

MARKET FOR COVERAGE FOR TERRORISM RISKS IMPROVES / PAGE 3

AON IN DISCUSSIONS WITH LONDON INSURERS OVER FEES / PAGE 3

EMPLOYERS SEE RISKS IN LAWS ALLOWING GUNS IN PARKING LOTS / PAGE 3

In Brief

Cyclone insured losses could reach \$1.49B

Tropical Cyclone Yasi could cause as much as \$1.5 billion Australian (\$1.49 billion) in insured damage, according to catastrophe modeling firm AIR Worldwide Corp. AIR estimated that insured losses from Yasi would range from \$350 million Australian (\$347.6 million) to \$1.5 billion Australian. Yasi made landfall just north of Mission Beach, Australia, last week.

Overcapitalization keeps P/C market soft

The property/casualty insurance market is overcapitalized to the tune of \$74 billion and will remain in the soft phase of the pricing cycle until that difference between supply and demand is brought into balance, according

See **IN BRIEF** page 2

CASE STUDY

DIRECTORS & OFFICERS LIABILITY [BEST PRACTICES]

Unusual D&O settlement by a group of insurers involving drugmaker Pfizer Inc. may set a trend. **PAGE 9**

HEALTH CARE REFORM

Health reforms face legal battle

By **JERRY GEISEL**

WASHINGTON—As the legal and congressional assault on the health care reform law intensifies and uncertainty grows, employers should hold off on dramatic changes until the law's future is decided, benefit experts say.

Since the enactment of the Patient Protection and Affordable Care Act nearly 11 months ago, many employers have been following a two-part compliance strategy.

The first part has been to examine and then amend their health care plans to comply with mandated design changes, such as extending coverage to employees' adult children and eliminating lifetime dollar limits, that took effect in January for calendar-year plans.

The second part has been more strategic and longer term, involving provisions in the law that do not take effect until 2014 and later. The biggest decision involves a provision that will require

WHAT HAPPENED

- A Florida judge invalidates the reform law, Virginia seeks an expedited review by the U.S. Supreme Court and lawmakers propose more changes.

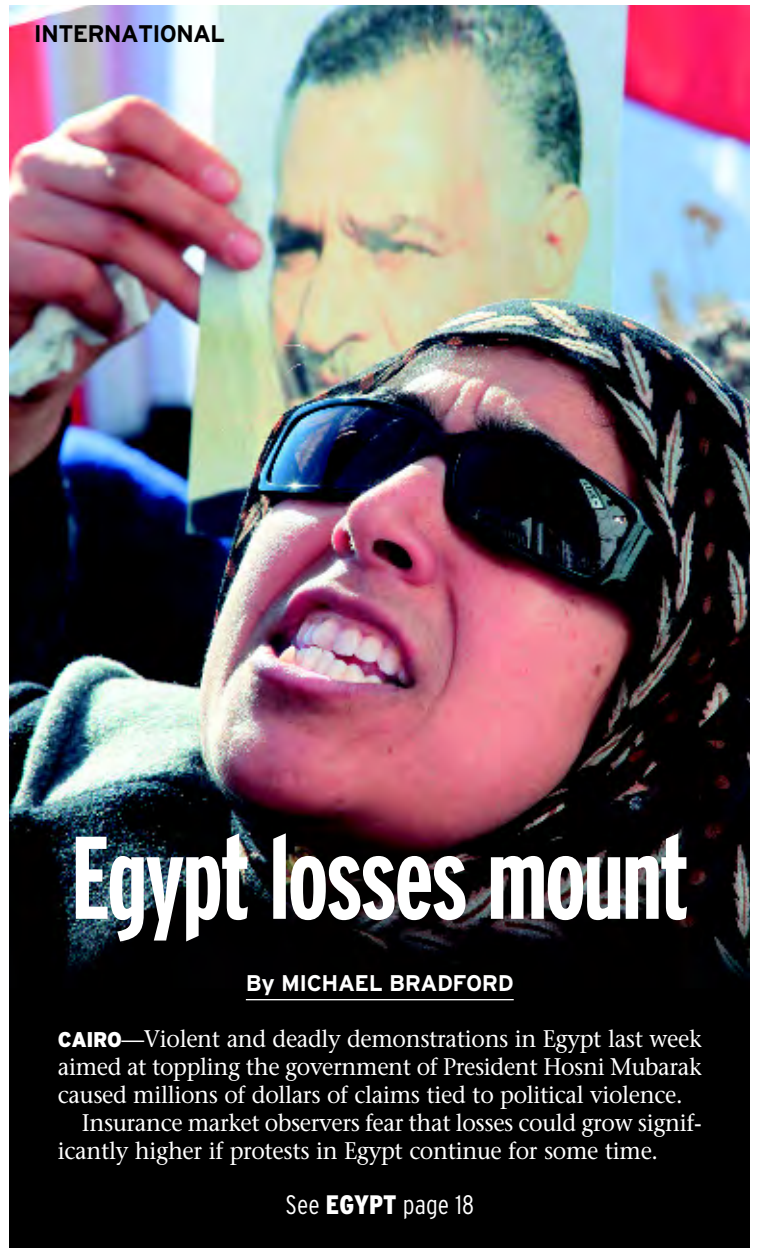
WHAT'S NEXT

- Observers expect the Supreme Court to hear reform law challenges in the 2011-2012 term while employers continue to examine their options.

employers with at least 50 employees to offer either qualified coverage or pay an annual fine of \$2,000 per full-time employee.

That play-or-pay mandate has led employers, big and small, to analyze whether it makes more sense financially to terminate coverage and increase employees' salaries to partially offset the pre-

See **CHALLENGE** page 20



Egypt losses mount

By **MICHAEL BRADFORD**

CAIRO—Violent and deadly demonstrations in Egypt last week aimed at toppling the government of President Hosni Mubarak caused millions of dollars of claims tied to political violence.

Insurance market observers fear that losses could grow significantly higher if protests in Egypt continue for some time.

See **EGYPT** page 18

CYBER RISKS

Monitoring communications? Know legal pitfalls

By **JUDY GREENWALD**

Employers that want to monitor their employees' electronic communications, regardless of whether the workers are on the clock or using company equipment, must proceed with caution, attorneys say.

They point out that case law is still developing in this area as

courts struggle to adapt long-standing law to new technology with regard to employees' expectation of privacy.

But precisely worded policies covering workers' use of e-mail while on the job, respecting employees' First Amendment rights and avoiding any effort to inappropriately access nonpublic forums can significantly mitigate employ-



which makes it illegal to intercept or retrieve electronic communications in certain instances; the federal Wiretap Act, which governs the privacy of oral and wire communications, and the National Labor Relations Act, which covers collective bargaining and other employer and employee rights.

Recent court cases that may provide guidance to employers include two apparently conflicting rulings in New Jersey and California on the issue of attorney-client communications. In addition, a federal appeals court last year ruled that surreptitiously automatically forwarding someone else's e-mails to a third party can violate the Wiretap Act (see story, page 17).

Observers say a 2009 case, in which an employer inappropriately

ers' liability risk, observers say.

Observers note that in most cases, state laws, which vary, apply to privacy issues. Federal laws that may apply include the Stored Communications Act, which imposes penalties for clandestinely accessing information held in electronic storage; the Electronic Communications Privacy Act,

See **MONITOR** page 17

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News In Brief

CONTINUED FROM PAGE 1

to a report from Advisen Ltd. The overcapitalization largely is the result of the growth of policyholders' surplus as stock markets rebounded from the financial crisis, along with reduced demand for insurance resulting from the Great Recession as business activity decreased and property values fell.

U.S. P/C combined ratio seen hovering at 102%

The U.S. property/casualty insurance industry is expected to report a 102.6% combined ratio for 2010 and a 102.2% combined ratio for this year, as the benefit of reserve releases tapers off, rating agency Standard & Poor's Corp. said in a report. At a CEO panel last month, Anthony J. Kuczinski, president and CEO of Munich Reinsurance America Inc. in Princeton, N.J., said insurers' release of prior-year reserves can create a deceptive picture of performance, with calendar-year results that may be very different from underwriting results.

Delaware issues 48 captive licenses in '10

Delaware licensed 48 new captive insurance companies in 2010, a record that doubled the number of captives to 96 at the end of the year. A majority of the new captives were small and qualify for special tax treatment under Section 831(b) of the Internal Revenue Code. Under that section, up to \$1.2 million in premiums can be paid to the captive without the premiums being included in the captive's taxable income. In addition, Delaware attracted about 10 captives that previously were licensed in domestic and offshore domiciles. Delaware passed its original captive statute in 1984, joining what then was only a handful of U.S. states with a captive law. But captive growth didn't start to take off until the passage of legislation in 2005 that slashed premium taxes and allowed sponsored or cell arrangements and special-purpose entities whose sponsors don't fall into traditional business categories.

Incorporated cell captive rules set by Malta

The Malta Financial Services Authority has put in place rules that enable companies to set up incorporated cell companies. The Companies Act (Incorporated Cell Companies Carrying on Business of Insurance) regulations went into effect last week and enable the establishment of incorporated cell companies, a form of rent-a-captive structure. Incorporated cell companies operate in a similar way to protected cell companies, which have been permitted in Malta since 2004. They differ, however, in that incorporated cells are separate legal entities than other cells within the same structure. Therefore, incorporated cells can transact business with other cells within the ICC, among other benefits.

QBE establishes U.S.-based general aviation underwriter

QBE the Americas has established a U.S.-based general aviation underwriting

operation and hired several former executives of Phoenix Aviation Managers Inc. to operate it, the insurer said. William P. McGloin has been named head of the aviation unit. Joining Mr. McGloin is Russell Walker, who has been named vp and underwriting manager. Roger Ridings has been named senior vp and underwriting leader for the QBE aviation unit. Michael Clark also joins the team as a senior vp and underwriting leader.

Breckenridge buys Calif. specialty reinsurance broker

Breckenridge IS Inc., a specialty insurance underwriting manager, wholesale broker and insurance services company, said it has acquired a majority interest in REcentis Intermediaries L.L.C., a specialty reinsurance broker with offices in Westlake Village, Calif., and Sydney. REcentis, which specializes in energy, casualty and financial reinsurance, has consulted, designed and executed reinsurance programs for risk retention groups, captives, program administrators and Fortune 500 companies, Breckenridge said. REcentis had served as the West Coast operations of reinsurance intermediary Carvill America Inc. before Carvill reached an agreement in principle to sell it to an investment group headed by the operation's president, Brendan Roche, in 2004.

U.K. pension hedge focuses on longevity

The trustees of a U.K. pension plan have completed the world's first longevity hedge against the increase in life expectancy for nonretired plan members. The trustees of the Pall (U.K.) Pension Fund, sponsored by the U.K. unit of global manufacturing company Pall Corp., announced completed a 10-year, £70 million (\$111 million) hedge with JPMorgan, the investment banking arm of JPMorgan Chase & Co. The deal, which protects the pension fund against the risk that nonretired members of the plan live longer than expected, is based on future values of JPMorgan's LifeMetrics longevity index. If plan members don't outlive longevity expectations, the total cost of the hedge deal should be less than £70 million.

Ex-Lloyd's exec would lead Brit post-buyout: Achilles

Achilles Netherlands Holdings B.V. said it intends to nominate Nick Prettejohn to be chairman of Brit Insurance Holdings B.V., which Achilles has offered to buy. Prettejohn previously was CEO of Lloyd's of London, a post he held for six years. He then served as CEO of Prudential P.L.C. in the United Kingdom and Europe, and most recently has been a nonexecutive director at Legal & General Group P.L.C. Mr. Prettejohn would succeed John Barton, whose term as Brit's chairman will end when the deal has been completed. Mr. Prettejohn's appointment as chairman of Brit is subject to Achilles' offer for Brit becoming unconditional and to confirmation by the U.K. Financial Services Authority.

Beecher Carlson names new CEO

Dan Donovan succeeded Tom Golub as CEO of Beecher Carlson Holdings Inc., the brokerage and risk management consultant said. Mr. Donovan previously was senior vp at Beecher Carlson. Before joining Beecher Carlson, Mr. Donovan was executive vp at Hilb Rogal & Hobbs Co., which Willis Group Holdings acquired in 2008. Mr. Golub remains Beecher Carlson's chairman.

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VIDEO: CORRUPT PRACTICES RISKS

In this latest D&O In FOCUS video, experts look at the Foreign Corrupt Practices Act and how recent legislation has made it a concern for D&O buyers. Click through the Multimedia tab to Video Reports.



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See the list of this year's winning companies and register for the March 14 awards dinner in New York at www.BusinessInsurance.com/Innovation2011.

MOST POPULAR STORIES Week of January 31, 2011

1. U.S. judge rules health care reform act unconstitutional
2. Overcapitalization keeping property/casualty market soft
3. *Business Insurance* names Innovation Awards winners
4. Insurance broker Beecher Carlson names new CEO
5. Bill would repeal employer health care coverage mandate
6. U.S. Democrat sees health law surviving repeal move
7. Virginia to ask Supreme Court to hear health care law case
8. Suit filed against Aon over fatal D.C. Metro crash
9. Toshiba faces \$100M gender bias lawsuit
10. P/C rates down, end of soft market in sight: MarketScout

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TERRORISM

Terrorism insurance market improving: Study

Government report shows TRIA works, backstop backers say

By MARK A. HOFMANN

WASHINGTON—A government study showing that the availability and affordability of terrorism risk insurance has improved since 2006 underscores the need to keep the federal terrorism insurance backstop in place, risk managers and industry observers say.

The report, prepared by the President's Working Group on Financial Markets, was posted on the Treasury Department's website in late January.

Since the enactment of the Terrorism Risk Insurance Act of 2002,

TERRORISM INSURANCE MARKET

According to the President's Working Group on Financial Markets, conditions in the terrorism risk insurance market have improved since its 2006 report. Positive developments include:

- Insurers reportedly continue to improve their ability to manage terrorism risk and model the measurement of an insurer's aggregate loss exposure.
- The financial condition of the property/casualty insurance and reinsurance industry has improved.
- Terrorism risk capacity has increased significantly, particularly in the stand-alone market.
- Generally, prices continue to decline for terrorism risk insurance and reinsurance.

Source: President's Working Group on Capital Markets' "Market Conditions for Terrorism Risk Insurance 2010"

the federal government has provided a backstop for insurers that underwrite terrorism insurance.

The working group is required by the 2007 law that extended the federal government's terrorism

insurance backstop through 2014 to present periodic reports on the state of terrorism insurance market to Congress. The group last issued a report in 2006, and is slated to issue a report again in 2013 as Congress considers whether to extend the program after its scheduled expiration on Dec. 31, 2014.

To prepare the report, "Market Conditions for Terrorism Risk Insurance 2010," the working group sought comments from stakeholders last summer. Many of those who submitted comments pointed out that the program provides an incentive for insurers and reinsurers that might not otherwise underwrite terrorism coverage at current capacity or at current prices, according to the report.

The report said the terrorism insurance takeup rate among commercial policyholders has been basically flat at 60% since 2006.

It also said improvements in the terrorism risk insurance market may be due to improvements in modeling, managing accumulation and concentration of aggregate loss exposures; new market entrants and increased competition; and improved capital positions of the property/casualty insurance and reinsurance industries. "The industry better understands aggregate risk, and the increased capacity and competition have resulted in decreases in price generally," the working group found.

See TRIA page 14

AGENTS & BROKERS

Aon seeks to revamp London fees

Broker says change would simplify pay for insurer services

By SARAH VEYSEY

LONDON—Aon Corp. is negotiating with insurers in the London market to alter the way it is paid for services it provides, raising some concerns that such changes by brokers could lead to higher costs for insurance buyers and raise the potential for conflicts of interest.

Chicago-based Aon is proposing a "carrier charge" it says will simplify the way it is paid by underwriters in London. The charge will be negotiated with

insurers by company rather than per policy as is currently the case, a spokeswoman for the brokerage said.

Brokers perform various services for underwriters in London, such as issuing policies, handling accounting, and delivering and storing documents, the spokeswoman said. Aon is paid in a variety of ways for these services, she said.

For example, charges for issuing a policy and storing documents probably would be separate and may vary depending on the piece of business and/or the underwriter involved.

"Aon is working to simplify and standardize its compensation process, to the benefit of all parties. We are replacing an old

structure with a new structure, not creating new charges," Aon said in a statement.

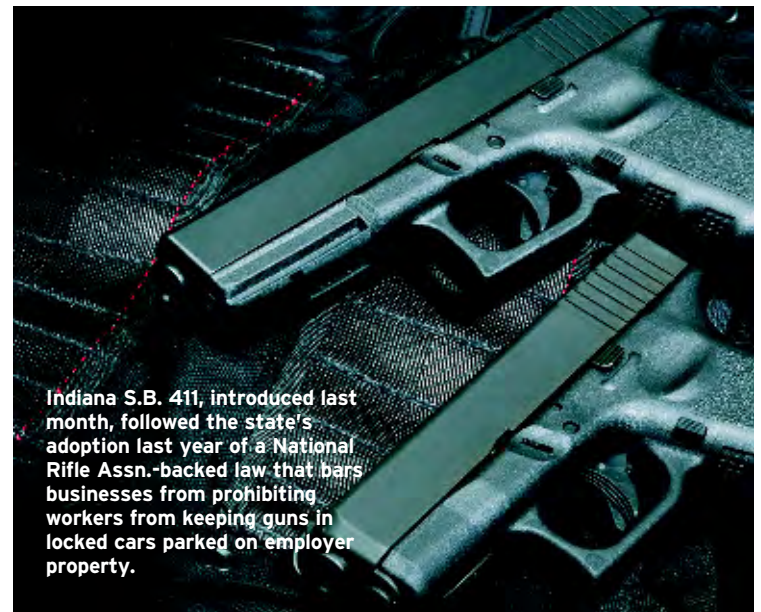
"Our aim is to standardize and simplify the compensation process, not increase compensation: Our goal is to create a simpler process for existing charges," Aon added.

While some sources suggested Aon was seeking to charge underwriters a flat fee of 3.5% of premium, the charge will be negotiated with each insurer, the Aon spokeswoman said.

Industry observers said they expect other brokers to evaluate Aon's move and the market's reaction before making any changes of their own.

See AON page 13

LIABILITY & LITIGATION



Indiana S.B. 411, introduced last month, followed the state's adoption last year of a National Rifle Assn.-backed law that bars businesses from prohibiting workers from keeping guns in locked cars parked on employer property.

Employers wary of laws that allow guns at work

Indiana measure would let job seekers sue over gun queries

By ROBERTO CENICEROS

INDIANAPOLIS—Legislation that would allow current and prospective employees to sue Indiana employers that inquire about gun ownership expands the battle over allowing firearms in workplace parking lots, experts say.

Indiana S.B. 411, introduced last month, followed the state's adoption last year of a National Rifle Assn.-backed law that bars businesses from prohibiting workers from keeping guns in locked cars parked on employer property.

The NRA has backed similar employer parking lot gun legislation across the country. Thirteen

states have adopted such laws, which employers have argued violates their property rights and creates safety concerns. Such legislation is now under consideration in Texas and Montana's House Judiciary Committee heard a similar bill last week.

However, the latest gun-related legislation in Indiana would further erode employers' ability to provide a safe workplace, experts said. The legislation would allow lawsuits if employers ask job applicants or employees about gun ownership or if they require employees to disclose whether they transport firearms in their cars.

The legislation, which would allow employees to file civil actions, does not specify damages that could be imposed on

See GUNS page 21

RISK MANAGEMENT

Risk summit to focus on innovation

NEW YORK—Risk managers from the largest companies in the United States and abroad will gather in New York next month at the *Business Insurance* 2011 Risk Management Summit.

The invitation-only event, to be held March 15-16, offers risk managers a unique opportunity to learn about leading-edge practices in the field of risk management and to network with peers across an array of industries.

The Risk Management Summit is open to senior risk managers at Fortune 500 companies and international companies of comparable size (more than \$4 billion in annual revenue), as well as to past *Business Insurance* Risk Manager of the Year and Risk Manage-



The 2011 Risk Management Summit will feature a keynote presentation by Richard A. Clarke, a counter-terrorism expert and author of "Cyber Wars: The Next Threat to National Security and What to Do About It."

ment Honor Roll honorees who are still serving as risk managers.

The Summit will feature risk

management executives presenting detailed case studies of innovation in four key areas:

- Alternative risk financing and captives, presented by Laurie R. Solomon, director of risk management at Coca-Cola Co.; and Stacy L. Apter, senior global benefits consultant at Coca-Cola.

- Cyber risk management, presented by Leslie Lamb, global risk manager for Cisco Systems Inc.

- Risk management processes, presented by Debra L. Rodgers, vp of global risk management for ARAMARK Corp.

- Risk management tools and technology, presented by Christopher E. Mandel, president

See RMS page 21

FEDERAL LEGISLATION & REGULATION

States moving slowly on surplus lines reforms

Delays raise fears of lack of uniformity in law's adoption

By MARK A. HOFMANN

State legislatures' slowness in considering how to implement surplus lines provisions of the federal financial services regulatory reform law dim the chances that a comprehensive approach to surplus lines will be in place by the time the law takes effect, observers say.

The surplus lines provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act are slated to take effect July 21. The provisions, which initially were contained in the Nonadmit-

ted and Reinsurance Reform Act before that measure was folded into the broader bill, make a policyholder's home state the sole regulator of any surplus lines transaction.

In addition, premium taxes will be paid only to the policyholders' home state as of July 21. The law calls on states to come up with a way to allocate premium taxes.

No state has enacted legislation to implement the provisions, said Joel Wood, senior vp of the Council of Insurance Agents & Brokers in Washington. The slow process led three groups involved in state governments to call on Congress to delay implementation of the law for a year.

In an open letter to Congress sent late last month, the National Conference of Insurance Legisla-

'Obviously, we want to see that it's done correctly and with the best interest of policyholders at heart.'

John Phelps, Risk & Insurance Management Society Inc.

tors, the Council of State Governments and National Conference of State Legislatures noted that several states have starting drafting implementation legislation. But the groups—which support a comprehensive approach to surplus line reform known as the Sur-

plus Lines Insurance Multi-State Compliance Compact, or SLIMPACT—note that some legislatures will be in session for less than two months and are consumed with other issues, such as health care reform.

Unless Congress postpones the effective date, states that haven't entered a compact could lose premium tax revenue, the groups wrote.

Further complicating the situation is that SLIMPACT is not the only proposal being offered. The current version of SLIMPACT would authorize a governing commission to establish allocation formulas to help states share premium tax dollars, uniform payment methods and reporting requirements for policyholders and surplus lines brokers, national eligi-

bility standards, and a single policyholder notice to replace various forms used across the country.

But the National Assn. of Insurance Commissioners has devised its own proposal—the Nonadmitted Insurance Multi-State Agreement. NIMA focuses on the tax issue but does not address uniformity issues addressed by SLIMPACT.

The Risk & Insurance Management Society Inc. "is continuing to monitor results," said John Phelps, RIMS secretary and board liaison to the external affairs committee. "Obviously, we want to see that it's done correctly and with the best interest of policyholders at heart," said Mr. Phelps, who also is director-business risk

See **SURPLUS** page 21

RISK MANAGEMENT



AP PHOTO

Workers remove snow from the field at the Metrodome, home of the NFL's Minnesota Vikings, where heavy snow caused the roof to collapse last year.

As snow falls (and falls), risk of roof collapse rises

Monitoring, clearing key to preventing damage to structures

By JEFF CASALE

Risk managers and building managers recovering from snowstorms like the one that hit Chicago last week were on the lookout for typical ground-level hazards but may have missed a higher risk: the snow- and ice-laden roof.

Several roof collapses have cropped up during the past month with the Midwest, Northeast and mid-Atlantic enduring bout after bout of winter weather. Last week, a blizzard dumped some 20 inches of snow on Chicago, closing airports, roads, businesses and schools in much of the region.

Perhaps the most high-profile roof collapse recently was the Metrodome in Minneapolis, home of the NFL's Minnesota Vikings. Following a series of snowstorms, the Metrodome's roof collapsed in December.

The blizzard that swept through much of the nation last week left its mark as well, causing a portion of the roof at the Hard Rock Hotel & Casino in Catoosa, Okla., to collapse under the weight of heavy snow.

Meanwhile in January, several roof collapses in the New York and New England areas were reported, including an airplane hangar near Boston and a gas station canopy in New York's Long Island. In Easton, Mass., Triton Technologies employees reportedly heard cracking, metal bending

See **SNOW** page 20

Business Insurance makes staff changes

CHICAGO—*Business Insurance* has made changes to its editorial staff in Chicago, naming a new managing editor and adding an assistant to the publisher.

Matt Scroggins has been named managing editor of *Business Insurance*, with responsibility for managing the newsroom and overseeing day-to-day operations of *Business Insurance's* print and online editorial products. Mr. Scroggins, who

previously was assistant managing editor-news, succeeds Gavin Souter, who recently was named editor of *Business Insurance*.

Mr. Scroggins joined the magazine in 1997 and also has served as news editor and copy desk chief, among other roles. He graduated from Millikin University in Decatur, Ill., with a bachelor of arts degree in philosophy.

He can be reached at



Mr. Scroggins

m.scroggins@businessinsurance.com and by phone at 312-649-5483.

In addition, Justine Karl

See **STAFF** page 19

LIABILITY & LITIGATION

Drywall cases hinge on exclusions

By JEFF CASALE

Early court decisions involving tainted Chinese drywall have handed both sides minor victories, but attorneys say it will be how courts interpret the pollution exclusion in insurance policies that will really determine who has the upper hand.

Insurers and policyholders—homeowners, developers, contractors, distributors and manufacturers—have been engaged in insurance coverage and liability issues in state and federal courtrooms since 2009, with neither side faring better than the other, legal experts say.

"It's yet to be determined where courts are going to come



out in how they will view and apply the pollution exclusion," said Michael Hamilton, Blue Bell, Pa.-based partner and chairman of Nelson Levine de Luca & Horst L.L.P.'s national insurance coverage group. "Some jurisdictions are going to view it with a more

traditional view of pollution and say that the exclusion doesn't apply to indoor contaminants, and others may look at it more broadly."

Likely, the most notable and recent Chinese drywall-related decision was Dec. 16, 2010, when U.S. District Court Judge Eldon Fallon granted 10 insurers' motions to dismiss claims in the case, *In re: Chinese Manufactured Drywall Products Liability Litigation*, ruling that faulty materials and corrosion exclusions in homeowners' policies barred coverage.

In his decision, the New Orleans federal judge said the

See **DRYWALL** page 13

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MANAGEMENT AND PROFESSIONAL
LIABILITY INSURANCE



Tennessee to ramp up captive appeal

Insurance regulator working to attract more business

By **JERRY GEISEL**

NASHVILLE, Tenn.—State officials and others are working to boost Tennessee's appeal as a captive insurance company domicile.

Following Colorado's lead, Tennessee in the late 1970s became the second U.S. state to pass legislation to allow employers and other organizations to set up captives.

But since reaching its peak of 16 captives in 1990, Tennessee has withered as a domicile for several reasons, including failure to update its law to compete with states, such as Vermont, that passed more attractive captives statutes. Observers also say Tennessee developed regulatory indifference to the captive industry.

Today, Tennessee has just four captives, making it one of the smallest U.S. domiciles.

"The market here never really took off," said Julie McPeak, the new commissioner of the Tennessee Department of Commerce and Insurance in Nashville, Tenn., and a former executive director of the Kentucky Department of Insurance.

But Ms. McPeak and others are moving to enable Tennessee to attract captives. On the regulatory side, Ms. McPeak is looking at what can be done to streamline captive reporting requirements.

In addition, the Insurance Department intends to hire staff with captive expertise, she said.

On the legislative side, longtime captive and insurance attorney Kevin Doherty, a partner at Burr & Forman L.L.P. in Nashville, is drafting a measure to update the state's 1978 captive law, which he said he hopes will be backed by the state's new governor, Bill Haslam.



Julie McPeak, Tennessee's new insurance regulator, intends to hire more staff with captive expertise.

The measure will be modeled after captive laws in Vermont and South Carolina. Provisions in the draft bill, which backers hope will be introduced soon in the Tennessee Legislature, include allowing captives to write employee benefit risks and allowing organizations that have captives in other domiciles to set up branch captives in Tennessee. The measure also would allow the formation of cell captives and special-purpose cap-

tives, whose sponsors don't fall into traditional business categories.

With an updated law and the necessary regulatory support, Mr. Doherty said Tennessee could be a magnet for captives.

"We are right in the middle of the country and travel is easy from most parts of the country," he said.

Ms. McPeak said with a more up-to-date captive statute, Tennessee could become a competitive player in the market with initial potential captive sponsors being public entities in the state as well as a host of industries, such as automobile parts manufacturers, that are based in Tennessee.

Ultimately, captive managers say, Tennessee will need a strong captive regulatory structure to thrive as a captive domicile.

"Having a captive law on the books is no guarantee of success," said Nancy Gray, regional managing director at Aon Global Insurance Managers in Burlington, Vt.

To be successful, among other things, a domicile has to have a regulatory staff big enough and with sufficient expertise that it can act on captive applications within about a month, Ms. Gray said.

"You need regulatory commitment and understanding," said Arthur Koritzinsky, a managing director with Marsh Inc.'s captive advisory practice in Norwalk, Conn.

Ms. McPeak pledged there will be "strong and consistent" captive regulation in Tennessee.

Commentary

Crowds sport views on what matters most

There's a decent chance that most people in Egypt weren't focusing on the Super Bowl last week as preparations for the big game reached a fever pitch and mobs began to assemble in the Dallas area.

As rioters took to the streets in Cairo demanding some form of democracy, crowds not far from my little corner of the paved-over prairie gathered at star-studded soirees to brag about how much they paid for admission to a football game in the nearby suburb of Arlington.

That particular topic probably didn't come up much in Egypt last week, given that the average monthly wage is about what Americans spend on toiletries and people have been busy with the thorny problems of convincing Egyptian President Hosni Mubarak to resign and get the government to turn the Internet back on.

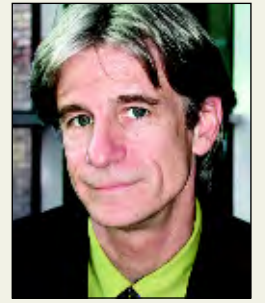
Despite all the talk in the past couple of decades about how the world has shrunk because of technology and air travel, the events in Cairo and Dallas make a good argument that we still live on a pretty big planet. It really isn't a small world, after all.

Distance is one thing—it's a long flight from Texas to Egypt—but the cultural differences are really what makes the world so large. There's dancing in the streets, and often some rioting, in an American city when its team wins the big game. But in places like Egypt or Tunisia, it takes a good shot at bringing down the government to get people in the mood to damage property.

Anthropologists have spent a lot of time studying the world's cultural oddities. It's unlikely, though, that the mentality of National Football League championships has thus far played a big role in their research.

In Cairo, there were hundreds of thousands of people screaming, hurling stones and setting things on fire as they demanded the president step down after 30 years in power. In Dallas, there were no such worries, but crowds still formed. In fact, people were paying good money to be part of a mob. For reasons I wish a behavioral scientist could explain, some 5,000 people paid \$200 apiece for tickets allowing them to stand outside Cowboys Stadium and watch the game on a big screen.

With communications crippled in Cairo, Egyptians may have missed out on the madness being beamed by satellite to every other corner of the



MICHAEL BRADFORD

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globe from north Texas.

Back at Cowboys Stadium, if I had surveyed the crowd of folks who paid around \$1 million to stand outside rather than watch the game at home, I would wager that while some had followed the chaos in Cairo over the past 10 days, a good portion of them were more concerned about matters on the playing field than in Tahrir Square.

"I heard something about that," or, "I'll bet that's going

Cultural differences are really what makes the world so large.

to make the price of gas go up," would likely have been responses from many outside the stadium. Of course, these would be people who paid \$200 to stand outside a stadium to watch a game on television, so the results of my unscientific survey might have been slightly skewed. It's the nature of many Americans, though, to pay much more attention to what's happening just beyond their doorstep rather than events abroad.

Some argue that the violence that erupted in Greece over austerity measures or the demonstrations that toppled the government in Tunisia and filled the streets of Cairo eventually will come to the U.S. The spark that will set it off will be crippling inflation, soaring gasoline prices, food shortages or drastic cuts in services, the pessimists say.

While it certainly is not impossible that it could happen, it is hard to imagine something that would upset Americans to the point that they would be motivated to try and bring down the government.

On second thought, let's just pray the Super Bowl is never canceled.

Want to STAND OUT from the crowd?

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Business Insurance OPINIONS

Caution urged on electronic monitoring

WHEN IT COMES TO electronic communications, employers have to tread cautiously in protecting the interests of their business and guarding employees' privacy to the extent feasible.

But the complexity of the issue is daunting: Is the computer equipment that sent the communications owned by the company or the employee? What if the employee bought the equipment that also is used for personal matters but was reimbursed by the company? Did the employee write the e-mail during work hours or on his own time? Was it sent from the employee's personal, password-protected e-mail account or on the company's e-mail system?

What should the employer do if, in monitoring the Internet, it inadvertently learns the worker is in a protected category, and then decides to terminate the worker for unrelated reasons? What can the employer do if the employee says something really nasty about his company on his blog? What if it was not just nasty, but also false and harmful?

As courts address these issues, employers can only hope they continue on the path taken by a California appellate court last month. In that ruling, the court held that e-mail that a worker sent to her attorney on company equipment and on the firm's e-mail system can be used as evidence, and is not protected by the attorney-client privilege.

What helped the employer in that case was a clearly worded policy that explicitly stated employees are not entitled to privacy on company e-mail. At least for now, that is the approach other employers would do well to follow, while hoping future court rulings are as sensible and practical.

The complexity of the issue is daunting.

TRIA program works, should be kept in place

A RECENT GOVERNMENT report on the state of the terrorism risk insurance market bolsters the case that risk managers and insurers have been making for years: that federal terrorism insurance backstop is critical to assuring the availability and affordability of the coverage.

As we report on page 3, the President's Working Group on Financial Markets found that the terrorism insurance market has improved since the panel made its last report in 2006. Although the report suggests policymakers should review parts of the program to encourage greater private sector involvement, it noted that stakeholders told the panel that the backstop encourages insurers to provide sufficient affordable terrorism cover they might otherwise decline to offer.

The report should be considered carefully in light of the Obama administration's call for a scaled-back program to cut government spending. That's a bit disingenuous, given that the program has cost next to nothing and that insurers would repay any government assistance. Any savings merely would be accounting tricks.

Even though some of the improvement in the marketplace reflects general conditions for property insurance, there's no guarantee that such buyer-friendly conditions will persist forever. The working group report shows the current program has worked, and worked well.

Keeping the program intact and in place after its slated 2014 expiration will help guarantee coverage will be available if it is needed in the wake of future terrorism attack.



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THIS WEEK'S RESULTS

Q Will there be meaningful med mal reform under the Obama administration?



Almost certainly

8%

50/50

43%

No chance

47%

NEXT WEEK'S QUESTION

Q: Should companies monitor employees' electronic communications, such as e-mail?

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CASE STUDY

DIRECTORS & OFFICERS LIABILITY [BEST PRACTICES]

D&O settlement may set trend

By **DAVE LENCKUS**

Pfizer Inc.'s corporate governance reputation steadily deteriorated for years as the pharmaceutical giant defended its marketing practices in court.

In three cases between 2002 and 2007, Pfizer twice pled guilty to fraudulently marketing drugs for unapproved uses and agreed to pay criminal fines and civil settlements exceeding \$500 million.

But the game-changing blow to Pfizer's corporate governance came in September 2009 with the New York-based company's blockbuster \$2.3 billion criminal settlement with the federal government. The settlement included the nation's largest-ever federal criminal fine—nearly \$1.2 billion, another guilty plea for promoting unapproved product uses and a commitment to maintain a corporate compliance program for five years.

Now, the directors and officers liability insurance market is abuzz over how Pfizer will finance a new board-level committee designed to ensure it stops violating rules that bar pharmaceutical companies from marketing drugs for uses not authorized by the U.S. Food and Drug Administration. In what market experts agree was an unprecedented settlement of a derivative D&O liability lawsuit led by the Louisiana Sheriffs' Pension and Relief Fund of Baton Rouge, La., Pfizer's insurers agreed in December to cover as much as \$51.1 million of future costs of the corporate governance committee.

Pfizer's D&O insurers also agreed to pay plaintiff attorneys \$23.1 million in fees and expenses, bringing the settlement to nearly \$75 million.

Insurers that settled the Pfizer litigation, which alleged breach of fiduciary duty by the company and 19 directors and officers, are Illinois National Insur-

ance Co. of New York, a subsidiary of American International Group Inc.; Hartford, Conn.-based Twin City Fire Insurance Co., a subsidiary of Hartford Financial Services Group Inc.; Schaumburg, Ill.-based Zurich-American Insurance Co., now Zurich North America, a unit of Zurich Financial Services Group; and Hamilton, Bermuda-based Corporate Officers & Directors Assurance Ltd., a unit of ACE Ltd., according to court records.

Marsh Inc. placed the coverage, according to sources. Marsh would not comment.

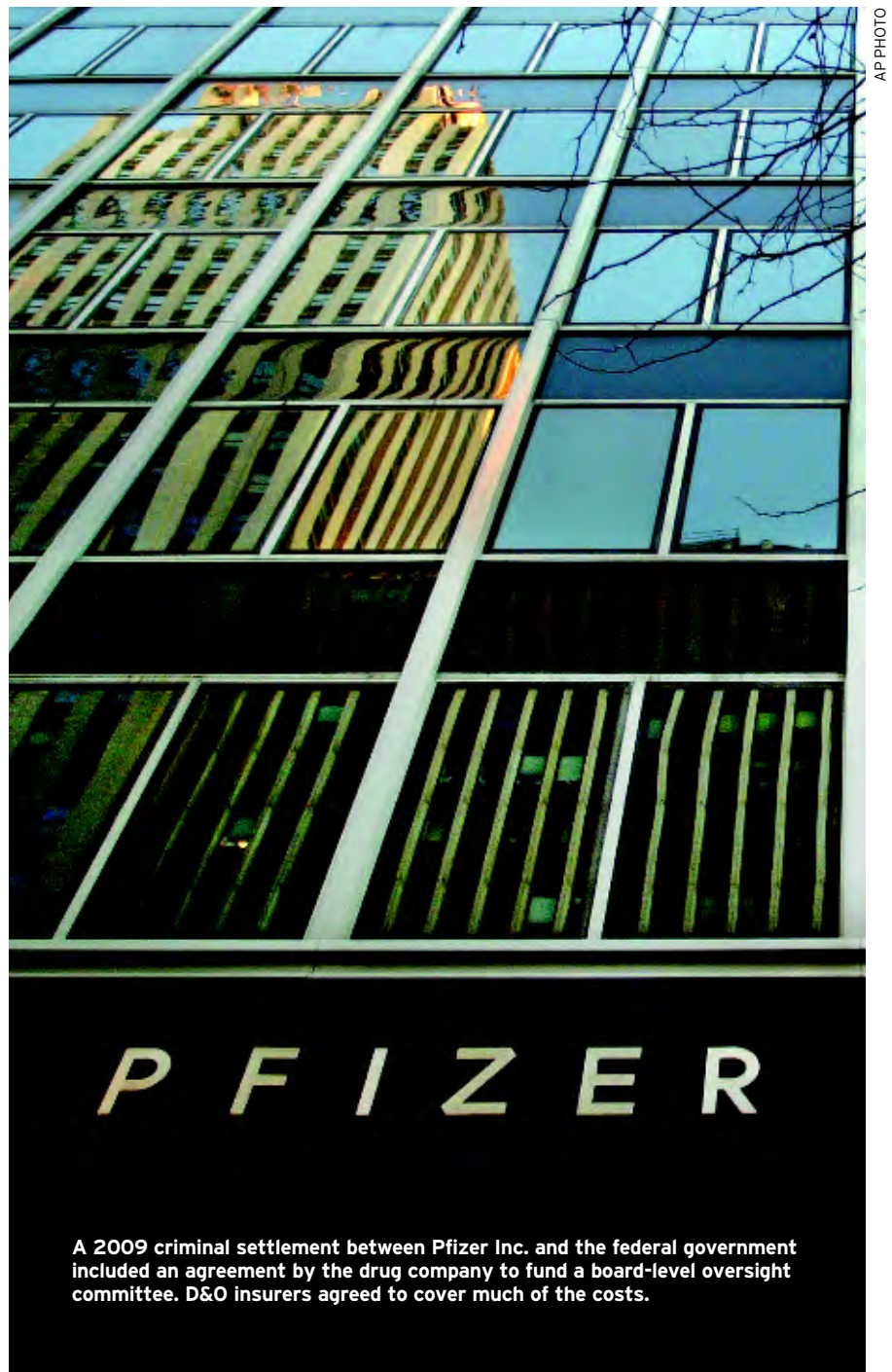
The agreement, which is subject to approval by a New York federal judge, is among the largest derivative-action settlements ever (see chart, page 10). Only five others, ranging from \$90 million to \$900 million, were larger, according to broker and attorney Kevin LaCroix, an executive vp at OakBridge Insurance Services L.L.C in Beachwood, Ohio.

Brokers and legal experts disagree whether policyholders would be able to get insurers to agree to a similar settlement or whether they would want to.

Unlike securities class actions, plaintiffs in derivative suits attempt to win concessions designed to help the company. So typically, defendants settle by promising to change specific corporate practices, allowing shareholders to vote on a transaction or agreeing to pull out of a planned transaction.

Legal experts say courts typically assign relatively nominal values to such settlements, which limit court-approved plaintiff attorneys' fees to between six- to low seven-figure amounts—a fraction of the fees approved in the Pfizer case, *In re Pfizer Inc. Shareholder Derivative Litigation*.

The derivative suit that Pfizer faced was different. It stemmed from the record \$2.3 billion settlement with the U.S. Department of Justice after the company had fielded marketing fraud allega-



A 2009 criminal settlement between Pfizer Inc. and the federal government included an agreement by the drug company to fund a board-level oversight committee. D&O insurers agreed to cover much of the costs.

tions in other cases for years. In the Justice Department agreement, Pfizer subsidiary Pharmacia & Upjohn Co. Inc. pleaded guilty to violating the Food, Drug and Cosmetic Act by marketing its anti-inflammatory drug Bextra for uses and at dosages that FDA had specifically declined to approve for safety reasons,

according to court records.

While physicians can use medications for what is called "off-label" purposes, the law bars pharmaceutical companies from promoting uses that the FDA not approved.

See **D&O** next page

'I THINK, WITHOUT A DOUBT, THIS WAS A KIND OF MARKET-CHANGING SETTLEMENT.'
ANN LONGMORE, WILLIS GROUP HOLDINGS P.L.C.

Business Insurance

CASE STUDY

DIRECTORS & OFFICERS LIABILITY [BEST PRACTICES]

D&O: Settlement by insurers may set trend

CONTINUED FROM PREVIOUS PAGE

Pfizer introduced Bextra in 2001 to treat osteoarthritis, rheumatoid arthritis and menstrual cramps. But according to a fact sheet produced by the Justice Department and Department of Health and Human Services, Pfizer aggressively marketed Bextra to treat acute pain and surgical pain at unsafe doses.

For example, according to the federal agencies:

- Pfizer's marketing team devised sales materials to promote the off-label uses and commissioned market research to test the materials.
- Pfizer's sales representatives drafted and distributed "proposed physician standing orders and hospitalwide protocols" calling for unapproved uses of the drug.
- Pfizer sponsored what were portrayed

neer new procedures so that we not only comply with state and federal laws, but also meet the high standards that patients, physicians and the public expect from a leading worldwide company dedicated to healing and better health. Corporate integrity is an absolute priority for Pfizer, and we will continue to take appropriate actions to further enhance our compliance practices and strengthen public trust in our company."

Fifteen months later, Pfizer's D&O insurers agreed to finance the cost of the new regulatory committee.

The agreement is "unprecedented, said OakBridge's Mr. LaCroix, because insurers historically have viewed any corporate effort to comply with government regulations as an uninsured overhead cost.

Broker Ann Longmore, New York-based executive vp at Willis North America, a

tions, a unit of Aon Corp. "We see that often" in settlement discussions.

The insurers refused to comment. Pfizer's attorney did not return calls.

But a source familiar with the negotiations said the agreement was driven by plaintiff attorneys who wanted a settlement that would justify much higher fees than they normally would be awarded.

Co-lead plaintiffs counsel Robert Klausner disputed that characterization. The settlement will reduce the "unmeasurable risk" that alleged executive and director misconduct creates for the company and its shareholders, said the partner at Klausner & Kaufman P.A. in Plantation, Fla.

If the insurers had agreed to a settlement under which they paid Pfizer directly—rather than fund the committee—that sum would be "insignificant" compared with Pfizer's settlement with the Justice Department, he said. "But if the money is used to fund the committee, we'll have a better (corporate governance) program than we ever had before."

In addition, Mr. Klausner said: "If the court thinks the fees are too high, it'll lower them."

The potential impact of the derivative-action settlement is disputed.

Both Ms. Longmore of Willis and Mr. LaCroix of OakBridge predict that it will become a model for plaintiff attorneys.

"I think, without a doubt, this was a kind of market-changing settlement," Ms. Longmore said.

But Aon's Mr. Shappell said he doubted that insurers would settle many other derivative actions similarly because of the available defenses. The primary defense is the business judgment rule—that defendants acted within their authority but their moves still turned out poorly.

Insurer attorney Dan A. Bailey said the settlement is "troubling" because it covers "a classic corporate expense." Derivative actions are designed to help a company recover its losses, not pay future expenses, said Mr. Bailey, a member of Columbus, Ohio-based Bailey Cavaliere L.L.C.

"This is not a model that will come without a fight from insurers in the future," Mr. Bailey said.

If insurers were to lose that battle, losses would mount and insurers could be expected to raise rates and add coverage exclusions relating to corporate expenses, creating a risk of "unintended consequences," he said.

Mr. Klausner suggested that a better model would be for D&O insurers to press policyholders to adopt committees similar to the one Pfizer must create and offer rate reductions in return.

But Mr. Shappell said corporate executives would contend that they already have superior corporate governance controls in place.

LARGEST DERIVATIVE-ACTION SETTLEMENTS

The five largest settlements of derivative litigation are:

COMPANY	AMOUNT	DATE
UnitedHealth Group Inc.	\$900 million	December 2007
Oracle Corp.	\$122 million	November 2005
Broadcom Corp.	\$118 million	August 2009
American International Group Inc.	\$115 million	September 2008
AIG, Maurice Greenberg and others	\$90 million	August 2010

Source: D&O Diary

as independent continuing education programs that provided information about the drug's off-label uses to attendees.

The Justice Department settlement also resolved civil allegations over how Pfizer promoted Bextra, which Pfizer withdrew from the market in 2005, and several other drugs. Pfizer settled those claims for \$1 billion, although it denied wrongdoing in most of them.

To prevent future regulatory violations, Pfizer also agreed to establish the special committee with broad powers—which the committee itself will establish—in overseeing Pfizer's health care-related regulatory and compliance issues. Those issues include product promotion, efficacy claims and safety claims, the settlement states.

The committee must have at least five members and operate at least five years

Pfizer did not return calls seeking comment.

But in Pfizer's news release announcing the settlement, Senior VP and General Counsel Amy W. Schulman stated: "We regret certain actions taken in the past but are proud of the action we've taken to strengthen our internal controls and pio-

unit of Willis Group Holdings P.L.C., agreed. But she also said the insurers' change of heart makes sense, given that the plaintiffs filed suit because Pfizer's criminal actions directly led to a multibillion-dollar loss.

"This is a creative way to diffuse a multibillion-dollar lawsuit and make it a multimillion-dollar settlement," Ms. Longmore said.

Another factor that likely was important for the insurers was that rejecting an offer to cover a normally uninsured cost could end up costing much more, Mr. LaCroix said. If the litigation had ended in a more expensive settlement or court award that involved only covered damages, all insurers in Pfizer's D&O program would have been exposed to that larger loss, even if it exceeded their policy limits, he said.

So Pfizer's high-excess-layer insurers likely were pressuring the lower excess insurers to settle, saying, "You owe me a duty of good faith," said Steve Shappell, Denver-based managing director of the global legal and claims practice in the financial services group at Aon Risk Solu-

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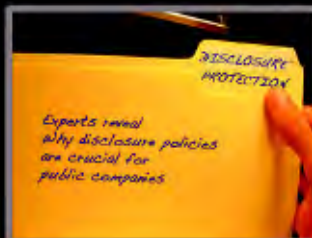
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More workers use employers as resource for health info

Employers seek to compare various treatment options

By JOANNE WOJCIK

Employees are turning more to their employers and health plans for medical and health-related information, according to a nationwide survey by the National Business Group on Health.

Employees also say they are somewhat familiar with comparative effectiveness research, the science that compares the clinical effectiveness of various health care interventions to determine which course of treatment works the best.

Employers are looking for ways to incorporate comparative effectiveness research into their health benefit design to ensure that employees are receiving safe, appropriate and cost-effective care, said Helen Darling, president of the Washington-based NBGH.

In addition, the Patient Protection and Affordable Care Act

includes funding for comparative effectiveness research that will be conducted by the Patient-Centered Outcomes Research Institute to determine the most cost-effective and efficacious medical treatments that should be covered by health insurance (*BI*, Sept. 24, 2010).

The NBGH survey released last week found that 75% of employees used their employer as a resource for medical and health information in 2010, a significant increase from 54% in 2007, the last time this survey was conducted (see box).

In addition, 69% of respondents rated their employers as completely, very or moderately trustworthy sources of such health information. The survey also examined employer adoption of wellness programs (see story below).

Ms. Darling said part of the reason that employees are relying more on employers to provide such information is the fact that "employers are gateways of information...they are the conduits." In addition, as employees are paying a greater portion of their

health care costs, they increasingly are seeking such information, she said.

"This is a combination of newly empowered consumers" and "more transparency and more information" being made publicly available, resulting in a "more informed and skeptical public," Ms. Darling said.

The NBGH survey also found increased use of health plan resources for health and medical information, with 76% of employees relying on that source in 2010, up from 67% in 2007.

Growing numbers of workers also turned to health-oriented websites, the survey found, while fewer workers sought information from doctors' offices; published articles; prescription drug package inserts; pharmacies; and medical school, hospital and governmental websites.

Employees also are becoming more inquisitive, with a greater percentage looking up information about their symptoms prior to seeing their doctors (85% in 2010 vs. 79% in 2007). A slightly smaller percentage brought a list of questions (71% in 2010 vs. 72%

INFORMATION SOURCES

More workers are seeking health information from their employer than they have in the past.

SOURCE	2010	2007*
Health plan	76%	67%
Employer	75%	54%
Internet	71%	68%
Friends, family	66%	66%
Doctor's office	61%	72%
Newspapers, magazines	50%	61%
Prescription package inserts	48%	59%
Pharmacists	47%	51%
Medical school/hospital websites	43%	45%
Governmental websites	38%	42%

Source: "Employee Attitudes Toward Health Information and Comparative Effectiveness Research," National Business Group on Health.

*Most recent time question was asked previously.

under the health care reform law passed last year, just 20% of employees said they thought government should be involved in such an endeavor.

The U.S. Government Accountability Office has appointed 19 members to the Patient-Centered Outcomes Research Institute. In addition to the GAO-appointed members, the director of the Agency for Healthcare Research and Quality and the director of the National Institutes of Health, or their designees, also will serve on the PCORI board.

Rather than the government conducting comparative effectiveness research, however, 74% of employees responding to the NBGH survey said they would prefer that a nonprofit organization focus on specific illnesses. In addition, according to the survey, 70% said an independent panel of doctors and other health care professionals were best suited to such research. Only 2% of employees said insurers should tackle the project.

The survey included responses of 1,538 employees ages 22 to 69 who were working for an organization with at least 2,000 employees. It was conducted Oct. 4-15, 2010, by Washington-based market research firm Mathew Greenwald & Associates Inc.

For further information about the survey, "Employee Attitudes Toward Health Information and Comparative Effectiveness Research," visit www.businessgrouphealth.org.

in 2007) or an advocate (52% in 2010 vs. 55% in 2007) with them to doctors' office visits, according to the survey.

A large majority of employees (81%) said they had heard of comparative effectiveness research, with 57% saying they view it as very important and 40% saying it is somewhat important.

Although a government-led panel has been established to lead comparative effectiveness research

Few firms measure effectiveness of wellness offerings

By JOANNE WOJCIK

Although the number of midsize and large companies using workplace wellness programs continues to grow, few employers use clinical measures to gauge the effectiveness of such efforts, new research shows.

Employers spent nearly 2% of their overall health care budgets on health-improvement activities in 2010—about the same as 2009, according to a survey conducted by Fidelity Investments in conjunction with the National Business Group on Health.

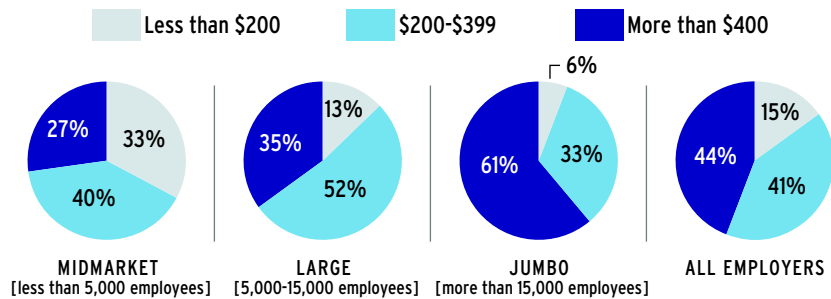
All of the 147 employers responding to the survey offered some type of wellness program, with the average number of programs offered by employers increasing to 23 in 2010 from 21 in 2009, the survey found.

In 2010, 74% of employers offered 19 or more types of wellness programs, including condition, lifestyle and health risk management as well as health education. In 2009, 60% of employers offered 19 or more types of wellness programs.

More employers—62%—provided financial incentives to employees to participate in these wellness activities in 2010, up from 57% in 2009. In addition, about half of all employers now offer financial incentives to encourage dependents to participate, according to the Fidelity/NBGH survey. This is a new question for 2010, so there is no comparative data for 2009.

EMPLOYER-PROVIDED INCENTIVES

Annual dollar value of all incentives provided by employers, per employee only



Source: National Business Group on Health

The dollar value of financial incentives averaged \$430 per employee in 2010 while dependent financial incentives averaged \$420.

Sixty-four percent of respondents adjust plan contributions to ensure that the incentives are cost-neutral, another new question added to the 2010 survey.

Most incentives offered to employees were "carrots" rather than "sticks," with only 12% using negative incentives, such as increasing premium contributions for nonparticipation in wellness programs.

Large employers, defined as those with 5,000 to 15,000 employees, are more likely to offer financial incentives than companies with fewer than 5,000 employees (78% vs. 38%, respectively). Jumbo employers, defined as those with

15,000 or more employees, are slightly less likely than large employers to offer such incentives, at 75%. 2009 results were not broken down by employer size.

Although most employers remain committed to investing in wellness, most are unsure about the returns they are realizing since only 46% measure their effectiveness using clinical outcomes as a gauge, the survey found.

Rather, the most popular metrics used to measure program success are participation levels, used by 77% of employers; engagement levels, such as program completion rates, 70%; employee feedback, 64%; and utilization of preventive services, 60%.

Additionally, 60% of employers use

claims costs as a gauge of program effectiveness, while 50% use annual health care trend rates, 26% use compliance with evidence-based medicine and 10% use utilization of high-performing providers.

If an employer feels a health improvement program is not performing as well as it had expected, it is more likely to reassess all of its wellness programs (69%) or increase communication efforts (61%) than discontinue the program (25%), the survey found.

However, 56% of employers that use incentives said the efforts are increasing employee participation and engagement in wellness programs, according to the survey.

The survey results demonstrate that employers continue to invest in health improvement, said Karen O. Marlo, vp of benchmarking and analysis at the NBGH.

"We saw consistency in that employers are investing in a lot of different types of programs and are continuing to use incentives," she said.

However, the survey also found that "employers are struggling with measurement and determining whether a program is successful; and if it isn't, whether they should invest those dollars elsewhere," Ms. Marlo said.

The survey, "Employer Investments in Improving Health," was conducted in September. To request a copy, e-mail benchmarking@businessgrouphealth.org.

Drywall: Court cases to focus on pollution

CONTINUED FROM PAGE 4

homeowners' policies did not define "faulty" or "corrosion" and that neither term had been defined under Louisiana case law. Judge Fallon cited dictionary definitions of each word to support his decision.

The ruling was an important one for property insurers, Mr. Hamilton said, but he noted that the judge also ruled that the pollution/contamination exclusions for latent defects did not apply in the denial of coverage.

That ruling could determine how future cases brought in Louisiana will be viewed and handled, Mr. Hamilton said.

"(Forum) could make a big difference if the insurer perceives one state's law to be quite favorable on a particular exclusion that they want to assert," said Matthew L. Jacobs, a partner in Jenner & Block L.L.P.'s Washington office and a member of its insurance litigation and counseling department. "In Florida, the pollution exclusion law is generally adverse to policyholders, although it's never been interpreted in the context of Chinese drywall cases."

Mr. Jacobs recently helped defend Denver-based building material supplier ProBuild Holdings Inc. in a Chinese drywall-related case against Granite State Insurance Co., a subsidiary of Chartis Inc.

Granite State had sought a declaration by the court to see if it had a duty to defend ProBuild and its subsidiaries under its insurance policy for pending and future lawsuits alleging ProBuild companies supplied drywall imported from China. The motion was filed Feb. 19, 2010, in U.S. District Court for the Southern District of Florida, according to court documents.

The hope by Granite State as

well as other Chartis subsidiaries, Mr. Jacobs said, was that Florida would be more favorable to the insurer in its view of the pollution exclusion and thus deny ProBuild coverage.

ProBuild countered by arguing that the case in Florida should be dismissed. It also sought a declaratory judgment in U.S. District Court for the District of Colorado on March 3, 2010, saying Granite State and 10 other insurers "may have the obligation to pay ProBuild's claims," and alleged breaches of duty, good faith and fair dealing.

The Florida judge ruled in favor of ProBuild and granted dismissal of Granite State's case against it in Florida; the Colorado case is still pending.

"Chartis is asserting the pollution exclusion will bar coverage (in Florida). That's why all of their companies have filed there," Mr. Jacobs said. "If they can find any connection to Florida, they will file in Florida."

Chartis declined to comment on the case.

Forum shopping is not uncommon when it comes to insurance coverage disputes, said Sheila Raftery Wiggins, Newark, N.J.-based partner for Duane Morris L.L.P., who specializes in coverage cases.

"Forum shopping is always an issue in cases like this, but it's never an unbridled action," she said. "You have to show (that the case) has a connection to the venue in consideration."

Robert Friedman, West Palm Beach, Fla.-based shareholder and insurance practice leader for Gunster, Yoakley & Stewart P.A., said that Florida "has about the worst case law" when it comes to the pollution exclusion and that courts tend to favor insurers because they interpret the exclu-



AP PHOTO

Attorneys say the way courts interpret pollution exclusions in insurance policies will determine how future litigation concerning tainted drywall will be viewed and handled.

sion so literally.

However, "for the most part," insurers are working with their policyholders involved in Chinese drywall cases under reservation-of-rights agreements or are trying to work out remediation deals.

"Insurance companies are recognizing the liability involved in these cases and that it can get out of control," Mr. Friedman said, adding that liability is being pushed from developers to builders, from builders to contractors, from contractors to subcontractors and so on.

"Insurers realize they are better off trying to work with the policyholder to get a resolution rather than fighting out coverage disputes in court. However, some insurers are handling it differently than others," Mr. Friedman said.

An example of a remediation

effort made by an insurer happened in October when State Farm Fire & Casualty Co. agreed with drywall maker Knauf Plasterboard (Tianjin) Co. Ltd. and builders to fund the removal of drywall and rebuild up to 300 homes in Alabama, Florida, Louisiana and Mississippi.

Meanwhile, Virginia Beach, Va.-based homebuilder Dragas Cos., remediated homes containing Chinese drywall but is finding it difficult to secure insurance coverage to fund remediation.

Dragas is mired in a dispute with its insurance company, Raleigh, N.C.-based Builders Mutual Insurance Co., in federal court in the Eastern District of Virginia after the homebuilder spent \$5 million to repair 73 condominiums in Chesapeake and Virginia Beach, Va., that were built with Chinese drywall.

Dragas did remediate the homes and filed a claim with Builders Mutual asking that it be covered under its insurance policy. Builders Mutual said Dragas' decision to remediate the homes was voluntary and that the insurer is not obligated to pay, however Dragas claims the remediation took place after homeowners issued oral and written demands to make repairs.

Builders Mutual is pushing for a summary judgment asserting that the pollution exclusion in Dragas' general liability policy bars coverage.

Additionally, third-party insurers—Hanover Insurance Co. and Citizens Insurance Co. of America—also are seeking a motion for summary judgment against Dragas. They too assert that the "total pollution exclusion" bars coverage for the homebuilder and they are not responsible for any costs associated with the remediation.

Both motions were filed in late January and are pending action.

"The homeowners provided Dragas with demands even though they didn't file a formal lawsuit," Ms. Raftery Wiggins said. "It provides sufficient facts that there was a threat (of claims) and provides a legal obligation to pay."

It's important to note, however, that insurance coverage issues are subject to the law of individual states and how they interpret policy language, attorneys say.

While none of the battles being fought and won by either policyholders or insurers are significant, legal experts say these decisions will help set precedent and provide guidance to courts as cases move forward.

"There will be some very important decisions made in these early cases and in the next 6 to 12 months that will help shape arguments going forward," Mr. Hamilton said. "Other courts may look at these decisions and use them to shape their decisions, while others will be jurisdiction specific."

Aon: Broker to revamp insurer fees

CONTINUED FROM PAGE 3

Brokers in the London market long have assessed fees on underwriters for services, such as policy issuance, that they perform on underwriters' behalf, in large part because so much London business is underwritten on a syndicated basis.

In the wake of former New York Attorney General Eliot Spitzer's investigation into insurance brokerage practices in the United States, several large brokers—including Aon, Marsh Inc. and Willis Group Holdings P.L.C.—in 2005 ceased collecting contingent commissions from insurers.

In the London market, brokers took varying approaches that were intended to better disclose the source and nature of their payments.

While some introduced specific percentage charges for underwrit-

ers, others negotiated charges case by case depending on the line of business. In addition, some brokers agreed they would not charge underwriters for services.

Underwriter bodies said it was a matter of commercial negotiation for their members whether to agree to new charge structures from brokers. But they also warned underwriters to be wary of potential lack of transparency and conflicts of interest. And they said underwriters may resist the proposed changes if they are deemed to be too costly.

Sources argue that if underwriters are charged more for services, they inevitably will be reflected in higher insurance rates.

"Insurers will, of course, be giving careful consideration to the terms of such agreements and will also need to take into account some important compliance concerns," said Dave Matcham, chief

executive of the London-based International Underwriting Assn., which represents underwriters. "Industry regulations on transparency, disclosure, conflicts of interest, outsourcing and anti-bribery measures may all be relevant," he said.

Aon said the charge will be fully transparent and be outlined clearly in underwriting slips.

"Each of these issues requires consideration and, if proposed arrangements are deemed unfavorable, it will not be surprising if insurers chose to resist them," Mr. Matcham said.

David Gittings, chief executive of the Lloyd's Market Assn., which represents underwriters at Lloyd's of London, said that while the proposed new charge is a matter of negotiation between underwriters and Aon, the change comes at a time when all businesses' margins are under pressure.

Mr. Gittings said he had written to Lloyd's managing agents about the proposed Aon carrier charge late last year, when Aon first floated the idea. In that letter, he said, he reminded underwriters of the need to ensure that charges are disclosed fully. He also said underwriters must be explicitly aware of the work being done on their behalf that is subject to the charge to ensure they do not run afoul of anti-bribery rules.

The London-based Assn. of Insurance & Risk Managers, which represents insurance buyers, had no objection in principle to brokers charging underwriters for their services—as long as such charges are transparent for buyers and disclosed up front, said Airmic CEO John Hurrell.

"However, our members have expressed concerns where different levels of charge apply to different underwriters, creating potential conflicts of interest when brokers recommend" insurers, he said.

"It is, of course, then up to individual buyers and carriers to decide whether they regard the charges as acceptable" and as not "distorting the market," he said. "Market forces will prevail. Buyers will always have a choice of brokers," he said.

One underwriter, who asked not to be named, said he was concerned that large brokers were more able to force through such changes because of the relative power they exert in the marketplace.

While the Aon insurer charge is a way of simplifying several fees that are imposed, it may be seen as a way to increase the amount that underwriters are charged, some brokers and underwriters said.

A market source, who asked not to be named, said several underwriters had refused to accept the new charge structure but others had not. That may be, in part, he said, because they were afraid that resistance could mean they would not be shown certain business.

Products & Services

TPA adds feature to illustrate data

MANDEVILLE, La.—F.A. Richard & Associates Inc., which does business as FARA Insurance Services, has launched a data visualization feature as part of its online claims management system.

The Analytics Tool Store is an online warehouse of more than 100 reports illustrating loss data through charts and graphs that aim to make the information more accessible, the Mandeville, La.-based third-party administrator said in a statement.

Analytics Tools Store is available on FARA's claims management system, iClaimsExpert, which delivers real-time claims management data to users.

"We felt that by incorporating data illustration into our reports, it would increase the functionality and better the delivery of data to our clients," David Richard, senior vp and chief technology officer of FARA, said in the statement. Users of iClaimsExpert "can now click a button to view graphs and charts of system-generated reports or even reports that are needed on an ad hoc basis."

For more information, contact Mr. Richard at 985-624-6750 or david.richard@fara.com.

Howden offers program for management liability

MIAMI—Managing general agency Howden Specialty Underwriters L.L.C. has formed a management

liability program for private firms.

The program, designed for private companies with less than \$250 million in assets, focuses on policies with limits up to \$5 million, the Miami-based unit of Hyperion Insurance Group Ltd. said in a statement.

Howden said the program is underwritten by Liberty International Underwriters, the specialty lines unit of Liberty Mutual Group Inc.

Howden will market, underwrite, bind and issue LIU's Private Advantage Executive Liability policies, which offer private companies access to management liability lines of coverage, including directors and officers liability, employment practices liability and fiduciary liability.

For more information, contact Bobby Vernon, CEO of Howden, at 786-275-3251 or bvernon@howdengrp.com.



Zurich offers driver safety services for fleet managers

SCHAUMBURG, Ill.—Zurich North America Commercial has launched a telematics program for fleet managers to reduce costs and improve driver safety.

Zurich Fleet Intelligence combines data from various telematics providers with the insurer's analytics tools to deliver results that can reduce crashes and minimize fleet operating costs, the Schaumburg, Ill.-based unit of Zurich Financial Services Group said in a

statement.

The program combines Zurich's fleet insurance, operations and risk engineering with telematics vendors' driver behavior-monitoring systems to deliver reports on driving and at-risk behavior while on the road.

Zurich said monitoring driver behavior helps reduce overall insurance premiums.

"I can attest to the importance, during our underwriting process, of establishing a total risk profile that is applicable for each business," Paul Horgan, chief underwriting officer of Zurich Global Corporate in North America, said in the statement. "We then respond by setting a price that will help achieve the right balance between covering the costs of the risks and having the ability to deliver when it matters."

Zurich Fleet Intelligence is offered in the United States through telematics vendor programs DriveCam, GreenRoad, IVOX, SmartDrive and Trimble.

Zurich does not collect fees or commissions from the telematics vendors when a customer chooses service, according to the statement.

For more information, contact James Noble, motor fleet lines of business director for Zurich Services Corp., at 719-689-2560 or james.noble@zurichna.com.

Marsh customizes policies for chemical companies

NEW YORK—Marsh Inc. has introduced a customized package of insurance policies that provide coverage for chemical companies.

ChemPreferred is available to chemical and processing companies in the United States with annual sales between \$25 million and \$500 million, the New York-

based insurance brokerage unit of Marsh & McLennan & Cos. Inc. said in a statement.

"Given the nature, complexity and sheer number of risks chemical companies face today, securing broad insurance protection should be a top priority for any company operating in the chemical sector," Fabrice Lebourgeois, Marsh's North American chemical industry practice leader, said in the statement.

"Not having the right insurance coverage could put an entire chemical company at risk in the event of a loss," Mr. Lebourgeois said.

The policies offer broad terms and conditions on comprehensive property, casualty and environmental insurance coverage. Other coverage can be written into the package, such as directors and officers liability, foreign casualty and cargo.

Underwriters of the policy are ACE Group of Insurance Cos. Ltd., Chartis Inc. and Liberty Mutual Group Inc., according to a Marsh spokesman.

For more information, contact Mr. Lebourgeois at 215-246-1219 or fabrice.lebourgeois@marsh.com.

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TRIA: Terrorism insurance backstop still needed

CONTINUED FROM PAGE 3

"However, policymakers should review aspects of the program in order to encourage further development by the private sector," according to the report.

Brad Wood, senior vp-risk management for Marriott International Inc. in Bethesda, Md., said the report demonstrates the program's success in keeping coverage available at reasonable costs.

"It is easy to be lulled to sleep by such a favorable report; however, increased capacity and declining premiums have as much to do with current market conditions and the lack of terrorism attacks as modeling improvements and reinsurance maturity," said Mr. Wood. "One should not expect that private insurance markets will ever be able to fully manage this risk based on the indiscriminate and catastrophic nature of terrorism. The government backstop remains critical toward protecting our long-term economic stability as part of our fight against terrorism."

The New York-based Risk &

Insurance Management Society Inc. welcomed the report.

"We're pleased to see that they continue to see a role for the federal government at least in terms of the backstop for TRIA," said John Phelps, RIMS secretary and board liaison to the external affairs committee. "The backstop has really enabled a market for terrorism insurance. Without the federal support, appropriate insurance coverage is not likely to be available. If it is, coverage will be restricted and costly," said Mr. Phelps, who also is director-business risk solutions at Blue Cross and Blue Shield of Florida Inc. in Jacksonville.

"The underlying message is, there still needs to be a TRIA mechanism in the future because the market probably still isn't there to take on this risk in the United States, broadly speaking," said Ben Tucker, senior vp in Marsh Inc.'s property specialized risk group in New York.

He said that in terms of terrorism as part of a property program, terrorism rates have stabilized or declined slightly during the past

18 months. The story is very similar in the stand-alone terrorism insurance market, except for perceived high-risk areas such as certain areas of New York.

Capacity also is plentiful. Mr. Tucker said coverage as part of a

'Importantly, the report acknowledges the value of TRIA in promoting stability in the insurance market.'

Stef Zielezienski, American Insurance Assn.

property program would follow the client's limits, which can mean programs with \$500 million to \$1 billion in terrorism coverage. In the stand-alone market, limits typically range from \$300 million to \$700 million, although in some cases limits may reach \$1.2 billion, he said.

"I think it's heartening that (the working group is) beginning to draw the same conclusions we have at Aon relative to the importance of the continuance of the

terrorism backstop," said Aaron Davis, managing director with Aon Corp.'s national property practice in New York.

Noting that the market remains stable, Mr. Davis said Aon recently completed its 2010 year-end

benchmark study and found that, on average, pricing decreased 8.5% for embedded and stand-alone terrorism coverage.

"I think the market's pretty flat on terrorism—I don't see it going into a steep decline," said Wendy Peters, terrorism practice leader at Willis North America in Philadelphia. "Terrorism is still unmodeled on a frequency basis. I think right now we've probably maxed out on the capacity."

Insurer groups said that the

report bolsters the case for the federal program.

"Importantly, the report acknowledges the value of TRIA in promoting stability in the insurance market," Stef Zielezienski, senior vp and general counsel of the American Insurance Assn., said in an e-mail. "While there are certainly improvements that can be made to the program, TRIA remains a necessary government backstop."

Jimi Grande, senior vp in the National Assn. of Mutual Insurance Cos.' Washington office, said the report has political implications, noting the document was meant "to lay the groundwork for scaling back the program by building a case for the capacity of the private market to handle risk."

"However, they were also forced to address many of the realities of the situation, mainly that capacity remains very constrained for high-risk locations and market participants remain highly skeptical of the ability of risk models to predict terrorist attacks," he said.

Ms. Peters said she thought a lot of the market is waiting to see whether the program is extended again. "I think we're all in a wait-and-see mode at this point."

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Reinsurance broker settles lawsuit

By **RODD ZOLKOS**

HARTFORD, Conn.—Guy Carpenter & Co. L.L.C. has reached a settlement with Connecticut concerning antitrust litigation brought against the reinsurance intermediary and Excess Reinsurance Co., now KnightBrook Insurance Co.

Under terms of the settlement announced last week, Guy Carpenter and 11 participating reinsurers will pay Connecticut a combined \$4.25 million. In the 2007 suit, Connecticut alleged that New York-based Guy Carpenter orchestrated a series of conspiracies with numerous reinsurers, which illegal-

ly inflated costs for insurance companies and consumers for decades.

Guy Carpenter disputed the charges, contending that the reinsurance facilities in question actually enhanced competition and offered more than 150 small and midsize insurance companies “the best available terms for reinsurance among the numerous options available to them.”

In addition, Guy Carpenter said in a statement, “these broader and more competitive terms for reinsurance enhanced our clients’ ability to compete in the insurance marketplace.”

The intermediary said it agreed

to pay part of the \$4.25 million “because the amount was substantially less than the expected legal fees and related costs to defend this case.”

In addition to the payment, Guy Carpenter agreed that through 2015 it would disclose certain information to clients and conduct the negotiation and placement of reinsurance for facility participants in a manner it initiated before former Connecticut Attorney General Richard Blumenthal began the investigation that led to the antitrust litigation handled by current Attorney General George Jepsen.

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LEGAL NOTICE

IN THE MATTER OF THE LIQUIDATION OF ADIRONDACK INSURANCE COMPANY OF NEW YORK, BENSON & JAMES INSURANCE COMPANY INC., DENALI CASUALTY COMPANY, DENALI NATIONAL SURETY COMPANY, E TITLE INSURANCE, INC., OLD TOWER INSURANCE COMPANY, PMI MORTGAGE INSURANCE CO. OF NY AND WESTMINSTER NATIONAL INSURANCE CORPORATION

Supreme Court County of New York, Index No.: 400850/10

NOTICE

The Superintendent of Insurance of the State of New York, has been appointed by an order of the Supreme Court of the State of New York, County of New York (the “Court”), entered June 10, 2010 (the “Liquidation Order”), as the liquidator (the “Liquidator”) of Adirondack Insurance Company of New York, Benson & James Insurance Company Inc., Denali Casualty Company, Denali National Surety Company, E Title Insurance, Inc., Old Tower Insurance Company, PMI Mortgage Insurance Co. of NY and Westminster National Insurance Corporation (collectively, the “Companies”) and, as such, has been directed to take possession of the Companies’ property and liquidate the Companies’ business and affairs pursuant to Article 74 of the New York Insurance Law (“Insurance Law”). The Liquidator has, pursuant to Insurance Law Article 74, appointed Dennis J. Hayes Special Deputy Superintendent (“Special Deputy”), as his agent to liquidate the business of Companies. The Special Deputy carries out his duties through the New York Liquidation Bureau, 110 William Street, New York, New York 10038-3889. The Liquidator has submitted to the Court a verified petition (the “Verified Petition”) seeking an order that: (i) approves the Liquidator’s first and final report on the status of the Companies’ liquidation proceeding (the “First and Final Report”); (ii) authorizes and directs the Liquidator to destroy or otherwise dispose of any and all of the books, files, records and other property of the Companies without further order of this Court; (iii) releases and discharges the Liquidator, his predecessors and successors in office, their agents, attorneys and employees, from any and all liability arising from their acts or omissions in connection with this proceeding; and (iv) terminates and closes this proceeding.

A hearing is scheduled on the Verified Petition on the 23 day of February, 2011, at 9:30 a.m., before the Court at the Courthouse, IAS Part 46, 71 Thomas Street, in the County, City and State of New York. If you wish to object to the Verified Petition, you must serve a written statement setting forth your objections and all supporting documentation upon the Liquidator and Clerk of the Court, at least 15 business days prior to the hearing. Service on the Liquidator shall be made by first class mail at the following address:

Superintendent of Insurance of the State of New York as Liquidator of Adirondack Insurance Company of New York, Benson & James Insurance Company Inc., Denali Casualty Company, Denali National Surety Company, E Title Insurance, Inc., Old Tower Insurance Company, PMI Mortgage Insurance Co. of NY and Westminster National Insurance Corporation
110 William Street, New York, New York 10038
Attention: John Pearson Kelly, Esq., General Counsel

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

Requests for further information should be directed to the New York Liquidation Bureau, Creditor Claims Department at (212) 341-6809.

Dated: January 19, 2011

Superintendent of Insurance of the State of New York as Liquidator Adirondack Insurance Company of New York, Benson & James Insurance Company Inc., Denali Casualty Company, Denali National Surety Company, E Title Insurance, Inc., Old Tower Insurance Company, PMI Mortgage Insurance Co. of NY and Westminster National Insurance Corporation.

REQUEST FOR PROPOSAL

NEW YORK CITY HOUSING AUTHORITY
PUBLIC NOTICE-REQUEST FOR PROPOSALS (RFP)
for In-Person Cash Rent
Collections Services

The New York City Housing Authority (the “Authority”) requests proposals from qualified business entities which will receive, on behalf of NYCHA, in-person cash payments of rent from NYCHA Residents. The Authority is seeking a Proposer that has existing places of business, with the capacity to receive the rent payments, which are conveniently located near NYCHA Developments.

Proposals must be submitted in the format outlined in the RFP solicitation document containing instructions, specifications and detailed submission requirements.

The release date of this RFP number 27772 is February 14, 2011. Completed proposals must be received by 4:00 PM on March 15, 2011.

Interested firms may obtain a copy on NYCHA’s website: Doing Business With NYCHA. <http://www.nyc.gov/nycbabusiness>; Vendors are instructed to access the “Register Here” link for “New Vendors”; if you have supplied goods or services to NYCHA in the past and you have your log-in credentials, click the “Log into iSupplier” link under “Existing Vendor”. If you do not have your log-in credentials, click the “Request a Log-in ID” using the link under “Existing Vendor”. Upon access, reference RFP number 27772.

Proposers electing to obtain a non-electronic paper document will be subject to a \$25 non-refundable fee; payable to NYCHA by USPS-Money Order/ Certified Check only for each set of RFP documents requested. Remit payment to NYCHA Finance Department @ 90 Church Street/6th Floor; obtain receipt and present it to 12th Floor/ General Services Procurement Group. A RFP package will be generated at time of request.

All inquiries concerning the scope of work for this RFP are to be directed in writing to NYCHA’s Coordinator: Janet Wilson, General Services Department, 90 Church Street, New York, NY 10007-2919 or e-mail to Janet.Wilson@nycba.nyc.gov no later than 4:00 PM on March 1, 2011.

Michael R. Bloomberg
Mayor
New York City
John B. Rhea
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New York City Housing Authority



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Contact Monique Murray at 212-210-0129

UP & Goings CLOSE



JOHN GLOMB

NEW JOB TITLE: Bala Cynwyd, Pa.-based chief underwriting officer of Philadelphia Insurance Cos.

PREVIOUS POSITION: Bala Cynwyd, Pa.-based senior vp of underwriting of Philadelphia Insurance Cos.

GOALS FOR NEW POSITION: To raise the marketing orientation of our underwriting staff. One of (Philadelphia Insurance Cos.) most significant competitive strengths is our captive marketing force. (Philadelphia Insurance) underwriters must leverage the agency relationships cultivated by our marketing force in order to increase the level of direct contact and, thus, service to our agency partners.

INDUSTRY OUTLOOK: I fully expect the market to continue to be fiercely competitive. Capacity is abundant and pricing has not shown any signs of hardening. Significant erosion of capital will be necessary for that to change. Hardening could be driven by shareholders eventually growing tired of underwriting losses

driven by inadequate pricing and poor risk selection.

FIRST MARKET EXPERIENCE: I have spent my entire career in or around the insurance industry (both carrier and investment banking). I started at (American International Group Inc.) as a directors and officers liability underwriter.

CAREER HIGHLIGHT: Right where I am now. I love what I am doing.

ADVICE: Work hard, initiate improvements and find a job you enjoy.

HOBBIES: Biking, triathlons and boating.

MOST PASSIONATE ABOUT: My wife, my 8-year-old and my 6-year-old triplets.

ON A SATURDAY AFTERNOON: I am coaching my kids in basketball, soccer and lacrosse. All four of them are on the same team.

E-MAIL OR PHONE, AND WHY: Phone. So much gets lost in e-mail. A personal relationship is key to any business and I prefer to pick up the phone and talk live with someone.

Comings & Goings ONLINE

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

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

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- XL Insurance
- Ironshore Europe Ltd.
- ACE Group
- Colony Specialty
- Amerisure Mutual Holdings Inc.
- Ironshore Inc.
- Chartis Inc.

OTHER PROVIDERS

- Towers Watson & Co.
- Magellan Health Services Inc.

Monitor: Avoiding pitfalls

CONTINUED FROM PAGE 1

accessed a private chat room, also is instructive (see story, below).

Other litigation includes a November suit by the National Labor Relations Board, which sued medical transportation firm American Medical Response of Connecticut Inc., alleging it illegally terminated and illegally denied union representation to an employee it fired for criticizing her supervisor on Facebook.

In addition, the U.S. Supreme Court held last year in *City of Ontario, Calif., et al. vs. Jeff Quon et al.* that public employers can search an employee's text messages on city-provided equipment when a legitimate reason for that search exists, although it did not rule on whether Mr. Quon had a reasonable expectation of privacy.

Observers say another area of concern for employers are guidelines that the Federal Trade Commission issued last year that could leave employers liable if their employees endorse a firm's products on the Internet without identifying themselves as company employees.

Employers are worried about the public image that may be conveyed in employees' e-mail and social media activities and the disclosure of confidential company information, observers say.

The issue of monitoring can arise on or off the job.

"Generally, if employees are using company equipment and their communications are passing over the corporate server...the information is fair game as long as employers provide clear notice to employees about the fact that they may be monitoring," said Philip C. Gordon, a shareholder with law firm Littler Mendelson P.C. in Denver.

Observers say it is important employers develop a policy that delineates employees' expectations of privacy while on the job.

"The courts are definitely trending in the direction of recognizing that employees have privacy expectations in some situations," said Robert M. Sherman, an associate with law firm Covington & Burling L.L.P. in Washington. But if the employer "clearly discloses that communications using the company's equipment may be monitored," those expectations can be avoided, he said.

Also, employers need to regular-

ly re-emphasize policies, "because it is problematic to potentially put employees on notice in a 20-page policy" that they never see again, said Michael R. Overly, a partner with law firm Foley & Lardner L.L.P. in Los Angeles.

Mark B. Wiletsky, of counsel at law firm Holland & Hart L.L.P. in Boulder, Colo., said, "Where employers get into trouble" is when they go into a MySpace, Facebook or personal e-mail account they are not entitled to access, but believe they are "because (employees) are using a company resource," its computer. That is where the courts "have really started drawing the line, and saying, 'No,'" employers are

BEST PRACTICES

Advice for employers in monitoring employees' electronic communications

- Establish a policy that explicitly states employees have no privacy rights in communications on company systems.
- Ensure the policy covers company-owned equipment as well as equipment the employee bought that was reimbursed by the company.
- Reinforce these policies periodically.
- Avoid rash reactions to perceived employee criticisms in electronic communications.
- Respect the privacy of personal, password-protected electronic communications.
- Be cautious, as case law continues to develop.

Source: Legal experts

not entitled to such access, Mr. Wiletsky said.

Mr. Gordon pointed to the New Jersey decision in which the court ruled against an employer that retrieved attorney-client communications from an employee's personal password-protected e-mail account that were sent on company equipment. He said he believes employees who have been put on notice should not expect privacy "in any communication stored on company equipment." Still, employers "have to tread with care, because the law's evolving and no one knows exactly where courts are going to end up and what courts outside of New Jersey are going to do," he said.

Robert D. Brownstone, Mountain View, Calif.-based technology and e-discovery counsel at law

firm Fenwick & West L.L.P., said one gray area is equipment that may have been purchased by the employee but reimbursed by the employer. Because of concern about company secrets being exposed, "a lot of employers do go as far as they can and reserve their right to inspect" such equipment in their policies, he said.

Randy Gainer, a partner with law firm Davis Wright Tremaine L.L.P. in Seattle, said, "Some employers would like to regulate what employers say on their own time on their own computers about the employers and—perhaps even further than preventing them from revealing confidential information—would prefer that their employees not say anything derogatory about the employer or any employer official."

However, assuming that the information is not defamatory, it is not clear employers can do so, Mr. Gainer said.

"I could only see very few instances" where whatever an employee does in his free time is the business of the employer, said Scott L. Vernick, a partner with law firm Fox Rothschild L.L.P. in Philadelphia. "I would tend to doubt that as a condition of employment you have to give someone full access to all of your Internet behavior and blog behavior and social media behavior."

However, "there are things that are said about employers that can be very harmful on these sites by employees," said Alexander Nemiroff, a partner with law firm Jackson Lewis L.L.P. in Philadelphia. While rash measures should not be taken, "employers should take those types of comments seriously" and review them to see they do not violate company policy.

Mr. Wiletsky said if a co-worker uses social media to harass another worker, "the employer may be obligated to look into that to see what's happening, and whether it has a legal duty to take action."

Observers say employers also should be aware that by monitoring even public sites, they may learn more than they want to know, such as personal information about an employee's sexual orientation or medical condition.

Another concern is the risk of violating an employee's free speech rights if adverse action is taken in response to a blog posting, said Mr. Overly.



Courts divided in rulings on employee e-mail use

By JUDY GREENWALD

Two recent rulings apparently conflict on whether employers have the right to see employee-attorney communications using company computers.

But observers say a close analysis of the New Jersey Supreme Court's March 2010 decision in *Marina Stengart vs. Loving Care Agency Inc.* and the Jan. 13 ruling by a California appellate court in *Gina M. Holmes vs. Petrovich Development Co. L.L.C.* reveals key factual differences, although it is unclear how other courts will rule on this and related issues.

Meanwhile, a federal appeals court in September held that surreptitiously automatically forwarding others' e-mail is an interception forbidden by the federal Wiretap Act.

Observers say the court ruled against the employer in *Stengart*, holding that the employer had an ambiguously worded policy in a case in which it accessed a private, password-protected e-mail account.

The employer, though, prevailed in the California case in which the worker used the employer's system despite being clearly warned her e-mails were subject to review by the employer.

In *Stengart*, the executive director of nursing at a Ridgefield Park, N.J.-based home-care nursing and health services agency used her company laptop to communicate with her attorney on her personal, password-protected e-mail account in December 2007.

She left her job shortly afterward and filed a complaint alleging a hostile work environment, retaliation and harassment based on gender, religion and national origin.

Loving Care retrieved the e-mails after it hired experts to build a forensic image of the laptop's hard drive. Ms. Stengart's attorney demanded their return, but a trial court concluded the attorney-client privilege did not apply because the company's policy provided her with sufficient notice that her

e-mails would be considered company property.

The New Jersey Supreme Court affirmed a state appellate court decision and overturned that ruling, saying the e-mail policy was ambiguous.

While the agency's policy states that communications are "not to be considered private or personal to any individual employee," it also says "occasional personal use is permitted," the court said in its unanimous ruling. "Under all of the circumstances, we find that Stengart could reasonably expect that e-mails she exchanged with her attorney... would remain private."

In the California case, Ms. Holmes contended the trial court abused its discretion in allowing e-mails she had sent to her attorney to be introduced as evidence. But the state appellate court ruled against her. "Holmes used her employer's company e-mail account after being warned that it was to be used only for company business, that e-mails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy," the three-judge panel ruled.

"The e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him," the California court said.

Meanwhile, in its September decision in the *United States vs. David S. Szymuszkiewicz*, the 7th U.S. Circuit Court of Appeals in Chicago held that surreptitiously auto-forwarding e-mails was forbidden by the Wiretap Act. The decision upheld the conviction of an IRS agent who activated a feature so duplicates of a supervisor's e-mails were forwarded to the agent without the supervisor's knowledge or consent.

Court rules against employer for improper access of private chat room

TRENTON, N.J.—A frequently cited 2009 court case in which an employer gained uninvited access to a password-protected employee chat room illustrates that companies are wise to avoid entering nonpublic sites without proper authorization, observers say.

According to the ruling in *Brian Pietrylo and Doreen Marino vs. Hillstone Restaurant Group*, Mr. Pietrylo and Ms. Marino were servers at a Houston's restaurant in Hackensack, N.J., operated by Hillstone Restaurant Group. In March 2006, Mr. Pietrylo set up a private, invitation-only group, called Spec-

Tator, on his MySpace account and invited co-workers to participate.

No member of upper management was invited to participate. But when a manager learned of the group, he allegedly pressured one of its members to provide the member's password. The restaurant's managers then used the password to access the chat room on several occasions.

In May 2006, Mr. Pietrylo was dismissed for operating the site. Ms. Marino, a group member, was terminated the next day.

In June 2009, a jury found that the

restaurant violated the federal Stored Communications Act, which prohibits unauthorized access to electronic communications, and the New Jersey Wiretapping & Electronic Surveillance Control Act.

The jury concluded that the restaurant, through its managers, "knowingly or intentionally or purposefully" accessed the chat group without authorization on five occasions, and acted maliciously.

The jury awarded Mr. Pietrylo and Ms. Marino \$2,500 and \$903, respectively, in compensatory damages, the maximum per-

mitted, and four times that amount in punitive damages.

In September 2009, a Trenton, N.J., federal judge upheld the jury's verdict and damage awards and refused to grant a new trial.

"Evidence was presented that Houston's managers accessed the Spec-Tator on several different occasions, even though it was clear on the website that the Spec-Tator was intended to be private and only accessible to invited members," Judge Faith S. Hochberg in her ruling.

—By Judy Greenwald

Political risk capacity for region evaporates

Insurers unwilling to provide coverage in Mideast, N. Africa

By MICHAEL BRADFORD

Companies in northern Africa and the Middle East that lack political risk insurance or other coverage for losses stemming from violence such as that in Egypt may be unable to secure the coverage in the near future, experts say.

Riots aimed at toppling the government of Egyptian President Hosni Mubarak could be repeated in other nations in the region, insurers and brokers fear, and underwriters have no appetite to take on new political risk policyholders there.

"We're looking at almost any emerging market or country with authoritarian rule where freedom of speech or voting rights are repressed" as potential hot spots where the sort of violence seen in Egypt could erupt, said Evan Freely, global head of the political risk and trade credit practice at Marsh Inc. in New York.

Saudi Arabia and Kuwait are two places where civil unrest could cause significant problems that would ripple through the insurance market, Mr. Freely said. There are large commercial operations in both countries and large insured losses would result if companies were forced to abandon their investments and evacuate personnel, he said.

Calls for regime change have erupted across the region after flaring first in Tunisia, where President Zine El Abidine Ben Ali was forced to flee in late January after



EPA/LANDOV

Protesters in Tunisia clash with authorities in Tunis on last month. The violence in Egypt began soon after Tunisian demonstrations over food prices began.

protesters took to the streets over food prices.

The chaos in Egypt began shortly afterward, and governments in Jordan, Yemen and other countries in the region have made changes as political leaders have stepped down in the face of protests.

Businesses that operate in the region without political risk coverage likely won't be able to find it soon, sources said.

"Insurance would already have

to be in place," said Andrew van den Born, London-based executive director, financial solutions at Willis Ltd. "No amount of premium would sway underwriters to do anything right now."

Even if an insurer were willing to take on a risk in the volatile region, if a loss occurred, "their reinsurers would not be happy," said Mr. van den Born.

Much of the region is a hot spot for potential violence, said Kirk Pasich, a Los Angeles-based part-

ner in the insurance practice at Dickstein Shapiro L.L.P. "If we were mapping out political risk and using the color red to mark sensitive areas, there would be a lot of red around Egypt," he said.

The spread of violence to other nations, particularly Saudi Arabia, is a concern in the insurance market, Mr. Pasich said. Political risk coverage in the Middle East would be difficult to obtain in areas already affected by upheaval and a spread of violence would further tighten the availability, he said.

When the chaos in Egypt and the region has calmed, "then people should think about putting the proper measures in place and buying appropriate coverages" to protect against potential losses from violence in the future, Mr. van den Born said.

He acknowledged, though, that even after Mr. Mubarak steps down, there likely will be a lengthy transition process to a new government in Egypt.

"Events like this can spark up quickly," Mr. van den Born said. "That's why you need to have coverage in place (before it is needed). It's too late now."

"A lot of corporations over the last several years have taken on more and more emerging-market risk without insurance," Mr. Freely said. "That's been a fairly benign market for political risk."

Instead, companies have paid more attention to political risks in Europe, where, for example, violence flared in Greece over government austerity measures and many believed would spread to other countries in the region.

"We think now that more clients are going to be looking more closely at the Middle East"

when considering their political risk exposures, Mr. Freely said. "I would venture to guess that the product will get more popular over the next couple of years."

While companies in the Middle East and North Africa aren't likely to find political risk coverage right now if they don't already have it, sources say there are things they should tend to as long as the tenuous conditions exist.

A risk manager with a global hotel group said he has been in regular contact with properties that his company manages in Cairo and elsewhere in the Middle East because "this is starting to look like a domino game."

Managers at properties in Africa and the Middle East are being advised to stock up on supplies and cash in case the violence that has rippled through Tunisia and Egypt spreads to other countries, the risk manager said.

Justin Priestley, London-based head of Aon Risk Solutions' crisis consulting team, said an immediate concern for companies is safety of their employees.

"What's going on in Egypt highlights the need for organizations to have plans and procedures in place to protect both in-country workers and traveling personnel from getting caught up in violent clashes of this kind," Mr. Priestley said in a statement.

"Situations like this can blow up very quickly, and in places that have traditionally been considered safe," he said. "Organizations need to have robust travel risk management and incident-response mechanisms to ensure that they are doing everything possible to protect their employees and keep them informed."

Egypt: Violent, deadly protests in Egypt raise fears

CONTINUED FROM PAGE 1

As of late last week, the violence in Egypt was expected to produce insured losses of at least tens of millions of dollars, said Elizabeth Stephens, London-based head of credit and political risk analysis for broker Jardine Lloyd Thompson Group P.L.C. "It could go to hundreds of millions if it continues," she said of claims related to the protests that began Jan. 25.

"We've seen some claims coming in for physical damage," said Ms. Stephens, including those filed by retailers with property damaged from fires set during the protests.

Reports of the number of people killed and injured during the Cairo violence vary widely, with some reports saying as many as 150 have died and thousands injured. The demonstrations began peacefully, but violence flared as the protests failed to quickly dislodge President Mubarak from power.

Insurance market sources say

coverage likely is in place for much of the political risk, property and business interruption losses that will stem from the protest. However, some companies operating in the country may not have coverage because they did not perceive Egypt as a particularly risky place to do business, experts said.

Some companies with operations in Egypt were probably caught off guard by the flare-up in Cairo and are underinsured, said Evan Freely, global head of the political risk and trade practice at Marsh Inc. in New York. Only a few Marsh clients there have "major limits," he said, because the country has not been considered "super risky."

"That's why everyone was a bit taken aback," when the chaos escalated, Mr. Freely said.

Businesses have begun to assume more risk in emerging markets and the demand for political risk coverage in many such countries has not been heavy, he added.

If policyholders bought political

risk protection on a country-by-country basis rather than as part of a global program, they may have underestimated the risk in Egypt, Mr. Freely said. "I would guess some companies may have excluded Egypt as one country

'When you're talking about an act of the government that prevents you from doing business, that looks and smells like traditional political risk.'

Kirk Pasich, Dickstein Shapiro L.L.P.

they were not too worried about."

Policyholders, their brokers and underwriters are assessing what coverage is in place. Commercial operations with coverage against political violence can expect to have claims paid from damage that results from the Cairo protests, Mr. Freely said.

The political violence coverage is common, Mr. Freely said, because "it is fairly inexpensive as

an add-on to a property or political risk program."

Terrorism coverage likely won't respond to claims from Egypt, Mr. Freely said. "Chances are that it would not be covered," because the protests are unlikely to be con-

sidered a terrorist event.

Business interruption losses are expected from companies that ceased operations last week as the violence escalated.

Among the companies that ceased operations at least temporarily, published reports identified Heineken N.V., Unilever N.V., Nissan Motor Co. Ltd. and General Motors Co.

Business interruption losses also

piled up from Egypt's tourism industry during the chaos.

"It's not just a loss of revenue for Egyptian businesses," said Kirk Pasich, a partner in the insurance practice at Los Angeles-based law firm Dickstein Shapiro L.L.P., "but also for hotel chains, airlines, travel agencies and anyone associated with the tourism industry."

Sandra Smith Thayer, also a partner in the firm's insurance practice, said the business interruption losses, property damage and costs of evacuating employees should be covered by a company's political violence terms within its coverage.

Separate property coverage may exclude losses from violence, Mr. Pasich said. "But political risk would pick that up."

In addition, the government shut down Internet access after protesters used social media sites such as Facebook and Twitter to organize the uprising, a move that also could trigger business interruption losses.

Whether coverage will respond to losses stemming from the

Continued on next page

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government shutdown of the Internet is less clear, sources said.

"When you're talking about an act of the government that prevents you from doing business, that looks and smells like traditional political risk," said Mr. Pasich. Whether an insurance policy will cover a loss from the Internet shutdown likely will depend on whether it is excluded, he added.

Mr. Freely said that while government actions can trigger coverage for business interruption losses, there generally are waiting periods of up to six months before the coverage kicks in. "I don't think it will go on that long," he said. Egypt's Internet service was mostly restored by late last week.

Beverley Marsden, London-based director of political risks at Aon Risk Solutions, said last week that the Internet shutdown likely would not generate claims because of the short-term nature of the action. In fact, "government contracts with mobile telecom providers may well give the government the right to shut down networks for reasons of national security," she said in a statement.

Business interruption losses could show up in the marine market, Ms. Stephens said. Egyptian ports are closed, and shippers are encountering delays in moving goods through the region, she said.

Insurers are monitoring shipping activity along the Suez Canal, which remained open late last week.

Lloyd's Market Assn. said marine underwriters are concerned about the risk to ships transiting the waterway, but "unless the situation changes drastically and there is extensive disruption over an extended period, the current situation is unlikely to have a major impact" on insurers, the group said in a statement.

Insurance market sources said the ultimate impact of the events in Cairo on the cost and availability of political risk insurance in the region won't be known for some time.

Andrew van den Born, executive director, financial solutions at Willis Ltd. in London, said the market will face uncertainty until it is clear what sort of government will follow that of Mr. Mubarak's administration.

The Muslim Brotherhood, an Islamist political group, is positioning itself to play a role in Egypt's government, Mr. van den

Born said, and there are concerns about how much power it might wield in the country's affairs. "Will we get another Turkey? Or...will we get another Iran?"

"Whatever political system emerges will likely have medium-term implications on political risk," said Ms. Marsden. As of now, the insurance market can only "monitor the situation as it unfolds," she said.

If the violence doesn't escalate significantly beyond Egypt, the cost and availability of political risk insurance is not likely to change much, experts said.

"Any price change will be modest," Mr. Freely said. "Overall, I don't think it will have a big impact. I do think underwriters

will be a little more conservative" in their approach to writing political risk insurance in the region. "No one will be pulling out of the market, but they will be reassessing their approach."

Ms. Stephens said rates for political risk coverages in the Middle East and North Africa jumped slightly—1% to 2%—just after the demonstrations began in Cairo, but noted that any insurance that included coverage for losses from political violence would be hard to come by at this point.

"Most underwriters are taking a wait-and-see attitude as things unfold," said Mr. van den Born. "No one is looking to write coverage in Egypt until things settle down."

Staff: Business Insurance makes staff changes

CONTINUED FROM PAGE 4

has joined *Business Insurance* as executive assistant to the publisher.

Prior to joining *BI*, Ms. Karl was a sales coordinator with H2O Plus L.L.C. in Chicago. In addition, she has supported a variety of C-level executives at Bally Total Fitness Corp. and real estate advisory firm Grubb & Ellis Co.

Ms. Karl can be reached at jkarl@businessinsurance.com and by phone at 312-649-5244.

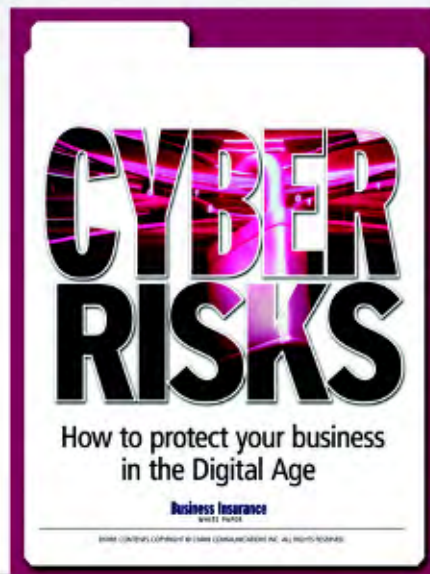


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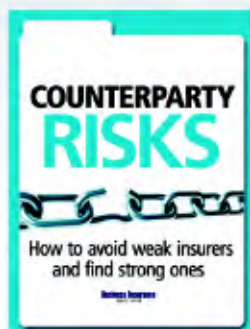


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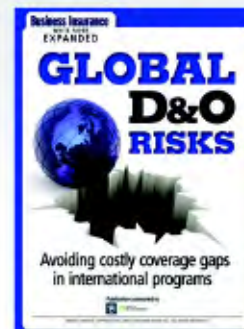
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Snow: Roof collapse risk often overlooked

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and tiles falling from the ceiling before escaping the collapsing building.

"There can sometimes be a natural tendency toward 'out of sight, out of mind' regarding roof snow load and roof drainage," said Daniel Howell, professional senior engineering specialist for Johnston, R.I.-based Factory Mutual Insurance Co., which does business as FM Global. "The parking lot cannot escape one's thoughts, but the roof is often out of view."

It's often not just one weather event that causes a roof system to fail, property insurers say. Repeated snow, rain and ice storms can overload a roof's weight limits.

For example, 1 foot of dry snow adds about 3 pounds per square foot of weight to a roof, 1 foot of mixed snow and ice adds about 12 pounds per square foot, and 1 foot of wet snow adds about 21 pounds per square foot, according to Zurich North America.

"I wouldn't say that there is an increase in roof collapses this year compared to past years," said Tim Rose, Weston, Mass.-based chief underwriting officer of national accounts and property for Liberty Mutual Group Inc. "I just think we're seeing more snow in areas that get snow and in areas that usually don't. When it snows where it's not supposed to, that's usually where we have a problem."

Seasonal snowfall totals already have been surpassed in many regions. Newark, N.J., had 62 inches of snow through Jan. 27 compared with the seasonal average of 25 inches, according to the

National Weather Service. Meanwhile, New York's Central Park had 56 inches of snow compared with the seasonal average of 22 inches.

Dale Seemans, Philadelphia-based senior risk engineering consultant for Zurich Services Corp., said partial or complete roof collapses can occur for several reasons, including frozen roof drains and/or downspouts, which prevent water from draining.

"It's been one storm after another in some parts of the U.S. and to help avoid a roof collapse,

'When it snows where it's not supposed to, that's usually where we have a problem.'

Tim Rose, Liberty Mutual Group Inc.

you have to get control of your roof drains," Mr. Seemans said. "Downspouts can be frozen solid and that will lead to pooling of water on the roof when snow melts or it rains."

Risk managers and building managers also need to take into account that—aside from snow and ice—the roof already is bearing a load if it is supporting heating and air conditioning units, sprinkler systems and excess supply storage units.

While no building is immune to a roof collapse, insurance experts say there are some things that can be done to help avoid a collapse (see box).

A building built prior to the late 1970s may be more prone to collapse due to snow drifts, Mr. Howell said, particularly where there are roof elevation differences or unusual shapes. He added that since then, building codes began to require that roof shapes be designed for snow drifts. Even so, commercial buildings often have flat roofs.

A common problem insurers say they encounter is new construction or changes to existing structures being made adjacent to an existing building with a lower roof. The building with the higher roof can cause drifting on the lower roof or where the two buildings meet.

"This can cause a problem because the building with the lower roof would not have been designed for the drifting snow load since the new building did not exist when the low-roof building was originally designed and constructed," Mr. Howell said.

It is critical to know the load design of the roof to prevent a collapse, insurers said. A diagram of the roof and the components on it, such as heating and air conditioning systems and skylights, is important so workers are aware of the hazards when they attempt to remove snow.

"You want to have a plan in place before the storm hits," said Ralph Tiede, Weston, Mass.-based vp of risk engineering and manager of property risk for Liberty Mutual. "You'll want to be monitoring the level of the snow on the roof and when it reaches a certain depth, you'll need to have a designated group go up and remove the snow...as safely as possible."

KEEPING THE LID ON

Roof collapses can be avoided if action is taken prior to winter weather and maintained year-round, and a contingency plan should be developed for extreme weather events, risk and insurance experts say. Some steps include:

- Keep roof drains clear of ice and accumulated debris.
- Keep gutters and downspouts clear so they flow freely.
- Keep the bottom of downspouts clear of snow and ice to allow draining.
- Make sure snow is not plowed or shoveled against downspouts.
- Remove snow from the roof when about 50% of design strength is reached.
- Contact a structural engineer to evaluate the building's safety.
- Select a roofing contractor in advance and retain on contract to make repairs as quickly as possible.

Source: Zurich North America



Shovels and equipment with plastic parts that touch the roof are the best and safest way to remove snow, insurers said, as metal shovels and snow blowers can puncture the roof and cause

leaks.

"You don't need to clean it to the bare surface," Mr. Tiede said. "Just make sure you clear enough to free up access to drains and downspouts."

Challenge: Attacks on health reforms complicate employer planning

CONTINUED FROM PAGE 1

miums they will have to pay for coverage through state exchanges that are to be established in 2014.

That planning and analysis, experts say, should continue even in the wake of last week's ruling by federal judge in Pensacola, Fla., which struck down the law's individual mandate that requires most U.S. residents to enroll in a health care plan or pay a fine, starting in 2014. Judge Roger Vinson ruled that the requirement exceeded Congress' authority under the Constitution to regulate interstate commerce. His ruling invalidated the entire law.

Despite the judge's decision, experts say the legality of the health care reform law and the individual mandate is far from settled.

"This is just one district court ruling and, in and of itself, it does not mean that much. It is subject to appeal and it is being appealed. There is a long way to go," said Leslye Laderman, a principal with Buck Consultants L.L.C. in St. Louis.

"You don't have to think for

more than a nanosecond" to know that this is not the end of the issue, said J. Michael Brewer, president of Lockton Benefit Group in Kansas City, Mo.

Regardless of the law's ultimate fate, experts say strategic planning on issues, such as steps to try to moderate health care cost increases, should continue.

"No matter what happens,

'Employers are taking a wait-and-see attitude until there is more legal clarity.'

Michael Thompson, PricewaterhouseCoopers L.L.P.

employers have to analyze how they are going to control costs. That does not change," said Helen Darling, president of the National Business Group on Health in Washington.

"Regardless of what is happening, there should and will be a focus on cost management," said Tracy Watts, a partner with Mercer L.L.C. in Washington.

Still, key strategic decisions for some—such as whether to offer

coverage—should be deferred until the law's future is clear, experts say.

"The next wave of changes are in 2014 and some of those changes are significant. Employers are taking a wait-and-see attitude until there is more legal clarity," said Michael Thompson, a principal with PricewaterhouseCoopers L.L.P. in New York. "While

employers are evaluating options today, they are deferring any decisions until the dust settles," Mr. Thompson said.

That dust could settle relatively soon.

Last week, Virginia Attorney General Kenneth T. Cuccinelli II said he would seek U.S. Supreme Court review of the constitutionality of the health care law on an expedited basis.

"Currently, state governments

and private businesses are being forced to expend enormous amounts of resources to prepare to implement a law that, in the end, may be declared unconstitutional," Mr. Cuccinelli said in a statement.

It isn't known if the Supreme Court will grant an expedited review, in which it would hear challenges to the law before federal appeals courts hand down their decisions.

But even if it doesn't act on Mr. Cuccinelli's request, observers expect a Supreme Court ruling sometime during the 2011-2012 term.

"It shouldn't take too long for the Supreme Court to take this up, perhaps sometime in 2012," said Andy Anderson, a partner with Morgan, Lewis & Bockius L.L.P. in Chicago.

The courts, though, aren't the only battlefield for the law. Last week, the U.S. Senate approved an amendment to a pending aviation bill to strip a politically unpopular provision from the reform law that will require employers to furnish 1099 statements when they do more than \$600 in business

with a corporate vendor starting in 2012. Small employers, in particular, have complained about the compliance burden of that requirement.

An amendment to that same bill by Senate Minority Leader Mitch McConnell, R-Ky., to repeal the entire law, though, was defeated. A similar repeal amendment has been approved in the House of Representatives, where Republicans have held a majority since the beginning of the new term.

In addition, GOP opponents have said they will continue their effort to derail, if not kill, the reform law. "We think this is just the beginning. This issue is still ahead of us," Sen. McConnell said in a briefing after the vote on his repeal amendment.

Given the November elections in which Republicans regained control of the House and picked up six seats in the Senate, experts say the congressional assaults are not surprising.

"Elections have consequences. Republicans are flexing their muscles," said Tom Lerche, Aon Hewitt Inc.'s national health care reform leader in Chicago.

Surplus: States move slowly on reform requirements

CONTINUED FROM PAGE 4

solutions at Blue Cross and Blue Shield of Florida Inc. in Jacksonville.

RIMS and other groups sent a letter last year that criticized NIMA to the head of the NAIC task force dealing with the implementation issue (*BI*, Nov. 22, 2010).

"We have problems with the compact that NAIC has proposed," said Dick Bouhan, executive director of the Kansas City, Mo.-based National Assn. of Professional Surplus Lines Offices Ltd. "It doesn't provide uniformity."

'We have problems with the compact that NAIC has proposed. It doesn't provide uniformity.'

Dick Bouhan,
National Assn. of Professional
Surplus Lines Offices Ltd.

NAPSLO recently released a set of guidelines spelling out surplus lines brokers' responsibilities under the law. Among other

things, the guidelines include being licensed in the policyholder's home state, complying with that state's placement requirements and providing any disclosure or disclaimer required by the state.

"Brokers will need to comply with the tax payment and premium reporting requirements of the insured's home state, including determining if the home state has enacted a new multistate tax-sharing system," Mr. Bouhan said.

"The clients have just as high an interest as the broker in assuring that everything is done in a kosher way," said the CIAB's Mr.

Wood. "By everything, I mean diligent search requirements, eligibility of insurers and premium tax allocation."

Mr. Wood said SLIMPACT is the preferred approach to implementation. The "worst scenario" would be for states to agree on an interstate basis to share revenue while doing nothing to define or avoid the inherent conflicts between states over where the premium tax would go, he said.

"Our core belief is if you have one single set of rules, it's a cleaner transaction for clients, brokers, insurers and ultimately for states," Mr. Wood said.

Guns: Employers wary of workplace firearm laws

CONTINUED FROM PAGE 3

employers who ask such questions.

"Everything they are doing is eroding the employer's ability to have some kind of control over safety within their businessplace," said Marty Wood, vp of the Insurance Institute of Indiana. "There is no doubt about that."

While the law adopted last year exempts employers from third-party liability for damages arising from incidents related to guns stored in a worker's car, plaintiffs could challenge that portion of the law, said George Raymond, vp of human resources and labor relations at the Indiana Chamber of Commerce in Indianapolis.

Additionally, the law did not eliminate workers compensation liability for injuries that could arise from gun accidents or deliberate workplace shootings, Mr. Raymond said. Previous workplace shootings in Indiana have already established a precedent to award workers comp benefits in such cases, he said.

"It would be rare in that type of situation, given our case history, that work comp benefits would not be awarded to the injured party," Mr. Raymond said.

Mr. Wood agreed: "You absolutely would be facing work comp claims."

To help employers cope with the parking lot gun law adopted last year, the Indiana Manufacturers Assn. provided members with several recommendations, said Ed

Roberts, vp of the Indianapolis-based association. But those recommendations led to the introduction of S.B. 411 by Sen. Johnny Nugent, R-Lawrenceburg, Mr. Roberts and others said.

Where parked employee cars potentially block fire trucks and other emergency vehicle access to employer property, employers were advised to require that employees keep their cars unlocked and leave their keys in the car or with the employer so the vehicle can be moved quickly, Mr. Roberts said.

The law requires that guns be kept in cars that are locked, which effectively prohibits workers from storing guns in their cars on company property, Mr. Roberts said.

The Indiana Manufacturers Assn. also suggested that employers ask employees about guns and ammunition stored in their cars in case a fire occurs in the parking lot, Mr. Roberts said. That way, firefighters could be warned about potential projectiles that could harm them or strike company property, say at a refinery, and cause other fires, Mr. Roberts said.

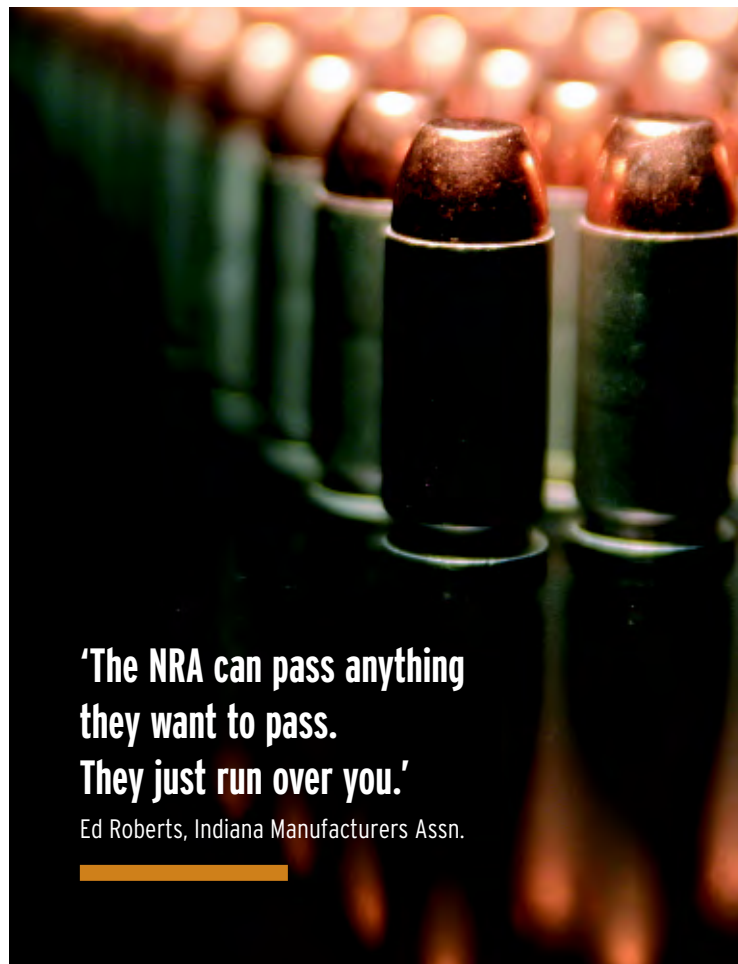
Several observers said S.B. 411 will become law in Indiana because of the NRA's backing.

"The NRA can pass anything they want to pass," Mr. Roberts said. "They just run over you."

Opposition "doesn't matter," Mr. Wood said. "We are up against the NRA."

The NRA did not return calls seeking comment.

In Texas, meanwhile, state Sen.



'The NRA can pass anything they want to pass. They just run over you.'

Ed Roberts, Indiana Manufacturers Assn.

Glenn Hegar, R-Katy, introduced S.B. 321 last month. It would bar employers from restricting employees from storing guns in locked cars parked in work areas. Like similar laws in other states, it would provide employers immunity from related liability, except in cases of gross negligence.

The Texas Assn. of Business opposes the measure because it would restrict employers' ability to tailor safety policies for their organizations, said Cathy DeWitt, vp of governmental affairs for the

Austin-based association.

Past attempts to pass similar bills in Texas failed in the state's House of Representatives. But a more conservative House this year makes passage more likely, sources said.

Last week, Montana's House Judiciary Committee heard H.B. 368, sponsored by Rep. Wendy Warburton, R-Havre. Like measures in other states, the bill would ban employers from barring guns in their parking lots and provide immunity from liability.

RMS: Key risks to be examined

CONTINUED FROM PAGE 3

of Excellence in Risk Management L.L.C. and formerly assistant vp of enterprise risk management for USAA Group.

Each case study will be followed by a thought-provoking panel discussion on the same topic featuring the views of top industry executives from industry partner companies, prominent academics and other experts, and moderated by a member of our advisory board. Summit partners include: Dempsey Partners, Sedgwick CMS, XL Insurance and Zurich.

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In addition to the focused discussions around the four core topics, a luncheon at the Risk Management Summit will feature a keynote presentation by Richard A. Clarke, a counter-terrorism expert who served in key roles in the administrations of George H. W. Bush, Bill Clinton and George W. Bush. Mr. Clarke also is the author of "Cyber Wars: The Next Threat to National Security and What to Do About It."

The Risk Management Summit will be held at the Waldorf=Astoria in New York. Attendees also are eligible to attend the 2011 Innovation Awards reception and dinner on March 14.

Eligible risk managers can obtain more information or register to attend the 2011 Risk Management Summit by visiting www.BusinessInsurance.com/RMSummit or by contacting Event Manager Rebecca Briggs at rbriggs@BusinessInsurance.com or 212-210-1032.

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Health reform law triggers response from lawmaker

If Democrats can force U.S. citizens to purchase health insurance, then Republicans in South Dakota should be able to mandate that every adult in their state buy a firearm.

That appears to be the logic behind the recent introduction of H.B. 1237 by state Rep. Hal Wick, R-Sioux Falls.

The bill states, "Not later than Jan. 1, 2012, each citizen residing in the state of South Dakota who has attained the age of 21 years shall purchase or otherwise acquire a firearm suitable to their temperament, physical capacity and personal preference sufficient to provide for their ordinary self-defense."

According to news reports, Rep. Wick said his bill pretty much is a joke and will not go anywhere. In addition, he said he believes it is unconstitutional.

But the legislation attracted national attention and gave the new member of South Dakota's Legislature a soap box on which he could state his opposition to the Patient Protection and



AP PHOTO

Rep. Hal Wick, R-Sioux Falls

Affordable Care Act's mandate that individuals purchase health insurance.

"If the federal government can order every one of us to buy health insurance because we need medical care, it makes just as much sense for us to require everyone to have a weapon to provide for their protection," Rep. Wick told the Rapid City Journal.

The bill, which doesn't state a penalty for noncompliance, would require citizens to purchase a firearm within six months of turning 21—except people who are forbidden by law to own a firearm.

Even without the law, South Dakota already has the fourth-highest gun ownership rate in the United States—56.6%, according to the NRA Business Forum website. Wyoming tops the list, followed by Alaska and Montana.

Business Insurance END PAGE

Contributing: Jeff Casale, Roberto Cenicerros, Mark A. Hofmann, Sonja Ryst

Actress Demi Moore plays a chief risk officer in the upcoming film, "Margin Call," which premiered last month at the Sundance Film Festival.

Film star takes on risky role



AP PHOTO

Actress Demi Moore is taking the role of chief risk officer to the big screen.

In "Margin Call," which premiered last month at the Sundance Film Festival in Utah, Ms. Moore's character fights to keep the investment bank where she is CRO safe during the early stages of the financial crisis in 2008.

In the story, an entry-level analyst finds information that could ruin the firm, and the ensuing 24-hour emergency challenges a cast that also

includes Kevin Spacey, Paul Bettany, Jeremy Irons and Stanley Tucci.

As Sarah Robertson, Ms. Moore fails to convince her supervisors to reduce the firm's exposure to risky but lucrative mortgages, according to the New York Times, much like the real financial crisis involved financial firms' exposures to subprime mortgage-linked securities.

"You really have to have a hard shell" to be a CRO, Ms. Moore told the newspaper. "It really is somebody who's stepping into a

position that without a doubt will be the scapegoat," which she said requires courage and perhaps being a bit of "an adrenaline junkie."

"Margin Call," which is due out this fall, has company in portraying the financial meltdown. HBO said last year that it plans to make a television movie based on Andrew Ross Sorkin's 2009 book "Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System—and Themselves."

Crook leaves print at crime scene

An insurance scam went awry when an alleged arsonist-for-hire literally left a tip for police investigating the case.

Police say they nabbed Ismael Ortiz, 24, after they found one of his finger tips inside a piece of a latex glove he left behind at the scene of a house fire in Titusville, Fla., according to a report by the Orlando Sentinel.

Police tracked him to the hospital, where Mr. Ortiz told them he had been hired by a resident of the home, Samuel Davis, to burn

the house so Mr. Davis could collect on his renters insurance policy, the newspaper reported.

While trying to flee the house after allegedly setting the fire, Mr. Ortiz slammed his finger in the door, cutting off the tip of one of his fingers.

Though Mr. Ortiz was arrested for arson based in part on authorities discovering that an accelerant was used in the fire, police said they still were looking for Mr. Davis, the newspaper reported.



SUNDANCE AUDIENCE LAPS UP 'HOT COFFEE'

Susan Saladoff used to be a trial lawyer, an experience she's putting to work in her debut as a filmmaker.

Ms. Saladoff's first film, which bowed recently at the Sundance Film Festival in Park City, Utah, deals with the widely known case of an elderly woman who suffered burns when she was scalded in 1992 by a cup of McDonald's coffee that spilled on her

while she was driving.

The documentary, fittingly enough, is called "Hot Coffee."

Stella Liebeck won nearly \$3 million in compensatory and punitive damages, although a judge later cut the award and the two parties later reached an undisclosed settlement. The case, which alleged that McDonald's served excessively hot coffee, gained national infamy as proof of a tort system run amok.

Ms. Saladoff said she believes that portrayal is unfair, and presents evidence to show that Ms. Liebeck was

indeed a victim of an uncaring corporation. The film also examines other cases where she says corporations behaved badly and minimized their legal responsibilities.

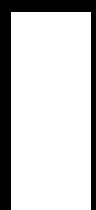
According to published reviews, "Hot Coffee" received a warm reception at Sundance. Within days of its debut, several sources reported that HBO had closed a deal for rights to the film.

Before long, we ought to know whether the public's reception to "Hot Coffee" is as warm as the audience at Sundance, or downright chilly.



AP PHOTO

Stella Liebeck, who is best known for suing McDonald's over too-hot coffee that spilled on her, is the subject of a new documentary.



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