

# Business Insurance

January 25, 2010

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**GEN RE SETTLES WITH SEC OVER FINITE RISK DEALS WITH AIG, PRUDENTIAL / PAGE 3**

**TREASURY'S GEITHNER TO FACE QUESTIONS OVER AIG / PAGE 3**

**PHYSICIAN FEE SCHEDULES NOT EFFECTIVE AT CUTTING COMP COSTS, NCCI SAYS / PAGE 3**



## In Brief

**U.K.'s Chaucer eyes new home**

Lloyd's of London insurer Chaucer Holdings P.L.C. may move from the United Kingdom to reduce its taxes. Chaucer, along with Amlin P.L.C. and Novae Group P.L.C., are the only publicly traded Lloyd's insurers with U.K. headquarters. Chaucer "will look at other options during the course of this year," a spokeswoman said. Lloyd's insurers Brit Insurance Holdings N.V. and Beazley P.L.C. last year said they planned to move to the Netherlands and Ireland, respectively, while Hiscox Ltd., Omega Insurance Holdings Ltd. and Hardy Underwriting Bermuda Ltd. previously moved to Bermuda.

**Fired worker owed comp benefits: Court**

An employer must continue paying workers compensation

See **IN BRIEF** page 22

### HEALTH CARE REFORM

## Senate upset forces rethink on reforms

*Scaled-back bill seen as effort's best chance*

By **JERRY GEISEL**

**WASHINGTON**—Republican Scott Brown's victory last week in the election to represent Massachusetts in the U.S. Senate has halted

In one day, Massachusetts voters ended serious chances of congressional Democrats and the Obama administration passing sweeping health reforms without any support from Republicans. Proposed reforms would extend coverage to millions of U.S. residents and penalize employers that do not provide coverage.

Bowing to the new political reality, President Barack Obama last week signaled that he would be receptive to a scaled-back reform bill.

"I would advise that we try to move quickly to coalesce around those elements in the package that people agree on," President Obama said in a television interview.

Later, Robert Gibbs, President's Obama press secretary, said the best course of action would be to put the reform effort on hold, at least temporarily. This is a dramatic change in direction, as the White House had pushed for quick passage.

"The president believes it is the



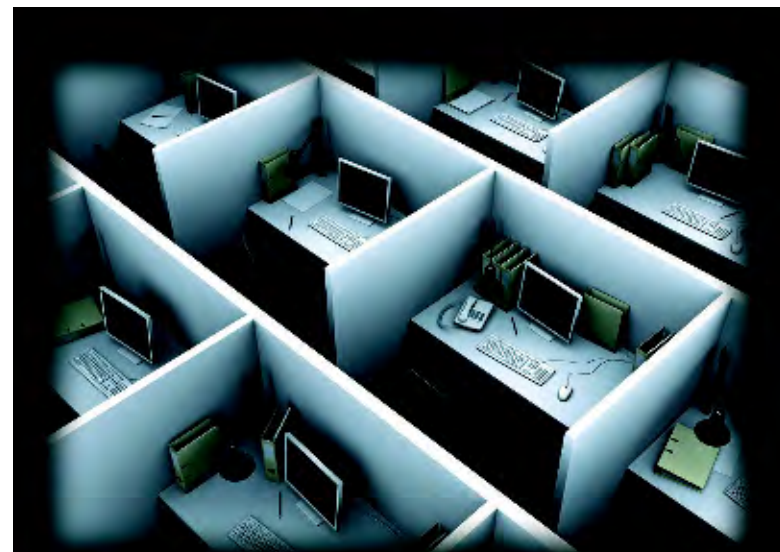
REUTERS/LANDOV

**Voters chose Republican Scott Brown to represent Massachusetts in the U.S. Senate.**

Democrats' drive to pass sweeping health insurance reform.

The state senator came from behind in polls to win the U.S. Senate seat that Sen. Edward Kennedy held for 47 years until the Democrat's death last August.

See **REFORM** page 22



## Use of temp workers invites exposures

By **JUDY GREENWALD**

As the use of temporary workers increases, employers need to guard against the potential liabilities and other pitfalls of bringing in such workers, experts say.

Even though a staffing agency may cut a temporary worker's check, experts say employers remain obligated to comply with state and federal employment laws, including discrimination statutes. There also are situations in which an employer could be required to provide benefits, experts say.

After several months of declines in the number of temporary

See **TEMPS** page 20

## SPOTLIGHT

### TRANSPORTATION RISKS: AEROSPACE

Rates maintain their altitude, but may soften if losses



decline; safety rules may change to counter rise in bird strikes; FAA delays updated regulations on pilot fatigue; space coverage rates fall, but satellite communications demand remains high. **PAGE 10**

### AGENTS & BROKERS

## Judge cancels charges in bid-rigging case

*Several Spitzer-won guilty pleas undone after prosecutors' losses in court*

By **COLLEEN MCCARTHY**

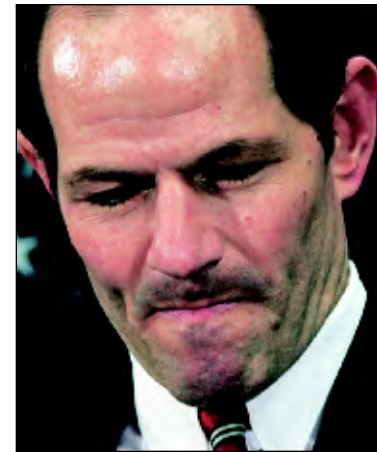
**NEW YORK**—A judge's decision to dismiss criminal charges against a

group of former insurance executives accused in New York state's investigation of bid rigging and broker compensation practices was

unusual but not entirely surprising given the outcome of other trials in the case, legal experts say.

At a hearing last week in New York County Supreme Court, Judge James Yates granted the prosecution's request to dismiss outright the misdemeanor convictions of six individuals who pleaded guilty in 2004 and 2005 to helping New York-based broker Marsh Inc. rig bids on client insurance placements.

In addition, Judge Yates reduced three other individuals' felony guilty pleas to misdemeanors. The remaining charges will be dropped



REUTERS/LANDOV

**A judge last week dropped charges against several individuals who had pleaded guilty in the Spitzer probe.**

in six months, via a legal mechanism known as adjournment in

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## On the Web

### HEALTH CARE REFORM

#### Keep up with health care developments

*Business Insurance's* health care reform section is dedicated to the latest legislative news updates, including the election of Republican Scott Brown as the new senator from Massachusetts, FAQs on health care reform and COBRA, a timeline of key health care laws and more.  
[www.BusinessInsurance.com/HealthCareReform](http://www.BusinessInsurance.com/HealthCareReform).

### BI SPECIAL REPORTS

#### New research report on Solvency II

The introduction of the Solvency II risk-based capital rules will have far-reaching implications, and risk managers trying to assess the security of their insurance programs need to understand how the new regulatory regime will affect insurers inside and outside the European Union. To preview and purchase *BI's* new guide to Solvency II, go to [www.BusinessInsurance.com/Reports](http://www.BusinessInsurance.com/Reports).

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### P/C INSURERS

# AIG may sell life insurance unit to MetLife

By COLLEEN MCCARTHY

**NEW YORK**—American International Group Inc. reportedly is in discussions to sell one of its largest life insurance units to MetLife Inc., a move that would represent its biggest divestiture since its 2008 bailout.

The sale would send one of the beleaguered insurer's most prized assets to its New York-based rival and allow it to repay billions of dollars to the federal government.

Separately, two influential lawmakers last week asked the Government Accountability Office—the auditing arm of Congress—to launch a broad investigation into the handling of the package that saved AIG from bankruptcy in 2008. This week, the House Committee on Oversight and Government Reform is to hold a hearing at which Treasury Secretary Timothy Geithner and former Treasury Secretary



AP PHOTOS

Treasury Secretary Timothy Geithner is scheduled to testify this week about his role in the 2008 bailout that averted bankruptcy for AIG.

Henry Paulson will testify about their roles in New York-based AIG's bailout.

Last week, the Wall Street Journal

reported that MetLife would pay between \$14 billion and \$15 billion for American Life Insurance Co., an international life insurance unit of

AIG based in Wilmington, Del. The deal could close in several weeks, unless negotiations fall apart over remaining terms, the report said in citing people familiar with the discussions. AIG declined to comment.

At year-end 2008, ALICO said it had \$89 billion in assets under management.

If successful, the sale would represent the largest sale to date in AIG's effort to sell noncore assets to repay the federal rescue package. The bailout provided up to \$182 billion to AIG; as Dec. 31, 2009, AIG still owed \$97 billion. Roughly \$9 billion from the ALICO sale would go toward repaying the government loan, the report said.

ALICO, which operates in more than 50 countries, is "positioned very strongly in Japan" and "has top five positioning in many of the other markets" it serves, Clark Troy,

See **AIG** page 18

### REINSURANCE

## Gen Re to pay \$92 million to settle finite charges

*Ends probe of transactions with AIG, Prudential*

By JEFF CASALE

**STAMFORD, Conn.**—General Re Corp. last week agreed to pay \$92.2 million and dissolve a subsidiary in Dublin to end investigations into the reinsurer's role in transactions that allegedly defrauded investors of American International Group Inc. and Prudential Financial Inc.

Gen Re, a subsidiary of Berkshire Hathaway Inc., agreed to pay \$12.2 million to settle the charges brought by the U.S. Securities and Exchange Commission. Gen Re also agreed to pay the U.S. Postal Inspec-

**SEC:** Assurant enters into \$3.5 million settlement agreement with SEC. **PAGE 18.**

tion Service Consumer Fraud Fund \$19.5 million to settle a Justice Department investigation, and \$60.5 million through settlement of a civil class action lawsuit brought by AIG shareholders, the SEC said in a statement.

Gen Re previously forfeited to the government \$5 million in fees it earned for its participation in what the government said was sham reinsurance scheme with AIG. As part of

### BY THE NUMBERS

Gen Re has agreed to pay:

**\$12.2 MILLION** to settle SEC charges

**\$19.5 MILLION** to U.S. Postal Inspection Service Consumer Fraud Fund to settle a Justice Department investigation

**\$60.5 MILLION** through settlement of a civil class action lawsuit brought by AIG's shareholders

its agreement with the Justice Department, Gen Re agreed to dissolve subsidiary Cologne Re Dublin, which helped structure the deals.

Calls placed to Gen Re seeking comment on the settlement, for which court approval is needed, were not returned.

According to the SEC's complaint filed in U.S. District Court for the Southern District of New York, Gen Re entered into two sham finite reinsurance transactions in 2000 with AIG. The transactions inflated AIG's loss reserves by \$250 million in the fourth quarter of 2000 and \$250 million in the first quarter of 2001, hiding a downward trend in loss reserves and premiums written, according to the SEC's investigation.

During the related federal trial of four former Gen Re executives and one former AIG executive involved in the deals, the court found that AIG shareholders lost between \$544 million and \$597 million as a consequence of the scheme.

Gen Re admitted that its senior executives, including former CEO Ronald E. Ferguson, were involved and knew that the true purpose of

See **GEN RE** page 18

### WORKERS COMPENSATION

## Billing changes stymie efforts to cut comp costs: NCCI

By ROBERTO CENICEROS

Physician fee schedules are losing their effectiveness as workers compensation cost-containment tools because of shifting medical provider billing practices, an NCCI Holdings Inc. report warned last week.

The report, Medicare and Workers Compensation Medical Cost Containment, also reviewed previous NCCI findings showing how much more workers comp systems tend to pay for specialty medical services than group health plans pay.

On average, workers comp payers spend 205% of what group health plans pay for surgery and 180% of what group plans pay for radiology services, according to NCCI, a Boca

Raton, Fla.-based rating and research entity of the National Council on Compensation Insurance Inc.

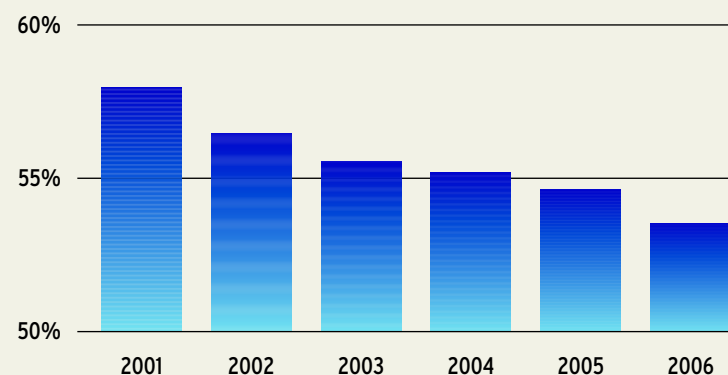
While it was known that workers comp systems often pay more for some medical services, the substantial gap surprised many observers, said Barry Lipton, an NCCI practice leader and senior actuary in Agoura Hills, Calif.

The cost differences are due to Medicare's payment practices, said John Robertson, NCCI director and senior actuary in Boca Raton.

Medicare, the dominant medical payer in the United States, historically set its payments for specialty services below market rates to shift

### PROPORTIONS DECLINING

Percentage of workers comp medical costs subject to physician fee schedules



Source: National Council on Compensation Insurance Inc.

See **COMP** page 17

## EMPLOYMENT PRACTICES

# Top wage-hour class action settlements soared in 2009

*Economic problems expected to drive more suits in 2010*

By JUDY GREENWALD

**CHICAGO**—The top 10 private wage-and-hour settlements paid or agreed to in 2009 under the Fair Labor Standards Act totaled \$363.6 million, a 43.9% increase from 2008, according to an annual report released this month.

The 575-page report, Annual Workplace Class Action Litigation Report, 2010 Edition, by Chicago-based law firm Seyfarth Shaw L.L.P. analyzed 715 cases and highlighted key trends in federal and state courts last year.

"The lesson to draw from 2009 is that the private plaintiffs bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2010 in bringing class action and collective action litigation against employers," the report concludes.

The 10 largest wage-and-hour settlements were split evenly between nationwide and state-specific claims. Five involved lawsuits pending in federal or state courts in California, according to the report.

The lawsuits typically allege failure to pay overtime, often by misclassifying hourly workers as being exempt from overtime.

Meanwhile, the top 10 private settlements under the Employee Retirement Income Security Act in 2009 decreased to \$499.5 million

## EXPENSIVE LITIGATION

Top 10 monetary settlements in class action litigation

SETTLEMENT TYPE	2009	2008
Employment discrimination	\$86.2 million	\$118.36 million
Wage and hour	\$363.6 million	\$252.7 million
ERISA	\$499.5 million	\$17.7 billion
Government enforcement actions	\$107.1 million	\$85.0 million

Source: Seyfarth Shaw L.L.P.

from \$17.7 billion in 2008. But ERISA class settlements actually increased in 2009 when three 2008

settlements involving voluntary employees' beneficiary associations, which totaled \$17.4 billion, are

excluded, according to the report.

In addition, the monetary value of the top 10 private plaintiff settlements in employment discrimination cases dropped 27.2%, to \$86.2 million, in 2009.

The report says the Equal Employment Opportunity Commission in fiscal 2009 filed 281 new lawsuits, resolved 319 pending lawsuits and secured \$294.1 million in settlements for allegedly injured victims of job bias. The monetary value of the top 10 settlements paid or entered into in 2009 totaled \$107.1 million, a 26% increase.

Key trends in federal and state courts last year included:

- Fueled by the economy, the plaintiffs bar increased the pace of

See **CLASS** page 19

## INTERNATIONAL



Lawyers representing clients in cases heard in the Royal Courts of Justice in London and other U.K. courts may have to change their fee structures.

## U.K. reform plan includes cap on win fees for lawyers

*Proposals intended to curtail high cost of civil litigation*

By MICHAEL BRADFORD

Fees that lawyers collect under conditional fee agreements for winning a case would be capped at 25% of damages and lawyers would be barred from paying referral fees under a comprehensive plan intended to reduce civil litigation costs in England and Wales.

Lord Justice Rupert Jackson made the recommendations Jan. 14 in a 557-page report, Review of Civil Litigation Costs, which was based on information gathered during two consultation periods he held in 2009.

The Judiciary of England and Wales, the body representing judges in civil courts in England and Wales, praised the plan, saying in a statement that the reforms would create a more effective legal system.

Among proposals drawing the

most attention is one that would bar recovery by the winning party of "success fees" and after-the-event insurance premiums in "no win, no fee" conditional fee agreements.

In the report, Justice Jackson said no win, no fee agreements are "the major contributor to disproportionate costs in civil litigation in England and Wales." Under such arrangements, a client agrees to pay his or her lawyer a success fee that is not tied to the amount of damages awarded. Current U.K. law allows the winning party to recover that fee from the loser.

After-the-event insurance premiums often are part of conditional fee agreements. If the party wins, current law allows the winner to recover the cost of premiums from the loser.

Justice Jackson previously said the premium for after-the-event insurance in large commercial cases typically is about 35% to 45% of the sum insured. For group litigation, premiums typically are

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## P/C INSURERS

## Competition keeps lid on rates: Report

*Market outlook little changed for 2010 as insurers vie for business*

By ROBERTO CENICEROS

Risk managers likely will see favorable market conditions for most U.S. commercial property/casualty insurance lines again this year, according to a report Marsh Inc. plans to release this week.

Insurers, though, likely face challenges as the investment outlook will force them to focus on underwriting profitability, the report says.

"Intense competition among insurers, increased capacity and fewer insured catastrophe losses all played key roles in keeping U.S. insurance markets generally stable in 2009—and are poised to do so again in 2010," according to the

See **RATES** page 17

## PROPERTY INSURANCE RATES

Typical rate change at renewal (average/good risk profile)

Segment	Rate change Q4 2009
Non-catastrophe-exposed organizations	2.5% increase to 5% decrease
Moderately catastrophe-exposed organizations (10% to 30% of values in high-risk zones)	5% increase to 5% decrease
Largely catastrophe-exposed organizations (more than 30% of values in high-risk zones)	Flat to 10% increase

Source: Marsh Inc.

## RETIREMENT BENEFITS

## High Court rejects review of 401(k) fees suit

By DOUG HALONEN

**WASHINGTON**—The U.S. Supreme Court last week declined to review the dismissal of a lawsuit against Deere & Co. and two Fidelity Investments units that alleged unreasonable fees were charged for investment options in Deere's \$3.1 billion 401(k) plan.

The high court rejected the case without comment.

The suit against Moline, Ill.-based Deere and Fidelity, which served as the plan's trustee and recordkeeper and as investment adviser for two mutual fund options in the plan, originally had been dismissed in June 2007 by a U.S. District Court judge in Madison, Wis. That dismissal was affirmed by the 7th U.S. Court of Appeals last year.

The original suit by plan participants alleged that Deere, Fidelity Management Trust and Fidelity

Management & Research violated their fiduciary duties by charging unreasonable fees.

In the original case, Deere plan participants argued that the company failed to negotiate the lowest possible fees for plan participants under an arrangement in which most of the plan investment options were Fidelity funds. In addition, they argued, Deere officials failed to disclose or were unaware of a revenue-sharing arrangement that Fidelity was using to share some of the asset-based investment fees it was getting from plan participants with a Fidelity affiliate.

In his decision, U.S. District Court Judge John C. Shabaz said Deere was protected from fiduciary responsibility by a provision in the Employee Retirement Income Security Act that provides safe harbor for plans that comply with its Section

404(c) regulations. That provision requires the plan sponsor to advise plan participants that they are responsible for their own investment decisions.

Mr. Shabaz also ruled that Department of Labor regulations do not require disclosure of revenue-sharing arrangements.

In a statement, Fidelity spokeswoman said: "We're pleased to see that there's final resolution in this case for both Fidelity and our client. We continue to believe that we provide valuable service at a reasonable cost and that this decision was the correct one."

Representatives of Deere and the plaintiffs in the case, *Dennis Hecker vs. Deere & Co.*, could not be reached.

Doug Halonen is a reporter for Pensions & Investments, a sister publication of Business Insurance.



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## Questions & Answers

At the beginning of 2010, Towers, Perrin, Forster & Crosby Inc. and Watson Wyatt Worldwide completed their merger to form Towers Watson & Co., the world's largest employee benefits consulting firm with annual revenues of about \$3 billion.

The firms were especially known for their expertise in retirement plan and health care consulting. In addition, Towers Perrin offered risk management and reinsurance brokerage services. Watson Wyatt had about



Mr. Mactas

7,500 employees in 33 countries, while Towers Perrin had more than 6,300 employees in 26 countries.

Former Watson Wyatt CEO John Haley, now chairman and CEO of Towers Watson, and Mark Mactas,



Mr. Haley

Towers Perrin's former CEO and now Towers Watson's deputy chairman, president and chief operating officer, discussed with Business Insurance Senior Editor Joanne Wojcik how the merger will affect their operations.

# Merger creates consulting giant

**Q: What are Towers Watson's biggest competitive strengths now that the two consultants have merged?**

**MR. HALEY:** We're going to have broader, deeper and more comprehensive services. A lot of the services that we have are ones we've both been in. For example, we've both been among the world's leading retirement consultants. We'll now have a deeper bench to draw from. We'll have a broader set of services in the sense that there are some services that each of us brings to the table where the other one didn't play in, or maybe only played in to a limited extent. That would include, for example, the reinsurance brokerage that Towers did. It would include the investment consulting that Watson Wyatt did, and a whole host of other services. I think we will have expanded geographic coverage and also an ability to grow. This kind of merger has really excited and energized both our client base and our consultants, and I think we'll emerge as the firm of choice for both clients and consultants.

**MR. MACTAS:** Both organizations had a common set of values that formed the foundation of each organization and forms the foundation of Towers Watson. In particular, we both share a client-first mentality. That commonality of purpose, along with integrity, respect, professionalism, collaboration, is a galvanizing thing that brings our people together in the pursuit of serving clients well.

**Q: Many benefit managers use more than one consultant because they say each has different expertise. What additional services will the combined company offer former clients that may have been supplied separately before?**

**MR. MACTAS:** For example, Towers clients now would have access to the investment consulting expertise that Watson Wyatt had. In addition, Towers Perrin clients will have access to the technology and administrative solutions business that Watson Wyatt had, which nicely complements what we had.

Going in the other direction, Towers Perrin has quite a large health care consulting practice. In addition, Towers Perrin has quite a good employee research capability, which is important in the context of designing HR programs, including benefit programs. If you broaden it beyond benefit manager domain, Towers Perrin brings a reinsurance brokerage operation to the benefit of clients as well.

**Q: What services are you providing now that you didn't five years ago, and what services do you expect to be providing in the years ahead?**

**MR. MACTAS:** There's a lot of work now in pension plan "de-risking." These are large, complex liabilities and obligations these companies have. By "de-risking," we mean having the assets and liabilities move in the same direction or you can offload some of those liabilities. So that's a huge area for us right now. An area that we've done a lot of work in the last couple of years is what we call workforce effectiveness. This includes the employee research business. It gives insight into the motivations, the psyche and the feelings of your employees. Towers Perrin a few years ago acquired a firm called ISR, International Survey Research.

We bring that capability into Towers Watson. That business has grown quite nicely since it became part of the family, and we expect that to be a primary foundation for further growth in the future. That's something that we dabbled in prior to the acquisition, but are in a real substantive way now.

**Q: What changes is the recession having on benefits departments in regard to their needs and decision-making? What is Towers Watson doing to assist benefits managers in coping with economic conditions?**

**MR. HALEY:** The thing that has most impressed me about this

downturn is that companies are more concerned with engagement and alignment of the workforce they've kept than I've ever seen before. We see a lot of work going on right now in that area.

**Q: How do you respond to analysts who say the merger could create near-term disruption that may help competitors?**

**MR. HALEY:** Anytime you do a merger, there's always the possibility of near-term disruption. And we've certainly been cognizant of that. I think we've done a pretty good job so far of trying to minimize that. We've had a senior person from each side—Bob Hogan, who had been CFO of Towers Perrin, and Kevin Meehan, who was Watson Wyatt's North American regional manager—working together running an integration office, trying to get things integrated as quickly and smoothly as possible. We're very pleased with the way things have gone so far. That doesn't mean that we think we're finished or there hasn't been a little disruption, but I think there's a lot less than we had any right to expect.

**MR. MACTAS:** We outlined a number of guiding principles for the integration of the firms, and the first one is to stay focused on the market and our clients. When we talk about the considerable amount of work to integrate the clients on the first day was very similar to the day before the merger closed. We just continually emphasize that fact. I think we've been able to galvanize our people in the marketplace as opposed to worrying about when the software or applications are going to come together.

**Q: Why was "Towers" chosen ahead of "Watson" in company's new moniker?**

**MR. HALEY:** There's a lot of brand equity in each of these names. We wanted something that got down to two names, and one of us had to go first.

**MR. MACTAS:** Besides, Watson Towers sounds like the name of a retirement community.

## Commentary

# Recovering economy will bring fresh risks

At the annual Property/Casualty Joint Industry Forum this month in New York, there was considerable discussion of the need for a solid economic recovery before property/casualty insurers could expect much growth.

"Clearly, we think unemployment has got to come down," said Thomas F. Motamed, chairman and CEO of Chicago-based CNA Financial Corp. "Banks have to loosen up and lend some money."

"I think the housing inventory has to drop," Mr. Motamed said. For good measure, he added, "I'd like to see interest rates remain low and retail sales pick up."

I'd think most businesses insured by CNA and other property/casualty companies would echo those sentiments.

Unemployment eventually will come down, access to credit will ease, home sales will improve and consumers will buy again. But a common theme of many recent examinations of the economy has been that the post-recovery landscape will differ significantly from the one that existed before the financial crisis and "Great Recession."

One of the regular features of the Joint Industry Forum is an attendee survey, gauging expectations for market and other trends in the year ahead. Not surprisingly, this year's survey results offered a pretty bleak outlook for the prospects of industry profit growth in 2010.

The good news for insurance buyers is that part of insurance executives' gloomy outlook reflects expectations for premium growth, with 51% expecting premiums to be flat, 36% expecting premiums to decline and 14% expecting premiums to grow.

Of course, soft pricing is one factor holding down premium volume. Another significant factor, though, is the economy's impact in depressing property values and reducing economic output.

In a statement detailing the survey results from the Insurance Information Institute, one of 16 industry organizations that sponsor the Joint Industry Forum, Steven N. Weisbart, senior vp and chief economist at the III, suggested the economic recovery will be gradual, leaving the property/casualty insurance industry some difficult challenges in the changed environment that comes with it.

Among them is research



RODD ZOLKOS

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showing that 40% of the unemployed ultimately will accept work at pay that is lower than in their prior job. "This affects consumer buying power in general and the workers compensation exposure base in particular," Mr. Weisbart said.

"Similarly, business bankruptcies have soared, and business formations slumped, so that the demand for commercial insurance in 2010 will rise from a

**If the coming economic landscape is so different, it seems reasonable to expect changes to the risk landscape as well.**

smaller base than would otherwise have been the case," he added.

In a recent article that's to be included in a larger report on The New Normal to be released Wednesday by Standard & Poor's Corp., the rating agency suggests that the changes in the post-recovery landscape will persist for years.

Among the changes S&P foresees are slower U.S. consumer spending, "stricter but inconsistent" government regulation in financial and other areas, more risk-averse investors and rising U.S. health care costs that threaten U.S. businesses' competitiveness vs. overseas companies.

If the coming economic landscape is so different, it seems reasonable to expect changes to the risk landscape as well.

So I'd think it's more important than ever for companies hoping to thrive when the economy bounces back to consider not only the risks confronting them today, but what their businesses might face in the new risks of tomorrow.

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# Business Insurance OPINIONS

## Injection of realism for health care reform

IN HINDSIGHT, the drive to pass comprehensive health care reform legislation was a crash waiting to happen.

Armed with what was a filibuster-proof majority, congressional Democrats assembled reform bills they believed could win final passage without Republican support.

That strategy fell apart when Republican Massachusetts state Sen. Scott Brown last week won the seat held by the late Sen. Edward Kennedy, giving Republicans 41 votes in the U.S. Senate and the ability to stop reform legislation.

*Democrats and Republicans should focus on health reform proposals that are desirable and politically doable.*

Even if Mr. Brown had not won, we very much doubt a bill put together by one party with no support from the other party would have been successful.

What would happen if, for example, President Barack Obama were to run for re-election in 2012 and lose and Republicans took control of the House and Senate? That could open the door for a drive to repeal the law.

That said, we think Democrats and Republicans should focus on health reform proposals that are desirable and politically doable.

That is what happened after 1994 when the Clinton health care reform package failed. Out of that defeat came incremental but vital reforms, such as curbs on pre-existing medical condition exclusions in group plans and greater parity in the coverage of mental health disorders, changes that have benefited millions of U.S. residents.

Reform as President Obama and some of his allies in Congress envisioned may not be achieved, but that does not mean efforts to improve the nation's health care delivery and financing system should come to an end.

## Spitzer overreached in Marsh investigation

THE REVERSAL of guilty pleas in the bid-rigging investigation of Marsh & McLennan Cos. Inc. and several insurance companies is a stunning legal development that may be the final chapter in a long-running saga.

The 2004 probe by then-New York Attorney General Eliot Spitzer shocked risk managers with allegations that Marsh Inc., MMC's main brokerage unit, and major insurers conspired to rig quotes and steer business to insurers paying the highest contingent commissions.

The investigation resulted in criminal charges, more than 21 guilty pleas and MMC paying an \$850 million settlement. Further fallout from Mr. Spitzer's bombshell resulted in thousands of MMC employees losing their jobs, huge devaluation of retirement savings in the form of MMC shares, and damage to the wider insurance industry's reputation.

Criminal convictions resulting from the bid-rigging scandal netted two people sentenced to weekends in jail, after they were acquitted of the most serious charges they faced.

Given the evidence of bid rigging that Mr. Spitzer's department uncovered, it would be hard to argue that the investigation did not reveal practices that should have no part in the insurance-buying process. But as prosecutors now move to dismiss charges against other individuals who cooperated with investigators, it's difficult to avoid concluding that Mr. Spitzer overreached as he sought to portray the insurance industry as rife with corruption.



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#### THIS WEEK'S RESULTS

Q Should Congress impose a tax on "Cadillac" health plans?



Yes, it's a practical solution to health care funding

13%

Maybe, but it should be limited to a few plans

11%

No, taxing health plans should not be an option

75%

#### NEXT WEEK'S QUESTION

Q: How should Democrats proceed on health care reform?

### LETTERS

## Time is ripe for N.Y. exchange

TO THE EDITOR: Your Jan. 11 article, "New York to Revive Insurance Exchange," did a very good job in summing up the facts and in also detailing some of the differences between this new proposed insurance exchange and the insurance exchange that many of us remember in the early 1980s.

The insurance brokerage firm I was associated with in those days jumped into the old exchange with both feet. In many respects it was a mistake. Some syndicates were undercapitalized, and those that were capitalized well, arguably, had the "wrong kind of capital"—capital from existing insurance and reinsurance company sources. All that accomplished was a recirculation of capacity. A mistake, no matter how you look at it.

The major broker I worked for owned several underwriting operations at the time (back in the days when such operations were considered a normal part of the insurance broking business), so although my broker invested

See **LETTERS** page 19

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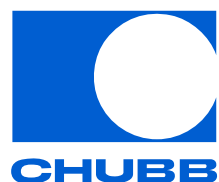
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# SPOTLIGHT

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MAINTAIN DEMAND  
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# RATES MAINTAIN ALTITUDE

*Increases continue as claims escalate,  
but some see softening ahead if losses dip*

By ZACK PHILLIPS

**D**espite a third consecutive year of unprofitable underwriting, aviation market capacity remains abundant and threatens to end a hardening market that underwriters say they need.

Rate increases for commercial airlines are expected to continue into 2010 but could moderate considerably if this becomes an average loss year, brokers and other experts say.

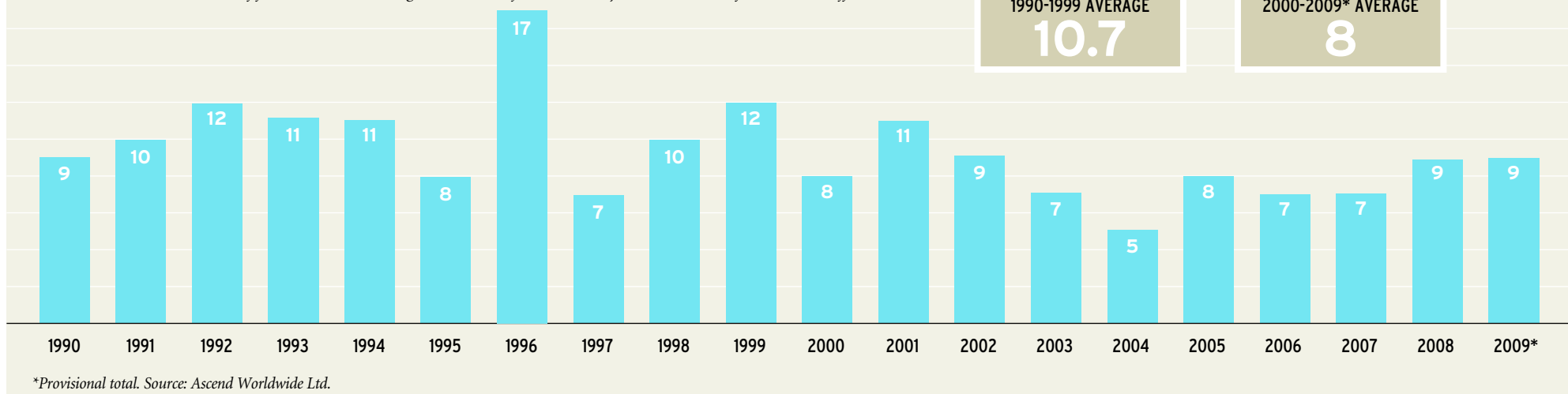
"There were incredibly high losses in 2009," said Magnus Allan, a London-based aviation analyst at Aon Aviation and Aerospace. "The price looks to be responding to that."

During December, when a significant portion of the global aviation market renews, rates increased about 20% for the average account, according to various broker reports. But that figure is heavily skewed by the renewal of Air France, which suffered a catastrophic loss in the crash of a

Continued on next page

## AIRLINE LOSSES

Number of fatal accidents involving Western-built jets, which carry more than 90% of the world's traffic.



Continued from previous page

transatlantic jet last June, brokers said. Excluding Air France, the average rate increase in December was slightly more than 10%, one broker said.

That is worrisome for underwriters, who have argued they need to increase premium revenue dramatically to account for high losses in 2009 and several years of plummeting prices. According to Aon Corp., underwriters earned \$1.9 billion in premiums but incurred \$2.3 billion in claims in 2009.

Rates increased dramatically in the middle of last year, after a spate of high-profile aviation accidents, but leveled off in the second half of the year, brokers said. In addition to the Air France crash in June, a Yemenia Airways jet crashed later that month, a Colgan Air jet crashed near Buffalo, N.Y., in February, and a US Airways flight ditched in the Hudson River in January.

On average, 2009 premiums

**'We have witnessed a softening in the last month.'**

Nigel Weyman, JLT Aerospace Inc.

increased 26% in June, 21% in July, and more than 30% in August and September before falling to below 20% in November and December, according to Aon's monthly index.

"We have witnessed a softening in the last month," Nigel Weyman, chairman of JLT Aerospace Inc., said in the firm's December aviation newsletter.

Brokers said the moderating increases were due to a decrease in losses in the second half of 2009 and an influx of capacity as rates began to harden.

In November, Hamilton, Bermuda-based Ironshore Specialty Co. said it would enter the aviation market with New York-based Starr Aviation Agency Inc. as its underwriter. Steve Doyle, London-based executive director at Willis Aviation, a division of broker Willis Group Holdings P.L.C., said he understood that Ironshore would offer 2.5% or 3% capacity on major risks. The market's largest players often offer about 10% capacity on major risks, he said.

See **AVIATION** page 13



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AP PHOTO

The engine of US Airlines Flight 1549 rests on a barge on the Hudson River after the plane was forced to make an emergency landing after it collided with a flock of birds in January 2009.

# Bird strikes prompt safety review

*Aviation regulator may change standards to reflect increased threat*

By ZACK PHILLIPS

The Federal Aviation Administration is considering whether to update regulations on bird strikes after a year that may set a record for the number of creatures that hit aircraft in the United States.

Government officials say when the final tally of bird strikes in 2009 is completed, it may exceed 10,000 incidents for the first time, according to reports.

The previous high was the 7,734 bird strikes in 2007, according to the U.S. Department of Agricul-

ture's Wildlife Services program, National Wildlife Research Center, which tracks such incidents and studies the problem. Since 1990, there have been more than 94,000 instances of a civilian aircraft striking wildlife—almost always birds, the program said.

Reporting wildlife strikes of aircraft is voluntary, although government officials say they encourage private operators to report all strikes.

Last July, the National Transportation Safety Board recommended that the FAA update its standards, mostly in effect since the 1970s, that require aircraft frames and tails to withstand a collision with a 4-pound bird and an 8-pound bird, respectively.

The recommendation came after the NTSB's determination that the fatal 2008 crash of a business jet in Oklahoma was caused by a collision with a flock of white pelicans, which can weigh up to 20 pounds each.

On Dec. 23, 2009, the FAA agreed to review the criteria for withstanding bird strikes, an agency spokesman said.

"We added we also would review current military and civilian bird strike data to determine how the threat may have changed since the last (regulation) revision," the FAA spokesman said. "After doing these reviews, we will decide if revision to (the regulation), the associated guidance material or policy is appropriate."

The NTSB also recommended that the FAA make reporting of bird strikes mandatory. So far, the FAA has not made a decision on the recommendations, although it reversed its earlier stance and made its bird strike database public last April.

Observers say part of the increase in bird strikes last year is due to an increase in reporting of such incidents, after US Airways Flight 1549 hit a flock of Canada geese on Jan.

15, 2009, and made a successful emergency landing in the Hudson River. But experts also say they think the number of strikes is growing as are the presence of Canada geese, white pelicans, sandhill cranes, bald eagles and other animals near some airports.

The USDA says wildlife collisions cost U.S. civil aviation about \$625 million a year and U.S. military aviation about \$100 million annually.

"We're seeing increases in wildlife populations in some areas," said Gail Keirn, public affairs specialist for the Wildlife Services program in Fort Collins, Colo.

Ms. Keirn said another factor is that jet engines are becoming larger, creating more powerful suction, and operating more quietly, all of which increase the likelihood of bird strikes.

Gulls are the most common type of bird to strike aircraft, followed by doves and pigeons, according to the FAA.

Earlier this month, a Swiss International Air Lines flight made an emergency landing soon after takeoff in St. Petersburg, Russia, when a bird became caught in one its engines. In November 2009, a Northwest Airlines Inc. flight landed in Minneapolis soon after takeoff after hitting a flock of pigeons. Neither incident caused any injuries.

The Wildlife Services National Wildlife Research Center and FAA are studying avian radar systems that attempt to track birds in real time and are testing lighting systems intended to make jets more visible to birds.

On its Web site, the FAA says it plans to push its proposed rules on the subject by the end of this year.

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## BIRD STRIKES

*There were more than 100,000 wildlife strikes involving civil and military aircraft between 1990 and 2008.*

- Most bird strikes occur between the months of July and October.
- Most bird strikes occur during the approach and landing roll.
- 92% of the bird strikes occur at or below 3,000 feet above ground level.
- Since 1990, there have been 23 fatalities attributed to wildlife strikes with US civil aircraft.
- The first reported bird strike was by Orville Wright in 1905.
- Gulls are the most common type of bird to strike aircraft, accounting for 19% of birds identified in bird strikes. Doves and pigeons are the second most common, accounting for 15% of birds identified in bird strikes.



Source: Federal Aviation Authority

# FAA pushes back deadline to update pilot fatigue rules

Major emphasis of revised regulations will be on rest time

By DAVE LENCKUS

The Federal Aviation Administration has postponed until spring the long-awaited update of its decades-old regulations on managing pilot fatigue, despite pressure from Congress to act sooner.

Ultimately, the proposal will incorporate the latest sleep and fatigue science—including how late-day departures affect pilot performance—and will be broader than originally planned, an FAA spokeswoman said.

In December, an FAA official told a U.S. Senate subcommittee on aviation safety that the agency would not meet its year-end 2009 target but would unveil the proposal in January. This month, however, the spokeswoman confirmed the new target date of late March or April for the revamped pilot fatigue regulations.

Fatigue regulations govern passenger airlines and charter operations, though not identically. They do not apply to general aviation, including corporate fleets. The regulations have been in place with little change since the 1940s, according to the FAA.

In recent years, the National Transportation Safety Board has cited pilot fatigue as a possible factor in several incidents, including the February 2009 fatal crash of a Colgan Air Inc. passenger jet near Buffalo, N.Y. Other incidents involved pilots flying past destinations, dozing and taxiing planes off runways after landing.

But the NTSB since 1989 has urged the FAA to update its fatigue regulations. The FAA floated a couple of proposals since 1995, but it withdrew both last year because of insufficient industry and labor support.

Largely because of the Colgan crash, Congress looked into the issue last year and pressed the FAA



AP PHOTO

The February 2009 crash near Buffalo, N.Y., of a Continental Connection flight operated by Colgan Air Inc. killed some four dozen people. Safety officials cited pilot fatigue as a possible factor contributing to the incident.

to update the regulations.

Meanwhile, aviation insurance underwriters also are paying greater attention to their policyholders' fatigue management protocols, brokers say.

## Economic conditions

While some airlines' own fatigue management protocols exceed FAA regulations, economic conditions force most airlines to work pilots nearly as hard as the rules permit, said John Prater, president of the Washington-based Air Line Pilots Assn. International and a commercial airline pilot.

The FAA spokeswoman agreed.

The agency's latest delay in

revamping the regulations was necessary because of the complexity of integrating the latest scientific findings with the rulemaking consensus reached on many points by various aviation industry representatives, the spokeswoman said. Representatives of management and labor collaborated with the FAA as part of a special rulemaking committee last summer.

While she would not provide details about the forthcoming regulations, the spokeswoman said, "The big thing we're trying to fix is rest time."

Pilots must have at least eight hours of rest during any 24-hour period involving flight time. Rest

begins when a pilot parks a plane at a gate and it can end as soon as eight hours later with the pilot backing another plane away from its gate.

ALPA wants a 10-hour rest period.

The FAA also plans to "fix" a regulation allowing pilots to be "on duty" 16 of every 24 hours. That provision is "unclear" and, because of union contracts, "on duty" means something different to each operator, the spokeswoman said.

The industry mistakenly assumes the proposal will not address pilots' personal commuting time—when pilots travel from their homes to their base airports during off-duty

hours at the outset of multiple-day shifts, the spokeswoman said.

Commuting time "will be taken into account," she said. The proposal might not specifically mention "commuting," but it is an important element of fatigue management that will be addressed, the spokeswoman said.

Several industry observers, however, said regulating any activity during pilots' private time would be challenging.

Ultimately, a pilot has the responsibility to be rested and refuse to fly when fatigued, said airline consultant and former airline pilot James F. Barnette, an executive partner with transportation energy and environment consulting firm Nexxt Steps L.L.C. in Princeton, N.J.

Once the FAA unveils its proposal, interests that participated in the rulemaking committee might suggest modifications.

For example, the Washington-based Regional Airline Assn. has retained Washington State University's Sleep and Performance Research Center in Spokane to conduct fatigue management research on pilots operating short-haul flights. Preliminary results should be available when the FAA invites comments on its proposal later this year, said RAA President Roger Cohen.

Mr. Cohen said fatigue research is abundant, but little of the research focuses on pilots.

For that reason, he questioned the widely held assumption that multiple takeoffs and landings that a pilot executes during a shift for a short-haul flight is more fatiguing than a single takeoff and landing by a pilot flying a long route. Short-haul flights might be comparable to adrenaline-pumping city driving while a longer route might be similar to a boring daylong drive along a flat Midwestern highway, he said.

William R. Voss, president and CEO of the Alexandria, Va.-based Flight Safety Foundation, agreed that "there's a gap in the science on the number of ups and downs" that fatigue pilots.

## Aviation: Rates maintain altitude as losses mount

CONTINUED FROM PAGE 11

In addition to Ironshore, other insurers have become more active and market capacity now stands at more than 175%, Mr. Doyle said.

"Certainly, some of the underwriters that have been reticent to participate the last year are sort of putting their toes back into the water and saying they have capacity," Aon's Mr. Allan said.

Despite high dollar losses in 2009, Mr. Allan said there were only a handful of major losses and not all insurers are in the red for the year. Aviation groups reported 2009 as a relatively safe year. Total losses were down 42% in 2009 compared with

2008, and fatal accidents dropped to 10 in 2009 from 13 in 2008, according to Ascend Worldwide Ltd., a London-based aviation consultant that tracks global accidents.

"If you avoid the catastrophic losses, there's an element of return available across the whole aerospace portfolio" for aviation underwriters, Mr. Doyle said. "When you look at other investment potential, there's very limited return to be had; and therefore, I can't see capacity leaving the aviation market until there are significant returns available elsewhere."

Mr. Allan said that if 2010 returns to an average level of losses, rate increases likely would moderate to

## AIRLINE LOSSES

Total cost in millions of airline losses from all causes on Western-built jets.



\*Provisional figure  
Source: Ascend Worldwide Ltd.

between 5% and 10%.

One favorable development for underwriters is that airlines' overall

exposure—fleet values for hull coverage and passenger numbers for liability coverage—has not

decreased as much as expected, brokers said. Premium income typically is based on the rate times the exposure, so underwriters end up collecting less premium than they projected if exposures drop in value after a policy is written.

Despite gloomy projections for the airline industry, exposure has remained about flat overall, brokers said. One reason is that many passengers have moved from business class to coach or from a large airline to a regional, low-cost carrier, observers said. Such changes produce less income for the large airlines, but do not decrease the overall number of passengers from insurers' perspective.

Also, by the time many airlines renewed in December 2008, the financial crisis already had taken much of its toll, so airlines' projections for 2009 likely were not overly optimistic, Mr. Allan said.

# Space coverage rates fall

*But demand remains high as communications services grow*

By MICHAEL BRADFORD

Demand for satellite services such as television broadcasting and Internet connectivity is keeping the space insurance market in a profitable orbit even as coverage rates drift lower.

The financial crisis has led to a cutback in demand for many consumer products and services, but that has had only a slight effect on those that come from space, sources say. Satellite launches have continued apace during recent years as TV, radio, Internet and mobile telephone service providers have expanded their offerings.

"The financial crisis has caused some projects to be pushed out a little further," Christopher Kunstadter, senior vp with XL Capital Ltd. unit XL Insurance in New York, said of satellite launches. "There may have been some programs that were delayed, but essentially the financial crisis has not had an impact on space."

"The market continues to be strong and healthy," said Mark Quinn, Bethesda, Md.-based senior vp of Willis Inspace, a specialist space division of Willis Group Holdings P.L.C. "Last year was a profitable year for the market, with \$825 million in premiums on \$400 million in claims," he said, noting that seven of the past eight years have been profitable for space insurers.

"What we have seen is the satellite industry had been fairly well insulated from the effects of the financial crisis," Mr. Quinn said of satellite operators. "One reason is that they have long-term contracts with their customers, which tend to be large, strong companies, so operators have been able to maintain or increase their revenue levels."

"Our clients have had very good years," said Jeffrey Polisen, CEO with Rosslyn, Va.-based International Space Brokers Inc., Aon Corp.'s space practice. "There has been an expansion of mobile technology on the satel-

lite side and growth in the field from (high-definition) TV. The satellite side has been extremely lucky that it has not been affected by the financial crisis to the degree others have."

As insurer profits have risen, rates for space insurance dropped as much as 10% to 15% for in-orbit and launch risks in the past year, sources said.

"The market is softening, and we anticipate that it will continue to soften," Mr. Quinn said.

Mr. Kunstadter, though, said the direction of rates is difficult to predict. "It's easy enough to look at what is planned in terms of launches, insurance placements and

**'Space debris is something that has always been taken into account by manufacturers, operators and launch providers.'**

Mark Quinn, Willis Inspace

what insured values will be," he said. "But pricing is driven by capacity and experience; we don't know what tomorrow's experience will be."

Space market profits have led some insurers to increase their capacity for satellite risks. Others have entered the market, including Lloyd's of London insurer Kiln Ltd., which began writing the coverage in November 2009 from an office in Paris.

Sources said new capacity has totaled as much as \$53 million during the past year from existing insurers and new entrants into the space market.



AP PHOTO



AP PHOTO

**A computer-generated NASA image shows objects tracked in Earth's orbit, most of which is space junk.**

There is plenty of capacity, with as much as \$773 million in "theoretical capacity" available this year, up from \$720 million a year ago, said Mr. Polisen. "We advise on actual capacity, which is the largest line we have seen an insurer put down on any one risk," an amount that stands at \$565 million, he said.

"The market is growing," said Benito Pagnanelli, president of Pagnanelli Risk Solutions Ltd. in London and a widely recognized expert on space insurance. "Whenever there is a year with some profit, (new insurers) come in to see if there is a piece of the profit for them the next year.... There is no problem with capacity."

Capacity is sufficient even with the increasing cost of satellites and launch services, Mr. Polisen said. That could change if problems crop up. If large losses were to hit the market, "we could see capacity dry up quickly," he said.

Satellites generally carry insured values of around \$250 million to \$275 million, experts say.

Once a satellite is safely in space, its mission is far from risk-free. "There is still the problem of debris," Mr. Pagnanelli said. "There is much concern about that in the space market."

The market suffered a major loss from space junk in February 2009 when a defunct Russian military satellite, Cosmos 2251, collided with Iridium 33, a U.S. communications satellite owned by Iridium Satellite L.L.C. in Bethesda, Md. NASA said the collision was the first known between two satellites.

"Space debris is something that has always been taken into account by manufacturers, operators and launch providers," Willis Inspace's Mr. Quinn said. "Different participants in the industry rely on very sophisticated models" that can provide some help in preventing satellites from colliding with space debris, he said.

Modeling and satellite monitoring services remain the best ways to lower the chance of damage from a hit by space junk, Mr. Quinn said. "At the end of the day, the risk is very low, so there is confidence that what is being done is appropriate."

"The design of spacecraft is as robust as it can be," Mr. Quinn added. "Components and the technology are built to withstand the debris environment. Manufacturers and operators have always looked at this seriously."

**A NASA image shows an artist's concept of an Iridium satellite in Earth's orbit. An Iridium satellite collided with a defunct Russian satellite in February 2009.**



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**Business Insurance**

## Products & Services



### Hanover enhances ocean cargo cover

**WORCESTER, Mass.**—Hanover Insurance Group Inc. says it has enhanced its coverage for its ocean cargo business for U.S.-based companies.

The product aims to help affiliated agents to better serve clients with goods in transit—whether by vessel, air or land—and cover possible exposures not covered by standard policies, the Worcester, Mass.-based company said in a statement.

“Today we live in a truly global economy, where more and more U.S. businesses are seeking new customers and suppliers beyond their own shores,” said Jane Sharfstein, vp of ocean marine for Hanover. “Whether these goods are being transported by vessel or air, they need coverage and that is where ocean cargo comes in.”

The worldwide coverage includes various protections and specialized underwriting, such as concealed damages and goods insured. It includes access to loss control specialists to identify potential loss hazards.

For more information, contact Ms. Sharfstein at 508-855-2544 or [jsharfstein@hanover.com](mailto:jsharfstein@hanover.com).

### Hartford launches bus safety program

**HARTFORD, Conn.**—Hartford Financial Services Group Inc. has launched a technology-based risk

management program to help school bus contractors enhance safety.

Hartford’s FleetAhead program aims to improve driving behavior and reduce operating costs by offering services such as in-vehicle driver feedback, real-time analysis and coaching technology, loss-control services, and customized reporting tools.

“Improving passenger safety, reducing accidents and controlling costs are key concerns for school bus operators and all commercial fleet managers,” said Scott Stevens, assistant vp of captive and specialty programs for Hartford.

Hartford has partnered with Redwood Shores, Calif.-based Green-Road Driving Technologies Ltd., a technology-based service administrator that will provide the core technology product.

FleetAhead is available to Hartford’s school bus contractor clients through Mahwah, N.J.-based broker Capacity Coverage Co. of New Jersey Inc.

Hartford said it is looking to make the program available to commercial fleet customers later this year.

For more information, contact Mr. Stevens at 860-547-7639 or [scott.stevens@thehartford.com](mailto:scott.stevens@thehartford.com).



### Ironshore expands property energy capacity

**HAMILTON, Bermuda**—Ironshore Inc. has expanded to \$25 million the energy property capacity it offers through its global energy practice.

The expanded global capacity, which is offered on quota share, excess-of-loss or full value basis,

excludes named Atlantic windstorms and California earthquakes, for which capacity remains at \$10 million, the Hamilton, Bermuda-based company said in a statement.

For more information, contact Nigel Jobson, vp of the energy property practice, at [nigel.jobson@ironshore.com](mailto:nigel.jobson@ironshore.com) or Mitch Blaser, CEO of Ironshore’s Bermuda operations, at [mitch.blaser@ironshore.com](mailto:mitch.blaser@ironshore.com) or call 441-279-8200.

### Irwin Siegel expands social services program

**ROCK HILL, N.Y.**—Irwin Siegel Agency Inc. has expanded its social services program with a product for foster care and adoption agencies.

The product features various coverages, including property, auto, general liability, professional liability and abuse coverage in addition to risk management and loss control resources.

The program is for foster care and adoption agencies that exhibit a “high quality of service and dedication to children served, proper policies and procedures in place, established best practices and respective loss history,” the company said.

The minimum premium for adoption agencies is \$25,000 and the minimum premium for foster care programs is \$75,000.

The programs, available through independent agents and brokers, are underwritten by Chartis Inc.

For more information, contact Terry Grafmuller, senior underwriter at Irwin Siegel, at 800-622-8272 or [Terry.Grafmuller@SiegelAgency.com](mailto:Terry.Grafmuller@SiegelAgency.com).

## TO SUBMIT ITEMS

**PRODUCTS & SERVICES**  
BI’s Products & Services column reports on new product offerings.

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## UP Comings & Goings CLOSE



### REBECCA RAMIREZ

**NEW JOB TITLE:** Senior vp and director of risk management for El Paso, Texas-based brokerage JDW Insurance.

**PREVIOUS POSITION:** Vp of risk management for JDW Insurance.

**GOALS FOR NEW POSITION:** My new goals are to increase the services that we provide to our clients with regards to risk management, safety, loss control and claims.

**INDUSTRY CHALLENGES:** The economy, the uncertainty of what’s going to happen in the future regarding the economy and political stability. Everybody is really hesitant to spend dollars when they don’t know what the future holds...There are all kinds of issues that are holding people back. Companies are afraid to spend money, hire new people or create jobs.

**INDUSTRY OUTLOOK:** I think the industry is doing well. My outlook is positive. From what we see in (Texas), we see that the local economy is doing well. There’s substantial growth here thanks to an army base (Fort Bliss). We’ve been fortunate to not see the

economic struggles seen elsewhere in the nation.

**FIRST MARKET EXPERIENCE:** My first job was for American General Insurance Co. I started in their data processing department and quickly transferred to underwriting. From my perspective, what was fun was that I was young and I had a whole group of underwriters who took me under their wing and mentored me. It was like the entire department helped me along. I got to learn a lot from them.

**CAREER HIGHLIGHT:** The highlight is the associations that I have joined and the amount of people that I have met. Even though it is very competitive, we are all in the industry together and we all understand each other. You can go anywhere to any seminar and meet someone new and interesting.

**ADVICE:** Continue to learn and learn as much as you can about every area of business. Don’t limit yourself. This is an ever-learning process because we are impacted with all areas of business with our clients, that we really have to know as much as we can to help.

## Comings & Goings

# ONLINE

**VISIT** [www.businessinsurance.com/ComingsandGoings](http://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 e-mail.

### 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:

Mike Tsikoudakis  
*Business Insurance*  
360 N. Michigan Ave.  
Chicago, Ill. 60601-3806  
[mtsikoudakis@businessinsurance.com](mailto:mtsikoudakis@businessinsurance.com)

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# Rates: Trends in P/C market favor buyers

CONTINUED FROM PAGE 4

Marsh report.

For example, strong competition among casualty insurers likely will continue because insurers are moderately overcapitalized, according to the 120-page U.S. Insurance Market Report 2010.

On the property side, barring a large catastrophe, insurance buyers likely will see more decreases than increases this year as property markets continue to stabilize, the report said.

"Firms with minimal to no cat exposure should expect higher levels of competition among insurers and rate changes generally ranging from 5% decreases to 5% increases," the report states. "Companies with moderate to high cat exposure, on the other hand, likely will see higher average rate increases, generally from flat to 10%."

## D&O still competitive

Directors and officers liability insurance will remain competitive, assuming economic and litigation environments remain relatively stable, while employment practices lia-

bility insurance continues to see abundant capacity, the report says.

The expectations for 2010 stem from developments in 2009.

Property coverage renewals during the fourth quarter typically saw rates ranging from 2.5% increases to 5% decreases along with improved terms and conditions and possibly reduced deductibles, the Marsh report states.

Buyers with more than 30% of their values in catastrophe-exposed regions saw rates ranging from 5% increases to 5% decreases.

Competition in casualty lines in 2009 was driven by insurers chasing new business in attempts to offset premiums lost due to clients' decreasing exposures, according to Marsh.

Coverage enhancements for some lines also were evident in 2009. Some employment practices liability insurers, for example, provided defense costs for wage-and-hour lawsuits, which previously had been excluded.

Based on earnings reports for the first nine months of 2009, Marsh also found that insurer profitability improved during the latter part of

the year, although soft market conditions for commercial lines policies and investment returns remain a challenge for insurers. However, some investment markets recently have improved.

Profits for the U.S. property/casualty industry partially recovered from a "steep decline" in 2008 with net income reaching \$16.6 billion through the third quarter of 2009.

"While profitability remains on the low side, signs of improvement were being seen in the second half of the year," Marsh said. "Overall profitability as measured by the rate of return on average equity improved to 4.8% for the first nine months of 2009 compared to 1.3% one year earlier."

The industry's combined ratio during the first nine months of 2009 reached 101.2%, which is a 4.6 point improvement from the same period of 2008.

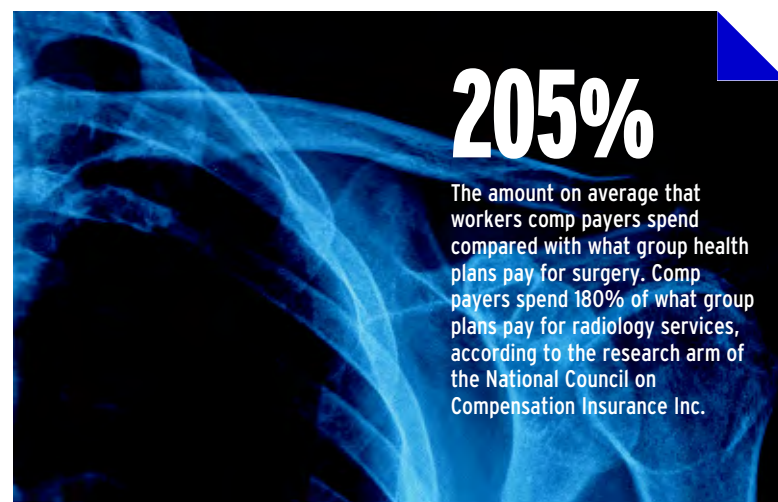
"Although this compares favorably to the prior year, insurers will need to post significantly better underwriting results if they are to return to levels of profitability they have seen in the past," the Marsh report adds.

## Investment income down

With low investment yields, the industry's net investment income fell 7% to \$36.4 billion for the first nine months of the year compared with the same period last year.

But third quarter results represented a significant improvement and show investment improvements.

"Overall, the (property/casualty) insurance industry remains quite strong, both financially and fundamentally," Marsh said. "2010 begins with guarded optimism about the economy as financial markets continue to stabilize. Although insurers' profitability in 2010 may equal or exceed 2009 levels, it is important to be aware that the investment world is extremely volatile and that large-scale catastrophic events can change the outlook for the insurance industry quickly and dramatically."



# Comp: Billing changes stymie efforts to cut costs

CONTINUED FROM PAGE 3

reimbursements from specialty care to primary care providers. Over time, Medicare and group health plans moved closer together as group health plans reduced their reimbursements to fall closer in line with Medicare while Medicare gradually raised its payments.

But generally, state workers comp fee schedules have not made similar adjustments for specialty services.

Fee schedules are not effective cost-containment measures for certain specialty medical procedures and are failing to hold down reimbursements, NCCI said. In some cases, NCCI said workers comp fee schedules can result in increased costs, such as shoulder X-ray reimbursements in Alabama and Arizona, that are higher than that paid by Medicare or group plans.

Meanwhile, various factors are contributing to a declining proportion of workers comp medical costs that are subject to physician fee schedules, including medical providers shifting from charging private practice fees to billing for procedures through hospitals or other facilities that employ them. The hospitals and other facilities may not fall under a workers comp fee schedule, NCCI said.

"To maintain the effectiveness of

medical fee schedules, workers compensation might consider using Medicare billing approaches for hospital stays and ambulatory services, but in doing so should adapt Medicare models to workers compensation priorities," NCCI recommended.

The NCCI report on Medicare's influence on workers comp medical pricing also reviewed data on aging from a separate report released last week, Claims Characteristics of Workers Age 65 and Above.

Workers comp claims for employees older than 65 are less severe in terms of indemnity and frequency, but medical expenses are about \$3,000 greater for the older workers when compared with other workers, NCCI concluded.

While the older workers comprise a small share of the nation's employment and injury cases, the recent sharp decline in the value of many investments "almost certainly" means that an ongoing trend of people working into later years will accelerate.

"Because seniors account for a growing portion of the workforce, this suggests that workers compensation insurers promote safety initiatives designed to prevent slips and falls and ensure that provider networks are equipped to provide hip replacements and related procedures," NCCI said.

## CASUALTY INSURANCE RATES

Typical rate change at renewal (average/good risk profile)

Coverage	Segment	Rate Change Q4 2009
General liability	Guaranteed cost	flat to 5% decrease
General liability	Loss sensitive	flat to 5% decrease
D&O liability	Fortune 250	5% decrease to 8% decrease
D&O liability	Fortune 250-500	flat to 5% decrease
D&O liability	Fortune 500-1000	flat to 3% decrease
D&O liability	Small to mid cap	flat to 9% decrease
D&O liability	Private companies	flat to 2% decrease

Source: Marsh Inc.

# Swiss Re cedes block of life business to Berkshire Hathaway

By MICHAEL BRADFORD

Swiss Reinsurance Co. Ltd. has ceded a block of U.S. life reinsurance business to a unit of Warren Buffett's Berkshire Hathaway Inc. in a transaction that the reinsurer says will free up capital to write new business.

Zurich-based Swiss Re last week said the deal brings it a ceding commission of about 1.3 billion Swiss francs (\$1.27 billion) and allows it to redeploy about 300 million Swiss francs (\$292.2 million) in capital.

Some analysts, though, questioned whether Swiss Re is too optimistic about its goal of achieving a 14% rate of return on the redeployed capital.

During an analyst presentation, Swiss Re said the capital can be used

to write more attractively priced life and health or property/casualty business.

"By transferring this block of life business, Swiss Re is monetizing intangible assets and freeing up capital," Christian Mumenthaler, Swiss Re's head of life and health, said in a statement. "The transaction puts us in an excellent position to redeploy the capital at more attractive returns."

In its investor presentation, Swiss Re said the quota share retrocessional deal involving Swiss Re Life & Health America Inc. transfers assets with a value of about 1.9 billion Swiss francs (\$1.85 billion) with "marginally positive" earnings and limits the risk for Berkshire Hathaway Life Insurance Co. of Nebraska

**'For investors it is hard to understand where the value creation is for Swiss Re.'**

Georg Marti, Zürcher Kantonalbank

to \$1.5 billion.

Swiss Re said it will continue to provide administrative and reporting services for the business.

Although the stock market reacted negatively to the deal, Georg Marti, an equity analyst with Zürcher Kantonalbank in Zurich, said the deal "to my mind, it is not

such a bad thing. They have reduced their operating risk by giving it away to Berkshire."

Mr. Marti acknowledged, though, "for investors it is hard to understand where the value creation is for Swiss Re."

"It's a bit difficult to read what they are trying to do," said Stefan Schumann, an analyst with Vontobel Group in Zurich. "It looks like they are trying to gain their AA rating back."

"They gave the indication that it was a rather flat transaction" in costs, he said. "So it's difficult to judge how much the whole thing costs to get this capital, if it costs at all."

Swiss Re said if the redeployed capital were invested with a 14% return, that would improve the rein-

surer's 2008 net profits by around 97 million Swiss francs (\$94.5 million) and 2009 profits by 55 million Swiss francs (\$53.6 million).

Mr. Schumann said that will be difficult to achieve.

"I can't see today where you could achieve a 14% return on capital in the reinsurance market," Mr. Schumann said.

Achieving such a rate of return on underwriting and investment could be challenging because the stock markets are volatile and interest rates are low, Mr. Marti said.

"The question that I have is: Why did they have a Q&A and issue a press release on a transaction that is 1% of their asset base?" Mr. Schumann said. "Apparently they felt like they had to explain it."

## Gen Re: Pact ends probes by SEC of finite risk deals

CONTINUED FROM PAGE 3

the transactions with AIG was to permit the New York-based insurance giant to falsely report its loss reserves to analysts, investors and the SEC in its filings.

"Hopefully, this (settlement) is the end of a sad episode," said Bill Bergman, an analyst with Morningstar Inc. in Chicago. "Traditionally, leadership at companies within Berkshire Hathaway is trustworthy and that trust was developed over time...maybe that trust was misplaced."

Four former executives of Stamford, Conn.-based Gen Re were convicted in February 2008, including Mr. Ferguson, who was sentenced to two years in prison and fined \$200,000.

The three others—Christopher Garand, former senior vp in charge of U.S. finite underwriting; Robert Graham, former senior vp and assistant general counsel; and Elizabeth Monrad, former chief financial officer—also received prison sentences and fines.

Also convicted was Christian M. Milton, former AIG vp of reinsurance, who was sentenced to four years in prison and fined \$200,000.

All are appealing their convictions.

Joseph P. Brandon, CEO of Gen Re since 2001, resigned from the post in 2008 amid the finite reinsurance allegations.

Mr. Brandon, whom prosecutors identified as an unindicted co-conspirator at the trial, was never charged.

The Wall Street Journal, citing people familiar with the matter, said that the SEC as part of the settlement told Gen Re that Mr. Brandon likely would not be prosecuted. A spokesman for the SEC declined to comment.

The SEC previously accused AIG of securities fraud and improper accounting, which the insurer settled by paying more than \$800 million. In addition, Maurice R. Greenberg, AIG's former chairman and CEO, and Howard I. Smith, AIG's former chief financial officer, last year paid \$15 million and \$1.5 million, respectively, to settle SEC charges related to the Gen Re deal, among other transactions.

Separately, the SEC alleged that Gen Re entered into a series of sham reinsurance contracts with Prudential's property/casualty division from 1997 to 2002, which allowed Newark, N.J.-based Prudential to improperly report more than \$200 million in revenues in 2000, 2001 and 2002.

## Assurant resolves finite reinsurance charges

**NEW YORK**—Assurant Inc. has entered into a \$3.5 million agreement with the U.S. Securities and Exchange Commission to settle charges that it used a 2004 finite reinsurance contract to improperly book a \$10 million payment as a reinsurance recovery instead of a return of a deposit.

The SEC said that as a result of the improper accounting, the New York-based insurer overstated its net income for the quarter ended Sept. 30, 2004, by \$6.4 million, or 9.4%.

According to the SEC, Assurant failed to properly account for \$10 million that one of its units, Assurant Solutions, obtained from American Reinsurance Co. in 2004's third quarter under a reinsurance policy that originated in 1992 and was renewed annually through 2004.

The SEC said in its complaint that the arrangement consisted of a written policy as well as an oral side agreement that "the parties referred to as their 'handshake' agreement.

"Although the terms of the written treaty purported to transfer the risk of certain losses from Assurant Solutions to Am Re under certain conditions, the terms of the oral 'handshake' agreement effectively negated the transfer of risk," the SEC complaint stated.

The complaint said the two parties agreed Assurant Group would pay Am Re back in full for any losses the reinsurer experienced under the treaty.

After Assurant incurred losses during the 2004 hurricane season, it improperly recorded the \$10 million payment it received from Am Re as a reinsurance recovery when "it was effectively a return of Assurant's own money," said the complaint.

The settlement agreement, which also enjoins

Assurant from violating certain provisions of federal securities laws, is subject to court approval.

In 2007, Assurant announced it had placed Assurant's president and CEO, Robert B. Pollock, on administrative leave after he received a Wells notice from the SEC related to the investigation into the finite reinsurance contracts. A Wells notice is a letter from the SEC stating it intends to begin enforcement proceedings against the recipient.

Mr. Pollock was reinstated in 2008, however, after the insurer said its own "special committee" had completed a review in which the company's board concluded Assurant would be best served if he returned to his leadership responsibilities.

Assurant said it has been informed by SEC staff that the regulator does not intend to pursue any charges or other action against any current Assurant executives, and that it believes it is also unlikely the SEC will pursue any actions against former employees who also received Wells notices in 2007.

Mr. Pollock said in a statement last week that he is pleased the matter is resolved. Assurant, which noted the SEC made no allegation of fraud on its part, said it neither admits nor denies the agency's allegations.

Credit rating agency Standard & Poor's Corp. in New York said the company's ratings are unaffected by the settlement.

In response to a query about American Re, which is now Princeton, N.J.-based Munich Re America Inc., the SEC spokesman said he could not comment on any actions not discussed in the SEC release.

A Munich Re America spokeswoman had no comment.

—By Judy Greenwald

## Fees: Changes to U.K. legal system eyed

CONTINUED FROM PAGE 4

30% to 40%; for libel cases, premiums can be up 50% of the sum insured, he said.

"The issues of conditional fee arrangements and after-the-event insurance have increasingly come up because some commercial parties have been using them as litigation tools," to transfer most of the costs to the opposing party, said Janet Lambert, a partner with London law firm Barlow, Lyde & Gilbert L.L.P.

"Success fees and (after-the-event) insurance premiums should cease to be recoverable," Justice Jackson said in the report. "If this recommendation is implemented, it will lead to significant cost savings, whilst still enabling those who need access to justice to obtain it."

Success fees would be borne by the client and not the opponent, he proposed. Those fees would come from damages and be capped at 25% of the award.

Justice Jackson said a benefit of conditional fee agreements is that they are "geared towards ensuring that claimants receive proper compensation. This, however, comes at a heavy price for defendants, who often have to bear a disproportionate costs burden."

With limits on success fees and after-the-event insurance, general damages awards for personal injuries and civil wrongs should be increased by 10%. In addition, generally limiting how much claimants must contribute to defendants'

costs would often remove the need for after-the-event insurance, according to the proposal.

It does, however, say that a defendant must pay a claimant's costs if a claim is successful, the same as current law.

Peter Staddon, head of technical services at the London-based British Insurance Brokers Assn., said a 10% increase in damages would add costs, but those would be offset by savings in other legal expenses, at least for smaller claims, under Justice Jackson's other proposals.

It is difficult to see exactly how the reforms might affect the insurance market, Mr. Staddon said.

"The insurance industry could see the demand for after-the-event policies reduced," Mr. Staddon said in an e-mail, but that could be offset by a greater demand for before-the-event insurance, or insurance covering legal costs that is placed before a claim is filed.

Among Justice Jackson's proposals in the comprehensive plan is one that would bar fees paid by lawyers to "claims management companies and other intermediaries who profit from the current arrangements."

"He also looked at cost management and proposes judges take more control over costs, asking for estimates and monitoring costs," Ms. Lambert said. Regarding large commercial cases, however, he accepted that the difficulty and expense to estimate the cost of cases with any accuracy would actually

increase total costs, she said.

Richard Smith, a partner with law firm Allen & Overy L.L.P. in London, said Justice Jackson did not concentrate his reforms on Britain's Commercial Court, where cases involving large companies generally are heard.

"There is a great respect internationally for the work that goes on there" in Commercial Court, Mr. Smith said, so Justice Jackson "was not too inclined to suggest that system be tampered with as much." "He recognized that there is a high level of satisfaction in the workings of the Commercial Court," Ms. Lambert agreed.

Although benefits from the reforms would be realized mainly by individuals and small businesses in cases outside the Commercial Court, large companies could see some gain if the proposals are implemented, said John Hurrell, chief executive of the Assn. of Insurance & Risk Managers in London.

"Whilst the Jackson review is not aimed at the sector covered by AIR-MIC members, we welcome any changes that would reduce legal costs, as these eventually push up insurance costs," Mr. Hurrell said in an e-mail. "Although some expenses will rise, overall the proposed reforms should cut the frictional costs of justice."

Any timeline for implementing the reforms depends on the specific proposals and some would require legislation, "which will take some time," Ms. Lambert said.

The report is available at [www.judiciary.gov.uk](http://www.judiciary.gov.uk).

## AIG: MetLife may buy life insurer unit ALICO

CONTINUED FROM PAGE 3

a senior analyst at Boston-based independent research and advisory firm Aite Group L.L.C., said in research note last week.

In December, AIG positioned the unit for sale or an initial public offering by transferring ALICO and another AIG life insurance unit, American International Assurance Co., to a special-purpose vehicle through two debt-for-equity swap transactions with the Federal Reserve Bank of New York.

Attempts to sell the unit were stalled for more than a year as AIG turned down what it viewed as low bids during the financial crisis. If successful, the ALICO sale "would vindicate (AIG President and CEO Robert) Benmosche's strategy of patient divestiture of strategic AIG assets," Mr. Troy wrote.

Mr. Benmosche, a former CEO of MetLife, reportedly is excluded from the negotiations with MetLife to avoid potential conflicts of interest.

Since its rescue, AIG has struck deals to sell more than \$12 billion of assets through roughly 24 transactions.

Meanwhile, last week brought fresh calls to investigate the federal government's rescue of AIG. Rep. Edolphus Towns, D-N.Y., the chairman of the House Oversight Committee, and Rep. Elijah Cummings, D-Md., asked the GAO to conduct a

wide-ranging investigation of the AIG bailout.

"We request the GAO undertake a full review of all aspects of federal assistance—whether through the Federal Reserve, the U.S. Department of the Treasury or any other public entity—provided to AIG from 2007 to the present," the two Democrats said in a letter to Gene L. Dodaro, the acting U.S. comptroller general.

They also said the GAO should examine who decided that AIG should be saved from filing for bankruptcy. In addition, the GAO should evaluate payments by AIG to counterparties of credit default swaps and examine who decided to pay them 100 cents on the dollar, the congressmen wrote.

AIG declined to comment on the letter requesting the GAO review.

While a GAO audit could take several months, lawmakers have a chance Wednesday to quiz two key players in the AIG bailout saga when the House Oversight Committee holds a hearing at which Messrs. Geithner and Paulson are to testify.

Mr. Geithner has been under fire since early January reports that the FRBNY instructed AIG to withhold information in a December 2008 regulatory filing about more than \$62 billion it paid to counterparties.

The hearing also will include testimony from Elias Habayeb, former chief financial officer of AIG Financial Services Group.

# Class: Rise in wage-hour settlements

CONTINUED FROM PAGE 4

FLSA collective action and ERISA class action filings seeking recovery of unpaid wages and 401(k) losses, while displaced workers also filed more wage discrimination and Worker Adjustment and Retraining Notification Act lawsuits.

- Wage-and-hour litigation continued to outpace all other workplace class actions.

- The Obama administration's emphasis on regulation and enforcement led to more government-initiated litigation over workplace issues, and employers are expected to encounter more investigations and governmental enforcement lawsuits in 2010.

- The Class Action Fairness Act of 2005, which was intended to curb abusive class actions, continued to significantly affect workplace litigation, particularly on wage-and-hour class actions in state court. "As the plaintiffs bar continues to devise techniques to adapt to the CAFA, rulings on the scope, meaning and application of the law are already numerous for a statute of such recent vintage," the report says.

- Cutting-edge developments spread rapidly among plaintiffs lawyers.

- The financial stakes continued to increase. "Plaintiffs lawyers have continued to push the envelope in crafting damages theories to expand the size of classes and the scope of recoveries," a trend that is "unlikely to abate in 2010," the report says.

Copies of the report can be obtained at [www.seyfarth.com/ClassActionReport](http://www.seyfarth.com/ClassActionReport) or by e-mailing [ClassActionReport@seyfarth.com](mailto:ClassActionReport@seyfarth.com).

## LETTERS

CONTINUED FROM PAGE 8

in the exchange...their heart was never in it. No broker really wanted to steer business away from existing wholly owned operating units to a new venture. Also of importance was the fact that the major insurance brokers, concerned about offending existing traditional sources of insurance capacity, were very reluctant to utilize the capacity of the exchange. All in all, it was a recipe for disaster and the old exchange quite rightly folded when it did.

Times have changed. And they have largely changed for the better. I am a long-standing proponent of Lloyd's as well as London- and Euro-

pean-company capacity; however, a new exchange could keep dollars as well as jobs here in the United States. More importantly, new sources of capital, from the investment community itself, rather than the traditional insurance community, could create needed new capacity, particularly in property lines where it certainly will be needed and, I suspect, needed sooner than we all think. A well-constructed and well-capitalized exchange could also assist captive insurance companies in pooling unrelated exposures, which might produce important premium deduction benefits for captives owned by for-profit and publicly traded entities.

Lastly, insurance brokers are better educated and more adaptable than they were in the early '80s. Exchanges, pools and the so-called nontraditional forms of capacity are now standard in the industry and accepted risk transfer practices. Many insurance brokers, for example, now regularly involve themselves with the placement of coverages through risk purchasing groups as well as Risk Retention Act companies...So the brokerage community, a community vital to the distribution of insurance and reinsurance coverages, this time could make all the difference in a successful insurance exchange, particularly when these brokers are no longer owners

of insurance underwriting organizations, and therefore have abandoned a protectionist point of view.

I, for one, welcome a Lloyd's-style marketplace here in the U.S. It's needed; it would encourage competition; it could be backed by new and imposing sources of capital; and it would, lastly, I believe, be embraced by the commercial insurance and reinsurance brokerage community. The time has come for a new New York Insurance Exchange, and we in the industry should embrace the opportunity.

Sincerely,  
**Michael Maglaras, Principal**  
 Michael Maglaras & Co.  
 Ashford, Conn.



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# Court allows hostile work environment suit to proceed

*Indiscriminate, vulgar language about women cited in appeals ruling*

By JUDY GREENWALD

**ATLANTA**—A female employee subjected to considerable gender-specific vulgarity can pursue her hostile work environment claim, even though the profanity was not directed specifically at her and was common at the workplace, a federal appeals court has ruled.

The Jan. 20 en banc decision by the 11th U.S. Circuit Court of Appeals in Atlanta in *Ingrid Reeves vs. C.H. Robinson Worldwide Inc.* overturned a lower court's dismissal of the case.

A panel of the appeals court also ruled in Ms. Reeves' favor in 2008. The court subsequently vacated the panel's decision and granted a rehearing.

According to the full court's decision, Ms. Reeves was the only woman who worked on the sales floor as a transportation sales representative in the Birmingham, Ala., branch of the Eden Prairie, Minn.-based shipping company from July 2001 to March 2004.

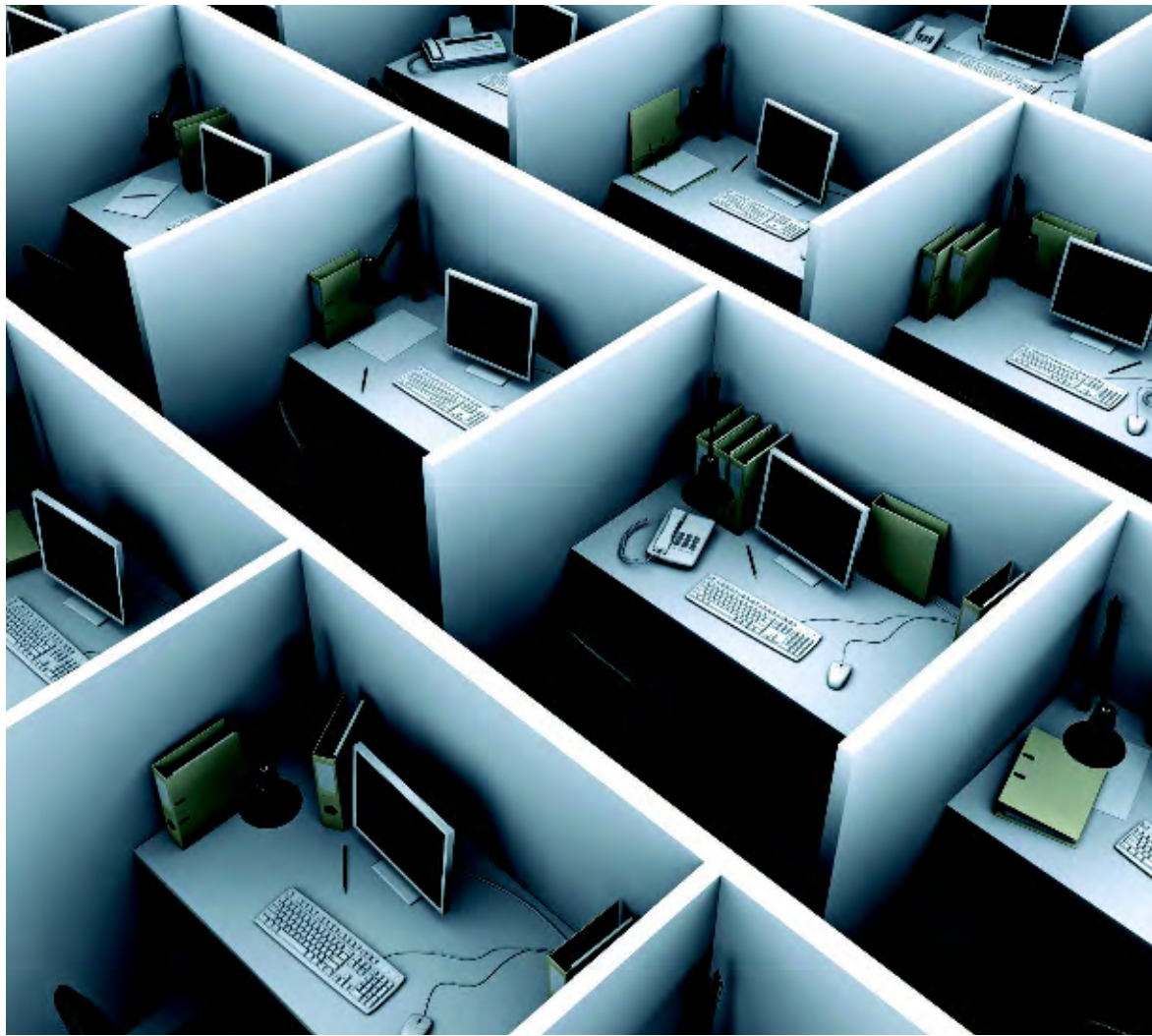
In addition to profanity that was not gender-specific, Ms. Reeves said she heard a "substantial corpus of gender-derogatory language addressed specifically to women as a group," although the language was not directed at her specifically, according to the decision.

She was also forced to listen to a morning radio show that regularly talked about topics such as the size of women's breasts and "elderly people having sex," according to the decision.

After her complaints to management went unheeded, Ms. Reeves resigned and filed suit, alleging she had been subjected to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964.

"Sexual language and discussions that truly are indiscriminate do not themselves establish sexual harassment under Title VII," the appeals court said in its unanimous decision. "Nevertheless, a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct.

"Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well," the court ruled in remanding the case for further proceedings.



## Temps: Agency, direct hires pose risks

CONTINUED FROM PAGE 1

help services employees in the U.S. workforce, the figure hit a yearly low in July 2009 at 1.7 million. Since then, though, the number has risen, hitting an estimated 1.9 million in December on a seasonally adjusted basis, according to the U.S. Bureau of Labor Statistics. The BLS does not track temporary workers or independent contractors hired directly by employers, a much smaller number than temp workers hired through agencies.

Observers say the recent temp hiring upswing could reflect an improving economy.

"I'm hopeful this is a sign that employers are dipping their toe back into the water," said Lorie E. Almon, a partner with Seyfarth Shaw L.L.P. in New York, who has seen increased client interest in hiring temporary workers.

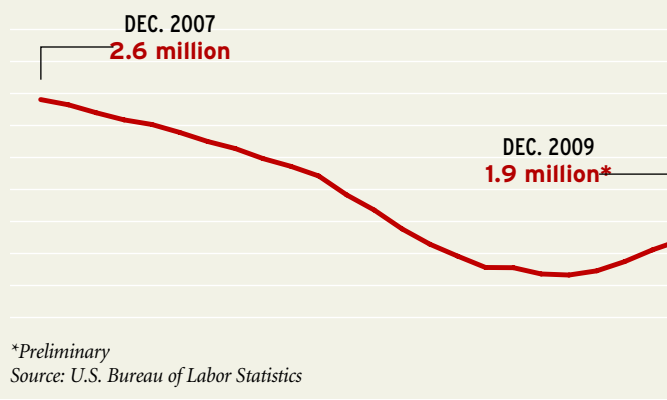
Attorneys say temporary workers hired through staffing agencies generally are considered to be employed by both the agency and company, even though the agency pays the salary.

"Some employers don't realize when they hire temporary employees through temp agencies they're potentially exposing themselves to most, if not all, the same risks that are involved in directly hiring employees," said Enzo Der Boghossian, an associate with law firm Proskauer Rose L.L.P. in Los Angeles.

"As long as you control those employees and you require them to adhere to your policies" and they are directly supervised by the firm, "they can be found to essentially be your employee under various employment laws," said Mark M.

### TEMPORARY EMPLOYEES

Individuals hired through temporary help services (seasonally adjusted)



Schorr, a partner with law firm Erickson & Sederstrom P.C. in Lincoln, Neb.

"There are elaborate agreements that dictate that the individual remains the legal employee of the temporary agency, and the temporary agency is legally bound to pay their wages and their workers compensation insurance and all of that," Mr. Schorr said. But when it comes to employment, discrimination and sexual harassment claims, "a myriad of laws" protect workers even though "they're not technically employed by that employer," he said.

Whether workers are brought in by a staffing agency or directly, observers say employers need to be concerned about employment laws and benefits.

A major decision in this area was the 1999 federal appeals court ruling in *Donna Vizcaino et al. vs. Microsoft Corp.*, which cost the Redmond, Wash.-based software giant

more than \$100 million in stock options when the court held that temporary workers were entitled to the same benefits accorded full-time Microsoft employees.

"Most employers have since (*Microsoft*) tried to address that issue by being more specific" in their employee benefit plan and employee handbook language, said Jeff Starling III, a partner with law firm Balch & Bingham L.L.P. in Birmingham, Ala.

Failing to clearly define what is considered temporary employment "runs a real risk that one of those contingent workers could claim they were entitled to benefits under that plan. That's probably the biggest source of potential liability, and one that's generally best addressed through careful analysis of the benefit plans and the definitions used in those benefits plans," Mr. Starling said.

Using an agency to hire temporary workers mitigates some of the

potential risk of someone seeking reclassification as an employee, Ms. Almon said.

If an employer hires temp workers directly, it should be clear "that these are temporary assignments and to define in contracts or employment policies what benefits apply to the temp employee vs. the full-time employees," including clearly stating they are not entitled to health care, 401(k) plans and vacations, said Mr. Der Boghossian.

Observers say the degree to which the employer controls the job performance of the directly hired temp is important in determining his or her employment status. As result, employers should avoid situations where an independent contractor is told what hours to work and treated much the same as a regular employee, which Mr. Starling said could obligate the firm to pay benefits.

Employers also should comply with employment laws, observers say.

"Just because they aren't on your payroll directly doesn't mean you still don't have to comply with most employment laws related to them," said Benjamin P. Roach, a shareholder with law firm Nyemaster, Goode, West, Hansell & O'Brien P.C. in Des Moines, Iowa.

Employers "need to ensure that their temp employees are aware of, and following, the workplace harassment and discrimination policies that they have," said Mr. Der Boghossian. "There is also the possibility of negligent hiring and negligent retention" liability if the temp agency is not conducting thorough background checks, he said.

Employers should seek indemnity agreements in the contracts they sign with temporary staffing agencies, "so that the temp agency retains liability for any employment-related claims and agrees to indemnify the employer for any losses they might suffer" if any claims are brought against it by a temp employee, Mr. Der Boghossian said.

Employers also must determine who at the temp agency is responsible for making accommodations for workers covered by the Americans with Disabilities Act, said Carolyn Rashby, an associate with Miller Law Group P.C. in San Francisco. "Oftentimes it's both, and you have to work out with the temp agency as to who's responsible for what," she said.

Small employers should be aware that bringing in temporary workers could inadvertently increase their employee count to subject them to laws, such as the Family and Medical Leave Act, imposed on firms with 50 or more workers, Ms. Rashby said.

One advantage of staffing agencies is they generally pay workers compensation premiums for the worker, which provides the employer with liability protection if the worker is injured.

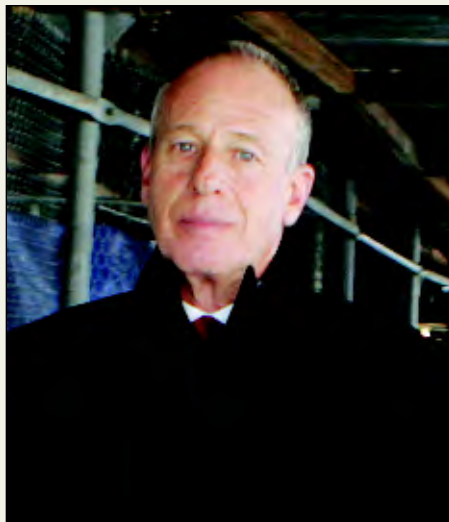
But employers still should adequately train temporary workers, because a staffing agency's increased workers comp costs ultimately will be passed on to the employer, said Bruce Hockman, Philadelphia-based workers compensation practice leader for Towers Watson & Co.

## HISTORY OF MARSH LITIGATION

Details about charges and trials

**MISDEMEANOR CHARGES** were dismissed for several individuals who pleaded guilty and cooperated with investigators:

- Patricia Abrams, former ACE Casualty Risk assistant vp;
- Kevin Bott, former assistant vp with Liberty International Underwriters' excess casualty division in New York;
- Maryann Brainard-Baret, formerly with Marsh Inc.
- John Keenan, former underwriter with a New York-based excess casualty unit of Zurich American Insurance Co.;
- Jason Monteforte, a former Marsh broker;
- George Niccolai, formerly with Marsh.



William Gilman

**FELONY CHARGES** were reduced to misdemeanors and likely will be dismissed for other cooperating individuals:

- James Spiegel, former Zurich North America senior underwriter and manager of the insurer's specialty excess casualty division;
- Robert Stearns, former Marsh senior vp;

- Kathryn Winter, former Marsh managing director and broker in the excess casualty operations of the global broking unit.

### FIRST TRIAL

- William Gilman, former Marsh managing director;



Edward J. McNenney

- Edward J. McNenney, former Marsh managing director.

Both convicted in February 2008 of violating New York's antitrust law; acquitted of 20 other charges. Sentenced to 16 weekends in jail and fined. Sentences stayed pending appeal.

### SECOND TRIAL

- Joseph Peiser, former managing director and head of Marsh's global broking excess casualty unit;
- Greg J. Doherty, former Marsh senior vp and ACE USA local broking coordinator team leader;
- Kathleen M. Drake, former Marsh managing director and local broking coordinator team leader.

Found not guilty in October 2009 of scheme to defraud and restraint of trade charges.

### CANCELED THIRD TRIAL

- Thomas T. Green Jr., former Marsh senior vp;
- William L. McBurnie, former Marsh senior vp;
- Geri Mandel, former senior vp at Zurich American Insurance Co.

Judge James Yates dismissed all charges in November 2009 prior to their scheduled trial.

## Former Marsh execs seek to have convictions vacated

**NEW YORK**—Attorneys for two former Marsh Inc. executives previously found guilty in New York's bid-rigging case asked a state judge last week to throw out the convictions due to "prosecutorial misconduct."

At a hearing Wednesday in New York County Supreme Court, attorneys for former Marsh managing directors William Gilman and Edward J. McNenney, said prosecutors "failed to produce or disclose multiple forms of exculpatory evidence" that "could have affected the verdict."

Robert Cleary, partner with Proskauer Rose L.L.P. in New York, who represents Mr. Gilman, and Scott D. Devreaux, a partner with Cooley Godward Kronish L.L.P. in Palo Alto, Calif., who represents Mr. McNenney, argued their previously filed motion asking New York County Supreme Court Judge James A. Yates to vacate the judgment.

Messrs. Gilman and McNenney—who were the first former Marsh executives to face trial in the case—were convicted of violating state antitrust law but acquitted of 20 other counts of fraud and larceny. They were sentenced to 16 weekends in jail, but the sentences have been stayed pending appeal.

The 440 motion, however, was filed separately and is based on evidence that was dis-

closed in a later trial against three other Marsh executives, all of whom were acquitted, the attorneys said.

The attorneys charge the New York attorney general's office was in possession of this material during their trial and was obligated to produce it. In addition, withholding the material "prejudiced" Messrs. Gilman and McNenney's right to a fair trial, they said.

Among the nondisclosed material, the motion cites "hundreds of thousands" of documents produced by Liberty Mutual Group Inc. unit Liberty International Underwriters, prior statements made by cooperating witnesses to other state's attorneys general and a prior conviction of one of the prosecution's cooperating witnesses.

Assistant Attorney General Hannah Stith Long said the material in question "would not have created any reasonable possibility of acquittal" and asked the judge to deny the motion due to a "lack of materiality."

A ruling in favor of the 440 motion could result in a retrial that would include the previously undisclosed material.

Last week, Judge Yates requested additional information from both parties. Another hearing date has not been set.

—By Colleen McCarthy

## Marsh: Judge cancels charges in bid-rigging case

CONTINUED FROM PAGE 1

contemplation of dismissal.

Then-New York Attorney General Eliot Spitzer brought the charges in 2004 and secured 21 guilty pleas and the individuals' cooperation in his investigation of contingent commission practices in the insurance industry (see box).

Eight other executives were indicted in 2005. While some were convicted, others were acquitted (see related story).

Prosecutors from New York Attorney General Andrew Cuomo's office, which inherited the case, asked the judge last week to grant the dismissal motion "in the interest of justice." A hearing for the remaining people who cooperated in the case is scheduled for Friday, when Judge Yates is expected to make similar dismissals.

While the move is rare for a criminal trial, "at this stage I'm not surprised given the history of this case," said James Carbin, a partner with Duane Morris L.L.P. in New York. "It really raises some questions of whether or not the entire investigation was warranted in the first place."

In November, Judge Yates acquitted three former Marsh executives of all charges in the case after a nearly 11-month trial. After that, the judge dismissed criminal charges against three remaining defendants before their trial began.

In making their request to dismiss the last wave of defendants, prosecutors cited the high cost of another trial and the likely outcome given the recent acquittals.

Given the recent acquittals, dis-

missing charges against the cooperators "is the prosecution doing the right thing," said Jacob Frenkel, a partner with Shulman Rogers Gandal Pordy & Ecker P.C. in Potomac, Md., and a former federal prosecutor.

Michael Cornacchia, a New York criminal defense attorney and a former assistant U.S. attorney, said dismissing charges in the interest of justice is the "judicial equivalent of a pardon, rather than a finding of innocence."

**'It really raises some questions of whether or not the investigation was warranted.'**

James Carbin, Duane Morris L.L.P.

Given the circumstances, "it's the best possible outcome (that the cooperating individuals) could have hoped for," Mr. Cornacchia said. "The individuals did admit under oath they committed a crime, and this does not erase that criminal taint," he said.

In making a general statement to the court, Assistant Attorney General Felice Sontupe said the factors of the case are "specifically unique." Ms. Sontupe declined to elaborate after the hearing.

The action may also reflect a shift in priorities by the state attorney general's office, some observers said.

"It's possible the office feels they have accomplished what they set

out to do," said James M. Burns, a partner and chair of the antitrust group of Williams Mullen in Washington. "The industry has already reacted to Mr. Spitzer's investigation." For example, industry changes have been made regarding contingent commission practices and there is an increased sensitivity to antitrust laws, he said.

From the attorney general's view, "these changes (in industry reaction) are likely more valuable than anything they could achieve by pursuing further criminal penalties against these individuals," Mr. Burns said.

Still, the attorney general and staff have to walk a fine line. "They can't be seen criticizing the investigation" begun by a previous attorney general, Mr. Cornacchia said.

For the individuals, observers said there likely are mixed feelings.

"On one hand, they're elated that the case ended without a conviction on their record. However, there is certainly some anger involved at having been dragged through this for five years," Mr. Frenkel said.

In addition, those once accused may face challenges in the future.

"Their testimony at trial is a matter of public record, and that is not going away," Mr. Frenkel said.

The association with the case may give future employers pause or raise regulatory issues with respect to obtaining industry licenses, observers said.

In February 2008, former Marsh Managing Directors William Gilman and Edward J. McNenney were found guilty of an antitrust charge but acquitted of other charges. Their sentences of 16 weekends and jail and fines have been stayed pending appeals.

Marsh never faced any criminal charges in the case, but paid \$850 million in January 2005 to end the bid-rigging and fraud investigations.

## News In Brief

CONTINUED FROM PAGE 1

benefits to an injured worker terminated for misconduct unrelated to the injury, the Illinois Supreme Court ruled in a closely followed case. The employer's obligation to pay temporary total disability benefits continues until the employee's medical condition stabilizes and he reaches maximum medical improvement, the court said in *Interstate Scaffolding Inc. vs. The Illinois Workers' Compensation Commission*. The company terminated the plaintiff for defacing its property and subsequently refused to pay his TTD benefits. The Illinois high court ruled last week that state law allows the discharging of at-will employees for "any reason or no reason," but whether an employee has been discharged for a valid cause or violation of public policy "are matters foreign to workers compensation cases." It reversed an appeals court and reinstated an award provided to the plaintiff by the Illinois Workers' Compensation Commission.

### Willis extends contract for CEO Plumeri to 2013

Willis Group Holdings P.L.C. has extended the contract of Chairman and CEO Joseph J. Plumeri until July 7, 2013. The brokerage's board of directors' decision to extend Mr. Plumeri's contract was due to Willis' progress despite a soft market and economic downturn, the company said in a statement. Mr. Plumeri joined Willis in 2000.

### Ex-CIGNA exec Hanway joins board at MMC

H. Edward Hanway, former chairman and CEO of CIGNA Corp., has joined the board of directors of Marsh & McLennan Cos. Inc. Mr. Hanway, who retired from the Philadelphia-based health insurer at the end of 2009, fills the board position left vacant by the November death of David Olsen, former chairman and CEO of Johnson & Higgins. With the election of Mr. Hanway, MMC's board consists of 12 members, including 11 independent directors.

### Nevada OKs 7.6% comp rate decrease

Nevada's workers compensation insurance rate will decrease 7.6%

effective March 1, the Nevada Division of Insurance said. Scott Kipper, Nevada insurance commissioner, approved a filing for an average decrease of 7.6% for workers compensation insurance rates and a 3.7% average decrease for workers compensation assigned risk rates. The reduction, specifically a reduction in loss costs, is based on Nevada employers' experience and future projections, Mr. Kipper said.

### Allianz China branch to become subsidiary

Allianz Group Asia Pacific, an arm of Allianz S.E., said the Chinese regulatory authority has granted the insurer a license to convert Allianz Insurance Co.'s Guangzhou, China, branch into a subsidiary.

### P/C rates fall again in fourth quarter: CIAB

Commercial property/casualty rates fell 5.6% in the fourth quarter of 2009 compared with a 5.8% decline in the third quarter, the Council of Insurance Agents & Brokers said. "Tough competition for new business was the name of the game last quarter as carriers chased market share in a still-weak economy," CIAB President Ken A. Crerar said in a statement. "Added pressure came from clients putting the squeeze on carriers to get the best terms and rates. We don't expect to see pricing turn upward until demand picks up and capacity diminishes." Rates for small, medium and large accounts decreased as brokers across the country reported aggressive underwriting by insurers, according to the CIAB's quarterly survey. But larger accounts experienced the greatest decline at 7.4%, while the small accounts reported a 3.1% decline.

### IAIS OKs framework for global regulation

The International Assn. of Insurance Supervisors has approved recommendations on a framework to better supervise internationally active insurance groups and their risks. The plan, which could be released in February, includes approaches to better monitor insurance group structures, insurance group business mix and intragroup transactions to identify risks and establish safeguards where necessary. After consultations, the IAIS said the plan could go into effect by 2013. "The framework will put internationally active insurance groups on a similar footing and allow home and host supervisors to better understand and supervise such groups," said Peter Braumüller, IAIS executive committee chairman.

# Reform: Senate upset forces rethink

CONTINUED FROM PAGE 1

exact right thing to do by giving this some time, by letting the dust settle, if you will, and looking for the best path forward," Mr. Gibbs said in a news briefing.

Senate Majority Leader Harry Reid, D-Nev., who previously pressed for fast action, last week told a news conference, "We're not going to rush into anything. We will wait until the new senator arrives."

Until Sen. Brown's election, Senate Democrats held 60 certain votes—58 Democrats and two independents who typically side with Democrats—for health care reform legislation crafted by party leaders. Sixty votes were enough to stop a certain Republican filibuster of a final bill, which still was being negotiated, to bridge differences between measures passed by the House and Senate.

But with Mr. Brown's election, Republicans will have 41 members in the Senate, enough to successfully mount a filibuster of the package.

### Scaled-back bill?

The demise of President's Obama signature domestic issue is widely recognized.

"People know there is no chance" of the passage of a comprehensive bill, said Gretchen Young, vp-health policy with the ERISA Industry Committee in Washington.

While some congressional Democrats last week discussed another way to act on health care reform legislation given Sen. Brown's election, House Speaker Nancy Pelosi, D-Calif., ruled out that idea.

Under that approach, the House would have passed the reform bill approved in late December by the Senate. Then, certain changes—such as a liberalization of an excise tax on the most costly health insurance plans—that House Democrats wanted made to the Senate bill would have been put in a budget reconciliation bill. Budget bills require only a simple majority for passage, on which the House and Senate then would act.

But Speaker Pelosi said there was little appetite in the House for that approach. "I don't think it's possible to pass the Senate bill. I don't see the votes for it at this time," she said at a news briefing.

Instead, observers say, the most likely course of action will be for top congressional Democrats and Republicans to work together on a vastly slimmed-down reform bill.



Last week's election of Scott Brown to one of Massachusetts' Senate seats increased the number of Republican senators to 41, which is enough to mount a filibuster of Democrats' health reform bill.

**'I don't think it's possible to pass the Senate bill. I don't see the votes for it at this time.'**

House Speaker Nancy Pelosi

Elements of that bill could include reform of the personal lines market and requiring health plans to extend coverage to employees' adult children up to age 26 or 27. Many states have passed such measures in recent years, but those state laws—because of federal pre-emption provision in the Employee Retirement Income Security Act—apply only to plans offered by insurers, not self-insured employers.

"Slimmed-down bills are a real

possibility," said Paul Dennett, senior-vp health care reform with the American Benefits Council in Washington.

Yet another possibility is that states, where interest in health care reform waned during the past couple years as the likelihood of federal action grew, could become more active again.

Congress could aid state efforts if, for example, it approved legislation giving such state reform measures waivers from the ERISA provision that pre-empts state and local laws and rules that relate to employee benefit plans.

Such a proliferation of varying state laws "would be a disaster" for employers that operate in different states and would have to comply with a hodgepodge of requirements, said Neil Trautwein, vp and employee benefits counsel with the National Retail Federation in Washington.



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## IT'S A BIRD... IT'S A PLANE... IT'S A METEORITE

It might not have been a close encounter of the third kind, but it definitely was too close for comfort.

According to the Washington Post, Dr. Frank Ciampi was working in his office in Lorton, Va., last week when he heard a loud bang, "almost like a small explosion," he said.

He thought perhaps a bookcase had fallen in the office, but when he went to examine things, he found debris in the hallway and inside an examination room. Amid the debris were three pieces of rock that together would have been a tennis ball-sized object.

While Dr. Ciampi initially thought the object came from an aircraft flying overhead, Cari Corrigan, a planetary scientist at the Smithsonian Institution's National Museum of Natural History, identified it as a meteorite.

"It's beautiful," said Ms. Corrigan of the half-pound rock that probably was going about 220 mph when it hit the building housing the family practice.

For his part, Dr. Ciampi said, "I thank God" no one was injured or worse by the space rock, which blasted through the ceiling and left debris in a frequently used examination room and hallway.

In the meantime, it was an encounter to remember but one that Dr. Ciampi clearly doesn't want to repeat.

# Business Insurance END PAGE

Contributing:  
Jeff Casale,  
Mark A.  
Hofmann

## FARMERS KEEPS BALL ROLLING FOR PGA TOUR

The PGA Tour has gained popularity in the past year despite the "transgressions" of its most popular golfer.

The PGA hooked its fourth new sponsor in nine months when Farmers Insurance Group of Cos. agreed to sponsor the Jan. 28-31 San Diego Open at Torrey Pines golf course.

Terms of the agreement were not released, but Los Angeles-based Farmers said there is a long-term option for the insurer to continue as sponsor of the tournament now known as the Farmers Insurance Open.

The tournament, which began in 1952, had been the Buick Invitational. Buick had sponsored the tournament since 1992, but ended its run when parent General Motors Corp. declared bankruptcy last year.

The decision by Farmers, a unit of Zurich Financial Services Group, to sponsor the tournament was a bit last-minute, but Farmers and the PGA are hopeful the signing is a hole in one.

"Although this has been finalized on such short notice, it represents a substantial investment on Farmers' part to help in the tournament's success," PGA Tour Commissioner Tim Finchem said in a statement. "We look forward to continuing our discussions with Farmers officials following the Farmers Insurance Open in regard to the possibility of a longer-term relationship."

The other recently added sponsors of PGA tournaments are Seoul Broadcasting System, Waste Management Inc. and The Greenbrier.



Valerie Bertinelli is featured in a Jenny Craig ad that Weight Watchers says is false advertising.

GLOBE PHOTOS/ZUMA PRESS

## Sales barb yields lawsuit

A court will have to weigh a dispute over false advertising.

Weight Watchers International Inc. is suing archrival Jenny Craig Inc. for airing what it argues is false advertising featuring Valerie Bertinelli. The TV spot in question asserts that "a major clinical trial" shows Jenny Craig clients lost more than twice as much weight as people who participate in "the largest weight loss program," indirectly referring to Weight Watchers.

According to reports, Weight Watchers argues that Jenny Craig didn't conduct a major clinical

trial comparing the two companies' products and, instead, relied on outdated studies to bolster its assertions.

The Weight Watchers suit, which was filed in federal court in New York last week, seeks a variety of remedies, including an end to the ad campaign, requiring Jenny Craig to run a correction and punitive damages, reports say.

For adversaries whose success is measured when their clients step onto the scale, it's perhaps fitting that this dispute may be weighed on the scales of justice.

## Owner feels the thunder

Seattle SuperSonics fans who still are reeling from the loss of their beloved professional basketball team may see the latest act by the team's owner as a kiss-off.

According to reports from Seattle's KING 5 News, Clay Bennett agreed to pay estranged Sonics season ticket holders \$1.6 million to settle a class action lawsuit.

The season ticket holders alleged that Mr. Bennett breached a contract by not allowing them to renew their seats after the team

moved to Oklahoma City in 2008, according to reports.

The settlement affects about 800 former season ticket holders, according to reports.

Seattle was paid about \$45 million in exchange for letting the Sonics move to Oklahoma City in 2008, where the team was renamed the Oklahoma City Thunder.

At that time, Mr. Bennett also agreed to pay an additional \$30 million in five years if the city is unable to secure another NBA team.



Team owner Clay Bennett unveils the Oklahoma City Thunder, formerly the Seattle SuperSonics, in 2008.

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