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FEBRUARY 2017

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### NOWELL SEAMAN

Nowell Seaman has risen through the RIMS ranks over the past 21 years, starting with his work with the Saskatchewan chapter. Now the director of global risk management for Potash Corp. of Saskatchewan Inc. will spend the next year serving as the society's president. He and RIMS have big plans for 2017 and beyond to help risk managers navigate the changing environment for risk and insurance. **PAGE 15**



### OFF BEAT

"Recklessly" underfilled candy box triggers \$5 million class action lawsuit. **PAGE 32**



## EPA toxic substances revamp likely to survive

BY GLORIA GONZALEZ

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A major overhaul of the U.S. Environmental Protection Agency's ability to regulate toxic substances is expected to survive the change in federal administrations, so risk managers must be proactive in ensuring their companies are not vulnerable under the agency's expanded authority.

In June 2016, Congress passed the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amended the Toxic Substances Control Act to outline new regulatory responsibilities, establish firm deadlines for completing these tasks and provide the EPA with stronger enforcement tools, including the ability to restrict or ban the use of chemicals.

The legislation had strong bipartisan support in Congress, with the initial bill passing the U.S. House of Representatives on a 398-1 vote and the Senate passing the bill by a near-unanimous voice vote, because lawmakers on both sides of the aisle, chemical industry and environmental stakeholders all recognized the need for a significant revamp of the TSCA, experts say. Regulated entities lobbied Congress for TSCA reform because they were dealing with a patchwork of regulatory actions at the state level, while environmentalists felt that the old TSCA process was simply too cumbersome for the EPA to effectively regulate these chemicals.

Given the widespread support, experts expect the TSCA revisions will remain intact despite general concerns about the unfavorable views of the role of the EPA held by President Donald Trump and his nominee to head the agency, Scott Pruitt.

"It showed a level of cooperation in the past Congress that probably was unpar-



alleled," said Judah Prero, Washington-based counsel at Sidley Austin L.L.P. "That just set a fantastic tone for TSCA to be able to move forward. With so many people pushing for the success of the program, I think it's not going to be one of the programs that a new administration might target for scaling down."

Chemicals existing prior to the passage of the original TSCA in 1976 were deemed safe for use and grandfathered in, but a key change is that the agency is now required to examine those existing chemicals, alongside new ones, to determine if they pose unreasonable risks, experts say.

The EPA must assess whether chemicals pose a risk to human health and/or the environment and to mitigate identified risks through restrictions on the use of the chemical or an outright ban on the chem-

ical or specific uses.

TSCA previously required the agency to do a cost-benefit analysis in its risk assessment, but the revamped version generally prohibits the EPA from doing this type of analysis and requires the agency to consider whether restrictions are necessary to protect vulnerable populations such as children, the elderly or pregnant women.

The legislation also required the EPA to identify 10 high-priority chemical substances for risk evaluation within six months of its passage, with the agency naming substances including asbestos and trichloroethylene to the list in November, giving it three years to complete its risk evaluation.

But the EPA is moving fast to act on its new authority, experts say.

In December, the agency proposed pro-

hibiting the manufacture, processing and distribution of trichloroethylene in certain dry cleaning functions because of unreasonable risks based on a risk assessment for the chemical published in June 2014 in which the agency determined that these uses could result in significant non-cancer and cancer risks.

And on Jan. 12, the agency published a Federal Register notice outlining a potential ban on the manufacture, processing and distribution of methylene chloride — often used in paint removal — for consumer and most types of commercial paint and coating removal.

Asbestos is seen as another likely target for restricted use or a ban because of its known health risks and the fact that the agency previously tried to regulate asbestos under Section 6 of the original TSCA, but the 5th U.S. Circuit Court of Appeals in New Orleans overturned major parts of the rule in 1991, rejecting the agency's cost-benefit analysis and ruling that the agency failed to demonstrate that a ban was the least burdensome alternative.

"There are lots of uses of asbestos out there that are still perfectly legal, so people that use products that contain asbestos or that have asbestos in their workplaces need to be anticipating that there's going to be a risk evaluation by EPA, and that risk evaluation may prompt EPA to take regulatory action," said Daniel Uyesato, a Raleigh, North Carolina-based partner at Hunton & Williams L.L.P.

Proactive risk managers should be checking to see if the production process utilizes chemicals already designated for evaluation by the EPA and be prepared to react if the agency bans their use entirely or for specific functions, experts say.

"They have to, as risk managers do, read the tea leaves," said Edward Cohen, St. Louis-based partner at Thompson Coburn L.L.P. "If they think there's a chance that it could be one of those chemicals that the agency views as so harsh or so dangerous, unreasonable in its risks, then they may start looking at product substitutions."

The EPA could also choose to issue warnings about the use and risks of particular chemicals, which may include advising the use of personal protective equipment to mitigate risks, Mr. Cohen said. "The most draconian is to ban a chemical completely."

Regulators will also have additional opportunities to impose non-compliance penalties, with fines up to \$37,500 per day, per violation and criminal penalties of one year and/or up to \$25,000 per day, per violation for individuals who knowingly or willingly violate TSCA provisions.

"TSCA is one of those sleeping giants," Mr. Uyesato said.

## Check supply chains for hazards

Risk managers will need to take a hard look at their companies' supply chains to ensure production of their products does not rely on the use of toxic substances that could be banned by federal environmental regulators.

Many companies fail to keep good track of the chemicals they buy and distribute, but they will have to review their supply chains to make sure the chemicals meet all U.S. Environmental Protection Agency regulations, said Hans Plugge, Bethesda, Maryland-based senior toxicologist with 3E Co., a unit of Verisk Analytics Inc.

"A lot of companies could use a little attention to their supply chain to make sure



that the same thing that they trying to do in their own business also happens within their supply chain, especially when they're in the formulation business rather than in the manufacturing business," he said.

Manufacturers may not know that certain chemicals are being used in their

product components, but the EPA is going to specifically look for use and exposure information to make a solid assessment of the risks, said Judah Prero, Washington-based counsel at Sidley Austin L.L.P.

"The supply chain is going to have to be much more engaged in this process than ever before," he said. "That doesn't necessarily mean they're going to have to engage with EPA, but I think it will definitely mean they are going to have to engage with their suppliers to get a better idea of what's in products, to get a feel for what's in the components, and to then keep track of what is EPA doing with these chemicals."

Gloria Gonzalez



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## Ruling may send ADA fight to Supreme Court

BY JUDY GREENWALD

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The issue of whether the Americans with Disabilities Act requires employers to offer disabled employees reassignment to another job if they can no longer do their current job, without having to compete with possibly more qualified workers, is likely to be heard by the U.S. Supreme Court following a recent appeals court ruling, experts say.

The 11th U.S. Circuit Court of Appeals in Atlanta held in December in *EEOC v. St. Joseph's Hospital Inc.* that the ADA "does not automatically mandate reassignment without competition." The ruling conflicts with other appellate court decisions, which makes it an issue likely to be heard by the high court (see related story).

Experts say this issue arises frequently, particularly among big employers.

"A large corporation with a thousand or more employees is going to run into this fairly regularly," said Andrew S. Hament, a partner with FordHarrison L.L.P. in Melbourne, Florida.

The current situation of conflicting appellate court rulings on the issue means employers' obligations will vary depending on the circuit in which they operate.

"This has been a thorny question that has been percolating in the lower courts for years, and is maybe one of the last big ADA questions that hasn't been resolved," said Richard R. Meneghello, a partner with Fisher & Phillips L.L.P. in Portland, Oregon.

The 11th Circuit ruling was "very well-reasoned and very practical in its approach," said Tasos C. Paindiris, a principal with Jackson Lewis L.L.P. in Orlando, Florida. "Basically, the court said it wouldn't be proper to require an employer to pass over a better-qualified candidate in favor of a lesser-qualified one just because



the lesser-qualified one has a disability."

The *St. Joseph's* ruling's significance is that, "contrary to the EEOC's position," it says the ADA "was never intended to require preferential treatment for individuals with disabilities. It was intended to provide them equal opportunity," Mr. Hament said.

The 11th Circuit affirmed the ADA does not mandate that employers offer vacant positions to the disabled. Rather, it says a "reasonable accommodation" may include the opportunity for disabled persons "to openly compete for an open position," said Nicole Eichberger, a partner with Proskauer Rose L.L.P. in New Orleans.

However, "When Congress said that reassignment was an accommodation, then that needed to be taken seriously," said plaintiff attorney Paul W. Mollica, of counsel at law firm Outten & Golden L.L.P. in Chicago.

"An employer couldn't just say, 'Well, there's somebody better qualified.' There

needs to be a more searching analysis of whether the reassignment would be an appropriate accommodation," Mr. Mollica said.

"Otherwise, the ADA isn't accomplishing its purpose of integrating disabled Americans into the workforce. It just becomes one more barrier to integration of the disabled, where the employer can cite a fairly subjective standard to bar them from an open position," he said.

Having conflicting appellate court rulings means the issue will eventually be considered by the Supreme Court, if not with the *St. Joseph's* case then with another, experts say.

"At some point, it will have to be taken up. There's just too much of a split" on the issue, said Katherine Dudley Helms, office managing shareholder with Ogletree, Deakins, Nash, Smoak & Stewart P.C. in Columbia, South Carolina.

Some observers believe that given the likely appointment of a conservative-oriented justice to the still-vacant ninth spot on the high court, a pro-employer ruling is likely.

If, as expected, the Supreme Court reflects a more conservative bent, "I could really see them coming down in the employer's favor," Mr. Meneghello said.

Mr. Hament agreed. "In this case, the EEOC went too far. I think that there's a very good chance" the high court would uphold the 11th Circuit ruling, he said.

Predicting how the Supreme Court will rule, however, "is a dangerous game," said William D. Goren, a Decatur, Georgia-based attorney and ADA consultant.

Meanwhile, the 11th Circuit ruling will be influential in other circuits, Mr. Paindiris said. "There's a lot of good quotes you can get out of this case for a summary judgment motion," he said.

### ARGUMENTS OVER ACCOMMODATION

Leokadia Bryk, a nurse at St. Joseph's Hospital Inc. in Tampa, Florida, sought a reasonable accommodation in the form of a job reassignment because she needed a cane, which posed a safety hazard in her job in a psychiatric ward, according to the Dec. 7 ruling by the 11th U.S. Circuit Court of Appeals in Atlanta in *EEOC v. St. Joseph's Hospital Inc.*

She was given the opportunity to apply for other jobs at the hospital but had to compete for them. The hospital terminated her employment in November

2011 when she failed to obtain another hospital position, and the EEOC filed suit on her behalf.

The agency argued the hospital had violated the Americans with Disabilities Act by requiring her to compete with other applicants.

A jury held that while the hospital had failed to provide a reasonable accommodation, it had made good-faith efforts to identify and make a reasonable accommodation for Ms. Bryk.

The case was appealed, and a three-

judge panel of the 11th Circuit ruled the ADA does not require reassignment without competition.

"Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance," said the ruling.

"Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients," it said.

The ruling creates a conflict with other appellate court rulings, most recently the 2012 ruling by the 7th U.S. Circuit Court



of Appeals in Chicago in *EEOC v. United Airlines Inc.*, which concluded the ADA requires employers to appoint disabled employees to vacant positions if this would not create undue hardship.

Judy Greenwald

# Pirate attacks on ships decrease as companies increase security

BY ROB LENIHAN

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Piracy is one of the world's oldest crimes and, despite some potentially encouraging statistics, maritime security analysts say it will never go away.

Last month, the International Chamber of Commerce's International Maritime Bureau said global piracy last year had reached its lowest levels since 1998, but added that more crews were kidnapped at sea in 2016 than in any of the previous 10 years.

The London-based bureau recorded 191 incidents of piracy and armed robbery on the world's seas in 2016, and pirates kidnapped 62 people for ransom in 15 separate incidents. Slightly more than half were captured off West Africa, the bureau said, while 28 were kidnapped from tugs, barges, fishing boats and, more recently, merchant ships around Malaysia and Indonesia.

"We've seen a reduction in the amount of attacks," said Phillip Cable, CEO of maritime security firm Maritime Asset Security & Training (MAST) Ltd. in Stanstead, England. "But I think the view of the intelligence community is that the apparatus of piracy very much remains intact, and the conditions that started it all in the first place still exist. The criminality still exists, but the deterrent, that being the security presence, is kind of keeping it at bay."

Piracy, Mr. Cable added, "is as old as ships," and he warned that in light of the decreasing number of attacks, some shipping companies might view security as an expense they can do without.

"There's an oversupply of tonnage, and fundamentally you can't run a ship if you're not making any money," he said. "Sometimes security is the first thing to go because if there isn't an incident for a year, people will think, 'Oh, we'll be okay.' So it's the first thing that goes."

Unfortunately, Mr. Cable said, cutting back on security is a risk that some people



Shipboard security presence is credited with helping keep piracy at bay.

think is worth taking.

"They have insurance," he said, "they consider the risk is remote, and they'll decide not to take any physical security and just let the crew deal with it. It really depends upon the attitude of the shipowner."

Peter Cook, a founding director of security consulting firm PCA Maritime Ltd. in London, said there were numerous incidents off the coast of Somalia and the northwestern Indian Ocean between about 2008 and 2012.

"And whilst the threat of that hasn't gone by any means, it has been significantly reduced," he said. "But we continue to have a lot of piracy and robbery at sea in the Gulf of Guinea and currently in the South China Sea, and there is an increasing amount of activity going on in the northern end of South America as well."

Mr. Cook was the CEO from 2012-14 of

the Security Association for the Maritime Industry, and he worked with Marsh Ltd. to formulate a bespoke insurance package for private maritime security companies called the "SAMI Facility."

He attributed the reduction of piracy to a "three-legged stool" of the combined efforts of several of the world's navies; a system of defensive procedures on ships known as Best Management Practices that includes security measures such as the use of fire hoses and barbed wire barricades on ships; and the introduction of armed security guards on ships.

"That was really the thing that changed," Mr. Cook said, noting that 30% to 35% of ships transiting the high-risk area of the Indian Ocean have guards. "Because whilst a pirate could manage to get through the barbed wire, if they discovered there were armed guards on board, the likelihood of them going on board was next to nil."

Stefano Costanzi, Washington-based publisher of The Costanzi Report on Piracy and Maritime Security, also cited the importance of having armed security guards on ships in the West Indian Ocean.

"I do believe the fact that the deployment of armed security guards in the area has significantly contributed to curbing the attacks," he said. "If you think about it, in the West Indian Ocean, piracy has gone down, but it has not gone down as much in the Gulf of Guinea or in Southeast Asia."

Mr. Costanzi noted that private armed security guards are not permitted in the territorial waters by several states in the Gulf of Guinea. Armed security guards are

## GLOBAL PIRACY INCIDENTS FALL

Piracy and armed robberies against ships fell to 191 incidents in 2016, down 28.8% from 2015.

|                    | 2016 | 2015 |
|--------------------|------|------|
| Vessels boarded    | 150  | 203  |
| Hijackings         | 7    | 15   |
| Attempted attacks  | 22   | 27   |
| Vessels fired upon | 12   | 1    |

Source: International Chamber of Commerce International Maritime Bureau

also a problem in Southeast Asia, he said, because ships pass through the territorial waters of several countries, including the Philippines, Malaysia, Indonesia.

"So I would think in the area where armed security guards were deployed, meaning the West Indian Ocean," he said, "we're seeing a dramatic effect on piracy. Cutting back on that is probably not a good idea. The oceans are vast and difficult to patrol. It's difficult for naval forces to be everywhere."

None of the analysts said they expect piracy to disappear anytime soon as the various trouble spots remain troubled by poverty, corruption and political instability.

"As long as people trade by sea," Mr. Cook said, "there will be somebody that will commit crime in order to get stuff, whether it be smuggling or committing piracy or whatever. There's always a criminal around. That's human nature."



# Brokers keep up buying spree

BY TIMOTHY J. CUNNINGHAM  
AND DANIEL P. MENZER

**A**nnounced and reported mergers and acquisitions for U.S. and Canadian insurance agents and brokers experienced a slight decline in 2016, finishing out the year with 449 deals compared with 456 in 2015.

This made 2016 the second-most active year in agent and broker M&A activity, falling only 1% short of the 2015 total but still more than 20% ahead of 2014, the next closest period.

As of Dec. 31, 2016, there had been nine consecutive quarterly transaction counts of 100 or more each, although the fourth quarter of 2016 just squeaked in at 103. Prior to 2014, the only quarterly total greater than 100 was the fourth quarter of 2012 in advance of the tax law change on capital gains rates that became effective Jan. 1, 2013.

For the year, Caledonia, Michigan-based Acrisure L.L.C. reported the most activity with 63 closed transactions, up from 56 last year. Chicago-based Hub International Ltd. was second, completing 45 transactions, followed by Lake Mary, Florida-based AssuredPartners Inc. with 28, Columbus, Ohio-based BroadStreet Partners Inc. with 27 and Arthur J. Gallagher & Co. with 24 announced transactions.

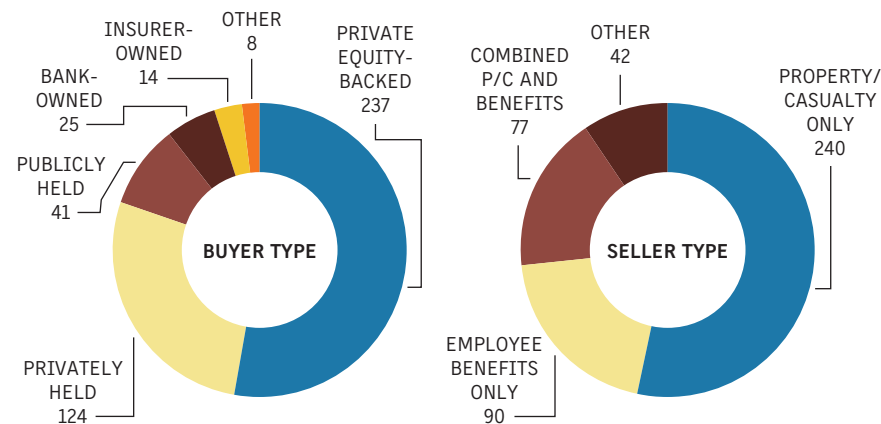
Huntington Beach, California-based Confie and Richmond, Virginia-based The Hilb Group L.L.C. were the only other buyers with more than 10 transactions, with 17 and 11 respectively, while the remaining 142 buyers all reported fewer than 10 transactions, including 106 with only one acquisition.

Acrisure and Hub reported the biggest increase in deals compared with 2015, up by seven and eight deals respectively, followed by Atlanta-based OneDigital Health and Benefits with six, and Boston-based Risk Strategies Co. Inc. and New York-based JenCap Holdings L.L.C. with four each. There were three firms with more than five fewer transactions in 2016 vs. 2015: Assured Partners declined to 28 in 2016 from 38 in 2015, followed by Daytona Beach, Florida-based Brown & Brown Inc. and New York-based NFP Corp., both down to seven in 2016 from 12 in 2015.

Private equity-backed buyers as a group accounted for 237, or 53%, of 2016's reported transactions, consistent with 53% in 2015. Privately owned brokerage acquisitions increased to 124 in 2016 from 109 in 2015 and increased their share of the total to 28% from 24%. All the other categories of buyers reported fewer transactions in 2016.

## BUYERS AND SELLERS

Private equity-backed firms were the biggest buyers of insurance agencies and brokerages in 2016, while property/casualty-only firms were the biggest sellers.



Source: Optis Partners L.L.C.

## TOP BUYERS

Most acquisitive buyers of insurance agencies and brokerages in the U.S. and Canada during 2016

| Buyer                     | 2016 | 2015 | Company type          |
|---------------------------|------|------|-----------------------|
| Acrisure L.L.C.           | 63   | 56   | Private equity-backed |
| Hub International Ltd.    | 45   | 37   | Private equity-backed |
| AssuredPartners Inc.      | 28   | 38   | Private equity-backed |
| BroadStreet Partners Inc. | 27   | 26   | Canadian Pension Fund |
| Arthur J. Gallagher & Co. | 24   | 27   | Publicly held         |

Source: Optis Partners L.L.C.

## TOP PUBLICLY HELD BUYERS

Most acquisitive publicly held brokerages over the past five years

| Buyer                                   | 2012-2016 total | 2016 |
|-----------------------------------------|-----------------|------|
| Arthur J. Gallagher & Co.               | 134             | 24   |
| Brown & Brown Inc.                      | 45              | 5    |
| Marsh & McLennan Agency L.L.C.          | 35              | 7    |
| CBIZ Benefits & Insurance Services Inc. | 14              | 2    |
| NFP Corp.                               | 8               | 0    |

Source: Optis Partners L.L.C.

Seven of the top 10 buyers in 2016 were private equity-backed firms, with Gallagher and Marsh & McLennan Agency L.L.C. as the two publicly traded firms in the top 10 and OneDigital rounding out the 10 most active.

Since the beginning of 2013, private equity-backed buyers have completed over 750 transactions out of the total reported 1,535 transactions, or 49%, compared with only 28% of the total — 360 of 1,300 total — for the five previous years. This has been the single biggest change in the M&A activity over the past eight to 10 years and has helped drive valuations to levels almost never seen before.

Property/casualty brokers continued to dominate the M&A landscape, but for

the first time since 2013, the number of property/casualty brokerages sold declined, dipping to 240 in 2016 from 259 in 2015. Only employee benefit brokerage transactions increased during 2016, up 20% to 90 in 2016 from 75 in 2015. The largest increase came from OneDigital as it returned to the active buyer group with eight transactions in 2016, up from two in 2015.

There were 149 separate buyers in 2016, down slightly from the 151 during 2015, while the 10 most active buyers accounted for 239 of the 449 reported transactions, or 53%, compared with the 244 out of the 456 total in 2015.

There were 16 firms reporting five or more transactions in 2016 compared with

17 in 2015. Four of the 2015 buyers — New York-based Integro Group Holdings L.P., Portsmouth, Virginia-based Towne-Bank, Cedar City, Utah-based Leavitt Group Enterprises and Fort Lauderdale, Florida-based Patriot National Inc. — fell out of this list, while three new buyers — OneDigital, Toronto-based Intact Financial Corp. and Fort Worth, Texas-based Higginbotham & Associates — joined the 2016 group.

In 2016, three of *Business Insurance's* largest ranked agencies sold to private-equity backed buyers:

- No. 61 Sterling & Sterling sold to BroadStreet Partners in April.
- No. 101 Old National Insurance sold to Prime Risk Partners in June.
- No. 41 Mesirow Insurance Services sold to Alliant in July.

Already in 2017, Marsh & McLennan Agency L.L.C. has announced the acquisition of J. Smith Lanier & Co., ranked 30th in the 2016 *Business Insurance* ranking of the largest brokers of U.S. business.

M&A activity and agency valuations remain at historically high levels, and will not likely change anytime soon, barring some dramatic outside influences. Even with the 2016 M&A count off slightly from last year, Optis Partners L.L.C. expects a continuation of an active marketplace for the next year or two, with the private equity-backed firms leading the way. However, the days of double-digit growth in the number of transactions may be behind us. The U.S. economy continues to move forward across a wide spectrum of economic measures, while property/casualty insurance prices continue to experience modest softening. Interest rates remain at historic lows but have slowly started inching upward and will likely continue over the next several years.



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CHICO'S FAS – AMY BADER  
CHUBB – MATTHEW PREVOST  
CLYDE & CO. – CARLY CELMER  
CORVEL CLAIMS MANAGEMENT – ANGELA BLANCH  
COTTON HOLDINGS, INC. – LANCE EWING  
CRACKER BARREL OLD COUNTRY STORE, INC. – ROB BEHNKE  
CRAVEABLE HOSPITALITY GROUP – GARY HELLER

DARDEN RESTAURANTS INC. – KATRINA LINDSEY  
DARDEN RESTAURANTS INC. – JAMES DAVID SATTERFIELD  
DAVE & BUSTER'S – LISA DILLARD  
DOLLAR TREE – J. RYAN JOHNSON  
GALLAGHER BASSETT SERVICES, INC. – CHRISTOPHER CARUCCI  
HOME DEPOT U.S.A., INC. – TESSA HOLLIS  
KOHL'S – LAURIE FREY  
MARSH – R. DAMIAN BREW  
MARSH – MACHUA MILLETT  
MARSH – ROBERT PARISI  
PUBLIX SUPER MARKETS, INC. – TAMMY GREGORY  
PUBLIX SUPER MARKETS, INC. – LAUREN MCBRIDE  
SALLY BEAUTY HOLDINGS, INC. – JENNIFER INGRAM  
SEDGWICK – KATHRYN TAZIC  
STARWOOD HOTELS & RESORTS WORLDWIDE, INC. – DAVID MARSHALL  
STARWOOD HOTELS & RESORTS WORLDWIDE, INC. – CAMERON SHIRLEY  
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# Opioids create dilemma for doctors, insurers

BY LOUISE ESOLA

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The steady march away from opioid prescribing in workers compensation will continue into 2017, according to industry experts who call this ongoing shift in treating pain for injured workers a necessary, but complicated journey for all parties involved.

Doctors have mixed feelings about more state regulations guiding opioid prescribing. And for comp insurers, it means covering alternative pain therapies, which some have been reluctant to pay for in the past.

"We have to realign ourselves on how we treat pain ... instead of sending everybody out the door with an opioid," said Dr. Robert Goldberg, San Francisco-based chief medical officer and senior vice president for pharmacy benefit management firm Healthsystems L.L.C.

Injured workers who may think every ache deserves a pill will need to look elsewhere for relief in some cases, experts say.

"What the patient wants may not be what they need," said Dr. Dan Hunt, Lansing, Michigan-based medical director for workers comp insurer AF Group. "You can actually make the injured worker upset with you (by not prescribing painkillers). That alone brings up growing pains."

Several states have placed opioid prescribing restrictions, guidance, and monitoring in place to limit the amount of narcotics in the hands of patients, with more changes expected this year.

For instance, California is set to implement a workers comp prescription drug formulary on July 1 that will drastically limit opioid prescriptions without a medical review. New York and Florida are considering similar drug formularies for workers comp, according to reports.

Meanwhile, Maine revised its prescription drug monitoring program in January, requiring prescribing physicians to check the state's database to see whether a patient has already received a prescription for opioids or other controlled substances. Pennsylvania and Ohio both strengthened their monitoring programs in 2016, and experts say others will follow suit.

Such regulations seem to have had an effect on workers comp. A study released in September by the Cambridge, Massachusetts-based Workers Compensation Research Institute showed a 20% to 31% reduction in opioid prescribing for six of the 25 states it studied, including Texas and New Jersey. The report observed that

the decreases coincided with various state reforms aimed at curbing opioid abuse.

Medical experts tend to agree with formularies and tracking, but not without reservations.

Phil Walls, Tampa, Florida-based chief clinical officer for pharmacy benefit manager Matrix Healthcare Services Inc., which does business as myMatrixx, said physicians ought to be "self-regulating," but that the new regulations are "necessary."

Dr. Steven Feinberg, founder of the Palo Alto, California-based Feinberg Medical Group, said most doctors are pressed for time. He worries that work-

ers comp prescribing regulations could stall treatment for a worker who may need more pain medicine than a few days' supply. "When I am seeing 25 patients a day, I don't have time to say, 'Mother may I?'"

During a December webinar hosted by the Western Occupational and Environmental Medical Association in San Francisco, Dr. Goldberg said that the opioid prescription review process under California's new workers comp formulary could take as long as five days.

Dr. Stephen Martin, a Barre, Massachusetts-based family doctor and a University of Massachusetts Medical School professor, said such a review process could prove detrimental for a worker in serious pain from a crushing injury, for example.

"In an acute pain situation... I would wonder about a person's state of mind when they get to day eight and don't have access to pain relief and they will have to contend with a system that doesn't have the same timeline for resolution as they



have, which is to not be in pain," he said.

Greg McKenna, Chicago-based senior vice president of external affairs for Gallagher Bassett Services Inc., said litigation could arise in such situations based on an injured worker's "perceived deprivation of rights."

Experts are looking for ways to manage injured workers' pain without relying on opioids. For some, that means physical therapy, massage therapy, chiropractic sessions, cognitive behavioral therapy, or encouraging claimants to practice mindfulness.

"I think the treatment angle is headed

toward a holistic approach," said Paul Peak, Memphis, Tennessee-based director of clinical pharmacy for Sedgwick Claims Management Services Inc. "We are addressing the whole person."

Dr. Goldberg said individuals need to be treated on a "case-by-case" basis, and noted that alternative pain treatment could be more cost effective in the long run.

"If you look at the pharmacy costs being accrued (with opioids), those are in the hundreds of thousands of dollars," Dr. Goldberg said. "Whereas you look at 10 sessions of physical therapy at \$100 a session, it's \$1,000."

**20-31%**

A study released in September showed a 20% to 31% reduction in opioid prescribing for six of the 25 states it studied coinciding with various state reforms aimed at curbing opioid abuse.

## Big Pharma's opioid push began in '90s



The cause of the current opioid crisis has roots not only in the pharmaceuticals industry of the 1990s, which marketed strong painkillers as a safe and effective way to manage pain, but also in doctors' offices, when the profession began accepting pain as a vital sign along with objective measures such as blood pressure, heart rate, respiratory rate and temperature.

The workers compensation industry has been a big driver, experts say. In California, for example, opioids represent 27% of all drugs prescribed to injured workers, according to the Oakland-based California Workers' Compensation Institute.

"The workers comp industry and society in general since the 1990s has been trained to think of opioids as a first-line remedy for pain," said Mark Pew, senior vice president

at Prium, a Duluth, Georgia-based medical cost management firm. "The pendulum is now swinging the other way."

Today opioids are documented to be highly addictive with a host of side effects that had been minimized in earlier marketing — several municipalities and individuals have filed lawsuits against the manufacturers and marketers of several opioids they claim spurred the crisis.

"It's only fair to say that physicians and pharmacists were duped by the pharmaceutical industry" marketing opioids as being nonaddictive, said Phil Walls, Tampa, Florida-based chief clinical officer for pharmacy benefit manager Matrix Healthcare Services Inc., which does business as myMatrixx.

Louise Esola

# Gig economy traveling faster than comp insurers can keep up

BY JOYCE FAMAKINWA

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The rise of the on-demand or “gig” economy creates new safety challenges for workers in the growing employment sector and raises questions about how to ensure they are covered if they are injured while working.

For instance, the Washington state Department of Labor & Industries in October ordered San Francisco-based delivery service Postmates Inc. to retroactively pay workers compensation premiums for over 3,000 of its couriers in the state, according to documents provided by the department.

Postmates, which allows customers to order groceries and other items through an app, considered its couriers to be independent contractors and did not cover them under workers comp. But the Washington state labor department — the state’s monopoly workers comp insurer — found that Postmates should have paid \$323,027 in audited workers comp premiums for those workers. The company was also charged \$75,275 in penalties for insufficient record keeping, according to documents provided by the department.

Robert Rieders, general counsel for Postmates, said the company has contested the decision.

Postmates is one of the many companies that rely on what is known as the on-demand economy. Those include San Francisco-based ride-sharing firms Uber Technologies Inc. and Lyft Inc. and TaskRabbit Inc., a San Francisco-based company that allows app users to contract people to perform tasks such as handiwork or cleaning.

There are several definitions for the on-demand economy, but the broadest is “any source of income where the workers

“Much of the on-demand economy is not structured around having a business model where they employ full-time workers.”

Kristin Sharp,  
Shift Commission on Work,  
Workers, and Technology



and the clients are connected by a digital platform,” said Kristin Sharp, Washington-based executive director of the Shift Commission on Work, Workers, and Technology, an initiative of non-partisan public policy think tank New America and financial media company Bloomberg L.P.

With the rise of workers taking on on-demand jobs, its relationship to workers comp has become a focal point, observers say. While technology may make things easier for consumers, on-demand economy workers do not avoid worker safety risks.

“A lot of the on-demand jobs are among the most dangerous in the country. In particular, for-hire transportation is a very hazardous industry,” said Washington-based Deborah Berkowitz, Washington-based senior fellow, worker safety & health at the National Employment Law Project.

Drivers for services like Uber and Lyft face the same risks as taxi drivers and chauffeurs who are killed on the job at a rate five times higher than the average for other workers, Ms. Berkowitz said. In addition, companies such as Postmates use bicycle delivery, which also leads to occu-

pational hazards, she said.

While some experts believe that the current workers compensation framework can accommodate on-demand economy workers, others say comp insurers have been slow to respond to this new category of workers and states may have to step in with alternative coverage arrangements for injured on-demand workers.

“A business can hire gig workers to do their job and that business is free to classify those workers as employees for work comp purposes and purchase a work comp policy and they would be covered,” said Steven A. Bennett, Washington-based associate general counsel and director of workers compensation programs at the American Insurance Association. “Our view is that no major changes have to be done to the work comp system to adapt to the gig economy.”

But workers comp insurers have yet to respond to the on-demand economy, said Los Angeles-based Edward Canavan, vice president of the workers compensation practice and compliance at third-party administrator Sedgwick Claims Management Services Inc.

After learning more about the evolving on-demand industry, workers comp insurers may begin to address the on-demand economy down the line, Mr. Canavan said.

“If I was a carrier, I would start thinking about coverage issues, I would start thinking about liability issues, I would start thinking about cost shifting ... could these workers potentially be tempted to shift costs somewhere else because they don’t have coverage,” he said.

Postmates and other companies that rely on gig economy workers could have to make changes to their business structure if they are required to provide workers comp coverage to workers that are currently considered independent contractors, experts say.

“Much of the on-demand economy is not structured around having a business model where they employ full-time workers,” said Ms. Sharp of the Sharp Commission.

“If judges increasingly rule that online platforms are employers, that changes the economic calculus of those companies, and I think you will see some go out of business and some that adapt and hire full-time workers,” she added.

# Medical marijuana comp payments rolling in

BY LOUISE ESOLA

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**M**edical marijuana has been paid for under workers compensation claims in six states, and experts say the push will continue despite a dearth of medical evidence supporting cannabis as an effective pain treatment and strong opposition from the insurance industry.

“This sets a dangerous precedent for insurers to pay for it,” said Steve Bennett, Washington-based director of workers compensation programs and associate general counsel for the American Insurance Association.

Experts say the reason there are few clinical studies on the safety or efficacy of marijuana is because cannabis is classified by the U.S. Drug Enforcement Administration as an illegal Schedule I drug alongside cocaine and heroin — a category the federal government classifies as drugs that having no medical use.

“We know anecdotally that it can help, but from a clinical perspective, nobody knows what it does,” said Brian Allen, Salt Lake City-based vice president for government affairs at pharmacy benefit manager OptumRx Inc.

In a recent example, a New Jersey administrative law judge ordered Beaumont, California-based 84 Lumber Co. to reimburse one of its injured workers for medical marijuana prescribed for neuropathic pain in his left hand after an injury suffered while using a power saw at a lumber plant in New Jersey.

The December ruling by the New Jersey Department of Labor and Workforce Development’s Division of Workers’ Compensation showed that the worker had been on a steadily increasing dose of opioids and that his doctors sought medical marijuana as an alternative to reduce his reliance on strong pain medications. According to legal documents, the marijuana had helped wean the worker off opioids.

The “evidence presented in these proceedings show that the petitioner’s trial use of medicinal marijuana has been successful,” the ruling reads.

Jeffrey Adelson, Santa Ana, California-based general counsel and managing partner for law firm Adelson, Testan, Brundo, Novell & Jimenez, followed accounts of the New Jersey case and said the judge was “diligent” in ruling that the injured worker’s medical marijuana should be covered by workers comp.

“Ultimately, she weighed the evidence as to the applicability of the New Jersey Medical Marijuana Program (and) determined the injured worker’s condition was ... a qualifying factor for the program,”



Mr. Adelson said.

Mark Pew, senior vice president at Prium, a Duluth, Georgia-based medical cost management firm, has been following marijuana cases in other states, such as Maine and Connecticut. He said most injured workers fighting for medical marijuana reimbursements, like the New Jersey example, tend to “tell a good story to the judge” and have “multiple doctors determining that marijuana is a better fit (and) that the patient is on a dangerous drug regimen.”

“To judges who have heard about the opioid epidemic, that story is resonating,” Mr. Pew said.

Mr. Allen said this anecdotal approach is what helped voters in now 28 states and Washington approve medical marijuana in recent years in what he referred to as a “populist” attitude toward health care.

Meanwhile, workers comp insurers aren’t eager to cover the drug because it’s unclear whether marijuana use could complicate a claim, experts say.

“It adds risk to the claim, the unknown effects (of marijuana),” Mr. Allen said.

Experts say the other issue is that cannabis remains illegal under federal law, posing the question: Could insurers be held liable for breaking federal law?

“Nobody really knows what the (Trump) administration is going to do,” added Mr. Allen. “The last administration was hands-off on prosecuting” marijuana violations in states that legalized it.

“For insurers, it constitutes a federal crime,” Mr. Bennett said. “I don’t think

insurers should be in a position where states are mandating that they violate federal law.”

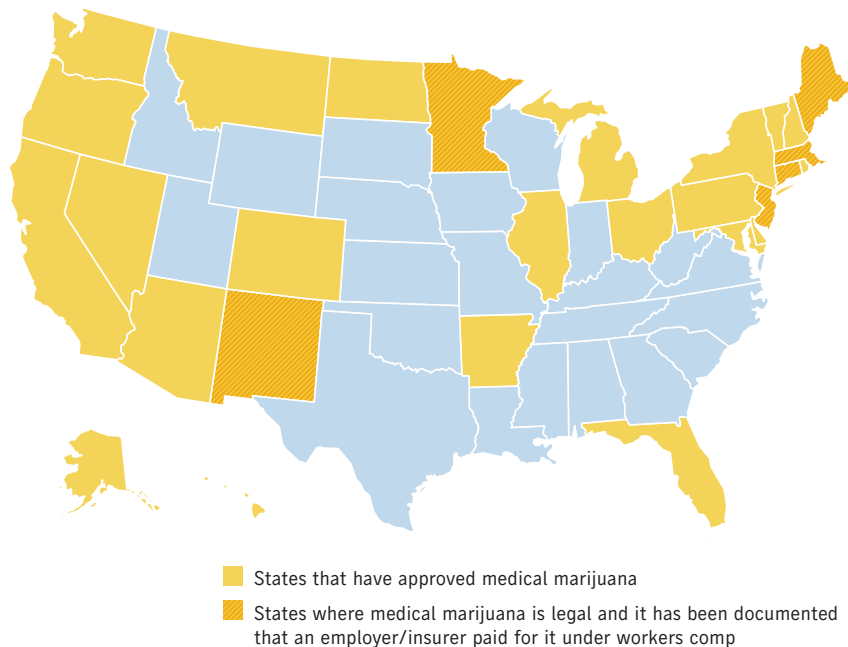
Some states have taken steps to prevent marijuana payment conflicts. In North Dakota, where voters recently approved medical marijuana, legislators in January overwhelmingly voted 81-9 in favor of a bill that would prohibit North Dakota Workforce Safety & Insurance — the state’s monopoly workers comp insurer — from paying for medical marijuana.

Harvey J. Hanel, Bismarck, North Dakota-based medical services and pharmacy

director for North Dakota Workforce Safety & Insurance, said the bill, which would still need the governor’s approval as of late January, is in line with what the state has been trying to do for injured workers since it introduced a prescription drug formulary: provide evidence-based care.

“When I look at studies on medical marijuana, they are not quality-controlled clinical studies. Additional study is needed ... We think it is prudent for us to hold off (on paying for medical marijuana) at this time,” Mr. Hanel said.

## MEDICAL MARIJUANA INROADS



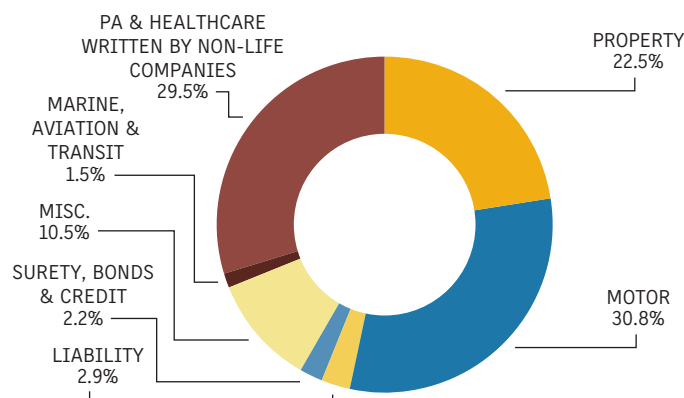
## PROFILE: SPAIN

# 11

GLOBAL  
P/C MARKET  
RANKING

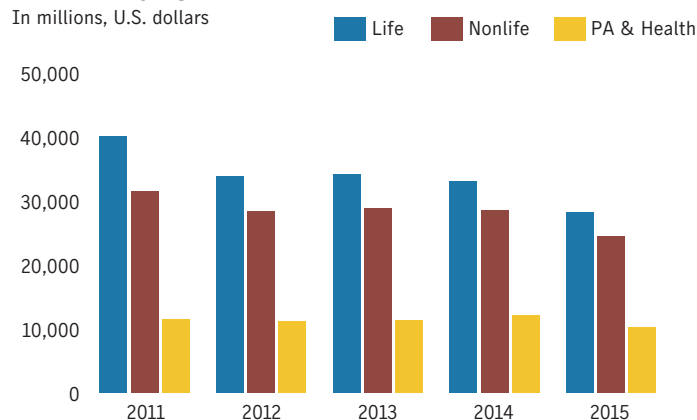
Despite a challenging economic environment in recent years, the property/casualty insurance sector in Spain has maintained sound solvency and profitability margins and remains well-capitalized. P/C premium income is still 5% lower than its peak in 2008, mainly because of business closures and cutbacks, allied with aggressive competition. Larger, profitable accounts are sought after; however, certain sectors, notably food and drink manufacturing, are experiencing stricter underwriting controls, as are certain classes of professional liability insurance. In addition, historically low interest rates have led insurers to focus more on underwriting profit rather than investment income.

### MARKET SHARE



### MARKET GROWTH

In millions, U.S. dollars



Source: Axco Global Statistics/Industry Associations and Regulatory Bodies

### COMPULSORY INSURANCE

Many lines of insurance are compulsory, including:

- Auto third-party liability
- Hunters' liability
- Third-party liability for owners of dangerous dogs
- Third-party liability for unmanned aircraft
- Professional liability for insurance brokers

### NONADMITTED

Nonadmitted insurance is not permitted in Spain because the law provides that insurance must be purchased from locally authorized insurers, the only exception being with special authorization from the regulator. In addition to insurers in other EU countries, insurers from European Economic Area states may provide insurance under freedom-of-services agreements.

### INTERMEDIARIES

Brokers and agents must be authorized to do insurance business in Spain and are not permitted to place business with nonadmitted insurers unless specially authorized to do so by the regulatory authorities — such cases being extremely rare. There is no obligation for brokers involved in nonadmitted placements to warn buyers that insurers are not subject to local supervision.

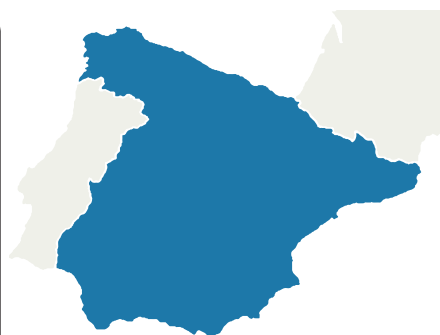
### MARKET PRACTICE

Attempts are made occasionally by nonadmitted insurers and brokers to seek business in the Spanish market, and the regulator regularly publishes a list of nonadmitted entities. Locally established insurers and brokers and those operating under freedom-of-services legislation are said to follow the law.

### MARKET DEVELOPMENTS

Updated December 2016

- Spain's decentralized political system has resulted in numerous classes of compulsory insurance. Law 20/2015 of July 14, 2015, includes a provision for the establishment and oversight of compulsory insurances. The law also provides for any future compulsory insurance requirement to have "the force of law" — that is, a class of insurance can only be considered compulsory if a law to that effect exists.
- Professional liability coverage for clinical trials is obligatory in accordance with Royal Decree 1090/15 of Dec. 4, 2015. However, contrary to previous legislation, the decree establishes that trials requiring a "low level of intervention" will not need to be covered by an insurance policy or financial guarantee provided a health center has group professional liability coverage.
- Spain transposed EU Directive 2009/138/EC, known as the Solvency II directive, through the passing of Law 20/2015 on July 14, 2015, on the management, supervision and solvency of insurers and reinsurers. The legislation came into force on Jan. 1, 2016.
- Article 22 of the Insurance Contract Law 50/1980 of Oct. 8, 1980, has been amended by Law 20/2015, whereby the policyholder now only needs to give one month's notification of nonrenewal prior to the renewal date. Previously, the notification period was two months.



### AREA

# 194,897

square miles

### POPULATION

# 46.4

million

### MARKET CONCENTRATION

# 38%

market share of top 5 insurers

### 2016 GDP CHANGE (PROJECTED)

# 3.1%

Information provided by Axco  
Insurance Information Services.  
[www.axcoinfo.com](http://www.axcoinfo.com)

## Pigeon droppings lead to lifetime comp benefit award

■ A Missouri appeals court upheld \$167,811 in permanent total disability benefits to a deceased worker — as well as more than \$500 in lifetime weekly workers compensation benefits to his wife — for lung disease that the worker contracted from pigeon droppings while smoking on his employer's roof.

Terry Lankford worked as an investigator for the Newton County, Missouri prosecutor's office. He often would smoke during work hours on a courthouse roof, which was a popular place for pigeons with droppings accumulating there.

Mr. Lankford left his job in December 2007 after undergoing lung surgery to remove half of his right lung, which contained a nodule that was suspected to be cancerous. He subsequently suffered a stroke after the procedure that left him unable to work, according to court filings.

In April 2008, he filed a workers comp claim asserting he was exposed to pigeon droppings during the course and scope of his employment. Doctors for Mr. Lankford noted that a biopsy of his lung nodule showed that the growth contained bacteria and a fungus linked to pigeon droppings.

In June 2012, Mr. Lankford died due to complications of pneumonia and chronic obstructive pulmonary disease, and his wife, Carol Lankford was substituted as the claimant, records show.

An administrative law judge ruled in March 2015 that Mr. Lankford's occupational activities caused his disease and ordered Newton County to pay \$167,811 in past PTD benefits for Mr. Lankford, in addition to \$502 per week to Ms. Lankford for ongoing PTD benefits for the remainder of her life. A three-judge panel of the Missouri Court of Appeals upheld the award.

## Worker wins comp benefits despite positive drug test

■ An Ohio truck driver should receive workers compensation temporary total disability benefits even though he was fired by his employer for testing positive for marijuana in a post-injury drug test, a split Ohio Supreme Court ruled.

According to court documents, James Cordell broke several bones in his leg after he fell five or six feet from a truck in February 2012 — an accident both he and his employer, Houston, Texas-based Pallet Cos. Inc., agreed was not caused by the marijuana found in a post-injury blood screening.

The Ohio Bureau of Workers' Compensa-

sation covered his medical expenses for the work accident but denied workers comp TTD payments, claiming he had voluntarily abandoned his position by testing positive for drug use, which prompted the company to fire him.

An Industrial Commission of Ohio staff hearing officer reversed that decision in July 2012, finding that "an injured worker who is unable to return to work at his former position of employment cannot voluntarily abandon his former position of employment." However, the industrial commission overturned that ruling after finding that Mr. Cordell's marijuana use represented voluntary abandonment under Ohio case law.

The Ohio Supreme Court affirmed the TTD benefit award to Mr. Cordell in a 5-2 ruling, finding that Mr. Cordell's "termination does not amount to a voluntary abandonment of employment," partly because he "was medically incapable of returning to work as a result of the workplace injury."



## Court caps liability for supermarket's data breach costs

■ A federal appeals court affirmed a \$500,000 cap on a St. Louis-based supermarket chain's liability to its payment processor and merchant bank in connection with a data breach.

Schnuck Markets Inc., which had suffered a data breach between December 2012 and March 2013, filed suit against Atlanta-based First Data Merchant Data Services Corp. and Jacksonville, Florida-based Citicorp Payment Services Inc., claiming they were withholding more transaction money than their merchant payment processing agreement permits in order to reimburse banks that issued payment cards affected by the attack.

At issue in the litigation was the master services agreement between Schnucks and First Data, under which First Data agreed to provide credit and debit card processing service for the supermarket chain.

The agreement states Schnucks must indemnify the defendants for "all losses, liabilities, damages and expenses" under certain circumstances, "but limits Schnucks' liability to \$500,000." An exception to that limit is "chargebacks, services

fees, third-party fees and fees, fines or penalties" assessed by payment card networks.

A unanimous three-judge panel of the 8th U.S. Circuit Court of Appeals in St. Louis found that the exception does not apply and that Schnucks' liability is limited to \$500,000. Fees have been defined as sums paid or charged for services, the opinion said.

These fees "do not qualify as payments for services, because they are imposed to compensate issuing banks for losses they sustained as a result of a data breach, not as compensation for performing services," the panel said.

## Zurich can arbitrate insurance dispute over Adidas clothing

■ Zurich Insurance Co., as the insurer for Adidas, can proceed with arbitration in a coverage dispute with a Panama transportation company that was a named insured in a policy issued by a now-insolvent insurer, says a federal court.

Herzogenaurach, Germany-based Adidas Group had consigned 574 boxes of clothing to Panama City-based Crowley Latin America Services for transport to Indiana via the port of Gulfport, Mississippi, in October 2011, according to a ruling by the U.S. District Court in New York.

Crowley in turn engaged Gulfport-based CW Enterprises Inc. to take the goods by land from Gulfport to Indiana, according to the ruling. Dallas-based Gramercy Insurance Co. insured CW for the cargo, and Crowley was named as an additional insured on the policy.

A second insurer, Beacon Insurance Co., a unit of Hamilton, Bermuda-based One-Beacon Insurance Co., also contracted to cover Crowley's liabilities, according to the ruling.

While in transit from Gulfport to Indiana, Adidas' clothing aboard CW's truck was damaged by fire. As Adidas' insurer, Zurich paid for the loss, then sought to recover that amount from Crowley because of its alleged neglect in causing the damage.

Gramercy was declared insolvent in August 2013 and its liabilities assumed by the Ridgeland, Mississippi-based Mississippi Insurance Guaranty Association.

Zurich filed a petition with the District Court to compel arbitration. Crowley opposed this, contending that under the Federal Arbitration Act, arbitration is barred by state insurance law that prohibits subrogated claims against the insured of an insolvent insurer.

But pointing to the Beacon coverage, the U.S. District Court disagreed. The Mississippi Insurance Guaranty Association law prevents recovery "only where there is single insolvent insurer, and does not purport to bar recovery where there are other, solvent insurers," the court ruled.

## DOCKET



### FDIC CAN'T RECOVER FROM BANK'S D&O LIABILITY POLICY

A federal appeals court held that the Federal Deposit Insurance Corp. is not entitled to recover from the directors and officers liability policy of a bank for which it acts as a receiver.

The FDIC had filed suit seeking coverage under the D&O policy issued by Oklahoma City-based BankInsure Inc. to West Los Angeles-based Security Pacific Bank, which was taken over by regulators in 2008.

A 2-1 panel of the the 9th U.S. District Court of Appeals ruled the FDIC was not entitled to coverage under the policy.

### CLASS CERTIFICATION IN WESSON OIL CASE AFFIRMED ON APPEAL

An "administratively feasible" way to identify class members is not a prerequisite to class certification, the 9th U.S. Circuit Court of Appeals in San Francisco found.

Plaintiffs from 11 states filed a case against ConAgra Foods Inc. based on bioengineered ingredients in its "100% natural" Wesson-brand cooking oil products.

ConAgra argued class certification for the group should be reversed because plaintiffs had not identified an administratively feasible way to identify class members. But an appeals court panel unanimously disagreed with ConAgra's position.

### HOME HEALTH AIDE WINS HOSTILE WORK ENVIRONMENT CASE

A federal court affirmed a jury's hostile work environment verdict against a New York nursing home.

Home health aide Lisa Fisher complained to supervisors about an Instagram photo that compared her with a chimpanzee from "Planet of the Apes." Officials reprimanded two employees for the photo.

The U.S. District Court in Brooklyn said the home "did not exercise reasonable care ... to eliminate" hostile work conditions, but cut a damages award to \$50,000 from \$250,000.



Nowell Seaman has risen in the ranks of the Risk & Insurance Management Society Inc. over the past 21 years, starting with his work with the Saskatchewan chapter of RIMS, where he served as a director from 1997-2007, and then as chair of the RIMS Canada Council in 2003-2005. Now Mr. Seaman, director of global risk management for Potash Corp. of Saskatchewan Inc., will spend the next year serving RIMS as its president. He recently spoke with *Business Insurance* Deputy Editor Gloria Gonzalez about assuming the presidency and the biggest challenges and opportunities for risk managers. Edited excerpts follow.

## Nowell Seaman

**Q** Congratulations on becoming RIMS president. Let's talk about what made you decide to take on the role.

**A** The driver behind this is that I'm a very strong believer in the mandate of RIMS. And I'm very passionate about the value RIMS brings to risk practitioners and to corporations through people that practice risk management.

**Q** What are your goals as president?

**A** The presidential theme for the year is moving forward together. It's about continuing momentum. But we've also experienced exciting things that we started, things such as certification. The initiative is to set the standard for the profession through the RIMS-CRMP: Certified Risk Management Professional certification. And we've invested a considerable amount of energy and resources to develop that in a way that is useful and practical and will help organizations recognize who is a certified risk management professional. We've been careful to follow ISO certification for the standard to ensure that it compares with professional standards across the globe.

**Q** What would you say are the biggest challenges facing your members these days, and how has that evolved since you joined the organization?

**A** I don't want to use the word dinosaur. I've been around for a few years. But one of the key observations I've made is that I think 20 years ago, you were trying to gain buy-in. You were trying to help people understand what risk management was. I think gaining that buy-in is no longer the challenge that it was. I think management, executive management and boards of organizations understand the importance of risk management to their organizations.

I think right now the majority of organizations do have some form of enterprise risk management to ensure that they understand the primary risks facing their organization and what the organization is doing about those risks. I think one of the challenges right now is how do we make risk management add value to strategy and add value to the decision-making process?

How can risk management processes, tools and information add more value to management's strategic decisions and operational decisions?

The challenge for the risk manager is we live in an evolving world. Risk is evolving. Cyber risk has been around for a long time, but we've also seen in the last couple of years an increased focus on cyber risk and the threats that cyber risks impose. We also have political risks, and I wouldn't say it's just from globalization. I think the world is changing a little bit. We have things such as Brexit and financial crises that have occurred over the last few years. All of these are challenges for an organization,



and the question is how can the risk manager ensure that the risk management process is adding value? How can we build that competency in our organizations so that our organizations are resilient, prepared and making good decisions?

**Q** Is there anything that risk managers should be particularly mindful of on the risk side?

**A** Well, cyber is certainly a hot topic. We can't forget that risk management is not only about protecting the organization against the consequences of risk, but also ensuring that risk management includes mitigation, loss prevention, loss control and doing those basics exceptionally well.

We often think of cyber as the theft or the loss of data and whatnot. But we can't forget that there's also the operational technology where there seems to be increasing profiles of cyber attacks on

operational systems at utilities and things that have been in the news very recently.

As we've seen, you can have recall issues with technology. You can have safety issues with new technology. And I don't know if you've ridden an airplane lately, and they'll say if you're carrying this kind of a device, you're not allowed to carry (hoverboards) on here.

**Q** What are the biggest opportunities for risk managers these days?

**A** I think the biggest opportunity is there's an increasing demand for effective risk management tools and processes. The opportunity is in ensuring that we are working to bring those available tools and processes to our organizations.

**Q** What are you most looking forward to over this next year?

**A** I'm very excited about the progress of RIMS, the certification, the advance of the continuing educational and conference opportunities that we give people, and really moving forward to engage our community.

We've really seen over the last few years an increasing desire for countries around the world to be involved in RIMS. And while the environments they operate in have significant differences, there's a real common desire to (advance the profession and the practice). And we can actually learn a lot from risk practitioners in other countries as well.

I'm also very excited about some of the work that we do with the rising risk professionals and the students. The quality of them is just amazing. And I think that they will continue to make a really great contribution as we evolve and grow.

I do think that there are going to be some important legislative contacts and initiatives coming down the pipe. I think they're looking at reauthorization of the National Flood Insurance Program, and there's also legislation on cyber risk and cyber security and possible regulatory changes affecting risk managers. It should be a very active year in terms of the legislative front.

And the conference will be exciting. We always get a great response when it's in Philadelphia. I think it's going to be a busy year. Get your hoverboards charged.

I think the biggest opportunity is there's an increasing demand for effective risk management tools and processes. The opportunity is in ensuring that we are working to bring those available tools and processes to our organizations.

# RISK MANAGEMENT CATCHES UP WITH FOOD SAFETY

Focus on mitigation includes insurance

BY GLORIA GONZALEZ

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Only six years ago, federal regulators had to “sweet talk” food manufacturers and suppliers into recalling contaminated food products quickly. But food companies are now under stricter mandates that shift the focus from reaction to prevention and guide their actions when their products are at the center of outbreaks.

The Centers for Disease Control and Prevention estimates that each year 1 in 6 Americans gets sick from contaminated food or beverages and 3,000 die. The U.S. Food and Drug Administration Food Safety Modernization Act, signed into law by then-President

Barack Obama on Jan. 4, 2011, shifts the focus of federal regulators from responding to contamination outbreaks to preventing them. While implementation of the law has been slow, several provisions were implemented in 2015 and 2016, and another key compliance date is in April.

The law has also accelerated growth in the insurance market for food recalls, with a sharp rise in insurers offering the coverage.

"For me, it's really about being proactive and being preventive," said Mike Robach, board chair of the Global Food Safety Initiative, a food industry group, and vice president of corporate food safety, quality and regulatory, at Cargill Inc. in Wayzata, Minnesota. "It is a mindset change."

The law was passed, experts say, largely in response to a salmonella outbreak at the now-defunct Lynchburg, Virginia-based

**"Even though the FDA has this new authority, companies themselves are recalling their products much more quickly because they don't want to be in the situation, just in terms of liability, that the FDA has to shut them down."**

Jaydee Hanson,  
Center for Food Safety

Peanut Corp. of America. The 2008-2009 outbreak resulted in 714 reported cases of salmonella poisoning in 46 states and nine deaths, as well as several pet food recalls occurring around the same time.

In the two years prior to FSMA passage, a total of 1,527 foodborne disease outbreaks — 675 in 2009 and 852 in 2010 — were reported, resulting in 29,444 cases of illness, 1,184 hospitalizations and 23 deaths, according to a CDC report.

And recalls are common. Just in the past few weeks, big name brands including Hostess Brands L.L.C., Tupperware U.S. Inc. and Whole Foods Market Inc. have recalled goods for reasons that range from salmonella contamination to undeclared ingredients.

"The bottom line why FSMA came into being is that every year there were more cases of food poisoning," said Jaydee Hanson, senior policy analyst at the Center for Food Safety, an environmental advocacy organization in Washington. "Finally, Congress decided that it needed to do something about it, and that something was to really give the FDA more authority to crack down on folks that weren't following good food safety procedures."

Before FSMA, federal food safety regulators could only cajole companies to recall contaminated products, but the statute, passed on a bipartisan basis, gave the FDA the authority to order recalls and shut down operations at production facilities if there is a significant risk to public health. The FDA is responsible for regulating the safety of about 80% of the U.S. food supply

as well as the safety of pet foods, with the remaining 20% regulated by USDA.

At the state level, only four states — Alaska, New Mexico, South Carolina and Texas — reportedly had authority to recall food products, but ordered recalls were rare before FSMA, according to a 2012 report by the U.S. Government Accountability Office.

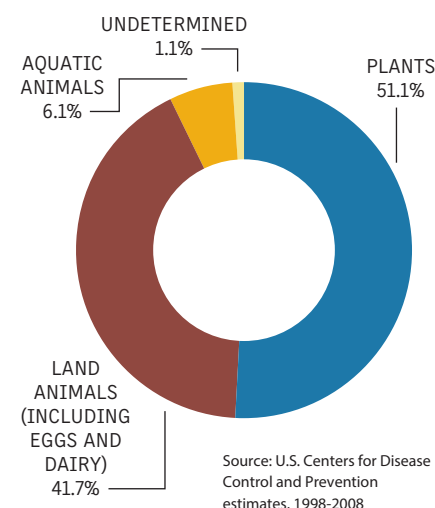
The FDA "would fine a company and make life fairly miserable for a company, but did not have the power to force the company to recall a product," said Kevin Velan, national product recall broking specialist for Willis Towers Watson P.L.C. in Chicago.

FDA previously had to "sweet talk" companies into recalling their products, Mr. Hanson of the Center for Food Safety said. "Now even though the FDA has this new authority, companies themselves are recalling their products much more quickly because they don't want to be in the situation, just in terms of liability, that the FDA has to shut them down. They would much prefer to shut themselves down a little bit than the FDA shut them down totally."

#### Shifting the mindset

The statute sets out a hazard analysis and risk-based prevention controls framework for companies to examine their operations and develop plans to ensure they do not distribute or transport contaminated human and pet food products, and applies to companies of all sizes except the smallest.

#### SOURCES OF FOODBORNE ILLNESS



FSMA "opens the eyes of those companies that weren't prevention-based and risk-based to really become that way and integrate their food safety departments, their people, their processes, within an enterprise risk management philosophy," said Melanie Neumann of law firm Neumann Risk Services L.L.C. in Frankfort, Illinois.

Previously, the food industry was under a safety management system called hazard analysis and critical control point, which had done a good job of controlling risks in the industry for a long time, but this new

See **SAFETY** next page

## Spreading the word on social media

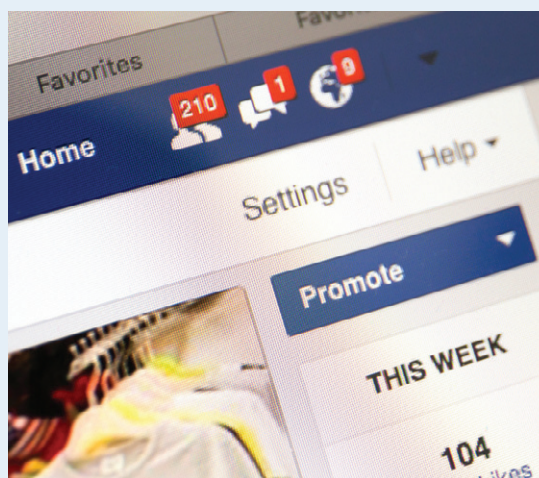
**S**ocial media has redefined how companies and individuals spread the word about food contamination outbreaks.

Peter Begg, senior director of global quality programs at Deerfield, Illinois-based snack producer Mondelez International Inc., said the company has "started to do social media a heck of a lot more than we ever did in the past." Previously, the company would put out recall information via newspaper notices, but it now uses social media sites like Facebook and Twitter.

"If the brand has a Twitter account or Facebook page, we're putting that information out there because we know there's so many avenues that people are getting their information from about our products that you can't just rely on the (Food and Drug Administration) website or the newspaper anymore," he said. "You have to really expand how you're contacting your potential customers."

Social media also helps sick individuals spread the word without prompting by corporations or governments, which has resulted in increased claims, said Glenn Drees, managing director of food and agribusiness for broker Arthur J. Gallagher & Co. in Cincinnati.

For example, 20 years ago, if people went to the same restaurant and got sick, they would not be able to contact each other and it could take weeks to track



them all down. Now, someone sickened at a restaurant can go on Twitter, Facebook and other social media sites to spread the word.

"Social media has really changed the landscape where more claims are being reported," he said.

But phone calls are still a key tool in contacting consumers, particularly because grocery retailers possess detailed information about customer purchases — often due to discount or loyalty cards — and can quickly identify which customers have bought recalled products, according to experts.

Gillian Kelleher, vice president of food safety and quality assurance for Wegmans Food Markets Inc. in Rochester, New York, said the supermarket chain identifies and directly calls customers who have purchased products implicated in recalls.

"They're very responsive and appreciative of that," she said. "They feel like you might be pestering them, but by and large it's a positive thing because we're trying to get that information to them about that particular product."

Back in late November, this reporter received a call on her cellphone from Landover, Maryland-based Giant Food L.L.C. after purchasing a hummus product made by Colonial Heights, Virginia-based Sabra Dipping Co. L.L.C. at her local Giant supermarket.

The call informed that Sabra was voluntarily recalling its products due to concerns over listeria monocytogenes found at a manufacturing facility, but not in the tested finished product. The organism can cause serious and sometimes fatal infections for those with weakened immune systems, while even healthy individuals can suffer short-term symptoms such as high fever, severe headaches, stiffness, nausea, abdominal pain and diarrhea.

In early January, the company followed up with a letter apologizing for the recall and providing coupons for free replacement of the products.

Gloria Gonzalez

## SAFETY

Continued from previous page

FSMA regulation shifted to a framework that expanded the types of risks and controls that food companies must consider, she said.

"It's making us as an industry stop long enough to think: What are all the risks around me and how can I reduce or mitigate those risks and then document that?" Ms. Neumann said.

FSMA elements can be divided into five key areas — preventive controls, inspection and compliance, imported food safety, response and enhanced partnerships — with seven foundational rules to implement the FSMA that became final in 2015 and 2016, according to the FDA.

## FOOD BUGS

Top five pathogens causing domestically acquired foodborne illnesses in the United States

| Pathogen                        | Estimated annual number of illnesses | Percentage |
|---------------------------------|--------------------------------------|------------|
| Norovirus (winter vomiting bug) | 5,461,731                            | 58%        |
| Salmonella, nontyphoidal        | 1,027,561                            | 11%        |
| Clostridium perfringens         | 965,958                              | 10%        |
| Campylobacter                   | 845,024                              | 9%         |
| Staphylococcus aureus           | 241,148                              | 3%         |

Source: U.S. Food and Drug Administration "Bad Bug Book," Second Edition, 2012

The regulations governing these areas have different compliance dates depending on when they were published and the size of the businesses, but April 6, 2017, is the date for most businesses to comply with a regulation intended to help prevent the contamination of human and animal food during transportation by requiring companies transporting food by motor or rail vehicles to follow recognized best practices for hygiene, including the provision of appropriate temperature control, cleaning between loads and security measures.

Companies transporting food must meet the cleaning requirements and properly maintain certain records, including documents of the products transported in their vehicles, and take steps to avoid cross contamination, including documenting when trucks are first used to transport one product and reused to transport a different

product — steps that many large manufacturers were already taking, said Glenn Drees, managing director of food and agribusiness for Arthur J. Gallagher & Co. in Cincinnati.

"They might have some changes to their record keeping, but the biggest impact is on people doing importing, transportation and smaller manufacturers that may not have had this level of documentation, this level of controls," he said.

## Limited penalties

In 2014, Peanut Corp. owners Stewart Parnell, of Lynchburg, Virginia, and Michael Parnell, of Midlothian, Virginia, were convicted of conspiracy, mail and wire fraud, and the introduction of misbranded food into interstate commerce. Stewart Parnell was also convicted of the introduction of adulterated food and obstruction of justice — all convictions arising from the unlawful sale of salmonella-tainted peanuts and peanut products.

In 2015, Stewart Parnell was sentenced to serve 336 months in prison followed by three years of supervised release, while his brother Michael was sentenced to serve 240 months in prison to be followed by three years of supervised release.

The brothers, who are serving their sentences in federal prison, are appealing the convictions.

FSMA "opens the eyes of those companies that weren't prevention-based and risk-based to really become that way and integrate their food safety departments, their people, their processes, within an enterprise risk management philosophy."

Melanie Neumann,  
Neumann Risk Services L.L.C.

But the Parnell convictions and prison sentences highlight the limitations of the FSMA, which is the absence of stiff criminal penalties for persons or companies intentionally engaged in actions that cause outbreaks, said Mr. Hanson of the Center for Food Safety.

While the statute holds company officials and directors responsible for knowingly shipping out contaminated food products, provisions that would make shipping adulterated product a felony were lost in the FSMA negotiations, he said, noting that the Parnells were convicted for conspiracy and fraud charges and that Sen. Patrick Leahy, D-Vt., introduced legisla-

## SUPPLY CHAIN MONITORING HELPS TO CONTROL RISK

A "game-changer" risk management element of the Food Safety and Modernization Act requires regulated companies to better monitor and manage their supply chains, experts say.

The law's hazard analysis and risk-based prevention controls framework requires that regulated entities have a written food safety plan that includes hazard identification; process, food allergen and sanitation controls, as well as supply chain controls and a recall plan; and monitoring, corrective action and verification mechanisms, according to the U.S. Food and Drug Administration.

In response to the fact that about 15% of the U.S. food supply is imported, the law also requires food importers to verify that food imported into the country has been produced in a manner that meets applicable U.S. safety standards.

These FSMA requirements place the onus on regulated companies to ensure that someone in the supply chain is responsible for mitigating the risk of foodborne pathogens, such as listeria or salmonella, because many recalls are related to a supplier distributing contaminated ingredients to other entities, said Melanie Neumann of food



safety law firm Neumann Risk Services L.L.C. in Frankfort, Illinois.

For example, a potato chip manufacturer who sprinkles black pepper on its product after baking or frying is not controlling the well-known salmonella risk associated with black pepper, she said. The FSMA requires the manufacturer to question the supplier on steps it is taking to control salmonella risk. If the supplier is not taking steps to mitigate the risk, it must inform the manufacturer and receive a written response from the

manufacturer taking responsibility for mitigating the risk.

"Someone in the supply chain has to control the risk," Ms. Neumann said. "These rules really up the ante and up the need for communication in the supply chain and partnership with your suppliers and your customers."

The requirements have important implications for a food producer's supply chain because they mandate better record keeping and retention of records. Such detailed records allow the FDA to trace

more quickly the source of contamination, possibly within 24-48 hours, rather than the months it took to track the source in the past, she said.

"There has to be this paper trail back and forth about who is controlling the risk," Ms. Neumann said. "Before FSMA, there was none of that. Really what it does is it gives FDA this bread crumb trail back to the whodunit if there is an outbreak."

Full traceability is only a matter of time, said Gillian Kelleher, vice president of food safety and quality assurance for Wegmans Food Markets Inc. in Rochester, New York. The FDA launched pilot programs in September 2011 to help determine what data is most needed to trace a product that has been widely distributed in the marketplace back to a common source, and is engaging in a rule-making on record-keeping requirements for high-risk foods to facilitate tracking, according to the agency.

"We have traceability in some fashion today, but some of it is sophisticated, some of it is primitive, some of it takes ages, some of it is old-fashioned," she said "It's all coming together."

Gloria Gonzalez

tion to implement criminal penalties in these instances.

The FSMA does target some specific actions highlighted in the Peanut Corp. case. For example, the company had gone to a different tester with a different portion of its product after the first portion tested positive for salmonella, and it then sent the clean report to customers. The law requires customers be provided with all testing reports, Mr. Hanson said.

Another limitation that emerged as part of the compromise to pass the FSMA is that the FDA pays for inspections, unlike in many countries in the European Union where companies pay, and the FDA depends on Congress to appropriate funds, Mr. Hanson said. The lack of resources led to slow rule development and implementation of FSMA provisions, which the center sued the agency over, reaching a court-overseen agreement on implementation deadlines.

Given the bipartisan support for FSMA, there is little concern that the law itself will be reversed by the new Congress, but the bigger threat is that Congress will not sufficiently fund the FDA to enable it to fully implement FSMA requirements or that the FDA under President Donald Trump will not focus on enforcement of its provisions, he said.

“The FDA is going to have to constantly beg Congress for enough money to do its basic functions because Congress has not decided to give it a fee-based system that works,” Mr. Hanson said.

In addition, small companies have different time frames to comply, must only comply with particular elements of FSMA or may even be exempt, said Ms. Neumann, the food safety lawyer.

“A lot of people can argue, and I don’t necessarily disagree, ‘Isn’t it the small companies that have the biggest risk?’” she said.

## Plentiful insurance

The coverage for contamination outbreaks is relatively young, with only three insurers writing it initially, but as food recalls have ramped up, especially over the past 10 years, more than 20 insurers now offer recall policies, keeping pricing flat to relatively soft, said Brandon Sielen, the national product recall broking specialist for Willis Towers Watson in Scottsdale, Arizona.

Limits of about \$10 million per occurrence category are available. Categories are business interruption, lost profits, recall expenses, brand/image expenses and crisis responses, said Gallagher’s Mr. Drees.

The coverage is triggered in situations where there is a government-mandated Class 1 or 2 recall or if an in-house laboratory or third-party test shows contamination, but not in the event of quality issues, Mr. Sielen said. Class 1 means a situation in which there is a reasonable probability that the use of or exposure to a violative product will cause serious adverse health consequences or death; and



REUTERS

Tighter food safety regulations followed a federal criminal investigation into Peanut Corp. of America, launched after salmonella found at its plant in rural southwest Georgia was linked to making 500 people sick and possibly killing eight people. Its owners were eventually convicted of conspiracy, mail and wire fraud, and the introduction of misbranded food into interstate commerce.

Class 2 means that use of or exposure to a violative product may cause temporary or medically reversible adverse health consequences, or where the probability of serious adverse health consequences is remote.

Retentions are usually high, as “it’s really a (catastrophe) coverage, it’s not a frequency type of coverage,” Mr. Sielen said. For example, a 2006 E. coli outbreak

linked to fresh spinach in California caused an estimated \$100 million economic loss to the spinach industry, while tomato growers and shippers lost an estimated \$145 million in revenue due to a food safety advisory that erroneously associated a 2008 salmonella outbreak to tomatoes initially, with peppers later deemed to be the source of the contamination, according to the GAO report.

But like employment practices liability insurance or cyber coverage, risk managers often do not purchase food contamination coverage until they experience an incident, Mr. Drees said.

“I think FSMA has increased peoples’ awareness of the need for it,” he said. “Insurance buyers tend to have a coverage quoted to them a couple of times before they buy it, or they have to have a near miss.”

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# MANAGEMENT LIABILITY

## Buyer's market for D&O policyholders

BY JUDY GREENWALD

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### INSIDE

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The U.S. Securities and Exchange Commission's whistleblower program is likely to continue. **PAGE 22**

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Employers who expect to get a break from employment practices liability issues may be disappointed. **PAGE 23**

#### ▶ PERSPECTIVES: D&O IN THE COURTS

Three issues that often arise in D&O disputes have been the subject of recent judicial developments. **PAGE 25**

**D**irectors and officers liability insurance policyholders are continuing to enjoy lower rates, increased capacity and broadening terms and conditions in their programs. Competition continues to be particularly intense in excess layers, say experts, with overall program rate decreases reaching double digits, depending on the risk. Meanwhile, one relatively new area of coverage that is receiving attention is for entity regulatory investigations, although the cost of the coverage has deterred widespread uptake by policyholders. Graeme Harper, executive vice president of global insurance for Jacksonville Florida-based financial services technology firm Fidelity National Information Services Inc., who works with Wells Fargo Insurance Services USA Inc., said his just-completed D&O renewals "went very smoothly." It is "standard procedure for risk managers to look for lower premiums and broader coverage, and we achieved both," he said.

"There's going to be very, very few insureds that don't have good choices available," said Kevin LaCroix, executive vice

president of RT Pro Exec, a division of R-T Specialty L.L.C. in Beachwood, Ohio.

"You're not seeing huge reductions in

## HOW WILL TRUMP POLICIES AFFECT EXECUTIVE LIABILITY?

**D**irectors and officers liability insurance experts will be watching closely to see the new trends that may emerge with the Trump administration.

Its impact on the market is now a big unknown, said Sarah Downey, New York-based D&O liability product leader for Marsh L.L.C. “We are still learning what changes Donald Trump and the administration are going to implement,” she said. Their effect on D&O “remains to be seen.”

One major factor in the market has been the increase in federal securities class action litigation, which reached a record level last year, according to industry reports.

The increase has been fueled by merger and acquisition challenges, as plaintiffs move to file these cases in federal court as a result of a 2016 Delaware court ruling that discourages disclosure-only settlements.

A disclosure-only lawsuit is litigation filed by plaintiff attorneys following M&A deals that result in them being awarded legal fees when all they did was force defendants to provide largely immaterial disclosures about the deal without conveying any monetary benefit to shareholders.



REUTERS

The Volkswagen diesel scandal is a prime example of cross-border D&O litigation.

One area of litigation that has been more pronounced is cross-border or international D&O litigation, with the emissions scandal surrounding Volkswagen A.G. a “huge example of this,” said Jackie Waters, Chicago-based managing director and practice leader of Aon Risk Solutions’ financial services group legal and claims practice.

Growth in this area has been spurred by the increase in litigation funding in

international markets. Unlike in the U.S., where plaintiffs can file lawsuits without incurring any costs, losing parties internationally must often pay the legal costs, and so the availability of litigation funding is financing increased litigation, say experts.

Meanwhile, despite the New York attorney general’s investigation of Exxon Mobile Corp. related to the issue of climate change, experts say the

issue is unlikely to have a major market impact because it potentially involves relatively few companies.

Experts also note that efforts to draw directors and officers into cyber risk litigation have been unsuccessful so far, in part because cyber breaches have not been followed by significant stock price drops to date, although plaintiff attorneys are expected to continue their efforts in this area.

“The plaintiffs’ bar is persistent, and they’ve got a lot of resources, and I think they’ll keep probing” to find the right approach or case, said Edward Kirk, a partner with Clyde & Co. U.S. L.L.P. in New York.

Another factor in the market has been the U.S. Securities and Exchange Commission’s pursuit of individuals, which has had an “aggravating effect in that claims can last longer as individual insureds fight harder to be exonerated and potentially not barred” from working in the securities industry, said Tony Galban, senior vice president and North American underwriting manager responsible for D&O liability business for Chubb Ltd.’s financial lines division.

Judy Greenwald

primary, but it is still possible to secure savings in most cases at the excess level,” he said. The “single most important factor” in the market is abundant capacity.

“Everyone wants to offer excess, but there’s only a few that want primary,” said Peter Taffae, a D&O liability insurance expert at Los Angeles-based wholesale brokerage Executive Perils Inc.

Meanwhile, “terms and conditions continue to expand as primary D&O markets try and differentiate themselves from competitors,” said Steve Boughal, New York-based vice president and chief underwriting officer of Hartford Financial Products, a unit of the Hartford Financial Services Group Inc.

“I don’t see anything on the horizon which suggests anything’s going to change,” and “if anything, we saw increased rate and price erosion” in 2016, said Simon Hodge, Atlanta-based professional risk practice leader at Wells Fargo Insurance Services USA. In a report issued in October, Willis Towers Watson P.L.C. predicted that overall rates will remain flat to down 7.5% this year, with public company primary coverage down 5% to flat, and excess coverage down between 5% and 15%.

However, “as competitive as this market is, it’s different for each risk,” said Rob Yellen, New York-based executive vice president of Willis’ FINEX North America.

In one case, a Crystal & Company client who had been expecting to get a 15% decrease in his D&O program experienced

a decrease of more than 25%, said Brian Dunphy, New York senior managing director of the management and professional risk group at Crystal.

“That’s just because good-quality, platinum-standard risks that have no issues with claims and don’t present any type of cause for concern are highly sought after for obvious reasons, and people will do whatever they can to get those accounts, including really lowering their prices,” he said.

About 85% of Marsh L.L.C.’s clients are getting reductions with perhaps 5% experiencing flat rates and 10% seeing increases, with those seeing increases having “challenged risk profiles,” said Greg Spore, the broker’s U.S. FINPRO placement leader in Chicago.

“There’s sort of a level of desperation on behalf of D&O underwriters to write business,” said Brian Wanat, New York-based CEO of the U.S. financial services group at Aon Risk Solutions.

However, some risks — education and health care in particular — are finding it harder to find capacity, with insurers “trying to selectively trim their exposures to be less exposed to the more volatile classes,” said Bert Spunberg, New York based senior vice president and practice leader of executive risk for Hiscox USA.

Experts say one hot-button issue has been expanded entity coverage for regulatory investigations. At least to date, the takeup rate for this coverage has been relatively low because of the increased premi-

ums sought by insurers.

“Most of the clients I work with are evaluating carefully the relative benefits of entity coverage of regulator investigations,” said Mr. Hodge, noting firms tend to buy coverage for the benefit of their directors and officers.

“There’s very few clients at this point that have decided to spend the additional money and partake of the additional coverage,” said Mr. Wanat.

**There are “very few insureds that don’t have good choices ... You’re not seeing huge reductions in primary, but it is still possible to secure savings in most cases at the excess level.”**

Kevin LaCroix,  
RT Pro Exec

“There’s a lot of interest in entity investigations coverage, just not a ton of interest in paying for it” because of its prohibitive cost, said Jerry Henderson, Glendale, California-based area executive vice president for Arthur J. Gallagher & Co.

Mr. Henderson said the coverage must be tied to a securities claim, in which case Foreign Corrupt Practices Act coverage

may be obtained as well as an add on to entity coverage.

“Where I think the market needs to go” is providing investigation coverage if any regulatory body launches an investigation, he said. Experts predict an eventual broadening of coverage in this area. However, Mr. Dunphy said, the industry “is waiting to see the posture of the incoming administration on many different things, and that includes its regulatory posture.”

Beazley P.L.C., together with Hiscox USA or Ltd., introduced such a product, Entity+, in January 2016. When a securities class action is filed against a company, the product provides coverage for costs incurred in response to informal and formal investigations related to the SEC’s enforcement division. It also provides, on a coinsurance basis, “look back coverage” for costs incurred in responding to the investigation before the launch of the securities class action.

While the initial takeup rate for this “investigation and inquiry” insurance has been slow, that was expected because it is “extra budgetary,” said Rachel Turk, Beazley’s London-based focus group leader for D&O.

Those who are interested in the product either have had investigations in the past and know how expensive they are, or are more sophisticated, while CEOs and chief financial officers are more inclined to purchase the coverage than the risk manager, she said.

# Whistleblower bounties may continue

BY ROB LENIHAN

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The U.S. Securities and Exchange Commission's whistleblower program, and the costs accused corporations face when they are investigated, are unlikely to disappear under the new administration despite President Donald Trump's criticism of the law that created the program, experts say.

During the campaign, President Trump said he would "dismantle" the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which was passed in response to the Great Recession that followed the financial crisis of 2007-2008.

Among other items, Dodd-Frank created a program where individuals who provide the SEC with information that leads to a successful enforcement action yielding sanctions of over \$1 million are entitled to an award of 10%-30% of the total monetary sanctions collected.

SEC enforcement actions from whistleblower tips have resulted in more than \$904 million in financial remedies as of Jan. 6 the commission said. The SEC's whistleblower program has awarded about \$142 million to 38 whistleblowers since issuing its first award in 2012.

Laura Coppola, Regional Head of Management Liability Commercial, North America with Allianz Global Corporate & Specialty in New York, said the actual dollar amount awarded to a whistleblower isn't necessarily insurable under the typical directors and officers liability insurance policy, yet the costs associated with any potential enforcement action



related thereto may be.

She said there are costs during an investigation, whether such investigation is formal or informal, that may be covered under a D&O policy, such as reasonable and necessary fees, costs, charges and legal expenses.

"Just like any other claim, most claims against directors and officers that come under the D&O policy allege fraud, and unless and until there's a final adjudication in the underlying proceeding, the policy should provide a defense," said Thomas H. Bentz Jr., a partner with Holland & Knight L.L.P. in Washington.

Mr. Bentz added that "the first issue is when you find out about it. A lot of these things are done under seal, and that can be a real problem because these policies are all done on a claims-made basis."

"Right along with that is the definition of what constitutes a claim, because while some policies will cover informal actions, most of them don't," Mr. Bentz said. "So, until there's a formal investigation, which is usually where an individual is under investigation by whatever government entity is acting, they're typically isn't coverage."

The new administration will likely make changes at the SEC, although how this might affect the whistleblower program is still unknown.

Earl "Chip" M. Jones III, co-chair of the whistleblower and corporate ethics practice group at Littler Mendelson P.C. in Dallas, said "it's a little too early to tell" if the program might be altered under the

Trump administration. He said that payment of bounties like the whistleblowers awards are a typical tool of the criminal justice system and that the IRS has had a similar bounty program for a long time.

"One thing the new administration could do," Mr. Jones said, "is appoint more conservative judges throughout the Department of Labor, which is a pretty common change when there's a change in administration. You see it agencies like the National Labor Relations Board, where that agency would become more employer-friendly than union-friendly when there's an administration change."

However, Mr. Jones added, "I just don't see them pulling the plug on the entire bounty program at all."

"No one is going to say they want to see fraud in the workplace," he said. "Why would you want to dial back a bounty program in the workplace? That's kind of a hard position to take. You haven't seen big reports of the bounty program being abused, so there's a not a lot of tangible evidence that program is creating a negative drag on business."

Margaret H. Campbell, a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart P.C. in Atlanta, said that while the new administration may want to repeal or roll back some aspects of Dodd-Frank, eliminating the whistleblower program is probably not a priority.

"It hasn't been articulated as a priority," she said, "but more importantly, I don't think they would have the same prospects of success and that's because whis-

tleblower protections do have a fair base of bipartisan support. And not only do they have bipartisan support, but in the courts, even with what would otherwise be considered conservative judges, there is a general aversion to retaliation cases."

Sean McKessy, a partner with Phillips & Cohen L.L.P. in Washington, is a former chief of the SEC's whistleblower program, said he believes "there are a number of things that speak to the long-term viability of the program."

"It starts with, I believe immodestly, a very extraordinary early track record of success," he said. "In my 5½ years, we were able to get more than \$100 million paid to whistleblowers. More importantly, over \$350 million was returned to investors who were wronged by the entities that the whistleblowers reported on."

Jordan Thomas, a partner with Labaton Sucharow L.L.P. in New York, said the whistleblower program not only paid awards to whistleblowers, but investors came away better off.

Mr. Thomas also is a former assistant director with the SEC's Division of Enforcement who played a leadership role in developing the whistleblower program.

"At the Department of Justice and the SEC, I've witnessed changes in administration several times and what I found is that law enforcement is a bipartisan priority," he said. "So I don't anticipate the whistleblower program being appealed or something like that, because it has been highly successful and it is a low-cost form of law enforcement."

*"One thing the new administration could do is appoint more conservative judges throughout the Department of Labor, which is a pretty common change when there's a change in administration ... (but) I just don't see them pulling the plug on the entire bounty program at all."*

Earl "Chip" M. Jones III,  
Littler Mendelson P.C.

# Workplace disputes may change, won't fade

BY JUDY GREENWALD

judygreenwald@businessinsurance.com

**E**mployers who expect to get a break from employment practices liability issues with the new Trump administration are likely to be disappointed, many experts warn.

That is because any decline in regulator-originated litigation is expected to be made up for by plaintiff attorneys eager to pursue litigation in the sector. Furthermore, to at least a certain extent, national regulation is likely to be pushed down to the state level, these experts say.

"I am expecting the federal government to be much less activist than it was under President Obama, and overall, I think, for most of our clients, that's going to be a positive development," said Robin E. Shea, a partner at Constangy, Brooks, Smith & Prophete L.L.P. in Winston-Salem, North Carolina.

"But from an employment practices liability standpoint, if there's less compliance activity for the federal government" it could result in more individual lawsuits filed against employers by plaintiff attorneys, Ms. Shea said.

There may also be more regulatory activity at the state level if there is a rollback at the federal level, say many observers.

"We're already seeing that states are taking matters into their own hands," said Adeola Adele, New York-based executive vice president and employment practices liability insurance product leader at Willis Towers Watson P.L.C.

Last year, for instance, California amended its equal pay legislation to apply on the basis of race and ethnicity in addition to gender, she said.

"I think you'll continue to see steps like that by the states to fill any gaps where it is expected the federal government won't support broader rights for employees," she said.

In addition, Richard B. Cohen, a partner with FisherBroyles L.L.P. in New York, pointed to news reports of former U.S. Attorney General Eric Holder being put on a retainer by the California Legislature's Democratic leaders "to ostensibly fight the administration on whatever issues come up that it deems worth fighting."

"I have never seen states gearing up to do this," he said.

Because of the patchwork quilt of state laws, "you might get sued for conduct in one state where you'd never get sued for conduct in another state," with California and New York having "very plaintiff-friendly environments," said Gerald L. Maatman Jr., a partner with Seyfarth Shaw L.L.P. in Chicago.

Meanwhile, it will be at least two to four years before Trump judicial appointments influence the sector, he said.

"One of the biggest things we face right now is uncertainty," more so "than in any administration transition in recent history," said Gregg M. Lemley, a shareholder with Ogletree Deakins Nash Smoak & Stewart P.C. in St. Louis. It is difficult to predict exactly what the Trump administra-

tion's agenda will be, he said.

"We're in this situation where employers spent the last eight years playing keep up" with Obama administration policies, whether it was U.S. Department of Labor guidelines and regulations, or the National Labor Relations Board's extensive guidance with respect to social media and other employment policies, he said. "And now the question is what's going to stick and what's not, and what do we do about it in the short term and long term?" Mr. Lemley said.

In the meantime, the U.S. Equal Employment Opportunity Commission will continue to be active. In January, for instance, the agency's activity included filing suits concerning same-sex harassment, discriminating against an employee with an intellectual disability and Hispanic-preference hiring.

"I don't think in the short term the new administration is going to slow down the EEOC's focus, in part because many of those initiatives are already in progress, and in part because the Trump administration is going to have a lot of other priorities on their plate," said Patrick H. Hicks, a shareholder with Littler Mendelson P.C. in Las Vegas.

"There are so many issues that this Congress and this administration have to address ... that I think the current trend will probably continue for the short term and even the midterm," Mr. Hicks said.

Meanwhile, some of the same issues that employers have been facing will continue, including claims related to the Americans with Disabilities Act, the Age Discrimination in Employment Act, gender equality, the Family Medical Leave Act, wage-and-hour laws and religious discrimination claims, particularly with respect to Muslims.

And retaliation claims filed under various laws, which have been the most frequent charge filed with the EEOC for fiscal years 2010-2015, are likely to remain in the forefront.

Employers would be "well-advised" to think about how they could prevent and correct retaliation claims, said Jonathan A. Segal, a partner with Duane Morris L.L.P. in Philadelphia.

Another issue likely to come to the forefront is whether Title VII of the Civil Rights Act of 1964 covers sexual orientation discrimination.

Both the 2nd U.S. Circuit Court of Appeals in New York and the 7th Circuit in Chicago are expected to rule in cases now before them that it does, which "just opens the door for more claims under Title VII, obviously," said Eric B. Meyer, a partner at Dilworth Paxson L.L.P. in Philadelphia.

Another major issue facing employers is the concept of joint employer liability. Franchisors are "now being dragged" into employment discrimination lawsuits filed against their franchisees, said Mr. Maatman.

That is a "very, very important issue because it impacts the liability and exposure of major companies," he said.

CLASSIFIED

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT

No. CR-2016-006525

IN THE MATTER OF  
**BOSWORTH RUN-OFF LIMITED**  
and IN THE MATTER OF  
**BRAMPTON INSURANCE COMPANY LIMITED**  
and IN THE MATTER OF  
**KNAPTON INSURANCE LIMITED** and IN THE MATTER OF  
**MARLON INSURANCE COMPANY LIMITED**  
and IN THE MATTER OF  
**MERCANTILE INDEMNITY COMPANY LIMITED**  
and IN THE MATTER OF  
**UNIONAMERICA INSURANCE COMPANY LIMITED**  
and IN THE MATTER OF  
**RIVER THAMES INSURANCE COMPANY LIMITED**  
and IN THE MATTER OF

**PART VII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000**

**NOTICE IS HEREBY GIVEN** that, by application dated 21 October 2016, Bosworth Run-Off Limited, Brampton Insurance Company Limited, Knapton Insurance Company Limited, Marlon Insurance Company Limited, Mercantile Indemnity Company Limited and Unionamerica Insurance Company Limited (the **Transferees**), applied to the High Court of Justice of England and Wales, for amongst other things, an order under Section 111(1) of the Financial Services and Markets Act 2000 (the **Act**) sanctioning an insurance business transfer scheme (the **Scheme**) providing for the transfer of insurance business (comprising policies, assets and liabilities) to River Thames Insurance Company Limited (the **Transferee**) and for an order making provision under Section 112 of the Act.

The business included in the proposed transfers comprise the entirety of the business underwritten by each Transferee (and where relevant assumed by it by way of a portfolio transfer) and all of its assets and liabilities.

Copies of a report on the terms of the Scheme prepared by an independent expert in accordance with section 109 of the Act (the **Scheme Report**) and copies of a statement setting out the terms of the Scheme and containing a summary of the Scheme Report may be obtained, free of charge, by contacting Enstar (EU) Limited, FAO Paul Thomas, 3 Guildford Business Park, Guildford, Surrey GU2 8XG, or may be downloaded from the website [www.project-rivertransfers.com](http://www.project-rivertransfers.com).

Anyone who has questions regarding the proposed Scheme or who requires any further information regarding the Scheme may contact Berwin Leighton Paisner LLP at Adelaide House London Bridge EC4R 9HA Email: [project-river-transfers@blplaw.com](mailto:project-river-transfers@blplaw.com) Telephone: 020 3400 3329 Ref: GQU/OSAU.

The application will be heard on 24 March 2017 before a Judge of the Chancery Division of the High Court at The Rolls Building 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL, United Kingdom. Any person (including an employee of the Transferees or the Transferee) who alleges that he or she would be adversely affected by the carrying out of the Scheme is entitled to:

- (i) appear at the hearing and make representations in person;
- (ii) instruct a barrister or solicitor advocate to appear at the hearing and make representations on his/her behalf; or
- (iii) make representations in writing.

If you intend to appear at the hearing in person, or to instruct someone to appear on your behalf, you are requested to give notice of your intention to do so in writing, setting out the reasons why you believe you may be adversely affected. If you do not give the requested notice you will still be entitled to attend the hearing, or to instruct someone to appear on your behalf.

You are requested to send such notice, or if you are not intending to appear in person or by your legal representative, any written representations that you may have, to Berwin Leighton Paisner LLP, at the address and reference given above. Please provide such notice or such written representations by close of business on 17 March 2017.

If the Scheme is sanctioned by the Court, it will result in the transfer of all the contracts, property, assets and liabilities, of the Transferees to the Transferee; notwithstanding that a person would otherwise be entitled to terminate, modify, acquire or claim an interest or right or to treat an interest or right as terminated or modified as a result. Any such entitlement will only be enforceable to the extent the order of the Court makes provision to that effect.

Berwin Leighton Paisner LLP, Adelaide House, London Bridge, London, EC4R 9HA

Solicitors to the Transferees and the Transferee (Ref: GQU/OSAU)

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT

CR-2016-006917

IN THE MATTER OF  
**MARKEL INTERNATIONAL INSURANCE COMPANY LIMITED**  
(and formerly Terra Nova Insurance Company Limited)  
AND  
**RIVERSTONE INSURANCE (UK) LIMITED**  
AND

**IN THE MATTER OF PART VII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000  
TRANSFER OF INSURANCE BUSINESS**

**NOTICE IS HEREBY GIVEN** that, by application dated 17 November 2016, Markel International Insurance Company Limited (the **Transferee**), applied to the High Court of Justice of England and Wales, for amongst other things, an order under Section 111(1) of the Financial Services & Markets Act 2000 (the **Act**) sanctioning an insurance business transfer scheme (the **Scheme**) providing for the transfer of insurance business (comprising policies, assets and liabilities) to RiverStone Insurance (UK) Limited (the **Transferee**) and for an order making provision under Section 112 of the Act.

The business included in the proposed transfer comprises substantially all of the insurance and reinsurance business underwritten or assumed (in whole or in part) by the Transferee and which incepted between 1970 and 1992 (inclusive). The Scheme **excludes** inward quota share reinsurance agreements entered into between the Transferee as reinsurer and Highlands Insurance Company Limited as reinsured (during the period 1981 to 1985 inclusive).

If you are in any doubt as to whether your insurance policy is included in the proposed transfer please contact either the Transferee or the Transferee, contact details of each are set out below.

Copies of a report on the terms of the Scheme prepared by an independent expert in accordance with section 109 of the Act (the **Scheme Report**) and copies of a statement setting out the terms of the Scheme and containing a summary of the Scheme Report may be obtained, free of charge, by contacting RiverStone Insurance (UK) Limited, F.A.O. Fraser Henry, Park Gate, 161-163 Preston Road, Brighton, BN1 6AU or Markel International Insurance Company Limited, F.A.O. Henry Gardener, Head of Legal & Regulatory Affairs, 20 Fenchurch Street, London, EC3M 3AZ or may be downloaded from the website [www.markelriverstonetransfer.co.uk](http://www.markelriverstonetransfer.co.uk)

Anyone who has questions regarding the proposed transfer or who requires any further information regarding the transfer may wish to contact the following telephone numbers, email addresses and postal addresses for assistance:

Transferee Contact Details:

+44 (0) 1273 792 475 or email [terranovatransfer@rsmi.co.uk](mailto:terranovatransfer@rsmi.co.uk) (please mark in the subject header "The Terra Nova Transfer") or write to RiverStone Insurance (UK) Limited, F.A.O. Fraser Henry, Park Gate, 161-163 Preston Road, Brighton, BN1 6AU

Transferee Contact Details:

+44 (0) 20 7953 6698 or email [terranovatransfer@markelintl.com](mailto:terranovatransfer@markelintl.com) (please mark in the subject header "The RiverStone Transfer") or write to Markel International Insurance Company Limited, F.A.O. Henry Gardener, Head of Legal & Regulatory Affairs, 20 Fenchurch Street, London, EC3M 3AZ

The application will be heard on Thursday 23 March 2017 before a Judge of the Chancery Division of the High Court at 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL, United Kingdom.

Any person (including an employee of the Transferee or the Transferee) who alleges that he or she would be adversely affected by the carrying out of the Scheme a) can make a representation by contacting the Transferee or Transferee through calling, emailing or writing to them via the contact details above; b) is entitled to:

- (i) appear at the hearing and make representations in person;
- (ii) instruct a barrister or solicitor advocate to appear at the hearing and make representations on his/her behalf; or
- (iii) make representations in writing.

If you intend to appear at the hearing in person, or to instruct someone to appear on your behalf, you are requested to give notice of your intention to do so in writing, setting out the reasons why you believe you may be adversely affected.

You are requested to send such notice, or if you are not intending to appear in person or by your legal representative, any written representations that you may have, to the addresses of the Transferee or Transferee provided above or to Berwin Leighton Paisner LLP, Adelaide House, London Bridge, London, EC4R 9HA (ref: Geraldine Quirk). Please provide such notice or such written representations by close of business on Thursday 16 March 2017.

If the Scheme is sanctioned by the Court, it will result in the transfer of all the contracts, property, assets and liabilities, within its scope, of the Transferee to the Transferee; notwithstanding that a person would otherwise be entitled to terminate, modify, acquire or claim an interest or right or to treat an interest or right as terminated or modified in respect thereof. Any such right will only be enforceable to the extent the order of the Court makes provision to that effect.

Berwin Leighton Paisner LLP, Adelaide House, London Bridge, London, EC4R 9HA

Solicitors to the Transferee and the Transferee (Ref: Geraldine Quirk)

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# SPECIAL REPORT

## LARGEST D&O INSURERS

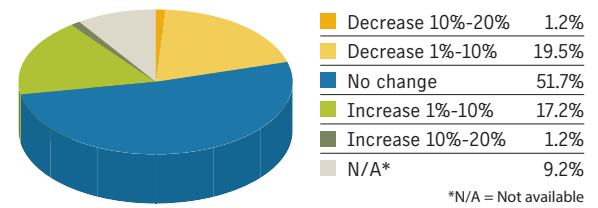
Ranked by direct premiums written through the third quarter of 2016, in millions of dollars

| 2016           | 2015 | Insurer                                  | Direct premiums written | Percent increase (decrease) vs. 3Q 2015 | Direct incurred losses | Direct loss ratio | Market share |
|----------------|------|------------------------------------------|-------------------------|-----------------------------------------|------------------------|-------------------|--------------|
| 1              | 1    | American International Group Inc.        | \$721.9                 | (7.3%)                                  | \$486.6                | 61.8%             | 15.8%        |
| 2              | 2    | Chubb Ltd.                               | \$577.8                 | (12.5%)                                 | \$257.9                | 39.8%             | 12.7%        |
| 3              | 3    | XL Group Ltd.                            | \$505.9                 | 8.4%                                    | \$279.7                | 57.7%             | 11.1%        |
| 4              | 4    | Tokio Marine Holdings Inc.               | \$408.9                 | (1.9%)                                  | \$254.5                | 60.1%             | 9.0%         |
| 5              | 5    | CNA Financial Corp.                      | \$287.1                 | (0.7%)                                  | \$245.3                | 82.0%             | 6.3%         |
| 6              | 6    | Travelers Cos. Inc.                      | \$221.8                 | (2.5%)                                  | \$124.7                | 54.4%             | 4.9%         |
| 7              | 7    | American Financial Group Inc.            | \$175.3                 | 0.5%                                    | \$44.4                 | 25.5%             | 3.8%         |
| 8              | 9    | Alleghany Corp.                          | \$121.7                 | (4.7%)                                  | \$48.5                 | 39.0%             | 2.7%         |
| 9              | 21   | Allied World Assurance Co. Holdings A.G. | \$115.2                 | 116.0%                                  | \$43.6                 | 40.2%             | 2.5%         |
| 10             | 10   | W.R. Berkley Corp.                       | \$105.8                 | (6.8%)                                  | \$62.3                 | 52.5%             | 2.3%         |
| 11             | 14   | Endurance Specialty Holdings Ltd.        | \$101.0                 | 25.3%                                   | \$47.4                 | 48.3%             | 2.2%         |
| 12             | 17   | Berkshire Hathaway Inc.                  | \$98.5                  | 46.0%                                   | \$45.4                 | 66.5%             | 2.2%         |
| 13             | 12   | Liberty Mutual Holding Co. Inc.          | \$94.3                  | (5.8%)                                  | (\$8.2)                | (4.9%)            | 2.1%         |
| 14             | 8    | Zurich Insurance Group Ltd.              | \$93.2                  | (40.2%)                                 | \$138.8                | 116.5%            | 2.0%         |
| 15             | 11   | Axis Capital Holdings Ltd.               | \$91.4                  | (10.0%)                                 | \$53.2                 | 50.1%             | 2.0%         |
| 16             | 15   | Hartford Financial Services Group Inc.   | \$80.2                  | 6.8%                                    | (\$10.6)               | (13.3%)           | 1.8%         |
| 17             | 24   | Navigators Group Inc.                    | \$78.3                  | 117.8%                                  | \$29.4                 | 39.6%             | 1.7%         |
| 18             | 13   | Arch Capital Group Ltd.                  | \$78.2                  | (13.5%)                                 | \$8.4                  | 9.5%              | 1.7%         |
| 19             | 18   | Old Republic International Corp.         | \$58.4                  | (7.7%)                                  | \$29.3                 | 49.5%             | 1.3%         |
| 20             | 19   | Everest Re Group Ltd.                    | \$58.2                  | 2.0%                                    | \$21.5                 | 39.6%             | 1.3%         |
| Top 20 total   |      |                                          | \$4,073.0               |                                         | \$2,202.2              | 51.0%             | 89.3%        |
| Industry total |      |                                          | \$4,561.1               |                                         | \$2,559.0              | 53.4%             | 100%         |

Source: S&P Global Market Intelligence, based on National Association of Insurance Commissioners statutory P/C statement filings

## D&O PRICING

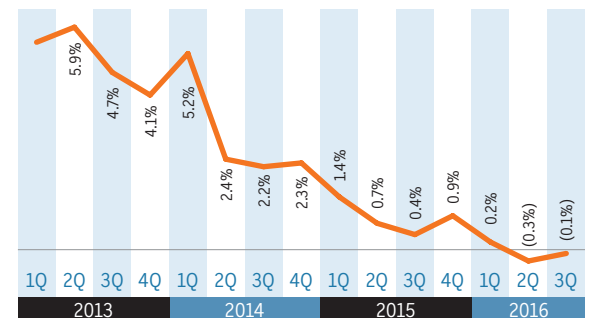
72% of survey respondents saw no change or a decrease in premium rates for directors and officers liability coverage during the third quarter of 2016.



Source: Council of Insurance Agents and Brokers

## RENEWAL PRICING

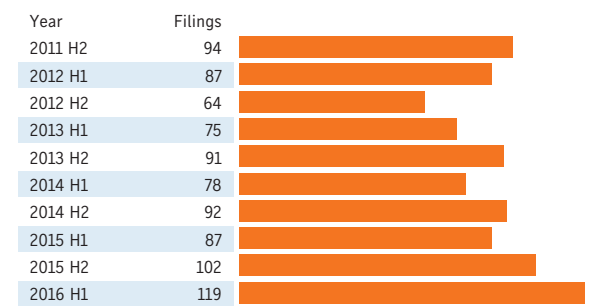
Average D&O renewal pricing changes by quarter since 2013



Source: Council of Insurance Agents and Brokers

## CLASS ACTIONS

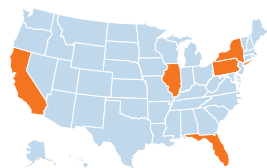
The number of class action filings for the first half of 2016 was the highest since 126 filings in the first half of 1999.



Source: Cornerstone Research

## TOP STATES

States with the most direct premiums written for medical professional liability insurance in 2015

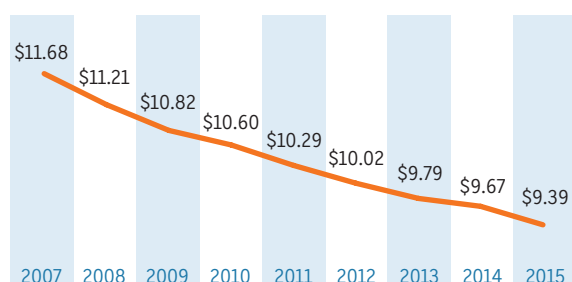


| State        | Direct premiums written | Number of insurers |
|--------------|-------------------------|--------------------|
| New York     | \$1,651,905,908         | 130                |
| California   | \$752,034,806           | 132                |
| Pennsylvania | \$655,077,332           | 150                |
| Florida      | \$572,342,525           | 126                |
| Illinois     | \$499,580,495           | 133                |

Source: National Association of Insurance Commissioners

## PROFESSIONAL LIABILITY COVER

Direct premiums written for U.S. medical professional liability insurance, 2007-2015, in billions of dollars



Source: National Association of Insurance Commissioners

## LARGEST MEDICAL PROFESSIONAL LIABILITY INSURERS

Ranked by direct premiums written through the third quarter of 2016, in millions of dollars

| 2016           | 2015 | Company                                         | Total direct premiums written | Percent increase (decrease) vs. 3Q 2015 | Physicians | Hospitals | Other health care professionals | Other health care facilities |
|----------------|------|-------------------------------------------------|-------------------------------|-----------------------------------------|------------|-----------|---------------------------------|------------------------------|
| 1              | 1    | Berkshire Hathaway Inc.                         | \$836.2                       | 6.1%                                    | \$593.6    | \$69.7    | \$117.0                         | \$56.0                       |
| 2              | 2    | The Doctors Co.                                 | \$539.5                       | (0.3%)                                  | \$513.0    | \$2.1     | \$17.4                          | \$6.9                        |
| 3              | 3    | Medical Liability Mutual Insurance Co.          | \$388.2                       | (7.4%)                                  | \$357.1    | \$21.0    | \$10.1                          | \$0                          |
| 4              | 5    | CNA Financial Corp.                             | \$367.3                       | 4.6%                                    | \$52.2     | \$90.2    | \$188.1                         | \$36.9                       |
| 5              | 4    | ProAssurance Corp.                              | \$354.6                       | (1.4%)                                  | \$241.7    | \$27.4    | \$79.4                          | \$6.1                        |
| 6              | 6    | Medical Professional Mutual Insurance Co.       | \$302.2                       | (1.5%)                                  | \$230.2    | \$43.7    | \$10.3                          | \$18.0                       |
| 7              | 10   | MCIC Vermont, a Reciprocal Risk Retention Group | \$279.2                       | 27.6%                                   | \$0        | \$279.2   | \$0                             | \$0                          |
| 8              | 7    | Physicians' Reciprocal Insurers                 | \$258.4                       | (7.8%)                                  | \$192.6    | \$60.5    | \$5.2                           | \$0                          |
| 9              | 8    | NORCAL Mutual Insurance Co.                     | \$247.6                       | (7.7%)                                  | \$243.7    | \$0.2     | \$0.4                           | \$3.2                        |
| 10             | 11   | Hospitals Insurance Co.                         | \$186.7                       | (9.6%)                                  | \$114.6    | \$72.0    | \$0                             | \$0                          |
| Top 10 total   |      |                                                 | \$3,759.9                     |                                         | \$2,538.8  | \$666.1   | \$427.9                         | \$127.0                      |
| Industry total |      |                                                 | \$7,736.0                     |                                         | \$4,557.0  | \$1,555.5 | \$1,007.8                       | \$615.7                      |

Source: S&P Global Market Intelligence, based on National Association of Insurance Commissioners statutory P/C statement filings

# Legal developments in D&O

BY DAVID H. TOPOL AND  
MATTHEW W. BEATO

**W**hen it comes to directors and officers liability insurance coverage litigation, a few key areas often pose challenges to insurers and to policyholders. Three significant issues that often arise in D&O disputes have recently been the subject of judicial developments:

- Whether a settlement constitutes insurable “loss” under a D&O policy
- Various cases interpreting the definition of “professional services” as used in D&O policies
- Cases addressing the application of the “insured v. insured” exclusion in unusual circumstances

## Insurability of ‘loss’

D&O insurance policies provide coverage for “loss,” a defined term that typically includes settlements and judgments. As determined by the 7th U.S. Circuit Court of Appeals in *Level 3 Communications Inc. v. Federal Insurance Co.* in 2001, “a ‘loss’ within the meaning of an insurance contract does not include the restoration of an ill-gotten gain.” This is the case for a number of reasons, including that an insured has not “lost” anything when he or she returns what he or she never should have had in the first place, as well as because of the moral hazard of allowing insurance coverage for such damages. Judge Richard Posner’s statement in *Level 3* remains generally accepted as a principle by courts throughout the country. As such, by way of example, a settlement or judgment representing the return of ill-acquired lost profits would not constitute an insurable “loss” under insurance policies.

In the past few years, however, a few courts have attempted to distinguish the circumstances presented in *Level 3*. These courts held that particular settlements did not constitute “restitution,” notwithstanding arguments by the insurer to the contrary. For example, in 2015 a Delaware trial court in *Gallup Inc. v. Greenwich Insurance Co.* held that it was insufficient for an insurer to point to the allegations in the underlying complaint as evidence that the settlement represented the return of ill-gotten gains, and required the insurer to provide evidence that the settlement was restitutionary.

In 2016, another Delaware trial court held that a settlement payment did not constitute disgorgement in the absence of a “conclusive link” proving that the insured committed misconduct. In *TIAA-CREF Individual & Institutional Services L.L.C. v. Illinois National Insurance Co.* the court did note, however, that “a different outcome in which disgorgement payments are deemed insurable might result when parties settle under different circumstances.”

Nevertheless, most courts use the allegations of a claimant’s complaint to determine whether a settlement or judgment is restitutionary in character. And, as noted, the *TIAA-CREF* and *Gallup* courts both allowed for the possibility that a settlement might constitute uninsurable restitution in other circumstances. As such, policyholders and insurers should closely examine the law of the relevant jurisdiction and the facts of a particular case in order to determine whether coverage could be available for a particular settlement.

## What are ‘professional services’?

Whether a given activity constitutes a “professional service” is often important in D&O insurance for two separate reasons. First, many D&O policies contain a professional services exclusion that bars coverage for suits arising from an insured’s professional services. Second, some policies may be “blended” — meaning that they afford both traditional D&O insurance as well as traditional errors and omissions insurance, the latter of which usually affords specified coverage for errors and omissions in rendering an insured’s professional services.

**Most D&O policies contain an ‘insured v. insured’ exclusion, which bars coverage in connection with disputes brought by one insured against another. Such exclusions limit the potential for collusive disputes among various insured parties under a policy. They also avoid insuring against intrafamily disputes within an insured company.**

In 2015 in *Goldberg v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, a Florida trial court ruled: “(T)he term ‘professional services’ unambiguously refers to services unique to a specific profession.” Two recent cases illustrate the distinction between services that are “unique” to a given profession and services that are not.

In *Goldberg v. National Union*, a group of directors and officers of an insured bank were alleged to have engaged in managerial acts in furtherance of a Ponzi scheme by one of their customers. For instance, one of the officers was alleged to have “disregarded obvious warning flags, red flags, and overt warnings from some sub-

ordinates” about the Ponzi scheme. The directors and officers sought coverage under a D&O policy, asserting that the professional services exclusion did not bar coverage because they were engaged in “purely internal management and regulatory functions—not services for others.” The court disagreed, stating that any failure by the directors was “done in order to” facilitate the insured’s banking services for its customer. As such, these acts “arose out of” professional services performed by the insured.

However, not every act by a professional will constitute a professional service. This is illustrated by the decision in a 2016 5th U.S. Circuit Court of Appeals decision in *Edwards v. Continental Casualty Co.* There, an insured lawyer received a portion of a client’s personal injury settlement with the client’s employer pursuant to a contingent fee arrangement. The employer later sued to rescind the settlement agreement on the grounds that the client had feigned his injuries. The employer also sought the return of funds from the client’s lawyer, even though it alleged that the lawyer was unaware of the client’s conduct. In this case, the court held that the suit did not arise from an “act or omission” by the lawyer in rendering professional services. Rather, the lawyer was only named in the suit because he received the settlement funds at issue, not because he made some mistake in his conduct as a lawyer.

*Edwards* was a 2-1 decision, demonstrating that where to draw the line between acts connected to professional services and those not connected can sometimes be debatable. As such, directors and officers should consider carrying both D&O and E&O insurance to limit potential gaps in coverage.

## ‘Insured v. insured’ exclusion

Most D&O policies contain an “insured v. insured” exclusion, which bars coverage in connection with disputes brought by one insured against another. Among other purposes, such exclusions limit the potential for collusive disputes among various insured parties under a policy. They also avoid insuring against intrafamily disputes within an insured company.

The applicability of the insured v. insured exclusion is not always clear-cut. To take one example, is a claim brought by the FDIC as receiver for a failed insured bank against the former directors of that insured bank a claim brought “on behalf of” one insured against another?

Courts have recently come out on different sides of this issue. Last year, in *St. Paul Mercury Insurance Co. v. Federal Deposit Insurance Corp.*, the 9th U.S. Circuit Court of Appeals decided that the exclusion was

ambiguous as to the FDIC, and therefore held that the exclusion did not preclude coverage.

However, courts analyzing different policy language have interpreted the exclusion differently. In *Hawker v. BancInsure Inc.*, a California trial court considered whether an exclusion barring coverage for “a claim by, or on behalf of, or at the behest of, any other insured person, the company, or any successor, trustee, assignee or receiver of the company” barred coverage for claims brought by the FDIC as receiver against insureds. Here, the policy language specifically referred to any “receiver” of the company. Accordingly, the court concluded that this claim for coverage by the FDIC failed.

Like those issues with receivership, issues concerning insolvency or bankruptcy of insureds have posed challenges for courts interpreting insured v. insured exclusions in recent years. For example, in 2016 in *Indian Harbor Insurance Co. v. Zucker*, a Michigan trial court considered whether coverage for a claim brought by a litigation trust of an insured bank against its former directors or officers was precluded by an insured v. insured exclusion that barred coverage where a claim was brought “in the name or right of” the insured bank. The court determined that it was. The court surveyed case law nationwide, and noted that there were a number of “inconsistent decisions across the country” concerning the insured v. insured exclusion.

In this case, the court held that the litigation trust’s claim was precluded. The court performed a fact-specific inquiry, and concluded that the fact that the insured bank “voluntarily” transferred causes of action to the litigation trust created a “direct connection” between the bank and the trust. Accordingly, the court held that the insured v. insured exclusion applied to bar coverage. As this illustrates, application of this exclusion is not always clear-cut, and courts will closely examine relevant policy language and the specific facts and circumstances of the matter to determine whether coverage is barred by an insured v. insured exclusion.



David H. Topol (left) is a partner at Wiley Rein L.L.P. in Washington. He can be reached at [dtopol@wileyrein.com](mailto:dtopol@wileyrein.com). Matthew W. Beato (right) is an associate in the Washington office of the firm. He can be reached at [mbeato@wileyrein.com](mailto:mbeato@wileyrein.com).

COMMENTARY

## Gig economy spurs need for coverage

**T**he on-demand or “gig” economy is rapidly changing the lifestyles of workers and consumers, often in good ways, but protections in place for people earning or supplementing their income in the sector need to be reviewed and updated.

The ability to tap an app to secure a ride, book a room, get some help moving, buy groceries and other things is transforming how we obtain those services and providing full- and part-time work to numerous people.

For consumers, it offers convenience and savings, as many of the gig economy services are provided at

a substantially lower cost than old-economy rivals — although a recent \$58 charge I paid for 4.4-mile ride via a ride-sharing app back to a price-inflated apartment obtained via Airbnb at the holiday peak shows that the supply-and-demand curve reaches well into the shared economy, too.

Workers can choose their hours, obtain extra income when they need it or work

full-time for one or a combination of the gig economy companies. But as independent contractors, what they can’t do in many cases is receive workers compensation benefits if they are injured on the job. And given that many of the jobs in the gig economy have higher-than-average worker injury rates, that’s a problem that needs to be addressed, preferably by policy rather than litigation.

Already, things are changing. As we report on page 11, a grocery service was recently ordered to pay workers comp premiums for its couriers, which it had classified as independent contractors. While the company is contesting the decision, this is not going to be the last case where a gig economy company is going to face pressure to offer workers comp benefits.

Given the varied, state-based workers comp systems that the companies deal with and the nontraditional employment structures they use, there may not be a straightforward solution to the problem. One suggestion that has been advocated by some workers comp experts is to introduce a new category of worker, dubbed “independent workers,” that would be eligible to receive at least limited injury benefits.

If a solution isn’t found, injured workers will get expensive emergency room treatment for nonurgent ailments, and we’ll all end up sharing the costs.



**Gavin Souter**  
EDITOR

SCHILLERSTROM



VIEW FROM WASHINGTON

## Medical pot predicament

**P**ass the pot. Actually, don’t.

Medical marijuana is now allowed by 28 states and the District of Columbia, with workers compensation reimbursement for medical marijuana already being documented in six states as physicians and others seek to wean injured workers off of dangerous opioids.

While acknowledging that marijuana is still illegal under federal law, the Obama administration essentially looked the other way, choosing to focus its limited enforcement resources on other issues.

Is President Donald Trump a friend or foe to the ganja movement? He has given mixed signals on marijuana use, receiving a C+ grade from the Marijuana Policy Project, which noted that he previously favored legalizing all drugs, but more recently opposed legalizing and regulating marijuana for adult use. However, he has also supported legal access to medical marijuana and has said he believes states should set their own marijuana policies, according to the Washington-based organization.

But as we’ve seen already, Trump cabinet nominees are not always on the same page as the president. During the confirmation hearings of Sen. Jeff Sessions, R-Ala., President Trump’s nominee for U.S. attorney general, he was asked about federalism as it relates to marijuana laws passed at the state level.

“One obvious concern is that Congress has made the possession of marijuana in every state an illegal act,” Sen. Sessions said. “If that is not desired any longer, Congress should pass a law to change it. It’s not the attorney general’s job to decide which laws to enforce. We should enforce the laws as effectively as we are able.”

It seems clear that Sen. Sessions is no fan of state efforts to permit marijuana usage, and the U.S.

Department of Justice could take action in states that have enacted laws to allow the use of medical or recreational marijuana. Would he lobby President Trump to allow his department to go after those using marijuana with the blessing of their individual states? Would he ask for permission to pursue recreational users, but leave medical marijuana users alone?



**Gloria Gonzalez**  
DEPUTY EDITOR

Robert Capecchi, the Marijuana Policy Project’s director of federal policies, expressed cautious optimism that President Trump will stick to his states’ rights platform and continue the current policy of not interfering with individuals and entities following state marijuana laws.

But employers and their workers comp insurers are caught in the middle of this feds vs. states battle. Do they take the chance of following state laws, knowing that they could be caught in the crossfire if the feds start enforcing federal marijuana law? Perhaps they could even enlist the federal government as an ally in pushing back against state-level bills or court decisions ordering them to cover medical marijuana for injured workers.

Given the human and economic toll of the opioid epidemic, maybe they should instead be encouraging Congress and the president to legalize marijuana at the federal level or at least follow the Obama administration’s lead. In the war on opioid addiction, a hands-off-of-weed federal policy could come in handy.

# Insurers can play crucial role in resilience efforts



Jeffrey T. Bowman is president and CEO of Arcarius Consultancy L.L.C. and chairman of the Board of Trustees of The Institutes. He was formerly president and global CEO of claims manager Crawford & Co. He can be reached at [jeffreymbowman@gmail.com](mailto:jeffreymbowman@gmail.com).

Every year provides opportunities for the global insurance industry and policyholders to learn from loss events. As we look back at 2016, by most measures an average year for catastrophe losses, there are some specific lessons for mitigating the consequences.

Swiss Re Ltd. estimates that natural catastrophes and man-made events in 2016 accounted for 10,000 deaths and at least \$158 billion in economic losses, of which insured losses were \$49 billion. While total insured losses increased 33% from 2015, economic losses were a quite different story — rising 68% from the prior year. The 10-year average for insured disasters was \$53 billion. 2016 showed a stark gap between insured and uninsured loss, as the costliest cat events tended to strike in areas where insurance penetration was low.

In the United States, the largest cat events of 2016 were Hurricane Matthew, severe weather that spawned a hailstorm in Texas, and flooding. Swiss Re estimates that Matthew caused at least \$8 billion in economic losses and more than \$4 billion in insured losses. The Texas hailstorm caused widespread damage to homes and businesses and generated \$3 billion in insured losses.

Matthew caught many residents in the Southeastern United States by surprise. It was the first hurricane to reach Category 5 in the Atlantic basin since 2007. Although Matthew made landfall as a Category 1 hurricane, it caused massive rainfall and flooding far inland in the Carolinas. When catastrophes are fewer and farther between, people unfortunately tend to become complacent. As in investing, the past is no guarantee of future performance when it comes to where — and how hard — the wind blows.

Catastrophe frequency and severity ebb and flow, but it seems that a 1-in-100-year event occurs almost annually. How can that be? The insurance industry does itself and the public no favors with this terminology. Actuaries express non-life loss probabilities in terms of years. Translated, a 1-in-100-year event has a 1% chance of occurring. When does the 100-year period start and end, exactly? It's confusing to most people, particularly insurance buyers.

## Loss mitigation

Insurance provides vital financial protection for natural disasters, but where the industry can offer an even greater service is through risk control and mitigation. The more people and businesses make use of insurance, the more the industry can bring its expertise in reducing the frequency and severity of losses.

The community of Flagler Beach along

the Atlantic coast of Florida offers an interesting study in catastrophe risk mitigation. Matthew's storm surge destroyed a 1.4-mile stretch of historic federal highway A1A, but coastal homes near sand dunes were largely spared. Sand dunes and beaches are natural defenses to storms and flooding, and they must be replenished. While some homeowners associations balk at the cost of rebuilding dunes annually, there is little argument that without such protection, the damage from windstorms would be far greater.

Mangrove trees and shrubs, incidentally, are another natural defense to flooding. Mangroves grow in the brackish waters of tropical and subtropical intertidal zones around the world and support complex coastal ecosystems. But mangroves and sand dunes cannot themselves solve catastrophe loss. A combination of greater insurance penetration and sensible local planning is needed in many areas of the world to protect people and property exposed to natural catastrophes.

*Insurance provides vital financial protection for natural disasters, but where the industry can offer an even greater service is through risk control and mitigation. The more people and businesses make use of insurance, the more the industry can bring its expertise in reducing the frequency and severity of losses ... greater insurance penetration and sensible local planning is needed in many areas of the world to protect people and property.*

Value at risk has increased, especially in coastal areas. AIR Worldwide, for example, estimated that in 2015, the total insured value on the U.S. East and Gulf coasts exposed to maximum storm surge was \$17 trillion. That is a staggering amount. Likewise, the global population at risk has grown exponentially in the just the past few decades. Hundreds of millions of people now live in areas susceptible to sea-level rise.

Dealing with underinsurance is a significant global problem for governments, as the cost ultimately is borne by taxpayers. Insurers and reinsurers take on a large part of the risk from governments, but

a majority of the exposure is essentially self-insured and unfunded. A 2012 analysis by Lloyd's shows that 17 countries with varying nonlife exposures are underinsured by \$168 billion. Among them are countries such as Bangladesh, which faces the highest annual exposure to loss as a percentage of gross domestic product. Reinsurance intermediary Aon Benfield, analyzing cat loss data since 1980, found that 90% of uninsured catastrophes occur in the Asia-Pacific region, compared with 77% in Europe, the Middle East and Africa and 55% in the United States.

The global insurance industry and governments can do more to protect the most vulnerable. There is an opportunity for innovation, to explore new models and methods of delivering insurance as well as responding to claims.

## Claims innovations

The industry should rethink its model for responding to catastrophe claims. Access to affected areas following a disaster is often difficult, yet the traditional model is "boots on the ground" when it comes to adjusting. That is simply not a recipe for rapid claims response.

Insurers can improve claim response by developing a new model. Technology is offering opportunities that a few years ago would have seemed to be science fiction. For example, drones, mobile apps, data capture and predictive modeling are now able pinpoint losses with greater speed and accuracy. Human judgment and contact are still necessary in insurance because it's a people business. But the industry can complement its "boots on the ground" strategy by using a trained network of contractors to evaluate property damage. This approach has been successfully used and implemented by a global claims company, and can be a force multiplier that removes steps in the process and accelerates claim resolution, making the customer experience better.

Catastrophic events can create complex and straightforward claims. Where there is no dispute, the industry should compensate policyholders quickly, using alternative payment methods if necessary. There is no question that the rapid flow of claim payments helps people, businesses and communities recover, which limits economic losses.

The customer's experience during the "moment of truth" influences their opinions and behaviors toward the insurance industry. There is a relatively simple formula that the industry can apply in catastrophe-loss scenarios. Better perception of insurance plus more participation equal greater spread of risk and ability to protect people and property more effectively. That's a win for all concerned.



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## Aon introduces energy loss modeling tool

Aon Global Risk Consulting is collaborating with Dutch research agency TNO to launch a loss estimating tool for oil, gas and petrochemical clients.

The Aon Loss Estimating Risk Tool, or ALERT, can model potential financial effects of a wide range of fire and explosion scenarios in the hydrocarbon processing industry, Aon said.

The modeling tool was developed in conjunction with several insurers, and is calibrated to model a full range of known historical losses from across the industry, according to the statement. It includes discharge and dispersion models, which are used to evaluate cloud dimensions for vapor cloud explosion events.

ALERT will be managed globally from London with support from Aon centers in Houston, Calgary, Alberta, Dubai, United Arab Emirates, and Singapore, according to the statement.

## ESIS adds telemedicine to worker injury service

ESIS Inc., the risk management solutions division of Chubb Ltd., said it has added telemedicine to the medical services it offers through ESIS NurseLine.

ESIS NurseLine is a 24/7, telephone service that provide access to registered nurses for work-related injuries. The service will now provide access to medical consultation for primary injury assessment via video conference through smartphone or tablet devices, ESIS said in a statement.

"Our new telemedicine solution further strengthens our NurseLine capability by offering virtual doctor visits when care is needed ... We are confident this telemedicine solution will provide clients with added convenience and greater cost savings to better manage their workers compensation programs," Littleton, Colorado-based Veronica Cressman, vice president of ESIS medical programs said in the statement.

## Starr enters employment practices partnership

Starr Cos. said it has reached an agreement with law firm Jackson Lewis P.C. to offer an employment practices liability risk management program to policyholders.

The program will provide tools that include an employment practices liability checklist to help develop workplace policies and procedures; webinars on a variety of employment issues; access to an employment liability blog; and interactive training, the New York-based



## Chubb expands cyber security services

Chubb Ltd. said it is offering an expanded suite of cyber loss mitigation services to its policyholders, including password defense, online cyber education and a cyber partner network.

Its password defense service will help drive cyber security by training policyholders' employees to create and use strong website passwords, store them in a secure vault and synchronize them across multiple devices, the insurer said in a statement.

Under its new security awareness training, Chubb cyber policyholders have access to two online cyber education courses.

In addition, with its cyber partner network, all Chubb commercial policyholders now have access to a preferred panel of prequalified cyber risk service providers, often at preferred rates, the insurer said.

Previously, only Chubb cyber policyholders had access to cyber-related services.

insurer said in a statement.

Qualifying Starr policyholders will also receive up to one free hour of consultation with an attorney from White Plains, New York-based Jackson Lewis, Starr said in the statement.

"Employee relations is often complex, so we created a value-added service to support our clients' employment practices needs," said Brian Inselberg, Starr's senior vice president for financial lines. "We chose Jackson Lewis because of their national presence and extensive experience handling workplace laws."

## Tokio Marine launches drone insurance platform

London-based Tokio Marine Kiln Group Ltd. said it has added unmanned aerial systems insurance to its One TMK digital exchange.

The product allows brokers to quote and bind drone policies online in real time, Tokio Marine said in a statement.

The One TMK digital exchange was launched in July 2016 with the aim of lowering transactional costs for brokers and enabling them to provide a more efficient service. The exchange features TMK's cargo insurance product Cargo10, which enables brokers to secure coverage after completing 10 questions, Tokio Marine said.

Drones "are playing an increasingly important role in the world and they're a class of business we've been pioneering for a number of years," said James Walker, head of aviation at Tokio Marine.

## Everest offers insurance coverage for auto fleets

Everest Insurance, a unit of Hamilton, Bermuda-based Everest Re Group Ltd., said it is offering an auto buffer product of up to \$5 million for U.S. clients with well-managed motor fleets of 250 to 1,000 units.

The product will be offered through a limited network of appointed wholesale brokers that specialize in the transportation network, the insurer said in a statement.

Maria Duffy, head of excess and specialty casualty for Everest Insurance, said in the statement the unit will operate with a dedicated underwriting team.

"This is a strategic addition for Everest which is designed to build on our strong relationships in the wholesale marketplace," she said.

## Service offers analysis of claims providers

Aon Global Risk Consulting, the risk consulting business of Aon P.L.C., has launched Aon Optics, to help risk managers select and evaluate third-party administrators and other claims service providers.

The service provides analytics on positive or negative outcomes delivered by their existing and prospective claim service providers.

Aon uses a set of performance-based analytics in detailed assessments that aims to match a client's claims management objectives, priorities, and geographic footprint to the capabilities and resources of claims service providers, Aon said in a statement.

## DEALS & MOVES

### Marsh agrees to acquire brokerage J. Smith Lanier

Marsh & McLennan Agency L.L.C., the middle-market agency division of Marsh L.L.C., said it has agreed to acquire J. Smith Lanier & Co., one of the largest privately held U.S. insurance brokerages.

Terms of the transaction, which is expected to close in the first quarter of 2017, were not disclosed.

West Point, Georgia-based J. Smith Lanier was ranked 30th in *Business Insurance's* latest ranking of the 100 largest brokerages of U.S. business with \$132.9 million in 2015 U.S. brokerage revenue.

### AIG buys \$20 billion in long-tail reinsurance

American International Group Inc. will pay Berkshire Hathaway Inc. \$9.8 billion to reinsure much of its pre-2015 long-tail commercial liability exposures.

The deal, which is effective Jan. 1, 2016, and is written by Berkshire Hathaway subsidiary National Indemnity Co., covers 80% of AIG's U.S. commercial long-tail net losses and loss adjustment exposures above \$25 billion. The limit on the reinsurance coverage is \$20 billion, an AIG statement said.

AIG will retain sole authority to handle and resolve claims, but National Indemnity will have various consultation rights, the statement said.

### USI Insurance Services acquires Ohio agency

USI Insurance Services L.L.C. has acquired Elmore, Ohio-based agency Diversified Insurance Service L.L.C.

Terms of the deal were not disclosed. Diversified Insurance Service provides personal risk, commercial and employee benefits products throughout Ohio.

USI is the ninth-largest broker of U.S. business according to *Business Insurance's* latest ranking, and has been subject to speculation that it may be acquired.

### Multiple agencies form new insurance brokerage

A group of 24 independent employee benefits, property/casualty, risk management and wealth management companies has joined to form Alera Group. The terms of the transaction were not disclosed.

Deerfield, Illinois-based Alera Group is an independent national insurance brokerage and wealth management firm with \$158 million in annual revenues and more than 750 employees in 40 offices across 15 states, Alera Group said in a statement.

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Insurtechs and companies that are doing insurance business via technology platforms (are) changing the model of how a traditional broker and underwriter work.

## UP CLOSE

### Deborah Morris

**NEW JOB TITLE:** New York-based New York operations leader at Integro Insurance Brokers

**PREVIOUS POSITION:** New York-based senior vice president and zonal executive at American International Group Inc.

**LOOKING FORWARD TO:** Truly understanding the broker model. I have a lot of experience in the insurance industry, but for me it will be very interesting to look under the covers of a brokerage and see how things get done (and) learning the broker secrets that sometimes underwriters never hear about.

**GOALS FOR NEW POSITION:** To grow the revenue of Integro, expand our relationships throughout the various industries, to meet new clients and show them the amazing customer service that we provide.

**ON LEADERSHIP:** One of the most important traits is empathy — being able to empathize with the people you are leading.

**CHALLENGES FACING INDUSTRY:** Technology. I think it's fairly well-known that the insurance industry may not have the best technology platforms. Given where technology is going ... the technology platforms of both carriers and brokers have to get better.

**CRYSTAL BALL:** What is emerging in the industry and will keep emerging is insurtechs and companies that are doing insurance business via technology platforms, changing the model of how a traditional broker and underwriter work. I think anyone who stands still when it comes to technology is not going to be here in 10 years.

**FIRST INDUSTRY JOB:** Professional trainee in the property department at American International Group Inc.

**ADVICE:** Insurance can be a great career; work hard and stick with it.

**FAVORITE QUOTE:** "Culture eats strategy for lunch." — Bob Benmosche

**OUTSIDE THE INDUSTRY, A DREAM JOB:** Author

**HOBBIES:** I love to work out, I love to travel, and I really love spending time with my kids.

**PETS:** I have a cat named Ollie.

**DON'T LEAVE THE HOUSE WITHOUT:** Lipstick

**BIGGEST OBSTACLE FOR WORK-LIFE BALANCE:** For me it's myself, my constant questioning if I'm giving enough to my family, if I'm giving enough to work. And I think a lot of women have this issue.

**PET PEEVES:** Procrastinators. Why wait until tomorrow if you can get it done today?

**WHEN I RETIRE:** I want to be sitting on a porch overlooking the sea, reading a book.

**FAVORITE MEAL:** Anything with avocado

**FAVORITE BOOK:** "A Little Life" by Hanya Yanagihara

**CAN'T-MISS TELEVISION SHOW:** "Homeland"

**BEST CITY:** Paris

**ON A SATURDAY AFTERNOON:** I enjoy watching my son horseback ride at our local barn.

**MONDAYS:** Coffee

## ON THE MOVE



Edgewood Partners Insurance Center said **Timothy Ward** has joined the broker's risk solutions practice in Stamford, Connecticut, as principal and casualty practice leader.

Mr. Ward previously was a senior vice president and leader of Marsh & McLennan Cos. Inc.'s national desk within its casualty placement practice, San Francisco-based EPIC said in a statement.



Aon P.L.C. has named **James Platt** to the newly created role of chief operating officer for Aon Risk Solutions, the brokerage said.

Based in London, Mr. Platt will work with Aon Risk Solutions' global operating committee to help develop strategy and drive business performance, an Aon spokeswoman said in an emailed statement. Previously, he was CEO of data analytics unit Aon Inpoint.



Claims administrator Crawford & Co. has named **Andrew Robinson** to the new position of global chief operating officer.

Based in Atlanta, Mr. Robinson will be responsible for the company's four business units — third-party administrator Broadspire, U.S. services, international operations and Garden City Group L.L.C. — as well as information technology on a global basis, Crawford said in a statement.

Previously, Mr. Robinson was president of specialty insurance, executive vice president of corporate development and chief risk officer at The Hanover Insurance Group Inc.



**Laura Foggan**, a leading insurer defense attorney, has joined Washington-based law firm Crowell & Moring L.L.P. as a partner in its insurance-reinsurance group.

Ms. Foggan joined the firm's Washington office after nearly 30 years at rival law firm Wiley Rein L.L.P., where she led its insurance appellate group. She was named as one of *Business Insurance's* Women to Watch in 2011.

Ms. Foggan has served as lead counsel in insurance disputes involving environmental and toxic tort, construction defect, personal and advertising injury, employment liability, product liability, mass tort and bad faith claims. Her clients have included the American Insurance Association, the National Association of Mutual Insurance Companies and the Property Casualty Insurers Association of America.

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## Lawsuit served up over Chipotle pics

**A** California woman is suing Chipotle Mexican Grill for \$2.2 billion, claiming the restaurant used her image without her permission.

Leah Caldwell, who is representing herself, filed suit in federal court against the Denver-based chain and the photographer who allegedly shot the unauthorized photo of her, according to media reports.

Ms. Caldwell claims the photographer approached her in 2006 as she was leaving a Chipotle restaurant in Denver, told her he had photographed her while she dined, and asked her to sign a release for the photographs. She reportedly declined, only to see her photograph on the wall of a Chipotle restaurant in Florida in two northern California locations.

In the advertisement, beer bottles had been digitally added to the table near her, which “put a false light upon her character associated with consuming alcoholic beverages,” according to the suit.

## Squirrel dinner burns Travelers

**T**ravelers Insurance Co. is on the hook for damages related to an apartment complex fire caused by squirrel dinner preparations.

Khek Chanthavong of Holland, Michigan, reportedly trapped and killed a squirrel to eat in 2012.

While on his apartment’s balcony, he used a propane torch to burn off the squirrel’s fur as he prepared to cook the little creature.

The propane torch reportedly ignited a blaze that displaced 29 families and caused \$2 million in total damages.

Auto Owners Insurance Co. sued Mr. Chanthavong to recover \$56,000 in insurance payouts, and Travelers aimed to recover \$300,000 from his roommate, who was asleep at the time of the fire, according to media reports.

A Circuit Court judge ordered Travelers to pay up in the case.

# Candy box leaves room for not-so-sweet suit



**A** yellow box of Raisinets is under the spotlight in a lawsuit filed against Nestle USA Inc. Sandy Hafer, of Los Angeles, is claiming that the box of chocolate-covered raisins she purchased from a grocery store was “recklessly” underfilled and is accusing the candy maker of false advertising in a class action suit filed last month in the U.S. District Court for the Central District of California.

The lawsuit, accessed by several media outlets, alleges that the “opaque packaging of Nestle USA Inc.’s Raisinets candies leads customers to believe they are buying a full box of the chocolate-coated raisins when, in fact, the box is only 60% full” and that “approximately 40% each (Raisinets’) packaging is non-functional slack-fill — empty space which serves no functional purpose under the law.”

The lawsuit contends that Nestle’s “deceptive packaging” violates California’s false advertising and unfair competition laws and is seeking \$5 million in refunds and interest accrued for purchases made by thousands of consumers.



## Firm in a pickle over pin designs

**W**omen’s fashion retailer Francesca Collections Inc. may be forced to take the advice displayed on a quirky pin it had been selling online and in stores since the summer of 2016: Dill with it!

According to a lawsuit in a Manhattan federal court, the retailer sold a number of whimsical pins featuring designs created by 11 artists without their permission.

According to a website created by the plaintiffs, the pins include such designs as a pickle with the words “Dill with it!,” a pizza slice with the words “True Love” draped across, a black cat with the proclamation “Cat Lady,” a pink strawberry, a frosted and sprinkled donut and a banana split.

According to the lawsuit, “enamel pins are again one of the hottest trends in fashion.”

Plaintiffs are asking for \$25,000 per violation, attorneys fees and punitive damages.



## Stylin’ striker caught in insurance scam

**A** former Australian soccer professional and stylish Instagram playboy was sent to prison Monday for travel insurance fraud.

Million Butshiire, a 25-year-old former player for the Perth Glory team, didn’t fall while on vacation in his native Democratic Republic of the Congo and didn’t need medical care or an airborne hospital transport, according to the newspaper West Australian.

But forged medical documents said otherwise, leaving a travel insurer to foot Mr. Butshiire’s hotel bill — among other items he intended to pay for with the \$120,000 in fraudulent claims filed.

Mr. Butshiire collected close to \$30,000 from his insurer before the scam became apparent. The money “fed his desire for the high life but led him to swap his Hugo Boss suit and Gucci loafers for prison greens,” the newspaper reported.

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