Pacific Islander, Alaskan Native/American Indian and others, 43.4% see the lack of understanding in their organization

about the benefits that diversity and inclusion can offer to the business as the biggest challenge, compared with only 22.0% of white respondents.

Minorities, 38%, also think that there needs to be more consistent and visible leadership on the issue, and 31.3% even feel that there is an unwelcoming culture for underrepresented groups, such as women, disabled people and ethnic minorities, which rounds out the top three challenges for diversity and inclusion — and not due to the lack of diverse job candidates, which is what their white counterparts, 42.3%, think is the biggest challenge to having a diverse workforce.

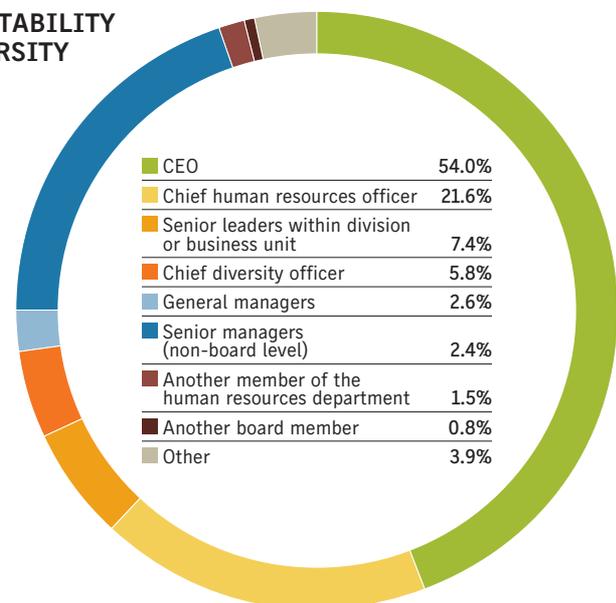
And compared with their male colleagues, 11.8%, women are also twice as likely to respond that they feel an unwelcoming workplace culture for underrepresented groups at 26.2%.

CHALLENGES CREATING DIVERSITY



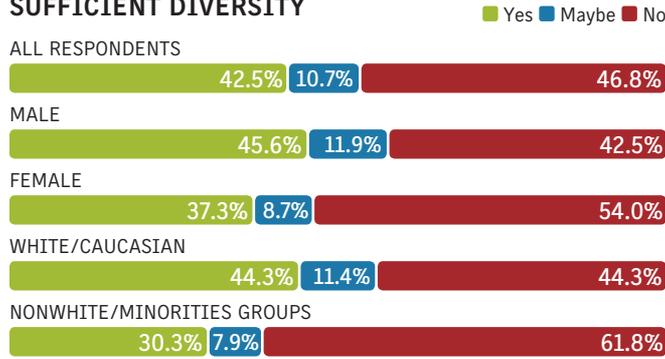
Fifty-four percent of the total respondents said CEOs should be accountable for their company's diversity, and 21.6% said it should be the chief human resources officers. In other words, three-quarters of the respondents felt that their companies' cultures, specifically on diversity and inclusion, are on the shoulders of these two top leaders.

ACCOUNTABILITY IN DIVERSITY

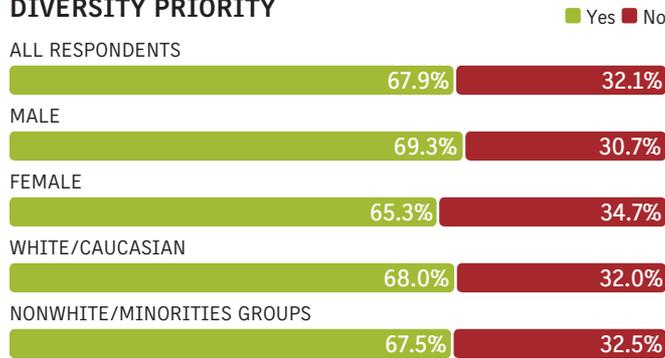


Female respondents and minority respondents were significantly more likely than male respondents and white/Caucasian respondents to feel that there is insufficient diversity. However, a majority — more than 60% — in all groups felt that their organizations do recognize diversity and inclusion as a business priority.

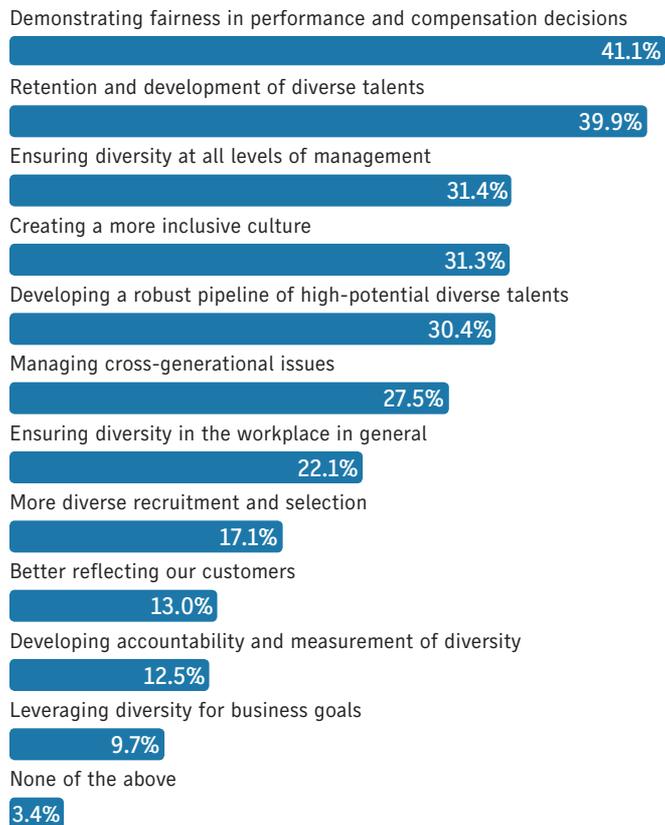
SUFFICIENT DIVERSITY



DIVERSITY PRIORITY

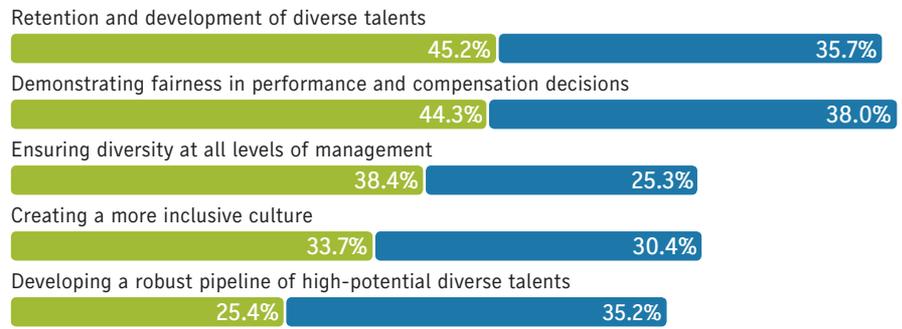


TOP PRIORITIES SHOULD BE

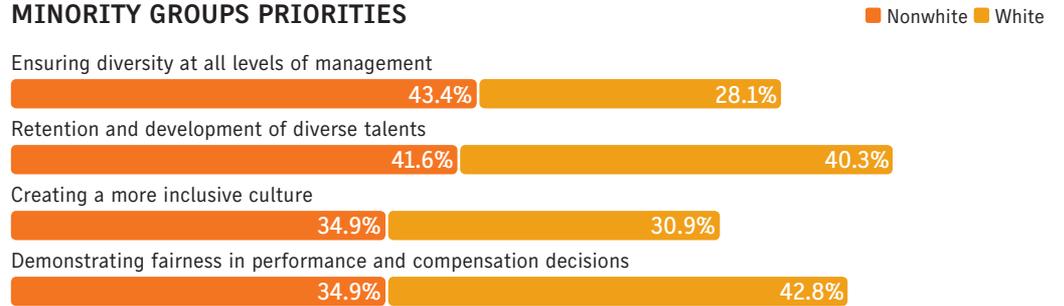


However, top priorities changed with different groups. When asked what the top priorities should be, male respondents and white/Caucasian respondents, 38% and 42.8% respectively, tend to think that demonstrating fairness in performance and compensation decisions should be the most important priority for diversity/inclusion efforts in the insurance industry. Female respondents, at 45.2%, feel that retention and development of diverse talents should be the most important, while nonwhite minority groups, at 43.4%, think that ensuring diversity at all levels of management should be the top priority, including more than half of black/African-Americans, at 53.7%, feel that should be the top priority.

WOMAN PRIORITIES



MINORITY GROUPS PRIORITIES



Sixty-five percent of the total respondents think that their companies' diversity programs are effective overall, though male respondents — 70.4% — are more likely to think that the program is either very or somewhat effective compared with their female colleagues at 58.2%. White respondents — 66.1% — are also more likely to rate their companies' diversity programs as very effective or somewhat effective compared with nonwhite minority respondents at 60.9%.

Consequently, male respondents and white respondents are also more likely to rate their companies' diversity efforts good or very good across all categories compared with female respondents and minority respondents.

DIVERSITY PROGRAM EFFECTIVENESS

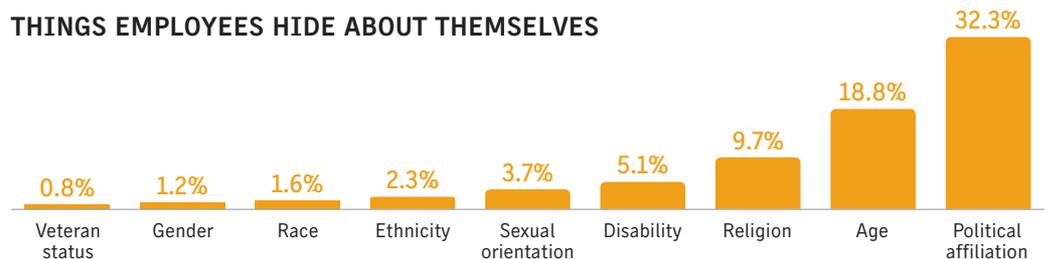
	All	Male	Female	White	Nonwhite
Very effective	23.1%	28.0%	15.4%	23.0%	20.5%
Somewhat effective	41.7%	42.4%	42.8%	43.1%	40.4%
Not very effective	14.8%	11.9%	18.2%	13.9%	18.1%
Not at all effective	5.7%	4.5%	7.7%	4.6%	10.8%
Not sure/don't know/not applicable	14.7%	13.1%	16.0%	15.4%	10.2%

DIVERSITY PROGRAM EFFORTS — GOOD OR VERY GOOD

	All	Male	Female	White	Nonwhite
Gender	66.8%	72.4%	60.6%	69.4%	60.5%
Age	58.8%	66.9%	49.4%	62.5%	49.1%
Ethnicity	56.3%	60.4%	51.4%	57.9%	51.8%
Race	54.1%	58.8%	49.5%	57.5%	44.5%
Veteran status	51.5%	56.7%	45.5%	54.1%	44.5%
Sexual orientation	48.8%	52.3%	45.2%	51.5%	42.7%
Religion	43.5%	47.6%	39.8%	46.1%	36.4%
Disability	42.8%	50.0%	34.7%	44.4%	38.4%

Political affiliations, age and religion remain to be the top three things that employees hide about themselves, reflecting no change from prior years' surveys.

THINGS EMPLOYEES HIDE ABOUT THEMSELVES





M&A RISK MANAGEMENT

Risk managers aid acquisition process

BY MATTHEW LERNER

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INSIDE

▶ TRANSACTIONAL COVERAGE NEEDS

Representation and warranties insurance is gaining traction in the M&A arena as claims rise and pricing remains competitive. **PAGE 24**

▶ BE WARY OF LEGACY COMP CLAIMS

Workers compensation and workplace safety issues need to be faced during a merger or acquisition, as lingering claims can become expensive. **PAGE 25**

Risk managers at companies involved in mergers and acquisitions face challenges in consolidating insurance programs but can also help the transactions run smoothly and spot potential problems, if they are given a seat at the M&A table early, experts say.

Beginning with the due diligence process, risk managers can play a central role in preparing for a merger or acquisition, and contribute to the process with insurance advice or purchases to help differentiate a bid, sources said.

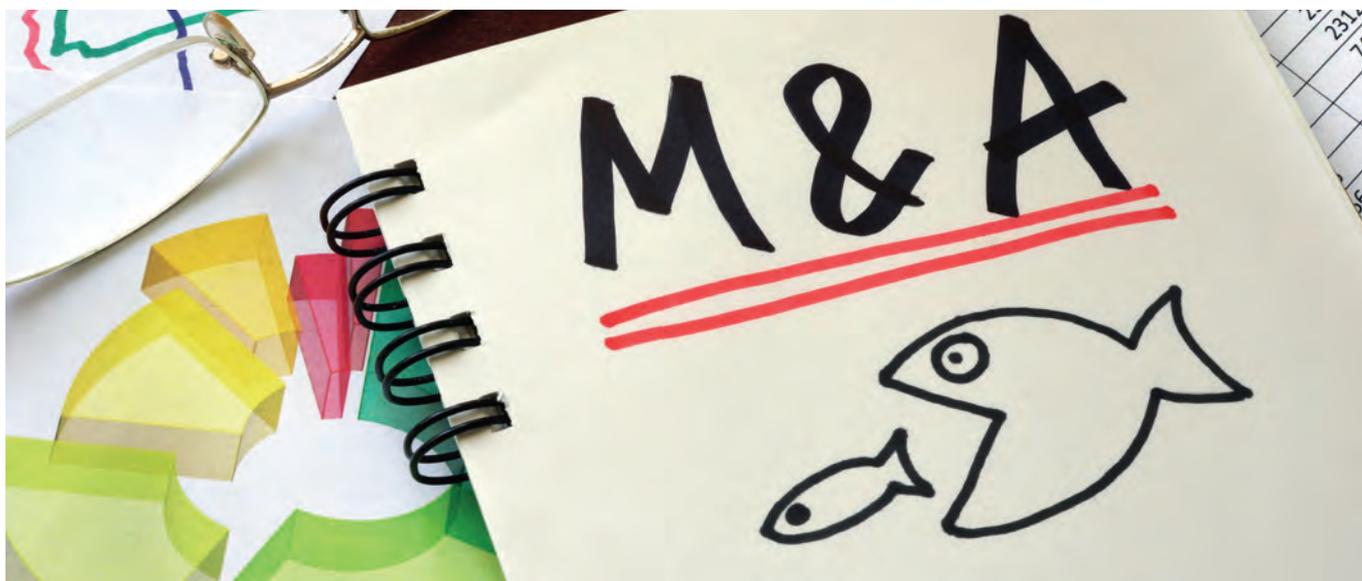
The number of M&As in North America soared over the past couple of years, with 18,576 deals in 2017 and 17,581 in 2018, compared with 12,882 in 2013, which was the lowest year since 2009, according to the Institute of Mergers, Acquisitions and Alliances, a New York-based nonprofit.

But the pace has slowed in 2019 with 5,399 deals through the beginning of June.

Risk managers can bring expertise beyond insurance management to M&A planning, experts say.

“Many companies will think in terms of insurance when it comes to mergers and acquisitions, but a risk manager’s perspective is much broader,” said Audrey Rampinelli, CEO and co-founder of insurtech advisory firm OnRamp Risk LLC.

“The process starts very early on, understanding the dynamics of what your deal



TRACKING OLD POLICIES CAN POSE CHALLENGE

Securing accurate and complete historical insurance information during a merger or acquisition is a key part of due diligence but can be a daunting task, experts say.

“You want to make sure you have access to as much history as possible of the company you are acquiring,” said Matthew Schneider, co-CEO of M&A and transaction solutions for Aon PLC in New York. “If you can get the historical coverage that can help as well.”

“Typically, the risk manager goes to the data room to scrape up whatever information is available,” said John Kelly, founder and managing partner at risk consultants Hanover Stone Partners LLC in New York.

Details on historical insurance coverage, however, can be hard to find, he said.

“Very often, old historical policies are not put into the data years,” and may extend back only five years or so, Mr. Kelly said. Policies offering potential coverage for long-tail liabilities may not be in the data room, he said.

Acquirers must be aware of “the limitation of information and the availability of information,” Mr. Schneider said.

“You can always ask for more information, but you can’t always get more information.”

Matthew Lerner



team is looking at,” said Ms. Rampinelli, who served as the senior risk executive leading risk management at Loews Corp. for more than 18 years and was a core member of the M&A team involved with numerous transactions through her tenure.

“As a buyer, the finance and risk manager’s diligence efforts should be prioritized,” said Greg Peterson, financial services deals leader in New York for PricewaterhouseCoopers International Ltd., focusing on “financial matters which could have a material financial impact on purchase price.” These include working capital, which is capital used in a business’ day-to-day trading operations, calculated as current assets minus current liabilities.

“The due diligence you do before you close on a deal, really, helps with the transitional part and the onboarding of the asset,” Ms. Rampinelli said, such as researching insurance coverages.

Risk managers generally are becoming involved earlier in the merger and acquisition process, said Matthew Schneider, co-CEO, M&A and transaction solutions for Aon PLC in New York.

“More and more, primarily with the larger firms with \$1 billion in revenues or more, risk managers are getting involved in the acquisition stage, as opposed to some in the past, which became involved after the acquisition was done.”

Their involvement can help identify lurking risks and exposures in a target company, experts say.

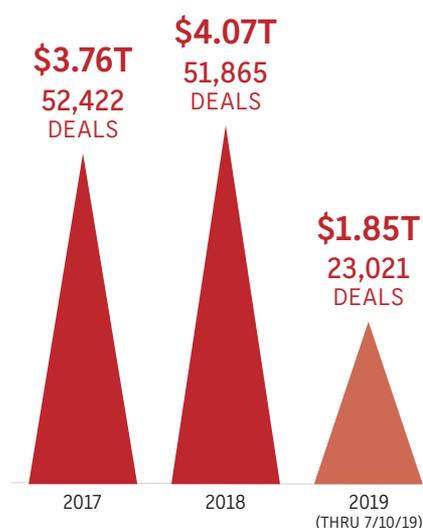
“If brought in early enough, a good risk manager” can help identify potential environmental liabilities of an acquisition target or product exposures of the company, said John Kelly, founder and managing partner at risk consultants Hanover Stone Partners LLC in New York.

The timing of involvement is critical, he added. “Sometimes they don’t get to practice really quality risk management because it’s so late in the ballgame,” Mr. Kelly said.

Risk managers may well see new or different insurer relationships, especially for the acquired company, sources said.

“Generally, the acquiring company’s relationships will prevail,” Mr. Kelly said.

WORLDWIDE M&A



Source: Institute of Mergers, Acquisitions and Alliances, a New York-based nonprofit

In merging the risk management and insurance programs of an acquiring company with the company being bought, there may be opportunities for synergies, but risk managers must be cautious when dealing with program cost, sources said.

“What cost reduction and risk mitigation program opportunities might exist,” Mr. Peterson said.

A target company’s risk management program may afford the “opportunity to enhance existing processes,” for a buyer, Ms. Rampinelli said.

In combining insurance programs, risk managers should consider whether a target’s insurance program offers any efficiencies, Mr. Kelly said.

For example, it might have multiyear programs that should be preserved in a hardening insurance market, he said.

More broadly, risk managers can help mitigate the effects of hardening insurance markets, according to Mr. Kelly.

“Finance people will tend to focus on historical costs, but risk managers will be well aware of insurance market trends and the potential financial impact of hardening market conditions that we are witnessing,” he said. “Not only will a hardening market impact pricing, but also potentially,

available capacity for more difficult risks. Another reason why a risk manager’s involvement early on in the M&A due diligence process is important.”

A careful analysis of insurance costs should include a consideration of prospective insurance costs, said Mr. Schneider of Aon.

“When a buyer acquires an asset, how will the target’s insurance costs be modified based on the new ownership? ... It’s never wise just to take the existing price and assume that has anything to do with what the future price will be,” he said.

One variable that could affect insurance costs is the existence of a captive, Mr. Schneider said, adding that any merger and acquisition involving a captive should ultimately include a captive feasibility study.

Another variable is technology, such as risk management information systems or legacy systems that may pose integration challenges, Ms. Rampinelli said.

“The important thing when doing due diligence is to really understand what the systems are; inventory them,” Ms. Rampinelli said. “Understand what the cost may be with those conversions and whether systems can be converted at all.”

Risk managers should also be involved with the purchase or placement of any transactional liability insurance, or representations and warranties coverage.

“The risk manager should be expected to manage the reps and warranties insurance process,” Mr. Peterson said.

Such transactional liability insurance may also go beyond reps and warranties to include environmental and tax coverages, Ms. Rampinelli said. “Typically, the risk manager is involved with that.”

Transactional liability coverage is an area in which existing insurer relationships can be beneficial because companies involved in mergers and acquisitions sometimes turn to existing brokers and insurers for such coverage, said Toria Lessman, Chicago-based senior vice president and head of transactional liability at QBE North America.

Further, risk managers can bring value to the transaction and raise their profile by using transactional liability insurance, Mr. Schneider said.

Transactional coverage gains traction

BY CLAIRE WILKINSON

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Transactional risk insurance purchases for merger and acquisition agreements have taken off in the past five years as deal activity has accelerated and corporate investors and private equity firms have become increasingly comfortable with how the coverage works.

Soft pricing is driving some of the rising interest in representations and warranties insurance, but claims frequency and severity have been increasing as well, experts say.

Ten years ago, reps and warranties insurance was used as “a last-ditch effort to pull together a deal where the parties were at odds and an insurance product was available,” said Aaron Zeid, area vice president for Gallagher Specialty Products at Arthur J. Gallagher & Co. based in Chicago.

“Now, it’s become part of the M&A toolbox,” he said.

As insurers have become more experienced in writing the coverage and handling claims, prices have declined, said Mary Duffy, London-based global head of M&A insurance for American International Group Inc.

“The rates came down significantly — that was the single most influential factor in it taking off,” said Ms. Duffy.

Private equity and strategic investors took up transactional risk insurance at a record level in 2018, as the number of insured transactions outpaced global M&A activity, according to a report released by Marsh LLC in July.

The brokerage placed 35% more transactional risk insurance limits globally in 2018 than the previous year, and the number of insured deals was up 31%, while average deal size increased to \$262.2 million from \$224.8 million in 2017.

The value of global M&A activity increased 11.5% to almost \$3.5 trillion in 2018, marking the fifth consecutive



year with deal volumes in excess of \$3 trillion and the largest value since 2015, Marsh said.

One in three M&A deals is covered by reps and warranties insurance, but the number is higher in the “sweet spot” of middle-market private deals between \$50 million and \$750 million, said Phil Norton, Chicago-based national managing director for the management liability practice at Gallagher.

“One of the reasons why R&W insurance is so popular is because the sellers want a true exit. They might have shareholders who want to be paid off quickly, and they don’t want to wait to see if an escrow clears or whether an indemnity agreement is going to be invoked,” Mr. Norton said.

Investors were hesitant a few years ago to use the coverage because they weren’t sure it would work, said Toria Lessman, Chicago-based senior vice president and head of transactional liability at QBE North America, a unit of QBE Insurance Group Ltd. in Sydney.

“What they’ve seen is that insurers are paying claims. The product is helping people with acquisitions, especially if they

have relationships that are going to continue post-closing. In the event there’s an issue on a deal, you’d rather go to the insurer to work through the issues,” Ms. Lessman said.

Reps and warranties cover stands behind the representations made by sellers and the due diligence of buyers, enabling them to move forward “with more confidence,” said Ms. Duffy.

The private equity community is using the insurance in around 75% of their transactions, said Gary Blitz, New York-based co-CEO of Aon PLC’s M&A and transaction solutions business in the U.S.

In the past few years, there has also been “significant acceptance by the strategic buyer, and that continues to increase,” with 20% to 25% of corporate transactions insured, Mr. Blitz said.

One of the reasons why corporations are buying it is “they realized they were not competitive, because a competing buyer using insurance was giving the seller a better exit,” he said.

Insurance market capacity for M&A deals has also increased, said Rowan Bamford, London-based president of Liberty

Global Transaction Solutions, a unit of U.S. insurer Liberty Mutual Insurance Co.

“Ten years ago, there was not enough insurance capacity in the market to make it viable ... Now the largest single M&A policy put in place was north of \$1.5 billion of limits, so there’s enough capacity out there to do most deals, whether mid-sized private equity deals or huge strategic corporate deals,” Mr. Bamford said.

The flood of market capacity is contributing to softening market conditions, but at the same time there has been an increase in claims frequency and severity, Ms. Duffy said.

More transactional risk products are being sold and more private equity firms and conglomerates are using them, so there are going to be more claims, said Seth Gillston, New York-based M&A and private equity practice leader at Chubb Ltd.

“There is nothing in the claims environment that we see to limit our interest in this area,” Mr. Gillston said.

Financial statements, tax, compliance with laws and material contracts are driving most claims notifications, and the proportion of material claims over \$10 million have doubled to 15% from 8%, at an average cost of \$19 million, according to a May report released by AIG.

Tax breaches accounted for 25% of claims notifications in Europe and a “significant” proportion of claims notices globally, AIG said.

“Many would say tax is the new representations and warranties coverage in the U.S.,” said Jeff Anderson, Atlanta-based director and co-founder of ASQ Underwriting, a managing general underwriter that is part of Alliant Insurance Services Inc.

In terms of insurers with expertise to underwrite it, tax insurance still lags reps and warranties insurance, he said.

But this is changing, and it will be a “vibrant market in the future,” Mr. Anderson said.

STAND-ALONE CYBER COVERAGE OFFERS ADDITIONAL PROTECTION

Cyber risk is a growing concern in mergers and acquisitions, with buyers stepping up their due diligence around the liabilities.

Having a stand-alone cyber insurance policy in addition to representations and warranties coverage can ensure that cyber exposures are adequately covered, experts say.

Insurers are “paying more attention” to cyber risks in mergers and acquisitions, said Jeff Anderson,

Atlanta-based director and co-founder of ASQ Underwriting, a managing general underwriter that is part of Alliant Insurance Services Inc.

“We are more finely tuned into that personally identifiable information exposure,” said Mr. Anderson.

While rep and warranties insurance policies typically provide some cyber liability coverage, insurers may require the purchase of a separate cyber insurance policy

depending on the risk profile of the company being acquired, he said.

“The representations and warranties policy is not looked to be a replacement for a cyber policy,” said Gary Blitz, New York-based Co-CEO of Aon PLC’s M&A and transaction solutions business in the U.S.

“There could be overlap, but the expectation of underwriters is that the R&W policy would be excess over that cyber policy,” Mr. Blitz said.

Like environmental liabilities, “ideally you should go out and get a separate cyber insurance program to have those coverages addressed,” said Seth Gillston, New York-based M&A and private equity practice leader at Chubb Ltd.

“A commercial cyber policy or environmental policy would tend to have a much lower retention and broader coverage than a representations and warranties policy,” said Mr. Anderson.

Claire Wilkinson

Watch out for legacy workers comp claims

BY LOUISE ESOLA

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Companies engaging in mergers and acquisitions often neglect a crucial part of the due diligence process: a close examination of the target company's workers compensation program, experts say.

Failure to thoroughly account for unresolved claims and injured employees on leave can become a costly problem after an acquisition, experts say.

Factors relevant to a workers comp program that should be considered prior to finalizing a deal include workers comp insurance policies, claims management, legacy claims, safety culture, experience modification ratings and accident and regulatory violation histories, they say.

"They seem like no-brainers but it has been overlooked in the past," said Jeff Cavignac, president of San Diego-based Cavignac & Associates, a privately held brokerage that assists with mergers.

The risk of too many departments being aware of a potential merger or acquisition and the cascading effect of leaks to employees who may fear for their jobs or the company's future often keeps information on lockdown, said Paul Braun, Dallas-based managing director of casualty claims for Aon PLC's commercial risk business.

But "all the silos need to be involved," he said. "That has really become the big issue: everybody communicating."

Forgoing a deep dive into old workers compensation claims still on the books or poor safety culture on sites could be more costly in the end, experts warn.

Gauging a workplace's safety management culture is "very important," said Eric Hobbs, shareholder in the Milwaukee office for the employer defense firm Ogletree, Deakins, Nash, Smoak & Stewart P.C. "There's a major disconnect psy-



chologically for employees who are all of a sudden thrown into a culture" opposite of what they are accustomed to.

Some companies are more transparent than others or safety may not even be a priority in a pending transaction, he said.

"The biggest problem is when a safety-focused company acquires a company where safety is not a priority," he said.

Sometimes risk management staffers are not aware of or do not remember a particular issue, said Mark Hansen, former president of the American Society of Safety Professionals and Dallas-based director of risk management for Contek Solutions LLC, which provides consulting services for small and medium-size companies that cannot afford full-time risk managers.

"Let's say they had a blowout and I show them the claim. Then they say, 'Oh, that blowout,'" he said.

Examining U.S. Occupational Safety and Health Administration records and comp claims are just part of what needs to be done in a transaction, said Mr. Hobbs.

A company that acquires a firm with a

poor experience modification rating — a safety score often used by insurers to establish premiums — could later face higher insurance costs or the inability to secure contracts, as EMRs are essentially recalculated in a deal, according to Mr. Cavignac.

"If you have a 100 (EMR) and you are buying a company with 200 (EMR), that will push your mod over 125, making it tougher to secure work contracts or even insurance in some cases," he said, adding it could eventually be a "deal-breaker" for some potential mergers or acquisitions.

In addition to examining a company's safety records, a site visit can help an acquiring firm better understand a target company's health and safety practices and whether acquiring the personnel should be part of a deal, according to Mr. Hansen.

"Local management will tell you the truth" on safety and employees, said Mr. Hansen. "Corporate won't. Not that they are lying. They just don't know. The field people will tell you who the keepers are."

Understanding current claims is another necessary part of merging with or acquir-

ing a company — not just to know how workers have injured themselves, but where claims are in the closure or return to work process, experts say.

"There could be a lot of potential pitfalls in those situations," said Seth Gillston, New York-based M&A and private equity practice leader for Chubb Ltd. "If you are an acquiring (company) and you are acquiring the legacy claims, you have to understand the data."

"I like to talk to the broker of the company we are buying. I like to talk to the carrier," said Mr. Hansen. "Sometimes risk management, for whatever reason, doesn't know, and you could end up opening Pandora's box."

Almost every firm has workers comp claims that have not been resolved, whether due to severity and unforeseeable complications that delay recovery or claim closure, or other matters such as malingering or pending litigation, experts say. Those considering a merger or acquisition need to know how many and how long such "legacy" claims have been ongoing, they say.

"You obviously have takeover claims, claims run by different administrators, and you have to make sure you have an idea of what they are and who they are," Mr. Braun said.

"Some companies don't keep close track of employees on leave and many, many employers don't understand that in most states just about every compensable workers compensation injury or illness qualifies as (a Family and Medical Leave Act) health condition," Mr. Hobbs said.

In many cases, Mr. Hobbs recommends that an acquiring company request a list of employees on leave and compare it to a list of comp claims over the past three years.

"I am amazed how often we get into a deal and the seller has employees who have no leave status," he said.

DIFFERENT APPROACHES TO COMP ADDRESSED IN AIRLINE MERGER

Months before the 2013 merger of two of the largest U.S. airlines — American Airlines and US Airways Group — Jennifer Saddy was already deep in the paperwork that comes with combining a workforce of 115,000 employees and a mountain of old workers compensation claims.

"There is certain information you can share premerger," said Ms. Saddy, Fort Worth, Texas-based director of workers compensation, corporate insurance and risk management for what is now American Airlines Group Inc. "We spent nine months mapping out and doing a gap analysis" of the two workers compensation and workplace safety programs.

"There were different cultures that existed and different approaches for handling claims (that) when we got to the point of merging it was so clear that there was a discrepancy (between the two companies) with what we were doing to handle workers compensation

claims," said Ms. Saddy, who hailed from US Airways before becoming the head workers compensation executive for the combined airline.

The differences included long-held attitudes and rules for handling claims for both companies, she said.

There were 7,127 open workers compensation claims when the companies merged, but the company expects to close 4,000 of those claims by the end of the year, according to Ms. Saddy. The giant airline sees 12,000 comp claims annually, she said.

The best strategy has been to comb through each claim — a task that for a variety of reasons was not done before the merger but had become critical during and after the transaction, she said.

That meant numerous conference calls with adjusters and creating plans to resolve problems, she said. "It was digging into the claims and understanding the obstacles," she said.

Why the claims were still open was the first question, Ms. Saddy said. Pharmacy turned out to be a problem as legacy claims often included prescriptions complicated by polypharmacy and drug dependence issues. "But sometimes it was so simple as nobody asked them if they wanted to settle their claim. I said, 'let's just make an offer'."

Another challenge was each company's rules for claims closure — rules that dictated when and why a claim was eligible for closure, which the new business entity tossed aside in favor of moving forward, Ms. Saddy said. That philosophy helped craft a new program for American Airlines, and helped lead to success in managing new claims and ensuring they do not linger.

"Any rules that you would live by before (the merger) do not exist. We said, 'Think with a clean slate,'" she said.

Louise Esola

LONGTAIL CLAIMS

When American Airlines merged with US Airways — an airline that was about one-third its size — tackling legacy workers compensation claims was among the top concerns, according to Jennifer Saddy, Fort Worth, Texas-based director of workers compensation, corporate insurance and risk management for what is now American Airlines Group Inc.

PRE-MERGER LEGACY CLAIMS

US AIRWAYS	1,344
American Airlines	5,783
TOTAL:	7,127

Estimated closed by 2019: 4,000

Source: American Airlines

Resurgent measles requires action

It's been more than 50 years since the measles vaccine was introduced in the United States, ending what had until then been an unpleasant part of growing up.

While most people recovered fully from the disease, measles also caused disability and death in some cases, so the introduction of the vaccine led to hopes it would ultimately be consigned to history.

Results were promising after the precursor to what is now known as the MMR vaccine was first licensed in 1963. Prior to the vaccine, an estimated 3 million to 4 million people contracted the disease annually, according to the Centers for Disease Control and Prevention, but the number of reported cases quickly plummeted, and in 2000 measles was declared eliminated in the United States.



Gavin Souter
EDITOR

Unfortunately, it's making a comeback. More than 1,100 cases have been reported so far in 2019. While officials are reluctant to pinpoint a cause for the revival of measles in the United States, some studies link the rise in cases to the increase in the number of parents who refuse to have their children vaccinated over concerns over safety or religious beliefs, among other things. While most doctors and other scientists say the safety fears are unfounded, a small but meaningful number of people remain unvaccinated and, especially when they travel overseas, are more vulnerable to contracting measles.

This can create problems for employers. As we report on page 10, while on the surface there may be some obvious steps that employers can take to quickly expel measles from the workplace, it's a much more complicated problem when you dig into it.

The most obvious problem is that the disease is extremely contagious and is easily transmitted, so once a sick employee enters the workplace, there's a good chance that other workers will also be sickened if they are not vaccinated.

In addition, employers must be concerned about privacy issues should an employee report they have the disease — there are several laws limiting the extent to which employers can identify the cause of the contagion, which may cause them to refrain from raising the alarm too loudly.

Organizations are also limited in how they can respond from a medical standpoint. Mandating vaccinations, except in some health care settings, is effectively barred by employment laws, so other unvaccinated employees will remain exposed.

Employers also face financial liabilities. Workers comp claims, even though it's difficult to link the contraction of the disease to a workplace, can follow from a measles outbreak.

There is no simple solution for employers on the issue, but it must start with informing employees early about the pros of vaccination and addressing the alleged cons. While it's tough to overcome firmly held beliefs, employers have a duty to make workplaces safe for all workers.

COSTLY CATS

A changing climate is drawing increased attention to the significant costs associated with natural catastrophes.

* Expected annual economic losses total **\$54 BILLION** for most types of damage caused by storm surges, hurricane winds and heavy precipitation — about \$9 billion, or 16%, of that loss being attributed to the commercial sector.

* Expected annual federal spending in response to hurricane winds and storm-related flooding totals **\$17 BILLION**.

* Expected federal spending includes **\$1.4 BILLION** in implicit federal subsidies for the National Flood Insurance Program.

Source: Congressional Budget Office



VIEW FROM WASHINGTON

NFIP reform inches closer

It might have gotten lost in the spectacle of Bob Mueller's congressional testimony, but a legislative fix for the troubled National Flood Insurance Program may finally be gaining some traction.

A bipartisan group of senators introduced a bill to revamp and reauthorize the NFIP in July, which followed unanimous approval of a program overhaul bill by the U.S. House of Representatives Financial Services Committee in June.

The bills are not that far apart. They both feature a five-year extension, which risk managers have been pushing for so they wouldn't have to contend with looming expirations and retroactive reauthorizations of a program critical to their insurance placements. Both bills pay particular attention and devote resources to flood mapping and mitigation initiatives, which experts say is critical to getting an accurate view of evolving flood risks and determining where best to deploy limited government resources.

But like any proposal emerging from Congress these days, the bills have not escaped criticism. The National Association of Professional Insurance Agents was "heartened to see bipartisan, bicameral support for important reforms," but the Senate bill includes a provision that PIA National deemed "unacceptable": a 25% cut to the Write-Your-Own reimbursement rate. "As a result, most, if not all, WYO insurance carriers could be pushed out of the program," the organization stated.

And naturally, the bills don't deal with the financial elephant in the room: what to do about the program's existing \$20 billion-plus debt. Premiums are failing to keep up with program payouts. The Congressional Budget Office has estimated a \$1.4 billion gap between the NFIP's expected annual payments and its expected income from premiums — a shortfall that the CBO assumed would be financed

by borrowing from the federal Treasury. Of course, the agency would assume that. Why would it assume anything else? The NFIP has continually needed to borrow to cover shortfalls caused by major catastrophic events. In October 2017, President Donald Trump signed a bill forgiving \$16 billion in debt following the devastation caused by hurricanes Harvey, Irma and Maria. But whether or not to forgive the rest of the debt continues to be a source of disagreement for federal legislators.



Gloria Gonzalez
DEPUTY EDITOR

The Federal Emergency Management Agency's Risk Rating 2.0 initiative aims to address the disconnect by charging actuarially appropriate rates, but legislators are skittish about the initiative, having gotten earfuls from their constituents the last time they tried to set rates that actually reflected rising flood risks — ergo, the 9% cap on annual rate increases featured in the Senate

proposal, which would draw "guardrails" around the initiative. The Senate bill would temporarily freeze interest payments on the NFIP debt — freeing up about \$400 million per year — but Congress does a disservice to FEMA and to its constituents by refusing to deal with the overarching debt problem.

However, it seems clear that a political calculation has been made that the only way to push some reforms forward is to ignore the elephant. If so, perhaps risk managers can be cautiously optimistic that a long-overdue overhaul of the program may finally be in sight.

Breaking through misconceptions on defense rules when litigating claims



Lynda A. Bennett is the chair of Lowenstein Sandler LLP's insurance recovery practice. She has represented policyholders in complex insurance coverage disputes for the past 25 years. She can be contacted at lbennett@lowenstein.com.

Recently, we have seen an uptick in coverage disputes with insurers that are centered on the insurer's defense obligation. Many policyholders do not understand their rights with respect to the selection of defense counsel, the hourly rates charged by defense counsel, whether insurer litigation management guidelines are enforceable, and the scope of available defense coverage for a "mixed" claim. This article addresses some of the common misconceptions held by policyholders and provides practical tips about how to engage with insurers on these issues.

Myth 1: The insurer always gets to select defense counsel

Many policyholders mistakenly believe that if a claim is covered by an insurance policy, then the insurer has the exclusive right to choose the lawyers who will defend the case. However, that is not always true.

As a preliminary matter, only certain types of policies contain a "panel counsel" provision that expressly and contractually gives the insurer the right to choose counsel. When a policy does not contain an express panel counsel provision, selection of counsel is a point that can, and should, be negotiated with the insurer. Moreover, even when a panel counsel provision exists in the policy, insurers may agree to approve the use of nonpanel counsel when policyholders agree to certain parameters with respect to the handling of the defense.

In addition, when an insurer agrees to provide a defense subject to a reservation of rights — whether or not there is a panel counsel provision in play — courts have determined that the policyholder has the legal right to select conflict-free and independent counsel. In fact, some jurisdictions have established a policyholder's right to independent counsel by statute.

Policyholders also should be aware that they can avoid the selection of counsel dispute at the policy placement stage by requesting an endorsement to pre-approve law firms to serve as defense counsel. However, this approach may come with some unexpected negative consequences if the policyholder needs the option of choosing different defense counsel depending on the nature of the claim asserted.

Myth 2: The insurer has the unilateral right to impose panel counsel rates

In circumstances where the insurer has denied coverage or has reserved rights and nonpanel counsel is defending the claim, another common area of dispute involves whether the insurer can take the position that it will reimburse defense costs only

at the rates that the insurer pays its panel counsel. While there is not extensive case law on this issue, courts generally reject the notion that insurers can establish a bright-line rule based on the volume discount rates that they have negotiated with their lawyers. Instead, courts seek to determine the prevailing market rate that is charged by capable counsel in the geographic area where the matter is pending while considering the level of complexities and magnitude of risk exposures faced in the underlying action.

The policyholder can, and should, work closely with experienced coverage counsel and their brokers to develop the data points needed to challenge panel rates and secure reimbursement at reasonable rate structures.

Myth 3: The insurer can impose litigation management guidelines on defense counsel

Once the horse trading on selection of defense counsel has ended, policyholders and their counsel next must confront the insurer's attempt to unilaterally impose litigation management guidelines that place material restrictions on what the insurer will agree to pay for and what will not be reimbursed to defend the case. Oftentimes, the guidelines are not a provision of the insurance policy that was purchased and were not agreed to by the policyholder. Nevertheless, the insurer contends the guidelines now govern the defense.

While the general idea behind the guidelines is a laudable one — that is, to put mechanisms in place to control litigation costs and expenses — the reality is that the guidelines are often draconian in nature and can be particularly unworkable in the context of a large, complex litigation. Policyholders should understand that the guidelines can, and should, be challenged with insurers. Indeed, some courts have determined that insurer litigation management guidelines are unenforceable because they are not agreed-upon terms of the policy and they impede a lawyer's ability to zealously defend his or her client. Other jurisdictions have issued ethics opinions warning defense lawyers against following the guidelines to the extent that doing so would impede the lawyer's professional judgment.

In many instances, policyholders and insurers can work together to develop a collaborative and agreed-upon approach to defend the case, and the guidelines can be customized to address the specifics of the underlying action. Clear, open and regular communications about these issues are the key to successfully managing them.

Myth 4: The insurer can do simple math to reduce its defense obligation for a 'mixed' claim

Another issue that regularly arises with respect to the scope of the insurer's defense obligation relates to a "mixed" claim. Think of the all-too-common "everything and the kitchen sink" complaint that includes 12 different legal causes of action and is asserted against a laundry list of defendants. Some of the legal causes of action and some of the defendants are potentially covered by the insurance policy, while other causes of action and defendants are not. And even though the complaint is a "mishmash," what is really driving the legal dispute is the potentially covered claim or claims asserted against the potentially covered policyholder or policyholders.

Oftentimes, the insurer attempts to artificially reduce its defense obligation by engaging "simple" math; for example, since only four of the 12 counts are potentially covered, the insurer will agree to pay one-third of the defense costs. However, that is not how the insurer's defense obligation is established, nor is that how allocation law works. As a preliminary matter, the insurer's duty to defend is broader than its duty to indemnify. Nearly every jurisdiction across the country recognizes that if there is one potentially covered claim alleged in the complaint, then the insurer has an obligation to defend the entire action. Moreover, many courts have held that if defense costs do "double duty" — that is, provide a benefit for both the covered and uncovered claims/defendants — then the insurer must pay those defense costs.

In other words, "simple math" does not rule when a mixed claim is presented. A careful analysis of the facts and circumstances of the underlying action is required, and policyholders must be armed with the appropriate legal authority to reject the insurer's attempt to artificially minimize its defense coverage obligation by tallying the covered and uncovered counts/defendants.

Conclusion

Defense coverage is a critical aspect of any company's risk management program. However, buying insurance policies and making claims are not enough to ensure that the company will be fully, fairly and immediately defended by its insurer when a complaint is served. In order to navigate these murky waters, policyholders are well served to engage experienced coverage counsel to negotiate these critical issues early on so that the policyholder and its insurers can then collaboratively focus on the task at hand — defending and resolving the underlying action.

CNA offers service to manage cyber risks

■ CNA Financial Corp. launched a program of cyber risk services that aims to help policyholders better manage their cyber risks.

The CNA CyberPrep program, built from National Institute of Standards and Technology guidelines, provides the insurer's policyholders a network of cybersecurity professionals and services to identify, mitigate and respond to cyber risks, CNA said in a statement.

The approach will "help identify security control gaps as well as create baselines to address the potential impact of loss prevention and mitigation efforts from a cyber threat incident," Brian Robb, New York-based underwriting director and cyber industry leader for CNA, said in the statement.

Brit using aerial images to survey disasters

■ Brit Ltd. is using aerial imagery from the Geospatial Intelligence Center, which was created by the U.S. not-for-profit National Insurance Crime Bureau, to help evaluate damage and adjust claims following a catastrophic incident.

High-resolution images from GIC aircraft help assess property damage and support catastrophe response efforts and claims adjusting, London-based Brit said in a statement.

Brit initially used GIC imagery in a pilot program for assessing claims related to the 2018 California wildfires, the statement said.

The National Insurance Crime Bureau is based in Des Plaines, Illinois.

MGA launches midmarket captive reinsurer

■ International Re Ltd., a London-based managing general agent, launched a captive reinsurer that offers coverage for midsize captives.

I-RE, which was founded earlier this year by Rupert Taylor, co-CEO and chief underwriting officer, and Andy Jeckells, co-CEO and chief commercial officer, will offer coverage through Bermuda-based R&Q Quest Ltd. for and on behalf of International Re Segregated Account, which operates at I-RE SA.

Initially, I-RE's "focus will be on U.S. business, but I-RE sees significant opportunities to rapidly expand both geographically and in product suite," the MGA said in a statement.

The MGA has completed several transactions with U.S.-based captives, the statement said.



Ironshore offers contractor legal liability policy

■ Ironshore Environmental offers a comprehensive contractors environmental legal liability policy that responds to third-party bodily injury, property damage and remediation of environmental damages resulting from pollution incidents caused by the contractor's work at a job site.

The coverage, which is available through an online quote and bind portal to brokers for contractors with up to \$100 million in revenues, provides available policy limits of \$500,000 to \$10 million and up to \$50 million upon referral, the unit of Liberty Mutual Insurance Co. said in a statement.

The policy has no minimum premium, with deductible options starting at \$2,500, and includes an "enhanced" commission, according to the statement. It is offered on an occurrence basis and can be underwritten for practice, project or wrap-up coverage.

Aon offers AI tool to cut comp litigation

■ Aon PLC unveiled an analytics tool to analyze historical claims data to identify characteristics that lead to litigation before it occurs.

In bringing the artificial intelligence platform to clients, Aon will continue its partnership with Santa Clara, California-based CLARA Analytics Inc., which helped the broker with its claims auditing platform, an Aon spokesman said.

According to data from Aon's diagnostics, attorney involvement on a workers compensation claim increases total claim costs, often greater than 400%; claims take 195% longer to resolve, and injured employees miss an average of 284% more days of work, the brokerage said in a statement.

Attorney malpractice program expands

■ Risk Placement Services Inc. is expanding its lawyers professional liability program to New York and Texas.

The Rolling Meadows, Illinois-based unit of Arthur J. Gallagher & Co. said the program provides law firms with between two and 50 attorneys up to \$5 million in liability limits as well as express vicarious liability, an annual aggregate deductible and an automatic 60-day extension for reporting claims among its features.

The program is designed to provide coverage for claims that arise from "wrongful acts" committed in the performance of legal services in the lawyer's capacity, and generally provides both indemnification and claims expense coverage, RPS said.

Predictive model for comp sector launched

■ Valen Analytics released a predictive modeling technology to enable the workers compensation market to improve scoring accuracy in the absence of loss history.

The Unavailable Loss History Model aims to help improve the accuracy of scoring insurance policies, Valen Analytics, a subsidiary of Hartford, Connecticut-based Insurity Inc., said in a statement. The predictive modeling software was tested against a granular data set of approximately 650,000 policies representing \$7.6 billion in premium.

MGA introduces US terrorism cover

■ Ensurance UK Ltd. has launched terrorism and sabotage insurance in the United States.

The products offer full terrorism and sabotage cover for businesses and a range of policy extensions, the London-based specialist managing general agent said in a statement.

Extensions are all nondamage business interruption extensions, such as denial of access, ingress and egress by a civil or military authority and loss of attraction and threat, Becky Steel, Ensurance's lead underwriter for terrorism, said in an email.

DEALS & MOVES

Sedgwick acquires rival TPA York

Sedgwick Claims Management Services Inc. has agreed to buy fellow third-party administrator York Risk Services Group Inc. in a transaction expected to close later this year.

Financial terms were not disclosed. Toronto-based private equity firm Onex Corp. acquired York in 2014 for \$1.325 billion.

Sedgwick will comprise nearly 27,000 staff following the close of the deal, the company said in a statement. York has nearly 5,000 employees in more than 60 U.S. offices, as well as an international presence.

Sedgwick is the largest TPA with \$2.7 billion in gross revenue in 2018, while York is the fifth-largest TPA with \$800 million in revenue, according to *Business Insurance's* latest rankings.

AssuredPartners makes Illinois, Texas buys

Insurance brokerage AssuredPartners Inc. has acquired McCarthy & Trinka Inc. and Cathey Insurance Services LLC. Terms of the deals were not disclosed.

Oak Brook, Illinois-based McCarthy & Trinka generates \$2 million in annual revenue, while Dallas-based Cathey makes \$3.4 million in annualized revenue, Lake Mary, Florida-based AssuredPartners said in a statement.

Hub purchases agency recruiting from Nationwide

Hub International Ltd. has acquired insurance agency Cosaint Insurance Partners LLC, which has been recruiting former Nationwide Mutual Insurance Co. agents who are transitioning to an independent model. Terms of the deal were not disclosed.

Conshohocken, Pennsylvania-based Cosaint provides commercial and personal insurance in Pennsylvania and surrounding states, Chicago-based Hub said.

Nationwide announced in April 2018 that it was fully transitioning to an independent agency distribution model by July 2020.

Gallagher acquires Florida insurance agency

Arthur J. Gallagher & Co. has acquired Stonehenge Insurance Solutions Inc. Terms of the deal were not disclosed.

Palm Beach Gardens, Florida-based Stonehenge offers commercial insurance for professional employer organizations and staffing clients throughout the U.S., Gallagher said in a statement.



UP CLOSE

Isabelle Santenac

NEW JOB TITLE: Paris-based global insurance leader, Ernst & Young Ltd.

PREVIOUS POSITION: Paris-based EMEA financial services assurance leader, Ernst & Young Ltd.

OUTLOOK FOR THE INDUSTRY: The insurance industry touches every sector, world event and individual. The industry is establishing itself in a world undergoing fundamental technological, political and environmental changes. New risks are emerging like cybercrime and climate change. Successful insurers will need to clearly define their role in this environment, put customers at the center of their business, and ensure they are building brands and businesses that excite and attract talent. With an aging population, in a world where interest rates are durably low and most countries have huge debt, personal protection will become a critical topic where the insurers can play a significant role.

GOALS FOR YOUR NEW POSITION: EY is very well known for traditional services around risk, audit and tax, but I want to really establish EY as the transformation partner of choice. We have made significant investments to our capabilities and talent in the IT transformation, digital, innovation and strategy space, so bringing it together with our traditional skill set — plus our global connectivity in every market — to help build a successful and sustainable future.

CHALLENGES FACING THE INDUSTRY: Technological developments — “internet of things” and artificial intelligence — are accelerating exponentially, customer expectations and demographics are changing, globalization is under pressure, low interest rates seem to be the new normal and climate change is having a visible impact on the way we live. In this environment, insurers are having to optimize today’s business while innovating for a tomorrow they can’t fully imagine yet.

FIRST EXPERIENCE: I come from a family of insurers and have memories of my grandfather sharing stories about his time as an insurance broker in Marseille, France. Even then, his work touched everything and everyone.

ADVICE FOR A NEWCOMER: Don’t believe what you hear about insurance being an old-fashioned, traditional business. It is a fast-evolving business that must reinvent itself in many aspects, which makes it very attractive and interesting.

DREAM JOB: I would like to be a sports coach, as I like to lead and motivate teams and get the best from them. I also enjoy playing and watching sports.

LOOKING FORWARD TO: The insurance industry is facing significant challenges, whether on the product side, distribution, the customer experience or the operating model. It is exciting to lead an evolving sector.

COLLEGE MAJOR: I studied at a business school in Paris, and my major was planning and business performance.

FAVORITE MEAL: Grilled Dover sole with yellow wine sauce, paired with French wine.

BOOK: A book that had a big impact on me when I was a teenager was “Froth on the Daydream” by Boris Vian. These days, I have less time to read, which I really regret.

HOBBIES: Cooking a nice dinner for my family on Sunday night, skiing, hiking and running trails in the mountains.

TV SHOW: I am not a big fan of TV shows, but one I can watch if I am home is “The Voice.”

ON A SATURDAY AFTERNOON: Now that my three children are adults, I like to take some personal time to go shopping, have a massage or watch Roland Garros or Wimbledon matches, as I am a big fan of tennis.

“Don’t believe what you hear about insurance being an old-fashioned, traditional business. It is a fast-evolving business that must reinvent itself in many aspects, which makes it very attractive and interesting.”

SEE MORE ONLINE

Visit www.businessinsurance.com/ComingsandGoings for a full list of this month’s personnel moves and promotions. Check our website daily for additional postings and sign up for the weekly email. *Business Insurance* would like to report on senior-level changes at commercial insurance companies and service providers. Please send news and photos of recently promoted, hired or appointed senior-level executives to editorial@businessinsurance.com.



Lockton Cos. LLC recruited **Anthony Dagostino** to lead its cyber risk and technology practice. Mr. Dagostino, who will be based in New York, will be

executive vice president, global cyber and technology leader at the Kansas City, Missouri-based brokerage. Previously, he had overseen the cyber risk practice for Willis Towers Watson PLC.



Zurich Insurance Group Ltd. named **Alison Martin** to be CEO for Europe, Middle East and Africa and bank distribution. Ms. Martin, who will be based in Zurich, will

continue in her role as group chief risk officer until a successor has been found.



Willis Towers Watson PLC appointed **Jim Dunlap** to be head of construction broking in North America. Mr. Dunlap most recently served as head of casualty construction

broking for North America for Willis Towers Watson. He will be based in Chicago.



Ryan Specialty Group LLC recruited Chicago-based **Michael Blackshear** to be senior vice president and global chief compliance officer, replacing Roger Smith, who

is retiring. Previously, Mr. Blackshear was North America chief compliance officer for Chubb Ltd.



Aon PLC appointed longtime executive **Tim Ronda** to be president of its U.S. reinsurance solutions business. Mr. Ronda, who was most recently executive managing

director, will continue to work with national and global property/casualty insurers. He will be based in New York.



Hamilton Insurance Group Ltd. named Hamilton, Bermuda-based **Venkat Krishnamoorthy** to the position of chief technology officer. Previously, Mr.

Krishnamoorthy was chief technology officer for Coleman Research Group Inc.



Tech risk is nothing to 😊 about

Contract disputes. Sexual harassment. Discrimination cases. Even murders.

Emojis can lead to lawsuits, wrote Jason Levine, a partner in the Washington office of Vinson & Elkins LLP, in an article posted to lexology.com this summer.

“Emojis mean different things to different people and therefore have the potential to create huge misunderstandings,” Mr. Levine wrote.

Citing data compiled by emoji law scholar Eric Goldman, a professor at Santa Clara University School of Law in California, from 2004 to 2018 there were 171 U.S. court opinions that have made references to emojis and their brethren, emoticons, according to Mr. Levine.

The “types of emojis most often cited in legal disputes are smiley faces, winky faces, sad faces, and guns,” he wrote.

Entire city fails drug test for pot

The urine in the sewage system of Tacoma, Washington, has tested positive for marijuana, the Associated Press reported.

A federally funded project aimed to study marijuana use since voters approved recreational use in 2012 and found that consumption doubled in Tacoma from 2013 to 2016 — “a conclusion scientists reached by way of the unglamorous work of analyzing raw sewage,” the wire service reported.

Researchers tested waste at two sewage treatment plants that serve the 200,000 people of Tacoma, “a city whose drug-use trends tend to mirror those of Seattle,” the AP reported.

Looking for THC — the euphoria-inducing component of cannabis and often found in urine — the scientists would pick up a cooler full of frozen wastewater samples and examine them, according to the news report.

ALIEN-ABDUCTION INSURANCE FINDS A MARKET



A Florida insurance agent is reporting an uptick in his “joke” alien abduction insurance business coinciding with the viral planned raid called Storm Area 51 on Sept. 20, Movieweb.com reported last month.

Mike St. Lawrence has been operating The Alien Abduction & Casualty Insurance Co. out of his home in Altamonte Springs, Florida, and selling \$20 policies since 1987. “People buy them for somebody else,” Mr. St. Lawrence told a reporter for The Palm Beach Post last year. “They usually just make themselves the beneficiary.”

Admitting he’s in the “humor” business, he offers policies of up to \$10 million. The fine print is chuckle-worthy: Should a loved one be abducted by an alien and can verify it — presenting a signature from an “authorized onboard alien” to process the claim — beneficiaries will be paid \$1 a year for the next 10 million years, according to Movieweb.com.

The joke isn’t on Mr. St. Lawrence, who told the site there’s been more interest in policies and business since nearly 2 million people signed up on Facebook to charge the Nellis Air Force Base in Nevada, which has long been subject to alien conspiracy theories. Actual business figures were not provided.

On the up-and-up or a white lie?

There’s a wrong way to create and market white chocolate candy and that’s to skip the cocoa butter, according to a lawsuit filed recently against The Hershey Co. alleging that its white chocolate Reese’s Peanut Butter Cups do not contain this key ingredient and are therefore a lie.



The class action suit, filed in federal court in New York and made public last month, alleges deceptive trade practices, negligent misrepresentation, breach of express and implied warranty, fraud and unjust enrichment, the news site Legal Newsline.com reported.

“Defendant has taken affirmative steps for consumers to mistakenly believe the products contain white chocolate,” the suit, accessed by the news site, reads.



Prosecutors root out dental cover scam

A family whose dental insurer was billed for 110 root canals is at the heart of charges filed against a California dentist who allegedly scammed insurers out of \$600,000, according to NBC 7 San Diego.

San Diego-based dentist April Rose Ambrosio is facing 75 felony counts of insurance fraud in connection with billing claims — more than \$950 per claim — to eight companies for procedures she never performed, according to the news report.

Specifically, Dr. Ambrosio claimed to have performed 623 root canals on 75 patients, an average of more than eight root canals per patient, over three years, according to the report.

Dr. Ambrosio faces 83 years in prison if convicted on all 75 counts, according to the report.

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