

**California court clarifies cover transfers in M&A / 3**

**AIG boosts reserves for casualty lines / 4**

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# Business Insurance

February 10, 2003

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\$4



PHOTOS: NASA

## Contractor liability may be limited Shuttle disaster raises questions

By MARK A. HOFMANN

As the National Aeronautics and Space Administration investigates the cause of the second major disaster in its space shuttle program, a 1988 Supreme Court decision could help limit the legal liability of contractors that participated in the manufacture and maintenance of the Space Shuttle Columbia.

In addition, the survivors of the five military personnel among the seven astronauts who died in the Feb. 1 destruction of the Columbia

face another hurdle, as federal law precludes lawsuits by military personnel against the government for wrongful death. In a case stemming from the last shuttle disaster—the Jan. 27, 1986, explosion of the Challenger—a federal court dismissed a suit filed by a widow of one of the military crewmembers.

Meanwhile, NASA has announced a claims-handling procedure for people who suffered damage stemming from the disaster. The Columbia broke apart and disintegrated as it was preparing to land, scattering debris over thousands of miles from California to Louisiana. Much of the debris fell in eastern Texas and neighboring portions of Louisiana.

Houston-based United Space Al-  
See **LIABILITY**/page 21

**NASA, contractors turn to EAPs** Page 21

**SPACEHAB insured its science module** Page 21

## Near North to sell brokerage division Ex-Aon execs to fill CEO, CFO roles

By RODD ZOLKOS

**CHICAGO**—The proposed acquisition of Near North National Group's brokerage operations will result in a new brokerage to be built around Near North's existing staff and executive leadership, according to the transaction's principals.

Last week, Michael Segal, owner of Near North National Group, signed a letter of intent to sell his company's insurance brokerage operations to Frontenac Co. L.L.C., a Chicago-based private equity investment firm.



Mr. Segal

Terms of the transaction, which is subject to due diligence, execution of definitive agreements and other customary closing conditions, were not disclosed. Near North reported more than \$100 million in revenues for 2001.

Former Aon Corp. executives Dick Riley and Robert Goss are "executive partners" in the transaction, according to Frontenac, and will serve as Near North's chief executive officer and chief financial officer, respectively, at the deal's closing. Rodney L. Goldstein, managing partner at

PHOTO: AP/WIDE WORLD

See **NEAR NORTH**/page 23

## Bush budget plan calls for simplifying 401(k) testing rules

By JERRY GEISEL

**WASHINGTON**—Employers with generous 401(k) plans would face fewer administrative hassles if the Bush administration's proposed federal budget becomes law.

A proposed change included in the budget package, which was unveiled last week, would make it much easier for plans to pass a basic nondiscrimination test and, consequently, for highly compensated workers to defer more to the plans.

In addition, employers would find it less costly, compared with current law, to meet safe harbors that would enable them to avoid nondiscrimination testing entirely.

Another change calls for the

eventual consolidation of the three types of defined contribution plans into one new "Employer Retirement Savings Account," which would ease employers' administrative burdens.

The three types—401(k) plans, which are offered by private employers; 403(b) plans, offered by nonprofit entities such as universities; and 457 plans, used by state and local governments—currently have somewhat different rules. Such differences can complicate administration when an employee changes jobs and becomes covered under a different type of plan.

"There is no rational reason to have three separate sets of rules,"

See **BUDGET**/page 22

## Late News

### New patients' rights bill introduced

Rep. Charles Norwood, R-Ga., formally relaunched his effort to get a so-called "Patients' Bill of Rights" enacted by introducing a bill last week. The bill omits provisions previous measures had that employers feared would expose them to new legal liability for the acts of the plans they sponsor. The measure would require, though, that a patient have the right to an external review when a health plan refuses to cover a physician's recommended course of action.

### Former Kmart chief seeks defense coverage

The former chairman and chief executive officer of Kmart Corp. is asking a bankruptcy court to lift its automatic stay and allow him to tap into a fiduciary liability policy to pay his legal costs in several

shareholder suits. Kmart's primary directors and officers liability insurer, National Union Fire Insurance Co. of Pittsburgh, Pa., a unit of American



Mr. Conway

International Group Inc., has agreed to advance his defense costs, but only if the payment does not violate the court's automatic stay on a bankrupt company's assets, states a motion by former Kmart CEO Charles C. Conway.

### Bethlehem Steel drops retiree benefits

Bethlehem Steel Corp. plans to eliminate life and health insurance benefits for "substantially all" of its retired workers and their dependents. In a Feb. 6 letter seeking court approval for the proposal, the bankrupt steel producer said it sought to end the benefits for 95,000 people "because we cannot pay the obligation for retiree health and life insurance now or in the future." The benefits cost an average \$19 million per month in 2002, according to a Bethlehem Steel statement. Earlier last week, Bethlehem Steel agreed to sell its assets to International Steel Group.

See **LATE NEWS**/page 3

## International INSURERS WARY OF VENEZUELA

Begins on page 17



February 10, 2003

## Inside

### Universal care calls proliferate

Proponents of universal health care in Oregon are vowing to continue their fight, and such proposals also are springing up in many other states.  
Page 4

### Covering those who cover war

As news organizations prepare to cover the possible U.S.-led invasion of Iraq, they are facing sharply increased insurance costs to cover reporters being sent to political hot spots.  
Page 4

### A modern twist on the game of life

Long-beloved board games such as Monopoly and Operation need to be updated to reflect the perils that property owners and physicians face these days, writes Paul Winston.  
Page 6

### AIG reserve boost shows the way

Insurers should follow American International Group Inc.'s lead and acknowledge reserve shortfalls where they exist, one of this week's editorials says.  
Page 8

### Switzerland analyzes pension security

Falling financial markets and an aging and longer-living population are forcing a major review of Switzerland's employer-sponsored pension funds, as concern grows about insurers' and pension plan sponsors' liabilities.  
Page 17

## Departments

Advertiser Index	22
Ask a Risk Manager	10
Classifieds	20
Commentary	16
For the Record	23
Insurance Services Guide	16
International	17
Opinions	8
Perspectives	10
Products & Services	20
Ticker	23
Paul Winston	6
World News	17

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

Business Insurance (ISSN 0007-6864) Vol. 37, No. 6, is published weekly by Crain Communications Inc., 360 N. Michigan Ave., Chicago, Ill. 60601-3806. Periodicals postage is paid at Chicago and at additional mailing offices. POSTMASTER: Send address changes to Business Insurance Circulation Department, 1155 Gratiot Ave. Detroit, Mich. 48207-2912. \$4 a copy and \$97 a year in the U.S. \$130 in Canada and Mexico (includes GST). All other countries, \$230 a year (includes expedited air delivery). Canadian Post International Publications Mail Product (Canadian Distribution) Sales Agreement No. 0293512, GST No. 136760444, Printed in U.S.A. Copyright © 2003 by Crain Communications Inc.

# Insurer consent is required for coverage to transfer in acquisition: California court

By ROBERTO CENICEROS

**SAN FRANCISCO**—To transfer insurance coverage in a merger or acquisition may require insurer consent and does not automatically occur in the exchange of assets and liabilities, California's Supreme Court has ruled.

The Feb. 3 decision in *Henkel Corp. vs. Hartford Accident & Indemnity Co. et al.* settles a coverage dispute over several commercial general liability policies arising from the acquisition of one company's product line by another corporation.

Mergers and acquisitions increasingly have led to coverage disputes involving coverage transferability and the introduction of contract clauses that state a policy's benefits cannot be assigned without insurer consent, said John C. Yang, a partner at Wiley, Rein & Fielding in Washington.

As more mergers and acquisitions occur, though, more policyholders are attempting to avoid those claus-

es, Mr. Yang said. He participated in the *Henkel* case through an amicus brief filed by the Complex Insurance Claims Litigation Assn. on behalf of insurers. Several insurers also filed briefs in the case.

The California court decision is particularly significant because only two other state supreme courts have ruled on "corporate successor liability" and the transferability of insurance contracts, according to Mr. Yang. In corporate successor liability cases, Colorado's high court found in favor of insurers while Massachusetts' high court sided with policyholders, he said.

There has been little case law regarding the issue because insurers generally have paid similar claims quickly when business contracts include the transfer of all assets and liabilities from one corporation to another, said Ed Joyce, a policyholder attorney in the New York office of Heller Ehrman White & McAuliffe L.L.P.

When claims disputes have oc-

curred, lower courts in a "smattering" of states have sided with policyholders under such circumstances, Mr. Joyce said.

The California Supreme Court ruling reverses an April 2001 Court of Appeals finding against the insurers.

**The California decision is significant because there has been little case law regarding corporate successor liability and the transferability of insurance contracts.**

An attorney representing Henkel Corp., an arm of Dusseldorf, Germany-based Henkel KgaA, did not return calls. Another attorney who filed an amicus brief on behalf of another policyholder also declined to comment.

Following a series of corporate mergers and transfers, Henkel, a diversified chemicals company, acquired a metallic chemical product line that was produced by Amchem Products Inc., court records show. Henkel assumed all related liabilities.

Acquisition agreements discussed the transfer of assets and liabilities, but they did not discuss assigning insurance policies or policy benefits to Henkel, according to the court records.

In 1989, years after Henkel's acquisition, employees from another corporation sued Henkel and Amchem, alleging injuries stemming from their exposure to metallic chemicals between 1959 and 1976.

Henkel tendered its defense to insurers that sold commercial liability policies to Amchem. The policies covered the period during which the workers alleged exposure.

Each of the CGL policies contained clauses stating that there  
**See TRANSFER/page 6**

## Late News

### Continued from page one Bias claims increase in 2002: EEOC report

Claims alleging job discrimination based on religion, age, race or national origin rose during the year ending Sept. 30, 2002, according to the Equal Employment Opportunity Commission. The EEOC said allegations of religious discrimination rose 21% to 2,572 during the period. Claims alleging age discrimination rose 14.5% to 19,921, while those charging discrimination based on national origin rose 13% to 9,086. Claims based on alleged racial discrimination remained the largest single category at 29,910, up 3.5% from the previous year.

### CIGNA reports loss after big charge

CIGNA Corp. reported a \$398 million loss for 2002, compared with a \$989 million profit in 2001. The sharp drop was due, in large part, to a \$720 million charge related to certain life reinsurance contracts in runoff and a \$317 million charge for the company's portion of the Uncover Managers Inc. workers compensation pool after an arbitration panel ruled that CIGNA was liable for a portion of the business it had ceded. Both charges were taken in the third quarter.



CIGNA

### More P/C rate hikes needed: E&Y report

Additional rate hikes will be necessary for the property/casualty

segment to reach reasonable levels of profitability, says a financial services industry report prepared by New York-based Ernst & Young L.L.P. The "State of the Industry" report notes that combined ratios for property/casualty companies are "settling around 107%," which is "not at all profitable at today's interest rates." And many insurers currently have inadequate loss reserves, the report notes.

### Civil justice reform on lawmakers' agenda

A bipartisan group of senators has introduced the Class Action Fairness Act of 2003. Among other things, the measure would allow the removal of some class-action lawsuits to federal court. The measure would also require judicial review of noncash settlements to ensure they are fair to plaintiffs. On the medical malpractice front, Orrin Hatch, R-Utah, who chairs the Senate Judiciary Committee, and a group of other Republicans announced that his committee and the Health, Education, Labor and Pensions Committee would soon hold hearings on medical malpractice liability.



Senator Hatch

### ABA to consider rules for asbestos claims

The American Bar Assn. is expected to vote this week on a proposal to endorse proposed asbestos claims

standards and to push for congressional adoption of the reforms. The ABA's Commission on Asbestos Litigation is proposing that delegates to its midyear meeting in Seattle—and, ultimately, Congress—adopt a minimum impairment threshold for claimants seeking to file a claim related to nonmalignant asbestos-related injuries. The standard would require submission of a detailed, technical medical report, including diagnostic tests.

### Willis reports jump in revenues, profits

Willis Group Holdings Ltd. reported profits of \$210 million in 2002, up from \$2 million a year earlier. The broker reported gross revenues of \$1.74 billion in 2002, a 21.8% increase over 2001. About 55% of the revenue increase was derived from new business, and the rest was the result of "hard market conditions," a spokesman for the London-based broker said.

### ACE reports \$77 million profit

ACE Ltd. posted a \$77 million profit for 2002 despite a large fourth-quarter loss. The insurer's profit in 2002 follows a \$146 million loss in 2001. ACE reported \$12.82 billion in gross written premium for 2002, a 26% increase over the previous year. The insurer recently announced a boost to its asbestos reserves of \$1.91 billion, which led to a \$354 million after-tax charge against fourth-quarter 2002 earnings. ACE reported a \$168 million loss for the fourth quarter.

### Hewitt first-quarter revenues \$480 million

Employee benefits consultant Hewitt Associates Inc. reported \$480.3 million in net revenues for its fiscal first quarter ended Dec. 31, 2002.

Hewitt, which completed an initial public offering in October 2002, reported that its net revenues—which exclude reimbursements paid by clients for expenses that Hewitt incurred—grew 19% compared with \$404.1 million in the prior-year period. Net income was \$14.8 million, up 48% from the prior year.

### Briefly noted

Frank Witthun will step down as **Acordia Inc.**'s president and chief executive officer on March 1. Mr. Witthun, who will become the brokerage's nonexecutive chairman, will be succeeded by Acordia Chief Operating Officer Kevin Conboy. Acordia, the world's sixth-largest broker in 2002, is a Chicago-based unit of Wells Fargo & Co....Average **annual renewal rates for property/casualty business** increased 27% in January, according to a survey by MarketScout.com. And the reinsurance market continues to be tight as reinsurers hold back capacity in hopes of obtaining higher rate increases, said Richard Kerr, chief executive officer of MarketScout.com.

### Check out Businessinsurance.com

Items in the Late News column originally appeared in *BI's* Daily News feature on [www.businessinsurance.com](http://www.businessinsurance.com). Visit the *BI* Web site to sign up to receive *BI's* Daily News by e-mail.

### Online this week:

- The **Datebook** calendar lists upcoming industry seminars and meetings and allows you to add info on your own event.
- New **Opinion Poll** for readers: When, if ever, do you think a state will enact a universal health care system proposal?

# Push for universal health care being made in states

## Employers are wary as varied proposals may turn states into labs for health care reform

By JUDY GREENWALD

Employers who breathed a sigh of relief when Oregon voters decisively defeated a universal health care proposal on last November's ballot may have been premature in their response.

Not only are proponents of the Oregon measure vowing to continue the fight for universal health care in that state but proposals also are springing up in many other states.

Unlike the failed federal attempt of the Clinton administration nearly a decade ago, these state proposals are largely grass-root efforts supported by consumer and labor groups, among others.

The proposals vary in their approach. They include single-payer plans, in which health care expenditures would be paid for solely through publicly financed state insurance systems; and multipayer plans, in which both private employers and the government would participate. The latter approach could incorporate so-called "play or pay" provisions, under which employers would either have to offer their employees health care coverage or pay a tax. Some of the proposed legislation calls only for studies or the creation of commissions to investigate the universal coverage issue, while others are more fully developed proposals.

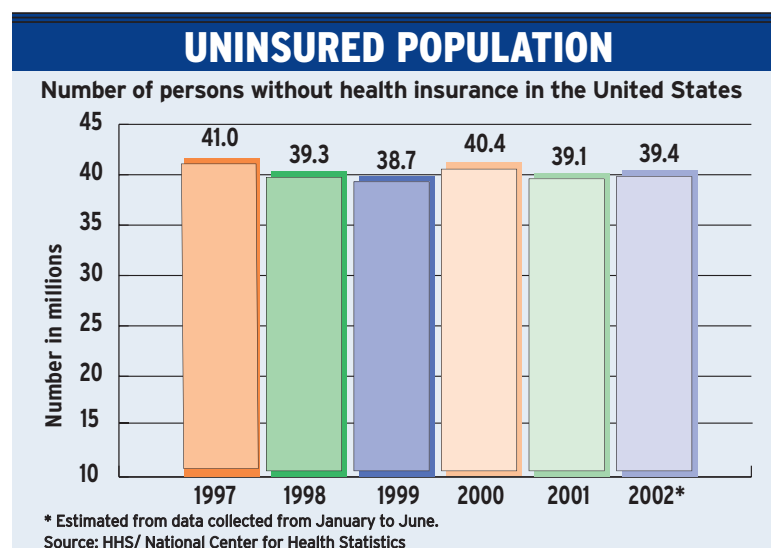
Many observers say that about

the only common denominator underlying the varied proposals is that businesses would likely face additional costs, because they would be tapped to help pay for the expanded coverage.

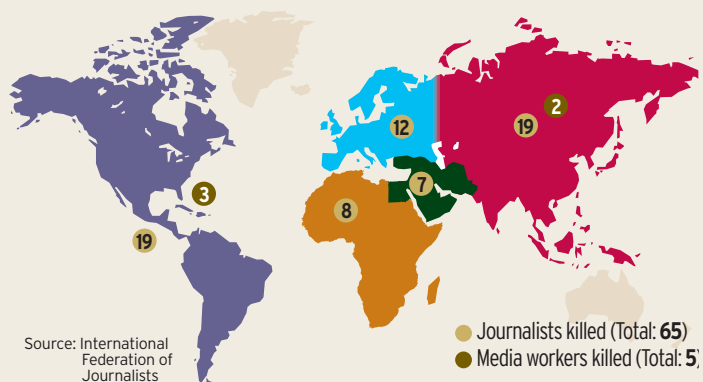
Advocates of universal health care say these approaches are needed because of an unraveling health care system, rising costs and a growing number of uninsured people. They also point out the United States is the only industrialized nation in the world that does not guarantee health care to all its citizens.

Employer groups acknowledge the health system's problems but are particularly wary of single-payer

See **HEALTH CARE**/page 14



## JOURNALISTS KILLED IN 2002



# Coverage is costly for journalists who would cover a war

By JOANNE WOJCIK and MEG FLETCHER

As news organizations prepare to cover the possible U.S.-led invasion of Iraq, they are facing sharply higher insurance costs to cover reporters being sent to the Middle East and other political hot spots.

Journalists employed by major U.S. media companies who are sent overseas on assignment typically have basic state workers compensation coverage, which nearly always covers war risks. But, brokers say, many media companies are buying additional coverage such as foreign voluntary workers comp cover and accidental death and dismemberment insurance to ensure that their reporters are adequately protected.

Numerous media companies contacted by *Business Insurance* declined to comment on their coverage arrangements.

The cost of AD&D coverage has been soaring because employers are being forced to pay substantial additional premiums

to remove war risk exclusions that have been added since the Sept. 11, 2001, terrorist attacks.

Furthermore, AD&D policies for journalists are now being issued for shorter time periods, with most written on a monthly basis. They also include either 7-day or 10-day clauses that let underwriters change rates if risks escalate.

But while the full-time employees of the major U.S. news organizations typically would be covered should they be hurt or killed while reporting on conflicts around the world, freelancers and many journalists from third-world countries are not.

Wall Street Journal reporter Daniel Pearl, who was brutally murdered in Karachi, Pakistan, in February 2002, was one of many journalists killed or injured last year while covering conflicts around the world. The Washington-based Committee to Protect Journalists, which has been tracking journalist casualties since 1992, estimates that

See **REPORTERS**/page 20

# AIG boosts reserves to cover excess casualty, D&O claims

**NEW YORK**—American International Group Inc. said last week that it will increase its loss reserves by \$2.8 billion for casualty business it wrote between 1997 and 2001.

AIG said it would incur a net after-tax charge of \$1.8 billion for the fourth quarter of 2002 because of the reserve increase.

New York-based AIG stressed that the reserve addition relates mainly to excess casualty losses and directors and officers liability claims, not asbestos-related losses.

"This action does not include an asbestos reserve increase. AIG's reserves for asbestos-related claims continue to be appropriate," Chairman and Chief Executive Officer Maurice R. Greenberg said in a

statement. He noted that AIG's asbestos liabilities are "relatively small" and stem principally from business written before 1985. AIG's gross asbestos reserves at year-end 2002 were \$1.3 billion.

In recent months, several large insurers, including ACE Ltd. Travelers Property Casualty Corp., have announced large increases in asbestos-related reserves, while other insurers have said they are examining their reserve position.

About 60% of AIG's reserve increase will go toward excess casualty loss reserves, including excess workers compensation, while 25% will apply to D&O liability, and 15% to other casualty, such as health care liability reserves, AIG

stated. A spike in loss costs since 1996, including large jury awards, increases in medical costs and corporate governance concerns following the collapse of the dotcom sector, necessitated the reserve addition, AIG said.

AIG is one of several companies that has increased loss reserves for casualty lines, said Jay Cohen, an analyst with Merrill Lynch & Co. Inc. in New York.

"Many companies have acted on these issues. Many still have to, but many have already acted on them," he said.

AIG will report fourth-quarter and full-year 2002 results on Feb. 13.

—By Regis Coccia

# N.J. regulator orders Zurich to roll back med mal rate hikes

By GAVIN SOUTER

**TRENTON, N.J.**—New Jersey's top insurance regulator last week ordered Zurich America to roll back medical malpractice insurance rate increases to 30% from the triple-digit levels it was seeking.



Health care workers protest high insurance costs at a Feb. 4 rally in Trenton, N.J.

PHOTO: GETTY

The order came on the third day of a strike by hundreds of physicians in the state who are protesting increases in malpractice rates.

New Jersey Banking and Insurance Commissioner Holly C. Bakke ordered Zurich to roll back rates that the department determined to be "excessive."

The order states: "Zurich must cease and desist from billing a base rate increase of 108% for its physicians and surgeons professional liability program in 2003. The carrier must implement an immediate rate rollback to no more than a 30% base rate increase and notify all affected policyholders; those that overpaid will receive refunds."

A spokesman for the Schaumburg, Ill.-based unit of Zurich Financial Services said the insurer is complying with the order, which affects individual and small group medical malpractice business.

Zurich had sought to non-renew

that part of its business in New Jersey in 2002 but was ordered to offer quotes by regulators, the spokesman said. Zurich subsequently offered quotes based on "trends in the marketplace," he said.

The commissioner's action will have little effect on physicians in New Jersey because the insurer has only a small share of the state's malpractice insurance market, said a spokesman for the Medical Society of New Jersey in Lawrenceville, N.J.

According to an MSNJ survey, New Jersey physicians faced minimum malpractice rate increases of 35% at year-end 2002, and many physicians saw increases of 60% to 100%, the spokesman said.

Faced with the increases, New Jersey physicians staged a work stoppage on Monday and Tuesday, and many stayed out on Wednesday and Thursday. The MSNJ estimates that about half the state's practicing physicians stopped work.

## Transfer: Cover shift not certain

Continued from page 3

could not be an "assignment of interest under this policy" without the insurer's prior consent, court records show.

All the insurers refused to cover Henkel. In 1995, the company settled the underlying tort claims for \$7.65 million and then sued the insurers for coverage of its costs. At trial, Henkel argued that it was entitled to coverage under policies purchased by Amchem because, as a matter of law, it was required to assume Amchem's liabilities. Henkel also argued that transferring policy benefits to it from Amchem would not create additional risks for the insurers.

Therefore, insurer consent was not necessary, Henkel argued.

The trial court disagreed. It found that Henkel, through its acquisition contracts, voluntarily assumed Amchem liabilities. It was not forced into shouldering them as a matter of law.

But the appeals court reversed. It ruled that Henkel had a right to coverage because agreements detailing the product line's acquisition did not explicitly disclaim assign-

ment of insurance benefits. "The right to indemnity followed the liability rather than the policy itself," the appeals court found.

The California Supreme Court disagreed, however, in a 6-1 vote. It found that when such a corporate acquisition occurs, insurers can face new risk. There may be potential for

**'In view of the potential for such increased burdens, it is reasonable to uphold the insurer's contractual right to accept or reject an assignment.'**

*Justice Joyce L. Kennard  
California Supreme Court*

the predecessor company and the successor to both file claims.

"In view of the potential for such increased burdens, it is reasonable to uphold the insurer's contractual right to accept or reject an assignment," Justice Joyce L. Kennard wrote for the majority.

But Justice Carlos Moreno, writing the lone dissent, called the majority's finding an "unfair windfall" for insurers. Mergers, sales and corporate restructures should not serve to destroy coverage for activities occurring before those transactions take place, Justice Moreno said.

"By allowing insurers to veto the assignment of benefits for which coverage has been triggered, but for which a claim has not yet been brought, insurers can retain premiums paid by the insured while escaping their coverage obligations," he argued.

Heller Ehrman's Mr. Joyce agrees. Contract clauses stating policy benefits cannot be assigned without insurer consent were created to keep insurers' risk from increasing.

In the case at hand, the insurers' risk did not increase because the claim triggering coverage happened years ago when the insurance policies in question were in force, Mr. Joyce said.

*Henkel Corp. vs. Hartford Accident & Indemnity Co. et al., California Supreme Court; No. S098242.*

## Paul Winston

### A modern twist on the game of life

Business often relies on analogies drawn from games to illustrate a point. You step up to the plate. You roll the dice. You're just a pawn. You do not pass "Go."

Similarly, games are often designed to mirror real life. The struggle between the haves and have nots (Monopoly). Geopolitics and colonialism (Risk). The freakish ability of some to retain useless information (Trivial Pursuit).

But some games, especially classic board games, do not hold up as well today, I feel, and could use some updating.

Take Monopoly, for example, which was developed in the 1930s and remains one of the best-selling games of all time. At the time, being sent to jail or being driven into bankruptcy under a crushing load of bills was seen as the worst that could happen.

Today, Monopoly could use a bit more verisimilitude. How about a card that says a Superfund site was found on Baltic Avenue, and you have to foot the bill for the cleanup? Or maybe a card that says you

tripped on Park Place and sprained your ankle, allowing you to sue the owner for pain and suffering? Or one that says your property is plagued with toxic mold, so you have to pay every player who lands there for fear of becoming ill?

And where is the reality in just being able to buy homes and plunk them down on your property? I know mortgage rates are at all-time lows, but all those homes—and especially the hotels—should require players to shell out for big umbrella policies, too.

At the very least, the game would go a lot faster, as players would be quickly wiped out by unforeseen liabilities, rather than slowly bled to death by tax and mortgage burdens.

Operation was a fun game when it came out, mostly because it used electricity to raise the stakes. If you made a mistake, the patient would buzz and his nose would light up. In fact, it was fun to screw up.

Today, the surgical tweezers should be electrified, giving the player a jolt at any misstep. That would be the shock of malpractice lawsuits. A second jolt would represent the high cost of malpractice insurance premiums.

To simulate the restraints imposed by managed care, players would have to perform their delicate operations with their eyes closed and using the opposite hand.

Mr. Potato Head and Cootie Bug were once harmless fun. Today, assembling these odd little

creatures might hit a little too close to home. That's because of the nefarious threat of genetically modified food and what it might mean for plants, insects and humans. Suddenly, having an eyeball where an ear should be isn't as playful and amusing anymore.

Some games clearly are anachronisms from a bygone era. Candyland? Today, we know that encouraging gluttony is bad, especially when aimed at children. Just ask McDonalds. Chutes and Ladders? Sorry, but few playgrounds today even have such dangerous equipment for fear of injuries and the resulting lawsuits.

In fact, maybe it's time for a new board game that captures the spirit

of our times.

It could be called Sue Everybody! Players would roll dice to move their game pieces along a path. The goal would be to amass income and property as you go, and reach the end without being sued penniless.

Along the way, players would have an opportunity to purchase insurance

and legal services for protection. If their luck holds out, they might make it all the way without any disasters.

But throughout the course would lurk numerous risks. Several spots would include lawsuits, allowing a player to sue a competitor. A roll of the dice would determine the size of jury awards. Class action cards would allow all other players to join in and sue a lone player.

Players caught in such legal quagmires would hope to have picked up insurance and defense cards along the way. But a roll of the dice would determine their effectiveness, too. Sometimes, the player will come out ahead, sometimes he or she won't.

Other spots could feature such perils as coverage disputes, requiring a player to forfeit the protection of an insurance policy. Reservation of rights cards. Or the sleeping defense counsel card.

The game would capture all the mindless glee of being able to sue someone else into oblivion, as well as the persistent dread of moving through a risky landscape fearing a lawsuit or ineffective insurance or legal representation.

What family wouldn't love to pull this board game out and teach their children such valuable lessons about the world we live in. Don't steal my idea, though, or I'll sue.

*Editor Paul Winston can be reached at [pwinston@crain.com](mailto:pwinston@crain.com).*



Paul Winston

## Captive manager directory deadline nears

*Business Insurance* will publish its online Directory of Captive Managers in conjunction with the March 10 issue. This issue includes a Spotlight report on self-insurance and captive management.

The directory is published as an editorial service, and there is no charge to be included. Companies must simply submit a completed questionnaire by the extended

deadline of Feb. 21.

To be listed, a company must directly manage captives formed under captive legislation. Companies that provide only support services or manage self-insured funds will not be listed.

If your company qualifies to be listed and has not received a questionnaire, please request one by calling Directory Editor Kevin P.

Edison at 312-649-5279 or download one from the directory area of [www.businessinsurance.com](http://www.businessinsurance.com).

All of *BI*'s online directories are available to *BI* subscribers at [www.businessinsurance.com](http://www.businessinsurance.com).

In addition, the various directories will be included in *BI*'s 2003/2004 Market Sourcebook, which will be published at the end of the year.

## Navigating the new D&O landscape is focus of *BI* Executive Forum

### Register now to save a seat at New York event

**NEW YORK**—While the risks and challenges facing corporate leaders are expanding, directors and officers liability insurers are narrowing and changing coverage terms.

Learn more about D&O insurance contract changes and risk management concerns by attending the *Business Insurance* Executive Forum "From the Boardroom to the Courtroom: The New D&O Reality," to be held Feb. 27 at the Grand Hyatt Hotel in New York.

The half-day forum will feature a panel of experts who will discuss the lessons learned from recent high-profile corporate scandals, how D&O coverage has changed and what alternative risk financing mechanisms may gain greater use, among other issues.

Susan R. Meltzer, assistant vp-

risk management for Sun Life Financial in Toronto and former president of the Risk & Insurance Management Society Inc., will give a keynote address on the challenging market conditions and how risk managers can rise to the occasion.

She will join a panel of D&O coverage experts moderated by *Business Insurance*'s Los Angeles bureau chief, Roberto Cenicerros. The panel members include:

- Dan A. Bailey, a partner and chairman of the D&O Practice Group at Arter & Hadden L.L.P. in Columbus, Ohio. He also is co-author of "Liability of Corporate Officers and Directors."

- Greg J. Flood, executive vp and chief operating officer of National Union Fire Insurance Co. of Pittsburgh, Pa., a New York-based unit of American International Group Inc.

- Anthony S. Galban, vp of Chubb & Son Inc. and underwriting manager for D&O liability insurance for Chubb Specialty Insurance in Simsbury, Conn.

- Edward M. Joyce, a shareholder and policyholder attorney at Heller Ehrman White & McAuliffe L.L.P. in New York.

The cost to attend the forum is \$100 for risk managers, chief executive officers, chief financial officers and other corporate executives. The cost for brokers, consultants, insurers, reinsurers, lawyers and other service providers is \$250.

The meeting will begin at 8 a.m. with a continental breakfast and will adjourn at noon.

To register for the forum or for more information, please contact Patricia Ghazvini at 212-210-0137; or by e-mail at [pghazvini@crain.com](mailto:pghazvini@crain.com).

## Business Insurance

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Published weekly at 360 N. Michigan Ave., Chicago, Ill. 60601-3806. Fax: 312-280-3174. [biweb@crain.com](mailto:biweb@crain.com)

Offices: 711 Third Ave., New York, N.Y. 10017-5806, Fax: 212-210-0704; 329 Calhoun St., New Orleans, La. 70118, Fax: 504-269-8115; Suite 814, National Press Building, Washington, D.C. 20045-1801, Fax: 202-638-3155; 6500 Wilshire Blvd., Suite 2300, Los Angeles, Calif. 90048-4947, Fax: 323-655-8157; 967 Bermuda Court, Sunnyvale, Calif. 94086-6750, Fax: 408-774-1155; New Garden House, 78 Hatton Garden, London EC1N 8LD England, Fax: 207-457-1440; 8157 N. Torrey Place, Tucson, Ariz. 85743, Fax: 520-579-3476; 777 E. Speer Blvd., Denver, Colo. 80203-4214; Fax: 303-733-2244; 11133 W. 108th St., Overland Park, Kan. 66210, Fax: 312-280-3174. 77 Franklin St., Suite 809, Boston, Mass. 02110-1510; Fax: 212-210-0704 \$4 a copy and \$97 a year in the U.S., \$130 in Canada and Mexico (includes GST). All other countries, \$230 a year (includes expedited air delivery). Craig Bowman, circulation coordinator. Four weeks' notice required for change of address. Send subscription correspondence to Circulation Department, *Business Insurance*, 1155 Gratiot Ave., Detroit, Mich. 48207-2912, Phone: 888-446-1422 or 313-446-0450, Fax: 313-446-6777. Microfilm copies available: University Microfilms, 300 Zeeb Road, Ann Arbor, Mich. 48103. Microfiche copies: Bell & Howell, Micro Photo Division, Old Mansfield Road, Wooster, Ohio 44691. Portions of the editorial content of this issue are available for reprint or reproduction in other media. For reprints or reprint permission: Karen Brown Tucker, *Business Insurance*, 360 N. Michigan Ave., Chicago, Ill. 60601-3806, 312-649-5319, Fax: 312-280-3174.

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## Editorial

# Fix, don't replace, health system

UNIVERSAL HEALTH CARE is on the legislative table again in the United States, as several states are considering proposals that would expand coverage.

As we report on page 4, California, Illinois, Maine, Maryland and Massachusetts are among the states now looking at ways to guarantee health care coverage for all their residents.

There is no question that the number of individuals without health insurance is a huge and growing economic and social problem and one that significantly affects employers. That's because to the extent hospitals provide charity care to the uninsured, they try to make it up in the form of higher rates charged for patients in employer-paid plans.

Ideas on how to solve this problem vary. Some states advocate a

single-payer system, while others seek a public-private partnership, and others suggest a play-or-pay approach, in which employers either have to offer coverage or contribute to a fund.

Employers must have a voice in creating any coverage system that will rely on them to either deliver benefits or help pay for them.

Single-payer proposals in the United States have been strongly opposed in the past and we think with good reason. Frankly put, we don't think government has the resources to effectively administer such a vast program.

What this country has instead is a strong employer-based system, one that provides coverage, we think reasonably well, to about 160 million people.

There is, to be sure, a role for government to play in providing cover-

age. Retirees who lack an employment connection need a governmental program, which they have in Medicare, to provide health care coverage.

Similarly, the very poor who aren't working, are appropriately covered by Medicaid, which is funded by the states and the federal government. Conceivably, Medicaid's eligibility requirements could be changed to also cover those individuals with somewhat higher financial resources than are currently eligible.

But rather than greatly expand the role of government as a provider of coverage, we think the wiser course of action is for legislators—both at the state and federal levels—to take steps to make coverage more affordable.

States can do that, for example, by imposing reasonable limits on

medical malpractice awards and repealing laws requiring health plans to offer certain benefits. Such mandates, as we have said many times before, often have more to do with the power of special interest groups than meeting any basic medical need.

The federal government must remove obstacles that stand in the way of generic drug manufacturers bringing their products to the marketplace after a reasonable amount of time. Giving employers new tax breaks to offer health plans also seems to us a good idea.

We know there are no quick fixes to the complex problem of guaranteeing health care. But we think that employers should have a role in shaping sensible change to the current system and some of the state proposal fail to recognize that basic necessity.

# More insurers should top off reserves

KUDOS TO HANK GREENBERG for shining a light on a property/casualty insurance company problem that many in the industry would prefer stayed in the shadows.

American International Group Inc. last week announced it would take a \$1.8 billion charge against fourth-quarter earnings to bolster reserves for various casualty lines. Unlike the recent string of other insurers that have added large sums to their reserves, the money that AIG set aside was not for asbestos claims.

Instead, AIG was boosting re-

serves for such lines as excess casualty, directors and officers liability and health care liability business. This is to cover claims arising from business written during the late 1990s, when competitive pressures and strong investment returns led most insurers—including AIG—to underprice their coverage.

In addition to not charging enough premium up front, investment returns of late have not generated enough additional income for insurance companies to cover the gap between assets and liabilities. At the same time, the risk today of

more frequent and severe jury awards has grown. Hence, the need for insurers to top off reserves, which is certainly more affordable for them to do in the current hard market than during soft times.

The stock market reaction to AIG's move, though, was nearly hysterical, sending shares of AIG, as well as property/casualty insurer stocks in general, down sharply. The reason: If one of the strongest and more conservatively run companies in the industry is adding billions to reserves, what does that bode for other companies that may be far less secure and far less prof-

itable?

The fact is, though, that the problem of industry reserve inadequacy has been known for some time. Many industry analysts have warned of this situation—and an eventual day of reckoning—for years. Investors should not, therefore, be so surprised. But then again, investor behavior can make even insurers seem rational.

Other insurers now must acknowledge their own reserve shortfalls, as AIG has done. The fact that until now no one has had the courage to take these needed steps for fear of disappointing shareholders does not bode well. But if they do not address their reserve inadequacy, they risk shareholder dissatisfaction—perhaps expressed in the form of a lawsuit—over failure to address a known problem that could be an endless drag on profits.

While the reduced earnings may be a bitter pill for insurers and their shareholders to swallow today, it will go a long way toward assuring that the companies remain strong in the future.

And the future happens to be when policyholders need their insurers to be strongest.

## Schillerstrom



## Letters to the Editor

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# Growing asbestos problem calls for reforms

By Edmund F. Kelly

Mounting liabilities for asbestos and the concomitant fear of bankruptcy are no longer confined to a small group of manufacturers. The potential costs to individual companies and the drag on the economy have become widespread concerns.

So how has this phenomenon occurred?

Over the last 20 years, most asbestos mining and manufacturing companies have gone bankrupt. In search of new deep pockets, plaintiffs attorneys have increasingly sued companies with only the most peripheral connection to asbestos. Now, thousands of companies that never mined, milled or



manufactured asbestos—such as retail stores, consumer products makers and even consultants—are defendants in asbestos litigation and face significant transaction costs and potential unforeseen exposure.

A recent RAND Corp. study reports that more than 8,000 U.S. firms are defending asbestos lawsuits and that these firms

represent virtually every major industry class. Conservative estimates place the ultimate legal cost to business—net of insurance—at \$150 billion.

But fallout from spiraling asbestos litigation is affecting more than businesses. Individuals who are truly ill from asbestos exposure are becoming lost in the crowd of unimpaired claimants who are being encouraged by plaintiffs attorneys to file suit. Fortune magazine recently reported that claims for asbestos-related illnesses reached 600,000 in 2000 and have been rising by 50,000 a year. Yet the RAND study concludes that as many as 90% of all new claimants have no asbestos-related health problems.

Finally, asbestos litigation and the growing number of bankruptcies it is causing—more than 20 in the last two years alone—are having a devastating impact on employee 401(k) plans at defendant companies, on pension funds that invested in these companies and on small investors. A recent study by the Nobel Prize-winning economist Joseph Stiglitz commissioned by the American Insurance Assn. indicates that, in an asbestos bankruptcy, employees lose, on average, 25% of the value of their 401(k) plans because defendants must divert funds to pay people who are not sick. Furthermore, asbestos-driven bankruptcy filings have resulted in an estimated loss of 52,000 to 60,000 jobs in the United States. Our ailing

economy needs these jobs.

Clearly, the risk is mounting for all defendants and, ultimately, all businesses and their employees, as plaintiffs attorneys continue bringing new entities into litigation every day. The huge number of pending lawsuits, coupled with the influx of new claims, forces most businesses to settle cases in groups rather than run the risk of a horrendous unfavorable verdict in one or a few cases.

Courts that permit forum shopping for claimants are adding fuel to the already dangerous fire. Rather than enforcing common-sense venue requirements that an individual be a resident or have been exposed to asbestos in a given state, courts have permitted plaintiff attorneys to seek recoveries in pro-plaintiff “jackpot” jurisdictions. For example, West Virginia recently consolidated 8,500 plaintiffs—largely unimpaired—into one trial. Faced with this litigation risk, asbestos defendants are increasingly deciding that bankruptcy is the only way out for them.

There are a number of relatively straightforward actions that would mitigate the problem. One is the creation of an “inactive docket,” under which only those with asbestos-related illness could sue. The unimpaired would retain the right to sue if and when they became sick. The key here is the establishment of a federal standard of

medical impairment to identify individuals who are truly sick, coupled with a suspension of the statute of limitations to preserve the rights of unimpaired claimants.

A second critical reform relates to venue. The legal system must enforce criteria that prevent claimants from forum shopping and pursuing lawsuits in jurisdictions that have no connection to the claim.

A push for solutions needs the support of a broad coalition of businesses and legislators, and risk managers must become involved.

There's never been a better time for tackling the issue of asbestos litigation reform. For the first time, there is even support in some quarters of the trial bar for a more equitable approach to compensating victims. Key members of Congress from both parties have expressed their support for reform as well.

Now is the time for action, and strong business support can help prompt meaningful reform. We need to advance a solution that is fair for everyone—the sick, those who may become sick in the future, the businesses that never produced a single asbestos-containing product and their employees.

*Edmund F. Kelly is chairman, president and chief executive officer of Liberty Mutual Insurance Co. in Boston.*

# Management, technical skills key to success

**Q: What kind of professional development and continuing education should risk managers pursue to get ahead in their careers?**

**A:** There's no one right answer to this, because it depends to a significant degree on what your specific career goals are. So, let me answer this in segments that relate to the most common paths I see “risk managers” having taken over the years.

Let's start with a reality check, though. In the present business and economic environment, career goals may require re-evaluation. On the one hand, I'd say that the aftermath of Sept. 11 has increased the general awareness of the need for focused risk management in all companies, large and small. Some



companies have created positions in risk management that didn't previously exist, while others have added to existing departments. On the other hand, there has also been the reverse pressure of tough economic conditions and

poor corporate performance. These forces have seen the termination of some risk managers, the elimination of some risk management positions and, in some cases, the outsourcing of whole departments.

Why do companies respond differently to this issue? Well, it's often purely external to the company (e.g., competition, market gyrations), but, sometimes, it is a function of upper management misunderstanding what risk management is all about and how it contributes to a firm's success.

Communicating this understanding is a core responsibility of risk managers—that is, making sure the decision-makers and power

## Ask a Risk Manager

brokers understand the value of risk management. Thus, effective communication is key.

This leads me to the matter of core competencies for risk managers. Of course, every discipline has them—or should—and, in many cases, there is much overlap in the more-generic areas of business management. The following list was developed as part of the RIMS Fellow research and encompasses the opinions of many risk managers regarding the most important skill traits—both generic and specific—of highly effective risk managers. The core competencies that were identified are:

### Generic management skills

- Have strong general business knowledge.
- Possess proven people skills that will generate support from all key stakeholders.
- Serve as a motivator of others.
- Be innovative, creative and inquisitive.
- Be a creative risk-taker.
- Have the ability to adapt to regular change.
- Be a strong communicator, both orally and in writing.
- Be detail-oriented but understand the “big picture.”
- Stay calm and objective in a crisis.
- Possess a keen understanding of financial theories.
- Be results-oriented.
- Demonstrate experience with planning, organizing, controlling and motivating.
- Develop project-management skills.
- Be a sound decision-maker.
- Be a strategic thinker and planner.

### Technical skills

You should have a solid risk management background and training in:

- Risk identification.
- Risk analysis, assessment and measurement.
- Risk control and mitigation strategies.
- Risk financing.
- Risk reporting and administration.
- Translating the generic risk model to any type of risk.
- Insurance knowledge.
- Specific industry-related knowledge.
- The effective use of risk-related technology.

Motherhood and apple pie, right? Well, I suggest that if you can develop most of these traits, your chances of succeeding over the long term are very high. In all likelihood, the average manager in business today possesses fewer than half of these traits. The result? A high degree of failure, evidenced through attrition, frustration and dislocation. But while these skills can define generalized success for most business managers, let's turn back to risk managers specifically and the central question of how they can advance their careers.

The traditional risk management practitioner focuses on insurance as a control or mitigation strategy for risks. This defines a fairly narrow area of practice, but one that is critical to the long-term success of most companies. Occupants of positions in this realm—and they are the majority of us—have varying backgrounds and experiences. Their educational background is often a business undergraduate degree, with many achieving specialized designations, such as the Chartered Property Casualty Underwriter (CPCU), or the Insurance Institute's Associate designations in such areas as risk management, claims, loss control, etc. A limited number have pursued graduate education, generally obtaining MBAs with financial concentrations. This approach has served us well for some time and continues to do so. I would say that most “No. 1” risk management jobs are those for which employers increasingly expect a risk manager

to have an MBA and some combination of specialized certifications, as well as 10 or more years' experience in corporate risk management.

While this set of credentials has served us well, the key to the future for this discipline—bordering on a profession—is getting out of the traditional box and broadening our functional focus and supporting skills more toward general management. This includes the requisite leadership traits and skills that make the best leaders of critical core competencies and functions—and, often, of large numbers of people. One approach to this is taking the generic risk management model of risk identification, assessment, measurement, mitigation and monitoring and being skilled at applying it to all significant or material risks to the enterprise. This is the next level of our practice and will open doors into senior ranks that may not have been so wide in the past.

Making this leap is not that difficult, but it requires energy, strategic focus and, most of all, the ability to sell your ideas and influence senior managers effectively—the “general” skills list where leadership is key to success. This means risk managers need not only the same set of educational credentials as in the traditional realm (assuming a graduate degree, preferably an MBA) but also specialized continuing education in enterprise risk, project management, strategic planning and thinking. Success in this broader realm sets the stage for executive general management opportunities like never before, where “executive presence” will become critical to your advancement.

Finally, no matter what direction you take in your career, as a practicing risk manager or risk manager in training, the future is bright and full of opportunity. These may be tough economic times, but they are also unprecedented in offering people who understand the nature of risk and how to manage it an unusual chance to make

See MANDEL/page 12

# What to expect from an insurer-appointed attorney

By Louie Castoria

Your company has been sued for damages.

Your insurer has appointed a defense attorney from its panel counsel list. In walks a well-dressed stranger who is about to guide you and your company through the procedural thicket and risks of a lawsuit. While the insurer approves the rates the law firm charges, pays the bills—usually after your deductible is expended—and controls the frequency and



format of counsel's written reports, the fact is that you're this lawyer's client.

Here are some things you are entitled to expect from your newfound advocate:

- **Communication:** The No. 1 complaint about lawyers is that they don't communicate with their clients. You should expect your appointed ally to keep you abreast of litigation developments, without you having to ask.
- **Expertise:** No attorney can be an expert in all areas of the law. Your insurer has selected panel firms because they have areas of expertise—often several practice areas in one law firm.
- **Early discussion of settlement:** More than 90% of all civil cases settle. With those odds, it's unwise to leave settlement discussions for the courthouse steps. An experienced defense attorney can usually tell at an early stage whether a case is "settle-able." Don't accept an answer that "we won't know until the depositions are done."

In most cases, an early settlement is going to cost less than one close to trial. Why?

Because as trial draws nearer, the plaintiff's attorney will have invested more out-of-pocket money in the case, and thus will advise his or her client not to settle at a low figure. More importantly, you and your company will lose a lot more time, money and energy in the lawsuit. Even if you don't want to settle, ask your counsel what the plaintiff's demand is, and what figure he or she recommends for settlement. That way, if you do choose to go to trial, it will be based on an informed business judgment.

- **Respect for your business:** Litigation deadlines can be tight and can impose real hardships on busy executives. Your counsel should give you advance notice of upcoming events that will require time from people in your company, and should obtain extensions of deadlines—when possible—to reduce litigation stress on you and your staff.

- **Involvement:** You know a lot more about your business than your counsel. A good attorney knows this and will solicit the client's input in every stage of the litigation.

- **Preparation:** Your personnel who will be deposed need to be prepared. Except in small cases, it is common for depositions to last a full day or more per witness. That's a lot of time answering loaded questions from your opponent's counsel. Expect your counsel to protect your people by giving them detailed training to withstand interrogation.

- **Courtesy:** Business clients, who have spent years developing good public profiles, need outside counsel who project the same professional image. It's important to have an aggressive, strong advocate, but those

qualities can exist without discourtesy to your staff, witnesses and, most especially, to the court and its personnel.

- **Confidentiality:** Respect for the confidentiality of a client's proprietary information has never been more important. Apart from trade secrets and intellectual property rights, your business and its personnel have important privacy rights under the law. Your lawyer needs to prevent the disclosure of confidential information.

- **Practicality:** It has been said that a lawsuit is the least efficient method ever devised to move money from Point A to Point B. As the client, you should question whether expensive motions, especially battles over discovery, are really worth your money.

- **Fair billing:** How much is too much? Clearly, hourly rates are only part of the equation. The key to efficiency is case staffing. Legal work should be performed by the attorneys or paralegals who can most competently and efficiently perform it. By becoming involved in legal staffing decisions early in the case, the risk manager can help ensure that his or her employer is getting the best value for its legal services dollar.

By setting the standards high and involving the risk manager as a partner, firms can increase business clients' satisfaction with the legal services they receive from insurer-appointed defense counsel.

*Louie Castoria is a partner in the San Francisco office of Wilson, Elser, Moskowitz, Edelman & Dicker L.L.P., an international defense and insurance coverage law firm.*

## Mandel: Development

Continued from page 10

significant contributions. Don't miss this opportunity by delaying the continuing education and skill development so crucial to competing in today's business environment.

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# Health care: State proposals push for universal cover

Continued from page 4

proposals. Many Oregon employers, for instance, opposed their state's ballot measure because they contended the single-payer system it called for would be expensive, unwieldy and difficult to administer.

Many observers also say that health care is a national, not a state, problem; that problem, they say, should be addressed by Congress rather than in piecemeal fashion by the states.

Furthermore, a possible complication in introducing universal health care at the state level is the Employment Retirement Income

Security Act of 1974, whose pre-emption provisions prohibit states from requiring employers to offer workplace coverage or directly regulate private employer health plans.

There is general agreement that, with many states now beset with budget woes, there may be relatively little immediate success in advancing these proposals, but proponents say they plan to continue their battle.

Meanwhile, a report issued in November by the Washington-based Institute of Medicine recommends that three to five states be selected to embark on model projects

designed to extend health coverage to all residents.

"I think the activity is picking up, especially since the Institute of Medicine report," said Rachel DeGolia, operations director at the Cleveland-based Universal Health Care Action Network, a national umbrella organization. "There's beginning to be a growing recognition" that states may become laboratories for health care reform, said Ms. DeGolia.

## State proposals

In Oregon, supporters of Measure

23, which would have created the nation's first universal health care program, say they still plan to push for a single-payer plan in the state. They blame defeat of their measure, which was supported by only 21% of Oregon voters, on a \$1.3 million campaign financed by insurance and hospital holding companies.

Here is a sampling of efforts in other states:

- In Maine, John Baldacci, the incoming Democratic governor, signed an executive order last month establishing the Governor's Office of Health Care Policy and Finance to draft a plan to provide

health insurance to all Maine residents. According to the governor's office, a plan will be presented to the Legislature within six months and implemented this year. The plan is expected to propose a joint public-private partnership.

Separately, in 2001 the Maine Legislature authorized a bipartisan task force, the Health Security Board, to explore a single-payer system in the state. It is expected to issue its final report in about a year.

- In California, Bruce Bodaken, chairman, president and chief executive officer of San Francisco-based Blue Shield of California, drew national attention in December when he called for universal coverage for all Californians. "The current system and its underlying economics are unsustainable," said Mr. Bodaken in a speech. The California Legislature is expected to consider several proposals, including one by Sen. Sheila Kuehl, D-Los Angeles, that is expected to propose a single-payer system. There is also the possibility of a state ballot measure.

**A November report by the Washington-based Institutes of Medicine recommends that three to five states be selected to embark on model projects designed to extend health coverage to all residents.**

- In Illinois, a bill introduced into the state Legislature last month calls for the introduction of a health care access plan for all Illinois residents over a five-year period. The bill calls for a bipartisan commission to study the issue and recommend one or more plans that would be implemented in the fifth year, said Jim Duffet, director of the Champaign, Ill.-based Campaign for Better Health Care.

- In Maryland, a bill that was introduced last week calls for a public-private partnership to deliver high-quality, affordable health care, said Glenn Schneider, deputy director of the Baltimore-based Maryland Citizens' Health Initiative. The proposal, in part, requires every business to either "offer quality and affordable health care to employees or pay into a fund for the uninsured," said Mr. Schneider.

- In Massachusetts, Senate Bill 686, which is now in committee, would create a single-payer plan through the creation of "The Massachusetts Health Care Trust." It would provide reimbursement for all "medically appropriate" health care services offered by the provider of each resident's choice and fund capital investments for health care facilities and resources statewide.

Catherine Hoffman, associate director of the Washington-based Kaiser Commission on Medicaid and the Uninsured, said the states are "at the level where it's not so easy to ignore social problems. And

See **HEALTH CARE**/page 16



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## Health care: Proposals pushed

Continued from page 14

since the states are administering the Medicaid programs, they recognize how many people in their states are going without coverage or going on and off their Medicaid programs, and they feel responsibility."

Ms. Hoffman said, "Having gone through a federal effort in the early '90s to try and do something about the health insurance coverage from a national perspective and seeing that fail, they probably recognize if something's going to happen, it's probably going to happen at the state level."

### Prospects for passage

But Ms. Hoffman acknowledged that the prospects for state initiatives to expand coverage are "far less than they were three years ago. The environment isn't there for these states to be able to do things for themselves when they're at the same time cutting their Medicaid programs."

Helen Darling, president of the Washington Business Group on Health, said, "I don't think, realistically right now, that anything's going to pass, given the condition the states are in. They're really challenged to pay for the people they're already authorized to cover, to keep up with what they're already doing."

"I'm very skeptical that in 2003 there's any hope that a bill like those would be passed," Ms. Darling said.

Neil Trautwein, director of employment policy at the Washington-based National Assn. of Manufacturers, concurred. "It's hard to see any state being willing to being able to attract the resources in order to put forth a state-based universal coverage option," he said.

"I think, if anything, the proliferation of initiatives is a testament to the complexity of the American health care system and concerns about cost and continued gaps in the access," Mr. Trautwein said. "But from the NAM's perspective, the best way to proceed is to protect what we have in terms of employer-based coverage, and then help more people buy in to private coverage with refundable tax credits" and other measures, he said.

But proponents of these proposals counsel patience, given that the health care system's problems are unlikely to disappear any time soon. Mr. Duffet gives the Illinois proposal a "50-50 shot" this year, but he added, "If it doesn't happen this year, we feel that the chances of it happening next year are very, very good, because the health care crisis is only going to be so much worse in a year from now."

Maryland's Mr. Schneider said also, "We will push hard for the bill this year," but if it does not pass during Maryland's 90-day legislative session, his group will continue to educate its members "and finish the job next year."

A spokesman for California Blue Shield said, "We don't think anything will happen in this calendar year, but we're hopeful by the end of this year there will be significant progress."

One possible boost to the state initiatives would be Maine's victory in a case now before the U.S. Supreme Court. In *PhRMA vs. Cannon*, the court will rule on the constitutionality of a Maine law that calls for the state's Department of Human Services to negotiate with drug manufacturers for lower prices for individuals who do not have prescription drug coverage. The court will rule as to whether the Constitution precludes the state

action called for by the law.

A decision in Maine's favor "would signal to states that the Supreme Court is willing to be consistent in its view of states rights, and that would really encourage states to experiment," said Alan Sager, professor of health services and director of Boston University School of Public Health's health reform program.

### A national problem

But some observers contend that health care is not a state issue to begin with.

Brian R. Klepper, executive director of the Jacksonville, Fla.-based Center for Practical Health Reform, said, "Health care is not a state problem. It's a national problem. Even though health care is delivered locally, it is very often organized and certainly financed and supplied nationally." Mr. Klepper said that the problems faced in Jacksonville are the same as those faced in Wichita or Chicago.

"You have to wonder about the effectiveness" of a state approach to the issue, said Joe Martingale, national health care strategy director for Watson Wyatt in New York. "Health care is a national issue, and it probably isn't going to be terribly effective for states to address this piecemeal—not that anybody expects federal action any time soon, either."

The spokesman for California Blue Shield said that "it's clearly a national problem, but sometimes the best solutions begin with the states." He added, "We think there would be support for California adopting its own program and seeing how it works."

"There's also a lot of interest in a national solution," the spokesman said. "You can almost guarantee that the Democratic presidential candidates are going to be talking about universal health care coverage."

Employers groups are not necessarily taking a rigid stance in opposition to these proposals. While the Maine Chamber of Commerce, for instance, does not support the idea of a single-payer system, it is waiting to see how the concept of a joint public-private partnership would be developed, said senior governmental affairs lobbyist Peter Gore. "It's something we're watching closely," he said.

Any universal coverage solution, though, ultimately is likely to mean added costs for businesses.

Mr. Martingale said, "I think it's inevitable the requirements to provide a minimum level of coverage end up costing the business community and the consumers as well, because these costs ultimately find their way into the cost of products and services that businesses provide."

Becky Cherney, chairman of the National Business Coalition on Health and president of the Central Florida Health Care Coalition in Orlando, said, "We know it's going to cost everybody something, but we want to share the pain and share the cost."

## Commentary

### Some tort reforms are hard to swallow

Pity poor McDonald's Corp. In winning the dismissal of a suit blaming it for the obesity and health problems of two teenagers, the company was forced into the tobacco industry defense: It can't be held liable, because everyone knows its products pose health risks. This is not a position a restaurant business would want to take very often.

For that reason, an eager congressman, Rep. Ric Keller, R-Fla., hustled to introduce a new bill, the Personal Responsibility in Food Consumption Act, that would bar suits "relating to consumption" of food products that otherwise meet regulatory and statutory requirements.

This is the kind of tort reform we don't need.

No one is against personal responsibility. I blame only myself if I eat my entire recommended daily calorie intake at breakfast.

Companies need to show a reciprocal sense of responsibility, though, and too many don't. You don't have to look far for examples of corporate behavior that virtually anyone—probably even Rep. Keller—would find shamefully irresponsible in a person.

Gunmakers, to take one example, decided in the 1990s against taking voluntary steps to halt illegal weapons sales by their dealers for fear that it would be seen as "an admission of responsibility" for the problem, according to testimony in a pending lawsuit against the manufacturers by a dozen California cities and counties. Documents showing that tobacco companies manipulated nicotine levels in cigarettes took years to unearth.

This is the kind of behavior the tort system is designed to correct. Along with compensating victims, lawsuits reinforce weak or inconsistent government regulation. Tort litigation is a free society's way of telling a company it's doing something wrong.

This is not to say some reforms aren't in order. The unique scale of the asbestos mess, for example, makes it a perfect target for congressional action. Limits on excessive punitive damage awards, forum shopping and other abuses may be good ideas.

But barring an entire category of complaint from the courthouse, as Rep. Keller's bill would do, is a

dangerous road to follow and an infringement on the proper role of the courts.

Just look at the McDonald's case, a widely derided lawsuit that U.S. District Judge Robert W. Sweet threw out last month in a ruling that was just as widely praised.

Judge Sweet found—to McDonald's relief, one assumes—that the dangers of salty, high-fat foods are so widely known that the company cannot be found negligent for failing to warn its customers. He also found that the plaintiffs—the parents of the two teenagers—failed to support claims of deceptive advertising or to prove that it was McDonald's food specifically that caused their

children's health problems.

He left the door open to an amended complaint, though, based partly on Chicken McNuggets. McNuggets, the judge observed, are a "McFrankenstein creation of various elements not utilized by the home cook" that contain twice the fat of a McDonald's hamburger. If plaintiffs can show that the highly processed nature of McDonald's food makes it more dangerous than most people assume, they could argue that the company had a duty to warn, he found.

Judge Sweet, in other words, did

exactly what judges are supposed to do: He sorted through the complaint's various allegations, rejected the ones that weren't supported and left room for those that had a chance of persuading a jury, however slim that chance might be.

That's the judiciary's job, and Congress should not intercede to change the rules for one industry. If other businesses find champions like Rep. Keller and are immunized against supposedly "frivolous" lawsuits, the result could be that real injuries will go uncompensated and their causes uncorrected.

As much as some companies would like to be insulated from potential tort liabilities, doing so isn't likely to encourage responsible corporate behavior.

Lawsuits, unlike Chicken McNuggets, can be a healthy thing.



Douglas McLeod

**I blame only myself if I eat my entire recommended daily calorie intake at breakfast.**

Senior Editor Douglas McLeod's commentary appears periodically and on [www.business-insurance.com](http://www.business-insurance.com). He can be reached at [dmcleod@crain.com](mailto:dmcleod@crain.com).

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## Political risks simmering in Venezuela



PHOTO: ENRIQUE MENDOZA

Venezuelan demonstrators rally against President Hugo Chavez in Caracas on Feb. 6, about two months after widespread strikes crippled the country's economy.

By ROBERTO CENICEROS

**CARACAS, Venezuela**—Although Venezuela is seeing the months-long strike that crippled its industry start to wind down, many political insurers remain wary of the country's risk profile.

It is likely impossible to find insurers willing to write new political risk coverage for business related to Venezuela, said Dan Riordan, Washington-based managing director for Zurich Emerging Market Solutions, a unit of Zurich North America that writes political risk coverage.

Thus far, though, insurers say they don't expect a significant number of commercial claims related to the unrest.

During the strike, which began in early December, many local and international property insurers stopped writing coverage and closed their offices in Venezuela. Insurers were particularly concerned about the capital city of Caracas, where scattered political violence and demonstrations continue, said

Jorge Luis Hernandez, president of risk management consultant Qstion Managers in Caracas.

Like other businesses, insurers in the country closed their offices during the strike and ceased all operations, including issuing new policies and processing claims, agreed Javier Mirabal, a native of Venezuela who is operations manager-Latin America for marine and commercial insurance adjuster Steeg Kingston Inc. in Houston.

Although many insurer offices had reopened last week, it remains unclear whether the strike's end will encourage property/casualty insurers to resume writing new coverage for Venezuelan risks.

Liberty Mutual Insurance Co., which acquired Caracas, Venezuela-based insurer Seguros Caracas in 1995, would say only that, due to the economic and political situation in the country, it expects 2003 to be a difficult business year for the entire Venezuelan insurance industry. Seguros Caracas writes several lines of business, including proper-

See **VENEZUELA**/next page

## Switzerland reviews pension security

### Financial, demographic changes

By CAROLYN ALDRED

**BERNE, Switzerland**—Falling financial markets and an aging and longer-living population are forcing a major review of Switzerland's employer-sponsored pension funds and how they are financed, as concern grows about insurers' and pension plan sponsors' increasing liabilities.

The Swiss government announced in late January that a review of the country's employer-sponsored pension system would concentrate on the financial stability of pension funds, the future of the system and its supervision, and revisions of the 1985 law on occupational pensions.

A mandatory guaranteed minimum interest rate of 4% already has been lowered by Switzerland's Federal Council to 3.25%, effective last month, but insurers claim that the rate still is too high in the current financial climate.

Under Swiss law, every employee earning more than 25,000 Swiss francs (\$18,330) is entitled to an occupational pension, funded at least 50% by his or her employer. The pension arrangements, which were laid down under the 1985 Mandatory Occupational Pensions Act, are an important part of Switzerland's so-called "three-pillar system" of state-provided pensions, occupational pensions and private pensions.

A revision of the occupational pension legislation is being debated

by parliament. One proposal would reduce the rate used to calculate pension amounts, known as the capital to pension conversion rate, to 6.8% from 7.2% over a 10-year period.

For example, at a rate of 7.2%, a worker who retires with \$100,000 in pension capital would receive an annual pension of \$7,200. Lowering this conversion rate is necessary because people are living longer, a Swiss Interior Ministry spokesman said. Another proposal would widen the provision of occupational pensions to all employees earning more than 18,000 Swiss francs (\$13,198), he said.

"This is the first major revision to the law since its introduction in 1985 and is necessary because of the state of the markets and our aging population," the spokesman said.

The guaranteed minimum interest rate already has been lowered to 3.25% for one year, when it will be reviewed again, but "there's still a big political fight, because insurers say that it is too high to make a profit, while employees say it is too low," he said.

"Switzerland, in common with many European countries, has compulsory guaranteed minimum rates, and pension funds and insurance companies are really struggling to meet their ongoing guarantees. It is biting into their reserves," said Mark Sullivan, European partner for London-based Mercer Human Re-

See **SWISS**/next page



PHOTO: AFP

Prestige Captain Apostolos Mangouras, second from left, released from jail in Teixeira, Spain, accompanied by his lawyers.

## P&I club bails out oil tanker's captain

**LONDON**—The protection and indemnity insurer of the sunken oil tanker Prestige said it would post bail for the captain of the vessel, which spilled its cargo after breaking up of the coast of Spain in November.

The London Steam-Ship Owners' Mutual Insurance Assn. Ltd. said it has agreed to pay the 3 million euros (\$3.2 million) bail required to secure the release of Captain Apostolos Mangouras, who was arrested by Spanish authorities after the accident.

It is unusual for P&I clubs to post bail in this manner, but, in this case, the level of bail was "offensive" and the club decided to help in light of the "very special circumstances," said Paul Hinton, chief executive of A. Bilborough & Co. Ltd., which manages the London Club.

"The decision has been made following careful review of very many complex considerations," Mr. Hinton said in a statement. "Our committee, which is comprised of shipowners, has been shocked at the treatment of a man who, by all accounts, put himself at grave personal risk to do his duty in very difficult circumstances."

The Bahamian-flagged Prestige suffered structural damage in heavy weather and subsequently broke up while under tow. The London Club said that the ship had been refused entry to a place of refuge in sheltered waters close to the Spanish coast.

The Prestige was carrying more than 20 million gallons of fuel oil, much of which has leaked.

—By Sarah Veysey

## World Updates

### Arch's Bermuda unit boosts excess capacity

Arch Insurance (Bermuda), a division of Arch Reinsurance Ltd., has increased its excess liability capacity to \$40 million from \$25 million. Arch Insurance (Bermuda) was established in March 2002 to write property/casualty insurance.

### Max Re posts loss on lower returns

Max Re Capital Ltd. reported a \$5.7 million loss for 2002, compared with a \$2.5 million profit for 2001, due to lower returns on its alternative investments. The Hamilton, Bermuda-based reinsurer also reported a drop in gross premiums written, to \$656 million in 2002 from \$710.6 million in 2001. But the reinsurer reported a substantial increase in premiums derived from traditional property/casualty reinsurance as it followed its strategy to reshape its book of business. In 2002, Max Re's gross premiums written included \$641.3 million from property/casualty business and \$14.7 million from life and annuity business. In 2001, the Max Re book included \$495.5 million in property/casualty business and \$214.1 million in life and annuity business.

### Renaissance Re profits up 122%

RenaissanceRe Holdings Ltd.'s profits rose 121.9% in 2002, to \$364.8 million. The Hamilton, Bermuda-based reinsurer reported \$1.17 billion in gross premiums written for 2002, an increase of 133.4% over 2001. Renaissance Re benefited from a low level of catastrophe claims in 2002, the reinsurer said in a statement. "We continued to expand our leadership in our core catastrophe reinsurance business and substantially grew in specialty reinsurance and individual risk," James N. Stanard, chairman and chief executive officer, said in a statement.

### XL renames global P/C unit

XL Capital Ltd. has changed the name of its international large commercial property/casualty business to XL Insurance Global Risks. The unit, formerly known as XL Winterthur International, comprises much of the business that XL acquired from Winterthur Swiss Insurance Co. in 2001. XL also plans to change the name of several other units it acquired as part of that deal.

## Swiss: Pension review

Continued from previous page  
source Consulting.

Although Swiss pension funds generally have balanced investment portfolios, the downturn in the economy, declining financial markets and a further retreat from the equity market are making it impossible for funds to earn enough, he said.

According to Mr. Sullivan, Swiss funds, on average, invest 28% in equities, 34% in bonds, 24% in property and 14% in cash.

Zurich-based Swiss Life Group, one of Switzerland's largest pension providers, is one of several insurers calling for more flexibility in the system.

The reduction of the guaranteed minimum rate is a "step in the right direction," but as the risk-free interest rate achievable today is about 2.2%, a further review will be needed, said a Swiss Life spokesman, noting that Swiss Life would prefer regulations closer tied to market conditions.

Winterthur Life & Pensions last year tapped its reserves for the first time to meet regulatory solvency requirements, reducing its reserves at the end of June 2002 to 900 million Swiss francs (\$659.9 million), a fraction of the level in the late 1990s, when equity markets were performing well.

"The continuing negative developments on the equity markets are forcing insurance companies to shift a considerable proportion of

their investments to risk-free securities," such as Swiss government bonds, the company said in a statement. Winterthur Life & Pensions added that, as a result, the company favors "a more flexible approach and a reduction of the minimum interest rate for occupational pension schemes in the current climate."

Zurich Switzerland, a unit of Zurich Financial Services Group, favors a reduction in the conversion rate to 6% and a more flexible guaranteed minimum rate that reflects current financial market conditions, said a spokeswoman.

Joe Baettig, chairman of the Swiss Insurance Assn.'s Life Committee, also is calling for a more flexible approach to providing occupational pensions.

Until now, the occupational pension system has been "held up as exemplary," with most companies supplementing the mandatory pension with extra, non-obligatory benefits, Mr. Baettig said. However, lower interest rates, changing capital markets, longer life expectancy and an aging population means that a radical review of the system is needed, he said.

The "overabundance" of occupational pension regulations needs to be "scaled down," Mr. Baettig said. He advocated the elimination or limitation of minimum interest rates as well as the scrapping of capital guarantees and the provision of more freedom for policyholders.

## Venezuela: Political risks

Continued from previous page  
ty/casualty coverage for small and midsize businesses.

Businesses, labor and other groups participated in the strike as part of their ongoing attempts to pressure Venezuelan President Hugo Chavez into leaving office. Anti-Chavez forces fear he will lead the country toward a Cuban-style dictatorship, accusing him of pushing Venezuela into economic and political turmoil with populist reforms aimed at redistributing wealth to the poor.

In 1992, Mr. Chavez, then a lieutenant colonel in the army, participated in a failed coup attempt and was imprisoned for two years. He then won a presidential election in 1998 and was re-elected to a six-year term in 2000.

Because of the current political climate, many Venezuela-based executives of multinational corporations have not returned since going back to Europe or the United States for the year-end holiday season.

Out of concerns for the security of its employees, Microsoft Corp. on Jan. 17 closed its sales and marketing operations in Caracas and has not reopened them despite the winding down of the strike, a company spokesman said.

Even though the strike is ending, political and economic conditions remain volatile, Mr. Riordan said. In the short term, the cooling of the strike is good news for Venezuela's economy, he noted. But, he said,

that doesn't solve the underlying problems, he added.

So far, however, a large number of insurance claims stemming from the recent turmoil is not expected.

Significant business interruption claims are unlikely, as such coverage is not widely purchased in Venezuela, said Mr. Mirabal of Steeg Kingston.

There has also been relatively little property damage related to political violence, added Qstion Managers' Mr. Hernandez. But, he not-

**Significant business interruption claims are unlikely, as such coverage is not widely purchased in Venezuela.**

Javier Mirabal  
Steeg Kingston Inc.

ed, local property insurers have encountered difficulties renewing their reinsurance treaties as a result of the country's political and economic situation. In some cases, they don't know whether they will be able to renew those treaties after receiving extensions of their current contracts, he said.

Political risk policies that cover property confiscation or the inability to transfer or convert currency typically have at least a 180-day waiting period. But so far, Mr. Riordan said, there have been no actions that he knows of that would

trigger such claims.

In fact, the end of the strikes will help avert the filing of political risk claims because that will help the country access foreign currency, Mr. Riordan said.

However, President Chavez last week announced he would impose foreign exchange controls designed to slow the devaluation of the bolivar. Although that is a concern, Mr. Riordan said, the news is mitigated somewhat by the ending of the strike, as oil production and distribution have again increased in the oil-rich nation. Mr. Riordan said he does not expect the exchange controls to remain in place for long.

The strike crippled oil production, but last week President Chavez said Venezuela had increased production to nearly 2 million barrels per day. That, however, remains short of the normal daily average of about 3.1 million barrels.

Issues such as how long President Chavez will remain in office and whether the government will eventually seize properties remain a concern, said a political risk insurer who is monitoring the situation but asked not to be identified.

"Overall, the country is now a horrible risk," the insurer said. A potential economic collapse could also spell losses for export credit insurers that insure banks, exporters and investors that purchase that coverage, he said. "The big question now is, where is the country going?"

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# Reporters: War risk coverage for journalists is costly

Continued from page 4

389 journalists were killed while carrying out their work between 1992 and 2001. Only 62 of those reporters died in crossfire; the majority were murdered in reprisal for their reporting, according to the CPJ. Other journalists were killed outside of war zones, such as while covering violent street demonstrations.

The CPJ estimates that 19 journalists were killed last year, while the International Federation of Journalists, a similar organization based in Europe, estimates that 65 journalists and five media workers were killed on assignment in 2002. The CPJ tracks only those who were murdered, while IFJ includes all types of casualties, including those who may have died in accidents (see chart).

Underwriters are skittish about insuring journalists sent to cover war, because "it's a high-risk occupation," explained Lloyd Young, senior vp and chief underwriting officer in the domestic accident and health division of American International Group Inc. in New York.

"Everybody else is running away, and (journalists) are running toward," said Anthony J. Galioto, president of AIG's domestic accident and health division. "It's their job."

But workers comp insurers, in many cases, are required to offer some coverage for the reporters. The protections of the state-based workers compensation system stretch beyond U.S. borders if the journalists meet two eligibility requirements: They must be in harm's way because of job requirements, and they must have a connection with a specific state.

"If the initial hiring of the em-

ployee took place in a specific state, the nexus with a state could be satisfied, even if the worker is living in a foreign country on a more regular or long-term basis," explained Nancy Schroeder, assistant vp-workers compensation for the National Assn. of Independent Insurers in Des Plaines, Ill.

Which state's law applies also could be determined by where the employee lived or worked before being sent overseas, according to Vickie Dorsey, senior counsel with the National Council on Compensation Insurance in Boca Raton, Fla.

State comp systems also vary in the way they distinguish between "temporary" journalists stationed abroad and "permanent" ones, she added.

Overall, "the laws that cover traveling employees are much broader than those for employees that are living in the area," Ms. Schroeder said.

Typical workers comp benefits for a wounded journalist include evacuation to an adequate medical facility, such as a military base, and full medical benefits. Journalists also receive wage-loss compensation and, in the case of a death, a burial allowance and stipends for survivors.

Employers seeking to provide workers compensation-like benefits to journalists not covered by their domestic comp programs can purchase coverage known as foreign voluntary compensation/repatriation insurance, Ms. Dorsey said.

The policies are written on a manuscript basis and are rated based on the location and concentration of employees, with underwriters taking into consideration safety precautions and the particular risks they face, explained Kevin

Behan, senior vp in the casualty division of AIG Worldsource.

Besides workers comp, most major U.S. media organizations also purchase AD&D or travel-accident insurance for the reporters they send overseas.

Since the attacks of Sept. 11, 2001, though, war risks have been excluded from these policies, forcing the organizations to buy back the coverage for an additional premium. And the cost to do so can be substantial.

**Many of the war risk coverage buyback provisions have seven-day or 10-day clauses that allow underwriters to increase premiums if conditions in a particular region deteriorate.**

While most news organizations do buy back the war risk coverage, some are self-insuring the risk because of the cost of coverage, said Michael Klein, president of MMG Agency Inc. in New York.

The premiums for buying back war risk coverage can be as much as \$12 per month per \$1,000 in coverage, compared with 75 cents per year per \$1,000 for a policy without the buyback, he estimated.

Most media companies purchase policies with limits of \$1 million, so a year's war risk coverage could total \$144,000, compared with \$750 for coverage without the war risk buyback. But the buybacks also are offered on a short-term basis, with their cost depending on the volatility of the region where the reporter

is being sent, according to Mr. Young of AIG.

"We provide quotes for 30-day periods of time and then watch how the war escalates or develops," he said. "For example, if a reporter is sent to Iraq, we would provide coverage for shorter terms than if somebody was just going to South Africa."

Many of the buyback provisions also have seven-day or 10-day clauses allowing underwriters to increase premiums if conditions in a particular region deteriorate.

AIG, for example, has a 10-day clause, allowing underwriters to make changes, according to Mr. Young.

In some cases, insurers are establishing aggregates on group AD&D coverage to limit their exposure because of the hits they took on Sept. 11, according to Mr. Klein.

"They're limiting their liability now," he said. "You can't get \$5 million on a guy anymore unless you can show that his earnings are at least one-tenth of that. If a reporter makes \$500,000, we might get \$5 million, but if he makes \$200,000, he gets \$2 million."

Insurers are also limiting the scope of coverage. In the past, most AD&D policies also included repatriation and medical evacuation, but those coverages now must be purchased as endorsements.

"Repatriation of remains, medical evacuation and double dismemberment schedule, spouse educational benefits were all included in the past," Mr. Klein said. "But now, those enhancements that were looked upon as throwaways" can be obtained only for an additional premium, he noted.

While most U.S.-based journalists sent on overseas assignments are

covered by workers comp or an AD&D policy, and sometimes even a kidnap and ransom policy, freelancers and foreign reporters in third-world countries generally are not.

For example, news organizations are having trouble persuading their insurers to include so-called "permanent freelancers," said George Austin, area vp at Arthur J. Gallagher & Co. in White Plains, N.Y.

"Up until this year, we have been able to include the permanent freelancers, those who are on retainers. But, unfortunately, this year we just haven't found a carrier willing to provide coverage," he said.

Coverage for third-world nationals also is limited, industry sources say.

Because of the dearth of insurance coverage for journalists not employed by major media companies, a coalition of media companies, journalists and press freedom groups led by the IFJ is creating a global risk management program to protect journalists. Part of that initiative is to ensure that journalists and their assistants working in war zones or dangerous areas are covered by insurance.

Reporters Without Borders and the Paris-based insurer Bellini Prevoyance, in partnership with Bermuda-based ACE Ltd., are offering medical and AD&D coverage to European journalists on assignment anywhere in the world.

But there is no such program available to U.S. freelancers, nor to journalists from countries outside of the European Union, according to Tina Carr, director of the London-based Rory Peck Trust, an organization concerned with the safety of freelance journalists worldwide.

## Products & Services



### New company provides risk management services

**BALTIMORE, Md.**—SAFE Risk Management Systems L.L.C. is a new independent source of risk management services.

The Baltimore-based firm offers a number of services aimed at assessing and mitigating risks. Those services include vulnerability assessments, cost of risk analysis, network security, protection of human resources systems, physical plant protection, design of security policies, intellectual property protection, disaster recovery and others.

Peter Teuten, president of SAFE Risk Management Systems, said in a statement that the company was

established so that businesses that couldn't dedicate the resources necessary to establish in-house risk management systems would have options other than those provided by their insurance brokers.

"Unfortunately, asking such an organization to handle risk management needs creates an obvious conflict of interest," Mr. Teuten said. "We give businesses the opportunity to turn to an independent resource at a fraction of the cost of either creating an internal solution or relying upon partial sources."

More information is available at [www.saferms.com](http://www.saferms.com).

### Coverage offered for intellectual property

**WEST CHESTER, Pa.**—Venture Programs Inc. is offering coverage to manufacturing clients for third-party infringement on patents, trademarks, copyrights and other intellectual property.

The VIP Defender policy indemnifies policyholders for damages and legal expenses and is



written to limits of up to \$2 million. Additional limits can be arranged. The minimum premium is \$50,000.

Venture Programs is the programs division of Harvey Insurance Group in West Chester, Pa. The coverage is written by Hiscox Syndicate 33 at Lloyd's of London.

Venture said its product is the first intellectual property coverage to focus exclusively on industrial risks instead of technology and life sciences risks.

More information is available at [www.venture-ip.com](http://www.venture-ip.com).

### Benefit foundation offers new designation

**BROOKFIELD, Wis.**—The International Foundation of Employee Benefit Plans is offering a new designation, called Compensation Management Specialist, as part of its Certified

Employee Benefit Specialist Program.

The designation consists of three courses: Compensation Concepts and Principles, Executive Compensation and Compensation Issues, and Human Resources and Compensation Management. An examination must be passed with each course to earn the CMS designation.

CEBS is a well-recognized designation among employee benefit professionals and adding the CMS track "creates the first total compensation designation in the industry," said Jerry Rosenbloom, academic director of the U.S. CEBS program at the Wharton School of the University of Pennsylvania, in a statement.

More information is available at [www.cebs.org](http://www.cebs.org) or at 262-786-6710, ext. 8579.

### New software released for loss-control diagramming

**BEAVERTON, Ore.**—The CAD Zone Inc., a provider of diagramming software for fire risks, has introduced the latest version of its Insurance Zone loss control software.

The Insurance Zone 6.0 is designed for property risk and loss



control analysis, fire protection consulting and underwriting.

The newest version includes an optional 3D viewer that lets the user recreate floor plans that exactly represent an insured property. Users can choose from hundreds of National Fire Protection Assn. and industry standard symbols in 3D to show details such as doors, stairways, sprinklers, hydrants and others.

The new version allows buildings to be drawn faster, simplifies the drawing of streets and intersections and provides for diagrams to be imported and exported in a number of formats.

The Insurance Zone 6.0 costs \$399, and the 3D viewer is \$299. Purchased together, the total is \$599, plus shipping and handling.

Orders and requests for free evaluation copies can be placed by telephoning The CAD Zone Inc. at 800-641-9077 or by visiting [www.cadzone.com](http://www.cadzone.com).

# Columbia: Boyle ruling may limit contractor liability

Continued from page 1

liance—a consortium made up of Boeing Co. and Lockheed Martin Corp.—has been NASA's contractor for space shuttle operations since 1996. A spokesman for the consortium said that it had an indemnification agreement with NASA.

Although investigators have yet to determine the cause of the tragedy—or to ascribe sources of liability—legal experts say that the Supreme Court's 1988 decision in *Boyle vs. United Technologies* may provide shuttle contractors with some protection against lawsuits.

That case began in 1983, when Marine Lt. David Boyle died in a helicopter crash off the Virginia coast. Lt. Boyle survived the initial crash but drowned when water pressure blocked the escape hatch. His family sued United Technologies Inc., which manufactured the aircraft.

A federal district court awarded the family \$725,000 in damages, but both the U.S. 4th Circuit Court of Appeals and the U.S. Supreme Court disagreed. Writing for the majority in the high court's 5-4 decision, Associate Justice Antonin Scalia held that state law "is displaced where the judgment against the contractor would threaten a discretionary function of the government."

Justice Scalia wrote that state law that imposes liability for design defects in military equipment does not apply when:

- The United States approves reasonably precise specifications.
- The equipment conformed to

those specifications.

- The contractor informed the government about any dangers in the use of the equipment known to the supplier but not to the government.

"The issue is whether a particular defect was directed by the government as part of specifications. If the problem is a design defect" and the manufacturer simply built the product according to the government specification, the contractor would have immunity, said James Kreindler, a partner in the New York law firm of Kreindler & Kreindler, which represents plaintiffs in aviation liability cases.

"I think it gives the contractor a lot of protection, but I think what it's really protecting is the interest of the federal government in the procurement of equipment by the United States in an area that is of uniquely federal interest," said Jay B. Eggspuehler, an aviation law expert of the Columbus, Ohio, law firm of Wiles, Boyle, Burkholder & Bringardner Co. L.P.A.

The *Boyle* decision wants "to protect the government's ability to procure the equipment without the threat of litigation. Therefore, the contractors get to benefit from that protection afforded the government," said Mr. Eggspuehler.

Courts look for a "continuous back-and-forth process, where the government is fully aware of what the design features are, they have exercised their discretion over those features and then they issue what amounts to an approval based on

their review of the design choices," said Mr. Eggspuehler.

"The *Boyle* decision stands for the proposition that the government is not going to be legally liable under traditional state product liability theories," said Philip Touitou, an insurance specialist member of the New York law firm of Ohrenstein & Brown L.L.P.

"*Boyle* provides—and, in some sense extends—the traditional immunity that the government enjoys to military contractors as well," Mr. Touitou said. "Whether there can be some distinction drawn between military vs. civilian applications is something somebody may seek to explore."

Mr. Touitou noted that, as a result of the dismissal of the Challenger astronaut widow's wrongful death suit against the government, as "a practical matter," wrongful death suits against the government or its contractors would be "pretty much precluded."

Mr. Kreindler said that although federal law precluded wrongful death suits against the government by survivors of the five U.S. military personnel aboard the Columbia, the legal options available to the estates of the other two crew members—an Israeli pilot and a NASA civilian employee—remain unclear. He predicted, though, "once the investigation is done and the cause is identified, you'll probably see a serious effort on the part of the defendants to settle the cases."

Mark Behrens, a product liability expert and partner in the Washing-



PHOTO: KRT

A large tank in Nacogdoches, Texas, is among the debris from the space shuttle Columbia, which broke apart as it returned to Earth.

ton office of the Kansas City-based law firm of Shook, Hardy & Bacon L.L.P., said the fact that the Columbia had flown safely for more than 20 years probably indicates that a design defect was not to blame. The craft flew 28 times since its first voyage in 1981.

"Almost any time you have a product with a long life and the product has performed safely for many years...that is strong evidence that the design of the aircraft is probably not going to be the focus of litigation, if it arises. When looking at products with long life usages, from aircraft to elevators, if the product was used safely over many, many years, that's strong evidence that it was not defective," he

said.

"Basically, you've got to look at what part or components are they claiming to be defective as the cause of the action," said Mr. Eggspuehler. "The real issue was what was the root cause. There's a lot to do yet."

As it continues to probe the cause of the disaster, NASA has established a claims-handling system for people who say they have suffered damage from the debris that scattered over a wide area.

"NASA is coordinating with the Federal Emergency Management Agency to address claims that require immediate attention," the space agency said in a Feb. 2 statement.

## Employers deploy grief counselors

**HOUSTON**—Shortly after the space shuttle Columbia went down, shuttle operator United Space Alliance activated its employee assistance program's efforts to help its employees cope with the tragedy.

The Houston-based company's 10,000 employees worked closely with the National Aeronautics and Space Administration to operate and maintain the space shuttle and prepare its crew for launch. Starting on the day of the crash, grief counselors from the company's EAP,

**Grief counselors from United Space Alliance's employee assistance plan were at the company's three main locations shortly after the shuttle disaster to assist employees.**

Columbia, Md.-based Magellan Behavioral Health, arrived at United Space Alliance locations in Alabama, Florida and Texas to meet with employees to help them deal with grief over the shuttle disaster, said a spokeswoman for United Space Alliance.

United Space Alliance, which is a joint venture formed in 1996 by Boeing Co. and Lockheed Martin Corp., has had an

EAP program since its inception, the company's spokeswoman said.

In addition to providing grief counseling services, Magellan counselors have spread out at the company's three main sites to be available to meet and talk informally with employees. A 24-hour toll-free hot line was also established so employees can call at any time for counseling.

According to space agency spokespeople, NASA also has two EAPs that have been working onsite with employees and dependents. Kelsey-Seybold Clinic of Houston has been holding one-on-one sessions with people in need of counseling at the Johnson Space Center in Houston, and Comprehensive Health Services Inc. of Vienna, Va., has been providing services at the Kennedy Space Center in Florida.

—By Michael Prince

## Shuttle lab insured at Lloyd's \$17.7 million cover attaches above larger retentions

By DAVE LENCKUS

**LONDON**—The owner of a \$67 million science laboratory module that was aboard the space shuttle Columbia retained more than three-fifths of its risk but has marine insurance and a U.S. government guarantee to cover the remainder of its loss, according to insurance market sources.

Marine underwriters at Lloyd's of London wrote nearly \$17.7 million of coverage for Webster, Texas-based SPACEHAB Inc. above an \$8 million primary retention assumed by the U.S. National Aeronautics and Space Administration.

SPACEHAB, though, is reviewing whether additional claims and recoveries are available to the company, a source said.

SPACEHAB describes itself as the only company in the world that owns and operates habitable, space-going facilities. The company's Research Double Module was making its maiden space shuttle voyage aboard the Columbia, which disintegrated while re-entering Earth's atmosphere Feb. 1, killing all seven astronauts aboard.

The pressurized aluminum module, housed in Columbia's cargo bay and connected to the shuttle's middeck by a pressurized access



PHOTO: NASA

SPACEHAB Inc. owned the Columbia's science module, seen above.

tunnel, served as the shuttle crew's primary working and living space. The module carried approximately 7,500 pounds of research payloads for NASA, other space agencies and commercial customers worldwide, according to a statement on SPACEHAB's Web site. The module also carried SPACEHAB-funded education experiments, according to the site.

Until about three years ago, SPACEHAB insured its equipment aboard shuttle flights with coverage obtained in the space insurance market, according to sources. Then, SPACEHAB turned to the marine market for coverage at a far lower cost, sources explained.

Under SPACEHAB's program, NASA retains the first \$8 million of

a loss.

The lead underwriter on the following \$17.67 million of commercial marine insurance is Lloyd's syndicate 102, managed by Goshawk Insurance Holdings P.L.C. Goshawk wrote \$10 million of coverage, according to sources.

Lloyd's syndicate 1414, managed by Ascot Underwriting Ltd. for American International Group Inc., wrote \$3.7 million of coverage for SPACEHAB.

Lloyd's syndicate 510, managed by R.J. Kiln & Co. Ltd., wrote about \$2.2 million of coverage, according to sources.

The remaining \$1.8 million of insurance was written by Euclidian Group P.L.C. through Lloyd's syndicate 1243.

# Budget: Changes in nondiscrimination test proposed

Continued from page 1

said Ethan Kra, chief actuary at Mercer Human Resource Consulting in New York.

"It makes a lot of sense. You'd have a lot less explaining of rules" if there were only one set, said Rich Koski, a principal with Buck Consultants Inc. in Secaucus, N.J.

Other proposed changes in the budget package, all of which would require congressional approval, would modify the "use it or lose it" rule for health care flexible spending accounts and would allow all employers to set up tax-favored medical savings accounts (see related story).

## Nondiscrimination changes

Benefit experts also hail the budget's proposed changes to nondiscrimination testing.

The key change is the proposed liberalization of a basic 401(k) nondiscrimination test that compares salary deferrals of highly compensated employees—those making at least \$90,000 annually—with those of other employees.

The test is used to ensure that average deferrals of highly compensated employees do not exceed average deferrals of rank-and-file employees by more than the permitted amount. Generally, the average deferral percentage, or ADP, of highly compensated employees can be no more than two percentage points higher than the rate of non-highly compensated employees.

This test is so difficult to meet, consultants say, that roughly 40% to 50% of employers have to make some kind of adjustment—typically limiting deferrals by highly compensated employees—to pass.

The test is especially troublesome for some employers, such as those in the retail and hospitality industries, that have a high percentage of low-paid employees who may lack the resources to contribute. As a result, highly compensated employees in those industries face signifi-

cant restrictions in what they can contribute, said Michael Weddell, a consultant with Watson Wyatt Worldwide in Southfield, Mich.

But under the administration's proposal, the average deferral rate of highly compensated employees could be as much as double the deferral rate of rank-and-file employees and the plan still would pass the nondiscrimination test.

"Passing the test really becomes much easier," Mr. Weddell said.

In addition, if the ADP of rank-and-file employees were to exceed 6%, nondiscrimination testing requirements would be waived.

Furthermore, the budget proposal would make it easier and less costly for an employer to qualify for a safe harbor that exempts plans from nondiscrimination testing. Currently, under the most commonly used safe harbor, an employer must match 100% of employee deferrals up to 3% of compensation and 50% of deferrals of between 3% and 5% of compensation. Matching contributions must vest immediately.

Under the administration's proposal, the safe harbor would be liberalized so that an employer would have to match only 50% of an employee's deferrals of up to 6% of compensation. As is the case under current law, employers' matching contributions would have to vest immediately.

## Some concerns

While benefit experts welcomed these proposals, some are concerned about the potential impact on 401(k) participation of budget provisions that would let individuals set up their own tax-favored savings accounts.

One such proposal would allow any individual to contribute up to \$7,500 per year to a new vehicle, dubbed a Lifetime Savings Account. While the contributions would be made with aftertax dollars, the earnings would accumulate tax-free and distributions could be tak-

en any time without penalty or taxes.

Under another plan, employees with incomes of at least \$7,500 could contribute up to that amount to so-called Retirement Savings Accounts. Like LSAs, RSA contributions would be made with aftertax dollars with distributions tax-free, if taken after age 58.

These new types of plans—especially LSAs, with their lack of taxes and withdrawal penalties—could be so attractive that they could lure contributions away from 401(k) plans that lack or have only small employer matches.

"The LSA model could draw people away from employer plans, especially if there is not a match," said Rachel Kugelmass, a manager with Mellon HR Solutions in Fort Lee, N.J. "There is a lot more flexibility," Ms. Kugelmass added, noting that withdrawals from 401(k) plans before normal retirement age are allowed only for hardship and, even then, a 10% tax penalty is imposed.

Still, the new plans shouldn't pose much of a threat to 401(k) plans with generous employer matches. The ability to make pretax contributions to the plans, coupled with a match "is a powerful incentive for an individual to save," said Frank McArdle, a consultant with Hewitt Associates Inc. in Washington.

"An employer match is the biggest factor in employee participation," added Susan Alford, a senior vp with Aon Consulting in Atlanta.

Others, though, worry that because LSAs and RSAs do not tax withdrawals, they could lead to a huge eventual loss of tax revenues, making it that much more difficult to fund governmental benefit programs.

"The problem here is we will have huge budget deficits in the future. Not only do these proposals not address that problem, they make it worse," said Mr. Weddell of Watson Wyatt.

In fact, experts say, a growing budget deficit could, if history repeats itself, have serious consequences for employer-sponsored plans.

After Congress in the early 1980s drastically cut basic tax rates, law-

makers, to raise new revenues, over the course of the next decade slashed the tax advantages of employer-sponsored savings plans, making the plans less attractive to employees and, in some cases, more difficult to administer.

## HOW THE BUSH ADMINISTRATION BUDGET WOULD AFFECT EMPLOYEE BENEFIT PLANS

More-liberal 401(k) nondiscrimination test

Easier safe harbor to avoid nondiscrimination testing

Consolidation of 401(k), 403(b) and 457 plans

Limited rollover of unused health care FSA contributions

Expansion of medical savings accounts

# Bush budget plan calls for increases in FSA, MSA flexibility

By JERRY GEISEL

**WASHINGTON**—Employees could roll over up to \$500 per year in unused health care flexible spending account contributions for use during the next plan year, under a Bush administration proposal.

Alternatively, unused FSA account balances—also up to \$500—could be taken as taxable cash or transferred to a 401(k), 403(b) or Section 457 savings plan or to a medical savings account.

Under current law, unused FSA balances are forfeited at the end of a plan year, under a rule known as "use it or lose it."

The changes, which the Bush administration has previously proposed, would encourage "savings for unexpected medical expenses and reduce the incentive to accelerate expenses or incur unnecessary costs," the administration said in its proposed federal budget for fiscal

2004.

A key reason that Congress in the past has not acted on the proposal, benefit experts say, is its cost to the U.S. Treasury. The administration estimates, for example, that allowing employees to carry forward to the next plan year up to \$500 in unused FSA account balances would cost the government more than \$3.3 billion from 2004 through 2008. The revenue loss would result because employees—without the full risk of forfeitures—would make greater pretax salary deferrals than they would otherwise.

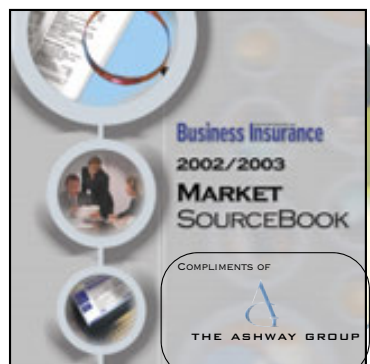
The budget also calls for allowing employers of any size to establish tax-favored MSAs. Under current law, only employers with fewer than 50 employees can offer such accounts. Additionally, the administration wants to scrap the current limit of 750,000 on the number of MSAs that can be established. Roughly 60,000 to 70,000 MSAs have been established since Congress first permitted their use as part of a 1996 health care portability law.

Another proposed MSA change would allow both employers and employees to contribute to the account. Right now, only the employer or employee—not both—can contribute.

The budget also proposes letting employers reimburse employees on a tax-free basis for up to \$10,160 in adoption-related expenses, regardless of employee income. Under current law, the adoption tax break phases out for employees whose adjusted gross income exceeds \$152,390.

The proposed changes require congressional approval.

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# INDEX

### Issue of February 10

ADVERTISER	PAGE #
Aetna Corporate	13
Aon Corporation	2
Burnham Systems	16
Business Insurance	6, 15, 19
Fireman's Fund McGee	9
First State Management Group	14
Liberty Mutual	24
Risk and Insurance Management Society	12
Sprint Communications Company	11
Wausau Insurance Company	5
Zurich NA	7

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# For the Record

This roundup of news from the previous week is generated by BI's daily news reporting.

## Swiss Re files new WTC cover brief

Swiss Reinsurance Co. has filed a brief in a New York federal appeals court, blasting World Trade Center leaseholder Silverstein Properties Inc.'s claim that the Sept. 11, 2001, attacks were two separate events. Swiss Re states that Silverstein's risk manager and lenders stated in communications following the attacks that they believed the leaseholder's property insurance limits totaled \$3.55 billion. Only after talking to attorneys and public relations consultants did Silverstein's owner, Larry Silverstein, pursue a two-occurrence recovery, the brief states.



Mr. Silverstein

Ill forecasts continued hard market in 2003

## Ill forecasts continued hard market in 2003

U.S. property/casualty rate increases for 2003 are projected to slacken,

but the hard market will continue throughout the year because insurers' combined ratios remain high, according to a report by the Insurance Information Institute. The report, based on forecasts by 14 insurance analysts, projects that property/casualty insurers' net written premiums will rise by 12.7% in 2003 due to higher pricing and stronger demand. This compares with an estimated rise of 14.2% in 2002 and represents the first slowdown since 1998.

## TRENWICK GROUP LTD.

### Trenwick downgraded after reserve boost

A.M. Best Co. has downgraded its ratings of Trenwick Group Ltd.'s ongoing operating units to C from B- following the announcement of a \$107 million reserve increase. The reserve boost, coupled with a \$90.7 million increase in last year's third quarter, "further depletes the low levels of surplus" in the operating companies, according to Best. Meanwhile, James F. Billett, chairman, president and chief executive officer of Trenwick, has retired. Mr. Billett took a leave of

absence from Trenwick last August for health reasons.

## House panel to examine insurance regulation

The House Financial Services Committee will revisit the issue of insurance regulation, including considering an optional federal



Rep. Oxley

charter for insurers, according to the panel's chairman. "We're going to make sure (insurance regulation is) going to be front and center," Rep. Mike Oxley, R-Ohio, said at the annual legislative summit of the Council of Insurance Agents & Brokers, the American Insurance Assn. and the Reinsurance Assn. of America. "We want to be a player and will be a player," Rep. Oxley said.

addition to its surge in net income, Anthem reported a 30% increase in operating revenue in 2002, to \$18.3 billion. Anthem converted from a mutual insurer to a publicly traded company in 2001. After acquiring Trigon Healthcare Inc. in July 2002, it became the fifth-largest publicly traded U.S. health benefits company.

## Chubb profits nearly double

Chubb Corp. reported profits of \$222.9 million in 2002, a 99.9% increase over its profits for 2001. The insurer reported net premiums written of \$9.0 billion, a 31%



increase over the same period in 2001. The results for 2002 include a \$700 million increase in asbestos-related loss reserves. The 2001 results included \$645 million in losses related to the Sept. 11, 2001, terrorist attacks and \$220 million in Enron Corp.-related surety losses.

## Briefly noted

More than \$2.2 million in new funding is earmarked for additional outreach by the Occupational Safety and Health Administration to Spanish-speaking and other non-English-speaking workers in the Bush administration's proposed \$450 million OSHA budget for fiscal 2004. "This is the first time OSHA's budget will include additional funding for multilingual outreach," according to an agency statement. The agency currently has some multilingual materials and training programs....Wisconsin Gov. Jim Doyle is appointing Jorge Gomez as Wisconsin's insurance commissioner, subject to legislative confirmation. Mr. Gomez, 45, is currently vp and general counsel of Milwaukee-based United Government Services L.L.C., a subsidiary of Blue Cross & Blue Shield United of Wisconsin....The Labor Department, effective immediately, has changed the name of its pension regulatory unit to the Employee Benefits Security Administration from the Pension and Welfare Benefits Administration.

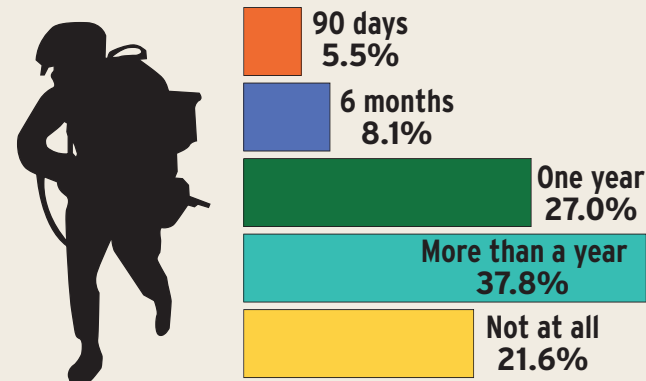
# Anthem

## Anthem posts gain in net income

Anthem Inc. had a profitable first year as a publicly traded company, boasting 2002 profits of \$549.1 million, a 60% increase over 2001. In

## Online Poll [ 2/3 - 2/7 ]

For how long are you extending health care coverage to reservists called up for active military duty?



Take part in our weekly poll at [www.businessinsurance.com](http://www.businessinsurance.com)

# Near North: Broker to be sold

Continued from page 1

Frontenac, said he does not anticipate other significant executive additions at Chicago-based Near North.

"Near North has a full and outstanding and experienced executive team," that is a significant element of the company's value, Mr. Goldstein said, adding that he sees the broker's current executives "being the team for quite some time in the future." In addition, William Bartholomay, Near North's president, "will continue to be a key integral part of the executive team, as he has been for many years," Mr. Goldstein said.

"The thing we love the most (about Near North) is the people," Mr. Riley said. "The retention of employees has been superb."

In a statement from Near North, John Harney, the company's chief operating officer, called the move "a very positive and natural step in Near North's progression," adding, "We are excited at the possibilities that exist for building our business by partnering with a firm such as Frontenac."

Mr. Riley said clients also have remained faithful to Near North over the past year, despite the legal problems faced by the company's owner, Mr. Segal. "What they like about the company is (that) the people who work with them really care about them," he said. "They're very client focused."

Mr. Segal resigned as Near

North's chairman and CEO in January 2002, after federal prosecutors charged him with illegally using up to \$20 million in a Near North premium fund trust account for his own and his company's use, then making false statements to Illinois regulators to conceal those activities.

## 'Near North has a full and outstanding and experienced executive team.'

Rodney L. Goldstein  
Frontenac Co. L.L.C.

The original charges have since been replaced by a federal grand jury indictment charging Mr. Segal with insurance fraud, mail fraud and racketeering. Mr. Segal has maintained his innocence, pleading not guilty to the charges, and is scheduled to go to trial in April.

Mr. Riley would not comment on any future role Mr. Segal might have with the firm. "We just don't think it's appropriate to comment on it at this time," he said.

The Near North acquisition is the culmination of an effort to form a new middle-market broker that Mr. Riley began last year with long-time brokerage executive Bernard H. Mizel.

"My responsibility in this deal is really just to help Dick put the deal together, to raise the money," Mr.

Mizel said. "I'm just going to be in an advisory capacity with Dick. It's like a consulting agreement."

While they had previously referred to their planned company as Entegra, both Mr. Mizel and Mr. Riley said the acquired broker's name remains under discussion.

With more than \$107.1 million in 2001 revenues, Near North ranked as the 15th largest broker of U.S. business in the *Business Insurance* broker rankings for 2002 (*BI*, July 22, 2002). The opportunity to purchase the company puts the enterprise ahead of original expectations, Mr. Riley said. "We never saw ourselves with a company of this size immediately," he said.

Mr. Riley said plans for growth include changing the company's mix of property/casualty and employee benefits business, "probably by acquiring some benefits companies."

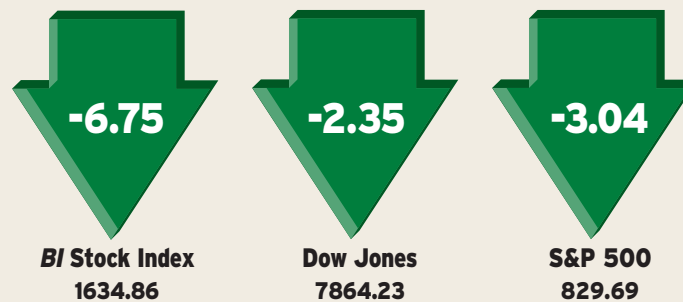
And he noted that the purchase includes Near North's wholesale brokerage, facultative reinsurance brokerage and structured settlement businesses, "and those are three great resources to have when you're dealing with middle-market and upper-middle-market businesses."

"This is certainly a major transaction," said Timothy J. Cunningham, principal at agency management consultant OPTIS Partners L.L.C. "I think the challenge for the management team and Frontenac is to hold on to the revenue that's been acquired."

## BI Stock Index [ 2/3 - 2/7 ]

Up-to-the-minute data for all 87 companies that comprise the BI Stock Index can be found at [www.businessinsurance.com](http://www.businessinsurance.com)

Percentage change of BI Stock Index vs. key indicators



### Largest gains

NYMagic Inc.	4.93%
Willis Group Holdings	4.80%
Markel Corp.	4.75%
Ohio Casualty Corp.	3.86%
American Safety Ins.	3.70%

### Largest losses

Trenwick Group Ltd.	-27.78%
Argonaut Group	-25.32%
Clark Bards Holdings	-22.27%
UNUM Corp.	-19.46%
WellChoice Inc.	-17.20%

### Weekly change by market segment

Brokers	-4.28%
Insurers/Reinsurers	-5.26%
Managed Care Organizations	-5.44%

Source: CNET Investor ([investor.cnet.com](http://investor.cnet.com))