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Business Insurance

January 2, 2012

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CALIF. HIGH COURT RULES IN INSURANCE ADJUSTER OVERTIME CASE / PAGE 4

In Brief

Judge OKs AIG comp settlement

American International Group Inc. has received final approval to pay a $450 million class action settlement to a group of insurers related to its alleged underreporting of workers compensation premiums. In a ruling, U.S. District Court Judge Robert Gettleman granted final approval to AIG to move forward with the settlement, to be paid to hundreds of other commercial insurers. This fall, the 7th U.S. Circuit Court of Appeals rejected Liberty Mutual Group Inc.'s request to appeal the judge's preliminary approval of the settlement. The settlement has been stayed until Judge Gettleman issues a final order and memorandum on the issue, according to court records.

See **IN BRIEF** page 21

SPOTLIGHT

LEGISLATIVE OUTLOOK

As lawmakers focus on elections, regulators seen dominating government affairs; workers comp legislation tackles costs; pivotal health care reform law rules on the way; federal data breach law unlikely this year; states highlight risk management legislative initiatives. **PAGE 10**

CATASTROPHES

Capacity shrinks after Thai floods

Reinsurers pull back as businesses struggle to quantify losses

By J. NILS WRIGHT

BANGKOK—Businesses disrupted by long-term flooding in Thailand ramped up efforts to restart production as the year began amid sharply contracted insurance capacity, higher pricing and tighter terms for the coverage that is available.

Insured damage from the floods that began last summer and generally receded by year-end is estimated at $10 billion, according to Aon Benfield, much of it among international manufacturers located outside of Bangkok in seven large industrial estates, or industrial parks, that each house more than 100 factories.

Swiss Re Ltd. estimated total insured losses from the Thai flooding at $8 billion to $11 billion. However, it will be some time before total insured damage is confirmed, as claims adjustment is taking time because of the severity of the damage and a shortage of adjusters.

Five of the seven estates that flooded in Ayutthaya province took the brunt of the damage. They housed hundreds of global manufacturers of cars, electronics and disk drives, and parts makers and suppliers to larger manufacturers worldwide.

While some factories have restarted their operations, others still are working on recovery efforts. A small percentage decided to move their production out of Thailand entirely (see story, page 18).

Jiraphant Asvatanakul, Bangkok-based president of the Thai Gener-

See **THAILAND** page 18

REUTERS

The auto manufacturing sector was among the industries that suffered heavy losses as a result of flooding around Bangkok last year. Much of the financial loss will be borne by international insurers.

RISK MANAGEMENT

Penn State case sharpens focus on reputational risks

By MIKE TSIKOUDAKIS

As Pennsylvania State University faces litigation alleging the school failed to prevent a former assistant football coach from sexually abusing children, reputational damage is top of mind for risk managers at educational institutions.

When a college's reputation is damaged, it can adversely affect student recruitment, alumni donations and even federal funding, experts say.

Awareness of educational institution reputational risks has been rekindled as Penn State faces unlimited legal liability in civil litigation. The first civil lawsuit was filed Nov. 30 alleging that the university knew of and failed to prevent former assistant football coach Gerald A. Sandusky's alleged child sexual abuse dating back to the early 1990s (see story, page 20).

$235 million

Private donations to Penn State in 2011 were among the highest of all public U.S. universities.

Reacting to the allegations, university trustees removed legendary football coach Joe Paterno and President Graham Spanier. Two other officials also stepped down. Mr. Sandusky retired before the scandal broke.

While reputational risks have been a major concern for school risk managers for several years, "I think the awareness of reputation risk is certainly heightened" since the Penn State scandal, said Ellen Shew Holland, director of risk management at the University of Denver in Denver.

"Something like the scandal at Penn State is a huge risk, and it does concern us," said Larry Stephens, director of risk management at Indiana University in Bloomington, Ind. "Certainly, Penn State has suffered a hit to their reputation," he said, noting that any revenue loss tied to reputational damage is difficult to quantify.

Moody's Investors Services Inc. was weighing reputational damage in its review of Penn State's bond rating.

In 2011, Penn State's major sources of revenue supporting its $4.5 billion in operations were derived from student tuition, housing and auxiliary fees, and health care operations. Private donations totaled $235 million—among the highest of all U.S. public universities, Moody's said in a statement.

Sources of Penn State's credit

See **PENN STATE** page 20

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EMPLOYMENT PRACTICES

Federal contractors face disability hiring quotas

Proposed regulation would set 7% goal for disabled workers

By JUDY GREENWALD

WASHINGTON—Employers would face difficulties meeting the requirements of a proposed federal rule mandating that federal contractors and subcontractors set a goal of having 7% of their workforce be people with disabilities, observers say.

Monitoring compliance with the rule, which was proposed by the Department of Labor's Office of Federal Contract Compliance Programs, would create administrative headaches, they say.

And finding sufficient numbers of disabled workers would be a challenge, especially as the proposed rule requires that contractors and subcontractors reach the percentage requirement in each job rather than the workforce as a whole, they say.

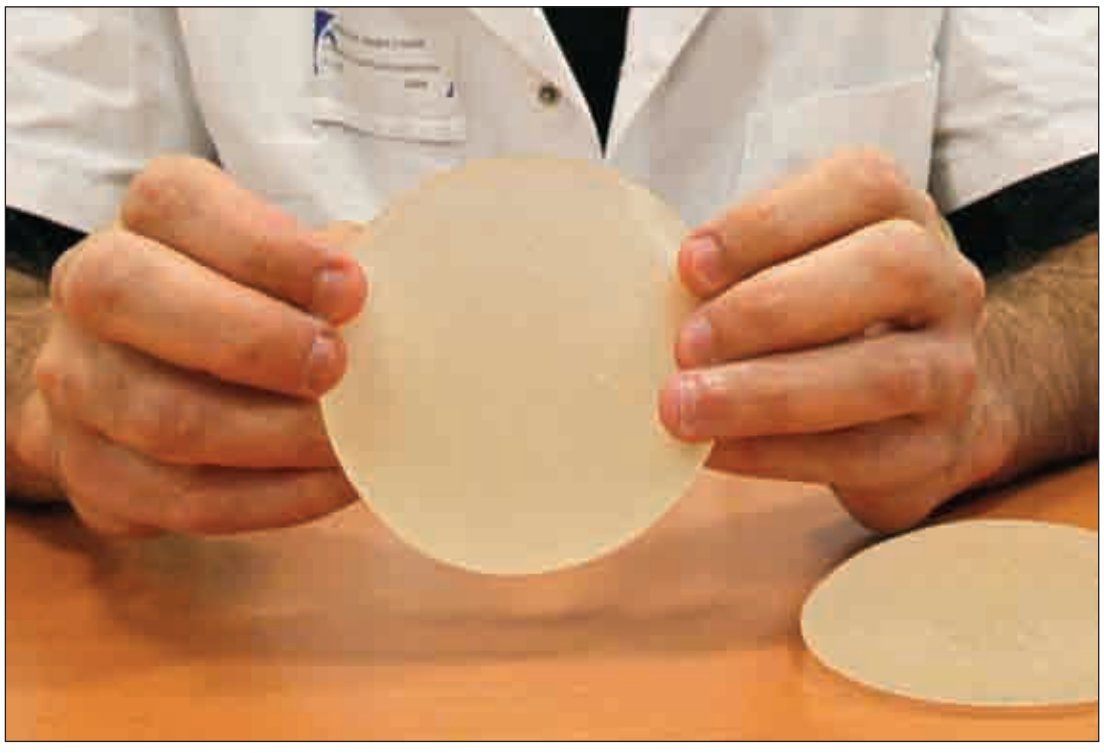
According to the proposal, which was published last month in the Federal Register, contractors and subcontractors would have to reach that percentage within each of their job groups rather than within its workforce as a whole.

In the proposal, which was published in the Federal Register last month, the OFCCP said it decided against setting an overall workforce goal "because of its potential for masking discrimination and segregation. For example, a contractor that has segregated all of its employees with disabilities into one or two low-paying jobs might be able to conceal this discrimination and satisfy the 7% if only a single whole-workforce comparison were required."

The proposed regulation outlines the specific actions contractors would have to take in the areas of recruitment, training, record-keeping and policy dis-

See **DISABILITY** page 19

RISK MANAGEMENT



AP WORLDWIDE

Silicone gel breast implants made by French company Poly Implant Prothèses S.A. have been deemed unsafe by France's medical health care products regulator, which has recommended their removal.

Litigation over implants begins

French agency aims to recoup expected losses

By SARAH VEYSEY

MARSEILLE, France—France's national insurance agency reportedly has filed a criminal complaint in an effort to recoup some of the damages it will incur in paying for women to have potentially dangerous breast implants removed.

Last month, the French government advised women who had received implants made by La Seyne-sur-Mer, France-based Poly Implant Prothèses S.A. to have them removed because of fear that they have a higher-than-usual rupture rate.

The government said it would pay for the removal of implants that were for reconstructive, not cosmetic, reasons.

France's medical and health care products regulator, the Agence Française de Securité Sanitaire des Produits de Santé, recommended that all women who have the PIP-made implants to receive an ultrasound scan, and that any women with ruptures or suspected ruptures should have the implants removed.

About 30,000 women in France are believed to have received PIP implants. In a 2010 bankruptcy filing, PIP said it once made 100,000 breast implants a year.

According to reports, PIP had product liability insurance coverage with limits of about $1 million, excluding the United States.

Filings made by PIP's parent company, Delaware-based Heritage Worldwide Inc., with the U.S. Securities and Exchange Commission show PIP was ordered in 2008 to pay damages totaling about $2.3 million as a

See **IMPLANT** page 18

AGENTS & BROKERS

Judge rules for Aon in poaching dispute

Temporary bar prevents Alliant from soliciting clients

By MARK A. HOFMANN

NEW YORK—Aon Corp. has won at least a temporary victory in a lawsuit that alleges poaching of employees and customers by Alliant Insurance Services Inc.

In a ruling late last month, New York State Supreme Court Judge Bernard J. Fried temporarily barred Alliant and some former Aon employees who joined Alliant's construction services group from soliciting business from certain Aon clients—those whose accounts on which the former Aon employees worked or served as producers.

Judge Fried also barred Alliant and the former Aon employees from soliciting any Aon construction group employees to work for Alliant.

Aon praised the judge's ruling in *Aon Risk Services, Northeast and Aon Corp. vs. Michael Cusack and Alliant Insurance Services Inc.*, while an attorney for Alliant said he did not see the ruling as a "major setback."

According to Judge Fried's ruling, the case "involves a systemic and coordinated raid by defendant Michael Cusack and his new employer, Alliant" on the clients and employees of Aon's construction services group.

Aon alleged that Mr. Cusack, while still an Aon managing director, and other former Aon executives met with Alliant to explore employment opportunities. Mr. Cusack and about 40 other construction group employees resigned June 13 and joined Alliant.

In his ruling, Judge Fried said that, in total, 60 Aon employees left to join Alliant and that "Aon has received more than 100 broker-of-record letters from clients transferring more than $20 million in revenue from Aon to Alliant."

Aon alleged that Mr. Cusack and others committed breach of contract and violated their fiduciary duties. Aon also alleged that Alliant aided and abetted breach of fiduciary duty, interfered with its employment contracts and engaged in conspiracy.

Judge Fried said Aon was "likely to succeed on the merits" of those claims. However, he also said Aon failed to establish that either Mr. Cusack or Alliant had misappropriated any of Aon's confidential information.

He ordered Mr. Cusack and Alliant, as well as any former members of Aon's construction services group who were employed by Aon Northeast, who resigned on June 13, 2011, and who were subject to restrictive covenants, from soliciting business on behalf of Alliant from any Aon client for whom the former Aon employee was the producer "or on whose account he or she worked during the 24 months prior to June 2011."

He also barred them from solic-

See **ALLIANT** page 17

WORKERS COMPENSATION

Firms score win with adjuster overtime ruling

Court overturns nonexempt status of claims adjusters

By ROBERTO CENICEROS

SAN FRANCISCO—California's Supreme Court has handed employers and insurers a victory in a case that has received nationwide attention for its potential impact on claims management practices and expenses.

In its ruling last week in *Frances Harris et al. vs. The Superior Court of Los Angeles County,* the state high court struck down a 2007 California appellate court finding that claims adjusters are not exempt from laws requiring employers to pay overtime wages.

The case stemmed from class action lawsuits filed by adjusters working for Liberty Mutual Insurance Co. and Liberty Mutual Group's San Diego, Calif.-based unit, Golden Eagle Insurance Corp. Liberty's claims handlers alleged the insurers erroneously classified them as exempt "administrative" employees and sought damages for unpaid overtime.

The ongoing legal debate over whether laws require paying adjusters overtime has significant ramifications for employers and insurers, said James Bacon, a managing principal at Integro Insurance Brokers Ltd. in San Francisco.

Insurers and third-party administrators operate on thin margins. If required to pay overtime, they could either pass the additional costs on to employers or become more cost-conscious, causing claims adjusters to spend even less time on each case file, Mr. Bacon said.

The case focused narrowly on whether adjusters' work is administrative, and thus exempt from state and federal laws and rules requiring overtime pay.

Time spent on workers compensation claims files already is minimal, particularly in California's complex claims adjusting environment, he said.

Having to pay overtime also could slow claims closures should insurers opt to hold down costs rather than pay overtime, added Mark Sektnan, president of the Sacramento, Calif.-based Assn. of California Insurance Cos.

The association views last week's ruling—which has particular significance for high-volume claims lines, such as workers comp and auto liability—as "a very favorable opinion for the (insurance) industry because they overturned the appellate court decision that said these employees were not exempt," Mr. Sektnan said.

In a statement, Boston-based Liberty Mutual said it is pleased the court gave the case "thoughtful consideration."

Under the state Supreme Court ruling, insurers may not have to pay adjusters overtime depending on the claims managers' level of decision-making, said Paul E.B. Glad, a partner and head of the appellate practice in the San Francisco office of SNR Denton.

California's Supreme Court focused narrowly on whether adjusters' work is administrative, and thus exempt from state and federal laws and rules requiring that they be paid overtime. It provided a four-part test to determine whether insurance adjusters are administrative employees.

To qualify as administrative employees, workers must be paid at a certain level, their work must be administrative, their primary duties must involve that administrative work, and they must

See **ADJUSTERS** page 21

AGENTS & BROKERS

Insurance exchange growing

Submissions reach 20,000 at 2011 end

By MARK A. HOFMANN

The LexisNexis Insurance Exchange continues to grow six months after completing its early adopter program.

The exchange, launched in 2010, was established by an alliance of LexisNexis Risk Solutions, the Washington-based Council of Insurance Agents & Brokers and intellectual property development company Marketcore Inc.

It is designed to enhance the flow of application data among insurance agents, brokers and insurers. By the end of its early adopter program in June 2011, more than 5,000 applications had been entered into the system involving about 175 insurers.

By the end of 2011, about 20,000 submissions had been entered into the system in which more than 300 underwriters participate, according to LexisNexis Risk Solutions.

LexisNexis Risk Solutions further bolstered the exchange in October when it acquired Marsh Berry & Co. Inc.'s sales management automation tool for an undisclosed amount. Insurance brokerages used the Willoughby, Ohio-based insurance consulting firm's sales portal to write more than $1 billion in aggregate commission income, LexisNexis said at the time of the acquisition.

5,000

5,000 applications from 175 insurers had been entered into the exchange system by the end of the early adopter program in June 2011.

The exchange also added a feature called market finder, which marries an insurer's appetite with

See **EXCHANGE** page 21

LEGISLATION & REGULATION

Solvency II deadline pushed back

Insurers forge ahead on compliance efforts despite new delays

By SARAH VEYSEY

BRUSSELS—The European Parliament's decision to delay its vote on Omnibus II, the directive that will introduce Solvency II in stages, means insurers' uncertainty over some details of the risk-based capital rules will be prolonged, experts say.

However, the delay should not mean that insurers will slow their preparations for Solvency II, they say.

A European Parliament vote on Omnibus II had been slated for late last year. But in December, the Parliament said the vote would not take place until April.

That delay could hinder progress in adopting Solvency II, which is slated for partial implementation beginning Jan. 1, 2013, according to KPMG L.L.P.

"This is another blow to the insurance industry, significantly shrinking the time frame between final rules being issued and the industry having to comply," said Janine Hawes, a director in KPMG's Solvency II team in London. "These latest delays mean the industry will be forced to spend another four months in the dark."

Once again, she said, "insurers are facing looming deadlines without sufficient time to get their heads around the final rules. Solvency II is a huge undertaking for insurers, and the fact that deadlines have kept slipping further complicates matters."

"The lack of guidance is a huge problem," she said. "The industry has been crying out for clarity on critical technical issues. These latest delays make it seem as though no one is listening," she said.

But while the delay in voting on Omnibus II also will delay clarification of certain technical aspects of Solvency II, the implementation date of Solvency II

See **SOLVENCY** page 18

THE BUILDING PLANS WE EXAMINED DIDN'T CALL FOR CUTTING CORNERS.

INDUSTRY:

WHOLESALE

CUSTOMER:

LUMBER AND BUILDING SUPPLY COMPANY

CASE OBJECTIVE:

HELP DEFEND CUSTOMER AGAINST AN UNWARRANTED LAWSUIT

CASE SPECIFICS:

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Helping C-level executives at midsize firms overcome critical risk and benefits challenges

Overcoming language barriers

Proactive strategies boost 401(k) participation by nonnative speakers

By LOUISE KERTESZ

Midsize employers have found ways to increase their 401(k) plan participation rates among employees who speak English as a second language.

Changes in plan design—primarily automatic enrollment—are the main drivers of the increased participation along with improved, culturally sensitive communications, experts say (see box).

The efforts, which allow employees to plan for their retirement, are recruiting and retention tools, experts say.

At its conference in December, the New England Employee Benefits Council cited Vicor Corp., a manufacturer with 1,053 employees, 45% of whom speak English as a second language, as a "most innovative employer." The Andover, Mass.-based maker of power conversion components and systems received the award for boosting its 401(k) participation from 70.6% in 2002 to 84.5% in 2010.

Another example is Unity Manufacturing, an electrical enclosure manufacturer with 93 employees, 45% of whom speak primarily Spanish. The Garland, Texas, company has boosted elective participation in its 401(k) plan from 55% three years ago to nearly 80% late last year. The average employee wage deferral rate also rose from 3.7% to 5.9%, said Chief Financial Officer Richard Buford.

Unity, a safe harbor 401(k) plan, contributes to its employees' accounts regardless of whether they elect to have their own funds deferred.

Prudential Financial Inc. provides administration, communication and investment options for both companies' plans.

In the past 18 months, BSI L.L.C., a Denver-based food service product manufacturer with 100 employees, also boosted the 401(k) plan participation rate of its Spanish-speaking employees by 150%, with support from Denver-based bilingual consultant Futuro Solido USA L.L.C., said Susan Kemp, BSI's human resources manager.

In response to demand, employers and providers are producing more materials and information in Spanish than in other languages, but employees who speak other languages often have access to a call center that will connect them with a translator to help them answer their questions.

Overall participation in 401(k) plans has been increasing, experts say.

Participation rates at Fidelity Investments, covering 20,000 corporate defined contribution plans and 12 million participants, rose to 66% in 2010 from 64% in 2007, said Beth McHugh, vp of marketing at Fidelity Investments in Covington, Ky.

Meanwhile, an Aon Hewitt survey last year of primarily large-plan clients found participation rates averaged 76%, said Barbara Hogg, head of the retirement communication group in Chicago.

Vanguard Group Inc. studies showed the participation rate at companies with 100 to 300 employees was 70% in 2010, compared with 68% at all Vanguard plans, which was up from 65% in 2001.

"A plan structure that includes automatic enrollment into a diversified portfolio and automatic increases (of amounts employees defer into their accounts) helps all participants save for retirement, but it's critical for those with English as a second language," because saving decisions are simplified for them, said Veronica Lee, senior vp of client services at 401(k) Advisors Inc., an Aliso Viejo, Calif., consultant.

Vanguard's study of seven large defined contribution plans found that "automatic enrollment improves participation rates for all race/ethnic groups, but the improvement is most dramatic for blacks and Hispanics." Cynthia Pagliaro, Valley Forge, Pa.-based senior research analyst at Vanguard, said research has shown "that different races and cultures perceive savings and time horizons differently," so the ease of auto enrollment may help in their decision to participate.

Vicor and Unity said automatic enrollment of new employees boosted 401(k) participation rates.

Once a Unity employee becomes eligible at six months, the company makes a nonelective contribution of 3% into the employee's 401(k) account, Mr. Buford said.

Unity's broker from Lockton Cos. L.L.C. in Dallas and human resources staff then meet with the group and explain that if employees take no action, they will be auto-enrolled at 3% deferral of their wages. That percentage automatically rises 1% a year. Employees can choose to defer up to 10% beginning in 2012, Mr. Buford said.

"If you look at the prevalence of auto-enrollment, that all came about because people weren't paying attention to communication" about their 401(k) plan, said Robyn Credico, senior retirement consultant at Towers Watson & Co. in Arlington Va.

Ms. Credico stressed that any communication aimed at increasing participation should be "a targeted campaign," not a generic message that employees can tune out.

Communication is "absolutely" as important as auto-enrollment, Mr. Buford said. "We've had people pencil in a 10% deferral at the educational meetings, and that wouldn't happen" otherwise, he said. "Auto-enrollment is a great tool, but if employees start to see that money is going out of their paycheck and they don't have a sense why, they could call Prudential and say, 'Change it to zero,'" he said.

Vicor and Unity offer Prudential's GoalMaker, an online asset-allocation tool that is "especially good for someone who doesn't have a good understanding of investment," said Jamie McInnes, senior vp and chief operating officer—total retirement solutions at Prudential Retirement in Newark, N.J.

"One of the biggest things that scares people is: What investments do I choose?" GoalMaker selects investments based on a person's time until retirement and risk tolerance. "When people see how easy that is, the scary part of participation starts to go away," Mr. McInnes said.

"Using GoalMaker is something we stress," said Mr. Buford. "The convenience and ease of use appeals to them." The tool periodically rebalances a portfolio "even if there's no attention paid to it. And it's all explained in Spanish," he said.

A 401(k) plan is effective for employee recruitment and retention, experts said. By offering a 401(k) with a company match, employees "see we care about their future," Mr. Buford said. With education and communication, "it maximizes their feeling that as an employer we really want them to take advantage of the benefits of working here."

Education crucial to reassure workers

Fundamental obstacles keep nonnative English speakers from investing in 401(k) plans, say experts who work with midsize employers.

"Spanish speakers who spent their formative years in Latin America and have come here to work have misconceptions about investing that are not always apparent to (the human resources) staff," said Melissa Burkhart, president of Denver-based Futuro Solido USA L.L.C., which provides translation and employee education services.

"There's a real mistrust of banks and the financial system. It makes them far more inclined to save in cash," Ms. Burkhart said.

Most Spanish-speaking employees "have doubts about investments," said Austin Gwilliam, a bilingual consultant at 401(k) Advisors Inc. in Aliso Viejo, Calif. "A lot of them don't even have a bank account."

Because of the cultural differences, these employees need to have "a comfort level with the employer involvement" in an investing program, said Ame McClune, director of marketing and client communications at Willis Human Capital Practice, a Radnor, Pa.-based unit of Willis Group Holdings P.L.C.

"Sadly, an employer contribution, which is the best part, can raise their hackles," because they know there's no such thing as "free money," Ms. Burkhart said. "There's a tremendous suspicion that whoever is trying to encourage them to participate is going to earn money at their expense. This applies to all sorts of workplace issues," she said.

Improving participation requires "really addressing these objections that have always gone unaddressed," she said.

"Straight translation (of English materials) doesn't necessarily work. A lot of 401(k) communication is written for the 'me generation,'" emphasizing freedom and the individual, said Barbara Hogg, head of the retirement communication group at Aon Hewitt in Chicago.

"My message to the Hispanic population is you have to put something away to take good care of your families. That's what resonates with them especially. They seem to care for their families more than their own futures," said Gary Weir, vp of retirement services for Frenkel Benefits L.L.C. in New York.

Educational meetings are crucial, Mr. Gwilliam said. But "most (of those employees) are very shy and they don't want to ask questions in a group setting." That's why it's important to follow up with individual consultations, he said.

It's also important to find a Spanish-speaking "peer advocate" who can vouch that his account has increased and that the employer has contributed, Mr. Gwilliam said.

"Deploying testimonials with champions or other co-workers" is effective, Ms. McClune said. "If they can relate and see how a program supports a co-worker, that supports their comfort level."

—By Louise Kertesz

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2012

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Opinions

EDITORIAL

Early retiree program flawed

A HEALTH CARE reform law program providing $5 billion in subsidies for sponsors of early retiree health plans may not have been a "bailout," but it was inequitable and maybe even deceptive.

Under the Early Retiree Reinsurance Program, after a participant enrolled in a plan offered by an approved sponsor incurs $15,000 in health care claims in a plan year, the government reimburses 80% of claims up to $90,000. The reimbursement cannot be used as general revenue by plan sponsors. Instead, the money must be used to reduce sponsors' health plan costs or premiums, and/or plan participants' premiums and other out-of-pocket costs.

That doesn't strike us as a bailout, a claim made in a memo by Republican staff members of the House Energy and Commerce committee's Oversight and Investigations subcommittee.

On the other hand, the program was hardly fair. Early retiree health care plan participants are the lucky ones in that they have group coverage. Contrast them with other early retirees age 55 through 64—who lack group coverage and have to shell out five-figure amounts to pay premiums for individual coverage. Those millions of early retirees and their families didn't receive one penny of federal financial support for their health care premiums and costs. That strikes us as particularly unfair, even for federal programs that routinely limit their aid to a particular group.

The program also strikes us as deceptive. The health care reform law created the program, with the law clearly stating that it would end Jan. 1, 2014. That wording certainly created an expectation that funds for reimbursement of claims would be available through the end of 2013.

But as of Dec. 2, according to Centers for Medicare & Medicaid Services, more than $4.5 billion in reimbursement money had been distributed to plan sponsors. Government regulators said they will not accept applications for reimbursement for claims incurred after Dec. 31, a clear sign they believe the reinsurance fund soon will be exhausted.

In the interest of truth in communications—an important issue for a law that has many critics—federal lawmakers would have been better off when establishing the fund to cap its total and then state that the program would end when the fund was out of money, without giving a date.

LETTERS

Med mal claims fall with reforms

TO THE EDITOR: I read with interest your article in *Business Insurance* ("Errors and Omissions—Doctors Owning up to Mistakes," Dec. 12, 2011). In the health care industry, this subject is referred to as the "I'm Sorry" initiative.

Having defended medical malpractice claims for over 50 years, I believe I have some knowledge on this subject.

The literature on this subject would leave the impression that if a patient experiences a less-than-perfect result in the course of medical treatment and the treating physician imme-

See **LETTERS** page 17

SCHILLERSTROM

COMMENTARY

Industry eager for inaugural FIO report

A potential inside-the-Beltway equivalent of a best-seller—at least for some people—is likely to roll off the presses in the next few weeks.

Unlike, say, the latest from John Grisham, this volume won't cost its readers a cent other than their share of whatever tax money goes into its production.

The long-anticipated publication, at least long anticipated among some in the insurance industry, is the Federal Insurance Office's report on modernizing and improving insurance regulation. The FIO gathered information from interested parties for a couple of months and is expected to issue its report soon.

MARK A. **HOFMANN**
SENIOR EDITOR

In fact, the Dodd-Frank Wall Street Reform and Consumer Protection Act directs the FIO to submit such a report to Congress no later than 18 months after Dodd-Frank's enactment, which makes the report due before the end of this month.

Some federal reports, such as the Warren Commission report on the assassination of President John F. Kennedy or the 9/11 Commission's final report on the 2001 terrorist attacks on the United States, make for compelling reading. More often, they're pretty turgid affairs for anyone outside the industry or people directly affected by a report's recommendations.

But the people most interested in the FIO report aren't necessarily going to be looking for sparkling prose. As a matter of fact, odds are they're going to be looking for something rather mundane—a sort of road map.

The report should give a strong indication of how the new insurance office views the current state of insurance regulation as well as the office's view of its role in improving regulation.

Under Dodd-Frank, the office has next-to-no regulatory authority. Regulation remains the prerogative of the states, courtesy of the McCarran-Ferguson Act, and is likely to remain so for some time. McCarran-Ferguson, however, doesn't mean that the federal government in general and the FIO in particular can't influence the nature of insurance regulation.

While the FIO can't overrule the states, it certainly can prod them in certain directions, and there are a lot of interested parties that would like to see the FIO do a bit of prodding. For example, in its comments submitted to the FIO, the Risk & Insurance Management Society Inc. stressed the need to have more uniform regulatory standards.

What suggestions the FIO makes to Congress regarding how and where insurance regulation can be improved and modernized could set the tone of Washington's relations with the industry and the states that regulate insurance for some time to come.

As such, it's certain to be snatched up as eagerly by insurance types as the general public goes after the latest from James Patterson.

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Perspectives

CONSENT DECREES HAVE LONG BEEN VIEWED as an efficient way for corporations to settle regulatory investigations by paying often substantial fines but not admitting any wrongdoing. A recent case heard in federal court in Manhattan, however, raises questions about the future of such consent decrees. Timothy Kevane, special counsel at Sedgwick L.L.P. in New York, analyzes the case and what it may mean for policyholders and insurers.

Judge's ruling may unsettle corporate policyholders

By Timothy Kevane

Mr. Kevane

KEY POINTS

In Securities and Exchange Commission vs. Citigroup Global markets Inc., the ruling by U.S. District Court Judge Jed S. Rakoff:

- Rejected a consent decree in which Citigroup neither admitted nor denied wrongdoing alleged by the SEC.
- While Citigroup argued such settlements avoid litigation and adverse "collateral consequences," the judge declined to be a "handmaiden" and approve the settlement.
- The ruling could have significant consequences for insurance recovery.
- A similar confrontation is brewing in a Wisconsin case.

Long-simmering tension regarding the significance of settlement agreements where corporate defendants pay fines but admit no wrongdoing recently boiled over in Judge Jed S. Rakoff's courtroom in the U.S. District Court for the Southern District of New York.

In refusing to accept a so-called consent decree, which essentially is a court-approved settlement between a company and government regulators, the judge called into question a legal maneuver that has facilitated numerous settlement agreements.

In the case, *Securities and Exchange Commission vs. Citigroup Global Markets Inc.*, the SEC alleged wrongdoing by Citigroup in its marketing and sale of collateralized debt obligations. The assets of the CDOs were made up of credit default swaps, which made financial headlines as the subprime loan debacle unfolded in 2008.

In October 2011, the SEC and Citigroup resolved their differences and the bank agreed to pay the SEC $285 million. Pursuant to longstanding procedure, the settlement provided that Citigroup neither admitted nor denied the allegations in the SEC's complaint.

When submitted to Judge Rakoff, however, he saw things differently and, like the sudden jolt of a turntable needle, asked the parties shortly before the hearing on the settlement: "Why should the court impose a judgment in a case in which the SEC alleges a serious securities fraud but the defendant neither admits nor denies wrongdoing?"

A second follow-up question by Judge Rakoff suggested that he believes there is an overriding public interest in determining whether the SEC's charges of wrongdoing were, in fact, true. Following additional briefing and argument, the judge nixed the deal, declining to serve as a mere "handmaiden" to a settlement negotiated on the basis of unknown facts.

Judge Rakoff's decision now is on appeal to the 2nd U.S. Circuit Court of Appeals.

Judge Rakoff's stance has touched a nerve, as it raises sensitive questions regarding the collateral consequences of consent decrees: that is, whether the factual basis for a regulatory settlement can come back to haunt the settling company in another matter. This issue often raises competing policy considerations, including fairness to the parties involved, conservation of court and litigant resources and the societal interests in consistent and accurate results of the judicial process.

The issue may have significant consequences for insurance.

Companies in regulated industries, particularly those whose stock is traded publicly, have a great interest in resolving disputes with their government overseers as discreetly and efficiently as possible.

Judge Rakoff's stance has touched a nerve, as it raises questions regarding the consequences of consent decrees: whether the basis for a regulatory settlement can come back to haunt the settling company in another matter.

In Citigroup's case, it sought to reassure Judge Rakoff that "business judgment" compels settlements such as these to avoid litigation and adverse "collateral consequences," which are magnified for financial institutions given popular dissatisfaction with their hand in the weak economy. That Citigroup has been named in multiple class actions arising from the subprime and credit crisis illustrates the importance of containing any effects of a regulatory settlement. Thus, by settling the charges without admitting or denying them, Citigroup says, it avoided the fallout to its shareholders that could result from an adverse outcome in litigation with the SEC.

Companies also would argue that settlements are intended to avoid adjudication of the facts and claims that are settled. Consent judgments are not true factual adjudications that can bind them in subsequent proceedings, so the argument goes. But this approach is arguably weaker in the context of insurance recovery—determining coverage based on the settled facts is different than imposing liability on the settling company, which is the company's chief concern.

That is why Citigroup, for example, cited the litany of subprime class actions it is defending, as a reminder of the disastrous consequences Judge Rakoff's truth-finding mission could portend. Even if a consent decree were potentially vulnerable to having binding consequences, industries might still cite the flexible nature of the collateral estoppel doctrine, which binds parties to prior decisions involving them, to avoid becoming stuck with statements they later regret.

Insurers, on the other hand, have an interest in making sure that their policies respond only to claims that are covered by the terms and conditions of their policies. In cases involving regulatory settlements, insurers have valid arguments in certain cases that the determination of the actual and true facts, on which Judge Rakoff rightly placed a substantial premium, should remain plainly evident, particularly where it is the result of a lengthy factual investigation by the regulatory body.

Indeed, certain settlements may identify the findings from that investigation in great detail. A strong case would exist in these circumstances for avoiding repetitive fact-finding or related litigation, particularly where the policyholder had a full and fair opportunity to contest determinations made by the regulators.

Even where the settling company neither admits nor denies those findings, it would be hard-pressed to argue, as is its right, that they are untrue and that it entered a settlement purely for expediency, with no concern for the actual facts underlying the claim. After all, these consent decrees can sometimes receive substantial publicity by themselves.

Indeed, taking at least one-half of the factual disclaimer at its face value, the company agreed not to deny the allegations in the regulator's complaint—a concession made somewhat gingerly by Citigroup, only to be ridiculed as worthless in Judge Rakoff's ruling. And where the regulator has alleged its claim in a manner that proof of only uncovered conduct could sustain its burden, a settling company may encounter skepticism at the suggestion that more innocuous, and thus insurable, conduct was involved.

There is another reason to value a consent decree more than the paper it's written on. Regulatory agencies, such as the SEC and the Federal Trade Commission, serve as public watchdogs. They are specifically designed to police the conduct of an entity's business, and assess penalties or other sanctions where warranted. They were not created to seek "damages," which is the function of private, civil actions.

This mandate sets them apart from civil plaintiffs, and supports the notion that a settlement, reflecting an agency's function to correct wrongful conduct, should be given greater weight than a settlement in the private sector. Judge Rakoff alluded to this mandate, contrasting the SEC's "contrivances" for a "quick headline" with its statutory duty to see that the "truth emerges."

While Judge Rakoff's rejection of the settlement will probably not end this important debate—as of this writing, a similar confrontation is brewing in Wisconsin, *SEC vs. Koss Corp. et al.*—it is clear from his opinion that the days of business as usual for regulatory settlements are at risk

Timothy Kevane is special counsel at law firm Sedgwick L.L.P. in New York, where his practice focuses on insurance coverage. He can be reached via email at Timothy.Kevane@sedgwicklaw.com.

Legislative Outlook

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Regulation takes the stage

As lawmakers focus on election-year politics, regulators expected to dominate government affairs

By MARK A. HOFMANN

While there may be limited congressional action on risk management- and insurance-related affairs during 2012, Washington still can have a major impact on the industry this year, Capitol Hill observers say.

That's because in some instances, the focus may shift from lawmakers to regulators, experts say.

The first major item on the regulatory agenda should be the new Federal Insurance Office's report on insurance regulation modernization, which is slated to be delivered to Congress this month.

Other regulatory issues include ongoing implementation of provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. And although almost certain to be focused on election-year politics, Congress nonetheless will have a role to play in the National Flood Insurance Program.

"I believe with the presidential election year, we are more likely to see regulators than legislators dominating the governmental affairs scene in our industry" in 2012, said Joel Wood, senior vp of the Council of Insurance Agents & Brokers in Washington.

"It would be easy for people to say nothing's going to happen (in 2012) because of the elections and the gridlock in Congress, but my response is, 'Not so fast,'" said Jimi Grande, senior vp of the National Assn. of Mutual Insurance Cos.' Washington office. "There's a lot happening in the regulatory part of the federal government that will be working feverishly despite the fact there's an election."

The FIO report will be a critical part of that, observers say. The FIO gathered comments on the issue of regulatory modernization from interested parties from October through mid-December.

"There will be a tremendous amount of attention on the first FIO report to Congress on the state of insurance regulation," said the council's Mr. Wood. He said he expects the report to set the stage for interaction among the FIO, the National Assn. of Insurance Commissioners and the states for years to come.

"It will be a very consequential report," Mr. Wood said.

The report will shine a "bright new spotlight on the insurance industry, and that can only serve to raise more issues for us to deal with in Washington," said Mr. Grande.

The Risk & Insurance Management Society Inc. filed its recommendations for regulatory reform with the FIO in December, said Kathy Doddridge, Washington-based director of government affairs for New York-based RIMS. "Hopefully, Congress will respond to some" of those recommendations in favor of greater uniformity and implementation of surplus lines provisions of Dodd-Frank, she said.

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The report will shine a 'bright new spotlight on the insurance industry, and that can only serve to raise more issues for us to deal with in Washington.'

Jimi Grande, senior vp, National Assn. of Mutual Insurance Cos.

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Lawmakers take on comp cost drivers

States addressing repackaged drugs, opt-out provisions

By ROBERTO CENICEROS

Expect to see state lawmakers tackle the pricing of repackaged pharmaceutical drugs this year, along with other practices that employers and insurers consider needless cost generators, several sources say.

An attempt by Oklahoma employers to gain the right to opt out of their state's workers compensation system—a popular practice in neighboring Texas—also is expected to be among major legislative efforts during 2012.

But unlike 2011, which produced comprehensive reform legislation in states such as Illinois, Michigan and Montana, 2012 is less likely to see sweeping reform efforts due to the attention on national elections, said Peter Burton, senior division executive for state relations for Boca Raton, Fla.-based NCCI Holdings Inc.

"That is not to say, though, that there is not going to be a lot of state-by-state focused activity on workers comp," Mr. Burton said. "We anticipate it's going to be a more focused approach (by interest groups) rather than a (year of) large-scale substantive reform" efforts.

In Colorado, for example, Gov. John Hickenlooper named a task force in November to review a Pinnacol Assurance proposal that could restructure the workers comp insurer into a mutual.

Such a plan also could require focused legislation on related issues, such as what would become of Colorado's residual market, Mr. Burton said.

Rita Nowak, vp of commercial lines and workers comp for the Property Casualty Insurers Assn. of America in Des Plaines, Ill., agrees that the 2012 elections will lessen chances of large-scale workers comp reforms. However, she expects system tweaks in some states.

One substantial issue PCI hopes to see addressed concerns the pricing of repackaged drugs dispensed by doctors, Ms. Nowak said.

In 2010, former Florida Gov. Charlie Crist vetoed a bill that would have limited how much doctors can receive for dispensing repackaged prescription drugs to workers comp claimants.

Last year, a similar Senate bill died in a budget committee. But H.B. 511, sponsored by Matt Hudson, R-Naples, passed through Florida's House Insurance and Banking Subcommittee in December in preparation for the 2012 legislative session. It would also limit doctor dispensing charges,

Insurers say another attempt could succeed in 2012 because there is a new governor and the issue has gained more attention.

The repackaging issue is very "high profile" in Florida, "so we expect that issue will be addressed, hopefully successfully," said Bruce Wood, general counsel and director of workers compensation for the Washington-based American Insurance Assn.

"Other state comp commissions are also looking at this," Mr. Burton said. "I think a lot of states will be jumping on that issue."

One substantial issue to be addressed concerns the pricing of repackaged drugs dispensed by doctors.

States where insurers would like legislation capping the prices doctors charge for dispensing workers comp pharmaceuticals include Hawaii, Louisiana and South Carolina, Ms. Nowak said.

"When you look at the repackaged drugs issue, you are seeing exorbitant costs being added on," Ms. Nowak said. "It's more than opportunistic pricing."

In Oklahoma, meanwhile, Senate President Pro Tempore Brian Bingman, R-Sapulpa, has agreed to sponsor a bill that would allow employers to opt out of the state's workers comp system, said Becky Robinson, assistant vp, risk management for Hobby Lobby Stores Inc.

Employers supporting such legislation spent 2011 laying the groundwork and expect a bill to be introduced early in 2012, said Ms. Robinson, who also is chair of the Oklahoma Injury Benefit Coalition.

Unlike Texas, which allows "nonsubscribers" to opt out of its workers comp system, the legislation under consideration in Oklahoma would require employers opting out to provide workers with a benefit plan meeting Employee Retirement Income Security Act requirements, Ms. Robinson said. She said this may lead to fewer litigated claims.

Under ERISA, employers would have to provide workers with substantial notification of benefits they are entitled to receive upon injury and would have to meet certain deadlines to provide those benefits, Ms. Robinson added.

Other states with potential changes on tap include Tennessee, where businesses propose establishing an administrative workers comp court system, which would eliminate hearing worker injury disputes in civil court.

But recent reports say reform proponents and the governor may want to wait until 2013 to propose broader changes to Tennessee's workers comp system.

"From what we hear, the governor is not in a particular hurry—not because he doesn't believe there is a need for reform in the Tennessee system, but he wants to go about it deliberately…to do it right, not just do it in haste," Mr. Wood said.

In Maine, a sweeping reform bill introduced in 2011, L.D. 1571, is expected to be taken up again in early 2012, observers said. The legislation would change the state's benefit structure, agency operations and governance.

Maine is weighing workers comp system changes to address cost drivers even in the midst of rate reductions, said Bruce Hockman, executive vp and workers comp practice leader in Philadelphia for Towers Watson & Co.

Maine saw two rate reductions during 2011 for 2012 workers comp policy pricing; the first was a 3.2% decrease, and the second was a 3.8% reduction. The second reduction came after introduction of a medical fee schedule in the state, where workers comp rates have dropped nearly 50% since 1993.

Mr. Hockman said he expects to see workers comp system-improvement legislation introduced in more states, like Maine, where rates are not rising.

In states where there is limited friction between labor and management, participants are no longer waiting until they are in a panic because the workers comp system is dysfunctional and needs immediate repairs, he said.

"It's breaking with history where workers comp reform, like other legislation, comes out of a panic" rising, Mr. Hockman said.

Instead, "I think you are going to find a lot of people coming together to say, 'If there is something broken in our system, let's get together and fix it,'" before it becomes a major cost problem, he said.

Federal: Regulation efforts key

CONTINUED FROM PAGE 10

"There are things we continue to anticipate working on in 2012," said Leigh Ann Pusey, president and CEO of the American Insurance Assn. in Washington.

The issues key to the AIA include extending the NFIP, implementing Dodd-Frank and "working with FIO as it's launched and its role, particularly in the international arena," said Ms. Pusey, noting that the FIO's regulatory reform report will be among the most important developments of the year.

The report will "give us some good idea of the direction FIO is setting for itself," said Tom Litjen, vp in the Washington office of the Des Plaines, Ill.-based Property Casualty Insurers Assn. of America.

"You always kind of narrow your focus on what's doable in an election year, but we still believe some things are doable," said Mr. Litjen, citing efforts to win a long-term extension of NFIP. "It is going to be a very difficult environment, but a lot of these issues are not necessarily partisan."

Extending the NFIP would "be at the top of the list" of perennial issues that RIMS would like Congress to deal with this year, said Ms. Doddridge.

RIMS also would like lawmakers to approve legislation that would allow risk retention groups to offer property as well as liability coverage to their members, she said.

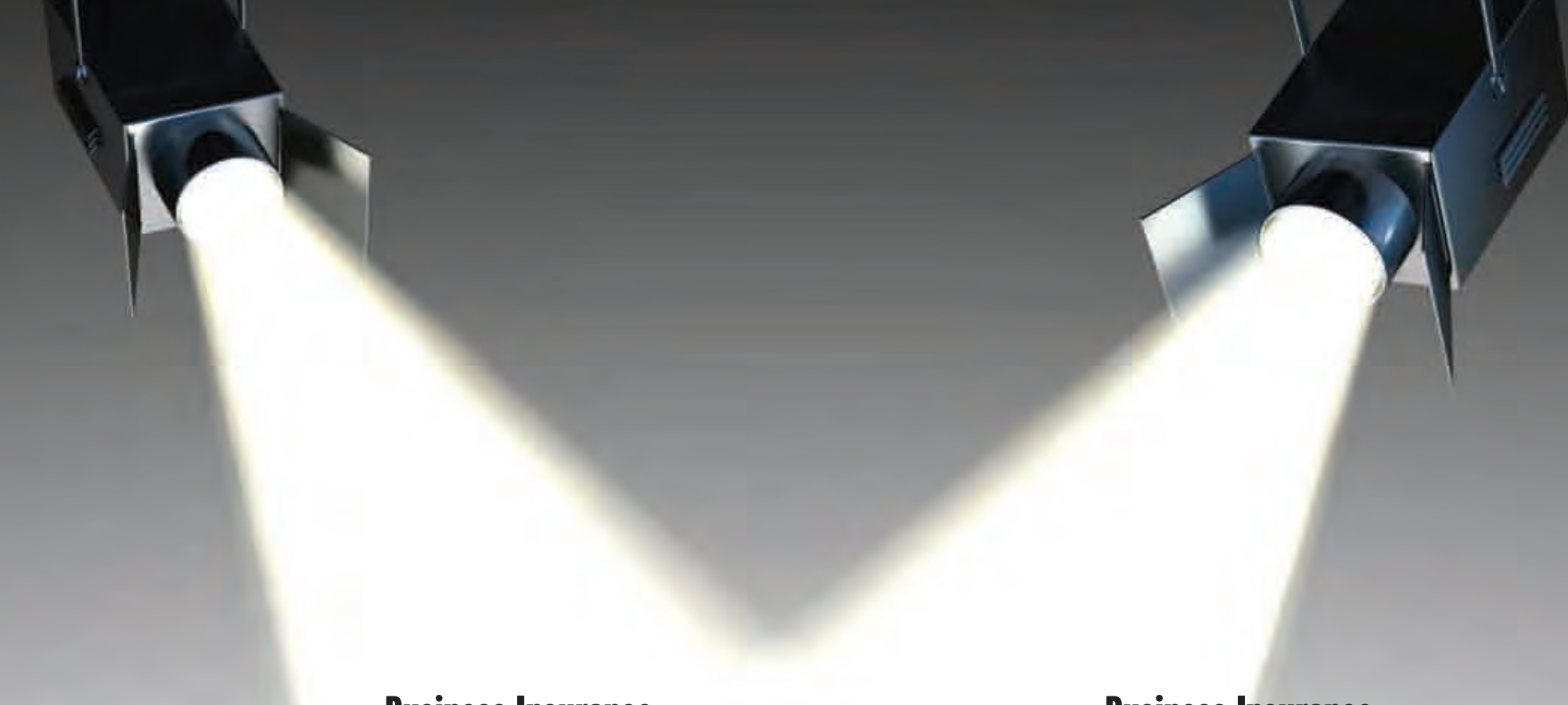
RIMS expects the House Financial Services Subcommittee on Insurance, Housing and Community Opportunity to examine international insurance issues, and is particularly interested in resisting protectionism in Brazil and elsewhere, she said.

Dodd-Frank implementation is a key issue for NAMIC, said Mr. Grande. This includes clarifying which institutions would be covered under the "systemically important" designation and thus present a systemic risk to the economy that would make the institution subject to heightened regulation. It also includes making certain that the Federal Deposit Insurance Corp. doesn't pull any insurance companies, including mutual insurers, into its resolution authority, he said.

The council's Mr. Wood cited another aspect of Dodd-Frank as critical—implementing the surplus lines reform provision initially contained in the Nonadmitted Reform and Reinsurance Act, which the House passed several times before it was incorporated into Dodd-Frank.

States are supposed to come up with a uniform approach for allocating premium taxes among themselves, but so far have approved multiple approaches, he said.

"This is going to sort out one way or another in the coming year," Mr. Wood said.



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Business Insurance

Big year ahead for benefit rules

Employers expect more guidance on health reforms

By JERRY GEISEL

2012 will be action-packed on the regulatory front for employee benefit plans, but experts say the year is expected to include little, if any, benefit activity on the congressional front.

As far as the health care reform law, "2012 will be a pivotal year for regulation," according to Frank McArdle, a principal with Aon Hewitt in Washington.

"There will be a fairly long list of regulations coming out," said Paul Dennett, senior vp-health care reform with the American Benefits Council in Washington.

From an employer perspective, one of the top health care reform issues involves what are called employer responsibility provisions of the Patient Protection and Affordable Care Act, an area in which Washington benefit observers expect regulatory guidance this year.

Under the reform law employers can be fined $2,000 a year for each full-time employee not offered health coverage.

The law will impose an employer penalty of up to $2,000 a year for each full-time employee—those working an average of at least 30 hours a week during a month—who are not offered health care coverage, starting in 2014.

The legislative language has been widely interpreted as mandating that the penalty would be assessed for all full-time employees—even those with employer-provided coverage—if just one lower-paid employee were not offered coverage, qualified for a federal premium subsidy, and used the subsidy to purchase coverage in a state insurance exchange.

Experts have described that section of the law as being akin to a "sledgehammer."

Last year, those employer concerns reached the Treasury Department, which said it "contemplated" that it would issue regulations to clarify that the penalty would not apply if an employer offered coverage to all "or substantially all" of its full-time employees.

Experts say that they anticipate Treasury will issue regulatory guidance on that issue this year.

"This is something Treasury is working on. We are looking for guidance on this and expect Treasury to do their best to produce reasonable rules so employers won't be hit with huge penalties," said Anne Waidmann, a PricewaterhouseCoopers L.L.P. director in Washington.

Federal regulators also are expected to make a fresh attempt in developing regulations to implement a reform law provision that requires employers to revamp how they explain and communicate their health care benefit plans.

Amid heavy criticism from employers, who said the rules left many issues unaddressed and that it would be impossible to meet the scheduled March 23, 2012, compliance date, regulators in November indefinitely postponed an effective date. Once the rules are finalized, regulators said group health care plans and insurers would have a "sufficient time" to comply.

AP WORLDWIDE

Little legislative action is likely this year, but one possible change could be the repeal of a federal long-term health program, which Health and Human Services Secretary Kathleen Sebelius thinks is unworkable over time due to its voluntary nature.

Some experts say the new communication rules could be released relatively soon.

"I would think we would see a regulation within the next few months, with an effective date around Jan. 1, 2013," said Ed Fensholt, senior vp and director of compliance services for Lockton Benefit Group in Kansas City, Mo.

Other health care reform law issues that could be addressed by regulators this year include whether employers even have to offer coverage to dependents and whether employees' pretax contributions to 401(k) plans should be included as wages in calculating whether their required premium contributions are—as a percentage of wages—affordable.

While numerous health care reform regulations are expected in 2012, little if any action is likely on the legislative front.

"Not much will change. There will be a lot of little skirmishes," but no major action, said Helen Darling, president and CEO of the National Business Group on Health in Washington.

There are several reasons for that lack of legislative action, experts say, the most significant being lawmakers' inability to reach an agreement on much of anything recently and Congress' reluctance to make any changes prior to a Supreme Court decision on whether the law's individual mandate—and potentially the entire law—are constitutional. That ruling is expected in June.

"I think things will be frozen until the Supreme Court rules," said J.D. Piro, an Aon Hewitt principal in Norwalk, Conn.

One possible change that lawmakers could agree on is repealing a reform law provision that would set up a voluntary federal long-term care program. In October, Health and Human Services Secretary Kathleen Sebelius said because the program would be voluntary, it would be unworkable over time as premiums would soar due to adverse selection.

With Ms. Sebelius lacking the authority to formally end the program, Congress may act, said Lockton's Mr. Fensholt. If Congress does anything on health care reform, it would be to kill the long-term care program because "each party might gain points in doing that," he said.

Pension plans are another benefit area in which rules may be issued this year.

A top pension issue awaiting final regulatory action is Internal Revenue Service guidance on acceptable formulas that cash balance pension plan sponsors can use to credit interest to employees' account balances.

The IRS proposed rules in 2010, but last year said final rules would not go into effect until Jan. 1, 2013, at the earliest.

"We would hope to see final rules soon," said Alan Glickstein, a senior consultant with Towers Watson & Co. in Dallas.

Under the proposal the IRS delayed without explanation, employers that use a fixed percentage to credit interest to participants' cash balance accounts cannot credit more than 5% a year.

In addition, employers that use a design formula that credits the greater of either the interest rate on certain bond-based indices or a fixed percentage, the fixed percentage would have been capped at 4%.

For employers using an equity-based rate, the interest credit would have been either the rate of return earned by the equity index or a certain percentage, whichever is greater, up to 3%. Few employers now use such an approach.

Pressure builds for federal action on uniform approach to data laws

Legislative progress uncertain in 2012

By JUDY GREENWALD

There is growing consensus that federal legislation is needed to address the 47 different state approaches to data breach notification, but passage of a comprehensive federal bill is less than certain, experts say.

Many say a polarized Congress may find itself unable to take decisive action, particularly given that this is an election year. As a result, many observers are, at best, cautiously optimistic.

According to one estimate, 30 to 40 pieces of cyber risk legislation already have been proposed in Congress. Observers say a uniform federal law governing notification of data beaches would be welcome, but it should pre-empt related state laws if it is going to be successful.

For instance, the Senate Judiciary Committee last year approved three Democrat-backed data breach bills.

On the related issue of security, a House Republican task force last year said Congress should give companies incentives to boost their cyber defenses, but also said that tough regulation may be warranted for potentially critical facilities such as power and water plants.

However, "In an election year, a lot of things don't get done with a stalemated Congress," said John F. Mullen, an attorney with Nelson Levine de Luca & Horst L.L.C. in Blue Bell, Pa. "I just question" whether there will be movement "unless it's to someone's benefit that it does happen."

Shawn Edward Tuma, a partner

States may address risk management concerns in 2012

Risk assessments, natural catastrophes on state agendas

By MIKE TSIKOUDAKIS and RODD ZOLKOS

As 2012 begins, there are several state-level issues around the United States with potential risk management implications.

The Risk & Insurance Management Society Inc. has several state issues it expects to follow this year, including its work with New York state Sen. Jeffrey Klein, D-Bronx/Westchester, to push for the creation of a New York state Office of Risk Assessment, which would integrate comprehensive risk management into the state's operations, RIMS said in a statement.

New York-based RIMS also plans to closely monitor state developments in implementing the surplus lines provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

And the Des Plaines, Ill.-based Property Casualty Insurers Assn. of America will track legislative developments involving the Florida Hurricane Catastrophe Fund.

"I think we're more likely to see some legislation down in Florida. We have not fully vetted it internally, but I think there's going to be a bill down there on that cat fund" to expand capacity, said Paul Blume, senior vp of state government relations for the PCI. "That's the most major state issue."

Overall, it's been a mixed bag for state property residual mechanisms, said Jim Whittle, vp and chief claims counsel for the American Insurance Assn. in Washington.

"While the Texas Windstorm Insurance Assn. was put on better financial footing, and regulatory implementation is ongoing there, Florida Citizens (Property Insurance Corp.) has grown more than 14% in the last year, while the Florida hurricane cat fund has a multibillion-dollar deficit for its exposures," Mr. Whittle said.

"At the same time, California's Earthquake Authority has only small market penetration for that important peril. On the positive side, however, Louisiana Citizens (Property Insurance Corp.) policies in force have been stable if not declining," he said.

Further risk management-related legislation also may result from last year's Hurricane Irene and the Virginia earthquake, and might address catastrophes and possible coastal and flood exposures, as "we have already seen regulations related to the application of hurricane deductibles," Mr. Whittle said.

The insurance industry has seen four states recently pass legislation defining construction defect claims as occurrences under commercial liability policies—a trend likely to continue in some places, experts say.

While PCI isn't aware of any other states planning to pass similar legislation, the trend is likely to be ongoing, Mr. Blume said.

"While a few states have sought to define occurrence, the vast majority have not, recognizing the importance of allowing the contracting parties, insurers and policyholders to define such important terms," Mr. Whittle said. "Nonetheless, we do expect similar legislation in some places in the coming year."

Harold Pumford, CEO of the Assn. of Governmental Risk Pools in Prague, Okla., said he currently doesn't see too much on the horizon in terms of state legislative activity that might affect public entity risk pools.

"About the only thing is the continuing discussion in New Hampshire…as to what is adequate surplus," Mr. Pumford said. "The issue there is some in the Legislature believe the pool has higher surplus than it should have."

That debate has centered on a pool operated by the New Hampshire Local Government Center, which some legislators argue is maintaining excessive surplus that should be returned to the pool's member municipalities, Mr. Pumford said.

"With the really tight budgets and everything, everybody is looking for any money that they can come up with," he said.

Mr. Pumford noted there also has been interest in some legislative quarters in Illinois in passing legislation that would establish a time frame in which pool members could return to a pool after giving notice they were withdrawing from the pool. Such legislation has been introduced previously in Illinois, but it has been unsuccessful, he said.

On the captive and alternative risk transfer front, Robert H. Myers Jr., managing partner of the Washington office and co-chair of the insurance and reinsurance practice at Morris Manning & Martin L.L.P., said, "We have some sort of national issues that involve the states," rather than state legislative issues of concern.

"I don't know of any state law that is proposed to be changed that is a problem," said Mr. Myers, who serves as general counsel of the National Risk Retention Assn.

The RRG community will be watching as states enact National Assn. of Insurance Commissioners accreditation requirements addressing risk retention groups, Mr. Myers said.

"The NAIC accreditation requirements for risk retention groups are being incorporated into state law," he said. "For states that domicile risk retention groups, there will be more compliance requirements."

Mr. Myers and others involved with RRGs, captives and the alternative risk transfer industry also will watch some states' efforts to restrict the ability of RRGs domiciled elsewhere to write business in a particular state.

AP WORLDWIDE

Several states may move forward with catastrophe risk-related legislation in 2012. The high insured losses from 2011's natural disasters—including from left,Tropical Storm Lee, Hurricane Irene and the Texas wildfires—has brought capacity issues to the forefront of lawmakers' risk management concerns.

with BrittonTuma P.L.L.C. in Plano, Texas, said, "I believe that before the end of 2012, there's a pretty good chance we will be getting legislation that helps," although "I don't know if it'll go all the way toward what a lot of people are seeking."

"It's a difficult climate to pass legislation, but if one thing can make it through, it will be a cyber security bill." said Jacob Alcott, a principal at Alexandria, Va.-based Good Harbor Consulting and former counsel to the Senate Committee on Commerce, Science, and Transportation.

Harley Geiger, policy counsel at the Washington-based Center for Democracy & Technology, said any action on data breaches "likely depends on Congress' other priorities, and that is going to depend in part on domestic events."

During the past couple of years, "we've seen data breaches rise in frequency and in cost to business and consumers. There's no reason to expect that won't happen again in 2012," although it may be "overshadowed by other events," Mr. Geiger said.

Celeste King, a founding partner with Walker Wilcox Matousek L.L.P. in Chicago, said there is a greater likelihood this year than previous years that legislation would be passed, "which isn't the same as saying it will happen."

Still, members of Congress "all seem relatively on the same page" in terms of being interested in doing something, and this is "probably one of the lesser controversial things" before them, she said.

Robert Dix, Washington-based vp of government affairs and critical infrastructure protection for technology company Juniper Networks Inc., said, "I think that there are some opportunities right now." Data breaches have "been a topic that we've been kicking around for quite a few years, and I think there are some opportunities to come to some bipartisan agreement on some chewable bits around this topic, and not try to load up the Christmas tree with all kinds of arrangements."

Beth Diamond, New York-based focus group leader for technology, media and business services for Beazley Group P.L.C., said the prospect that federal legislation will pass is very good. She said she believes there is strong bipartisan support for a federal cyber security law, and many versions of potential legislation are pending in Congress.

"I think what's been missing is somebody really showing some leadership," Ms. Diamond said. "What we've seen in the past last few weeks is that Senate Majority Leader Harry Reid, D-Nev., is looking to break that gridlock and get some movement." When Congress returns this month from its recess, "I think you're going to see some real movement," she said.

In a Nov. 17 letter to Senate Minority Leader Mitch McConnell, R-Ky., Sen. Reid said, "Given the magnitude of the threat and the gaps in the government's ability to respond, we cannot afford to delay action" on critical legislation related to cyber security.

"For that reason, it is my intent to bring comprehensive cyber security legislation to the Senate floor for consideration during the first Senate work period" in 2012. "It is my firm hope that the working groups will be able to achieve an agreement on legislation by then, but I believe the cyber threat to be of such urgency that we must act whether or not such agreement can be reached."

However, Lori S. Nugent, a partner with law firm Wilson Elser Moskowitz Edelman & Dicker L.L.P. in Chicago, said she does not believe that federal cyber legislation is necessary.

Federal agencies and state governments "have increased their hiring of regulators to enforce existing laws that are impacted by data security," she said. "I anticipate that in the coming year, more aggressive regulatory activity will take place and that additional legislation is not needed to support this activity."

Products&Services

Chubb cyber security covers private firms

WARREN, N.J.—Chubb Group of Insurance Cos. has added cyber security to its line of professional liability insurance for private companies.

The coverage provides protection for private U.S. firms against liability and damages resulting from network security intrusions and privacy violations, the Warren, N.J.-based insurer said.

"The frequency and severity of cyber breaches, employee thefts, kidnappings and workplace violence incidents are growing concerns for many companies and their employees," Lisa Jones, vp of private business management liability products for Chubb, said in a statement. "Private companies remain vulnerable to these potentially disruptive and expensive criminal incidents if they are relying solely on their general liability and umbrella insurance."

The cyber security coverage has been added to Chubb's ForeFront Portfolio 3.0, which addresses professional liability exposures for small to midsize companies.

The policy provides crisis management and privacy notification expenses in the event of a data breach, even if a claim for cyber liability is not triggered.

ForeFront Portfolio 3.0 also broadened its coverage to include crime, workplace violence, and directors and officers liability.

For more information, contact Ms. Jones at 908-903-3301 or *ljones@chubb.com*.

Willis rolls out global placement system

LONDON—Willis Group Holdings P.L.C. has launched its global insurance placement system.

WillPLACE uses a proprietary matching algorithm to correlate insurer risk appetites with specific client risks, matching clients with appropriate insurers.

"Willis risk advisers then work with their clients to assign a variety of weightings to their priorities," Willis said in a statement. "These weightings for ultimate carrier selection may include such factors as price competitiveness, claims service and underwriting focus, among others. The client's requests are then electronically matched with carrier data, resulting in a recommended match between client need and carrier appetite."

Willis launched WillPLACE as a pilot program in Italy a year ago. By the first quarter of next year, the placement program is to be rolled out in 14 areas, including the United States, the United Kingdom and Canada.

The London-based brokerage said once the rollout is done, more than 70% of its premiums placed will go through WillPLACE.

Both Marsh Inc. and Aon Corp. have launched placement systems matching insurer risk appetites with client needs in recent years. Marsh launched its program in 2006, and Aon launched its Aon Global Risk Insight Program in 2008.

For more information on the Willis system, contact Matt Keeping, chief placement officer for Willis North America, at 212-915-8250 or *matthew.keeping@willis.com*. For international inquiries, contact Jonathan Prinn, chief operations officer at Willis Global Placement, at +44-0-203-124-7817 or *jonathan.prinn@willis.com*.

Navigators launches N.Z. legal costs policy

NEW YORK—In response to a recent judgment of the High Court in Auckland, New Zealand, Navigators Group Inc. has launched a legal defense cost policy for individual directors of corporations domiciled or operating in Australia and New Zealand.

The NavDefence policy specifically addresses emerging risks in the region since a recent Auckland High Court judgment that may prevent directors and officers insurance from responding to legal defense costs, the New York-based specialty insurer said.

"In light of the recent Australian Institute of Company Directors' survey results and the recent judgment by the Auckland High Court in the *Bridgecorp (Holdings)* case, directors have felt vulnerable to the potential of funding their own defense costs despite having traditional D&O policies in place," Carl Bach, head of syndicate 1221's professional liability division, said in a statement.

The policy, underwritten though Navigators' Lloyd's of London syndicate 1221, provides dedicated defense cost coverage for directors under certain circumstances where a charge is placed on the main D&O policy.

For more information, contact Mr. Bach at +44-207-220-6976 or *cbach@navg.com*.

TO SUBMIT ITEMS

BI's Products & Services column reports on new product offerings. Please send Product & Services news to Mike Tsikoudakis, 360 N. Michigan Ave., Chicago, Ill. 60601 or email *mtsikoudakis@businessinsurance.com*.

Comings&Goings

VISIT

www.businessinsurance.com/ComingsandGoings for a full list of this week's personnel moves and promotions. Check our Web site daily for additional postings and sign up for the weekly email.

TO SUBMIT ITEMS

Business Insurance would like to report on senior-level changes at commercial insurance companies and service providers. Please send news and photos of recently promoted, hired or appointed senior-level executives to:

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LEGAL NOTICE

IN THE MATTER OF THE LIQUIDATION OF U.S. CAPITAL INSURANCE COMPANY
Supreme Court County of New York
Index No.: 403176/97
NOTICE

Pursuant to an order of the Supreme Court of the State of New York, County of New York (the "Court"), entered November 20, 1997 ("Liquidation Order"), the then-Superintendent of Insurance of the State of New York and his successors in office were appointed as liquidator ("Liquidator") of U.S. Capital Insurance Company ("U.S. Capital") and, as such, has been directed to take possession of U.S. Capital's property, liquidate its business and affairs, and dissolve its corporate charter pursuant to Article 74 of the New York Insurance Law ("Insurance Law"). The Superintendent of Financial Services of the State of New York has now succeeded the Superintendent of Insurance as Liquidator of U.S. Capital. The Liquidator has, pursuant to Insurance Law Article 74, appointed Jonathan L. Bing, Special Deputy Superintendent ("Special Deputy"), as his agent to liquidate the business of U.S. Capital. The Special Deputy carries out his duties through the New York Liquidation Bureau, 110 William Street, New York, New York 10038. The Liquidator has submitted to the Court a verified petition ("Verified Petition") seeking an order: (i) approving the Liquidator's initial report on the status of the liquidation of U.S. Capital ("Initial Report") and the financial transactions delineated therein; (ii) authorizing the continued payment of administrative costs and expenses; (iii) authorizing the Liquidator to distribute U.S. Capital's assets, consistent with this Court's orders and the priorities set forth in Insurance Law Section 7434, to those creditors of U.S. Capital with allowed claims, to the extent that, in the Liquidator's discretion, sufficient funds are available; (iv) extending immunity to the Superintendent in his capacity as Liquidator of U.S. Capital, and his successors in office and their agents and employees, for any cause of action of any nature against them, individually or jointly, for any act or omission when acting in good faith, in accordance with the orders of this Court, or in the performance of their duties pursuant to Insurance Law Article 74; and (v) granting such other and further relief as this Court deems appropriate and just.

A hearing is scheduled on the Verified Petition on the 10th day of January, 2012, at 10 a.m., before the Honorable Richard B. Lowe III, JSC, New York Supreme Court at the Courthouse, IAS Part 56, Room 408, 60 Centre Street, New York, New York 10007. If you wish to object to the Verified Petition, you must serve a written statement setting forth your objections and all supporting documentation upon the Liquidator and Clerk of the Court, at least seven business days prior to the hearing. Service on the Liquidator shall be made by first class mail at the following address:

Superintendent of Financial Services of the
State of New York as Liquidator of
U.S. Capital Insurance Company
110 William Street
New York, New York 10038
Attention: John Pearson Kelly
General Counsel

The Verified Petition and Initial Report are available for inspection at the above address. In the event of any discrepancy between this notice and the documents submitted to Court, the documents control.

Requests for further information should be directed to the New York Liquidation Bureau, Creditor and Ancillary Operations Division, at (212) 341-6665.

Dated: December 5, 2011
Benjamin M. Lawsky
Superintendent of Financial Services
of the State of New York as Liquidator of
U.S. Capital Insurance Company

HELP WANTED

Ascot Underwriting Inc. seeks Assistant Underwriter/Compliance Manager in Hartford, CT to perform analysis of property risks in support of underwriters including clearance, pre-risk, quoting, file management, underwriting documentation, endorsements, and closing notices. Liaise with national and international colleagues to advise on compliance regulations and other corporate processes such as cash allocation, workflow management, and accounts. Train new hires related to underwriting systems, Ascot processes, and compliance standards. Position requires: Bachelor's degree plus 18 months experience in the job offered or 18 months of experience performing underwriting and compliance support, including document production, compliance monitoring and in-depth use of electronic underwriting systems and pre-risking aggregation tools. To apply, please send copy of ad, cover letter and resume to Ascot Underwriting Inc., 20 Church Street, Ste #1760, Hartford, CT 06103 Attn: Paul Amrose.

UP COMINGS & GOINGS CLOSE

CLARK SCHWEERS

NEW JOB TITLE: Washington-based managing director of insurance claim services at BDO Consulting.

PREVIOUS POSITION: Washington-based senior manager of insurance claims services at Ernst & Young L.L.P.

LOOKING FORWARD TO: Being part of an environment where client service is top priority, and teamwork, entrepreneurship and hard work are always at the forefront of decisions.

INDUSTRY CHALLENGES: The level and frequency of disasters is simply unprecedented. Risk managers are dealing with many more claims and need more help prioritizing and resolving them.

INDUSTRY OUTLOOK: Insurance is a fundamental part of our society. As long as it continues to adapt to the new normal, the future is quite bright.

BEST THING ABOUT A BAD ECONOMY: It allows for exceptional service providers to rise above average performers.

FIRST MARKET EXPERIENCE: Assisting state insurance guaranty associations in recovering funds from a major life insurance embezzlement.

COLLEGE MAJOR: Business administration.

ADVICE: Treat everyone you meet in life with respect and value each person's contribution.

SOMEONE ONCE TOLD ME: Never compromise your values.

OUTSIDE THE INDUSTRY, A DREAM JOB: Travel critic.

HOBBIES: Watching Capitals hockey and college sports, going to the gym and watching movies.

MOST PASSIONATE ABOUT: Family and travel.

CAN'T-MISS TV SHOW: The Weather Channel and "Shark Tank."

FAVORITE MEAL: Barbecue or Cajun.

EMAIL OR PHONE, AND WHY: Neither. I am old school and prefer face-to-face meetings.

Alliant: Ruling for Aon

CONTINUED FROM PAGE 3

iting Aon construction group employees to work for Alliant until the case is decided.

"We are delighted with the court's decision and we are looking forward to the final trial on the merits," an Aon spokesman said.

An attorney who represents Mr. Cusack and Alliant said the judge "narrowed the requested injunction by Aon substantially such that in his view there will be free competition between Aon and Alliant."

"Aon did not have any confidential information that had been utilized by any of the Alliant people, and therefore there was really no damage to Aon but for the fact that Aon refused to properly renew employment contracts with some of its major producers," said Blair Fensterstock, a partner in Fensterstock & Partners L.L.P. in New York.

> 'Aon did not have any confidential information that had been utilized by any of the Alliant people, and therefore there was really no damage to Aon.'
>
> Blair Fensterstock
> Fensterstock & Partners L.L.P., New York

"I do not see this ruling as a major setback to Alliant and/or to Michael Cusack," he said, adding "that's not to say that I don't disagree with some of Judge Fried's findings."

The ruling was the latest in a legal battle between Aon and Alliant over Alliant's hiring of employees of Aon's construction services group last year. The group includes Peter Arkley, who resigned as chairman and CEO of the Aon unit to head Alliant's construction practice.

In a complaint filed in chancery court in Chicago last June, Aon holds that the former executives conspired with Newport Beach, Calif.-based Alliant to solicit at least 40 other employees of Aon's construction services group to quit Aon and join Alliant. The complaint also alleges that the defendants poached Aon clients when they moved to Alliant.

In June, the Chicago court granted Aon a temporary retraining order barring several former executives in its construction services unit and Alliant from soliciting Aon employees and clients for Alliant.

LETTERS

CONTINUED FROM PAGE 8

diately falls upon his sword and confesses being negligent, that this would materially reduce the number of medical malpractice claims and the costs associated with such claims.

The number of articles addressing the "I'm Sorry" concept, which extol the success of this approach, have taken off like a rocket in the health care industry, which is an industry that has a long history of blindly engaging in "follow the leader."

One can trace the onset of the "I'm Sorry" concept to a standard promulgated by the Joint Commission on the Accreditation of Healthcare Organizations in 2001, which imposed on hospitals an obligation to inform patients of unanticipated outcomes. This was followed by the University of Michigan adopting an "I'm Sorry" program. The reports that followed from the University of Michigan created the impression that the program was highly successful and was repeatedly referred to in numerous articles which followed on the subject. The reports indicated that the U of M had experienced:

- A reduction in the number of medical malpractice claims from 262 in 2001 to 63 in 2009;
- A reduction in reserves from $72 million in 2001 to $16 million in 2009;
- A reduction in attorney fees related to malpractice claims from $2.8 million in 2001 to $1.1 million in 2008.

Many assumed this demonstrated that the cost savings from the "I'm Sorry" program were substantial.

Overlooked was that in 1993 the Michigan Legislature passed medical malpractice tort reform legislation, which resulted in one of the most successful malpractice tort reforms in the country.

After the enactment of the 1993 medical malpractice tort reform (legislation), the number of medical malpractice cases began to decline dramatically each year. In 2002, the number of such claims was 1,501. In 2006, the number had fallen to 932, a reduction in four years of 42%. In 2007, the number of malpractice cases in Michigan was 833; and by 2009, it was less than 800.

Considering that Michigan has over 23,000 physicians, 144 hospital and thousands of allied health care providers, the minimal number of malpractice cases now being filed in Michigan is remarkable.

Every hospital in Michigan experienced a substantial reduction in costs associated with medical malpractice claims after 1993. The reduction of the number of medical malpractice claims in Michigan and the reduction of expenses associated therewith were not the result of hospitals adopting an "I'm Sorry" program but of the success of Michigan's 1993 medical malpractice tort reform. Hospitals in Michigan which did not adopt an "I'm Sorry" program experienced the same statistics quoted by the University of Michigan.

The success of the 1993 Michigan medical malpractice tort reform legislation is related to the fact that the Michigan Supreme Court rejected all challenges to the legislation and strictly construed the requirements to pursue a medical malpractice claim set forth in the legislation.

To determine where malpractice claims are going in Michigan, errors and omissions carriers need to keep their eye on the makeup of the Michigan Supreme Court and not the number of hospitals adopting an "I'm Sorry" program.

Richard A. Kitch
Principal,
Kitch Drutchas Wagner
Valitutti & Sherbrook,
Detroit

Thailand: Capacity shrinks after floods

CONTINUED FROM PAGE 1

al Insurance Assn., said multinational and foreign-Thai joint venture operations suffered the most insured damage. Those accounts were written largely by foreign insurers, particularly Japanese underwriters, he said.

Meanwhile, insurers, reinsurers and third-party administrators were dealing with a shortage of surveyors and claims adjusters, logistical difficulties and the sheer scope of the disaster, said Richard Jones, a principal at Guy Carpenter & Co. L.L.C.'s Singapore office.

The adjuster shortage led to a flap, with Thai insurers accusing outside adjusters and surveyors working for reinsurers of charging more than is customary.

"The problem was the limited ability of survey companies in appraising these losses," said Mr. Jiraphant. "Since then, the Office of the Insurance Commission (Thailand's insurance regulator) has relaxed its regulations and allowed surveyors from Malaysia, Singapore and Japan to come and work in Thailand."

"But it's still quite a slow process," Mr. Jones added. "Loss adjusting is taking time from a resources viewpoint, and there's a lot of uncertainty still."

Business interruption losses have been equally hard to assess, said Theera Bunnag, executive vp of Bangkok-based ThaiSri Insurance Co. Ltd. Policyholders and insurers are having a difficult time accurately estimating income lost due to the many factors involved. Aside from lost revenue due to production shutdowns, factors such as costs associated with "supply chain disruptions; the lag time when either fixing or procuring new machinery; as well as time spent rejigging, retooling and rehiring staff," also are factors, he said.

Other issues include accounting for when the damage occurred, which varied from location to location. He also said it's likely that many companies have exceeded their limits for business interruption coverage, and that companies on the other side of the world whose businesses were disrupted because of the Thai flooding also are claiming business interruption losses, he said.

Mr. Jones said reinsurers have been left in the difficult position of having to price out 2012 reinsurance treaties while they still don't know their full losses from the Thai floods. Reinsurers' renewal treaties include new terms and conditions, higher pricing and several new options that are not easy for clients to digest, he said.

> 'Once, people did not consider Thailand a (catastrophe) market and now everyone has to manage their cat. The market will be lucky to get 10% of its previous capacity.'
>
> Surachai Sirivallop,
> Thai Reinsurance P.L.C.

For example, Swiss Re has estimated its exposure from the flooding at about $600 million. Munich Reinsurance Co. put its losses at about $655 million before taxes.

"Clients are having to grapple with different reinsurance structures that they have to take on board, and we are seeing sublimits coming in for flood" coverage, Mr. Jones said.

Brokers also say that reinsurers are pulling back on underwriting in Thailand. French state-backed insurer Caisse Centrale de Reassurance S.A. announced that it has quit underwriting in Thailand, as well as New Zealand and Australia, as a result of several natural disasters.

Surachai Sirivallop, chief executive director and CEO of Thai Reinsurance P.L.C. predicts that multinational reinsurers will more than double pricing for flood and industrial all-risk policies while capping flood coverage.

He added that most primary insurers have started imposing flood coverage sublimits, with some covering a mere 20% of the amount insured, and rate hikes of up to 30%.

"Capacity may shrink a lot," Mr. Surachai said. "Once, people did not consider Thailand a (catastrophe) market and now everyone has to manage their cat. The market will be lucky to get 10% of its previous capacity."

He said that Thai Reinsurance still has been unable to assess its full losses from the floods, but he added that the Thai property market accounts for less than 5% of its book of business. He said the company has avoided the property market due to what he says is rampant underpricing by local Thai insurers.

"The local underwriters don't care much," said Mr. Surachai. "They chuck it all to the international reinsurers. If they don't keep (the risk) for themselves, they don't care about the impact."

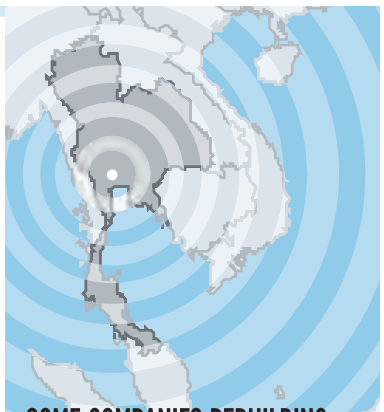
He added that the flooding "has been a wake-up call for everybody, including reinsurers," to tighten underwriting standards and price responsibly.

Local insurers are feeling the effects as well.

Due to concerns about the ability of the industry to absorb another hit in the future, Thailand's Office of the Insurance Commission is considering creating a 50 billion baht ($1.60 billion) flood insurance risk pool.

Mr. Surachai said such a pool would go a long way toward calming insurers.

"Most markets that have cat exposure have national pools with support of the government," he said.



SOME COMPANIES REBUILDING, OTHERS LEAVING THAILAND

BANGKOK—While some of the worst-damaged factories still were working to restart their flood-damaged operations, others, such as SANYO Semiconductor Co. Ltd., decided not to rebuild and opted to move elsewhere in Thailand or outside the country.

The plant owned by the division of Phoenix-based ON Semiconductor Corp., which has made semiconductors, transistors and large-scale integrated circuits in Ayutthaya since 1990, was closed Dec. 25. It had produced 5% to 10% of the company's output, and the flooding disrupted its worldwide supply chain.

One of the worst-hit companies, Honda Automobile (Thailand) Co. Ltd., does not expect to resume operations at its only Thai automotive plant—in the Rojana Industrial Estate just north of Bangkok—until April.

Another hard-hit estate in Ayutthaya province, Hi-Tech Industrial Estate, partially reopened in mid-December. But only 10 of the 140 factories that were shut down for two months were back in operation, including car parts maker AAPICO Hitech Public Co. Ltd. and inkjet printer maker Canon Hi-Tech (Thailand) Ltd., said Thavich Taychanavakul, managing director of the estate.

Hi-Tech is spending more than 100 million baht ($3.2 million) to restore utilities and other services at the estate. It also plans to spend 330 million baht ($10.5 million) to build a new 6.8-mile long dike that is 17.7 feet high vs. the current 13.8-foot dike. The flooding peaked at nearly 16 feet, Mr. Thavich said.

The estate will take out loans to build the dike and pay for it by doubling the central utility assessments it charges factories in the estate. Despite those plans, Mr. Thavich said that "3% of the companies in the estate will relocate to minimize risks of disruptions in the future."

—By J. Nils Wright

Solvency: Deadline delayed

CONTINUED FROM PAGE 4

likely will not be affected, so insurers must move forward in their preparation for the new regime, said Jim Bichard, an insurance partner at PricewaterhouseCoopers L.L.P. in London.

In the interim, companies may need to look to their national regulators for extra guidance, he said.

There have been delays in acting on various aspects of Solvency II previously. Because of that, the European Commission and the European insurance regulator, the European Insurance and Occupational Pensions Authority, have factored such delays into their timetable to implement Solvency II, said Gareth Haslip, London-based head of risk and capital strategy for the Europe, the Middle East and Africa for Aon Benfield.

European regulators are "giving the fairly uniform message that they are expecting companies to get on with Solvency II," Mr. Haslip said.

For example, the U.K. Financial Services Authority has indicated that companies that intend to use their own internal models for Solvency II can begin to do so starting Jan. 1, 2013.

"The momentum for Solvency II has reached a critical mass and a lot of people are up to speed for 2013 and 2014," Mr. Haslip said.

While the European Parliament did not outline the reasons for delaying its vote, it likely indicates that there is still much political negotiation to be completed before the vote can take place, said PwC's Mr. Bichard.

The parliamentary process in Europe is a complicated one and the politicians involved likely have "quite a lot of other big issues on their minds," Aon Benfield's Mr. Haslip said.

Implants: Litigation begins after France issues safety warning

CONTINUED FROM PAGE 3

result of product liability litigation in the United Kingdom. The company said it could not afford those payments.

The damages were awarded as a result of two cases in Nottingham, England, and London that were filed in 2006.

In May 2006, PIP was sued under the U.K. Consumer Protection Act in Nottingham County Court by 28 plaintiffs who alleged that the envelope surrounding their implants was not resistant enough and that the implants could cause pain and inflammation when they leaked.

And in December 2006, a plaintiff sued PIP in the High Court in London alleging that the envelope surrounding her implants was not sufficiently resistant.

In addition, suits have been filed against private clinics in the United Kingdom that inserted the PIP implants.

Kevin Timms, a trainee solicitor at Garden House Solicitors, a plaintiff law firm in Hertford, England, said his firm has filed a group action representing 27 claimants against 13 clinics. The firm is not pursuing PIP because implant manufacturer does not have adequate insurance coverage to meet its liabilities outside of France, he said.

Lawyers have been contacted by more than 400 claimants out of an estimated 50,000 women in the United Kingdom with PIP-made implants, he said.

The SEC filings show that PIP was the subject of several other complaints, many of which did not make it to court.

France's national insurance agency filed a complaint alleging fraud on the part of PIP, according to reports last week. The effort would aid the agency's effort to recoup funds it pays.

In the United States, the U.S. Food and Drug Administration issued a warning about PIP-made implants as long ago as 2000, although those were filled with saline.

While the French government has recommended that women with PIP implants have them removed, the advice from governments in many other countries where the implants were sold has varied.

The implants also were sold in Europe and South America. The Venezuelan government last month said women with PIP reconstructive and cosmetic implants could have their implants checked and that the government would cover the cost of removal.

The Italian consumer association, Coordinamento delle Associazioni per la Difesa dell'Ambiente e dei Diritti degli Utenti e dei Consumatori, said it that would launch a class action on behalf of women who had received PIP implants.

Gavin Souter contributed to this report.

Disability: Federal contractors face 7% hiring quota

CONTINUED FROM PAGE 3

crimination, and are similar to those that have long been required to promote workplace equality for women and minorities, according to the Labor Department.

The OFCCP is accepting comments on the proposal until Feb. 7.

Employers who fail to make a good-faith effort to comply with any goal that is ultimately set by the OFCCP could face administrative proceedings and ultimately even suspension or cancellation of their federal contracts.

According to the Labor Department, the unemployment rate for people with disabilities, at 13%, is 1.5 times the rate for those without disabilities, while 79.2% of working-age individuals with disabilities are outside the labor force altogether, compared with 30.5% of those without disabilities.

Molly Kurt, of counsel to law firm Husch Blackwell L.L.P. in Kansas City, Mo., said, "Everybody agrees that it's good for our workforce and our country to get qualified disabled people working. But the bigger question is how to do that effectively and without imposing ineffective burdens on employers."

Observers say one of the major challenges of the proposed rule would be finding applicants who self-identify as disabled, one of the requirements under the proposal.

"Everybody's going to be trying to find disabled candidates," said Neil Dickinson, managing partner at Mount Pleasant, N.C.-based consultant HudsonMann Inc.

"Employers have had very low numbers" of persons who have self-identified as disabled in their work force over the years, said Ms. Kurt. Meeting that 7% goal would be a "significant challenge" in certain job categories, such as professionals, executives and people with certain technical computer skills, she said.

Cara Yates Crotty, a partner with law firm Constangy Brooks & Smith L.L.P. in Columbus, S.C., said the proposal would require employers to enter into "linkage agreements" with referral agencies that could be used to recruit disabled workers. But finding these organizations, particularly in rural areas where these types of services are either not available "or very difficult to find," would be a "continuing challenge," she said. The proposal does not "really address that," Ms. Crotty said.

Ms. Kurt said the proposal also "presents a lot of questions in the minds of employers" in terms of surveying existing employees on an annual basis to seek disclosure of their disability status.

The proposal would require voluntary identification by the workers, "but employers have been conditioned for years not to ask about disabilities, and so it would be a sea change for them to begin asking current employees and applicants for their disabled status," said Ms. Kurt.

Debra Milstein Gardner, president of Owings Mills, Md.-based human resources consultant Workplace Dynamics L.L.P., said many employees would be reluctant to self-identify themselves as disabled.

Mr. Dickinson said, "It's kind of a two-edged sword," trying to collect information for those who classify themselves as disabled "and then managing that sensitive information."

Furthermore, the proposal is silent on the issue of cases in which there might be only five people in a particular job group and 7% would be "less than a whole person," Ms. Gardner said.

Administrative headaches also would result, say observers, who note employers would have to make annual reports on their efforts to reach the 7% goal.

Edwin Hopson, a member of law firm Wyatt Tarrant & Combs L.L.P. in Louisville, Ky., said this would be an issue for large employers in particular. "For large employers, with thousands of employees, you're going to see some pushback" on the proposal because it requires "a lot of internal paperwork, and it's not a one-time proposition."

Ms. Crotty said also having employers ask applicants if they have a disability would "undoubtedly lead to more charges of disability discrimination" as a result of employers having that information.

> 'Employers have been conditioned for years not to ask about disabilities, and so it would be a sea change for them to begin asking current employees and applicants for their disabled status.'
>
> Molly Kurt, Husch Blackwell L.L.P.

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Penn State: Case sharpens focus on reputational risks

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risk include the cost of litigation and potential settlements, loss of federal and state funding for research and other programs, weakened student demand, and diminished philanthropic support, among others, Moody's said.

Higher education risk managers can mitigate potential reputational risks using insurance and risk management techniques, which often start with making sure that allegations of misconduct are avoided, experts say.

"The obvious thing is to prevent anything from happening and doing your due diligence to make sure that the university community is informed as to their responsibilities and obligations and what kind of behavior is tolerated and what will not be tolerated," said Christopher Johnson, director of risk management and safety for Northwestern University in Evanston, Ill.

Industry experts agree that ignoring misconduct allegations can harm a school's reputation quickly.

"People understand and expect that crises are going to happen. It's the cover-up that's optional," said Gene Grabowski, senior vp at Levick Strategic Communications L.L.C. in Washington.

Universities and colleges should have rules in place not just for conduct but also for procedures to deal with potential misconduct, Mr. Grabowski said. When there is a problem, schools should act swiftly and transparently. Institutions also need to demonstrate to stakeholders that a plan is in place to prevent a repeat of such events, he said.

For many risk managers, managing key reputational risks at their schools can be challenging, but institutions with enterprise risk management programs have embraced the importance of risk managers' role in this area, said Leta Finch, national practice leader for higher education at Aon Risk Solutions in Burlington, Vt.

"In the last three to five years as we have begun to see more colleges and universities embrace enterprise risk management, which is where these types of issues get addressed, risk managers are being asked to participate in the process because of their expertise in managing risk," Ms. Finch said.

Northwestern's ERM program identifies 40 to 50 of the top perceived risks to the institution and reputational risk is at the top, Mr. Johnson said.

"When you have the stature of an institution like Northwestern, your image to the public is paramount," he said.

Mr. Johnson's office handles traditional risks such as fires, slips and falls, and workers compensation, "but almost every discussion begins with what's the impact to the reputation of Northwestern University," he said.

Another best practice is to have business continuity planning in place along with workplace training for faculty with annual updates and reminders on various reporting laws, said the University of Denver's Ms. Shew Holland.

"So while strategic ERM is a tool, it doesn't take the place of building relationships and working with people and having a very open dialogue," she said.

Most reputational risk insurance provides crisis management services and does not indemnify loss of revenue tied to potential reputational damage, experts say.

"If universities don't have response plans in place and they want a quick solution, the insurance products are basically a turnkey crisis management product in that immediately after learning of an incident…you can call up any of the (public relations) firms the insurance companies have contracted with to immediately put them into action," said Scott Kannry, vp for Aon Risk Solutions' financial services group in New York.

"However, in all cases, the policies must be purchased pre-incident," He said. "This isn't burning-building insurance."

The products are intended to be purchased on a stand-alone basis and priced comparably with professional liability policies, which generally start at $10,000 per $1 million of coverage for a regional college, he said. Larger universities may see higher rates, depending on their stature, with large retentions or a percentage of coinsurance.

Efforts to develop coverage specific to this problem already are under way.

Lockton Cos. L.L.C. is working with insurers to develop business interruption insurance coverage resulting from the reputational damage suffered by universities or colleges, said Teena Hostovich, executive vp at Lockton Insurance Brokers L.L.C. in Los Angeles.

"Reputational damage has several different forms," Ms. Hostovich said, noting that a decrease in student recruitment stemming from reputational damage is a business interruption loss that is very difficult to quantify.

"Most business interruption coverage currently is tied to specific types of losses that are much (easier) to quantify," she said. "We're working on some language now that might address this type of thing."

> **'In all cases, the (reputational risk) policies must be purchased pre-incident. This isn't burning-building insurance.'**
>
> Scott Kannry,
> Aon Risk Solutions

AP WORLDWIDE

Former Penn State Assistant Football Coach Gerald Sandusky last month waived a preliminary hearing during a Centre County, Pa., court appearance on child sexual abuse charges.

Liability coverage to respond in civil litigation

The first civil lawsuit naming Pennsylvania State University in connection with child sexual abuse allegations has spurred state and school officials to define how its liability insurance will address its potential financial liability.

In a December letter to state Sen. Mike Stack, D-Philadelphia, Penn State President Rodney Erickson said the school's liability insurance will cover financial obligations arising from civil suits.

"I am very concerned about how these potential lawsuits would be handled and how the university will pay for its representation," Sen. Stack said in a statement after meeting with Mr. Erickson. "The president assured me that no taxpayer funds, student tuition or donor dollars will be used, and he explained that the university's liability policies are segregated from its general fund," the senator said.

The suit, the first of many expected, alleges that former Penn State Assistant Football Coach Gerald A. Sandusky abused the plaintiff hundreds of times, including at Penn State facilities, from 1992, when the victim was 10, to 1996. The suit also alleges that Penn State officials knew of and failed to prevent Mr. Sandusky's misconduct.

Penn State may face unlimited liability in civil litigation because it may not be able to invoke sovereign immunity, which protects state entities and employees from tort claims and imposes limits on liabilities, experts say.

Penn State has a captive insurer, Nittany Insurance Co., that it formed in Vermont in 1993. Coverage provided by the captive includes general and professional liability, according to Penn State's website.

In a statement, Penn State's office of public information said that in an effort to prevent legal costs from falling on the public, the university's directors and officers insurance would help cover the costs of any lawsuits.

—By Mike Tsikoudakis

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Exchange: LexisNexis platform grows

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submissions that are made, said Peter Lynch, president of the exchange.

However, some obstacles still need to be overcome as the exchange matures, say those involved with the effort. One of the biggest is simply getting people to use it, they say.

But the exchange is a success, said Mr. Lynch.

"The reaction we've gotten from the market has been very positive," he said. "The feedback we get from the users has been very positive."

"What allows me to sleep at night is that the people who use it like it," he said.

"We've got a system that actually works," said council President Ken Crerar. "We've got a substantial number of submissions going through the system. From all the different parameters, this thing is up and running."

"It continues to grow," he said. "It's never done."

Mr. Lynch said the "only issue that we run into" is people taking the time to learn the new system. This involves implementing another part of the workflow process, he said.

"It's taken longer for people to adopt than I thought it would, but this is a behavior change," said Mr. Crerar.

"This is different from anything we've done before and it changes the process," he said. He likened the exchange to texting, which he described as "a totally different way to do something."

> 'What allows me to sleep at night is that the people who use it like it.'
>
> Peter Lynch
> LexisNexis Insurance Exchange

One of the early adopters noted that the process of converting to the exchange is ongoing for his company.

"We are still early in the process of converting," said David Pruett, vice chairman and chief administrative officer of Raleigh, N.C.-based BB&T Insurance Services Inc. "We just crossed the one-year anniversary."

BB&T chose five of its offices and about 15 marketing employees to work as early adopters with LexisNexis and the exchange, said Mr. Pruett.

The process of placing an account is "pretty complex," with different insurers having different ways of dealing with the account, said Mr. Pruett. "Now, we have one way to do it. We do it all in the exchange, and the carrier goes to the exchange to get it. We don't have to encrypt."

It said the exchange simplifies the process. He added, though, that "it hasn't been an easy year. LexisNexis has been great to work with. The part that's been difficult is to get carriers to buy in."

"We're expecting a bigger bump first and second quarter of 2012" in usage, said the exchange's Mr. Lynch.

Messrs. Lynch and Crerar said they believe the exchange will expand beyond its property/casualty focus to include employee benefits accounts as well, and Mr. Lynch said he's optimistic that the exchange will "be able to handle a lot of that business."

"From all of our perspectives, we're excited about where we are, and we're pleased at overall takeup rates," said Mr. Crerar.

Adjusters: Firms score win with court ruling

CONTINUED FROM PAGE 4

regularly exercise independent judgment and discretion, the court said. The California court also looked to a 2007 federal court ruling that found insurance examiners typically engage in work that makes them exempt employees, sources said.

"What this should do is give insurance companies a safe harbor for designing the role of their claims adjusters to assure they are exempt from overtime rules," said Mr. Glad, who filed an amicus brief in the case on behalf of several insurance associations.

Organizations that filed amicus briefs supporting Liberty Mutual included the U.S. Department of Labor, the U.S. Chamber of Commerce's National Chamber Litigation Center Inc. and the California Employment Law Council. Some argued that California's wage law should be consistent with federal regulations, but the 2007 decision by California's 2nd District Court of Appeal failed to do that.

The appellate court reviewed several issues in its decision, including a trial court's denial of summary judgment sought by the adjusters, who were seeking to eliminate insurers' defense that the adjusters were exempt from the overtime compensation requirements.

A divided appellate court ruled that "the undisputed facts show that plaintiffs are primarily engaged in work that falls on the production side of the dichotomy" between administrative and production work.

"None of that work is carried on at the level of management policy or general operations," the appellate court ruled.

But in last week's unanimous ruling, the California Supreme Court said the appellate court improperly evaluated the situation.

"The majority…provided its own gloss to the administrative/production worker dichotomy and used it, rather than applying the language of the relevant wage order and regulations," the Supreme Court said in remanding the case with directions for the lower courts to apply the legal standards it laid out.

However, the state high court also said it was not expressing an opinion on the strength of the parties' relative positions. "We merely hold that the Court of Appeal majority erred in its analysis," the Supreme Court said.

That means the issue remains unsettled.

Still, the state Supreme Court provided lower courts with "dramatic guidance" to resolve key issues in the case by applying its four-part test, Mr. Glad said.

inBrief

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Beazley explores new offer for Hardy

Beazley P.L.C. said it is exploring making another offer for Hardy Underwriting Bermuda Ltd. The Dublin-based specialty insurer and reinsurer, which operates several Lloyd's of London syndicates, said last month that it is interested in "entering into exploratory discussions with Hardy regarding a possible offer." The proposal is Beazley's latest to acquire Hamilton, Bermuda-based Hardy, which also operates Lloyd's syndicates. In late 2010, Beazley abandoned an unsolicited offer totaling about $174 million after Hardy's advisers deemed Beazley's bid to be too low. In the latest effort, Hardy said in a strategy and trading update that it had "received several preliminary expressions of interest in its business," without naming specific potential suitors.

Catastrophes hit P/C insurers' income

U.S. property/casualty insurers' aftertax net income dropped 70.5% to $7.98 billion during the first nine months of 2011 compared with a year earlier, according to a survey by the Insurance Services Office Inc. and the Property Casualty Insurers Assn. of America. Inc. The survey found that property/casualty insurers' net underwriting losses grew to $34.91 billion during the first nine months of 2011 from $6.3 billion during the same period of 2010. The industry's combined ratio deteriorated to 109.9% from 101.2% a year earlier.

Reinsurers trying to avoid 'surprise' cat losses

Reinsurers are taking steps to control or reduce their exposure to "surprise losses," according to a report by Willis Group Holdings P.L.C.'s Willis Re unit. The report noted that insured losses of more than $100 billion and reinsured losses in excess of $50 billion made 2011 the second-worst on record for catastrophe and man-made losses. The report notes that reinsurers are responding by attempting to deal better with "surprise" losses, such as the flooding in Thailand. These responses include demanding "far greater transparency of data" or imposing sublimits to keep their exposures to manageable levels. Changes in catastrophe modeling also are affecting the reinsurance market, according to Willis Re.

Mass. proposes higher penalties for uninsured

Massachusetts residents who do not have health insurance would face a higher financial penalty in 2012 under newly proposed rules. Under guidelines proposed by the state Department of Revenue, the maximum penalty in 2012 for those with incomes that exceed 300% of the federal poverty level would be $105 for each month that an individual is not covered by health insurance, or $1,260 a year. In 2011, the maximum penalty for noncompliance was $101 a month, up to a maximum of $1,212 a year. However, penalties for those with incomes that are less than 300% of the federal poverty level would be unchanged from 2011.

Maximum mass transit tax benefit to fall

Due to a lack of congressional action, the tax-favored status of an employee benefit tapped by those who use mass transit to get to and from work will be reduced starting Jan. 1, 2012. Under a provision in a 2009 economic stimulus law, employees have been able to reduce their taxable salaries by up to $230 a month to pay for mass transit expenses. Previously, the maximum was $120 per month. Just prior to its expiration in 2010, lawmakers agreed to continue the higher mass transit tax break through the end of 2011 as part of a broader measure that temporarily reduced payroll taxes. However, lawmakers did not include an extension of the higher mass transit contribution limit in a measure they passed last month that extends the payroll tax rate cut by two months. Without congressional action, the maximum pretax contribution employees can make toward mass transit expenses, such as rail and bus fares will fall to $125 a month effective with the start of 2012.

CONTRIBUTING: Matt Dunning, Mallory Gillikin, Mike Tskikoudakis

End Page

Judge finds his muse in insurance fraud case

A Pennsylvania Supreme Court jurist known for issuing poetic justice has handed down a six-page ruling in an insurance fraud case written entirely in rhyme.

Released last month, the opinion was written on behalf of the 4-2 majority in a case determining whether a forged check purporting to be from Bloomington, Ill.-based State Farm Mutual Automobile Insurance Co. constituted insurance fraud.

"Sentenced on the other crimes, he surely won't go free, but we find he can't be guilty of this final felony," Supreme Court Justice J. Michael Eakin wrote in his ruling.

"Convictions for the forgery and theft are approbated—the sentence for insurance fraud, however, is vacated. The case must be remanded for resentencing, we find, so the trial judge may impose the result he originally had in mind."

The ruling is not the first time that Justice Eakin has put a decision into verse. He reportedly first gained fame as the "rhyming judge" in the late 1990s while he was an appellate court judge.

Though former state Supreme Court justices have shown concern that his writing style could reflect poorly on the serious matters of the court, the voters elected Justice Eakin to an another 10-year term in November.

REUTERS

Star as student embroiled in NYU employment suit

New York University student and Hollywood actor James Franco has landed his latest supporting role—not on the stage or screen, but in a New York courtroom.

Jose Angel Santana, a former NYU professor, reportedly is suing the school for being fired for giving Mr. Franco a bad grade.

Mr. Franco, who was pursuing a master's degree in fine arts, received a "D" for missing 12 of 14 of Mr. Santana's "Directing the Actor II" classes, according to news reports.

Mr. Santana is suing NYU in Manhattan Supreme Court, alleging that the school fired him for giving the actor the bad grade.

"The school has bent over backwards to create a Franco-friendly environment, that's for sure," Mr. Santana told the New York Post. "The university has done everything in its power to curry favor with James Franco."

While Mr. Franco did not provide immediate comment, he told Showbiz411.com, "I did the work. I did well in everything else," in an interview last year.

Mr. Santana alleges the good grades that Mr. Franco received were because he hired one of his other NYU professors to write and direct a film.

"In my opinion, they've turned the NYU graduate film degree into swag for James Franco's purposes, a possession, something you can buy," Mr. Santana, who is suing NYU to get his job back, told the New York Post.


BLOOMBERG NEWS

The original Mark Zuckerberg, founder and chief executive officer of Facebook Inc.

Zuckerberg wannabe faces wrath of Facebook on name change

Given that much of Facebook's history has played out in civil courts, it was perhaps inevitable that the Internet giant eventually would sue Mark Zuckerberg.

However, the Mark Zuckerberg being sued is not the founder of Facebook.

An Israeli businessman formerly named Rotem Guez was notified in September that his online social media marketing company, Like Store, was in violation of Palo Alto, Calif.-based Facebook Inc.'s terms of services contract.

Perkins Coie L.L.P., the Seattle-based law firm representing Facebook, sent Mr. Guez a cease-and-desist order on Sept. 1, threatening to sue him if the site was not dismantled.

This month, apparently in response to Facebook's letter, Mr. Guez had his name legally changed in Israel to Mark Zuckerberg, the name of Facebook's famous founder. In a video posted on Mr. Guez's website, an Israeli Ministry of Home Affairs clerk reluctantly grants his request, pointing out several times that he may experience problems given Mr. Zuckerberg's fame.

According to letters from Facebook's attorneys, two companies that Mr. Guez owns—including Like Store—violate Facebook's terms of service by selling fan page "likes" to brands.

In each letter to the former Mr. Guez, Facebook demands that he shut down the websites and that he refrain from ever accessing Facebook's "site, services, platform or network for any reason whatsoever."

BASEBALL TEAM IN ANIMATED DISPUTE OVER NAME

The Atlanta Braves have a new rival, but it's not another Major League Baseball team.

Instead, the battered sports franchise is taking on Burbank, Calif.-based The Walt Disney Co.

Disney/Pixar's latest animated film, "Brave," which centers on a flame-haired Scottish princess with a talent for archery, already is garnering publicity six months prior to its projected release. The Atlanta Braves reportedly filed a "formal objection" with the U.S. Patent and Trademark Office after Disney's most recent attempt to trademark various iterations of the title on Oct. 20.

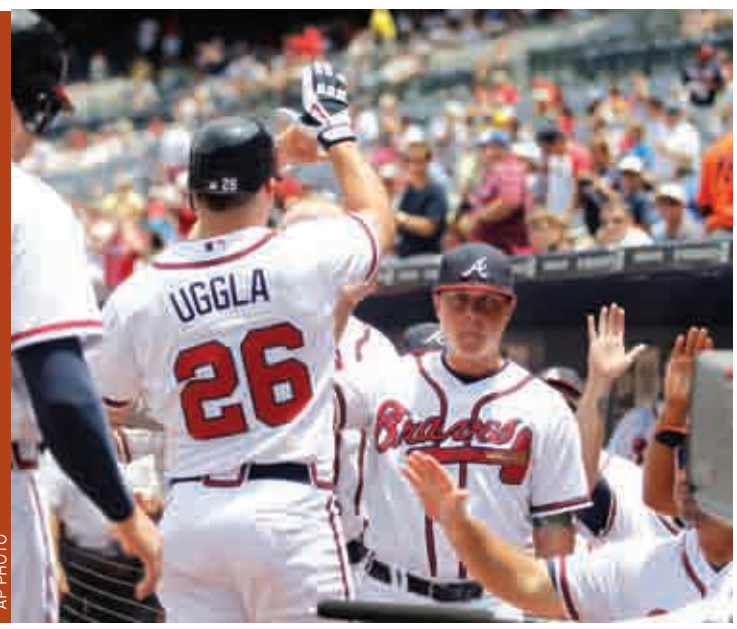
The team has until Jan. 18, 2012, to file opposition papers with the Trademark Trial and Appeals Board, according to reports.

Although the Atlanta National League Ball Club, which owns the Atlanta Braves, holds only the rights to the word "Braves," it alleges the fans, media and others commonly use the word "Brave" to refer to a single player and "Braves" to refer to the entire team.

Its objection stems from the fear that Disney's use of the singular form will lead to confusion and even damage due to the team's use of "Brave" in its merchandising.

In New York, several institutions - including a baseball franchise - include singular or plural versions of "Met" as variations on their names: the New York Mets, the Metropolitan Museum of Art and the Metropolitan Opera House.

The Atlanta National League Ball Club and Disney Co. reportedly were in negotiations to settle their naming dispute.



AP PHOTO

The Atlanta Braves have filed an objection against The Walt Disney Co.'s use of the title "Brave" for its next animated film.

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