

SEXUAL HARRASSMENT: Murder case highlights need for urgent action - PAGE 4

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SPECIAL
REPORT

WORKERS
COMP
REFORM

PAGE 19

NEWS

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Fake news, public mistrust
put pressure on news outlets

PAGE 14

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INSIDE



SPECIAL REPORT: WORKERS COMP REFORM

Finding alternatives to prescribing opioids; medical marijuana quandary; workers comp reform spotlight on Florida; a spate of reform bills hits statehouses nationwide; largest workers compensation insurers. **PAGE 19**

NEWS ANALYSIS

FOR BREAKING NEWS
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RISK MANAGEMENT

Harassment in the workplace, sometimes leading to tragic consequences, deserves to be taken seriously. **PAGE 4**

WORKERS COMP

Employers are taking a fresh look at integrating their workers comp, disability and benefit programs. **PAGE 8**

INTERNATIONAL

The Swedish insurance market is well-developed and mature, with extensive use of captives. **PAGE 11**



PERSPECTIVES

Carly Rowland and Richard Frese of Milliman Inc. advise on how to project self-insured comp losses. **PAGE 24**

VIEW FROM
THE TOP



ART LYNCH

The chief executive of Bethesda, Maryland-based Coventry Health Care Inc. is responsible for the company's overall revenue, operations, networks, pharmacy and care management products. He discusses the impact of the opioid epidemic, return-to-work programs and how technology can help improve treatment outcomes for injured workers. **PAGE 13**



OFF BEAT

Headbanging at a concert results in serious consequences for one rock fan. **PAGE 30**

- **LEGAL BRIEFS**
Recent court opinions **PAGE 12**
- **OPINIONS**
Pain management for injured workers needs a fresh approach. **PAGE 27**
- **MARKET PULSE**
Products, deals and more **PAGE 28**
- **PEOPLE**
Insurance industry moves **PAGE 29**

Brutal case shows protection shortfalls

BY JUDY GREENWALD

jgreenwald@businessinsurance.com

Afederal appeals court ruling that reinstates negligence charges against Home Depot USA Inc. and associated firms in the rape and murder of a young worker highlights the need for firms to have well-coordinated programs in place to address sexual harassment of vulnerable workers by those in authority.

Observers stress that the March 24 ruling by the 7th U.S. Circuit Court of Appeals in Chicago in *Sherry Anicich v. Home Depot USA Inc. et al.* against Atlanta-based Home Depot in connection with the brutal murder is only an intermediary ruling, with the appeals court obligated to assume for now that the alleged facts are true.

Nevertheless, it's a warning to other firms who fail to heed signs of sexual harassment.

This case involves a 21-year-old woman who worked as a clerk in the home improvement chain's garden department in its Plainfield, Illinois, store (see related story).

The Home Depot case is "a teaching moment for employers about nipping these sorts of problems in the bud," said Larry Peikes, a partner with law firm Wiggin & Dana L.L.P. in Stamford, Connecticut. "It's a classic case of the apparent indifference or failure to take remedial measures."

Home Depot did not respond to requests for comment.

These incidents usually happen where there is "a disparity of power relationships between boss and worker," said Richard B. Cohen, an attorney with FisherBroyles L.L.P. in New York. "The greater the dis-



parity, the more chance of something like this" occurring.

"We see in almost every case — the tragic ones and the ones that are just escalating incidents — there are always preincident indicators" of a problem, said Rick Shaw, CEO of Awareity Inc., a Lincoln, Nebraska-based provider of threat assessment, management and prevention solutions.

Many victims of sexual harassment at work never report it for fear of retaliation, said Chai R. Feldblum, commissioner on the U.S. Equal Employment Opportunity Commission.

"The clear lesson from this case is if you have an employee or supervisor who's exhibiting violent or threatening behavior, you have to take action against that supervisor," said employment lawyer Richard D. Tuschman in Plantation, Florida.

Employers cannot simply assume that because a supervisor is "not committing an overtly violent act or criminal behavior in

the workplace" that the supervisor is not going to harm the employee outside it, and the employer can then be held liable in these cases, he said.

"The lesson learned is you have to have a sexual harassment program that's not just on paper, because I'm sure Home Depot had one," said Eric Hemmendinger, a partner with law firm Shawe & Rosenthal L.L.P. in Baltimore.

"You never really know when one of these situations is going to get out of hand, and that's why you need to treat them seriously," he said.

Certainly, "employers that are presented with sexual harassment situations committed by supervisors are going to need to think long and hard about what discipline they instill," said David N. Michael, a partner with law firm Gould & Ratner L.L.P. in Chicago. In this case, "the employers didn't do enough as it related to the allegations against this individual of harassment

and abuse." They required the supervisor to attend anger management training on two separate occasions, "but they didn't make sure" he completed them, Mr. Michael said, citing the 7th Circuit ruling.

Susan K. Lessack, a partner with Pepper Hamilton L.L.P. in Berwyn, Pennsylvania, said, "I'm not sure (the ruling) warrants any changes in the way that employers address harassment complaints. I think most employers investigate them and take remedial measures if it's appropriate."

But others say the case demonstrates that better-coordinated programs are needed.

The problem is, there may be different incident reporting systems in place at companies, "and they're not connected together," said Mr. Shaw. "Each one of those is a silo, and until they have the right strategies and the right tools, they will continue to have their pieces of the puzzle scattered all over the place," he said.

Organizations should be encouraged "to make sure their plans are aligned, and that every function within an organization" is talking to the others, said Renata Elias, vice president with Marsh Risk Consulting in Dallas.

Employers must have in place a holistic prevention policy that includes communication of values, a clear policy and "serious and effective reporting," said the EEOC's Ms. Feldblum.

Job descriptions of managers and others should include the requirement that they act on harassment claims, she said, and corrective action should be proportionate. An employee who physically assaults someone should be fired, but a worker who makes inappropriate comments should be less severely disciplined, she said.

After repeated complaints about supervisor, a tragic end

Brian Cooper, a regional manager for Atlanta-based Home Depot USA Inc. "had a history of sexually harassing his young female subordinates," said the March 24 ruling by a three-judge panel of the 7th U.S. Circuit Court of Appeals in Chicago in *Sherry Anicich v. Home Depot USA Inc. et al.*

Although subordinate Alisha Bromfield, who had worked at various Home Depot garden centers in northern Illinois for six years, "complained repeatedly" about him to other supervisors and managers, he remained her supervisor, according to the ruling. Then in 2012, when Ms. Bromfield was 21 and about seven months pregnant with someone else's baby, Mr. Cooper began asking her to go to his sister's

wedding in Wisconsin. She refused.

"Then, invoking the authority the defendants had entrusted to him as a supervisor, he told her he would fire her or reduce her hours if she did not go," said the ruling.

She went, and after the wedding Mr. Cooper took her to the hotel room he had rented for the two of them and repeated his request for her to be in a relationship with him, which she again refused.

"Cooper strangled her to death. He then raped her corpse," said the ruling.

Mr. Cooper was sentenced to two life terms for killing Ms. Bromfield and her unborn daughter.

Ms. Bromfield's mother, Sherry Anicich, who lives in Plainfield, Illinois, filed suit, charging the defendants with negligence

in connection with her daughter's death. Also named as defendants in the case were Grand Service L.L.C. and Grand Flower Growers Inc., based in Wayland, Michigan, which managed garden centers for Home Depot stores. All three defendants jointly employed Mr. Cooper as a regional manager, according to the ruling.

None of the companies responded to requests for comment.

A unanimous three-judge panel of the 7th Circuit reinstated the case after it was dismissed by the U.S. District Court in Chicago. "To succeed on a claim for negligent hiring, supervision, or retention, the plaintiff must demonstrate that the employee's 'particular unfitness rendered the plaintiff's injury foreseeable,'" said

the ruling, in addressing the arguments of one of the defendants and quoting an earlier case. The amended complaint recounts how Cooper's behavior escalated: from private inappropriate comments and touching, to workplace retaliation, to continual harassment and monitoring, and finally to public outbursts, verbal abuse, and physical intimidation.

"Hearing such evidence, a reasonable jury could easily find that the employers could and should have foreseen that Cooper would take the small further step to violence," the ruling said.

Observers stress that at this stage of the litigation, the court has accepted all the plaintiff's allegations as true.

Judy Greenwald

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UK insurers seek Continental footholds

BY SARAH VEYSEY

With Britain firmly on the path to exiting the European Union, major insurers are moving forward with their plans to establish bridgeheads in key European cities to try and ensure that they keep unfettered access to EU business.

In late March, U.K. Prime Minister Theresa May triggered Article 50 of the European Treaty, setting in motion the process, likely to take two years, by which the U.K. formally will leave the EU following a referendum vote in June 2016.

At the same time as the so-called Brexit was triggered, Lloyd's of London announced that it has chosen Brussels as the location for an insurance company aimed at allowing its syndicates continued access to the European market once the United Kingdom leaves the European Union.

The decision by Lloyd's followed U.S. insurer American International Group Inc.'s announcement that it plans to set up a base in Luxembourg once the U.K. leaves the EU to retain so-called passporting rights, which enable insurers and reinsurers based within the EU to write business in all 27 members states without the need to be regulated in each one.

It is not yet known the extent to which U.K. insurers will retain those rights — if at all — once the U.K. leaves the EU.

Lloyd's announced last year that it would examine the options available to it to set up an insurance structure within the EU to enable syndicates to have continued access to business from the EU and the three countries in the associated European Economic Area.

Several of the larger managing agencies that operate syndicates at Lloyd's said they also would consider setting up operations



REUTERS

British Prime Minister Theresa May signs the official letter to European Council President Donald Tusk invoking Article 50 and declaring the United Kingdom's intention to leave the EU.

in Europe.

Lloyd's became one of the first major U.K. financial institutions to announce its post-Brexit plan when it said it had decided to set up an insurance company in Brussels.

The operation is expected to be ready to underwrite business for the January 2019 renewal season, subject to regulatory approval.

"It is important that we are able to provide the market and customers with an effective solution that means business can carry on without interruption when the U.K. leaves the EU," Inga Beale, CEO of Lloyd's, said in announcing the move.

"Brussels met the critical elements of providing a robust regulatory framework

in a central European location, and will enable Lloyd's to continue to provide specialist underwriting expertise to our customers," she said.

John Nelson, chairman of Lloyd's, said that "tens" of Lloyd's staff members would either move or be hired locally once the company is set up.

Sources said that Brussels had been chosen ahead of other EU domiciles including Dublin, Luxembourg and Malta in part because of its location within mainland Europe, and because of its strong regulatory framework, among other factors.

In a note to members of the Lloyd's Market Association, which represents managing agents at Lloyd's, Mel Goddard, the LMA's market liaison and

EUROPEAN BUSINESS

- In 2015, the European Economic Area, which includes the 27 European Union states, Iceland, Lichtenstein and Norway, accounted for **£2.93 billion** (\$3.75 billion) — or 11% — of Lloyd's of London's gross written premium.
- More than **£8 billion** (\$10.23 billion) of premium is brought annually to the London insurance market by brokers on behalf of EU customers.
- More than **£6 billion** (\$7.67 billion) of international business is written in London by firms with a parent company or principal base located elsewhere in the EU.

Sources: Lloyd's of London, London Market Group



underwriting director, said that a key factor in the choice of location for a European insurance company had been the ability to retain key features of the Lloyd's franchise. The LMA was part of a cross-disciplinary working group set up to examine the options available to the market.

Ms. Goddard said that a solution that emulated as closely as possible the Lloyd's market model — for example the ability to cede 100% of premium written back to a managing agent — had been a key factor in the decision.

Other important considerations, she said, had been the robustness of the local regulatory environment, as well as keeping costs low, since the Brussels company will be an additional operation to the existing Lloyd's structure, and flexibility.

AIG in March announced that it would set up a base in Luxembourg to service EU business once the U.K. exits the EU.

"This is a decisive move that ensures AIG is positioned for whatever form the U.K.'s exit from the EU ultimately takes," Anthony Baldwin, CEO of AIG Europe, said.

In a statement, AIG said that "the majority of the business we write out of the Luxembourg entity will be in continental Europe, and geographic proximity is a benefit."

"Luxembourg is a core member of the European Union and has a stable economy and a well-respected insurance regulator," it added.

Meanwhile, Beazley P.L.C. has applied for a license to set up a company in Dublin, a location where it already has operations.

Hiscox Ltd., another major Lloyd's player, said it is in talks with regulators in Luxembourg and Malta about setting up an insurer once Brexit takes place.

London market plots a course

The London Market Group has published a "road map" for the U.K. specialty commercial insurance sector once the country leaves the European Union.

The LMG, which represents Lloyd's of London insurers, other London market insurers and London market brokers, in March published the plan, which it said was intended to inform the U.K. government's negotiations on Brexit with regard to the insurance market.

The road map states that the U.K. must aim to retain regulatory equivalence with Solvency II, the EU-wide risk-based capital regulatory regime with which U.K.



regulations currently comply.

A trade deal must be struck that allows U.K. insurers to retain access to the EU market, according to the road map.

That deal must enable U.K. insurers to accept business brought to them by EU-based brokerages — with no obligation

to meet capital requirements imposed by that home state — and include a reciprocal arrangement for EU firms, the LMG said.

The LMG also urged the government to act speedily on negotiations to enable London-based insurers and reinsurers to retain their competitive advantage and renew contracts covering EU risks in London.

It also said a swift resolution of negotiations would give greater certainty to EU insurers with headquarters in the U.K.

Timely resolution of talks also would give EU buyers certainty that their policies could be renewed in London, it said.

Sarah Veysey

Insurers await tax reform

BY ROB LENIHAN

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If the devil is in the details, then he has yet to make an appearance in the Trump administration's tax reform plan.

While talk of a reduction in corporate tax rates is being generally applauded by insurance industry analysts — including President Donald Trump's proposal to cut the federal corporate income tax rate to 15% from 35% — the strong protectionist message on numerous issues coming out of the White House has caused concern for some areas of the industry.

In addition, House Republicans have their own ideas, outlined in their Tax Reform Task Force Blueprint released last June, that propose cutting the corporate rate to 20% and the implementation of border adjustment taxes, wherein a tax is rebated when a product is exported to a foreign country and is imposed when a product is imported from one.

Robert Gordon, Washington-based senior vice president of policy development and research for the Property Casualty Insurers Association of America, said U.S. insurers buy much of their reinsurance from foreign reinsurers.

"If the border adjustment tax is applied to foreign reinsurance," Mr. Gordon said, "then that makes foreign reinsurance a lot less attractive and shifts more reinsurance capital back into the U.S. It could potentially raise the rates for reinsurance and reduce the attractiveness of reinsurance overall, and reinsurance helps spread risk around global markets."

"There's been campaign talk and other media buzz," said Jim Auden, Chicago-based managing director at Fitch Ratings Inc., although no legislation is proposed yet. "Generally, if corporate taxes are lower and more competitive with the rest of the world, that's probably a good thing overall for insurers."

Michael Beaty, tax partner at Ernst & Young L.L.P. in Boston, said there are "a number of issues that insurance companies need to be thinking about within the House Republican blueprint."

"The House Republican blueprint has a very controversial proposal in there around the border adjustment tax," Mr. Beaty said. "We've seen Treasury Secretary Steven Mnuchin say the administration is not going to embrace that border adjustment tax as is. And so the border adjustment tax was a significant, big contributor to being able to pay for rate reduction."

Mr. Beaty added that "there's a lot of uncertainty about what will be in the Trump administration's new tax reform proposal."



REUTERS

U.S. Office of Management and Budget Director Mick Mulvaney, right, listens as President Donald Trump meets with members of the Republican Study Committee at the White House in March.

In a report issued last month, insurance analysts at Credit Suisse Securities (USA) L.L.C. said that after meeting with policymakers, lobbyists, and others, they concluded that "the border adjustment tax has effectively no chance of getting through the Senate." Without additional revenues, it may not be possible cut corporate taxes below 25%, the note said.

Mr. Mnuchin recently said that is unlikely that tax reform legislation will not get to President Trump's desk by August.

If tax reform is passed, it could have a significant effect outside the U.S. insurance market, particularly in Bermuda. Over the past 30 years, many insurers and reinsurers established operations in Bermuda, where there are no taxes on profit, income, dividends or capital gains.

The domicile has proved particularly attractive to catastrophe reinsurers and excess liability insurers, which can operate with relatively small staffs compared with other insurers and reinsurers. Many of the insurers and reinsurers in Bermuda offer coverage for U.S.-based risks.

In a February report, "The Bermuda Triangle: The New U.S. Administration, Taxes, and Reinsurance," S&P Global Ratings said "the prospect of lower corporate tax rates, a border adjustment tax, and a lighter-touch regulatory regime in the U.S. could erode the relative attractiveness of Bermuda as a jurisdiction, and the competitive advantage enjoyed by Bermuda (reinsurers and insurers)."

The report said that while it is too early to tell what the final rules will be or how they will apply to Bermuda insurers, "we

believe a lower corporate tax rate as part of a broader overhaul of the U.S. tax code has a higher likelihood of materializing than a border adjustment tax."

But Bermuda holds other benefits for insurers and reinsurers, said Bob Richards, Bermuda's deputy prime minister and minister of finance, during an interview at the Risk & Insurance Management Society Inc. conference in Philadelphia last month.

"There are other places in the world where there's no tax on insurance and they don't have what we have in Bermuda," he said.

The combination of Bermuda's regulatory environment, the expertise in the market and the Bermuda government's support of the industry, through speedy legislative changes, are also important elements that companies consider when establishing operations in the domicile, Mr. Richards said.

"Tax is an important element but it's not the only element," he said.

Robert Hoyt, the department head and Dudley L. Moore Jr. chair and professor of risk management and insurance in the Terry College of Business at the University of Georgia in Athens, said while lower taxes might make the U.S. a somewhat more attractive domicile for insurers, Bermuda has other advantages, including technical insurance expertise within the Bermuda market.

In addition, the regulatory constraints within the U.S. may "make it attractive for certain aspects of the business to be located in other domiciles that might have a more flexible regulatory environment," he said.

Gavin Souter contributed to this report.



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Integrated disability makes a comeback

BY KRISTEN BECKMAN

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A recent increase in the number of state and municipal leave regulations, along with an expansion of paid family leave laws, is prompting employers to take a fresh look at integrating their workers compensation, disability and benefit programs, either internally or through third-party vendors, and creating a new wave of momentum around the concept of integrated disability management.

There are at least 500 different federal, state and municipal rules governing job absence in the United States, including notably the Americans with Disabilities Act and the Family Medical Leave Act, said Bryon Bass, senior vice president of disability and absence practice and compliance at Memphis, Tennessee-based Sedgwick Claims Management Services Inc. These leaves can be triggered by injury, illness, family situations, judicial proceedings and dozens of other situations, creating compliance challenges for employers, he said.

From an enforcement point of view, all leaves must be handled consistently by employers, regardless of what type of event triggers a leave. Having inconsistent leave policies and practices opens employers to audits and fines, said Terri Rhodes, CEO of the San Diego-based Disability Management Employer Coalition.

The increased complexities of complying with leave regulations is driving renewed interest in integrated disability management and an evolution to a broader focus on integrated absence management, said Mr. Bass.

"The idea isn't necessarily new, but the amount of cooperation and partnership is reaching a new level," said Jeff Smith, a disability and productivity consultant with the Workplace Possibilities program, an



absence and disability management program operated by Portland, Oregon-based disability insurer Standard Insurance Co.

Decades ago, employers considered ways to create synergies between occupational medical claims and nonoccupational health claims to save on overhead costs. But occupational injuries and nonoccupational conditions are treated differently by doctors, and employers did not realize the synergies they hoped to achieve, said Matt Sears, executive vice president of employee benefits at San Francisco-based EPIC Insurance Brokers & Consultants.

"Because of that failed effort, a lot of people ignored the idea of integrated disability management," said Mr. Sears. "In recent years, the idea of integrated programs has come back amongst the more sophisticated employers. There are some challenges in

most firms, because there are silos built up about who in the organization is managing these different issues."

Organizational silos have been the primary reason integrated disability management has struggled to gain footing, disability management experts say.

"Workers comp is law-driven," said Tim Rarick, vice president of product strategy and solutions at Phoenix-based Matrix Absence Management Inc. "Employers are required to have workers comp coverage, so it is viewed as an insurance program and tends to fall to risk management. Disability is viewed as a benefit and part of compensation packages.

es. There are two different buyers and two different mentalities, and because of this disparity, their focus tends to be different."

Attempts to break down these silos have gained some traction, but integrated dis-

INTEGRATION BENEFITS

Employers that implement integrated disability management programs reduced their internal administration costs by an estimated

10%-20%

and decreased days away from work by

10%-25%

depending on past administrative practices.

Source: Sedgwick Claims Management Services Inc.

ability and absence management can be difficult to accomplish until a high-level executive initiates organizational change, said Ms. Rhodes.

"It's a very painful process trying to get everybody to work together," she said. "Some progressive organizations have managed to work through those silos. In the current environment, FMLA and ADA applies to workers comp claims, so it's important even if they are not integrating programs that they all communicate with each other. The (U.S. Department of Labor) and (U.S. Equal Employment Opportunity Commission) don't care about organizational silos."

In addition to ensuring compliance, integration can potentially yield other benefits for employers. Sedgwick estimates employers can experience a 10% to 20% reduction in costs by integrating their disability management programs. In addition, depending on past administrative practices, employers that implemented integrated disability managed programs saw a 10% to 25% decrease in days away from work, Sedgwick said in a 2014 white paper.

Administrative cost savings are a primary benefit of integrating workers compensation and disability management, said Mr. Sears. Another benefit is the potential to analyze collective data generated from disability, workers comp, health and wellness programs to identify patterns that can be used to prevent injuries and lost time, he said.

"One of the things most people don't notice is the impact wellness and health plans can have on workers comp," said Mr. Sears. He noted smokers and stressed workers have a higher risk of being injured at work, and diabetics and obese workers typically incur higher costs during treatment for injuries. Employers have an opportunity, he said, to incorporate wellness initiatives, such as smoking cessation programs, with workers comp programs to help improve medical outcomes and reduce comp costs.

Workers comp and disability programs can work together and share resources in a mutual effort to get workers back to work quickly and prevent future claims, said Mr. Smith. "Preventing a short-term disability claim might be preventing a workers comp claim as well," he said.

Ultimately, integrated disability and absence management is about viewing and treating employees holistically so they don't get stuck in a confusing and frustrating series of systems, said Mr. Bass.

"It's really taking an employee-centric position, not a company- or department-centric position, which is the way it used to be," Ms. Rhodes said.

OVERLAPPING LAWS COULD LENGTHEN EMPLOYEE ABSENCES

Employers should consider starting the clock on Family Medical Leave Act leave as soon as possible when it is clear a work-related injury is going to require an employee to miss time at work to avoid an unintended extension of leave, human resources experts say.

Workers compensation claims and FMLA, along with the Americans with Disabilities Act and even COBRA, often overlap, said Kathryn Carlson, vice president of human resources management products at Lafayette, Colorado-based HR management solutions company KPA

L.L.C., in a webinar last month. When an employee is injured, employers must determine which laws apply, what each law requires and how they intersect, she said.

Employees are eligible for FMLA leave if they have worked for the employer for at least 12 months or at least 1,250 hours during the preceding year. Employers are required to provide FMLA leave if they employ 50 or more people.

"Pretty much anyone with a lost time workers compensation claim will have an FMLA claim concurrent with that," said Terri Rhodes, chief executive officer of the

San Diego-based Disability Management Employers Coalition.

While an employee is on FMLA leave, they cannot be asked to re-certify their medical condition even if an employer has evidence an employee on a workers comp claim is well enough to return to work. In addition, employees on leave should not be allowed to do any work at all, including answering emails or calling in to conference calls, because any work completed constitutes a day of work according to FMLA rules, Ms. Carlson said.

Kristen Beckman

Psychosocial factors weigh on comp claims

BY LOUISE ESOLA

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Mounting evidence demonstrates that some troublesome workers compensation claims have more to do with the mental aspect of being injured than the injury itself.

Trecia Sigle, Columbus, Ohio-based associate vice president of worker comp claims for Nationwide Insurance, said the industry is ripe for change.

"It used to be from an insurance perspective, we never thought about (psychosocial issues)," she said. "I don't think that they saw the value in it ... We as an industry didn't understand the impact of the bio-psychosocial problem when we were looking at a claim."

Ms. Sigle and others credit recent studies that point to psychosocial issues such as depression and anxiety that arise with an injury as a major driver when it comes to an insurer's inability to close a claim.

One study released in late March found that claims leaders ranked psychosocial issues as the No. 1 barrier to successful claim outcomes, according to Chicago-based managed care solutions provider Rising Medical Solutions' 2016 Workers Compensation Benchmarking Study. Out of that survey came the report "How to Overcome Psychosocial Roadblocks: Claims Advocacy's Biggest Opportunity," which examines best practices for addressing psychosocial factors.

According to the Rising report, the "greatest roadblock to timely work injury recovery and controlling claim costs ... is the negative impact of personal expectations, behaviors and predicaments that can come with the injured worker or can grow out of a work injury." The report also highlights how many claims professionals surveyed have skills in customer service and communications, and possess traits such as empathy.

The Rising study follows other recent studies such as one conducted by Hartford Financial Services Group Inc., which in 2016 analyzed its workers comp claim data from 2002 to 2015 to find that 10% of them featured at least one psychosocial issue and that those claims accounted for 60% of claims costs. In another study, conducted by Lockton Cos. L.L.C. in 2016, 39% of claims had derivatives of the word "fear" in claim adjusters' notes — a study that revealed anxiety



to be high among those injured on the job.

"I think that studies are better and medical literature is better," said Ms. Sigle, whose company is now exploring what it can do to better serve injured workers to avoid problems later on.

"(It's) a program that we are working on to revise claim-handling philosophy to a more advocacy-based approach," she said. "We view this as a one of our biggest focus areas, especially with our older claims."

One solution has been to provide cognitive behavioral therapy when a provider deems it necessary for an injured worker to heal, she said (see related story).

Nationwide isn't the only company honing in on the psychosocial aspect of a claim. The Rising study named grocery store chain Albertsons Cos. Inc. as a leader in the field of tackling the issue. In the Rising study, Albertsons revealed that since 2013, roughly 9% of workers injured in the company's stores who were voluntarily screened for mental complications were found to have psychosocial issues embedded in their workers comp claim.

Denise Algire, Pleasanton, California-based director of risk initiatives and national medical director for Albertsons Cos., said the company saw psychosocial issues in workers comp as a major driver for long-tail claims — in line with what claims handlers revealed in the Rising survey.

"(The issues can) drive up claim costs far more than catastrophic injuries," said Rising study co-author and study program director Rachel Fikes in a statement. "Through this examination, one can see how adversarial, compliance and task-driven claim styles are ill-suited for addressing the fears, beliefs and perceptions of this distressed population."

In 2013, Albertsons launched a pilot program in several of its 40 markets that provided injured workers the opportunity to consult with a third-party "health coach" whose primary job was to gauge the worker's mental state in light of the injury, according to Ms. Algire, who called the program a success and a major driver for improved return-to-work figures. The company is now tallying its results, she said.

Ms. Fikes said Albertsons' approach is good corporate strategy and that more companies should adopt a similar approach.

"It's likely no coincidence that while the industry has progressively paid more attention to psychosocial issues this past decade, there's also been a shift toward advocacy-based claims models over adversarial, compliance and task-based processing styles," Ms. Fikes said. "Simply put, advocacy models — which treat the worker as a whole person — are better-equipped to control or eliminate psychosocial factors during recovery."

COMPASSIONATE SKILL SETS

Does your organization include any of the following skills and abilities training/testing for frontline claims professionals?

CUSTOMER SERVICE

57%

COMMUNICATION SKILLS

53%

CRITICAL THINKING

44%

ACTIVE LISTENING SKILLS

39%

EMPATHY

29%

APTITUDE TESTING

23%

*Researchers surveyed 492 claims professionals to gauge whether psychosocial issues affected workers compensation claims.

Source: Rising Medical Solutions 2016 Workers' Compensation Benchmarking Study

DEPRESSION THERAPY ALLEVIATES INJURY COMPLICATIONS

Whether one is talking about opioid addiction, psychosocial claims or return-to-work hurdles, a buzz phrase in workers compensation is "cognitive behavioral therapy."

Dubbed CBT, cognitive behavioral therapy has its roots in treating depression, according to Norman Cotterell, Bala Cynwyd, Pennsylvania-based clinical coordinator at the Beck Institute, a training center created by Aaron T. Beck, who developed cognitive behavior therapy at the University of Pennsylvania in Philadelphia in the 1960s.

"Depression is probably the major

complication for any injury," said Mr. Cotterell. "Depression is triggered by loss ... An injury results in loss: loss of capability, loss of one's connection to a career they value," he said. "Depression will add insult to that workplace injury and make it much, much worse."

CBT teaches that "it's not the situation that makes me feel the way we do, it's the way we think about it," he said, adding that the therapy typically involves exercises in examining what a person's negative beliefs are and replacing them with better thoughts.

Dr. Simon Rego, chief psychologist at

Montefiore Medical Center/Albert Einstein College of Medicine in New York, said the therapy involves understanding the role that thoughts and actions can play in emotions and feelings, and then learning skills to challenge and change both how the patient thinks and what the person can do, which often leads the patient to feel better.

"CBT has a strong evidence base; the research shows that it can be highly effective at helping people improve the way they cope with problems," Dr. Rego added.

Louise Esola

OSHA standards should be met despite delays

BY GLORIA GONZALEZ

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Employer representatives hope that delays in the enforcement dates of U.S. Occupational Safety and Health Administration regulations issued over the past year are accompanied by better compliance guidance.

But the delays do not mean employers can rest on their laurels, with legal and loss control experts firmly advocating that they continue to work to comply with these regulations as they currently stand, in spite of President Donald Trump's deregulation efforts, which include an executive order requiring agencies to repeal two existing rules for each new regulation it puts in place.

OSHA announced in early April that it would delay enforcement of its silica standard for the construction industry to Sept. 23 because of the need to provide additional guidance on the silica rule's requirements. The Occupational Exposure to Respirable Crystalline Silica rule reduces the permissible exposure limit for crystalline silica over an eight-hour shift to 50 micrograms per cubic meter of air for the construction industry, one-fifth of the previous maximum.

This followed the U.S. Department of Labor's March announcement that it would delay enforcement of its beryllium rule to May 20 to allow it to further review



law and policy questions, but the proposed extension will not affect its compliance dates, with employers required to comply with most of the obligations by March 12, 2018, according to the department.

"With respect to the silica and beryllium rules, the important thing is the rules and the enforcement of rules are not stayed," said Erin Brooks, a St. Louis-based associate with law firm Bryan Cave L.L.P. "They're only delayed, so employers should continue to work toward compliance, understanding that there may be additional compliance guidelines in the pipeline."

Beryllium is used in the aerospace, electronics, energy, telecommunication, medical and defense industries, but it is highly toxic when beryllium-containing materials are processed in a way that releases airborne beryllium dust, fumes or mist into workplace air that can be then inhaled by workers, potentially damaging their lungs, according to OSHA. The final rule will reduce the eight-hour permissible exposure limit to 0.2 micrograms per cubic meter from the previous level of 2.0 micrograms per cubic meter.

PROTECTING WORKERS' LUNGS



OSHA's regulations to reduce permissible exposure limits for silica and beryllium in the workplace will have a significant impact in saving lives, according to the agency.

- About 2.3 million workers are exposed to respirable crystalline silica in their workplaces, including 2 million construction workers and 300,000 workers in general industry operations, such as brick manufacturing, foundries and fracking.

- OSHA estimates the silica rule will save more than 600 lives and prevent more than 900 new cases of the lung disease silicosis each year once its effects are fully realized.

- The silica rule is projected to provide net benefits of about \$7.7 billion per year.

- About 62,000 workers are exposed to beryllium in their workplaces.

- OSHA estimates that the rule will save 90 lives from beryllium-related diseases and prevent 46 new cases of chronic beryllium disease each year once the rule's effects are fully realized.

- The beryllium rule is projected to provide net benefits of about \$560.9 million per year.

Source: U.S. Occupational Safety and Health Administration

"Beryllium seems to be one of the rules that is being held in abeyance for further review based on Trump's recent order," said Michael Sterling, managing partner of law firm Vandeventer Black L.L.P. based in Norfolk, Virginia. "The silica rule, on the other hand, seems to be a more generic delay where OSHA is trying to make sure they've given all the right guidance out to employers."

Employers could use additional help to comply with the complex, highly technical silica standard for construction, experts say.

"A lot of construction employers are not misrepresenting the facts when they say compliance with the new standard will not be feasible in some, potentially many, settings," said Howard Mavity, an Atlanta-based partner at law firm Fisher & Phillips L.L.P., noting that these concerns previously have been rejected by OSHA and union representatives. "I've watched good-faith research and experimentation by different universities working with forward-thinking construction companies that want to do the right thing, and they are finding in numerous

settings that they can't comply."

One challenge for employers will be to identify how to manage silica exposures in situations where multiple trades are working in one area and one firm is creating a silica hazard that exposes others, said Andy Giza, assistant vice president and senior loss control consultant with Lockton Cos. L.L.C. in Scottsdale, Arizona.

"From what I see with our clients, they are already actively looking at what these exposures are and understanding that even though rule is not enforceable yet, it's still in the best interest to control these hazards to protect their workers," he said.

The silica standard requires employers to either come into compliance with the new permissible exposure limit or implement specific dust controls for certain operations as provided in Table 1 of the standard, which refers to guidance outlining exposure control methods for selected construction operations. Employers who follow these methods are not required to measure workers' exposure and not subject to the permissible exposure limit.

"Some employers have said, 'It's not that big a deal as long as I can meet Table 1,'" Mr. Mavity said. "The problem is it doesn't cover everything. The second problem is they're going to find it difficult to comply with some of the requirements to fit within that safe harbor. Many, many construction employers underestimate that."

OSHA may be able to publish better guidance on what employers can do in specific scenarios, Mr. Sterling said.

But extensive guidance or changes to the silica standard would be challenging because OSHA would have to conduct a new rule-making process to pursue major changes or overturn the rule, and unions and other groups are likely to sue if the standard is not implemented, Mr. Mavity said. "The administration does not have the power to ignore the new exposure limits," he said.

BERYLLIUM RULE UNLIKELY TO BE REVERSED

Despite a delayed enforcement date, the U.S. Occupational Safety and Health Administration's beryllium rule is not seen as vulnerable to reversal by the Trump administration because industry and government worked together to craft the rule.

The U.S. Department of Labor in March delayed the beryllium rule to May 20 to allow OSHA an opportunity for further review, but the proposed extension will not affect the compliance dates, Labor says.

"My general impression is the beryllium standard is less controversial," said Howard

Mavity, an Atlanta-based partner at law firm Fisher & Phillips L.L.P. "Although there were industry groups that attacked it, there also was decent cooperation between the main manufacturer of beryllium and steelworkers. Do employers want it? Probably not, but it has not been as potentially disruptive to business as silica. Silica is affecting a huge swath of employers, and the beryllium standard isn't."

The beryllium rule still is within the review period for the Congressional Review Act, and Congress and President

Donald Trump have already shown a willingness to use that tool, including on OSHA's controversial Volks rule, which aimed to clarify that employers have a continuing obligation to make and maintain an accurate record of each recordable injury and illness for five years.

"I don't see (the beryllium rule) going away like the Volks rule," said Matthew Linton, Denver-based of counsel with law firm Ogletree, Deakins, Nash, Smoak & Stewart P.C.

Gloria Gonzalez

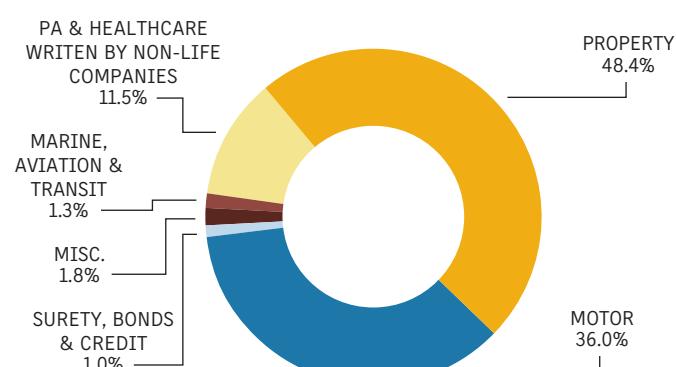
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26

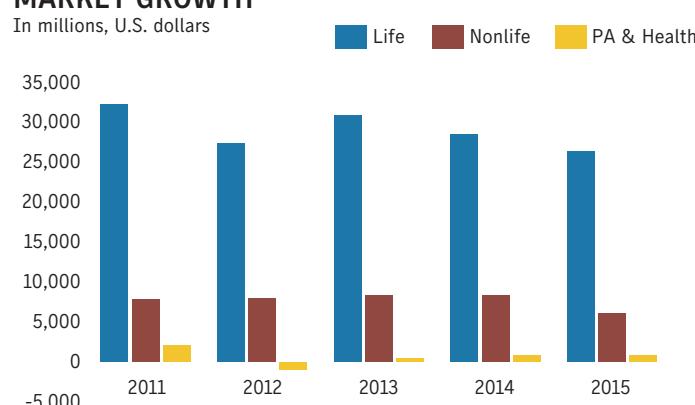
GLOBAL
P/C MARKET
RANKING

The Swedish insurance market is well-developed and mature, with very sophisticated buyers. This is particularly true in the industrial/commercial sector, where the largest corporations make extensive use of captive insurers. Competition in the industrial sector continued to be keen in 2016, but insurers' loss ratios remained satisfactory. Municipal property risks continue to prove a challenging class to insure, but the overall situation has improved with increased focus on risk management and higher premiums and deductibles. Only a few insurers are interested in these kinds of risks and, as a result, several municipalities have turned to captives.

MARKET SHARE



MARKET GROWTH



COMPULSORY INSURANCE

Several lines of insurance are compulsory, including:

- Third-party auto liability
- Liability for nuclear installations.
- Professional liability for lawyers, accountants, insurance intermediaries, realtors and the medical profession
- Clinical trials liability
- Shipowners third-party liability

NONADMITTED

Unauthorized insurers cannot carry on insurance activity in Sweden. At the same time, there is nothing in the law that indicates insurance must be purchased from locally authorized insurers, with some exceptions. The law is generally interpreted to mean that insurers can issue policies from abroad with exceptions if approached by a buyer and/or an intermediary.

INTERMEDIARIES

Intermediaries must be authorized to do insurance business. Intermediaries are allowed to place business with nonadmitted insurers. Intermediaries involved in nonadmitted placements do not have to be registered with the insurance supervisor. Where local risks are placed as part of a multinational insurance program, brokers involved in nonadmitted placements do not have to warn buyers that their insurer is not subject to local supervision. Intermediaries operating in any EU/European Economic Area country must be registered with their home authority.

MARKET PRACTICE

Apart from some compulsory insurances that should be placed with approved insurers, there are no restrictions on where Swedish residents or corporations may obtain insurance from, and they are free to buy cover outside the country. Given the sophistication of the local market and the presence of many major international insurers, there is little reason to seek insurance protection elsewhere.

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



MARKET CONCENTRATION

82.7%

market share of top 5 insurers

2017 GDP CHANGE (PROJECTED)

1.96%

MARKET DEVELOPMENTS

Updated March 2017

■ A member of the European Union since 1995, Sweden transposed into its law the EU's risk-based capital requirements under the Solvency II directive on Jan. 1, 2016. Only two insurers are thought to have received approval to use their own internal models, with the rest of the market using the standard formula.

■ In 2015, the Swedish government set up a commission to consider the taxation of the financial sector. The commission proposed the introduction of a new financial activities tax on financial services and insurance, possibly based on the payroll for such companies. There are indications that the government is not fully behind the proposal.

■ In 2014, a government committee proposed that property/casualty insurers be required to report a taxable standard income for contingency reserves. Since January 2016, changes to the calculation of the maximum amount of the contingency reserve have been made, and the calculation is now linked to the type of insurance business the contingency reserve relates to. Under transitional arrangements, however, insurers have until the end of 2019 to comply fully with the new regulations.

■ One recent development that may challenge the current market leaders in the coming years is the establishment of an insurer, ICA Försäkring A.B., by ICA, one of the country's leading supermarket chains. With a client base of 4 million loyalty card holders, the company has the potential to build an important share in the private lines market segment.

LEGAL BRIEFS

Jury finds for Alliant in poaching fight with Aon

■ A California jury found that a group of 10 former Aon P.L.C. brokers did not breach their fiduciary duty to the broker when they left Aon to join rival Alliant Insurance Services Inc. in 2014 and were later followed by a team of more than 60 other Aon employees.

The case is one of several between Aon and Alliant where Aon accuses the Newport Beach, California-based brokerage of orchestrating mass raids on Aon staff, causing the departing brokers to breach noncompete agreements they had signed with Aon.

After a two-month trial, the jury in *Peter Baldwin et al. v. Aon Risk Services Inc.* cleared the former Aon brokers of breach of fiduciary duty, aiding and abetting fiduciary duty, breach of duty of loyalty, interference with contract and theft of trade secrets.

The case began after a group of staff in Aon's California operations in Fresno, Salinas and Walnut Creek left the brokerage for Alliant in February 2014.

According to Aon, the Alliant recruitment of its staff "decimated the Fresno and Salinas offices" and Alliant tried to take on "thousands of Aon's customers that collectively generate approximately \$30 million in business each year," court records show.

Aon alleged that the 2014 recruitment by Alliant was a continuation of a raid of Aon employees that began in 2011 with the recruitment of Peter Arkley, former head of Aon's construction services group.

Chubb unit must pay \$1.7 million in coverage dispute

■ A Chubb Ltd. excess and surplus lines unit must pay \$1.7 million in a coverage dispute with a construction company over a joint venture-related claim, a federal appeals court ruled, upholding a lower court ruling.

Wilmington, North Carolina-based Clancy & Theys Construction Co. was hired in a joint venture to construct a mid-rise student housing building in Raleigh, North Carolina, according to the ruling by the 4th U.S. Circuit Court of Appeals in Richmond, Virginia, in *Westchester Surplus Lines Insurance Co. v. Clancy & Theys Construction Co.*

Clancy bought a "joint venture endorsement" to its commercial general liability and professional liability policy issued by Chubb unit Westchester Insurance.

After construction began, a portion of the building began to lean, damaging other portions of the building.

Clancy's share of the repair cost was eventually deemed to be \$1.8 million, and it sought reimbursement from Philadelphia-based Westchester, according to the ruling.

Westchester argued that Clancy's liability did not arise from the performance of its work and that responsibility for the losses belonged to the joint venture, not Clancy.

The District Court ruled Clancy was entitled to \$1.7 million, after a \$500,000 deductible plus interest, but the court also granted summary judgment to Westchester on a breach of contract claim.

A three-judge appeals court panel unanimously upheld the District Court's ruling.

"Not only did Clancy have liability as a joint venture, it was this very liability that it insured when it purchased the Joint Venture endorsement," the ruling said.



\$7.1 million award upheld in AIG patent lawsuit

■ A federal appeals court upheld a \$7.1 million breach of contract and bad-faith jury verdict against an American International Group Inc. unit in a dispute over acceptance of a settlement agreement.

National Union Fire Insurance Co. of Pittsburgh, Pa., a unit of New York-based AIG, had issued a \$14 million general liability excess policy to San Diego-based LMA North America Inc., a unit of Teleflex Medical Inc. that produces laryngeal mask airway products, according to the ruling by the 9th U.S. Circuit Court of Appeals in *San Francisco in Teleflex Medical Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*

In 2007, LMA filed a patent infringement suit against a competitor, Copenhagen, Denmark-based Ambu A/S, for patent infringement, and Ambu counter-sued, charging trade disparagement and false advertising.

After mediation — in which National Union did not participate — Ambu agreed to pay LMA \$8.75 million for the patent claims and that LMA would pay Ambu \$4.75 million for the disparagement claims. The settlement was conditioned on insurers' approval.

National Union delayed and the settlement was finalized without its approval.

National Union then said it would assume the defense if LMA could "undo" the settlement, and LMA said it could not do so and sued National Union, winning \$7.1 million in damages and interest.

The 9th Circuit upheld the jury verdict and court ruling.

A key factor in the case was a 1991 ruling by a California appellate court in *Diamond Heights Homeowners Association v. National American Insurance Co.*, which held an excess insurer has three options when presented with a proposed settlement of a covered claim that has met the insured and the primary insurer's approval: approve the proposed settlement; reject it and take over the defense; or reject it, decline the defense and face an insured's potential lawsuit.

The 9th Circuit disagreed that the District Court had wrongly extended the *Diamond Heights* ruling to apply to the National Union case.

Hartford wins false advertising coverage dispute

■ A unit of Hartford Financial Services Inc. does not have to defend a policyholder against false advertising claims because the alleged disparagement of another company's products was by "implication," a federal appeals court ruled.

The case involved West Bloomfield, Michigan-based Vitamin Health Inc., which produced a supplement intended to reduce the risk of age-related macular degeneration, an eye disease causing vision loss. The product competed with another supplement produced by Bausch & Lomb, in Rochester, New York.

Bausch & Lomb sued Vitamin Health in 2013 alleging patent infringement and later amended the suit to allege false advertising, too, charging that Vitamin Health's product contained less zinc than the amount recommended in the National Eye Institute's second Age-Related Eye Disease Study, meaning that Vitamin Health's advertising of the product as being AREDS 2-compliant was "false and/or likely to mislead or confuse customers."

Vitamin Health sought coverage under the personal and advertising injury section of liability policies it bought from Hartford Casualty Insurance Co.

The policies cover "oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services," court records show.

The U.S. 6th Circuit Court of Appeals, ruled: "Bausch & Lomb alleged that Vitamin Health made false and misleading statements about its own products. The district court was therefore correct in holding that the underlying action could not be interpreted to include an explicit disparagement claim."

DOCKET



EMPLOYEE FIRED FOR MISCONDUCT DUE COMP

An employee who injured his back at work is entitled to workers compensation temporary total disability benefits even though he was fired for misconduct, the Indiana Court of Appeals ruled.

The worker injured his back and work, and later got into a verbal altercation with his supervisor regarding his back pain and a lack of work restrictions. The company ultimately terminated his employment.

The appeals court says the man's inability to work was related to his injury, not his termination, therefore preserving his eligibility for comp benefits.

TEXAS ROADHOUSE SETTLES EEOC CASE

The U.S. Equal Employment Opportunity Commission reached a \$12 million settlement of an age discrimination lawsuit filed against restaurant chain Texas Roadhouse Inc.

The Louisville, Kentucky-based chain was accused of discriminating against applicants for "front-of-the-house" positions, such as servers and hosts, who were 40 or older. The EEOC said the consent decree resolving the case will identify and compensate individuals affected between January 2007 and December 2014.

The company said in a statement: "The settlement was not an admission of guilt but rather a business decision. ... Texas Roadhouse is and always will be an equal opportunity employer."

HUSBAND CAN'T SUE FOR WIFE'S MURDER

Workers compensation is the exclusive remedy for the husband of a woman who was murdered while working at a Virginia apartment complex, and therefore he can't sue the owner and manager of the complex for negligence, a U.S. District Court judge in Virginia ruled.

The judge found that the worker, who was killed in a robbery, was targeted as an employee, not out of a personal relationship with her assailant and that her death occurred in the course of her employment.



Art Lynch became CEO of Bethesda, Maryland-based Coventry Workers' Comp Services, a unit of Aetna Inc., in November 2013 and is responsible for Coventry's overall revenue, operations, networks, pharmacy and care management products. He spoke to *Business Insurance* Deputy Editor Gloria Gonzalez about the opioid epidemic, return-to-work programs and how technology can help improve treatment outcomes for injured workers. Edited excerpts follow.

Q What do you see as the key issues in the workers compensation space these days, and how that has evolved over the past three to five years?

A There have been a number of changes that are looking to set limits on the initial supply of opioids that injured workers can receive and regulations that are causing prescribers to access (prescription drug monitoring programs) to help control the number of injured workers initially exposed to opioids. And different states are looking at those types of issues as well as the adoption of formularies for certain high-cost opioids and compounds.

Separately, for quite a while we were all wondering what was going to be happening with the Affordable Care Act and what that might do to the supply of physicians in the workers compensation space.

Q Let me follow up on that point. I'm curious how you deal with the uncertainty, how that affects how you think about this issue and how you can prepare for any impacts with regard to injured workers given that uncertainty.

A We're a division of Aetna, and Aetna is staying very closely involved in what's happening on the federal level. We have open lines of communications with the regulatory folks within Aetna so that we are staying as up-to-date as we possibly can with what's going on. That being said, until there's more concrete not only legislation but also rule adoption, it's going to be very difficult to predict what we're going to have to do in reaction to the changes.

Q Can you give me a sense of the impact of the opioid epidemic from a workers comp perspective and how you've been trying to address this from your company's perspective?

A It goes without saying that the opioid epidemic is obviously a top public health concern in the United States, and so it's impacting the workers compensation community as well. And this is seen in that

Art Lynch

COVENTRY WORKERS' COMP SERVICES

roughly one out of every four prescriptions dispensed is an opioid. Beyond the extreme consequences of death and addiction that may occur, this epidemic is prolonging time away from work and driving up costs in the workers compensation system. Some of the strategies that are being utilized within the workers compensation space are early intervention and educational outreach to prescribers, patients and adjusters. We utilize drug utilization assessments and peer-to-peer outreach with providers and some specialty pharmacy nurse case management to help manage individuals at risk for opioid use and abuse.

Q What are you seeing in terms of return-to-work trends among employers?

A I think that employers and managed care companies are looking to promote greater advocacy and trust between the employer and the employee to help drive improved return to work.

If I was going to sit here and say what drives the most effective return-to-work programs, it would incorporate preventive interventions such as ergonomic evaluation, which we do here.

You have formal job analysis and transitional duties alternatives that are communicated, or at least written, in advance so that when an injury or illness occurs, the injured worker can very quickly know what to expect.

And then lastly, health and wellness support and care coordination built into their return-to-work program. It's looking more holistically. Yes, you've got an injury, but there may be other comorbidities that you have to take into consideration to treat that specific injury.

Q Are there any technologies that you're seeing being used to help deal with the issues in the workers compensation system, whether it's cost-related or perhaps improving the treatment outcomes for injured workers?

A I can tell you that we have worked on and deployed mobile apps and web portals to try to improve the communications. I'll say it's particularly between ourselves, nurse case managers and adjusters at this point in time. Integrated into the mobile apps and web portals are also increasingly advanced decision support tools to help make informed decisions and take actions on a case and even using push notifications to enable faster response. But beyond that, I think that the next step would probably be to look at the lack of adoption of telemedicine in our space. I think that as telemedicine gets more broadly adopted in the general health care space, it will see increasing adoption in the workers compensation space.

The opioid epidemic is obviously a top public health concern in the United States, and so it's impacting the workers compensation community as well. And this is seen in that roughly one out of every four prescriptions dispensed is an opioid.



MEDIA RISKS RISE AS PUBLIC TRUST FADES

High-profile critics increase
scrutiny of news providers

BY GLORIA GONZALEZ

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President Donald Trump has accused the mainstream media of being the enemy of the people, but the media's own enemy remains defamation lawsuits, with social media complicating the equation.

Mr. Trump's negative view of the media is shared by a sizable segment of the U.S. population, with their distrust being compounded by concerns over "fake news." These developments may have made media companies more vulnerable to litigation, experts say, raising concerns over increased liability exposures.

While media companies have traditional First Amendment protections as well as more recent laws to protect them from malicious or frivolous lawsuits that aim to chill free speech, media liability coverage can be bought for added protection.

"It's a really interesting time for news media, in particular having to do with the political environment and a focus on whether news media organizations are as truthful as I think we have always assumed," said Shannon Groeber, Philadelphia-based senior vice president for JLT Specialty USA. "They have been held to the highest standard of providing factual, accurate and cross-referenced information for as long as the First Amendment has been protective and then all of a sudden they

are under intense scrutiny. That also has to do with the introduction of non-traditional media companies and the accessibility through social media for any organization to provide content without reaching the same standards as some of the larger, traditional or more established media companies."

Americans' trust and confidence in the mass media "to report the news fully, accurately and fairly" has dropped to its lowest level in Gallup Inc. polling history, with only 32% saying they have a great deal or fair amount of trust in the media, according to a September 2016 report, a drop of eight percentage points from the previous year.

"There is a growing group that has an inherent distrust of the media," said Emily Caron, vice

HULK HOGAN'S VICTORY OVER GAWKER RAISES STAKES FOR LIABILITY

Growing public distrust has resulted in increasing exposure for media companies, as evidenced by the lawsuit former professional wrestler Hulk Hogan won against Gawker Media L.L.C.

In March 2016, a six-person jury awarded \$60 million to Terry Gene Bollea, aka Mr. Hogan, for emotional distress and \$55 million for economic damages, after Gawker in 2012 published a one-minute, 41-second edited sex tape. The jury then slapped another \$25 million in punitive damages on Gawker founder Nick Denton.

A tort claim can be filed for public disclosure of private facts, which means that media organizations can be found liable if the publication of private facts is offensive to a reasonable person, according to lawyers.

Newsworthiness is a "complete bar to liability," except when it comes to the disclosure of such private information, said Lee Brenner, Los Angeles-based chair of the media and entertainment practice group of law firm Kelley Drye & Warren L.L.P.

"One of the issues that goes into that is the extent to which an individual voluntarily took a position of public notoriety," he said. "Did they inject themselves into the public? Did the person give up some of their privacy? Just because you're a celebrity doesn't mean you give up



REUTERS

Terry Bollea, better known as Hulk Hogan, stands in court during his trial against Gawker Media.

all of your privacy."

Although Mr. Denton initially vowed an appeal, the case was later settled for \$31 million after Gawker filed for Chapter 11 bankruptcy in June 2016.

"The folks at Gawker were not in a position to fight it anymore, and the bankruptcy group ended up really driving the resolution of the case rather than taking it to appeal," said Emily Caron, vice president of media

liability claims for entertainment division for OneBeacon Insurance Group Ltd. based in Overland Park, Kansas.

"Those of us who were following it feel like there were some very compelling and strong arguments that could have been successful on appeal, but we'll never know."

The Gawker case does highlight the importance of engaging attorneys when there are questions about the legality of publishing information — even if the answer isn't always clear-cut, according to experts.

"Reasonable lawyers who practice in this area don't even agree among themselves whether or not it was appropriate to publish the video," Mr. Brenner said. "The First Amendment protects matters of public concern, but there's less rigorous First Amendment protection for purely private matters. Sometimes you don't publish. You have to make a choice."

Mr. Bollea's lawsuit was bankrolled by billionaire investor Peter Thiel, whose sexual orientation was allegedly outed by Gawker. George Freeman, executive director of the Media Law Resource Center in New York, called Mr. Thiel's funding of the case "nefarious" and done "for the purpose of destroying a media entity which he doesn't like. That is a very dangerous threat."

Gloria Gonzalez

president of media liability claims for the entertainment division for OneBeacon Insurance Group Ltd. based in Overland Park, Kansas. "Whether that is warranted or not, it is causing a shift, particularly when dealing with juries. This whole phenomenon of fake news, which used to be satire, but as we saw in the election, people are unable to discern what is fake news and what is real. It's really undercutting the credibility of what real journalists do, which I see as a threat to the First Amendment and the media's role as the Fourth Estate in the government."

The distrust breaks down largely along partisan lines, with Republican trust and confidence eroding to 14% from 32% in the previous year, partly due to the belief that Mr. Trump received unfair or negative media attention. Democrats and independents generally have more trust and confidence in the media, with their levels declining only three-to-four percentage points.

George Freeman, executive director of the Media Law Resource Center in New York, said he did not believe Mr. Trump's accusations — such as his numerous Twitter posts referring to the "fake news media" — has led to more libel litigation, "but to have a more and more polarized situation with Trump supporters who think the media is terrible is not a healthy situation and could potentially lead to more lawsuits."

The center has not been able to track the overall number of cases filed against media organizations because of decentralized court systems, but found the number of cases going to trial against media defendants has decreased significantly since the 1980s. And anecdotally, Mr. Freeman, the former assistant general counsel for the New York Times, said there has been a decline in litigation against the newspaper

— confirmed by a Times spokesperson — and other major media outlets.

However, media liability insurers, brokers and attorneys are concerned about the effect of the anti-media rhetoric.

"I've seen defamation claims booming lately and attacks on the media as well," said Lee Brenner, Los Angeles-based chair of the media and entertainment practice group of law firm Kelley Drye & Warren L.L.P. "We have an administration that has basically made no bones about the fact that he has contempt for the press."

First Lady Melania Trump has also been involved in disputes with the press, winning a financial settlement and an apology from one of Britain's largest newspapers. She sued Mail Media Inc. in New York in February for "false, salacious and highly offensive statements" made in an August 2016 story in the Daily Mail that repeated past allegations that the modeling agency she worked for was also an escort service. The parties settled the litigation in mid-April, with the media company paying a reported \$2.9 million in damages and costs.

"We accept that these allegations about Mrs. Trump are not true and we retract and withdraw them," the media company said in a statement. "We apologize to Mrs. Trump for any distress that our publication caused her."

But the biggest media liability case in recent years was *Bollea v. Gawker*, filed by Terry Gene Bollea, better known as professional wrestler Hulk Hogan, who sued New York-based Gawker Media L.L.C. in December 2012 for invasion of privacy over the media outlet's publication of a sex tape. The \$140 million jury award in favor of Mr. Bollea rocked the media world and forced Gawker into bankruptcy protection in June 2016 (see related story).

The First Amendment

Freedom of the press protections were established by the First Amendment and in subsequent case law, particularly the U.S. Supreme Court's 1964 decision in the *New York Times v. Sullivan* case which required public figures to prove actual malice in libel and defamation cases.

"The first line of defense will be the judges," Ms. Caron said. "If the judges are inclined to stick with the *New York Times v. Sullivan* standard and are able to themselves discern fake news from real news, things should be fine. But if there becomes more confusion, I could see that muddying the waters and allowing more cases to go through to a jury."

The actual malice standard has been reaffirmed in numerous cases, including by the Texas Supreme Court in January in *Wade Brady v. Leanne Klentzman and Carter Publications Inc.* The case emanated from an article that indicated that a local police chief intimidated officers on behalf of his son who was allegedly drinking and driving. The jury, after being erroneously

instructed that the media defendants bore the burden of proving the statements were substantially true, found in favor of the plaintiffs. But the state Supreme Court determined the matter to be of public concern in overturning the jury award to Mr. Brady and observed that courts have declined to get involved in deciding the newsworthiness of specific details or making editorial decisions for the media.

"I think one of the important takeaways in that case was that the (state) Supreme Court made clear, at least with a media defendant and a story involving a matter of public concern, the plaintiff bears the burden of proving falsity rather than the defendant having to prove truth," said Tom Williams, a Fort Worth, Texas-based partner at law firm Haynes and Boone L.L.P.

More than half of U.S. states, including California and Texas, now also have anti-SLAPP laws on their books. Strategic Lawsuit Against Public Participation are lawsuits designed to censor, intimidate

See MEDIA page 18

LIBEL SCORECARD

The number of cases filed against the media that go to trial has decreased dramatically over the past 36 years, but large damage awards have risen significantly.

- Only 38 trials were held against media defendants between 2010-15, down from 266 in the 1980s, 192 in the 1990s and 124 between 2000-09.
- A defense verdict was reached in 15 out of 36 trials, or 41.7%, in the 2010-15 period — a number that does not include hung juries — almost identical to the 36-year average of 41.4%.
- Defamation is the predominant claim made against the media, brought in 87.7% of all cases and representing the sole claim in 73.1% of cases. False light is the second most frequent claim, made in 9.2% of all cases, while invasion of privacy is third in 5.2% of cases.
- Media defendants are equally likely to prevail in defamation and false light claims, with a 40% victory rate in both types of cases, and fared slightly better on invasion of privacy, winning 46.9%.
- Historically, 69% of initial awards have been under the \$1 million mark, but the percentage of awards at or above that level has increased from 24.2% in the 1980s to 57.1% in the 2010s.

Source: Media Law Resource Center 2016 Report on Trials and Damages.



Healthcare trends bring uncertainties

Expert knowledge, long-term focus reduce the risks

Leo Carroll | Senior Vice President, Healthcare Professional Liability

Risk and uncertainty pervade the U.S. healthcare industry. Healthcare organizations ranging from large, integrated delivery systems to senior care facilities to managed care companies operate in highly challenging times.

As Congress moves to replace the Affordable Care Act, amid the ongoing industrywide transformation of the reimbursement system, the business of providing and paying for healthcare is under tremendous pressure. Organizations across the healthcare sector are facing complex operational and regulatory challenges. At the same time, these organizations have other exposures and need to protect their people and assets.

Healthcare executives can alleviate some of the burden of these complexities and challenges through insurance and risk management. The appropriate coverage, coupled with risk management support, can not only provide healthcare facilities and clinicians with valuable financial protection, but also peace of mind.

Risks Within the Trends

Let's consider some of the trends in healthcare today and the risks they can create:

Consolidation. Mergers and acquisitions have been a long-term trend as healthcare systems increasingly look for economies of scale, greater efficiency and leverage with payers. Data from the American Hospital Association shows that between 1998 and 2012, more than 1,100 multi-hospital system M&A deals occurred, an average of 74 consolidations per year. The market forces that drove consolidation in this period remain in play, continuing to motivate M&A deals among many different types of facilities. When systems merge, their property and liability exposures scale with them; therefore, they must consider how best to address the increased risks that such integrations can create.

Outpatient facilities. More organizations are delivering care in outpatient settings. Health Facilities Management's 2016 Hospital Construction study found that the number of new facilities in several areas doubled from the prior year, led by

medical offices, health system-branded general medicine and family care centers, immediate care facilities and ambulatory surgery centers. As health systems expand their reach into communities through outpatient facilities, they must provide consistent patient safety and care quality.

Financial uncertainty. The transformation of the healthcare reimbursement system, initiated by the Centers for Medicare and Medicaid Services, creates uncertainty in revenue streams for healthcare organizations. This, in turn, pressures organizations to adapt operations from the traditional fee-for-service model and toward population health. In short, organizations' financial risk is growing.

Technology adoption. Advances in technology and pressure by payers pushes clinicians in independent practice as well as those employed in hospital-owned groups to increasingly embrace electronic health records. Learning new processes and applying them consistently takes time and training. Should errors or omissions occur and result in patient harm, the liability risk can be high.

Non-physician providers. From nurse practitioners to physician assistants, a growing amount of healthcare is delivered by providers other than physicians. While this trend increases access to care for many people who are unable or unwilling to wait to book appointments with a physician, a likely outgrowth is an increase in medical professional liability exposure related to alternate providers.

Social media usage. Consumers frequently consult the Internet and social media for information on healthcare conditions and providers, and more providers are themselves reaching out to communicate with patients via these tools. This is a growing area, as patients seek non-traditional ways of connecting with providers, such as through telehealth consultations. Patient/provider communications outside official channels create risks such as: privacy concerns and missed diagnoses among other issues. Such risks can increase providers' liability exposure.

Increased life spans. Senior care facilities are on the front lines of this trend, providing a range

of healthcare services across extended periods as people live longer. Higher utilization of healthcare, particularly by patients with co-morbidities, makes long-term care even more challenging.

Benefits of knowledge

As the above-referenced trends in the industry demonstrate, healthcare is an increasingly complex industry. Risk officers have a more difficult job than ever, having to manage patient safety, while protecting their organizations' reputations by ensuring patients have a positive experience with the provider. The right insurance partner can help reduce that complexity by helping to provide stability in a dynamic and volatile environment.

Navigating uncertainty in the healthcare marketplace is best achieved with guidance from a partner like Berkshire Hathaway Specialty Insurance. We focus on the long-term, allowing us to know our customers and provide tailored solutions to specific problems faced by a particular operation. We value simplicity over complexity — a core company value. We seek to eliminate, reduce and avoid unnecessary complexity putting forward solutions based on the individual needs of the customers.

Empowered to provide service excellence, we listen to and engage with our customers both through our Customer Advisory Board as well as in one-to-one discussions where customers operate. All of these are part of our collaborative approach, which guides our underwriting and claims service, and is another reason customers choose to partner with us. Our goal is to facilitate connections between our customers, across industries, with the knowledge and solutions they need to focus on improving their businesses and achieving better outcomes for the people and communities they serve.

Leo Carroll is senior vice president, Head of Healthcare Professional Liability, at Berkshire Hathaway Specialty Insurance. He is responsible for the strategic growth and production of the group's Healthcare Professional products.



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COVER STORY

MEDIA

Continued from page 15

or silence critics, but these anti-SLAPP laws push back by allowing defendants to quickly move for dismissal and receive reimbursements of their legal fees if those motions are successful. Mr. Williams said the strong Texas statute, adopted in 2011, resulted in a reduction in claims in the state.

But Mr. Brenner expressed concern about the high settlement involved in the Melania Trump case, given that the neutral reportage privilege generally allows the media to report about allegations made, especially against public figures, even though he observed the protection isn't foolproof.

"I'm sure that it had its reasons, even though I continue to believe the Daily Mail had a strong neutral reportage privilege in this case," he said. "The media has a fairly wide berth to report about allegations that have been made against public figures like Melania Trump. Read in context, the Daily Mail was not vouching for the allegation that had been made against Mrs. Trump."

Media, cyber risk hand in hand

Media liability coverage is typically bought in tandem with cyber liability, particularly by large clients with \$500 million or more in revenues, leading to some volatility that might not otherwise exist, said David Finz, New York-based media product leader, senior vice president

and client advisor with the Marsh L.L.C. E&O Center of Excellence.

For "standalone media coverage, the capacity in the marketplace, the pricing, has been relatively stable," he said. "Not all markets that write cyber are necessarily willing to write media liability coverage, especially on a primary basis, so there is a finite number of markets that will write media. There has been some movement within the underwriting community of some talent from larger markets to some of the up-and-comers in this space, which may translate into additional opportunities for us as brokers to have alternate markets to write media on a primary basis."

Blending media liability and cyber coverage makes sense for many media companies because the evolution in the delivery of content, via streaming services or social media, introduces cyber risks to their operations, and they may also have subscriber information that could be targeted by hackers, including email addresses, passwords and credit card information, according to experts.

Outside of motion picture studios, which carry an increased risk from copyright infringement, it would be difficult to justify a client purchasing media coverage above \$50 million to \$100 million as most judgments would not reach that level, with the notable exception of the Gawker jury award, Mr. Finz said.

The Gawker case has not altered pricing or demand, but it may have triggered requests for additional information from underwriters about how content is cleared

and how media organizations evaluate the reliability of their sources and corroborate the information they receive, he said.

But the heightened exposure for media companies due to the political rhetoric could eventually effect pricing, Ms. Groeber said.

"I do think the political environment, as well as the evolution of cyber risk that we're experiencing right now, as well as some open cases that may impact case law going forward and uncertainty around how that might change, will impact rates over the next six to 18 months," she said. "Those companies that have experienced a really favorable rate environment should potentially consider budgeting for increases."

Media companies typically win libel cases either on summary judgment or appeal because of existing legal protections, but they still face claims that are costly to defend, according to insurers. More than 90% of OneBeacon's costs in its media segment are for defending their media insureds from these lawsuits, Ms. Caron said.

"We do look at the legal issues in every jurisdiction, but from an underwriting perspective, it's almost not the main issue for us because we're still going to have to incur the legal costs," said Angela Weaver, London-based media liability underwriter/media specialist for Beazley P.L.C.

Self-defense

Media organizations can rely on the First Amendment protections for news-gathering, but engaging in illegal activi-

ties such as fraud, misrepresentation, criminal trespass or gaining access under false pretenses will work against them, Ms. Caron said.

"If a regular person can't do it, then journalists should not be doing it either," she said.

Media companies should also use good sourcing and documentation in their stories and in some cases have them vetted by attorneys, according to experts.

"My view remains that the best legal strategy is still good journalism," said Mr. Williams of Haynes and Boone. "If the story is right and well-researched and well-prepared, you're usually going to be okay as a legal issue as well. That's been the advice for a long, long time, but I still think it's the best. What has changed is the demands of the business, the pressure to get things out more quickly. As with any other endeavor, that can sometimes lead to mistakes. But I don't think it changes the fundamentals."

However, media companies cannot shy away from their watchdog role for fear of litigation, experts say.

"People are very worried about Mr. Trump and some of his comments and dislike of the media," Mr. Brenner said. "The sky isn't falling. Nothing whatsoever has changed the fact that political speech is certainly a matter of public concern. I'm not seeing this huge risk to the First Amendment at this point. I'm personally much more concerned about media defendants getting too scared and self-censoring."

INSURERS SHUN USER-GENERATED CONTENT

User-generated content presents a growing and evolving exposure for traditional media companies — one that insurers do not have much of an appetite for covering.

A key risk for media outlets occurs when an individual posts an item on social media and news organizations report the item without following their traditional fact-checking processes, according to experts.

"We've seen organizations have to retract very quickly after jumping on a story, publishing it and realizing how embarrassing it was because they relied on something they thought was accurate and realistic and in some cases turned out not to be," said Thomas Srail, Cleveland-based executive vice president and tech media telecom practice leader, North America for Willis Towers Watson P.L.C.

Underwriters are examining the extent to which news organizations are moving away from traditional news-gathering policies and practices in the shift toward more real-time publication of news, particularly with the use of user-generated content, because that "could arguably raise the risk and raise the chance of litigation and liability," he said.

Underwriters confirmed they have serious concerns about this trend.

"One thing that clients need to watch out for is the appetite of insurers for user-generated content," said Angela Weaver, London-based media liability underwriter/media specialist for Beazley P.L.C. "It's not necessarily a

policy exclusion, but they should make sure the insurer understands what the business model is and to make sure if they do have any user-generated content that their liability for that is covered."

Underwriters previously asked for premoderation of user-generated content, but "that's just not feasible nowadays," due to the volume of content, she said.

A key risk management response is to quickly remove any offending items, said David Finz, New York-based media product leader, senior vice president and client advisor with the Marsh L.L.C. E&O Center of Excellence. When it comes to copyrighted material, the Digital Millennium Copyright Act of 1998 offers safe harbor provisions that can shield companies from liability specifically for copyright infringements made by their website's users as long as they have effective notice and takedown procedures and promptly remove the copyrighted material.

"There isn't necessarily a take-down prerequisite when it comes to other user-generated content that's perhaps libelous," Mr. Finz said. "If you're hosting comments or allowing users to upload content, it's imperative for media organizations to monitor their websites or chatrooms or whatever electronic forums that they're hosting to make sure that the content that's being posted does not create a liability for them."

Media companies cannot be sued for merely hosting defamatory comments online, per Section 230 of the federal



Communications Decency Act of 1996, but can be sued for repeating a defamatory statement posted in other forums, according to legal experts.

For example, a newspaper publisher would be liable for a defamatory statement contained in a letter to the editor it printed, even if the statement is attributed to the writer, said David Greene, civil liberties director and senior staff attorney with the Electronic Frontier Foundation in San Francisco. However, an online publisher would not be liable for defamatory statements by readers published in the comments section of a news story, but it would be at risk if it uses these comments as source material for its own story, he said. And there are exceptions to Section 230 protections, including the publication of intellectual property or federal criminal law violations such as child pornography, Mr. Greene said.

"It doesn't eliminate the risk, but it does make it more manageable," he said.

Gloria Gonzalez

WORKERS COMPENSATION REFORM



States grapple with opioid restrictions

BY LOUISE ESOLA

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Workers compensation experts say the industry is bracing for side effects and growing pains as more states aim to put opioid prescribing in check.

With new laws on how much can be prescribed and when, emerging drug formularies that do just the same and stricter prescription-monitoring programs — among a host of other reforms — employers and insurers are being forced to consider alternative therapies and patient advocacy as they grapple with how to provide pain relief for injured workers.

Some experts say they believe the politics of pain management have the potential to get ugly.

"There is going to be a lot of litigation," said Mike Farrand, Radnor, Pennsylvania-based senior principal of integrated casualty consulting with Willis Towers Watson P.L.C. "True reform will take about two years of litigation; any legislative

change has litigation around it."

Many states have either put parameters on opioid prescribing in place or are in the process of doing so.

For example, both New Jersey and Pennsylvania now limit first-fill prescriptions for opioids. As of April, Delaware and Ohio were well on their way to doing the same. California is proposing that its closed drug

INSIDE

► FLORIDA MULLS REFORMS

Court decisions trigger rate hikes and efforts to overhaul the Sunshine State's comp system. **PAGE 21**

► LARGEST COMP INSURERS

Data and trends on the largest workers compensation insurers, premiums and more. **PAGE 22**

► LAWMAKERS TACKLE COMP ISSUES

Legislatures across the U.S. consider reform proposals on costs, opioids and first responders. **PAGE 23**

MEDICAL MARIJUANA MAY HOLD PROMISE, BUT FEDERAL LAW CURTAILS RESEARCH

Can medical marijuana replace opioids? That is the question on the minds of those who deal with pain in workers compensation.

Anecdotally, some say yes.

Several states such as New Mexico have seen decreases in opioid use with the widespread availability of medical marijuana for pain management.

Meanwhile, given the lack of research into medical marijuana — including for side effects, effectiveness and dosage — others say the workers compensation industry is more cautious.

"We are all wrestling with the same quandary," said Lisa Anne Forsythe, Sacramento, California-based director of workers comp government relations for Coventry Health Care Inc.

"The states can do what they want, but as long as it remains illegal at the federal level ... that will be a challenge for payers," Ms. Forsythe said.

So far, 29 states and the District of



REUTERS

Anecdotal evidence supports substituting medical marijuana for prescribed opioids, but inconsistent laws stand in the way of research.

Columbia have legalized marijuana for medicinal use.

And several other states are considering adoption of regulations that would pave

the way.

But the federal government's stance that medical marijuana remains an illegal substance — along with that of the new

presidential administration, which has voiced skepticism — has stalled further research on medical marijuana, which has forced insurers to tread lightly as the industry adopts an evidence-based approach to health care.

Nikki Wilson, Coventry's Omaha, Nebraska-based pharmacy product director, said medical marijuana studies "don't go through the same process — consistency and potency is questionable."

Chrystal Woodard, Tampa, Florida-based senior consultant for claims with Aon Risk Solutions, said replacing opioids with marijuana "is not as easy as people think it is."

The medicinal makeup is not the same as that of recreational marijuana, she said. And then there is the accessibility issue, she added.

"It very well could reduce the amount of narcotics prescribed," she said. "We just don't know."

Louise Esola

OPIOID PRESCRIBING AT A GLANCE

- Overall opioid spending trend decreased 13.4%.
- 50.9% of injured workers had an opioid prescription claim in 2016.
- 25% of injured workers used opioids for 30 days or more in 2016.
- In 2016, 13 of the top 25 drugs for injured workers were opioids.

Source: Express Scripts Holding Co. 2016 Drug Trend Report

societal side, the states, the population as a whole — are saying, 'Look, (opioids) are out of control."

For an industry whose purpose is to manage treatment and heal injured workers, the road will be challenging, experts warn. Chrystal Woodard, Tampa, Florida-based senior consultant for claims with Aon Risk Solutions, predicts the problems will arise with older claims where injured workers are used to getting opioids clear of the review processes some new regulations now call for.

"Where we are going to see the biggest problem is with the older claims where people have been on these medications for years and years," she said. "Clearly there will be a lot of litigation as a result of it. It's tough because you just can't stop someone (who is taking) narcotics."

Insurers and employers are already starting to introduce weaning programs — all to avoid expensive legal entanglements, Ms. Woodard said.

Dr. David Ross, a Plantation, Florida-based neurologist in private practice who co-authored a white paper on misdiagnoses and pain in workers comp for Lockton, said much of the lingering problem with opioid prescribing — and the issues that will likely arise when fewer doctors are willing to write prescriptions for powerful and addictive pain medication — has to do with the societal conditioning and the attitudes toward pain management.

"What has been contentious will increase in contention," he said.

Attitudes on pain will have to shift for the industry to work its way past the complications, he added.

Legislation "is going to require doctors to retrain and understand emerging knowledge about pain," he said. "In the meantime, people are going to suffer unless doctors and others start understanding."

Dr. Ross and others point to a rash of recent studies and guidelines — including those advocated by the American Medical Association — that say opioids do not help with chronic pain. He said opioids for chronic pain tend to mask the underlying cause of the pain, much of which can fall under psychological and emotional categories.

"(Research) shows that in most cases the pain isn't real and what the opioids are doing is not having a biological effect — it's emotional," he said.

The United States is several years into tackling the problem, and so far opioid prescribing is down, according to several studies and experts. Many observers predict the trend will continue despite the muddy landscape where injured workers may feel shortchanged and payers find themselves grappling with the long-term consequences of haphazard opioid prescribing.

In a study released in April, St. Louis-based pharmacy benefit manager

Express Scripts Holding Co. said it lowered opioid drug spending for workers compensation payers by 13.4% in 2016 (see box), due in part to legislative changes.

"We are definitely seeing impact (coming from) multiple directions, whether it is formularies or guidelines," said Brigitte Nelson, Scottsdale, Arizona-based senior vice president of workers compensation clinical management at Express Scripts. "We definitely expect this (decline in opioid prescribing) to continue."

"There is a pendulum where opioids were very far off, given out for minor situations," said Mr. Farrand of Willis Towers Watson. "The doctors and the pharmaceutical companies created this problem and now the pendulum is swinging the other way. Hopefully it will come back to the middle so people can get what they need."

Erica Fichter, Sunrise, Florida-based senior vice president of medical management for Broadspire, the third-party administrator unit of Crawford & Co., said the industry is shifting into the realm of alternative therapies and patient advocacy — a move that could help the industry avoid the legal mess that can come with change.

"There are a lot of alternative therapies that can be used to control pain outside of medication," including cognitive behavioral therapy, patient education and physical therapy, she said. "As long as (insurers) take the customer-care perspective and explain what is happening and provide care holistically, as long as they are looking at solutions (for pain), it does reduce the chance of litigation."

formulary, which will go into effect July 1, keep opioids off the preferred list for pain medications. New York's budget for 2018 includes the creation of a formulary. Other states such as Florida and Louisiana were considering similar moves as of April.

"(What) I expect to see continue is the greater connectivity of what neighboring jurisdictions are doing and greater uniformity," said Lisa Anne Forsythe, Sacramento, California-based director of workers comp government relations for third-party administrator Coventry Health Care Inc. "States are really keenly interested in knowing what other states are doing."

Meanwhile, 28 states and Washington, D.C., have now legalized marijuana for medicinal use, an alternative some say will help further curb opioid reliance for pain management (see related story).

"There's a lot of pressure from the federal government" to tackle opioids, said Keith Rosenblum, Kansas City, Missouri-based senior strategist for workers comp risk control for Lockton Cos. L.L.C. "Every avenue — from the medical associations,



Court rulings, big rate increases concentrate reform efforts in Florida

BY JOYCE FAMAKINWA

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Florida's workers compensation landscape has garnered attention for its legislative activity in response to major court decisions that have upended the system over the past year.

The state is considering various reforms to address elements of its workers comp law that were struck down in separate Florida Supreme Court decisions in 2016, *Bradley Westphal v. City of St. Petersburg* and *Marvin Castellanos v. Next Door Co. et al.*

The National Council on Compensation Insurance Inc. initially sought a 19.6% increase in state workers comp rates in response to these court decisions last year, but the Florida Office of Insurance Regulation approved only a 14.5% rate increase that took effect last December.

The vast majority of the higher rate filing was "due directly to the Florida Supreme Court's *Castellanos* decision striking down the statutory attorney fee schedule, and that highlights why it's so critical that the legislature act to address the attorneys fee cost drivers effectively and as soon as possible," said Ronald Jackson, Atlanta-based vice president for state affairs, Southeast region at the American Insurance Association.

The 14.5% rate increase is estimated to increase annual premiums over \$528 million, \$368 million of which is assignable to *Castellanos* in the first year, according to a state House Commerce Committee staff analysis provided by the Florida Office of Insurance Regulation.

"The portion attributable to the cost impact of *Castellanos* is controversial and is expected to continue to develop in subsequent years, which would lead to additional rate increases. The actual impact on attorney's fee related costs will not be known for some time," according to the analysis.

The Florida Office of Insurance Regulation ultimately approved a 14.5% increase,



but also acknowledged that, depending on stakeholder behavior in the workers comp system, additional increases could be necessary in 2017, said Trey Gillespie, Austin, Texas-based assistant vice president of workers compensation for the Property Casualty Insurers Association of America.

The rate increase is being challenged under Florida's Public Records Act, and that case is pending before the Florida First District Court of Appeals.

Reform bills recently proposed in Florida include workers comp opt-out and a prescription drug formulary.

It "seems like a drug formulary is on the horizon in Florida," said Desirée Tolbert-Render, Orlando, Florida-based assistant vice president, national tech compliance for workers comp at Sedgwick Claims Management Services Inc.

Last December, Jacksonville Beach, Florida, state Rep. Cord Byrd, also proposed a bill that would allow companies in Florida to opt-out of purchasing workers comp insurance, but the bill was never formally introduced and experts say that Florida adopting opt-out for workers comp is unlikely.

"All the other states that have tried to put it through have failed. If I was a betting

man I would say opt-out is not something that I think would move forward," said Dennis Tierney, New York-based national director of workers compensation claims for Marsh L.L.C.

"Don't expect any movement on the opt-out issue," Mr. Jackson said.

Other workers comp reform legislation in Florida includes H.B. 7085, which would extend total combined temporary wage replacement benefits from 104 weeks to 260 weeks, cap attorneys' fees at \$150 an hour and make injured workers responsible for remaining attorney fees. The bill has been amended since its introduction and has received support from the business community and organizations such as AIA.

However, concerns about S.B. 1582 remain because while it provides for a transition to loss-cost ratings, it will not address the primary drivers of workers comp costs: excessive litigation and attorney fees, Mr. Jackson said.

S.B. 1582, introduced by Sen. Rob Bradley, would codify *Westphal*, increasing the time limit on temporary partial disability and temporary total disability benefits from 104 weeks to 260 weeks and change workers comp attorney fees to address *Castellanos*, which ruled that a cap on workers comp claimant attorney fees was unconstitutional.

"Both bills have opposition and challenges in Florida," said Ms. Tolbert-Render of Sedgwick. "It could be considered a good sign that neither side — the trial bar, the claimant attorneys or those who say they represent injured workers — are satisfied with the proposal. We have statewide elections in Florida next year and the question then becomes 'is there enough of a spirit of compromise?' Time will have to tell."

Regardless of any legislative changes, the way that claims are handled in Florida has already changed, according to experts.

"The whole theme is litigation avoidance, even with some of these laws passing ... there is still a huge increase in the exposure in Florida," Mr. Tierney said. "We have to be cognizant in the way we go about handling claims in Florida and doing everything we can to avoid litigating claims that don't need to be litigated."

LAWYERING UP

Attorney involvement represents approximately 25% of workers compensation lost-time claims costs in Florida. Fees shown in millions per fiscal year.

	2011-12	2012-13	2013-14	2014-15	2015-16
Claimant attorney fees	\$152.8	\$151.9	\$141.8	\$136.2	\$136.5
Year-over-year percentage change	(2.69%)	(0.63%)	(6.60%)	(4.00%)	0.21%
Defense attorney fees	\$242.4	\$240.9	\$237.4	\$234.6	\$242.1
Year-over-year percentage change	(6.51%)	(0.64%)	(1.47%)	(1.17%)	3.21%

Source: Florida Office of Judges of Compensation Claims

KEY LEGAL DECISIONS BEHIND EFFORTS TO CHANGE STATE'S COMP SYSTEM

Two 2016 Florida Supreme Court cases are the main drivers of workers compensation reform proposals in the state. In *Marvin Castellanos v. Next Door Co. et al.*, the Florida Supreme Court ruled 5-2 that Florida's mandatory attorney fee schedule was unconstitutional.

Marvin Castellanos was injured while employed by Miami-based Next Door Co. Through the assistance of an attorney, Mr. Castellanos received workers comp benefits. However, because Florida

law limits a claimant's ability to recover attorney fees to a sliding scale based on the amount of workers comp benefits obtained, the fee awarded to Mr. Castellanos' attorney amounted to only \$1.53 per hour for 107.2 hours of work, according to court documents.

The state Supreme Court decided that the attorney fee provision violated due process under state and federal law and impeded an injured worker's ability to gain legal representation.

In *Bradley Westphal v. City of St. Petersburg*, the Florida Supreme Court ruled that the state's 104-week cap on temporary total disability benefits was unconstitutional.

The case was based on Bradley Westphal, who was a firefighter and paramedic for the city of St. Petersburg, Florida. In 2009, Mr. Westphal suffered back and knee injuries while fighting a fire.

Mr. Westphal was denied permanent total disability benefits when the 104-week

cap on TTD benefits ended because his condition had not reached maximum medical improvement, according to court documents. Therefore, Mr. Westphal was left without comp benefits for a period of time.

The Florida Supreme Court ruled that the 104-week TTD time limit was unconstitutional because the "statute deprives a severely injured worker of disability benefits at a critical time," according to court documents.

Joyce Famakinwa

SPECIAL REPORT

LARGEST WORKERS COMPENSATION INSURERS

Ranked by 2016 direct premiums written¹

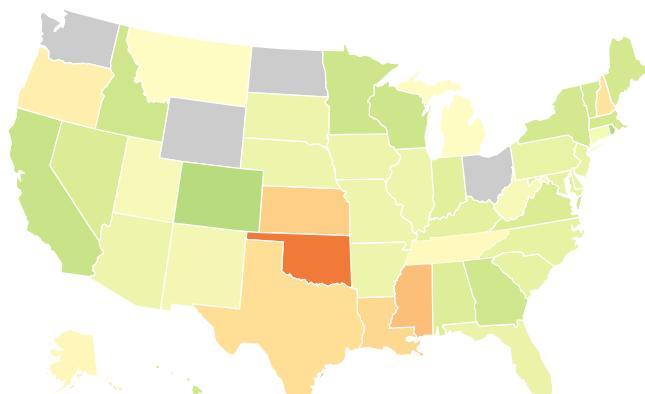
2016 rank	2015 rank	Company/group name	2016 direct premiums written	% increase (decrease)	Market share
1	1	Travelers Cos. Inc.	\$4,427,995,308	(0.9%)	7.6%
2	2	Hartford Financial Services Group Inc.	\$3,329,238,805	0.1%	5.7%
3	4	AmTrust Financial Services Inc.	\$3,109,384,749	13.3%	5.3%
4	3	Zurich Insurance Group Ltd.	\$2,841,990,910	(0.6%)	4.9%
5	6	Berkshire Hathaway Inc.	\$2,705,515,643	9.0%	4.6%
6	14	Chubb Ltd.	\$2,558,394,696	114.5%	4.4%
7	8	State Insurance Fund	\$2,437,552,497	0.0%	4.2%
8	7	Liberty Mutual Insurance Co.	\$2,404,126,836	(3.1%)	4.1%
9	5	American International Group Inc.	\$2,145,750,320	(16.2%)	3.7%
10	9	State Compensation Insurance Fund	\$1,612,049,875	(1.6%)	2.8%
11	10	Old Republic Insurance Corp.	\$1,448,602,801	0.3%	2.5%
12	11	W.R. Berkley Corp.	\$1,438,454,732	3.2%	2.5%
13	12	American Financial Group Inc.	\$1,304,362,609	(0.8%)	2.2%
14	15	Blue Cross Blue Shield of Michigan	\$1,291,794,983	13.4%	2.2%
15	16	Texas Mutual Insurance Co.	\$948,660,159	(12.8%)	1.6%
16	17	Fairfax Financial Holdings Ltd.	\$946,555,664	4.6%	1.6%
17	18	American Assets Group	\$935,957,678	13.9%	1.6%
18	19	CNA Financial Corp.	\$755,242,599	3.6%	1.3%
19	20	Employers Holdings Inc.	\$690,958,097	0.9%	1.2%
20	21	Pinnacol Assurance	\$624,536,243	(1.3%)	1.1%
21	Not ranked	Arch Insurance Group Inc.	\$518,114,713	NA	0.9%
22	22	New Jersey Manufacturers Insurance Group	\$517,548,791	1.6%	0.9%
23	25	SAIF Corp.	\$499,868,522	6.5%	0.9%
24	Not ranked	The Starr Group	\$492,746,056	NA	0.9%
25	24	Sentry Insurance Group	\$487,813,684	2.3%	0.8%

¹Based on filings received by March 27, 2017

Source: National Association of Insurance Commissioners

CHANGES IN WORKERS COMPENSATION DIRECT WRITTEN PREMIUM¹ GROWTH BY STATES

Between 2014 and 2015, countrywide private insurer direct written premium grew 4.3%.



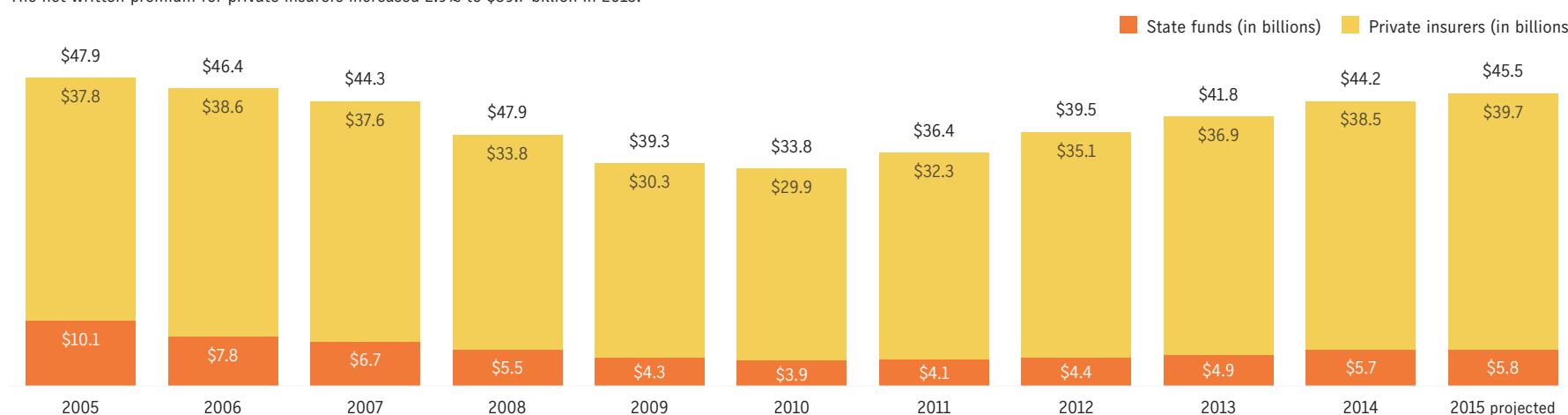
State	% increase (decrease)	State	% increase (decrease)
Alabama	5.5%	Mississippi	(4.8%)
Alaska	(0.6%)	Missouri	1.9%
Arizona	2.9%	Montana	0.2%
Arkansas	2.5%	Nebraska	1.7%
California	8.1%	Nevada	5.8%
Colorado	10.3%	New Hampshire	(2.4%)
Connecticut	2.8%	New Jersey	2.1%
Delaware	5.2%	New Mexico	2.0%
District of Columbia	25.1%	New York	6.9%
Florida	3.5%	North Carolina	4.0%
Georgia	7.3%	Oklahoma	(9.6%)
Hawaii	6.7%	Oregon	(1.3%)
Idaho	7.4%	Pennsylvania	3.7%
Illinois	2.7%	Rhode Island	11.0%
Indiana	4.9%	South Carolina	3.9%
Iowa	2.9%	South Dakota	2.6%
Kansas	(3.8%)	Tennessee	(0.3%)
Kentucky	4.4%	Texas	(2.8%)
Louisiana	(3.3%)	Utah	1.3%
Maine	6.1%	Vermont	6.2%
Maryland	3.9%	Virginia	6.0%
Massachusetts	6.4%	West Virginia	1.4%
Michigan	0.2%	Wisconsin	7.6%
Minnesota	8.0%		

¹Percentage changes are based on private carrier data only and exclude monopolistic state funds.

Source: National Council on Compensation Insurance Inc.

WORKERS COMPENSATION NET WRITTEN PREMIUM BY YEAR FOR PRIVATE INSURERS AND STATE FUNDS

The net written premium for private insurers increased 2.9% to \$39.7 billion in 2015.



Source: National Council on Compensation Insurance Inc.

Lawmakers tackle comp issues head-on

BY KRISTEN BECKMAN
kbeckman@businessinsurance.com

Legislatures across the United States during the first quarter of 2017 considered reform proposals that focused on containing workers compensation costs, addressing the growing prescription opioid problem and pondering increased coverage for first responder mental stress injuries.

"One of the major trends in 2017 is that a lot of legislatures are looking seriously at ways to effect positive medical cost containment," said Steve Bennett, associate general counsel and director of workers compensation programs at the Washington-based American Insurance Association.

Workers comp reform efforts are typically political, said Christie Hayes, a Johnson City, Tennessee-based shareholder with law firm Baker, Donelson, Bearman, Caldwell & Berkowitz P.C. She said legislators feel pressure to enact regulations designed to make their states more attractive to employers and competitive with neighboring states.

Adam Brackemyre, vice president of state government relations at the Washington-based Self-Insurance Institute of America Inc., agreed that workers comp reform is often politically driven and in many cases is a result of fraud the state is trying to address through legislation.

"I would say generally we see more reform attempts in the legislative period just after an election," said Mr. Brackemyre. "The bigger issue is the exploding cost of workers comp. If a program is growing, they need to address how to fund it."

Several common themes appeared in workers comp reform proposals being considered nationwide.

Drug formularies

Formularies adopted by Texas and Washington state have served as prototypes for formularies being implemented or considered by other states. California is currently implementing a workers comp drug formulary under legislation it passed in 2015, said Jeremy Merz, Sacramento, California-based vice president of AIA's Western region. That formulary is expected to be fully implemented by July 1.

Last month, New York passed a state budget that includes a workers comp drug formulary, and Louisiana also is considering two separate bills that would create a drug formulary, both of which were still under consideration late last month.

AIA's Mr. Bennett noted drug formularies are also being discussed by lawmakers in Illinois, Kentucky, Nebraska and Pennsylvania.

Opioids

Beyond formularies, some states have aimed to implement other ways to curtail



abuse and addiction stemming from opioid use. For instance, a joint-legislation bill introduced in North Carolina would require doctors to prescribe opioids electronically and would limit prescriptions to a five-day supply, among other proposed reforms. Both the state House and Senate are calling the legislation the Strengthen Opioid Misuse Prevention Act of 2017, or STOP. Drafts of H.B. 243 and S.B. 175 are identical and would require prescribers and pharmacies to adhere to new reporting standards that include electronic prescriptions, investigations into the patient's prescription history and, in some cases, documented rationale for prescribing.

Benefit limits

Iowa attracted national attention in March when lawmakers introduced a workers comp reform bill that would have limited benefits for older workers at retirement age. The bill ultimately passed when that language was removed, but limitations on compensation for shoulder injuries, as well as closer scrutiny when intoxication is suspected to have resulted

in a work injury, were passed by the Iowa Legislature. The bill was signed into law by Iowa Gov. Terry Branstad, who said the law rebalanced the state workers comp system to ensure injured workers are fairly compensated but abuses are curtailed.

New Mexico also sought to limit workers comp total temporary disability and permanent partial disability benefits for certain injured workers who leave their current employers for another company or fail to accept a job offer. Senate Bill 155 also ends disability benefits for workers terminated for misconduct unrelated to the workplace injury. Signed into law by Gov. Susana Martinez and effective July 1, it is expected to result in minimal administrative costs.

Opt-out

On the Arkansas Senate docket since early March is Senate Bill 653, a shell bill that calls for an optional alternative system for workers comp health, disability and death benefits outside of the state system to finance and administer benefits for injured workers. Late last month, there had been no movement on the bill.

AIA's Mr. Bennett said there has been a noteworthy absence this year in workers comp opt-out legislation in other states. Opt-out efforts typically gain momentum in at least a couple of states each year, he said, noting that most states this year have focused instead on more targeted initiatives.

First responders

Several states took up legislation aimed at increasing coverage for first responders by lowering the bar for receiving benefits for mental health injuries or establishing presumption for PTSD and certain cancers.

New York was a notable example when it included a provision in its 2017-18 budget that would make it easier for first responders to receive workers comp disability benefits for mental injuries.

Montana also saw progress on a bill that would provide coverage for presumptive illnesses for firefighters under specific circumstances. That bill was passed by the state Senate but tabled by its House of Representatives.

NOTABLE REFORM PROPOSALS

Iowa — H.F. 518, a bill that includes stricter rules about the burden of proof for intoxication resulting in workplace injury and disability resulting from shoulder injuries, was signed into law in March.

Montana — S.B. 116, passed in April, would bar benefits for claimants who failed to disclose prior medical problems.

New York — The state's 2017-18 budget includes the creation of a drug formulary and caps the time limit for an injured worker to reach maximum medical improvement at 2½ years.

NEW YORK ADOPTS WORKERS COMP DRUG FORMULARY

New York's 2017-18 budget agreement, reached nine days beyond the state's April 1 deadline, incorporated several workers compensation reforms, including a drug formulary requirement that topped the priority list for several insurance industry and employer groups.

Alison Cooper, vice president for the Washington-based American Insurance Association, pointed to recent studies that show formularies are effective at reining in prescription drug costs, including a 2014 study by the Cambridge, Massachusetts-based Workers Compensation Research Institute that suggested a drug formu-

lary in New York could reduce drug costs by 29%, and a 2016 study from the Boca Raton, Florida-based National Council on Compensation Insurance Inc. that predicted formularies can save at least 10% in drug costs.

The budget also caps the time limit for injured workers to reach maximum medical improvement at 2½ years by providing a credit to employers for temporary payments beyond that threshold, and guarantees development of new impairment guidelines that adhere to modern medical evidence and outcomes, employer advocates said. Another provision of the budget relaxes requirements related to first responder

workers comp claims for mental injuries due to work-related stress.

The New York State AFL-CIO called some of the workers comp reforms that were initially proposed in the budget an "all-out assault on injured workers" by cutting benefits for amputees, workers killed on the job and those who are permanently injured.

But President Mario Cilento said the organization successfully worked to maintain "benefits for the most seriously injured workers, which will allow them to continue to lead their lives with dignity after being injured on the job."

Kristen Beckman

Ten considerations for projecting self-insured workers compensation losses

BY CARLY ROWLAND
AND RICHARD FRESE

Projecting self-insured workers compensation losses is a complex process due to its long-tail nature and the many factors that can significantly impact the final costs of claims. A proper actuarial review can provide valuable insight and tailor estimates to each unique self-insurance program. The following discusses the top 10 considerations used by actuaries for projecting self-insured workers compensation losses and integrating them into the projection process.

1. Collecting claims and exposure data

Claims and exposure data are the key inputs when projecting self-insured losses. It is important to keep clean, organized records of a program's historical data because inconsistencies can compromise the accuracy of results. Treatment of subrogation and other recoveries should be clearly and consistently applied. Likewise, allocated loss adjustment expenses should be treated consistently if losses are limited to retention, as they may not erode the limit depending on the excess insurance or large deductible policy purchased. In addition, policies may include other limits or deductibles, which need to be captured. Payroll is often chosen as a preferred exposure metric because it directly correlates with the cost of benefits provided to injured employees, but it can be inconsistently measured. Items excluded should remain constant over time, such

Workers compensation exposures have very long tails. For example, a minor back injury today may require back surgery five years from now. An experienced actuary will factor in a provision for incurred but not reported costs to protect against these late claims cost increases.

as bonuses and vacation time. Because exposures are used on a relative basis to measure change in program size, a change in reporting of exposures can signal a false change in program size.

2. Loss development

Loss development serves as the foundation for many estimation methods used by actuaries when selecting ultimate losses. Data is usually organized into so-called loss development triangles, which are constructed using claims data — often organized by accident/policy period — at multiple valuation dates and which present an effective way to analyze how a program's losses have developed over time. It may be useful to split data into different triangle subsets if it is believed that losses from certain business segments or geographical regions could develop in significantly different ways from others. Losses from different states can show different development patterns due to differences in benefit laws and legal environments. It may also be worthwhile to build triangles by job type or class code.

Loss development factors, or LDFs, are selected for each development period from the triangles. The first step is deciding if a program's experience is fully credible or if it should be supplemented with industry development factors. The selection of tail development is especially critical, as it affects LDFs for all younger development periods. In addition, LDFs must be tailored to the specific needs and experience of each data set. If LDFs are limited to a retention that is different from the projected losses, it may not be appropriate to use those LDFs in the projection process. LDFs can be adjusted to various retentions, but theoretical increases or decreases may not be appropriate based on a program's history.

3. Determining trends

In addition to selecting LDFs, frequency and severity trends should also be reviewed. There is a common misconception that they are accounted for when developing losses. This is known as "the overlap fallacy." Applying trend to claims data adjusts losses to a desired exposure period to account for nominal cost differences between years, while developing

losses estimates the final costs of all claims — also referred to as ultimate losses. If a program's data is considered credible enough to estimate trends and they are significantly different from the industry, it must be demonstrated to auditors that the utilized trends are appropriate. It is important to also recognize what type of trend is needed when dealing with severity, specifically whether inflationary trend should be included. In addition, exposure trends, as measured through payroll, should be accounted for and should consider any shift in class codes of workers.

4. Selection of methods

Actuaries utilize multiple estimation methods when selecting ultimate losses for each accident/policy period. Some methods rely strictly on current claims values and the selected LDFs; others rely on historical claims averages and ignore how claims for a specific year have developed so far; and others weigh actual and theoretical experience together. Understanding the advantages and disadvantages of how the various methods react to data and program changes is essential to selecting appropriate ultimates. There are also times when commonly accepted actuarial methods do not produce intuitive results. It is critical that the actuary step back from the methods and apply business sense, because any movement in ultimate losses affects the bottom line. Additionally, selected ultimate losses for prior years hold an extra level of importance because a prospective year's loss estimate is typically based on historical experience.

5. Large losses

Large losses are inevitable. Two key considerations are how much do current estimates include for possible future large losses, and how much impact do large losses have on future projections. It must be considered whether a large loss is an anomaly or an indicator of possible future large losses. In order to minimize fluctuation in reserve estimates that are due to large losses, selected ultimates should include some provision for potential large losses or additional incurred but not reported, or IBNR, costs. IBNR losses represent unreported losses and can arise from unreported claims, development on known claims,

reopening of claims or claims in transit. The majority of workers compensation IBNR costs are for development on known and reopened claims. A conservative approach would hold a healthy amount of IBNR and slowly lower estimates over time if large losses do not occur as a year matures. For older years, the reporting of a large loss may result in a dollar-for-dollar increase in ultimates, because less IBNR is typically held for more mature years. If large losses are not expected to occur every year, estimates for each individual year may not need to hold enough protection against a large loss. Collectively, however, there should be enough IBNR to absorb some expected level of large losses without significantly raising ultimates in total.

6. Stability vs. responsiveness

Selected LDFs, ultimates, severity and frequency trends, and other model assumptions all affect the level of stability when projecting workers compensation losses. Estimates for younger years are typically based on theoretical methods that are more stable compared with methods that rely heavily on actual claims experience. For example, if a large loss is reported within the first six months of a policy year, a method that relies solely on actual claims experience will assume continuing large development in the future and can potentially overestimate ultimate losses. A balance must be achieved between overreacting and reacting too slowly to new information.

7. Program changes

Possible changes to a program may include size of retention, purchase or sale of a division, changes in claims handling and new loss initiatives. Adjustments for retention typically use increased limit factors, or ILFs, which can be based on an industry source or a program's own data. Similar to limiting LDFs, theoretical increases or decreases based on industry experience may not be appropriate, and actuarial judgment must be exercised when selecting appropriate ILFs. Adjustments for the purchase or sale of a division are more complex and must be tailored for each scenario. Adjustments for changes in claims handling and new loss initiatives must also be tailored for each scenario. For

example, a switch from using a third-party administrator to handling claims in-house may result in more focus being placed on gathering claims detail and closing claims more quickly.

8. Special considerations

Changes to reserving methodology and timing of claims payments can have significant effects on the accuracy of LDFs and associated estimation methods. For example, if there is an increase in case reserve adequacy, ultimate losses will likely be overstated unless the necessary adjustments are made. Changes to employee mix — due to layoffs or changes in business — may also have a significant impact on the accuracy of estimation methods. An additional consideration includes any new initiatives to improve safety that will influence workers' attitudes toward claims.

9. Issues specific to workers compensation

Workers compensation benefits are highly dependent on state and jurisdiction. Prior claims must be adjusted for any new benefit laws put into place when projecting losses. Additions of new locations

may also require adjustments to make sure prior claims are level with expected future losses, if the new locations fall within jurisdictions known to be different from current locations.

Workers compensation exposures have very long tails. For example, a minor back injury today may require back surgery five years from now. An experienced actuary will factor in a provision for IBNR to protect against these late claims cost increases.

10. Financial reporting

Although the long-tail nature of workers compensation adds complexity to projecting losses, it offers a great advantage for discounting liabilities from a financial perspective. Discount factors are based on a chosen interest rate and the estimated payment pattern from the selected LDFs. The discount rate is usually provided by the company, but an actuary would be able to provide guidance related to interest rates similar companies are using. An actuary would also be able to provide expertise in estimating liabilities at various probability levels above the actuarial central estimate using loss distributions for programs that are interested in evaluating

different degrees of conservatism.

Conclusion

When projecting workers compensation losses, it is beneficial to have a strong understanding of the many pieces that affect results. If carried reserves are understated, accruals will be inadequate. If carried reserves are overstated, capital is tied up and unavailable for other strategic uses. It is always a best practice that management works closely with the actuary to fully understand the analysis and newly-founded insights.



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Large losses are inevitable. Two key considerations are how much do current estimates include for possible future large losses, and how much impact do large losses have on future projections. It must be considered whether a large loss is an anomaly or an indicator of possible future large losses.

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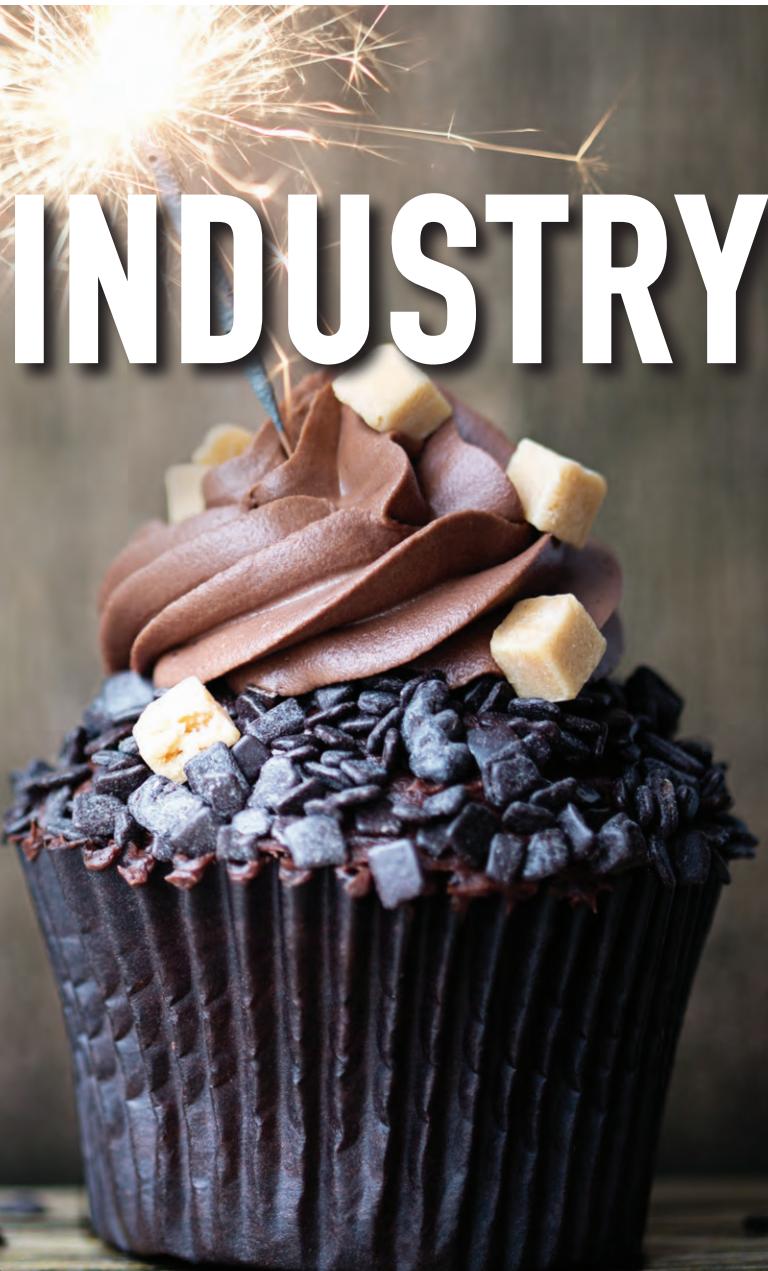
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Opioid alternatives worth finding

Pain management remains a complex problem for employers and the workers compensation sector, but realistic solutions are proving hard to find.

The well-known downside to widespread opioid use by injured workers has been extensively documented, and many states are taking action to curb the use of the drugs by introducing formularies or putting other controls on prescriptions.

While controlling or limiting use of opioids is a start, other remedies need to be offered to help employees recover from injuries and get back to work.



Gavin Souter
EDITOR

to help workers heal. Such programs can offer a combination of physical therapy, psychological therapy, work conditioning and group support to control pain and help injured workers get back on the job.

A big part of such programs is addressing the mental side of pain management. Rather than offering the quick fix of a prescription drug, psychosocial support can help patients face the pain that accompanies physical therapy.

As we report on page 9, cognitive behavioral therapy and other psychosocial treatments are increasingly being seen as ways to effectively help people overcome the depression that can accompany physical injury and to help them recover. By replacing negative thoughts with a more positive outlook, patients are more able to tackle the feelings of loss that can be associated with physical injury.

As is often the case, the complicating factor is cost. Such treatments are not cheap, and workers comp payers will be reluctant to fund treatments whose effectiveness can't be ascertained by traditional physical examinations and tests. Furthermore, the risk of creating a psych claim often has payers thinking twice.

That may be short-sighted, however, if the alternative is to keep prescribing highly addictive opioids or trusting in alternative medications whose efficacy is still open to question. Looking to mental and physical solutions to replace chemical solutions in pain management has to be seen as a step in the right direction.



VIEW FROM WASHINGTON

Will Trump get another chance at high court pick?

Will the U.S. Supreme Court's so-called swing vote swing the court in favor of employers by giving up his seat?

Mere days after Neil Gorsuch was officially sworn in to fill the Supreme Court seat that has been vacant since the death of Justice Antonin Scalia in February 2016 came speculation that 80-year-old Justice Anthony Kennedy, who has been on the court since 1988, could soon retire. The speculation was fueled by someone presumably in the know: Republican Sen. Chuck Grassley of Iowa, who chairs the Senate Judiciary Committee. While he didn't specifically name Justice Kennedy, Sen. Grassley said he expected a justice resignation as soon as this summer.

This news is noteworthy coming so quickly after Justice Gorsuch was confirmed using the "nuclear option," meaning Senate rules were changed to allow his confirmation with 51 votes rather than the 60 votes needed to overcome a filibuster. Now that the precedent has been set, far more controversial justices on either end of the political spectrum could be approved with simple majority votes.

Justice Gorsuch was generally seen as a good pick for employers, although perhaps not as good as Justice Scalia. But the newest associate justice — so new his picture is still not up on the Supreme Court's biography page — is clearly no fan of the Chevron deference, which refers to the concept established in a 1984 U.S. Supreme Court case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, that requires courts to defer to an agency's reasonable interpretation of laws it implements or enforces. The Chevron deference is already under challenge via a legislative proposal, but even if that

bill doesn't pass, Justice Gorsuch's resistance to the concept bodes well for employers who may find themselves on the wrong end of workplace safety citations from the U.S. Occupational Safety and Health Administration or enforcement orders from the U.S. Environmental Protection Agency or another federal agency.



Gloria Gonzalez
DEPUTY EDITOR

Justice Gorsuch once clerked for Justice Kennedy, who has been the deciding vote on many critical and controversial decisions, including *Obergefell v. Hodges*, the 2015 case in which the Supreme Court decided by a 5-4 margin that the U.S. Constitution guaranteed a fundamental marriage right to same-sex couples. Liberals would be wise to worry that a replacement selected by President Donald Trump and confirmed by a simple majority in the Senate could tip the balance of power to the conservative side for years to come and leave them on the losing side of cases such as *Obergefell*. Even though the president and then-nominee Gorsuch have both called same-sex marriage "settled law," there's no guarantee that a Justice Kennedy replacement would feel the same.

But for now, employers have Justice Kennedy in the middle of the restored balance of conservatives and liberals on the court. How long that lasts will be a great guessing game — something Washington excels at.

Alliant combines practices into specialty group

■ Alliant Insurance Services Inc. has combined its portfolio of industry-focused specialty insurance practices to form Alliant Specialty Group.

Newport Beach, California-based Alliant Specialty Group will cover a broad range of industries and sectors, including public entities, construction, agribusiness, energy and marine, health care, real estate and more, Alliant said in a statement.

Alliant is the 12th-largest broker of U.S. business, according to *Business Insurance*'s latest ranking.

FM Global releases interactive flood map

■ FM Global released a new global flood map that it says will give risk managers and others a way to assess flood exposures and enhance their loss-prevention decisions.

The free, interactive map provides a global view of high and moderate-risk flood zones, allowing risk managers and others to determine if their properties are at risk, the Johnston, Rhode Island-based insurer said.

Users can determine whether their business locations reside in a flood zone by typing in physical addresses. The map is a physically based flood map, rather than the typical statistically based map, that incorporates factors such as the topography of the land, riverbed and rainfall to model where flooding will occur from precipitation events, said Brion Callori, senior vice president and manager of engineering and research at FM Global.

Companies can identify the base flood risk for all their facilities at a resolution of just 90 meters by 90 meters, a resolution that will be improved to 30 meters by the end of the year to improve its accuracy, Mr. Callori said.

Runoff company sets up Rhode Island subsidiary

■ Runoff specialist Pro Global Insurance Solutions P.L.C. set up a subsidiary in Rhode Island to offer insurers and reinsurers portfolio transfer services that take advantage of the state's expanded runoff law.

ProTucket Insurance Co. will take on portfolios of business from solvent insurers and place them in a protected cell within the Rhode Island-licensed insurer. Currently in the U.S., insurers usually run off discontinued business in-house, but the practice of transferring portfolios of discontinued property/casualty business to a third party is well-established in other jurisdictions.

PRODUCTS & SERVICES



Marine, energy coverage offered

■ Global Special Risks L.L.C., a division of Ryan Specialty Group L.L.C., has introduced a new product portfolio to the energy and marine insurance market.

The new products were designed to provide more specialized coverage solutions to clients in the energy and marine space, Houston-based GSR said in a statement.

The company has realigned its products into five distinct underwriting units, with each unit headed by an expert in the subject and staffed with underwriters with specialized product knowledge, Steve England, president and CEO of GSR, said in the statement. Those units are OEE/control of well, casualty, property, marine and specialty. GSR also is developing products for emerging exposures such as cyber liability, Mr. England said.

Rhode Island amended its so-called Regulation 68 law in 2015 to allow any U.S. insurer or reinsurer, including U.S. units of foreign insurers, to transfer closed books of business or any "reasonably specified groups of policies" through novation. Regulation 68 was modeled on Part VII of the U.K.'s Financial Services

and Markets Act 2000, which has produced hundreds of insurance business transfers to date.

A spokesman for the Rhode Island insurance department said ProTucket was the first insurer established in the state to take advantage of the expanded law.

The value of U.S. property/casualty business that could take advantage of the Rhode Island law could be as much as \$100 billion, said Artur Niemczewski, CEO of London-based Pro Global. He said ProTucket has a pipeline of potential insurance clients interested in transferring portfolios, but the transfer process, which requires policyholder and court approval, can take a year or more to complete.

QBE adds transportation workers comp program

■ QBE North America is partnering with Morris Plains, New Jersey-based High Point Underwriters L.L.C. and Louisville, Kentucky-based Midwestern Insurance Alliance L.L.C. to deliver a national workers compensation and occupational accident insurance program for the transportation market, according to a joint company announcement.

The insurer, a New York-based operating division of Australian insurer QBE Insurance Group Ltd., will offer coverage to employee drivers on a workers compensation policy and the owner-operators on an occupational accident and contingent liability policy with the same insurance company. This program will offer coverage nationally on an admitted and nonadmitted basis, according to a statement.

"Coverages and limits are customized and tailored based on the customer's operations and QBE's underwriting appetite," a QBE North America spokeswoman said in an email.

Cyber coverage launched for airline industry

■ Willis Towers Watson P.L.C. has launched CyFly, an insurance solution designed to cover cyber exposure affecting the airline industry.

CyFly was developed through a collaboration with American International Group Inc., Willis Towers Watson said in a statement.

CyFly includes coverage of technology and non-information technology providers such as global distribution systems, baggage processing, aircraft maintenance, fueling and catering, and airport security. It also covers aviation regulatory fines and compensation for cyber incidents and network business interruption, according to the statement from Willis Towers Watson.

DEALS & MOVES

AmWins buys rival Partners Specialty

AmWINS Group Inc. will acquire Partners Specialty Group L.L.C. in a deal that will create a wholesale broker with more than \$14 billion in annual premiums. Terms of the deal were not disclosed.

A statement said Partners Specialty will become part of the AmWINS brokerage division.

Charlotte, North Carolina-based AmWINS is the largest independent wholesaler, while Partners is the ninth-largest, according to *Business Insurance*'s latest ranking.

Sompo completes acquisition of Endurance

Tokyo-based Sompo Holdings Inc. has completed its \$6.3 billion acquisition of Endurance Specialty Holdings Ltd.

Sompo announced plans to purchase Hamilton, Bermuda-based Endurance on Oct. 5. Endurance will be integrated into Sompo Holdings through the creation of Sompo International, which will be based in Bermuda and encompass Sompo's existing international commercial insurance and reinsurance business, Sompo said in a statement.

Liberty Mutual acquires medical stop-loss MGA

Liberty Mutual Insurance Co. has acquired the assets of TRU Services L.L.C. Terms of the deal were not disclosed.

Beverly, Massachusetts-based TRU Services is a managing general agent that specializes in providing medical stop-loss products, administering \$65 million in premium in 2016, Liberty Mutual said in a statement.

TRU Services will continue operating as an MGA throughout 2017 but will transition to directly writing medical stop-loss for Liberty International Underwriters.

Risk consulting firm expands in South Carolina

The Risk Authority Stanford, a Palo Alto, California-based health care risk management consulting firm associated with the Stanford University Medical Network, plans to acquire substantially all the assets of PHT Services Ltd., the organizations said.

Columbia, South Carolina-based PHT Services' specialties include workers compensation, professional and general liability, and medical stop-loss, among others, according to a statement. Terms of the acquisition were not disclosed.



UP CLOSE

Gavin Shiels

NEW JOB TITLE: San Francisco-based senior vice president for JLT Specialty Insurance Services Inc.

PREVIOUS POSITION: San Francisco-based senior vice president at Aon Risk Solutions.

LOOKING FORWARD TO: The specialty focus at JLT. We are assembling a team of the best specialty experts without trying to be all things to all people. This allows us to focus solely on helping our clients solve complex and specific issues within our areas of expertise.

GOALS FOR NEW POSITION: To be a key contributor to the JLT team by leveraging JLT's collaboration culture to build best-in-class teams and solutions for my clients. And to have a little fun while doing it.

ON LEADERSHIP: Starting with good communication leads to other important traits including building trust, demonstrating passion, and transparency, which is important when executing strategic plans.

CHALLENGES FACING INDUSTRY: Technology — the evolving risks presented to clients and insurers, along with the continued changes it will bring to how we work and how we staff our companies.

FIRST INDUSTRY JOB: San Francisco-based client service representative in the property brokerage group at Marsh L.L.C.

WHAT SURPRISED ME: How many talented and fun professionals there are working in what an outsider might view as "boring." I think this is a testament to the challenging problems we collectively get to solve through collaboration and relationship-building, and the meaningful impacts that our risk mitigation and financing strategies can make. At the end of the day, this is still a people business, and I think that attracts a certain kind of like-minded individuals.

ADVICE: Be patient, get exposed to a wide variety of things, and be good to others — good things will happen!

OUTSIDE THE INDUSTRY, A DREAM JOB: Play-by-play sports announcer

HOBBIES: San Francisco sports, cooking.

BIGGEST OBSTACLE FOR WORK-LIFE BALANCE: Mobile devices

CORPORATE IMPROVEMENT: Increased focus on — and action around — colleague engagement. I am lucky to work at a company that makes this a priority. Culture and colleague engagement are infectious and can make or break the ability to achieve desired company outcomes.

PET PEEVES: Presentations that have not been adequately proofread. Take some pride in your work product and review it carefully — it is an indicator to the outside of your attention to detail!

WHEN I RETIRE: In my generation, it is increasingly a question of "Will I be able to retire?" But I remain bullish that I will get there and will look forward to an overabundance of family, friends, good food, warm weather and travel.

FAVORITE MEAL: Any authentic taqueria

CAN'T-MISS TELEVISION SHOW: "Game of Thrones"

ON A SATURDAY AFTERNOON: With two kids under 4 years old, my Saturdays (and most every other moment of nonwork time) are family-related!

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Pam Ferrandino has joined Gallagher Bassett Services Inc.'s North American risk management sales team.

She will serve as vice president of business development for the Rolling Meadows, Illinois-based third-party claims administrator, the company said in a statement.

Ms. Ferrandino, who is based in Essex, Connecticut, departed Willis Towers Watson P.L.C. last year, where she was executive vice president and senior principal of its national casualty broking team.



Chubb Ltd. has named Whitehouse Station, New Jersey-based **Ana Robic** chief operating officer for North America personal risk services.

Ms. Robic

succeeds Scott Gunter, who will serve as senior vice president of Chubb Group and division president of North America commercial insurance.

Previously, Ms. Robic was executive vice president and Canadian region manager of commercial insurance, Chubb said in a statement. She was a named a Woman to Watch in 2016 by *Business Insurance*.



Marsh & McLennan Cos. Inc. has named New York-based **Keith Walsh** chief financial officer of the company's risk and insurance services segment, which includes Marsh L.L.C. and Guy Carpenter & Co. L.L.C.

Mr. Walsh succeeds Courtney Leimkuhler, who is leaving the company to pursue an opportunity outside the industry, Marsh & McLennan said in a statement.

In this role, Mr. Walsh will also serve as chief financial officer of Marsh. His appointment became effective May 1. Previously, Mr. Walsh was global head of investor relations.



G2 Insurance Services L.L.C. has named **Kelly Crowder** to the new position of senior risk management consultant.

Previously,

Ms. Crowder was risk manager at Google Inc., the San Francisco-based insurance brokerage said in a statement. She is based in San Francisco.



Fake butter leads to real settlement

A Massachusetts man reportedly couldn't believe it wasn't real butter that Dunkin' Donuts was smearing on his bagel. So he sued and got a settlement. In a pair of lawsuits filed in Massachusetts' Suffolk County Superior Court, Jan Polanik accused more than 20 Dunkin' Donuts franchises in eastern and central Massachusetts of "a grand deception: using a butter substitute on his bagels, even though he had ordered the bagels with butter," the Boston Globe reported.

The suits each targeted a different group of related franchises and sought class action status to represent any customer who "ordered a baked product, such as a bagel, with butter, but instead received margarine or butter substitute between June 24, 2012, and June 24, 2016."

The settlement terms will be filed with the court in the coming weeks, the man's attorney told the Globe. The doughnut chain has not commented on the suits.

Waffle House leaking grease?

An Alabama man wants \$800,000 for damages caused by grease he claims is seeping from a Waffle House restaurant to the area under the building he owns next door, devaluing his property, according to media reports.

Mack Crook Jr.'s suit in federal court reportedly states that the restaurant's "grease interceptor" at its location in Anniston, Alabama, has continuously leaked grease and contaminated fluid into the ground. Norcross, Georgia-based Waffle House Inc., in a recent court filing, denied that its grease trap leaked as the lawsuit alleges, according to media reports.



ROCK FAN SUES AFTER HEAD BASHED WITH SKATEBOARD AT CONCERT



They don't call heavy metal aficionados "headbangers" for nothing, one man is learning.

An Alabama man who attended a heavy metal festival in 2015 in Atlanta is suing the city, and concert promoters and organizers Live Nation Entertainment and the Truth Initiative Foundation after allegedly getting his head bashed in with a skateboard at the Rockstar Energy Drink Mayhem Festival, according to an article in the Atlanta Journal-Constitution in April.

The man was watching the band HellYeah perform when an unknown assailant ran up and hit him with the skateboard, according to the newspaper, which accessed the lawsuit.

He "became dazed and confused upon being hit in the head and went in and out of consciousness," court documents reveal. The man's "continuing and permanent injuries" have caused him physical, emotional and "economic" injuries, the suit says. The suit cites more than \$40,000 in medical expenses, with more to come, according to the newspaper.

Naval officer cooks up scam

A naval intelligence officer in Tampa was charged with first-degree arson and burning a building to defraud an insurer in an unintelligent scheme that involved an obvious whiff of gasoline, according to the Tampa Bay Times. Navy Lt. Nolen Zander reportedly told investigators that burns on his face and hands just after his home caught fire were from the radiator in his car, and that he and his wife just happened to be sleeping at a nearby Quality Inn on the night of the blaze in 2014.

Hillsborough County Fire investigators later determined gasoline was used to set several fires inside Lt. Zander's house; that an "incendiary device" that didn't detonate was found in a detached apartment on the property; and that the 43-year-old naval officer had recently purchased a homeowners policy with an increase in limits.



Potato chip buyers hungry for justice

It is unwise to underfill potato chip bags, claim the plaintiffs in a lawsuit against the makers of Wise potato chip bags.

Two consumers filed a suit in a Manhattan federal court against Berwick, Pennsylvania-based Wise Foods, the network CNBC reported. In the complaint, the plaintiffs referred to a 2.75-ounce bag of Wise Ridges Sour Cream and Onion chips that they said was filled to only 2.5 inches of its 10-inch capacity. The plaintiffs compared the bags to PepsiCo's Ruffles potato chip bags, which have a higher amount of chips in a similar size bag.

The plaintiffs said they would have paid less for their chips had they known about the empty space or if bags were "proportioned" to their contents. The proposed class action suit seeks damages for consumers and packaging changes.

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*WC Magazine internal subscriber figures, March 2017.

SUMMER

THE "LEGAL" ISSUE

Space close - 6/21

Material close - 6/28

FALL

THE "CLAIMS" ISSUE

Space close - 9/20

Material close - 9/27

WINTER

THE "RISK" ISSUE

Space close - 11/22

Material close - 11/29



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