

Business Insurance

June 10, 2002

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\$4

St. Paul downgrade draws new attention to industry exposure

Asbestos funding uncertain

By JOANNE WOJCIK

The downgrading of The St. Paul Cos. Inc.'s financial strength rating by A.M. Best Co. after the insurer announced it would pay nearly \$1 billion to settle a single asbestos claim is putting other insurers with significant asbestos-related liabilities on their books under the spotlight.

As a new wave of asbestos litigation sweeps through U.S. courts, targeting companies that previously were not expected to become defendants, insurers are re-examining their asbestos liabilities and, in some cases, significantly increasing their reserves.

But even with these reserve boosts, analysts, rating agencies and other industry observers warn that insurers still may be seriously underfunded for asbestos claims. In a 2001 report, Tillinghast estimated that overall asbestos settlements to individuals in the United States and related expenses could reach \$200 billion. Tillinghast also estimated that U.S. insurers would pick up \$55 billion to \$65 billion of this tab.

A.M. Best also increased its estimate of ultimate asbestos losses to insurers to \$65 billion in May

2001, up from its 1997 estimate of \$40 billion.

"There is an element of burying your head in the sand," observed William M. Wilt, a senior credit officer at Moody's Investors Service Inc. in New York. Mr. Wilt is author of a March 2002 report that concluded there is "a huge gap between the ultimate cost of asbestos claims and the amount recognized by the insurance industry to date."

St. Paul's \$975 million settlement last week with Western Asbestos Co.—as well as PPG Industries Inc.'s \$2.7 billion settlement with dozens of its insurers last month—reinforces that assertion, he said.

St. Paul's settlement announcement prompted Best to downgrade the insurer's financial strength rating to A from A+, and Moody's said it was reviewing the insurer for a possible downgrade.

Standard & Poor's Corp. and Fitch Ratings both placed their ratings of St. Paul under review.

Although St. Paul did not fully reserve the settlement amount for this claim, a spokesman for the insurer said that its net settlement cost would be lower than its total asbestos reserves.

Because of tax deductions, reinsurance and the

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PHOTO: AP/WIDE WORLD

Increasing asbestos litigation is raising questions about insurers' exposure.

Late News

Terrorism insurance bill introduced in Senate

Senate Majority Leader Tom Daschle, D-S.D., is promising swift action on a terrorism insurance bill introduced late last week by a



Sen. Daschle

group of Senate Democrats. The text of the bill, S. 2600, was not immediately available, but sources said it would allow the federal government

to act as a backstop for private insurers in the event of future terrorist attacks after individual insurers had covered claims up to a level determined by their market share. The government would cover 80% of losses above the first level of caps, up to \$10 billion, and 90% of losses above that. The measure, which was introduced by Sen. Chris Dodd, D-Conn., has no Republican co-sponsors. "As soon as practicable, I plan to call up the bill and see where the votes fall," Sen. Daschle said in a statement. "We need to stop playing games with this critical issue."

Merrill Lynch forms Bermuda reinsurer

Merrill Lynch & Co. Inc. has established a reinsurer in Bermuda. The Bermuda Monetary Authority confirmed the formation of the Class 3 reinsurer but did not release details on its capitalization or the types of coverage it would reinsure. Class 3 reinsurers in Bermuda are required to form with at least \$1 million in capital. The move by the New York-based investment bank follows other recent reinsurance and insurance company formations in Bermuda, as companies have sought to capitalize on rising insurance rates.

Concern expressed about SCIF capital

California Insurance Commissioner Harry W. Low is requiring the State Compensation Insurance Fund to develop a "corrective action plan" to address its capital adequacy, loss reserves and surplus. The plan must be submitted to the Department of Insurance by June 14. As part of that plan, SCIF

See LATE NEWS/next page

Buyers seek more options

RIMS' Phillipus argues for RRG expansion

By MARK A. HOFMANN

WASHINGTON—Congress should expand the Risk Retention Act to allow risk retention groups to provide their members with property coverages, according to the Risk & Insurance Management Society Inc.

Testifying last week before the House Financial Services Committee's Subcommittee on Capital Markets, Michael Phillipus, vp-communications and external affairs for New York-based RIMS, also expressed support for allowing insurers the option of choosing a federal charter rather than a state charter as a way to increase market efficiency and lower costs. The hearing was the first of several dealing with insurance regulation and other in-

See RIMS/page 30

Court denies coverage in Y2K sue-and-labor suit

By GAVIN SOUTER

SEATTLE—Policyholders seeking insurance coverage for their costs of avoiding the Y2K computer bug have been dealt a blow by a state appeals court ruling that the Port of Seattle's insurers cannot be required to pay a claim brought under the sue-and-labor clause in the port's property policies.

In what is the first substantive appellate decision on the issue of coverage for Y2K remediation costs, the Court of Appeals for the State of Washington rejected the Port's arguments that insurers should pay its \$10 million to \$11 million in Y2K remediation costs because it incurred those costs through an attempt to prevent a future loss.

The court ruled that, because the expected loss would have occurred in a different policy year from those in which the remediation efforts took place, the remediation cost was not covered. The court also rejected the Port's argument that the Y2K bug constituted a computer virus and, there-

fore, was covered by the "data processing media" clause in the property policies.

The May 28 decision by the appeals court in Seattle is a setback for policyholders that are seeking coverage for their Y2K remediation costs, which in many cases totaled in the millions of dollars, attorneys say.

The Port of Seattle was one of the first large commercial policyholders to claim that its remediation costs should be covered under the sue-and-labor clause in its property policies, which provides that insurers will pay costs that policyholders incur in efforts to prevent a larger loss. The clause dates back to marine policies that were designed to pay for the costs of, for example, cargo that had been jettisoned in order to prevent a ship from sinking.

Policyholders have argued that the sue-and-labor clause, which is still contained in many property policies, should also apply to modern-day efforts to prevent a loss, such as reprogramming computers to ensure that they do not mal-

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Spotlight on

ENVIRONMENTAL RISK MANAGEMENT

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Inside

Federal backstop prospects dimming

The creation of a federal backstop for terrorism insurance is growing increasingly unlikely, says the District of Columbia's top insurance regulator. **Page 4**

Lawyers wake up to a new standard

In Commentary, Editor Paul D. Winston considers a Supreme Court ruling that may keep attorneys awake at night. **Page 6**

ADEA should be clarified

Now that the EEOC has said it won't bring bias charges against employers that provide lesser health plan benefits to Medicare-eligible retirees than they provide to younger retirees, it's time for Congress to clarify the scope of the Age Discrimination in Employment Act, this week's editorial says. **Page 8**

Russian financial firm's expansion bid blocked

A Russian banking and insurance company has suffered a setback in its plans use Finland as a gateway into the larger European Union financial services market. **Page 25**

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**REPORTING WEEKLY ON
CORPORATE RISK,
EMPLOYEE BENEFIT AND
MANAGED HEALTH CARE NEWS**

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CONTINUED FROM PAGE ONE should consider increasing rates, eliminating credits and discounts offered to large accounts, and ceasing payment of policyholder dividends, the commissioner advised in a May 29 letter to Kenneth C. Bollier, president of San Francisco-based SCIF. "SCIF's ongoing financial viability is of great concern," the commissioner states in his letter. In particular, he is concerned that SCIF's growth has been too rapid, a department spokeswoman added. SCIF now has a 44% market share, an increase from 21% just a few years ago, she noted.

Punitive award reinstated against Philip Morris

Philip Morris Inc. will have to pay a \$79.5 million punitive damage award, which earlier had been reduced by more than half by a trial court, the Oregon Court of Appeals has ruled. The ruling reinstated the award to the relatives of a man who died of lung cancer in 1997 after smoking up to three packs a day since the 1950s. A circuit court judge had slashed the 1999 jury award to \$32 million, calling the original amount excessive. The jury decided punitive damages were warranted because the cigarette maker had fraudulently concealed the dangers of smoking. The three-judge appeals court said that, even at \$79.5 million, the punitive award represents just slightly more than two and a half weeks of profit for Philip Morris.

House OKs permanent adoption tax break

The House of Representatives has passed legislation, H.R. 4800, that would make permanent a provision in the 2001 Economic Growth and Tax Relief Reconciliation Act that

Late News

raised to \$10,000 from \$5,000 the maximum amount of tax-free reimbursement an employer can provide for adoption-related



expenses. The EGTRRA provision also raised to \$150,000 from \$75,000 the maximum annual gross income an employee could earn without being taxed on an employer adoption reimbursement. These increases, which took effect at the start of this year, are scheduled to sunset automatically in 2010 unless Congress acts.

Canada expands federal airline terrorism cover

The Canadian government has extended its temporary aviation war and terrorism liability coverage to include new airlines. The change was made after three new airlines started operations in Canada, according to a spokesman for the Canadian transport department, Transport Canada, in Ottawa. Like several other countries, Canada began offering

emergency war and terrorism risk coverage for airlines after commercial insurers canceled airlines' coverage following the Sept. 11 terrorist attacks. The \$50 million in coverage that the government provides to airlines is due to expire on July 19.



Hershey workers were scheduled to vote on a new contract over the weekend, which could end a strike that began April 26.

Hershey, union reach deal over worker health costs

Hershey Foods Corp. reached a

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All the material in the Late News column, as well as other content in this week's issue, is generated from Daily News postings that appeared on the Web site in the previous week.

APIW Insurance Woman of the Year

Hartford's Blades is honored

By SALLY ROBERTS

HARTFORD, Conn.—When Judith A. Blades reflects on her success as the highest-ranking woman at The Hartford Financial Services Group Inc., her thoughts turn to her parents.

"I really believe that your leadership skills are developed at home and practiced in the office," she said. "My father started me in the business. He's old school and never spoke his emotions, but his eyes would light up every time I walked

in the room. You develop such confidence in your ability to do everything you want to because of the belief that you can," said Ms. Blades, senior executive vp for the property/casualty operations of the Hartford, Conn.-based insurer.

Ms. Blades said, "My mom is one of those people who always finds good in everybody," a trait Ms. Blades said has rubbed off on her. "In the business world...if I have a person who is not suited for a particular position, I look for a position within the company that's more

suitable," she said.

For her skills as a leader and mentor and her overall success within the insurance industry, Ms. Blades was named Insurance Woman of the Year 2002 by the Assn. of Professional Insurance Women. She received the award at a ceremony and reception held last Wednesday in New York.

"Judy really exemplifies what the Insurance Woman of the Year is supposed to represent," said Catherine A. Kalaydjian, president of the

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tentative contract agreement late last week with union workers striking over health care cost contributions. The 2,800 workers, who have been on strike since April 26, were expected to vote on the contract over the weekend. The two sides had been at odds over Hershey's insistence that union workers contribute more toward their health care costs. Earlier last week, Hershey said it had hired temporary workers at one of its plants and planned to do the same at another plant.

Briefly noted

The Federal Emergency Management Agency would become part of the new Department of Homeland Security if Congress approves President Bush's government reorganization plan....The Alabama Department of Revenue has made clear that 401(k) plan catch-up contributions will be exempt from state income tax. Department officials earlier said that state law would have to be amended to recognize catch-up contributions, which are permitted under the federal Economic Growth and Tax Relief Reconciliation Act of 2001. The clarification is posted on the department's Web site at www.ador.state.al.us....The Shawnee County District Court in Kansas last week overturned the Kansas Insurance Department's decision to block Anthem Inc.'s purchase of Blue Cross & Blue Shield of Kansas. The court vacated the department's ruling and remanded the matter back to the commissioner. Kansas Insurance Commissioner Kathleen Sebelius rejected the plan in February, saying that it would reduce BC/BS of Kansas' surplus and would increase rates for small-group and individual policyholders in the state.



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3rd Circuit elaborates on Supreme Court ADA decision

Employers' accommodation duties outlined

By JUDY GREENWALD

PHILADELPHIA—Employers must engage in an interactive effort with disabled employees—not rigidly adhere to arbitrary employment rules—when they ask to be moved to a more accommodating job, a federal appeals court ruled.

The May 29 decision by a unanimous 3rd U.S. Circuit Court of Appeals panel in *Howard Shapiro vs. Township of Lakewood* is apparently the first to elaborate on the U.S. Supreme Court's decision in *US Airways Inc. vs. Robert Barnett*. In that recent decision, the high court ruled that the Americans with Disabilities Act does not automatically override company seniority systems except in special circumstances (*BI*, May 6).

As a result, some attorneys say,

the 3rd Circuit's *Shapiro* decision is likely to be influential in other federal appellate and district courts.

The case involves Howard Shapiro, who injured his back while working as an emergency medical technician for the Township of Lakewood, N.J. Mr. Shapiro repeatedly inquired about the availability of lighter-duty positions. Lakewood contended that accommodating Mr. Shapiro would have forced it to violate an unwritten practice of requiring employees to monitor postings on the township's bulletin board and then apply for any positions they sought. A lower court ruled for the township and granted summary judgment dismissing the case.

In overturning the decision and permitting Mr. Shapiro's lawsuit to proceed, the appellate court said

employers must initiate an "informal interactive process" with the employee who needs accommodation.

The first lesson is 'the interactive process is extraordinarily important, and employers should take it seriously.'

Jeffrey Pasek
Cozen O'Connor

In *Barnett*, the Supreme Court had ruled that while an "employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to show the re-

quested accommodation is unreasonable, the employee still "remains free to show that special circumstances" make the requested accommodation reasonable, the appellate decision ruled.

The appellate decision says the Supreme Court appeared to prescribe "a two-step approach in cases in which a requested accommodation in the form of job reassignment is claimed to violate a disability-neutral rule of the employer."

The first step requires the employee to show the accommodation is reasonable "in the run of cases." If so, "then the burden shifts to the employer to show that granting the accommodation would impose an undue hardship," says the decision.

But if accommodation is not reasonable in the run of cases, "the employee can still prevail by show-

ing that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case," the appellate panel ruled.

The lower court's decision to dismiss the *Shapiro* case "simply because he did not comply with Lakewood's policy regarding transfer applications" cannot be reconciled with the *Barnett* decision, the appellate court concluded.

The first lesson to be learned from *Shapiro* is "the interactive process is extraordinarily important, and employers should take it seriously," said Jeffrey Pasek, an attorney with Cozen O'Connor in Philadelphia.

Furthermore, the township's insistence on a formal job application despite Mr. Shapiro's query letters

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2002 Employee Benefits Leadership Forum

Consumer-driven model driving plan design

By JERRY GEISEL

WHITE SULPHUR SPRINGS, W.Va.—Will consumer-driven health care plans one day become the dominant group plan design?

Proponents, understandably, think so.

"It won't happen overnight. But it will happen," said Doug Kronenberg, chief strategy officer for Lumenos Inc., an Alexandria, Va.-based designer of consumer-driven plans.



Tony Miller, chief executive officer of Minneapolis-based Definity Health, another marketer of the plans, concurs: "It is inevitable."

Others, however, are more cautious. "There will be more plans, but nothing happens that quickly—and in health care, no one plan fits all," said Terry Warren, operations leader for the benefits practice at Willis North America Inc. in Nashville, Tenn.

But regardless of the speed at which consumer-driven health plans are adopted, managed care is in trouble and alternatives need to be examined, agreed speakers and attendees of a session at the recent 2002 Employee Benefits Leadership Forum sponsored by the Council of Insurance Agents & Brokers at the Greenbrier resort in White Sulphur Springs, W.Va.

"We are on the cusp of change," said Richard Sorian, a senior researcher at The Center for Studying Health System Change in Washington, a non-profit research organization.

That change is being driven by the failure of managed care, after a brief success, to control costs. Last year, 15% rate hikes were common, and this year's increases are expected to be even greater.

"We are in trouble. Rates are going up 20% to 30%. How do we solve that problem?" asked Robert Munao, chairman of the Council of Employee Benefits Executives, a CIAB committee, and the president of Kaye Benefits Consulting in Woodbury, N.Y.

The problem, some panelists said, stems in large part from the way many managed care plans are designed. In exchange for using a plan's network of providers, enrollees are responsible for only a small share of costs, such as a \$10 copayment for office visits.

But that type of system has given employees little financial

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PPO to rank hospitals on cost
Blues plan adopts alternative to tiered health plan design

By JUDY GREENWALD

THOUSAND OAKS, Calif.—Blue Cross of California is planning to rank hospitals in its network by their relative cost, having decided at least for now against introducing financial incentives for participants to use lower-cost facilities.

The ranking program, which will be introduced in BCC's printed and online directories of network facilities beginning next month, was developed after the insurer encountered hospital opposition to introducing a tiered health plan—an approach to holding down costs that is being

introduced by other health plans in California and across the country (*BI*, Feb. 11).

Its introduction may be a first step toward eventually factoring hospitals' costs into benefit design and charging employees higher copayments for more expensive facilities, said Max Brown, senior vp at BCC, a Thousand Oaks, Calif.-based unit of WellPoint Health Networks Inc.

BCC initially plans to introduce the program only to its 4.1 million preferred provider organization members. "We may do something like it for (health maintenance organizations) but we haven't settled on

a definitive strategy yet," he said.

The BCC program uses data on charges for diagnostic-related groups—a payment method used by Medicare that is based not on the number and kind of medical services provided, but instead on the diagnosis—as its basis to rank hospitals by their cost on a scale of from one to four, with four being the most expensive.

The insurer's hospital directories will use icons rather than dollar figures to represent how the facilities rank in terms of cost.

About 10% of the hospitals within BCC's network fall within category one and four, while about 40% each are within categories two

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Low-limit terrorism coverage more affordable: Panel
Market adapting to turmoil

By MICHAEL PRINCE

NEW YORK—Both buyers and insurers need to adjust their risk financing strategies to cope with the market turbulence caused by last year's terrorist attacks, a panel of speakers says.

"The challenge of intentional acts is something that needs to be addressed," said Douglas Elliot, chief operating officer at Travelers Property Casualty in Hartford, Conn. Mr. Elliot participated in a panel discussion in New York sponsored by the Spencer Educational Foundation Inc.

After the Sept. 11 terrorist attacks, exclusions for terrorism appeared, and "we really have not seen a return of that coverage" in property insurance policies, said Christopher Treanor, managing director of global broking operations for Marsh Inc. in New York.

But a new market has since sprung up, offering stand-alone terrorism coverage that is "moderately robust," Mr. Treanor said. This market can provide terrorism limits for \$500 million to \$700 million, which, he noted, is significantly lower than the limits that were available to buyers before Sept. 11. Nevertheless, such coverage is generally extremely costly.

At lower levels of terrorism coverage, such as \$200 million in limits, prices are not as exorbitant because more insurers are willing to provide coverage at those levels, making the market more competitive. Above \$200 million, though, "the market starts to fall out, and you're left with one to two carriers," Mr. Treanor said. He noted that the biggest stand-alone terrorism policy he has seen was for \$800 million in limits.

Since little history exists in evaluating terrorist risks in the United States, the pricing for terrorism coverage is not based on actuarial models, Mr. Treanor said. "It's a little bit of a guessing game based on supply and demand."

As insurers try to limit their concentration of risks, though, many have reached their limit on terrorism policies in Manhattan and won't take on any more business there, Mr. Treanor pointed out.

For small and midsize buyers that require lower limits, on the other hand, terrorism coverage is generally available "with very little additional premium," said John Cay III, the chairman and chief executive officer of broker Palmer & Cay Inc. in Savannah, Ga. Mr. Cay echoed Mr. Treanor's observation that a more competi-

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Regulator says chances are dim for terrorism bill

By MARK A. HOFMANN

WASHINGTON—Enactment of legislation that would allow the federal government to serve as a backstop for terrorism insurance is growing increasingly unlikely, according to the District of Columbia's top insurance regulator.

"Despite what you've heard, all members of Congress are from Missouri," Lawrence Mirel, the district's insurance commissioner, told a gathering of risk managers during the Risk & Insurance Management Society's fourth annual "RIMS on the Hill" advocacy training event

last week. No matter where they're from, members of Congress have a "show me" attitude, Mr. Mirel said.

Despite calls by the insurance industry for the federal government to play a role in guaranteeing coverage for future terrorism attacks, lawmakers haven't been shown enough to persuade them to pass such legislation, he said.

Enactment of such a bill is one of RIMS' legislative priorities. Although the House passed its bill in November, no bill was formally introduced in the Senate until June 7, two days after Mr. Mirel made his comments; and the Senate bill,

which has no Republican sponsors, does not resolve disputes over tort reform that stalled earlier measures.

Mr. Mirel touched on a variety of other subjects of concern to risk managers during his keynote address, including class action reform and optional federal chartering of insurers, both of which merited their own panel discussions during the RIMS event.

"I know you're very concerned about a terrorism backstop bill," Mr. Mirel said. But he said that while he's heard rumors of large-scale problems in the property/casualty market, proof of massive dis-

location in the Washington area is rare. These limited exceptions, he said, are terrorism-related problems in workers compensation and, possibly, in regard to covering large apartment buildings and embassies.

But the market is beginning to solve the terrorism coverage problem itself without government intervention,



Washington D.C. Insurance Commissioner Larry Mirel, left, with RIMS President Chris Mandel.

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said Mr. Mirel, who added that at least 11 companies currently offer some sort of terrorism coverage.

"If there really is a problem, you must show it," he said.

Mr. Mirel made clear that he agrees with RIMS that another legislative priority—how courts deal with class action lawsuits—truly is a problem in need of reform. In fact, he called the current system nothing less than "an abomination."

Mr. Mirel likened some plaintiffs' attorneys to swashbucklers engaged in piracy, looking for the "biggest, fattest" target, after having tackled the tobacco industry. "The insurance companies are the Spanish galleons," he said.

Allowing nationwide class actions to be brought in state courts against insurance companies results in situations in which a state judge can set insurance law that can be applied nationwide, he said.

Mr. Mirel cited a class action lawsuit brought on behalf of policyholders nationwide against State Farm Mutual Automobile Insurance Co. in a rural Illinois county. In the dispute—which was over State Farm requiring the use of parts not made by the car's original manufacturer when adjusting claims for damage to insured vehicles—an Illinois state judge's ruling rejecting such a requirement in auto insurance policies effectively applied state law to the entire class of policyholders nationwide.

Mr. Mirel said that moving such class action cases to federal courts would improve the situation, as would considering appropriate administrative remedies before suits can be filed. Both potential remedies are among RIMS' principles for class action lawsuit reform.

On the topic of optional federal chartering, Mr. Mirel was not afraid to disagree with his hosts. "I know where you guys stand on that one."

Michael Phillipus, RIMS vp-communications and external affairs—had testified in support of creating an optional federal charter before a House subcommittee fewer than 24 hours before Mr. Mirel's address (see story, page 1).

Mr. Mirel's said that while he is not afraid of the federal government—for which he has worked in the past—he believes state regulation of insurance is preferable to any federal system. "The problem is, if you get the right federal regulator, you're in good shape. You get the wrong federal regulator, you're in terrible shape."

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Change of delivery for postal plan

DOWNERS GROVE, Ill.—First Health Group Corp. has agreed to pay \$20 million to CNA Financial Corp. for operational and administrative assets it will use to manage its recently acquired contract to administer benefits for federal mail handlers.

The National Postal Mail Handlers Union awarded the benefit plan contract, which serves nearly 400,000 federal employees and 600,000 dependents and retirees nationwide, to Downers Grove, Ill.-based First Health last month. Previously, Chicago-based CNA administered the program.

The contract, which goes into effect July 1, is valued at \$1.3 billion over the next five years, Edward L. Wristen, First Health's president and chief executive officer, said in a

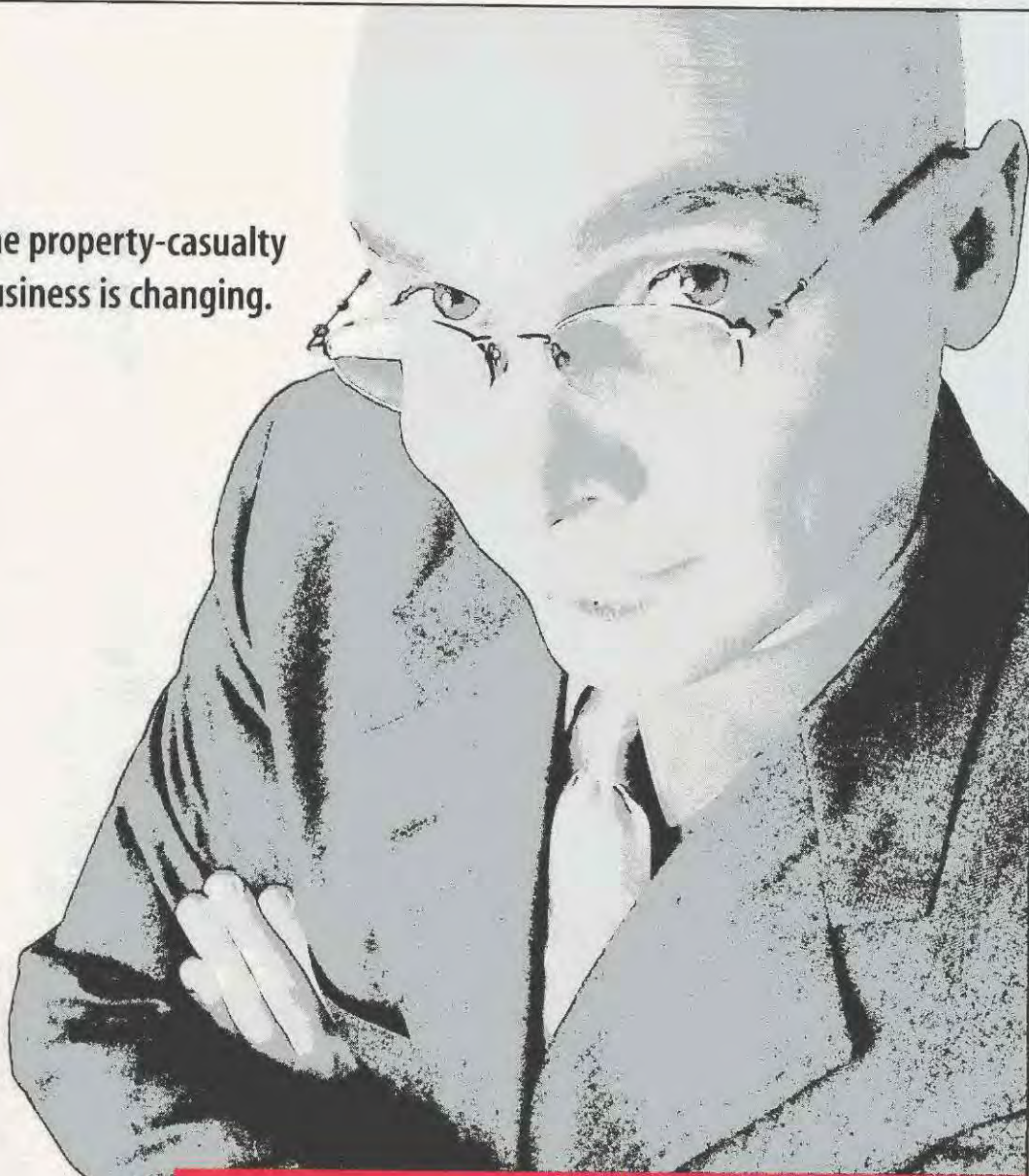


statement. It is the largest contract in First Health's history, Mr. Wristen added.

The acquisition includes transferring about 1,000 CNA employees and assets, which supported the mail handlers' contract nationwide. "These employees will assume the same function for First Health, providing the company with an experienced team of personnel already accustomed to administering the 1 million-member plan," according to a First Health statement. That should allow for "an orderly, seamless transition," Mr. Wristen said.

—By Meg Fletcher

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Commentary

Sleepy counsel rouses high court

In what may be the sleeper decision of its current docket, the U.S. Supreme Court is holding the nation's attorneys to a new and higher standard of alertness in the courtroom.

The court's decision last week to let stand a 5th Circuit ruling means it no longer will suffice for attorneys to merely show up and file relevant motions on time to be deemed "effective counsel"; now, they must also be awake.

In so doing, the justices also sent an important message that they will not take the task of deciding important legal matters lying down. (However, because the court merely upheld the federal appeals court decision without comment or dissent, it is impossible to say for certain that all the justices were awake as the nation's high court grappled with this thorny issue.)

The case before the court arose from an appeal by an inmate on Texas' death row, Calvin Burdine, that he was denied effective representation because his court-appointed attorney dozed frequently at the defendant's table during trial. The attorney has since died and is therefore unable to defend himself against the charge of incompetence. Short of arguing that he talked in his sleep, I'm not sure what he could have said in his defense.

Regardless, Texas officials argued valiantly for the right of attorneys to snooze at trial so they could execute the defendant for his alleged crime of murder. If the state's case is as strong as it maintains, then it should have no trouble overcoming the defense mounted by a conscious defense attorney. But all eyes will be watching this new trial. Anything longer than a blink might be seen as grounds for a mistrial.

The ruling is sure to be hailed as a dream come true by many a death row inmate and a nightmare for attorneys—not to mention judges and juries—who often may be lulled to sleep by procedural delays and boring testimony.

On first hearing the case, *Burdine vs. Texas Department of Criminal Justice*, a three-judge panel for the 5th Circuit ruled that just because an attorney was unconscious some of the time did not mean he or she was not providing effective counsel during the majority of time he or she was awake. But the full 5th Circuit overturned that decision on a 9-5 vote, ruling that having a court-appointed attorney doze was unfair to the defendant.

In appealing that decision to the

Supreme Court, Texas argued that courts have held that counsel was not automatically deemed ineffective when attorneys were later shown to be drunk, on drugs or mentally ill. Therefore, the state said, creating an automatic assumption that counsel was deficient simply because he was asleep was excessive.

Texas warned that holding attorneys to such a standard would serve as a wake-up call to defendants to claim they were harmed by inattentive and sleepy counsel, costing the taxpayers great sums to reargue criminal cases. I would think most taxpayers might support the concept of requiring relevant players in the

courtroom to be awake during proceedings, on the off chance that they themselves might one day need to avail themselves of conscious legal representation. Maybe it's the liberal in me, but I also think that, particularly in death row cases, the taxpayer recognizes the importance of people being alert in

proceedings that might send someone to the gallows.

Someone on the high court must have been alert to the possibilities of people being denied their constitutional rights by mentally absent counsel and rejected Texas' appeal, effectively making "you snooze, you lose" the new standard for legal defense work.

While this case was focused on a criminal trial, it might also become an issue in civil cases. Such things as contractual disputes, after all, are likely to be far less gripping than your average murder trial. Insurance policy disputes, for example, in which days are spent arguing the definition of a single word such as "sudden" or "accidental" might sedate most courtroom participants. Don't get me started on the sleep-inducing qualities of litigation over the drafting of ERISA provisions.

So plaintiff and defense attorneys who don't want to become charter members of the Narcoleptic Attorneys Assn. should be taking whatever steps are necessary to stay awake.

A bit of free legal advice: It costs only about 50 cents to get an extra shot of espresso in your coffee at Starbucks.



Paul D. Winston

Editor Paul D. Winston's commentary appears fortnightly and at www.businessinsurance.com. Mr. Winston can be reached at pwinston@crain.com.



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Editorial

Now, Congress must clarify ADEA

Employers can breathe a sigh of relief that they are now less likely to face an unreasonable risk of being sued for age discrimination over how their retiree health plans are designed.

As we reported last week, federal regulators are abandoning a controversial policy of bringing age discrimination charges against employers that provided lesser health plan benefits to retirees who are eligible for Medicare than they provide to younger retirees. The proposed change, announced by the Equal Employment Opportunity Commission, comes as a great relief to employers, who will breathe even easier when the EEOC actually issues its new enforcement guidelines.

For the many employers that use this commonly accepted approach to retiree benefit plan design, the threat of being sued by the EEOC

was bewildering. Designing retiree health plans to take into account whether a beneficiary is eligible for Medicare is practical and cost-effective. Requiring employers to essentially disregard that older workers are entitled to such benefits would not only be ludicrous, but also would hurt retirees, a point the EEOC now understands.

That's because the EEOC's stance put employers between a rock and a hard place: To comply with the EEOC, employers either would have had to provide more benefits to older retirees, or scale back benefits for younger retirees. Given the choice of paying more or less, it is certain that younger retirees would have seen their benefits reduced so employers could avoid the threat of age discrimination litigation.

The EEOC's unpopular and unwise position arose when it embraced a questionable federal ap-

peals court ruling that held retiree health plans were covered by the Age Discrimination in Employment Act. The EEOC is responsible for enforcing the ADEA. In order to prevent a charge of discrimination, an employer would either have to spend the same amount of money or provide equal benefits to younger and older retirees.

That ruling by the 3rd U.S. Circuit Court of Appeals, which involved Erie County, Pa., was bad enough, but it was compounded when the EEOC incorporated that approach into its national enforcement manual even though no other courts had ruled the same way. That appeals court decision and the fact that it was championed by the EEOC so horrified us that we have repeatedly called for it to be overturned.

We are relieved, therefore, that the federal agency has listened to

the outcry from employers and other stakeholders and has woken up to the dangers posed by its position.

But even more needs to be done if employers are to be protected from being sued for discrimination over retiree plan design. Because even though the EEOC may not bring an enforcement action, retirees alleging bias still can sue companies.

Congress should amend ADEA to clarify without a doubt that the law applies—as long had been thought and the legislative history behind the law strongly suggests—only to active employees' benefit plans. This exception for retiree health plans is a necessary and proper one, given the role that Medicare plays.

Such a move, along with the EEOC's change in position, will settle the issue once and for all and will help to preserve these vital plans for older and younger retirees.

Letters to the Editor

More information needed in debate over RRGs

To the editor: I feel called upon to respond to the May 20 letter, "Facts call for the Expansion of the Risk Retention Act."

Robert H. Myers Jr., the letter's author and special counsel for the National Risk Retention Assn., is handicapped by the same dearth of information that affects all of us: We cannot cite comprehensive data

from unimpeachable sources. In launching the RRG experiment in insurance regulation avoidance, legislators neglected to require that the result of their hunches be monitored.

I obtained the information that Mr. Myers cites from A.M. Best Co., not the Risk Retention Reporter, which is also an excellent source of information. But neither of these sources has created a comprehensive description of the experience of RRGs.

Our information, both that of Mr. Myers and my own, is anecdotal.

It was for that reason that I suggested that *Business Insurance* undertake the job of publishing the facts.

The Risk Retention Reporter's "Risk Retention Group Directory & Guide 2002" tells what happened to the non-operating RRGs, including those that became insolvent. By contacting the states in which they were domiciled, one could find out their status. The results would be of great interest to the insurance community.

I do have a little trouble with the math of Mr. Myers. He advises that

only 15 of the 142 RRGs formed have become insolvent. He compares this to an A.M. Best insolvency study for the years 1992-2001 that shows that a little less than 1% of the 3,000 property/casualty insurers tracked by Best became insolvent.

Perhaps I am missing something, but on this basis of this comparison, RRGs fail at a rate that is more than 10 times that of property/casualty insurers. That is the point I was trying to make.

I am sure Mr. Myers is certain of his facts concerning the experience of RRGs domiciled in Vermont. Perhaps no one has been hurt by Vermont insolvencies.

However, that still leaves 12 insolvencies unaccounted for. That is the information necessary for the public to judge the success or failure of the experiment.

Charles A. McAlear
New Orleans

Schillerstrom



Letters to the Editor

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Environmental Risk Management

Spotlight editor: Roberto Cenicerros

Remedy doctrine not updated EPA approach needs renewing, some say

By MARK A. HOFMANN

As far as some cleanup experts are concerned, the Environmental Protection Agency's presumptive remedy initiative for Superfund is a good idea that deserves better.

The program, launched in 1993, aims to save time and money by building on past experience with certain types of Superfund sites. According to the most recent overview of the program—last updated in 1998—the initiative's "objective is to use the program's past experience to streamline site investigations and make remedy selection speedier and more predictable."

But the process is limited to five types of sites, a number that hasn't changed for about five years, leaving some observers to question EPA's commitment to the program.

As Mike Murphy, president of Chubb Environmental in New York, a unit of Chubb Corp., put it, "It's been around for a long time, but a lot of people don't use presumptive remedies. People aren't as sure about them as they should be. The federal government doesn't promote them as well as they should."

A quick review of documents related to the EPA's Web site devoted to presumptive remedy, www.epa.gov/superfund/resources/presump, shows that most date from the early to mid-1990s. The Web site was last updated in March 2001, when it said that, among other things, information on PCBs was "coming soon." In an e-mail, the EPA said that presumptive remedies had been applied in 92 situations through 1997—the last year for which data was available—and estimated that they would apply to no more than 25% of all sites on Superfund's National Priorities List.

"It would appear that it's been forgotten because there's not been any updates of those existing presumptive remedy guidance manuals that they have because technologies do advance," said Marlin Zelman, an environmental engineer with XL Environmental in Exton, Pa., a unit of XL Capital Ltd. "As technology advances and the presumptive remedy guidance documents are not kept up to date, the technologies identified may not necessarily be the most cost-effective," he said.

When PCBs are added, they will join volatile organic carbons, municipal landfills, metals in soils, wood treaters and contaminated ground water as situations that can be addressed through presumptive remedies.

The practice could ease the cleanup process, say experts.

"My feeling is it could move cleanups along a little faster," said Joe Boren, president of AIG

See REMEDY/page 16



Pollution risk transfer continuing to evolve Market for cleanup coverage growing

By DAVE LENCKUS

Risk managers are slowly but increasingly turning to insurance to contain pollution cleanup costs and third-party liabilities, but charting the sea of coverage issues can be a complex and lengthy task.

Some risk managers who have made pollution coverage deals that blend finite risk and conventional insurance are using the products to offload pollution liabilities from their organizations' balance sheets. Those risk managers have turned to the coverage in ad-

vance of mergers or divestitures or after a change in company management.

Many other risk managers that purchase pollution coverage, though, are not interested in prefunding their organizations' pollution remediation obligations through a finite product. Instead, they want only to guard against unforeseen pollution remediation costs and third-party liabilities through conventional risk transfer coverages.

Experts estimate that the market for the finite or conventional coverages has grown in recent years at a 20% annual rate to more than \$2 billion of premium. A decade ago, premium volume was less than one-tenth the current level, they say.

Still, the market has reached relatively few of the risk managers at companies with the kind of pollution remediation and liability problems that pollution insurance products are designed to cover. Market impediments have held down risk managers' interest, but those barriers are eroding, according to market experts.

Brokers say they are adding the expertise they lacked in the past to help risk managers evaluate the coverages, and the distribution channel has expanded to include attorneys, finance experts, real estate developers and property managers.

In addition, pollution cleanup regulations now often consider a site's planned use, which could mean sharply lower cleanup

See MARKETS/page 18

ADR gains ground in cover fights More disputes trying options to litigation

By ROBERTO CENICERROS

Negotiation and mediation are gaining greater acceptance as alternatives to litigation among policyholders seeking pollution coverage under older commercial general liability insurance policies.

From the mid-1980s through the mid-1990s, it was "all-out war," recalls Mark Siwik, senior counsel for Risk International Services Inc. in Cleveland. Uncertainties over legal outcomes and liability costs encouraged policyholders and insurers to fight court battles state by state.

But times have changed.

"We are in a different era now, where people are able to resolve things without litigation," said Mr. Siwik, whose risk management consulting company helps policyholders negotiate coverage settlements.

Wider use of companies specializing in reaching settlements with minimal litigation are helping fuel the trend, say risk management consultants, brokers and policyholders.

A maturing of pollution liability case law and an accumulation of data on appropriate cleanup procedures and costs are also helping, they add. Those factors have made it easier for engineers, scientists and financial analysts to forecast cleanup costs. Those factors also can help allocate coverage liability when numerous insurers and multiple polluted sites are involved, as is often the case.

Lawsuits may still be necessary, however, to help resolve coverage disputes, observers say. Companies that help policyholders obtain coverage while minimizing litigation now have a track record of obtaining positive results by building a good case for coverage, they add.

"I've seen them get some decent settlements," said Kenneth Ayers, chief executive officer of the environmental practice at Willis Group Ltd. in Nashville, Tenn.

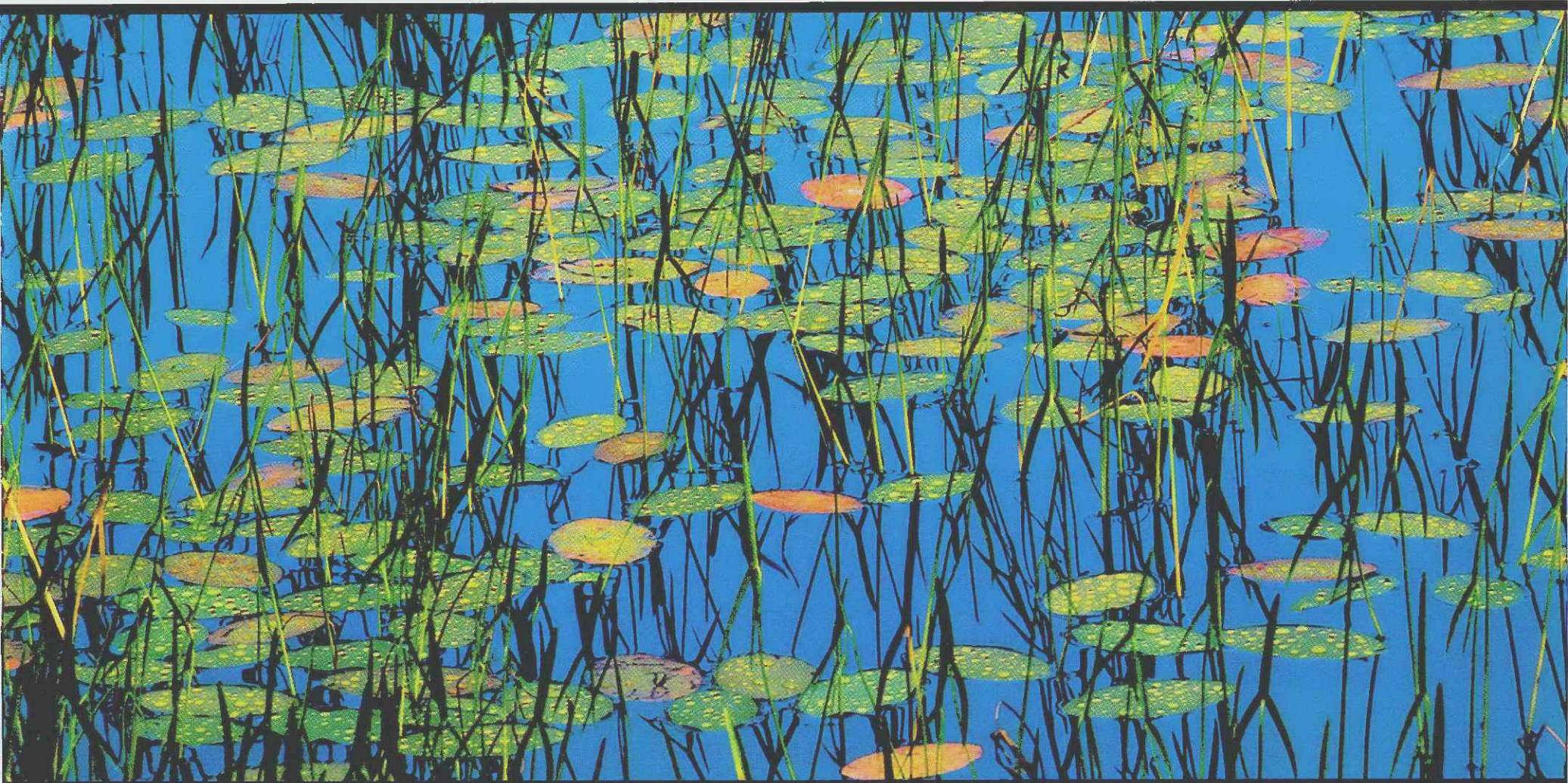
Clients fare well if they can win 40 to 60 cents per dollar of purchased CGL coverage after suing and engaging in lengthy litigation, Mr. Ayers said. Clients likely are getting similar or better results by turning to companies that "come in with the absolute opposite strategy," he said.

Willis often recommends Emeryville, Calif.-based LECG L.L.C. to its clients, Mr. Ayers said. LECG, whose services include economic analysis, consulting and litigation support, has an environmental practice and provides insurance recovery services.

The company's employees include engineers, administrators and technicians who formerly worked at organizations such as the

See ALTERNATIVES/page 14

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Ranked by number of corporate/institutional clients receiving unbundled environmental risk management consulting services

MACTEC Inc.	3,400
EMG	1,250
URS Corp.	1,020
Clayton Group Services Inc.	1,000*
STS Consultants Ltd.	835

TOP COMPANIES BY STAFF

Ranked by number of professional staff assigned to environmental risk management consulting

USR Corp.	7,600
MACTEC Inc.	3,700
Ecology & Environment Inc.	790
LAW Engineering & Environmental Services Inc.	530
Terracon	350

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Percentage of companies that provide each service

Litigation support, including expert testimony	97%
Environmental site assessment	93%
Environmental audits of real estate	90%
Operational audits of manufacturing plants	86%
Design and analysis of remediation plans	83%

* Estimate
Source: BI survey

GRAPHIC BY ADAM DOI

Top environmental risk management consulting specialists

Ranked by 2001 environmental risk management consulting revenues

Rank	Company/address	Phone/fax/Web site	Environmental risk consulting revenues ¹	Total clients	Corporate/institutional clients	Professional staff	Officer
1	URS Corp. 100 California St. San Francisco, Calif. 94111-4529	415-774-2700 Fax: 415-398-1905 www.urscorp.com	\$465,000,000 ¹	2,000	1,020	7,600	Martin Koffel, CEO
2	MACTEC Inc. 1627 Cole Blvd. Golden, Colo. 80401-3305	303-278-3100 Fax: 303-273-5000 www.mactec.com	\$389,063,000	4,000	3,400	3,700	Scott State, chairman/CEO
3	Terracon 16000 College Blvd. Lenexa, Kan. 66219	913-599-6886 Fax: 913-599-0574 www.terracon.com	\$43,500,000	NA	NA	350	Larry K. Davidson, chairman/CEO
4	Ecology & Environment Inc. 368 Pleasant View Drive Lancaster, N.Y. 14086-1397	716-684-8060 Fax: 716-684-0844 www.ene.com	\$39,700,000	328	198	790	Gerhard J. Neumaier, chairman/president
5	GZA GeoEnvironmental Inc. 1 Edgewater Drive Norwood, Mass. 02062	781-278-3700 Fax: 781-278-5701 www.gza.com	\$37,500,000	1,277	800 ²	270	William R. Beloff, president/CEO
6	Clayton Group Services Inc. 41650 Gardenbrook Road, Suite 155 Novi, Mich. 48375	248-344-8550 Fax: 248-344-0229 www.claytongrp.com	\$35,000,000	1,086	1,000 ²	175	Thomas P. Kowalski, president/CEO
7	AMEC Earth & Environmental 1 Plymouth Meeting, Suite 850 Plymouth Meeting, Pa. 19462-1308	610-828-8100 Fax: 610-828-6700 www.amec.com	\$20,000,000	800	400	200	Roger Jinks, president
8	Environmental & Occupational Risk Management Inc. 283 E. Java Drive Sunnyvale, Calif. 94089	408-822-8100 Fax: 408-822-8001 www.eorm.com	\$19,000,000	343	304	125	Glenn Fishler, president/CEO
9	Environmental Resources Management 16300 Katy Freeway, Suite 300 Houston, Texas 77094	281-600-1208 Fax: 281-600-1001 www.erm.com	\$13,800,000	200 ²	200 ²	NA	Peter Regan, president/CEO
10	STS Consultants Ltd. 750 Corporate Woods Parkway Vernon Hills, Ill. 60061	847-279-2500 Fax: 847-279-2510 www.stsconsultants.com	\$13,748,224	900	835	225	Thomas Wolf, president

* For unbundled services provided directly to corporate/institutional clients 1 BI Estimate 2 Estimated NA=not available
Source: BI survey

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Alternatives: Negotiation, mediation gaining ground

Continued from page 10

Environmental Protection Agency, said John Butler, LECG director in Los Angeles.

LECG also maintains data on factors such as the cost of installing groundwater treatment systems or the costs of excavating and hauling away contaminated dirt. The company uses that expertise and data, along with opinions on the remediation strategy that state and federal environmental regulators are most likely to require for specific sites, in analysis to determine the liability a policyholder may face for all the polluted sites they may own, Mr.

Butler explained.

Once the probable costs are estimated, allocation analysis determines how a policyholder's expected liability should be apportioned among its various commercial general liability insurers.

Allocation often is a starting point for negotiations with insurance companies, Mr. Butler said. The allocation process requires negotiation because relevant court decisions vary widely from state to state. Therefore, depending on factors such as the location of contaminated sites and insurance policy arrangements, the allocation as-

signed to each insurer will vary widely.

In some cases, negotiations alone can bring a resolution. Other cases may require a mediator. Mr. Butler said.

But a lawsuit often is filed regardless of whether a client intends from the outset to litigate or negotiate a coverage settlement, Mr. Butler explained. A lawsuit may be stayed while negotiations occur. But the suit works as a stick to bring insurers to the bargaining table.

"We have had clients who have said, 'We are going to hold off on a lawsuit,' but they have drawn up

the complaint, and if (negotiating) doesn't work, they are ready to go," Mr. Butler said.

During the early 1990s, many policyholders were skeptical about vendors that provided such recovery services, said James Cox, managing director of Aon Corp.'s environmental group in New York.

They were uncertain the companies could deliver on promises to estimate accurately the amount of insurer money they would collect for clients.

But their services now are being adopted by a growing number of

industries, Mr. Cox said. More than ever, policyholders understand their contribution.

"It was a momentum thing," Mr. Cox said. "Once they had a couple of success stories...the word of mouth spread."

Aon has formed a "strategic alliance" with one such company, Mr. Cox said. That company is Palmetto, Fla.-based Integrated Economic Solutions, which offers services similar to LECG.

"Anybody that has an insurance portfolio is a candidate for" their work, Mr. Cox said. "Obviously, you have to have some environmental headaches as well."

The mediation and negotiation

'Between the time we put the insurers on notice and the time we settled, it was less than a year. Litigation would have lasted five or six years. It was a good business solution to a complex problem.'

Risk manager

approach also is being applied to other areas of commercial insurance recovery.

A risk manager for a large corporation who asked not to be identified said he recently settled with 15 insurers after seeking more than \$100 million for a class-action product liability claim. He did so by turning to a group of attorneys that specialize in mediating cases. He chose to do so to save time and litigation costs.

"Between the time we put the insurers on notice and the time we settled, it was less than a year," the risk manager said. "Litigation would have lasted five or six years. It was a good business solution to a complex problem."

The insurers did not want to go to court any more than he did, the risk manager said. They agreed to negotiate a settlement individually over a coverage gray area, he said.

Although the risk manager's intent from the outset was to mediate a settlement, the company filed a lawsuit against the insurers just before sending them a letter requesting to mediate.

The lawsuit was a stick to get them to mediate. And, in case mediation failed, suing gave the policyholder the advantage of picking the legal forum should litigation become necessary, the risk manager said.

While alternative dispute resolution is gaining wider acceptance, several observers say, however, that in some cases insurers have a financial incentive to tie up matters in court rather than pay a large claim.

But insurers are more likely now than in the past to engage in mediation efforts, said Donald V. Jernberg, an attorney and environmental liability insurance specialist in Chicago.



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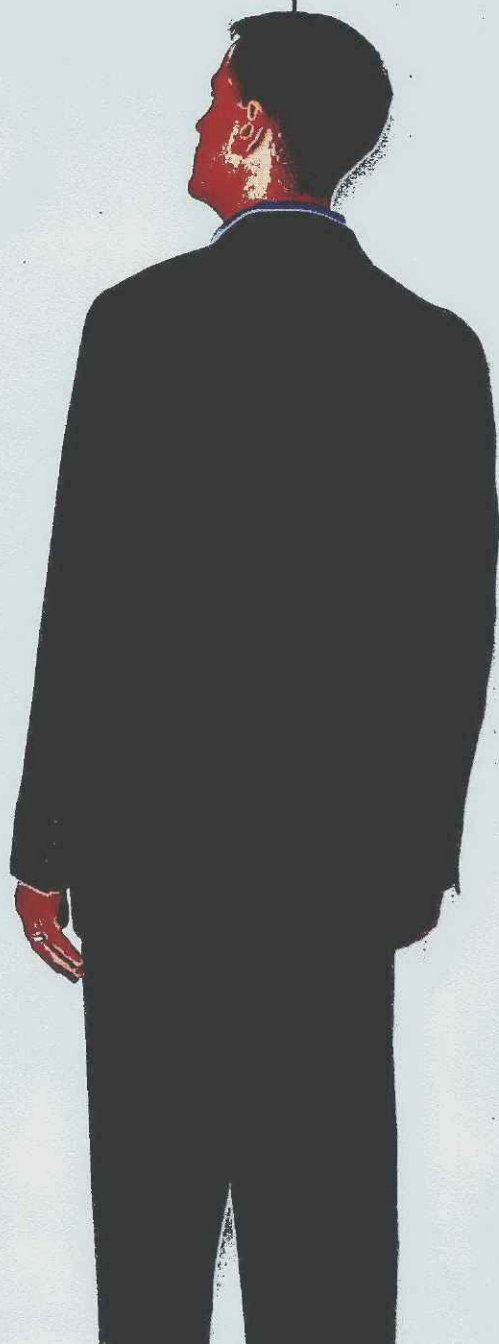
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Remedy: Presumptive approach slow in developing

Continued from page 10

Environmental in New York, a unit of American International Group Inc. That should save money and take the time-consuming step of determining a remedy out of the process, he said.

"From my perspective, it's been increasingly used for specific types of sites, which is what EPA intended," said Alan Bressler, senior vp of Marsh Environmental Practice in Atlanta, a division of Marsh Inc. The use of presumptive remedies recognizes that there's "a fair degree of homogeneity" among certain types of sites. For example, "we can

look at a municipal landfill and say there are a lot of different remedies" for cleaning the site but recognize that not all are feasible.

Even sites polluted with the same contaminant present challenges, cautioned Kim Hanna, vp and product manager-pollution legal liability for AIG Environmental. Other observers share her contention.

Mr. Bressler noted that "one type of remedy that works well at one locale might not work well at another" because of factors such as soil type, groundwater level and bedrock, he said.

And, even given favorable conditions, a company that pursued presumptive remedy and missed some contaminants could "have to go back and do more cleanup," he said.

"This is where environmental insurance comes in. If you find something that was missed, you're on the hook for the potential cleanup of that missed contaminant, and environmental insurance can pay for that," said Mr. Bressler. Even where all relevant contaminants were detected and cleaned up, regulatory changes could lower the threshold for acceptable levels of a

substance and force reopening of the site. Environmental insurance could come into play there, too, he said.

"Presumptive remedies aren't a cookie-cutter approach to environmental cleanup. Companies still need to perform a full site characterization" to determine the extent or degree of pollution, said Brian W. Merkley, a risk management consultant at Tillinghast-Towers Perrin in Dallas.

In practice, companies generally have to hire qualified environmental contractors, he said. Their contractors will generally perform all

the site investigation and engineering studies associated with a polluted property. Usually, the goal is to save clients money and make the site characterization and remediation process economical and efficient, he said.

In the context of presumptive remedies, most contractors know which remedies apply to the site, he said.

"For example, if you have leaking underground storage tanks with volatile organic carbons—like gasoline—in the soil, the contractor during the course of the site investigation activity will begin to already think about soil vapor extraction as the potential cleanup technology. So these presumptive remedies are really, in my view, sort of the normal course of business in the envi-

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'Presumptive remedies aren't a cookie-cutter approach to environmental cleanup. Companies still need to perform a full site characterization.'

Brian W. Merkley
Tillinghast-Towers Perrin

ronmental industry," he said.

Paul Tassinario, a consultant with AIG Environmental, said that the process is "used pretty widely," though more often at state-managed cleanups than at the federal level.

State programs often use a different name to describe the process, but "the cleanup technology is commonly used" at state-managed sites, such as certain underground storage tanks, Mr. Merkley noted.

"From a risk manager's perspective, it can be used as a resource for proven technology that will be acceptable to the state regulatory approval," said XL's Mr. Zelman.

"To that extent, it would provide the risk manager with some kind of comfort level. If they hired an environmental consultant and the consultant comes in with a technology as a proposed remedy, and it's a remedy that's listed in the presumptive remedy program, then the risk manager can feel comfortable that it's a technology that will work and their money is well spent," he said.

Chubb's Mr. Murphy stressed that "engineers should select the remedy and then sell that remedy to the regulators. If you reverse this, the regulators will select. In many instances, they don't have a vested interest in selecting the most efficient remedy. It's easiest to pick the most expensive," he said.

The environmental engineering community knows what works and what doesn't work, said Mr. Murphy. "Unfortunately, there's a tremendous amount of time, effort and money wasted" in the remedy selection process, he said.

"There should be more emphasis on looking toward the endpoint—what are we trying to achieve from a public health standpoint and the environmental standpoint," Mr. Murphy said.

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Markets: Pollution risk transfer evolving

Continued from page 10

costs. That has given property owners greater certainty about their liabilities and greater comfort in making commitments to cover their pollution cleanup and liability costs.

Meanwhile, coverage and some terms and conditions have improved in recent years, market experts said.

For organizations looking for some balance sheet relief from expected pollution remediation costs, the finite risk product is designed to be at least part of the answer. Property owners can prefund remediation costs through a finite risk product for the net present value of the costs plus some fees that vary from insurer to insurer.

The cost may exceed the amount the property owner is carrying on its books, but self-administering a remediation project can add substantial administration costs to the expected total, experts say.

Including the cost of pursuing other parties responsible for pollution at a site, administration costs could add 30% to 40% to the project's costs, estimated David J. Dybdahl, president of Littleton, Colo.-based International Risk Group L.L.C. IRG divisions offer risk management consulting and brokerage services and purchase property owners' pollution cleanup and third-party liability obligations.

Property owners that prefund their expected remediation costs through a finite product also usually obtain a remediation cost cap policy that covers cost overruns up to 150% of the expected costs.

Property owners also generally further pro-

tect themselves against unforeseen pollution risks by obtaining pollution legal liability or environmental site liability insurance—coverage previously known as environmental impairment liability coverage.

The huge cash outlay that usually is necessary for the finite piece of blended programs or to move pollution obligations to a third party is 'one of the biggest barriers' risk managers face in completing such deals.

David J. Dybdahl
International Risk Group L.L.C.

PLL products typically cover both the cost of remediating any unknown pollution at a site and third-party claims relating to known and unknown pollution risks. PLL enhancements in recent years include coverage for the additional financing, permits, design costs and missed-deadline penalties that property developers incur after encountering previously unknown pollution at a redevelopment site, noted Gregory Schilz, senior vp of Marsh Inc. in San Francisco.

One huge benefit of the blended products is that the aftertax cost of the coverage would be less than just the expected remediation costs that a property owner faces, market experts agree.

Another benefit is that the full cost of a blended program is tax deductible as an insur-

ance expense, market experts say. That is because the cost cap and PLL coverages make the program a true risk transfer transaction. While the finite risk piece of the deal alone would not be a tax-deductible expense, insurers that write blended programs do not break down program costs into risk transfer and finite elements, explained David Bennink, a New York-based director of Aon Environmental, a division of Aon Risk Services Inc.

Experts, though, are less certain about whether a blended program would allow a property owner to write its pollution cost obligations off its balance sheet. Such a move is possible, but it would have to pass muster with a property owner's attorneys, chief financial officer and auditor, experts said.

A liability writeoff would be easier to accomplish by selling the pollution obligations to a third party, said Patrick Riddell, a partner with IRG.

But the huge cash outlay that usually is necessary for the finite piece of blended programs or to move pollution obligations to a third party is "one of the biggest barriers" risk managers face in completing such deals, said IRG's Mr. Dybdahl. Such deals usually are done only when the property owner is entering into a merger or acquisition or is selling the property, he said.

As a result, many property owners purchase only the cost cap and PLL coverage, and self-administer their remediation projects.

Either the blended pollution insurance coverage or only the pure risk transfer products can be attractive mechanisms for boxing in pollution liabilities, as long as risk managers

also understand what they are and are not buying, market experts advised.

Among the factors that risk managers should weigh in evaluating either a blended program or only the cost cap and PLL coverage are:

- Insurers are willing to structure 30-year—or possibly longer—deals for blended programs, but they typically will not offer deals longer than 10 or 15 years when just the cost cap and PLL coverage are purchased together.

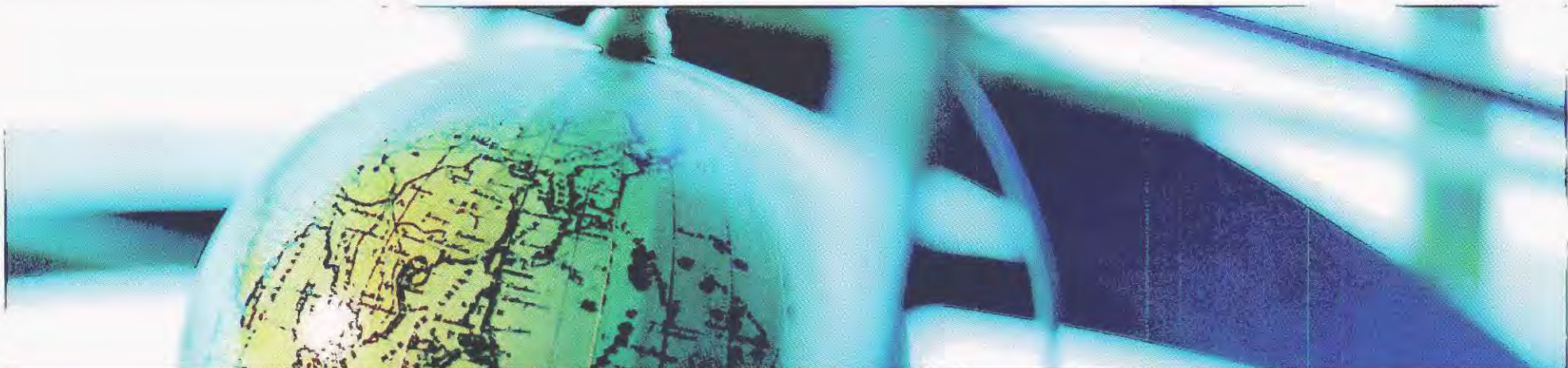
- PLL coverages generally will not respond if there has been a material change in operations at the site, though the coverage could be saved in some cases by obtaining the insurer's preapproval for the operational change.

If the coverage is obtained to facilitate a property sale and covers the buyer and seller, the seller should try to limit this provision's applicability to the insured responsible for the change, advised attorney Michael Mostow, a partner with Quarles & Brady L.L.P. in Chicago.

- Insurers generally return little if any of the premium for the risk transfer products if they cancel the coverage, Mr. Mostow said.

- Risk managers who do not prefund their expected remediation costs through a finite product typically will face a 10% to 20% deductible for cost cap coverage, though some insurers may reduce the deductible in return for a coinsurance arrangement.

Broker Tim Greene advises risk managers to make sure they bring in their chief financial officers, attorneys and company auditors when structuring pollution coverage. Because of the complexity of these transactions, risk managers "can't do it alone," said Mr. Greene, a vp with the Willis Environmental practice of Willis North America of Nashville, Tenn.



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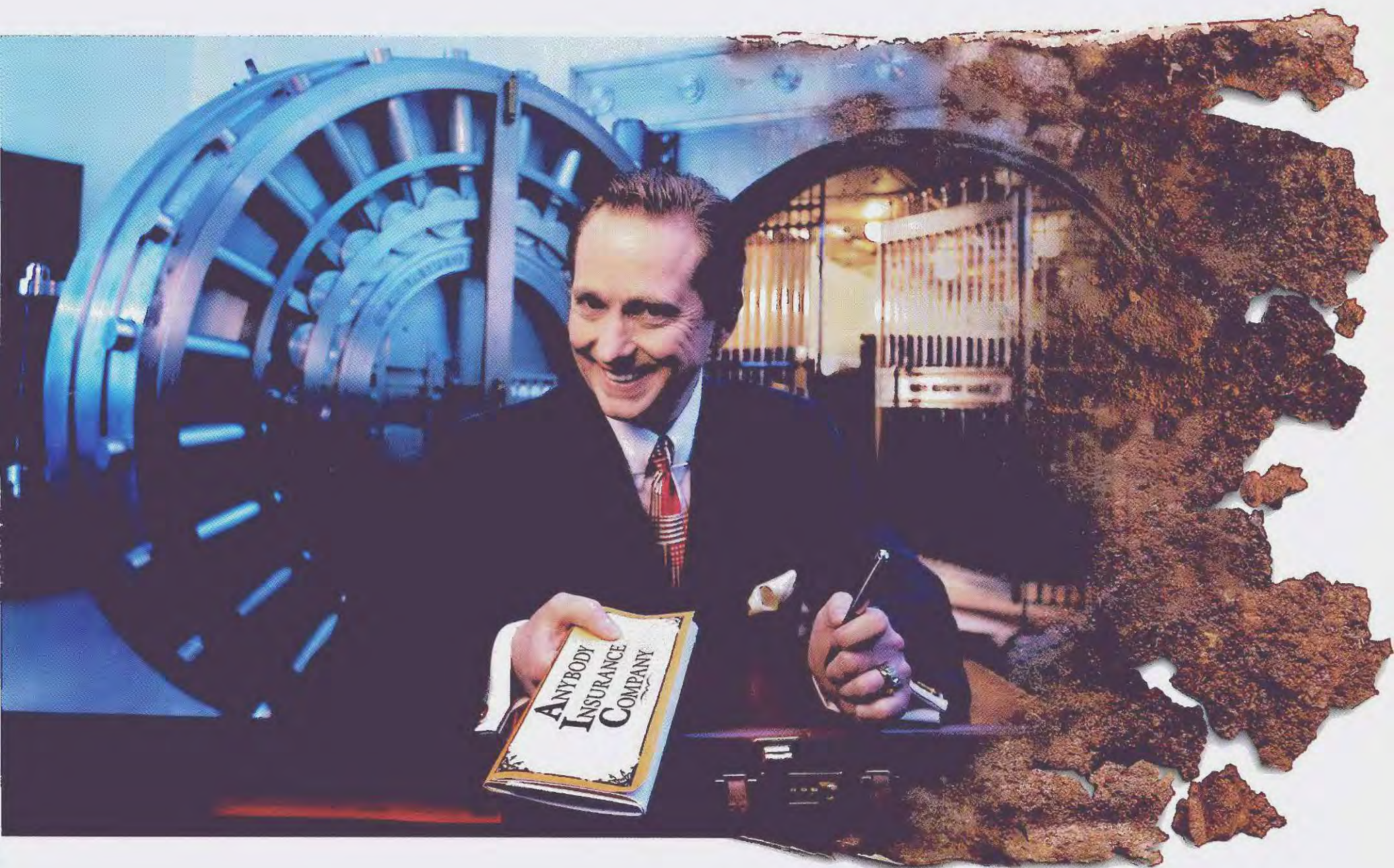
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Mold remediation being hampered by lack of standards

By MICHAEL BRADFORD

A lack of standards on mold toxicity and remediation is leaving a lot of uncertainty in how to deal with a rapidly spreading problem.

As mold problems continue to grab headlines, insurers, building owners and remediation experts are grappling with ways to protect people and property while stemming the tide of mold-related claims. And lawmakers are facing their own struggle in developing standards that can be used to determine the appropriate extent of cleanups and what types of mold should be regarded as hazardous to health.

Experts say it will be very difficult to answer some of the questions that standards should address.

"I think the science is quite a few years away from developing meaningful standards," said William Stewart, an attorney with Cozen O'Connor in Philadelphia. To do so would mean answering such questions as "How much is too much?" "What's the best way to remediate it?" and "Why are certain people af-

fectured and others aren't?" he said.

"These are cutting-edge questions," Mr. Stewart said. "It sounds like a good idea, but it's not that simple."

State lawmakers have begun to wrestle with those questions. California last year became the first to pass a bill calling for a government-sponsored study of indoor fungal contamination, though that effort remains unfunded due to the state's budget problems. In addition, several other states have similar bills pending. But, even with such legislative activity, adoption of standards could be a long way off.

A set of guidelines developed by the New York City Department of Health is routinely referred to by insurers, brokers and remediation firms as the nearest thing to standards that exist. Although some states have developed limited guidelines, those proposed by the New York Health Department are widely considered the most comprehensive available. The Environmental Protection Agency also of-

See MOLD/page 22

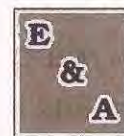
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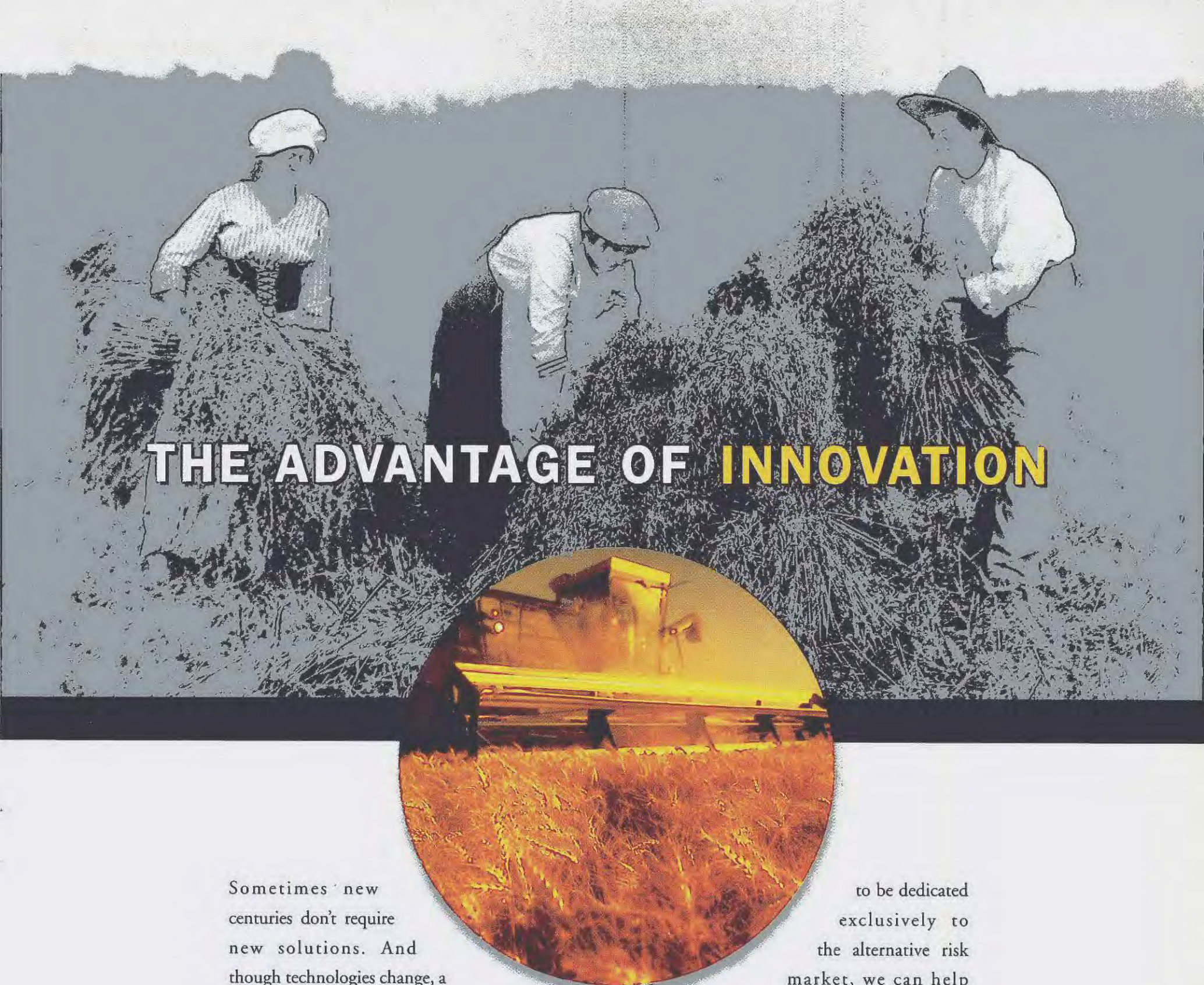
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Mold: Lack of standards complicating risk solutions

Continued from page 20

fers some cursory guidelines, as does the Occupational Safety and Health Administration.

Mold presents a particular problem because it is a naturally occurring organism, said David Golden, director of commercial lines at the National Assn. of Independent Insurers in Des Plaines, Ill. "It exists everywhere. There are no causal connections between mold and any sickness, not that mold couldn't make some things worse," he said. "Consequently, there are no standards for exposure or remediation, because it gets down to how much is too much of something you can't get rid of completely, no matter what you do."

Insurers have a big stake in the mold problem. Claims have soared in recent years, fueled in part by high-profile cases, such as the suit filed by television personality Ed McMahon, and by some large jury awards. Texas, in particular, has become a hotbed of mold suits, with one well-publicized case ending in a \$32 million judgment against Farmers Insurance Group, which a jury said mishandled a water damage claim.

Most of the claims that have led to litigation have come from homeowners, said Mr. Golden. Some high-profile commercial lines claims have been third-party liability claims filed by workers in "sick-building" type situations where mold was present, he said.

Product liability cases against manufacturers of synthetic stucco and wood treatment products are

also being filed, Mr. Golden noted. "Believe it or not, we even saw a case against an auto manufacturer," in which mold grew in a leaky car, he said.

Developing standards is "very important," said Eric M. Goldberg, assistant general counsel with the American Insurance Assn. in Washington, because "insurers are being forced into a position to remediate, but they don't know how far to go."

There are no mold exposure or remediation standards because 'how much is too much of something can't get rid of completely, no matter what you do.'

*David Golden
National Assn. of
Independent Insurers*

That's because there currently is no scientific data that can show safe or unsafe levels of mold or that can establish whether medical conditions are caused by mold, sources note. "There is no one in the scientific community who can say honestly that this person's exposure to mold caused this symptom," said Mr. Goldberg.

Allen Gilley, vp with Marsh Inc.'s risk consulting practice in Atlanta, agreed that lack of scientific data makes it difficult to set standards. "A lot of what we see is allergic response, so any exposure is too much."

Until questions such as those pertaining to safe levels of exposure are answered, juries are going to be making those decisions, Mr. Goldberg said. "Depending on the jurisdiction you are in, that could be a real problem for insurance companies."

The lack of standards produces uncertainty not only about medical issues but remediation as well. The dilemma of "how much is too much" becomes a problem of "how clean is clean enough" with remediation, experts point out.

"We pretty much self-regulate ourselves," said John Tancredi, corporate director of health and safety at LVI Services Inc., a remediation firm in New York. "There are really no regulatory guidelines out there," he added, so LVI relies on those suggested by the New York City Department of Health. "Those are pretty much what everyone looks to."

Mr. Tancredi said he believes that "there will be some standards down the road," as states continue to tackle the problem. And, he said he hopes the final product will contain some minimum training standards or certification requirements for workers who clean up mold—an issue that the New York City Health Department's guidelines do not address.

Experts say that, with no standards in place, property owners should take the straightforward view that if mold is present, they should clean it up and repair the water source that created it.

"It's important to deal with wa-

ter-damage claims in a whole different way," because of the potential for property damage and bodily injury that could result from mold, advised Kevin Shane, senior vp and environmental practice leader with Marsh's risk consulting practice in Los Angeles. "There really is a lot of money at risk" for property owners, property managers, insurers and others who could be involved in a mold-related claim, he noted.

Richard Janisch, vp and senior consultant with the Marsh practice in Los Angeles, agreed that there needs to be a change in how water damage is addressed. In addition to cleaning up and preventing further water damage, performing air-sampling tests can determine the levels of mold present, he suggested. "It's not just cleaning up the water anymore; some air sampling needs to take place."

But others say that, in the absence of damage or illness that could be attributed to mold, air sampling is not a good idea.

Mr. Gilley said "the only time we recommend air sampling is when you suspect mold contamination but can't find it. Sometimes air sampling can have some utility there," he explained, and can be useful if someone has been diagnosed with an illness that could be mold-related.

Dave Dybdahl, founder of the Environmental Risk Resources Assn., a group that promotes the use of environmental insurance products as risk management tools, said air sampling could come back to haunt property owners if they establish mold levels that are above standards that could someday be in place. "So you are better off not generating the data," he said.

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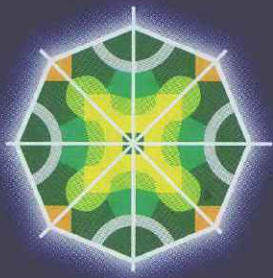
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HLF to go public before end of year

SARAH VEYSEY

LONDON—HLF Insurance Holdings Ltd. is planning to become a publicly traded company, the brokerage announced last week in reporting its financial results for the year ended March 31, 2002.

London-based HLF hopes to raise between £250 million and £300 million (\$365 million and \$438 million) through an issue of ordinary shares on the London Stock

Exchange, a spokesman said. He said the proceeds from the offering, which HLF plans to complete before the end of the summer, would be

used primarily to pay down the brokerage's debt.

"We have established a strong platform which I believe will generate significant growth for the future. I believe this growth will be accelerated by a stock exchange listing," David Margrett, chief executive of HLF, said in a statement.

HLF was formed by the 1999 merger of London brokerages Lambert Fenchurch and Heath Group. Heath had been publicly traded on

the London Stock Exchange until 1997, when it delisted following a management buyout. Lambert Fenchurch delisted following the merger with Heath.

A long-term reorganization of the group is now largely complete, HLF said in the statement. During the last fiscal year, HLF split its U.K. operations into three divisions: marine/aviation; business solutions, which is HLF's large-client operation; and business services, which handles the brokerage's high-volume business.

Rate increases helped fuel growth in HLF's revenues in fiscal 2001, the company said. For the year ended March 31, HLF's brokerage revenues increased 12% to £278.9 million (\$399.4 million).

Investment income, however, dropped 41% to £9.6 million (\$13.7 million), HLF reported, which resulted in total gross revenues of £288.5 million (\$413.1 million), up 5% over the previous year.

Mark Hewlett, managing director at Moody's Investors Service Ltd. in London, said the planned listing would likely have little impact on policyholders or underwriters, as their interest in brokers is more relationship-oriented than based on share price.

But, he added, the change to public ownership would likely make HLF both more transparent and better capitalized.



Mr. Margrett

Ex-public worker wins pension case

By SARAH VEYSEY

LONDON—A ruling by the European Court of Justice last week could force private employers to pay out millions of pounds in extra pension benefits to former public-sector employees.

In the case, *Beckmann vs. Dynamco Whicheloe MacFarlane Ltd.*, the European Court ruled that Katia Beckmann, a former employee of the National Health Service who was transferred to Dynamco when her NHS unit was privatized, was entitled to enhanced pension benefits under the NHS occupational pension plan in effect when she was laid off by Dynamco.

Ms. Beckmann was transferred to Dynamco in 1995 and laid off two years later, when she was over 50.

She claimed that, under U.K. regulations on the transfer of employee benefits, she was entitled to the immediate payment of enhanced benefits that would have been owed to her under the NHS pension plan.

The disputed benefits are paid to workers laid off over the age of 50. Such benefits are common in many public-sector pension plans in recognition of the difficulty workers over the age of 50

have in finding similar employment.

Dynamco argued that the U.K. regulations on pension plan transfer, the Transfer of Undertakings (Protection of Employment) Regulations 1981, excluded so-called "old-age" benefits. The regulations incorporate a European Union directive on the transfer of undertakings. The company claimed that the benefits Ms. Beckmann sought fell under the definition of an old-age benefit.

An Employment Tribunal ruled in favor of Dynamco, but last year the U.K. High Court referred the case to the European Court.

The European Court ruled that the benefits Ms. Beckmann sought were not old-age benefits as defined by the TUPE regulations, and that the obligation to pay them was transferred to Dynamco when Ms. Beckmann joined the company. The value of the benefits Ms. Beckmann will receive was not disclosed.

UNISON, the labor union that backed Ms. Beckmann's case, said that private employers that have withheld benefits from employers transferred from the public sector might now have to pay out millions of pounds.

World Updates

Tokio Marine in pact in China, South Korea

Tokio Marine & Fire Insurance Co. is partnering with insurers in China and South Korea to develop and market insurance products. Details are still being worked out by Tokyo-based Tokio Marine & Fire, People's Insurance Co. of China and Samsung Fire & Marine Co. of South Korea. But, under a recently signed agreement, Tokio Marine & Fire will work with PICC and Samsung to develop and market new products in their countries. Tokio Marine holds an insurance license in Shanghai but is barred from writing coverage in other areas of China. In Korea, it has only a representative office.

ACE to set up Bermuda insurer

ACE Bermuda Insurance Ltd. and Bermuda-based brokerage Freisenbruch-Meyer Group are forming a commercial and personal lines insurer in Bermuda, Freisenbruch-Meyer Insurance Ltd. The new insurer will offer up to about \$10 million in property coverage. Liability limits generally will be \$1 million to \$2 million for retailers, office buildings and other commercial risks. ACE Bermuda will hold a 40% stake in the new company and will buy a similar stake in managing agency Freisenbruch-Meyer Insurance Services Ltd., which will provide underwriting and claims administration services to the new insurer. ACE Bermuda will also be the new insurer's principal reinsurer.

AXA selling Australian unit

AXA Asia Pacific Holdings is selling its AXA Health Insurance unit to Macquarie Bank Ltd. for \$595 million Australian (\$338.0 million). Under terms of the deal, Sydney-based Macquarie will pay \$56 million Australian (\$31.8 million) upon completion—regulators are expected to approve the deal by August—and pay the balance six months later. Macquarie will sell the unit to investors including U.K. health insurer British United Provident Assn. AXA Asia Pacific said the deal will enable it to concentrate on asset management business in Australia.

Briefly noted

PartnerRe Ltd. has opened an office in Santiago, Chile, to manage the reinsurer's business in South America....Mutual transportation insurer the Through Transport Mutual Insurance Assn. has been downgraded to B+ from A- by rating agency A.M. Best Co. In a statement, Best cited the London-based TT Club's recently announced \$23 million reserve strengthening.

Russian firm's expansion bid blocked

By GERARD O'DWYER

HELSINKI, Finland—Russian banking and insurance company International Bank of St. Petersburg has suffered a setback in its plans use Finland as a gateway into the larger European Union market.

Finland's central bank recently rejected an application by IBP to open a branch operation in Helsinki. The Bank of Finland rejected IBP's application after it met with Finnish government officials.

IBP had planned to develop a European regional headquarters in Helsinki from which to expand its business across the European Union's 15 member states, according to the company.

The Bank of Finland says that it conferred with the European Commission prior to denying the IBP's request. European Commission officials have previously indicated that Russian financial services companies will not be allowed to establish in any E.U. country until the Russian regulatory structure is reformed and made more transparent.

The Finnish ruling has dealt a blow to Russia's leading financial services companies, many of which are hoping to enter the potentially lucrative E.U. marketplace.

To date, Russian companies have

usually been allowed only to establish representative offices, which can perform liaison work but cannot offer banking or insurance services.

Similarly, non-E.U. countries such as Switzerland, Norway and Iceland also bar Russian financial services providers from opening branch operations in their markets. The states are principal members of the European Free Trade Assn., a

'A branch office in Helsinki...would represent a de facto green light for Russian financial services companies to do business with the entire E.U. and EFTA area.'

Katri Nuotio
Finland Ministry of Finance

non-E.U. trading bloc.

"A branch office in Helsinki established through a Finnish-incorporated subsidiary company would represent a de facto green light for Russian financial services companies to do business with the entire E.U. and EFTA area. Obtaining a branch operating license in Finland

would be the same as giving them 15 different licenses," said Katri Nuotio, a senior regulator with Finland's Ministry of Finance.

According to Ms. Nuotio, the principal flaws in IBP's application relate to the differences in Russian and E.U. accounting and auditing standards. The E.U. market uses recognized national accounting standards, as well as the International Accounting Standards system.

With Russia's lack of accounting transparency and its reputation as a money-laundering locale, Ms. Nuotio said, the Bank of Finland's decision was the "only option available."

"These are important questions of supervisory difficulties because of differences in accounting standards. The Russian accounting system uses a different method for calculating company solidity. There is also the matter of transparency. It is not always evident from the documentation available from Russian finance houses just who the shareholders are," Ms. Nuotio said.

IBP is Russia's 10th-largest private banking and insurance company. The company is headquartered in St. Petersburg, with a growing segment of its nonlife insurance business operating out of Moscow. The nonlife division offers commercial

property and liability insurance, travel and auto insurance.

"This scenario is as new to us as it is to the Finnish regulators," said Mauri Raveala, the IBP's representative in Finland.

"The reality is that European countries must get used to the idea that bank and insurance houses from Russia will want to develop a presence in Europe in future years," he said.

According to Mr. Raveala, IBP is seeking to expand into Finland in response to the needs of its corporate clients, which include large companies in E.U. countries.

IBP is not the only Russian financial services provider facing difficulties establishing in Finland.

IngoNord, the Helsinki-based subsidiary of the Russian insurance company Ingosstrakh, is also facing delays in its bid to get branch status for its Helsinki representative office.

In a strategy similar to that pursued by IBP, Moscow-based Ingosstrakh seeks to use Finland as a platform for the expansion of its nonlife and reinsurance business into the European Union.

"Helsinki...would provide a very important gateway to European insurance markets," said IngoNord Managing Director Gennady Baskov.

Asbestos: Reserves questioned

Continued from page 1

partial application of existing reserves, the net cost to St. Paul will be only a \$380 million charge against earnings.

He added that its remaining asbestos reserves would be adequate to handle all remaining asbestos claims against the insurer. St. Paul reported \$1.6 billion in asbestos and environmental reserves, of which \$478 million was for asbestos liabilities, as of year-end 2001. As of March 31, its A&E reserves stood at \$852 million, though St. Paul would not disclose a breakout of asbestos reserves.

Other insurers are in a similar position, industry analysts say.

Mr. Wilt said that most insurers would have to double their existing reserves to be adequately funded for asbestos liabilities.

Reserves vary

According to preliminary estimates by Best, insurers increased reserves by about \$2 billion last year, even though total incurred losses related to asbestos amounted to \$4 billion in 2001. Best's final report on the industry's A&E liabilities will be published this summer.

Most insurers do not prefund losses they know they will have to pay, one industry analyst who asked not to be identified said. That is because strengthening reserves can tie up capital, reduce earnings and lead to rating downgrades.

"The art and science of reserve setting allows for a lot of judgment to creep into decision-making," said Ken LeStrange, president, chief executive officer and chairman of Endurance Specialty Insurance Ltd. Because it is a startup property/casualty insurer and reinsurer, Bermuda-based Endurance has no asbestos liabilities on its books.

"It's one thing if you're a Gen Re and you put up \$2 billion and it really should have been \$2.5 billion. It's another thing if you're XYZ Insurance Co. with \$1 billion of capital and you put up \$100 million and maybe it should have been \$600 million or \$700 million," he said.

Some insurers are using funding ratios, or survival ratios, to project how long their asbestos reserves will last, said Mr. Wilt. But historical asbestos payouts are no guarantee of future liabilities, he noted.

"I think that people still have a lot of hole-filling to do in terms of

their balance sheets," Mr. LeStrange said. "And I think that will tend to suppress earnings as they are reported by companies, particularly public companies, going forward."

"There are companies out there that I believe are (technically) insolvent right now," based on how much asbestos liability they truly face, Mr. LeStrange said.

"It's a balancing act," described Dave Golden, director of commercial lines at the National Assn. of Independent Insurers in Des Plaines, Ill. "You want the right amount in reserves to pay claims, but everything you put in limits growth, and overreserving is detrimental to perceived strength."

While a few property/casualty insurers significantly increased their gross asbestos reserves in 2001, most made only modest additions, SEC filings reviewed by *Business Insurance* show. As environmental claims decline, some insurers are shifting funds for those claims into asbestos reserves. In many cases, insurers also reinsure substantial portions of their asbestos liabilities.

For example, CNA Financial Corp. nearly doubled its 2000 gross asbestos reserves of \$603 million to \$1.2 billion at the end of 2001; White Mountains Insurance Group raised asbestos reserves to approximately \$1.2 billion from just \$51 million, mainly due to its acquisition of the North American property/casualty business of CGNU Group P.L.C.; and Berkshire Hathaway Inc. upped its ante last year by nearly \$1.9 billion to \$6.3 billion, of which \$5 billion is attributable to retrospective reinsurance contracts it wrote for other insurers.

By contrast, American International Group Inc. added just \$14 million to its gross asbestos reserves, bringing its 2001 year-end total to \$1.1 billion; Trenwick Group raised its reserves \$19.2 million to \$118.7 million; and Highlands Insurance Group Inc. raised its asbestos reserves \$19 million to \$96.9 million at the end of last year.

Why are some insurers making huge additions and others making small ones?

It might seem that the insurers making the biggest reserve additions are being more realistic than others, or it may just be that "the companies boosting reserves might be doing it because they have to," suggested Mr. Wilt.

In setting reserves, "the first thing that you look at is what the

experience has been. However, with this kind of growth, you would have to moderate that judgmentally," said Ann W. Spragens, senior vp for public policy development and general counsel to the Alliance of American Insurers in Downers Grove, Ill.

New wave of claims

"We're dealing with an effort to provide a rational response to a completely irrational litigation system," Ms. Spragens said.

"When you're talking about claims against the local hardware store and the recent case in which six symptomless plaintiffs got \$25 million apiece," it's apparent that the system is out of control, said the NAII's Mr. Golden. He was referring to an October 2001 asbestos case in Lexington, Miss.

Mr. LeStrange agreed. "Asbestos has become a much bigger problem than anyone believed it would 10 years ago, when we were all watching paid claims and number of claims reported starting to tail off."

"What we've seen over the last five or six years is a whole new wave of claimants, largely driven by the actions of plaintiffs attorneys," he said. "Now what you see are companies that picked up, in some cases, small operations that had tangential involvement in that industry also being threatened."

There is "horror" in the way asbestos has morphed into a whole new wave of plaintiffs against a whole new wave of defendants," said Ms. Spragens. "It's horrific when you see suits brought against companies that didn't manufacture asbestos brought by plaintiffs who aren't sick."

While in 1982, only 4% of asbestos claimants showed no manifest injuries, by 1993, about half of the claimants showed little or no physical impairment, and by 2000, two-thirds of the claims provided no evidence of impairment, she said, citing a 2001 study by the Santa Monica, Calif.-based Rand Corp.'s Institute for Civil Justice.

"This is a significant development and a change from where things were the first time asbestos ripped through the insurance industry," Ms. Spragens said.

And Rand's original estimate in the mid-1990s that a total of 600,000 asbestos-related personal injury suits would be filed is now anywhere from 1.1 million to 2.4

GROSS ASBESTOS RESERVES INCREASE			
U.S. Insurers ranked by increase in their asbestos reserves, in millions of dollars			
Insurer	2001	2000	Increase
Berkshire Hathaway	\$6,300.0 ¹	\$4,444.0	\$1,856.0
White Mountains	1,246.9 ²	51.0	1,195.9
CNA	1,204.0	603.0	601.0
The Hartford	1,633.0	1,506.0	127.0
St. Paul	478.0	397.0	81.0
Allstate	929.0	871.0	58.0
ACE INA	1,119.0	1,073.0	46.0
Travelers	1,046.0	1,005.0	41.0
SAFECO	340.7	315.5	25.2
Trenwick	118.7	99.5	19.2
Highlands	96.9	77.8	19.0
Ohio Casualty	31.8	13.5	18.3
AIG	1,114.0	1,100.0	14.0

1 Reserves for asbestos and environmental liabilities, including \$5.0 billion in assumed reinsurance contracts. 2 Reflects acquisition of CGNU property/casualty operations.
Source: A.M. Best Co., company filings

million, she added.

At the same time that asbestos suits are proliferating, the universe of potential defendants is expanding due to the bankruptcy of earlier defendants and the application of joint and several liability, she said.

"If somebody transported (asbestos), it's grotesquely irrational to hold them liable simply because they're still solvent," she said. "This cries out for the elimination of joint and several liability."

Indeed, the Asbestos Alliance, a group formed by the National Assn. of Manufacturers of which the Alliance of American Insurers is a member, is lobbying Washington to do just that.

But industry experts doubt that any such tort reform legislation will be passed in the current Congress, so the effort has shifted toward limiting asbestos lawsuits to plaintiffs who can prove they are sick, said Gary Karr, director of federal media relations at the American Insurance Assn. in Washington.

Moody's Mr. Wilt warns that insurers hoping for legislative relief could be in for a rude awakening. "Despite the fact that the number of claim filings is increasing dramatically and that courts are increasingly interpreting the law in favor of plaintiffs, there is undoubtedly an element of hopefulness" among insurers, he said. "The biggest concern is those that don't recognize that any inventory of asbestos claims potentially has one that will blow up."

In response to queries by *Business Insurance* about reserve adequacy, most insurers' sentiments echoed that of The Hartford Financial Services Group Inc.: "We believe that we're well-positioned in our reserves. The plaintiffs bar is very cre-

ative so we're constantly reviewing our reserves. But we certainly feel that at any one time that we're comfortable. We can't speak for the industry but, in general, most CEOs we've spoken to feel the same way," a spokeswoman for the insurer said.

She noted that The Hartford, like many other insurers, also could draw on reinsurance to pay its asbestos liabilities.

Nevertheless, rating agencies and investors are expressing doubts about insurers' ability to absorb mounting asbestos losses. Loss development from asbestos claims already is affecting not only insurer ratings, as evidenced by St. Paul's downgrade, but also share prices.

St. Paul's shares were trading at \$40.98 per share Friday, down nearly 4% from a week earlier, before its announcement last Monday.

Shares of several other large insurers fell sharply last week on the St. Paul news because of fears of other large settlements in the near future, said Michael Smith, an insurance industry analyst at Bear, Stearns & Co. Inc. in New York.

Reserves have to be boosted, he insisted. And because of the Enron Corp. debacle, it is essential that the industry be upfront about insurers' financial situations, he added.

"The posture that Best is going to take in the current environment is that it's better to err on the side of conservatism," Mr. Smith said.

Blues: Copays tied to costs

Continued from page 3

and three, said Mr. Brown.

"We normalize every hospital's experience" so that hospitals that treat more serious cases are not penalized, he said. "It's a very fair methodology. It's also very objective," said Mr. Brown. "Everyone knows what DRGs are and it's a methodology that's recognized and accepted by the hospital industry."

Driving the insurer to adopt this approach are two key trends: rising health care costs and consumers' greater activism, said Mr. Brown. These

two trends came together here because employers, who pay the bills, "are saying employees will have to accept more financial responsibility" in light of the rising costs while consumers, who are now better informed, "are more inclined to seek out more information" as a result, said Mr. Brown.

The icon system will permit members to see whether their hospital copayments, which are normally 20%, have a "higher or lesser value," said a BCC spokesman.

Mr. Brown said BCC had initially suggested

introducing a tiered health plan approach to members of its hospital relations committee. Their reaction was negative, though, "and so we went back and reconsidered our strategy" and decided "at least as a first step" to simply provide consumers with more information about the costs at individual hospitals, he said.

Mr. Brown said the icon program "is a difficult thing to do and I think it certainly may be misinterpreted or misunderstood by people as we roll this out."

"I think like anything else we do we will gain experience from this over time" and improve it, "but I think we have to start somewhere and I think we have an obligation to provide consumers with cost information," he said.

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RIMS: Buyers seek options

Continued from page 1

industry concerns that the subcommittee plans to hold this summer.

The Liability Risk Retention Act "does not permit risk retention groups to underwrite property insurance. This limitation reduces the number of insurers that could underwrite property insurance at a time when market restrictions from terrorist threats, combined with a hard market, have driven prices up and reduced availability," said Mr. Phillipus, who is also manager-risk management for Pennzoil-Quaker State Co. in Houston.

"RIMS urges Congress to expand the LRRRA to permit risk retention groups and risk purchasing groups to write all coverages except personal lines and direct statutory workers compensation coverage," he said. Mr. Phillipus also discussed the role of captive insurers, surplus lines and self-insurance in providing choices for buyers of commercial insurance.

Turning to the question of optional federal insurance chartering, Mr. Phillipus called the current state-based regulatory system "inef-

ficient." He said that a "single regulator to establish risk-based capital and surplus requirements, as well as requirements for public disclosure of rates and forms, would reduce costs and restrictions for U.S. purchasers and act as an incentive for increased participation by foreign companies."



'Market restrictions from terrorist threats, combined with a hard market, have driven prices up and reduced availability.'

Michael Phillipus

Mr. Phillipus said RIMS acknowledges that enacting legislation to allow optional federal chartering would take time, "but we believe that the time for this idea to become reality is now."

Support for optional federal chartering as a means to improve market operations was the minority

view among witnesses before the subcommittee, though. In fact, of the six witnesses, only one other individual—Steve Bartlett, a former congressman who now serves as the president of the Washington-based Financial Services Roundtable—endorsed the idea. Mr. Bartlett said there is "zero debate" among large

integrated financial services companies over the idea that an optional federal charter would serve consumers' interests better than the current state system.

The others admitted that the state-based regulatory system needs improvement but urged the panel to allow states more time to implement reforms.

"Before Congress intercedes, state legislative action must be the focus of modernization efforts," said Wayne F. White, the president and chairman of Conway, Ark.-based Home Mutual Fire Insurance Co., as

he testified on behalf of the Indianapolis-based National Assn. of Mutual Insurance Cos.

Vermont state Rep. Mark Young, R-Orwell, speaking on behalf of the Albany, N.Y.-based National Conference of Insurance Legislators, expressed concern that a federal guaranty fund for federally chartered insurers would reduce funds available to the state-based guaranty fund system to less than \$3 billion, down from the current \$4.8 billion. The state system, Rep. Young said, "is in no way broken. Congress, I respectfully submit, does not need to fix it, replace it or establish anything parallel to it."

Steve Harter, owner of Select Risk Management, an insurance agency in Ava, Mo., and the president of the Alexandria, Va.-based National Assn. of Professional Insurance Agents, called for the reform of state countersignature laws but reiterated his association's opposition to optional federal chartering.

The other witness, Ann Spragens, senior vp and general counsel of the Downers Grove, Ill.-based Alliance of American Insurers, also defended state regulation as the best way to serve public policy. Ms. Spragens hailed the National Assn. of Insurance Commissioners for its efforts

to improve the system.

During a question-and-answer period, the subcommittee's chairman—Rep. Richard Baker, R-La.—asked Ms. Spragens how much time Congress should give the states to implement reforms before stepping in and doing so itself. Ms. Spragens replied that "perhaps a clock isn't the way" to measure progress. After he asked the same question of other witnesses, Rep. Baker commented that "there ought to be some point where the whistle's blown" and Congress steps in.

Rep. Ken Bentsen, D-Texas, noted that, during the debate over the Gramm-Leach-Bliley Financial Services Modernization Act in the late 1990s, the U.S. comptroller of the currency acted as an effective advocate for allowing banks the power to sell insurance. "There's something to be said for a single-headed dog rather than a 55-headed dog who's doing your bidding," he said.

"The pressure's going to become increasingly greater for some sort of dual system," Rep. Bentsen predicted.

The subcommittee has scheduled additional hearings for June 11 and June 18. Rep. Baker indicated that more hearings would take place throughout the summer.

Y2K: Court rejects remediation claims

Continued from page 1

function and cause other losses (BI, Jan. 15, 2001).

Insurers have vigorously denied Y2K remediation claims, and though the Washington appeals court did not specifically address the question of whether the sue-and-labor clause applies to Y2K remediation, the ruling is a significant defeat for policyholders, attorneys say.

About a dozen Y2K remediation cases are still being litigated today, and some of those might be withdrawn as a result of the decision, attorneys said. In addition, policyholders are less likely to file future

Y2K claims, they note.

"I think it's the nail in the coffin, and I don't think we'll see any more litigation on this issue," said Walter J. Andrew, a partner at Shaw Pittman in Washington who has represented insurers in Y2K coverage disputes.

The state of Washington has traditionally been seen as a pro-policyholder legal venue, and policyholders in other venues will likely be unwilling to pursue costly litigation in light of the decision, he said.

"People will see this and say, 'We are wasting our money,'" Mr. Andrew said.

The ruling in a state that is gener-

ally more sympathetic to policyholders than to insurers might discourage other policyholders from filing claims, acknowledged Laurence J. Eisenstein, a partner at Swidler Berlin Shereff Friedman, a policyholder law firm in Washington.

"But I fully anticipate that we will see other decisions in the future," he said.

Although the decision did involve some issues that were specific to the Port of Seattle's claim, parts of the ruling could also apply to other Y2K remediation cases, Mr. Eisenstein said.

In *Port of Seattle vs. Lexington Insurance Co. et al.*, the Port sought

coverage for Y2K remediation costs under policies that were issued for 1997 and 1998, the years in which it incurred much of the costs it spent on modifying its computer system to ensure it would continue to function normally after the date change at midnight on Dec. 31, 1999. The Port, like many organizations, used computer systems that did not have the capacity to read four-digit years. Prior to the date change, it was widely feared that malfunctions and widespread damage could result if the computer systems were not upgraded to read four-digit years.

The Port sought coverage under the sue-and-labor provision in its property policy. In addition, it argued that the Y2K problem was a computer virus and was, therefore, covered under the data-processing portion of its policy.

The court ruled, however, that the sue-and-labor clause applies only to losses for which the insurer would be liable.

"The insurers did not have a duty to reimburse the Port for expenses spent to prevent a loss for which the insurers would not be liable. Because the Port sought to prevent losses that would occur on or after Jan. 1, 2000, after the policies expired, there was no covered loss," the ruling states.

The court also ruled that the Y2K problem was not a computer virus.

"We hold that the Port's Y2K problem was not a computer virus because it was not able to replicate itself and it could not infect other programs by modifying them to include a version of itself," the ruling states.



The Court of Appeals for the State of Washington ruled that the Port of Seattle cannot obtain coverage for its Y2K remediation costs.

Furthermore, the court held, the Y2K problem was an "internal" problem in the computer systems and not an external one, so it is excluded under the "inherent vice" exclusion in the Port's policy.

"The Port's Y2K problem is an excluded inherent vice because the date field is an internal quality that brought about its own problem," the ruling states.

The ruling that the Y2K bug was not a computer virus is unlikely to affect many of the other Y2K remediation costs cases currently being litigated, said Mr. Eisenstein, the policyholder attorney.

However, if other courts follow the rulings on the sue-and-labor clause and the inherent vice exclusion, the ruling could shape the outcome of other cases, he said. He noted, though, that state appeals court rulings generally are not as influential as federal court rulings, as individual states often differ on insurance coverage issues.

Port of Seattle vs. Lexington Insurance Co. et al., Court of Appeals of the State

Ruling: Elaborates on ADA rule

Continued from page 3

was the equivalent of insisting on using a blue pen instead of a black one, Mr. Pasek said. "Employers should not stand behind formal rules and requirements just because they are neutral. If such rules or requirements are not important to the employer's business interests, then the emphasis should be on attempting to accommodate," he said.

Brian Ashe, an attorney with Seyfarth Shaw in San Francisco, said the decision demonstrates that "it's monstrously stupid not to engage in the interactive process with employees, because you need to be able to show that you considered reasonable accommodations and ruled them out, for whatever particular reasons."

"Employers are always between a rock a hard place. This (decision) just reinforces that," said Steven K.

Ludwig, an attorney with Fox, Rothschild, O'Brien & Frankel in Philadelphia.

Gerald L. Maatman Jr., a senior partner and chairman of the global labor, employment and employee benefits practice group at Baker & McKenzie in Chicago, said the decision goes beyond *Barnett*, which just focused on seniority, and applies its analysis to the procedural process involved.

This decision means employers in other jurisdictions are going to have to convince those courts the 3rd Circuit was wrong, so in a sense the decision has "created an uphill battle" for them, said Mr. Maatman. An employer that does decide to refuse to accommodate a disabled employee must make sure that decision can pass the litigation test, because it is "really going to be under a microscope," he said.

The decision will be influential,

said Robert Stewart, an attorney with Philadelphia-based Dillworth Paxson. Other courts will conclude it is not an undue burden for employers to go through the interactive process itself, even if the ultimate conclusion is that accommodation would be too expensive or complicated, he said.

Steven Wall, an attorney with Morgan, Lewis & Bockius in Philadelphia, said, though, "I think that many courts who had prior to *Barnett* clearly held that disability-neutral rules which are consistently applied do not need to be violated in favor a accommodation...will follow that rule" despite the *Shapiro* decision.

Howard Shapiro vs. Township of Lakewood; Frank Edwards; Gar Woodfield; and John Does 1 to 5, 3rd U.S. Circuit Court of Appeals; No. 01-3212.

FTR

This roundup of news from the previous week is generated by *BI's* Daily News reporting. For breaking news as it occurs, log on to www.businessinsurance.com or sign up online for free *BI* Daily News by e-mail.



WTC cover dispute sent to trial

The \$7.1 billion dispute over the whether the destruction of the World Trade Center is one insured loss or two should go to trial, a federal court judge ruled last week. Rejecting WTC leaseholder Silverstein Properties Inc.'s motion for a summary judgment that the attacks constituted two "occurrences," U.S. District Court Judge John S. Martin ruled that there was insufficient clear legal precedent on the general meaning of "occurrence" in insurance policies. WTC insurers argue that the attacks constitute one occurrence and that only one \$3.55 billion limit should be paid. The trial is set to start in November.

High court to hear punitive case

The Supreme Court will revisit the question of how courts levy punitive damages when it hears a case next term that involves an insurer's claim practices. *State Farm Mutual Insurance Co. vs. Curtis Campbell et ux.*, which stems from a 1981 auto accident, revolves around whether the Utah Supreme Court acted

correctly in reinstating a \$145 million punitive damage award against Bloomington, Ill.-based State Farm last October. The Utah high court held that State Farm for years "repeatedly and deliberately deceived its customers" by, among other things, rewarding adjusters for paying less than fair value for claims.

Drug cost hikes ease slightly

Drug costs increased by 19.3%, on average, for the first three months of



2002, compared with an average increase of 19.8% for the same time period in 2001, according to a report released by Express Scripts Inc., a prescription benefit manager

located in St. Louis. The company also forecasts overall drug prices for 2002 rising by 15.9%, lower than last year's 16.9% average growth rate.

Wholesale broker broadens reach

Wholesale insurance distributor Americana Financial Services Inc. has acquired MTS Insurance Services L.L.C., New Century Global Inc. and Specialty Programs & Facilities Managers Inc. for an undisclosed amount. To reflect the merger, Charlotte, N.C.-based Americana Financial Services also changed its name to American Wholesale

Insurance Group Inc. The deals give American Wholesale more than 300 employees and 16 locations nationwide and total premium of about \$700 million, said M. Steven DeCarlo, American Wholesale's president and chief executive officer.

HMOs pushing higher rates

Health maintenance organizations are seeking to charge employers, on average, 22% more than this year's rates for 2003 renewals, according to a Hewitt Associates L.L.C. analysis of current renewal negotiations. Through May 31, rates grew at levels far above the 15.3% average increases that employers experienced for 2002 renewals. The 22% average figure is expected to drop when employers finish negotiating their final plan prices and make changes to plan coverage, noted a spokeswoman for Lincolnshire, Ill.-based Hewitt.

Premium hikes average 30% in May renewals



Commercial insurance premiums increased by an average 30% for annual policies renewed in May, according to a survey of business placed through MarketScout Inc.'s Internet portal. "Premiums for residential contractors, apartments, manufacturing/distribution and health care facilities are increasing more rapidly than other industry segments," said Richard Kerr, the chairman and chief executive officer of Dallas-based MarketScout, an Internet portal that allows agents to receive quotes from insurers. Mr.

Kerr also pointed out that "standard products liability and umbrella coverages are leveling off at about a 20% rate increase."

Comp benefits denied for psychiatric injury

A psychiatric injury caused by workplace gossip about an employee's extramarital affair with a co-worker does not arise out of employment, an appeals court recently ruled. The court overturned a Workers' Compensation Appeals Board finding that an employee was eligible for benefits because her co-workers originated the gossip. Carrie Gerdes, a school bus driver, sought workers comp benefits for a psychiatric injury during 1999 as a result of gossip about her affair, court records show. The appeals board ruled the injury arose out of the course of employment because her co-workers were the source of the workplace gossip. But the appeals court overruled the board.

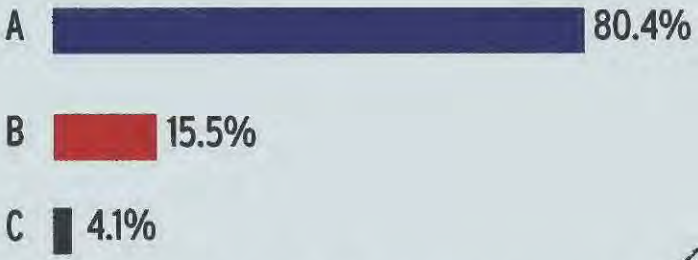
Briefly noted

Arizona Gov. Jane Hull is expected to sign legislation, H.B. 2712, given final

approval last month, that amends Arizona law to conform with federal legislation passed last year that allows employees 50 and older to make catch-up contributions to their 401(k) plans....The Financial Services Coordinating Council, a Washington-based group of insurance and financial services trade groups, including the American Insurance Assn., has released its principles for optional federal chartering of insurance. Among other things, the principles call for the creation of a federal insurance regulatory authority within the Treasury Department to oversee federally chartered insurers. The principles were made public one day before the House Financial Services Subcommittee on Capital Markets held the first in a series of hearings concerning insurance regulation....The Occupational Safety and Health Administration is extending to June 30 from May 31 the comment period on a rule that establishes whistleblower complaint procedures. The interim final rule would protect airline employees who provide information to OSHA in regard to safety violations from retaliation by air carriers and their affiliates.

Online Poll [6/3 - 6/7]

In the current hard market, what is the minimum rating you will accept for property/casualty insurers of your organization?



Take part in our weekly poll at www.businessinsurance.com.

BI Stock Index [6/3- 6/7]

Up-to-the-minute data for all 87 companies that comprise the BI Stock Index can be found at www.businessinsurance.com.

Percentage change of BI Stock Index vs. key indicators



Largest gains		Largest losses	
Fremont General Corp.	7.88%	SCPIE Holdings Inc.	-16.78%
Penn-America Group	5.26%	Meadowbrook Ins. Group	-15.58%
Wellpoint Health Network	5.26%	ESG Re Ltd.	-15.00%
Navigators Group	4.25%	Brown & Brown	-7.94%
United Health Group	3.95%	Argonaut Group	-7.57%

Weekly change by market segment

Brokers	-3.42%
Insurers/Reinsurers	-2.33%
Managed Care Organizations	0.12%

Source: CNET Investor (investor.cnet.com)

Blades: Woman of the year

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New York-based APIW. The association looks for an honoree "whose career embodies growth, success, mentoring and camaraderie among her own company" and in the larger industry, she said. "Judy is really a standout."

"She's had a long career with The Hartford and worked her way up the ranks, which is something we want our members to see and know—that it's possible to achieve success," said Ms. Kalaydjian, who is vp-claims for QBE Reinsurance Corp. in New York.

Ms. Blades joined The Hartford in 1972 as a commercial account representative in the insurer's Orlando, Fla., regional office. In 1974, she became an underwriter for that region and rose to supervising underwriter, then assistant property manager. In 1982, Ms. Blades moved to Memphis, Tenn., as property underwriter

ing manager and the next year became director of Western division operations in the insurer's Hartford headquarters.

In 1988 she was appointed director of operations review, and in 1990 she became assistant vp and director of Select Customer, the insurer's small-business insurance unit. In 1994, she was named vp-policy support for the commercial market segment, was promoted to vp and director of commercial business insurance in 1996 and was named to head business insurance in 1998. She was appointed to her current position in January.

"I think of her as one of our strongest and smartest leaders," said Ramani Ayer, chairman and chief executive officer of The Hartford, who submitted Ms. Blades' application for the APIW honor and introduced her at last week's reception. "If she were stacked up against her

peers in the business, I believe very strongly that her leadership skills would stand out," he said.

"Where I think she's exceptional is her capacity to create a vision, drive it and execute it through a really strong team-oriented culture," Mr. Ayer said. "Everybody who works for her is delighted to work for her. They would probably go to the end of the earth for her to make sure she is proud of what they have accomplished. It's a dynamic, energizing and excited team."

Ms. Blades said she considers the work she has done to bring talented people to The Hartford to be her biggest accomplishment.

"I'm most proud of the people that I've attracted to the company and the company has retained," she said. "Whenever I do leave the company in terms of retirement, I will leave behind a legacy of people who are better than I am."

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