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U.S. rate increases attract HMOs to Medicare / 3

U.K. proposes pension guaranty fund / 3

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February 16, 2004

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WTC trial takes form

Stakes high as sides present arguments

By DOUGLAS McLEOD

NEW YORK—Lawyers for Silverstein Properties Inc. and a dozen insurers offered clashing views of the World Trade Center's $3.5 billion property insurance program last week as a long-awaited trial got under way to determine whether the twin towers' Sept. 11, 2001, destruction was one occurrence or two.

In a packed federal courtroom only blocks from Ground Zero, the two sides are sparring over a single issue: whether the program is governed by a Willis Group Ltd. form that would treat the loss as one event, or by a Travelers Property Casualty Corp. policy issued after the attack that Silverstein says would entitle it to two policy limits, or $7 billion.

The insurers, led by Swiss Reinsurance Co., launched their case by confronting Silverstein Risk Manager Robert F. Strachan on a series of documents and statements that they say show WTC leaseholder Silverstein knew the Willis form, known as Wilprop, was in effect on the day the terrorists struck.

Mr. Strachan, for example, faxed sections of the Wilprop form the day after the attack to representatives of Silverstein's lender, General Motors Acceptance Corp., and the WTC's owner, The Port Authority of New York and New Jersey, with a note reading, "FYI, the occurrence definition and the insuring agreement and the exclusions in the Willis policy that we are working with."

"You didn't send any information about the Travelers policy, did you?" asked Barry Ostrager, a lawyer with Simpson, Thacher & Bartlett, representing Swiss Re.

"No, I did not," Mr. Strachan answered.

On the question of which form applies to the

See **TRIAL**/page 33

PHOTO: REUTERS/CHIP EAST

Silverstein Properties' Larry Silverstein is seeking to recover two policy limits for the loss of the World Trade Center.

Late News

Sen. Frist schedules med mal reform review

Senate Majority Leader Bill Frist, R-Tenn., intends to make medical malpractice reform the first item of business when the Senate returns from its Presidents' Day recess later this month. The exact shape of the medical malpractice legislation isn't known, but Sen. Charles Grassley, R-Iowa, last week introduced a measure that would limit noneconomic damages in medical malpractice cases and could be a vehicle for reform. The Healthy Mothers and Healthy Babies Access to Care Act—S. 2061—would also introduce a sliding scale for lawyers' contingency fees in medical malpractice cases.

PHOTO: REUTERS

Sen. Frist

New financial guarantee reinsurer in Bermuda

A financial guarantee reinsurer led by former executives of MBIA Inc., itself an investor in the new facility, has been formed in Bermuda. Channel Reinsurance Ltd. has been capitalized with $366 million. It carries financial strength ratings of Aaa from Moody's Investors Service and AAA from Standard & Poor's Corp. Bermuda-based RenaissanceRe Holdings Ltd. is the largest investor in Channel Re, with a 32.7% stake. Koch Financial Corp. owns 29.9%, and Partner Re Ltd. in Bermuda holds a 20% stake. MBIA owns 17.4% of the new company.

Health care spending slows in 2003

Health care spending in the United States likely slowed last year but

See **LATE NEWS**/page 35

Consumer-driven plans evolving, poised to grow

By JOANNE WOJCIK

Although the growth of consumer-directed health plan participation has been slow compared with that of managed care plans when they were introduced in the early 1970s, federal legislation permitting health savings accounts, more plan options and a better marketing campaign will likely give it a boost, benefits experts say.

Enrollment in the first health maintenance organizations was about 3 million after the first year. By comparison, just 1.5 million people are enrolled in consumer-directed health plans four years after their launch.

The primary roadblock stopping employers from offering consumer-directed health plans is their lack of experience, according to a recent survey of the membership of the National Business Group on Health.

"I agree that there is merit and value to the

See **CONSUMER DRIVEN**/page 33

Policies on access can head off intrusion charges

Privacy issues creating dilemma for employers

By JUDY GREENWALD

Safeguarding employee privacy demands a fine balancing act from employers.

On the one hand, employers want to ensure employees' right to privacy for moral, ethical and legal reasons.

On the other, they must also protect against the actions of employees who download pornography or copyrighted music, send harassing e-mail, reveal company secrets, disclose personal information, sell drugs or even slack off on their job because of the time they spend surfing the Internet.

Observers say the first step in this process is to develop a policy that clearly establishes employers' right to access e-mail, voice mail, desks and any other company property.

In practice, though, employers generally avoid taking any action unless a pattern of misbehavior becomes evident or if any other reason to be suspicious arises, say observers.

Employee privacy encompasses a wide range of issues, including drug testing and the confidentiality of medical records, as well as technology issues such as voice mail, e-mail and Web surfing.

Technology factors, in particular, can present employers with thorny privacy issues. Access to information is "so easy" these days, said Shanti Atkins, president and chief executive officer of San Francisco-based Employment Law Learning Technologies Inc., which conducts online compliance training. Whereas files once were held under lock and key, accessing data now may be just a matter of opening an e-mail attachment, which makes it easier to make a mistake when sending out information, she said.

"Employees should understand that anything they send, create or receive over the company computer system" may be viewed by others, said Michael R. Overly, an attorney with Foley & Lardner in Los Angeles. If someone falls off a ladder and is hurt, a plaintiff's attorney may well demand of the ladder's manufacturer a copy of "ev-

See **PRIVACY**/page 32

NEWSPAPER

Spotlight report

LITIGATION REFORM:

CRISIS IN THE COURTS

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Council attempting to overturn remaining countersignature laws

By MARK A. HOFMANN

WASHINGTON—The Council of Insurance Agents & Brokers hopes that lawsuits it filed in federal court last week will overturn the nation's last remaining countersignature laws.

That's a sentiment shared by risk managers, who support reforms that bring greater efficiency to insurance transactions.

Although the laws vary, states with countersignature laws generally force licensed nonresident agents to obtain the countersignature of a resident agent for a fee before doing business in the state. The CIAB views the laws as anachronistic remnants of a protectionist era that harm producers and buyers alike.

A federal judge last fall struck down Florida's countersignature law on constitutional grounds after the CIAB sued to have it overturned (*BI,* Oct. 13, 2003). Nonresident agents regarded that law as particularly onerous because it required them to turn over as much as 50% of their commission to the countersigning resident agent.

'It protects no one, it adds no value, it slows down transactions and the corporate buyer ultimately ends up on the hook.'

Joel Wood
Council of Insurance Agents & Brokers

The CIAB had already filed suit against Nevada's countersignature law when the Florida decision came down. The Nevada law requires that nonresident producers obtain a countersignature on most insurance contracts and pay a commission of at least 5% of the premium to the countersigning agent. The CIAB's Nevada suit has yet to be decided.

On Feb. 10, the CIAB filed suits in

See COUNCIL/page 34

U.K. pension guaranty fund draws mixed employer reviews

By SARAH VEYSEY

LONDON—Employer groups have given a mixed reception to the U.K. government's outline of a proposed fund to protect the benefits of pension plan participants.

Legislation to create a guaranty fund, the Pension Protection Fund, was presented to Parliament last week by Pensions Minister Andrew Smith. The fund, which would be similar in some respects to the Pension Benefit Guaranty Corp. in the United States, would guarantee a portion of the pension obligations of insolvent employers with underfunded pension plans. The U.K. government currently provides no guarantee of pension benefits.

The PPF would be funded by an annual levy on all employers offering defined benefit pension plans, known in the United Kingdom as final-salary plans. While employers generally embrace the spirit of the proposal, they have expressed concerns about the manner in which the PPF would be funded.

Mr. Smith said he hopes that the fund will be in place by early next year, subject to the speed of the legislative process.

Under the proposal, employees who have reached normal retirement age at the time their plan is terminated would receive 100% of their vested pension benefits, while workers below that age would receive 90% of their vested benefits, subject to plan-specific benefit caps, according to the proposals.

For first year of its operation, the levy on plan sponsors would take into account such basic factors as the number of members in the plan and the proportion of active vs. retired participants, according to the government's proposals.

But from the second year on, risk-based factors would make up a major component—at least 50%—of the levy, Mr. Smith explained. He said that a board would be appointed to administer the PPF and to decide how to incorporate into the levy such factors as a company's risk of insolvency and its level of underfunding.

An administration levy and a fraud compensation levy would also be charged.

The London-based Confederation of British Industry welcomed the prospect of a pension guaranty fund but criticized the proposed levy mechanism.

Richard Greenhalgh, chairman of the CBI's pensions strategy group, said that businesses recognize the need for a fund to help protect the pension benefits of employees whose employers go bust.

But Mr. Greenhalgh said that the

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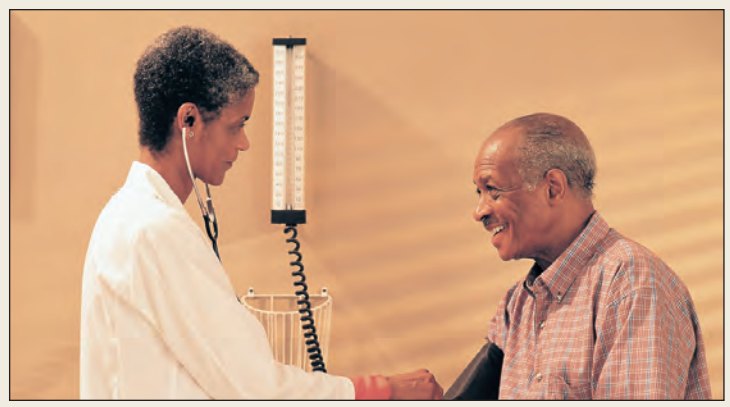

Medicare Advantage federal funding boost renews plans' interest

By JERRY GEISEL

WASHINGTON—The potential of Medicare managed care plans to cut employers' costs, while providing retired workers with richer benefits, is looking brighter thanks to a big infusion of government money.

Earlier this month, the federal Centers for Medicare and Medicaid, announced that managed care plans that participate in the government's Medicare Advantage program and provide coverage to enrollees who opt out of the traditional Medicare indemnity program, will be receiving a rate increase averaging 10.6%, starting March 1.

That increase, which is more than five times what the plans have received annually since the late 1990s, is the result of provisions tucked into legislation Congress passed last year that will add a prescription drug benefit to Medicare beginning in 2006.

In all, Medicare Advantage plans—formerly known as Medicare + Choice plans—will receive an additional $1.3 billion in federal funding for the next two years.

The impact of this new federal generosity has been dramatic: Dozens of managed care plans immediately announced that they will be boosting benefits, cutting premiums and studying entry into new geographic markets.

The infusion of additional federal funding into the Medicare Advantage program strengthens Health Net Inc.'s commitment to the Medicare Advantage program, said Jay Gellert, president and chief executive officer of the Woodland Hills, Calif., insurer.

"We're evaluating virtually the entire country as to how we can broaden our reach," said Susan Rawlings, head of Aetna Inc.'s Retiree Markets in Hartford, Conn.

Some of the Medicare Advantage changes, all effective March 1, include:

- Aetna Inc., which has 105,000 Medicare Advantage enrollees, is slashing, in several parts of New York and New Jersey, the inpatient hospital fee to $100 a day and a $700 maximum-out-of pocket limit per stay. It previously was $200 per day with a $1,400 limit per stay.
- Blue Cross & Blue Shield of Florida's Health Options unit will eliminate monthly premiums in the Medicare Advantage

See MEDICARE/page 34

Inside Business Insurance

Online

- The first issue of ***Industry Focus***, a supplement to *Business Insurance* aimed at providers of risk management, benefits and insurance services, debuts online on the *BI* Web site.
- A searchable **Datebook** calendar lists upcoming industry seminars and meetings and allows you to add info on your own event.
- New **Opinion Poll** for readers: Do you think your organization will offer a defined benefit pension plan a decade from now?

Departments

REPORTING ON CORPORATE RISK AND EMPLOYEE BENEFIT MANAGEMENT NEWS.

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Consumer-driven plans may keep medical costs low: Aetna

By ROBERTO CENICEROS

Medical costs for participants in a consumer-driven health plan remained relatively flat over a nine-month period, while costs for those in many other types of health plans continued to see double-digit increases, according to preliminary results of a study released today by Aetna Inc.

Participants in the consumer-driven plan also increased their use of generic prescription drugs and dramatically increased their utilization of preventive care services during the period studied.

The Aetna results represent an early comparison of the medical utilization patterns of employees before and after they joined a consumer-driven plan.

Most previous studies have lacked data on the health care utilization of employees before they joined their consumer-driven plans, noted Tamra Lair, a senior consultant for Watson Wyatt Worldwide in Minneapolis.

In studying 14,000 members in its Aetna HealthFund, representing employees from 19 different employers, Hartford, Conn.-based Aetna evaluated claims and utilization data for nine months of 2003. The insurer compared that information with nine months of experience for the same population in 2002, before members moved to Aetna's consumer-driven plan.

The study found that medical costs for participants in the Aetna HealthFund rose only 1.5% during the nine-month study. That sharply contrasts with double-digit medical cost increases typical for similar populations in other types of plans, Aetna stated in a press release.

Because 16 of the 19 employers in the study are self-insured, the nearly flat medical cost increase represents immediate savings for employers, an Aetna spokeswoman noted.

The costs that Aetna evaluated included money spent by the employers as well as money employees contributed from their health reimbursement accounts, the spokeswoman said.

Consumer-driven plans combine a high deductible with an employer-funded health reimbursement account, which employees tap to pay some expenses they incur.

Aetna's study also found that members experienced a 6.5% decrease in pharmacy costs driven by an 11% decline in prescription use

See AETNA/page 34

Colorado Springs votes against partner benefits, going against trends

By JOANNE WOJCIK

COLORADO SPRINGS, Colo.—The recent Massachusetts Supreme Court rulings allowing gay couples to marry had very little influence over the Colorado Springs City Council, which voted last week against offering health care coverage to any adult sharing a home with a city employee.

The council voted 5-4 against the proposal last Tuesday under pressure from local conservatives who called it a backdoor way to

provide domestic partner coverage, thereby endorsing gay unions. Under the plan, an employee would have been able to purchase coverage for any adult living with him or her. However, the employee would have had to pay 100% of the premium.

Although opponents of domestic partner coverage may have won the battle in this conservative city, they are very likely to lose the war, because employers nationwide increasingly are liberalizing their benefit plans to include such coverage, employee benefit experts say.

In fact, in Colorado alone, the percentage of employers offering coverage to domestic partners nearly doubled in 2003, to 26% from 15% the year before, according to Patty Goodwin, director of the survey department at the Mountain States Employers Council, a Denver-based employer coalition with approximately 2,300 members.

Nationally, nearly half of the Fortune 500 companies now provide domestic partner benefits, consultants estimate.

"I think most of the big companies, if they don't already, they will," predicted Helen Darling, president of the National Business Group on Health in Washington. "This is one of those things that's been underway for 15 years now. "

The recent ruling by the Massachusetts high court allowing gay marriage will likely further the cause, she added.

"Every additional decision or step that some entity takes makes it easier for people who want it to get it through and harder for the people who are fighting it to have a rationale," Ms. Darling said.

"The trend is definitely toward designing a benefits program under which you have to attract and retain the best employees," observed J.D. Piro, chairman of the health care law group at Hewitt Inc. in Norwalk, Conn.

While unusual, the Colorado Springs compromise proposal of offering employee-paid benefits to other adults in an employee's household is not unique.

In fact, Xerox Corp. provided "extended household" coverage in the mid-1990s to surreptitiously extend benefits to domestic partners, according to Ms. Darling, former benefit manager for the Stamford, Conn.-based document company.

"We weren't ready to take the next step. We thought it was at least a way to buy a little help for

See BENEFITS/page 32

Chance for class action reform is better in House than Senate

By MARK A. HOFMANN

WASHINGTON—Class action reform probably has the best chances of any of three major tort reform initiatives in this Congress, according to the chairman of the House of Representatives' Judiciary Committee.

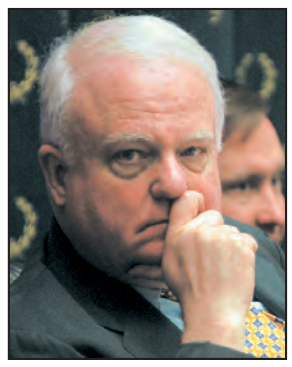

PHOTO: ROLL CALL

Senate opponents of class action reform could still scuttle a bill by loading it with 'nongermane' amendments.

Rep. F. James Sensenbrenner R-Wis.

But that doesn't mean that class action reform is a done deal, warned Rep. F. James Sensenbrenner Jr., R-Wis. Even though the House passed its version of class action reform months ago, the Senate bill may still be weeks from the floor, where proponents fell one vote short of cutting off a potential filibuster against the measure late last year. Rep. Sensenbrenner noted that although three former Senate opponents of the Class Action Fairness Act have now said they would support it, opponents could still scuttle the measure by loading it down with "nongermane" amendments dealing with gun control and other unrelated issues.

Shortly after Rep. Sensenbrenner spoke, Senate Majority Leader Bill Frist, R-Tenn., said he would delay consideration of the class action reform bill until after the Senate had dealt with medical malpractice reform.

Rep. Sensenbrenner made his re-

See CONGRESS/page 6

LTD market still competitive, but some trying to raise rates

By ROBERTO CENICEROS

Although some group long-term disability insurers are striving to raise rates, employers for now can avoid large premium increases, brokers say.

A competitive marketplace and the ease of changing providers continue to suppress insurers' efforts to boost rates, brokers explain. Although some disability insurers in certain instances are renewing coverage at existing rates, some brokers see signs of market hardening and insurers having to take a harder line because of increasing losses and shrinking profit margins.

As employers demand more services from their insurers, such as integrated disability management, and as insurer profits suffer under rising claim trends, fewer insurers are willing to renew business at existing rates, said Paul Botkin, senior vp and income replacement segment leader for Aon Consulting in Dallas.

"We are getting to a point where that market is starting to harden up pretty good," Mr. Botkin said.

Mr. Botkin said he recently witnessed two accounts, each with more than 5,000 lives, where insurers sought increases of more than 300%. The employers negotiated increases in "the double-digit arena," he said.

Employers may be able to hold off increases during their current renewal efforts, but that will grow increasingly difficult, Mr. Botkin added.

While premium renewals have remained flat for years, group LTD insurers are under increasing pressure for a variety of reasons. Those include declining investment returns because of low interest rates and growth in claim activity.

UnumProvident Corp., for example, reported on Feb. 4 that its claim frequency in the second half of 2003 was 8.4% greater than during the first half of the year, and was 5.8% above the second half of 2002.

The Chattanooga, Tenn.-based disability insurer also reported a $386.4 million loss for 2003. UnumProvident said that its income protection segment, which mostly consists of long-term disability business, reported a $355.7 million operating loss during the fourth quarter.

UnumProvident said it is committed to improving profitability in part by shedding unprofitable long-term group disability accounts. To do that, it has been raising renewal rates—particularly among large employers with unfavorable experience—while focusing on sales to employers with 2,000 or fewer workers.

Renewal "repricing" and risk selection resulted in fourth-quarter 2003 sales dropping 21% among "large case" accounts compared with sales in the fourth quarter of 2002, Thomas R. Watjen, UnumProvident's president and chief executive officer, said earlier this month during a conference call with analysts. The trend should continue in 2004, he said.

"We want to continue to pursue profitable large-case opportunities, but are also shifting resources and focus to our core markets, which are employers with less than 2,000 lives

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Congress: Class action reform

Continued from page 4

marks during a luncheon address to the 2004 Insurance Legislative Summit in Washington last week. The American Insurance Assn., the Council of Insurance Agents & Brokers and the Reinsurance Assn. of America, all based in Washington, sponsored the summit.

The Judiciary Committee chairman pointed out that the House has given its approval to a variety of civil justice reforms in recent sessions, only to see them falter in the Senate. The House "has been in the forefront of trying to put some sense in the legal system," Rep. Sensenbrenner said. He told his audience that they can tell who their friends and enemies are among senators by looking at how they voted on cloture motions involving tort reform measures. Cloture—which requires 60 votes for invocation—limits debate on a given measure, thus preventing filibusters.

It's "very frustrating" to see measures that are passed by the House fall before Senate filibusters, he said. That was the fate of a second major piece of House-approved tort reform legislation—medical malpractice reform legislation. Sen. Frist, however, said last week that he would take up med mal reform legislation again later this month.

The third major tort initiative—reforming the system by which victims of asbestos-related disease receive compensation—has not been taken up by the House during the current legislative session. That failure to act has been deliberate, Rep. Sensenbrenner said.

"I told the Senate to pass a bill first," he said. Rep. Sensenbrenner said that he told his Senate counterparts that if a reasonable bill were to pass, he would put it at the top of the Judiciary Committee's agenda and move it to a vote within a month.

But "the stars are not getting into the proper alignment" to get a bill through the Senate, he said. The Senate Judiciary Committee passed a bill last summer, but it has yet to go to a full Senate vote.

Regarding another issue of interest to risk managers, Rep. Sensenbrenner said that he is "not opposed" to expanding the Liability Risk Retention Act to cover property and workers compensation risks. He noted, though, that his committee has no jurisdiction over the matter. And the House Energy and Commerce Committee, which does have jurisdiction, has shown no interest in the issue. That situation is further complicated because the panel is undergoing a change in leadership as Chairman Billy Tauzin, R-La., steps down in preparation for a return to the private sector. The expansion issue may receive consideration, said Rep. Sensenbrenner, "but not soon."

Miller joins *BI* staff in London bureau

LONDON—*Business Insurance* has added to its editorial staff in London.

Peta Miller has joined the magazine as an associate editor.

Ms. Miller will report on risk management and employee benefit issues for both the weekly newsmagazine and *BI*'s Daily News on *www.businessinsurance.com*.

Ms. Miller

Ms. Miller most recently was a reporter for Insurance Day, a daily trade newspaper based in London. Previously, she worked as a staff writer on energy titles published by the Daily Mail Group.

She holds a bachelor of arts degree in French and international studies from Warwick University in Coventry, England.

Ms. Miller can be reached by phone at 44-207-457-1425 and by e-mail at *pmiller@businessinsurance.com*.

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Paul Winston
Road to hell paved with bad lawsuits

It always warms the cockles of my heart when bizarre lawsuits are dismissed. It affirms that the courts are doing their part to ensure that justice is not hijacked by the greedy. In recent weeks, a couple doozies were dumped by courts:

Is going to hell a tort?

This case ranks as perhaps my favorite bizarre lawsuit of 2003. For months, a report on the suit has graced my computer's desktop, waiting for me to do something with it. Now that it has been dismissed, I'd better hurry up.

In June 2002, Ben Martinez, a city councilman from Chama, New Mexico, died of emphysema at age 80. Although a lifelong Catholic, in his last year of life his illness prevented him from attending church. At his funeral, the priest angrily said that Mr. Martinez was going straight to hell.

This naturally upset his family members, and after a year of shame and mental anguish, the family—nine people, no less—filed suit against the priest and the Archdiocese of Santa Fe, seeking compensatory and punitive damages for intentional infliction of emotional distress, among other things.

According to the family, the priest blasted the deceased for "living in sin," for being "lukewarm in his faith," and, to top it off, said that "the Lord vomited people like Ben out of his mouth to hell."

The archdiocese and priest denied the family's allegations, saying the priest had only quoted scripture, including part of Revelations 3:15-16.

It is my experience that the Catholic Church, among other denominations, regularly warns people they are going to hell. It's a central tenet of their beliefs and has probably caused emotional and spiritual distress in millions if not billions of people over the years. Yet I would guess that, until now, such fire and brimstone talk has rarely, if ever, resulted in lawsuits by the faithful.

Last month, a New Mexico state court judge thankfully decided to keep the door shut on tort claims over church doctrine and dismissed the lawsuit.

Judge Stephen Pfeffer of New Mexico's 1st Judicial District Court on Jan. 23 dismissed the case, saying the court was not the proper forum to take issue with the church's doctrine.

"For thousands of years, churches have been making judgments against people," he noted.

The family, naturally, is upset with the outcome. According to an Associated Press report about the lawsuit's dismissal, Mr. Martinez' daughter complained, "It's sad that a priest can say whatever he wants."

If the family can't get satisfaction from the courts, they can always do what thousands of other people disgruntled with their church have done over the years: Form a new one.

You can't have it both ways

The Mississippi Supreme Court last week refused to hear a woman's claim that her cousin's homeowners insurer should cover a jury award the cousin was ordered to pay for shooting her in the stomach.

Paul Winston

The problem is, to win the jury award, the woman claimed her cousin intentionally hurt her. But to win insurance coverage of the award, she flip-flopped and said her cousin did not mean to shoot her, after all.

Just as basic laws of matter state that two objects cannot occupy the same space simultaneously, the Mississippi Court of Appeals had ruled that both arguments could not describe the same shooting. The Supreme Court let that decision stand.

Pearlie Thomas was shot by her cousin, Bessie Mallard, in 1996. Ms. Mallard pleaded guilty to aggravated assault and was given a 15-year sentence. This being America, Ms. Thomas sued her cousin and won half a million dollars for medical expenses and compensatory and punitive damages. In awarding punitive damages, the Sunflower County Circuit Court agreed with Ms. Thomas' contention that the shooting was intentional.

But when the cousin declared bankruptcy, Ms. Thomas went after Ms. Mallard's homeowners insurer, State Farm Fire & Casualty Co. The insurer rejected the claim, citing a provision barring coverage for intentional acts.

This being America, Ms. Thomas changed her story and said her cousin did not mean to shoot her after all. The appeals court said it was too late to change her story.

Wardrobe flap blows over

And finally, last week, a proposed class-action lawsuit filed over Janet Jackson's "wardrobe malfunction" at the Super Bowl was withdrawn. I think this is an example of a self-correcting lawsuit malfunction.

Editor Paul Winston can be reached at pwinston@businessinsurance.com.

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Editorial

Business has a rare reform chance

ARE BUSINESSES DOING enough to promote meaningful tort reform?

That's a critical question addressed by a group of experts on page 26 as part of our "Crisis in the Courts" Spotlight report. While opponents of civil justice reform would say businesses are already doing far too much, the truth is that business could—and should—do more.

And that's particularly true now, as the Senate prepares to tackle three major civil justice reform initiatives. Senate Majority Leader Bill Frist, R-Tenn., has said he intends to bring medical malpractice reform legislation to the floor for a vote after the Presidents' Day recess. In addition, Sen. Frist intends to bring both class action reform and asbestos injury compensation reform legislation to the floor, probably this spring.

This is probably the best chance for these measures to pass. The question is whether employers have the will to take the steps needed to reach that goal.

Unfortunately, the record isn't encouraging. Part of the reason is simple enough—businesses have matters other than the legal system with which to contend. The chief foe of tort reform—the trial bar—has one issue, which is maintaining the status quo while attempting to roll back reforms wherever possible. That single-mindedness gives opponents an advantage.

But businesses have ceded them some advantages, too. In too many cases—uniform product liability legislation being a prime example—businesses have let parochial perspectives trump common interests. Splintered by internal differences, pro-reform forces have made matters worse by overreaching and allowing the perfect to become the enemy of the good, ending up with the bad status quo.

And, as Yale Law Professor George Priest notes, in some cases businesses have actually adopted the tactics and reasoning of the trial bar to further individual agendas, undercutting the moral arguments of equity and fairness that must be made if tort reform is to pass.

Experience in numerous states proves that tort reform can pass if proponents are willing to put aside parochial interests and invest the time, energy and money needed to turn reasonable legislation into law. That same willingness must exist at the federal level as well. This spring is probably the best opportunity to enact meaningful federal civil justice reform. Given the congressional calendar and the uncertainty that precedes any national elections, it may also be the last opportunity for some time. Business must not fail to seize it.

Cash balance rules a first step

WE HOPE THAT a new Treasury Department proposal for regulating cash balance pension plans is a first step that will lead, finally, to clear and definitive rules.

Certainly, the most significant position Treasury has taken is that cash balance plans will not be considered age discriminatory as long as they offer the same or better pay credits to older plan participants as to younger participants.

To anyone with a scintilla of common sense, that should be obvious. What could be age discriminatory about a plan that gives, for example, all plan participants an annual credit equal to 5% of pay?

Similarly, we applaud Treasury for making it clear that employers should have flexibility in setting the interest rate credit they provide on cash balance accounts. An alternative approach, which Treasury rejected, would have had, in some situations, the effect of employers providing smaller interest rate credits to cash balance plan participants.

The toughest issue of all is what benefit protection, if any, employees should receive when their employers convert a traditional plan to a cash balance plan.

On this, Treasury took a middle ground between giving all current plan participants the continued opportunity to accrue benefits in the old plan or providing no rights at all. Treasury said cash balance credits earned by participants for each of the first five years after a conversion should be at least equal to what they would have earned under the old plan. Alternatively, the employer simply could give all current participants the opportunity to choose between the two plans.

This is a tough issue. Imposing such a mandate might encourage more employers to exit the defined benefit plan system in favor of defined contribution plans. At the same time, the benefit guarantee Treasury is proposing is a modest one—and is exceeded by many employers that in recent years have moved to cash balance plans.

Certainly, legislators need to weigh the ramifications of these provisions very carefully before making a decision.

Schillerstrom

Letters to the Editor

Postmodern viewpoint doesn't work in insurance

To the editor: The Feb. 9 Perspectives article " 'Pollution Exclusion' Definition Still Elusive," ends with the words "sometimes 'no' means 'yes.' "

I don't think I have ever seen a clearer example of the postmodern swamp the law has become. It should be enshrined with: "It depends what the meaning of 'is' is."

The insurance product is a contingent promise to pay. Unless there is some reasonable expectation that words mean what they mean and contracts say what they say, insurance is impossible. Or rather, it becomes just another slot machine in the jurisprudential casino.

We all know what the word "sudden" means. It means: quickly; in a brief period of time. Usually, this also implies: unexpectedly, without much forewarning. This latter meaning is not an alternative; it is a refinement. The necessary ingredient of "sudden" is that whatever happens, happens quickly. If the change in circumstances is always quick by its very nature, then there may be an added requirement that it come unexpectedly, without a long build-up.

Death is always virtually instantaneous. One minute you are alive. The next, you are not. A healthy person killed by a speeding car while crossing the street may be said to have died a "sudden death." But if he sticks in the car's windshield and slowly bleeds to death in the driver's garage, we ordinarily do not call that "sudden"—even if the death certificate said he died at 6:32 on Monday morning. And a cancer victim—wasting gradually away over months—is never said to have died suddenly of cancer.

Postmodernism says (and I am aware of the irony built into this sentence) that the meaning of any

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Litigation Reform

Spotlight Editor: Mark A. Hofmann

Courtrooms playing role in reforming tort system

Gavels hold clout

By DAVE LENCKUS

Limiting unimpaired plaintiffs' access to the courts. Forcing plaintiffs to meet tougher evidence standards. Restricting punitive damage awards. Curbing joint-and-several liability.

Tort reform advocates have seen state and federal lawmakers tackle those issues in the past and would like to see additional headway.

But if past experience with those issues were any indication of the future, then state and federal courts also would have a relatively significant role to play in modifying the tort system, according to tort reform observers.

A spokesman for the Assn. of Trial Lawyers of America scoffed at the notion that courts have ever played such a role or have the capability of doing so in the future.

But other legal observers disagree.

"We see courts do a number of things," said insurer attorney Stephen A. Cozen, a partner with Cozen O'Connor in Philadelphia.

Mark Behrens, a counsel with both the American Tort Reform Assn. and the Coalition for Litigation Justice in Washington, agrees.

"These judges are not tort reformers, so to speak, but they look at trends in the law and at what other states are doing" and then issue rulings that modify the system in the best interests of public policy, said Mr. Behrens, a partner with Shook, Hardy & Bacon L.L.P. in Washington.

And, despite what some critics have maintained, such rulings should not be considered judicial activism, asserted attorney David Schoenfeld, a principal with Grippo & Elden L.L.C. in Chicago, who typically represents insurers and policyholders in underlying cases.

Some issues near the top of tort reformers' lists—such as revising joint-and-several liability and the standard of evidence required of plaintiffs seeking punitive damages—are judicially created concepts in the first place, he said. "So,

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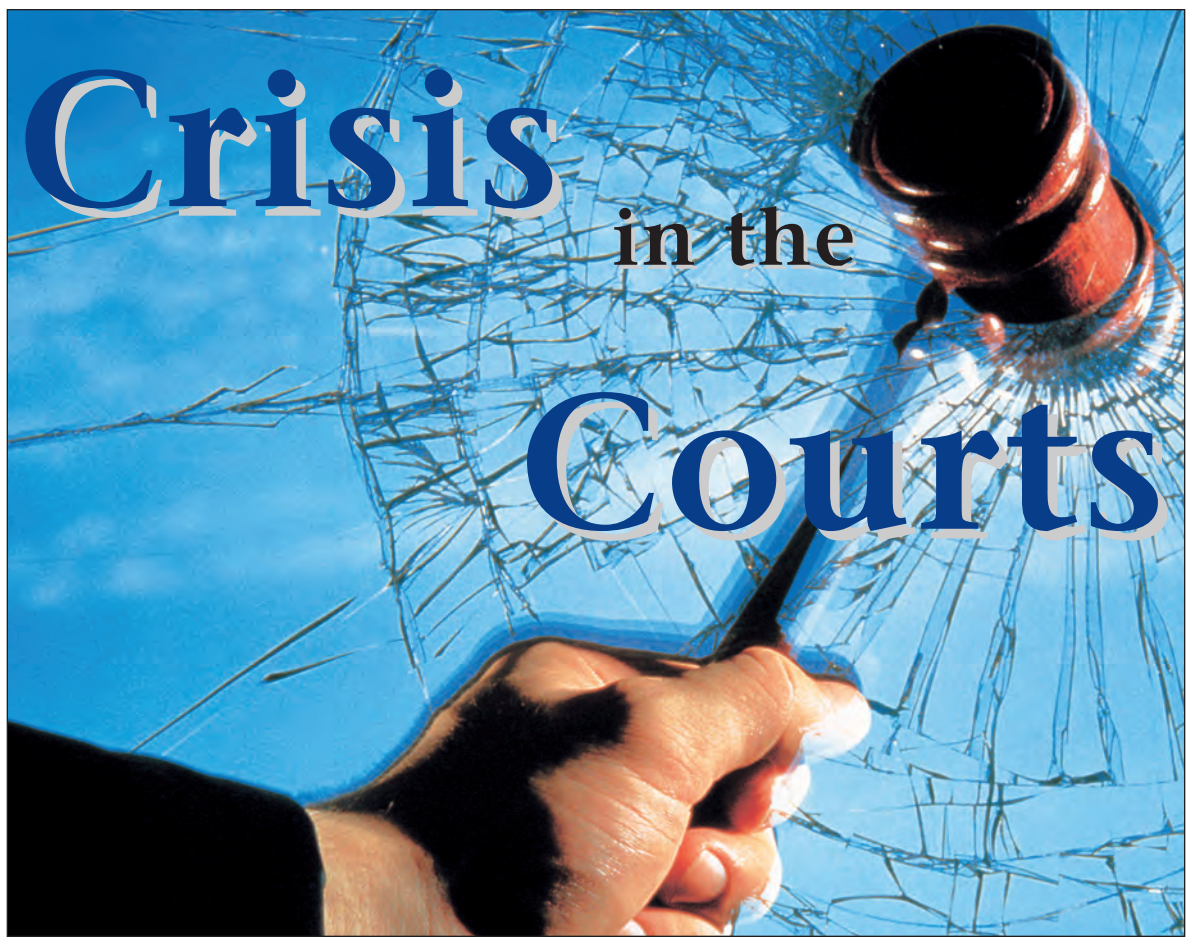

Challenges in passing reforms show value of simple approach

By MARK A. HOFMANN

Simplicity is a virtue when it comes to enacting federal tort reform legislation.

Carefully targeted bills stand a much better chance of passage than sweeping measures, legal observers say. But reformers also must persuade Congress that a liability problem is of such national importance that it justifies federal intrusion into what has traditionally been the province of the states. That can invite objections from some usually pro-business conservatives, noted one tort reform opponent.

If those challenges are not daunting enough, reform proponents also face the political fact of life that unfinished business in one Congress must start the entire legislative process all over again.

And, reform advocates warn, even the most finely crafted bill does not face favorable odds if the business community and other pro-reform forces don't close ranks behind it.

Despite such long odds, there have been victories in the federal tort reform effort.

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Q&A: *Business Insurance's Spotlight report, "Litigation Reform: Crisis in the Courts," examines the tort system and explores issues relating to liability reform. As part of the report, Business Insurance polled a variety of legal experts and tort reform leaders. Our questions and their answers can be found on the following pages:*

Tort reform opponents tout rights of plaintiffs

Access at issue

By ROBERTO CENICEROS

If it ain't broke, don't fix it, say tort reform opponents.

In fact, they claim that tort reform is unnecessary because the existing legal system works well and does what it's supposed to, which is to give injured citizens an accessible and fair means for righting wrongs and stemming future harm, say tort reform opponents.

That argument might rile many risk managers and insurers struggling to stem claims losses, but tort reform opponents battle for public opinion by emphasizing how the current system—in their view—benefits society and consumers.

Injured consumers do not need political clout or financial influence to get a fair shake in the court system, according to Robert S. Peck. Mr. Peck is president of the Center for Constitutional Litigation, a Washington-based law firm that often poses constitutional arguments against tort reform statutes.

A day in court, along with the full value of a jury verdict, is a constitutional right, Mr. Peck said.

"Tort reform tries to change that formula without consideration for fairness, without doing anything other than making it more difficult for somebody who may be egregiously injured to obtain justice," Mr. Peck said.

Reform advocates who see trial lawyers behind most attempts to derail their efforts can certainly point to Mr. Peck's practice.

The Assn. of Trial Lawyers of America is one of his largest clients, hiring him to help wage their legal battle against tort reform measures. Other reform opponents include consumer organizations and public interest groups with politically liberal leanings.

And they are not all funded by trial lawyers, noted Joan Claybrook, president of Public Citizen, a Washington-based consumer advocacy organization founded in 1971 by Ralph Nader.

Public Citizen relies on member-

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ADR slow to grow page 22

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Challenges: Small steps more effective in reform effort

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Victor Schwartz, general counsel of the Washington-based American Tort Reform Assn., points to the General Aviation Reform Act of 1994 as a prime example of how focused tort reform can be achieved at the federal level. The act provides manufacturers of small aircraft with certain defenses against product liability claims.

Mr. Schwartz said that pilots and general aviation aircraft owners aren't generally thought of as consumers, yet in the case of small aircraft, they are. And, he said, the pilots and owners were among the staunchest proponents of the bill, because of fears that liability costs would drive the manufacturers out of business.

This showed a "very legitimate consumer interest—not something that's made up," he said. As a result, "you had your so-called 'victims' supporting GARA—that's what made GARA."

In addition, "to the extent that the bill does not create a clarion call to the plaintiffs bar, it's more likely to pass," said Mr. Schwartz.

He cited legislation that offered teachers some protection against liability as an example, noting that only a small segment of the bar specializes in litigation against teachers. "They had difficulty mobilizing against teacher protection," Mr. Schwartz said. Similar circumstances applied to GARA and legislation involving certain medical devices, he said.

James A. Anderson, vp-government relations for the National Assn. of Wholesaler-Distributors in Washington, also cited GARA's passage as a tort reform milestone.

"Look at that against the backdrop of earlier efforts to enact more sweeping tort reforms. The lesson we learned is clear—tort reform at the federal level is possible in incremental steps. The question becomes, how many of those steps will the political branches of the federal government be willing to take over a specific period of time, such as a two-year Congress?" said Mr. Anderson.

"It is a political exercise," he said. "Do I believe that broad and sweeping tort reform is possible? Not in this Congress. That may be another election away."

Reformers need "pretty clear federal interest," demonstrating to lawmakers that this is not something that can be handled on a state-by-state basis, said Mr. Schwartz. "The more true federal interest, the more likely it is that a federal bill can pass," he said.

"Then you get into what the solution is. With respect to the federal component, that's a real issue. I think the burden is on the advocates, the tort reform supporters, to demonstrate why something must be done in Congress because, obviously, our civil justice system at its core is a matter of state law," said Sherman Joyce, president of ATRA.

But an issue such as the jurisdiction of federal courts in class action litigation can be addressed only by Congress, Mr. Joyce said in reference to the pending Class Action Fairness Act. The bill, which the Senate is expected to take up next month, would allow the removal to federal courts of certain class actions involving defendants and plaintiffs from different states.

"That problem has been amply demonstrated, and there's no dispute that problem has to be addressed by Congress," he said. Similar arguments can be made for asbestos liability and medical malpractice liability reform being handled at the federal rather than state levels, said Mr. Joyce.

Yet some conservative lawmakers balk at enhancing federal jurisdiction over what have been traditionally state matters, pointed out a leading opponent of tort reform initiatives.

"For a long time, the reason they failed on the big things was even Republicans believed this was not an appropriate issue for Congress to handle, because tort law has traditionally been the province of states," said Joanne Doroshow, executive director of the New York-based Center for Justice & Democracy.

"More recently, the proposals have been so severe in terms of restricting victims' rights that even Republicans did not have the stomach for it. That was definitely why the medical malpractice bill failed," she said, referring to a measure that passed the House last year but was killed in the Senate.

Even having a pro-reform president doesn't guarantee success with Congress at the other end of Pennsylvania Avenue, pointed out a veteran insurance industry lobbyist.

"It is striking that Gov. George W. Bush was noted for two major legislative initiatives that were successful—education reform and tort reform—and he's been unable as president, even with Republican majorities in both chambers, to translate his agenda into law on tort reform. It's not his fault or the administration's fault," said Joel Wood, senior vp-government affairs for the Council of Insurance Agents & Brokers in Washington.

"Legal reform issues are as polarizing as issues get in Congress," Mr. Wood said. In the aftermath of the 2002 enactment of the McCain-Feingold campaign finance reform legislation, "trial lawyers have replaced labor unions as the primary source for hard cash for Democratic campaigns across the country," he said.

A spokesman for the Assn. of Trial Lawyers of America said that lawmakers don't regard legal reform to be reform of any sort.

"Corporate special-interest lobby money doesn't buy fairness for the American people," said the spokesman for Washington-based ATLA. "What the advocates of limiting the legal rights of American families want cannot ever in good conscience be called 'reform.' And when they know what the tobacco, chemical and drug companies are trying to do, the constituents of members of Congress don't like the idea. The special interests want Congress to say, basically, that they don't trust the American people who do their patriotic duty by serving on juries, listening to all the facts and making intelligent decisions," the ATLA spokesman said.

Broad business support is crucial for federal reform efforts, proponents say.

"Bills die not so much by the plaintiffs lawyers' hatchet as by division in the business community," cautioned ATRA's Mr. Schwartz. "That killed federal product liability, it's affecting asbestos and it has arisen in a number of other situations. Again, the broader the bill, the more likely you're going to have division," he said.

"One of the fundamental challenges is getting the business community to focus," said Francis D. Bouchard, senior vp and director-federal affairs for Zurich Financial Services Group in Washington.

"We all have our own parochial agendas dealing with the specifics of our respective business but, unfortunately, it tends to take a crisis to get us to focus on the broader issues of our legal system. The trial bar, by comparison, is singularly focused on these issues, which gives them an ability to concentrate all of their resources on one subset of issues."

CIVIL CASELOADS: FEDERAL vs. STATE

	Federal courts caseload	State courts caseload
1997	273,212	15,317,717
1998	252,994	15,331,616
1999	261,651	15,047,495
2000	257,832	15,139,995
2001	259,927	15,750,071
2002	NA	16,335,207

Source: National Center for State Courts, Administrative Office of the U.S. Courts

Movement began with med mal crisis in early 1970s

By MARK A. HOFMANN

It all began with the medical malpractice crisis of the early 1970s.

A spike in liability insurance costs led physicians to seek relief from some legal liability they thought had been unfairly imposed upon them. By doing so, they inadvertently gave rise to the modern tort reform movement.

In the intervening 30 years, the tort reform effort has grown into a broader movement that focuses on the problems of the civil justice system as a whole rather than dealing with an immediate liability crisis faced by one sector of the economy. Yet the very nature of tort law—focused as it is on the states—has meant that the movement looks more like an ever-shifting coalition than a monolithic drive toward a single goal.

The focus on tort reform "began with the first medical malpractice crisis, which was in the early '70s, before product liability. There was movement to limit liability," said Victor Schwartz, a longtime tort reform advocate who currently is general counsel of the American Tort Reform Assn. in Washington. Medical malpractice reform played out on the state level, with California's pioneering Medical Injury Compensation Reform Act becoming the standard against which other efforts were measured. MICRA, enacted in 1975, limited the noneconomic damages that may be levied against physicians, among other changes.

At the same time, Mr. Schwartz noted, the federal government became involved in the possible reform of product liability law. A special task force urged the adoption of uniform product liability laws at the state level and insurance reform at the federal level, which led to enactment of the Liability Risk Retention Act, said Mr. Schwartz, who served on the task force.

Attempts to pass a federal product liability law failed repeatedly, though, and "finally Roman-candled when the business community split over a bill that President Clinton would have signed," recalled Mr. Schwartz.

In the meantime, though, "tort reform changed into civil justice reform, and civil justice reform is broader—it goes to improving our civil justice system as a whole rather than limiting rights to sue," he said.

One of the most significant developments in tort reform was the creation of ATRA in 1986. The group came into being in a conference room of the Washington-based American Consulting Engineers Council.

"It was a great way of doing things—you could start fresh," said Diane Swenson, who was ATRA's first staffer and who is now executive vp of the National Assn. of Federal Credit Unions in Arlington, Va. "The one thing I've noticed is, whoever is the trial lawyers' enemy at the moment are the most active members." As a result, ATRA functioned more like a coalition than a "true association," as members came and went, she said.

When Martin Connor succeeded former Republican lawmaker James Coyne as ATRA's president in 1989, tort reformers were enjoying a run of success at the state level, notably in the area of joint-and-several liability, Mr. Connor said. "We had meetings around the country for which people from all the states came in" to learn about strategy, Mr. Connor said, but he stressed that ATRA has never financed state coalitions, instead encouraging members to invest in state efforts.

Tort reform organizations proliferated at the federal level during the 1980s and early 1990s, leading to a scramble for resources, said Mr. Connor. There have been so many different organizations out there working independently, that to speak of "a tort reform movement" is misleading, he said.

While many of the issues remain the same as they were in the early years of the movement, tort reformers have grown more sophisticated, said Sherman Joyce, who succeeded Mr. Connor in 1994 as ATRA's president, a job he still holds.

"The overarching point is that civil justice and tort reform has to be more broadly defined in 2004 than it would have been 10 years ago or 20 years ago," said Mr. Joyce. "The challenge, solutions and whole agenda were pretty narrowly focused on a well-developed menu of legislative initiatives. Today, we're seeing an era of regulation through litigation, new tactics are being used, and it's brought the tort reform movement into the political arena," he said.

"The single greatest challenge is looking at the complexity of the litigation climate and the different responses that are necessary," Mr. Joyce said, "and recognizing that, in some instances, no single response will be a 100% solution."

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Q: What aspect of society is hurt the most by our current legal system?

Jeff Driver
President
American Society for Healthcare Risk Management
Chicago

All of us—as patients in hospitals, clinics, doctors' offices and long-term care facilities—suffer due to inequities that result when plaintiffs are unfairly compensated for medical accidents. Precious resources are utilized to practice "defensive medicine" as well as to manage, defend and pay for spurious and exaggerated legal claims. These resources, which must be drawn from a limited pool, could otherwise be used to improve access to health care and the health of Americans, as well as permit further measures to assure the safe administration of medical care.

We often hear that "an ounce of prevention is worth a pound of cure." Could you imagine the impact if the wealth of health care resources that are channeled into the legal system were instead redirected into preventative health strategies to improve medical care and the health of all Americans?

Mr. Driver is chief risk officer of Stanford University Medical Center in Palo Alto, Calif.

Maurice R. Greenberg
Chairman and Chief Executive Officer
American International Group Inc.
New York

The economy of our country is suffering greatly because of the tort system. It costs about 2.2% of our gross domestic product and could reach 2.4% of GDP by 2005. That is going from $230 billion annually to approximately $300 billion. Too many people in our country now believe that we have a "riskless" society. If something happens to them, they expect to be reimbursed by somebody. They don't recognize that the "somebody" who's paying for it is "everybody."

Marjorie E. Powell
Senior Assistant General Counsel
Pharmaceutical Research & Manufacturers of America
Washington

The personal injury litigation system clearly hurts people seeking health care. Costs of care increase because fear of lawsuits drives doctors to order unnecessary tests. Physicians desert practice areas that plaintiffs' lawyers target, leaving pregnant women driving long distances to find doctors to deliver their babies, and emergency rooms with fewer and fewer physicians. Providers won't talk about accidents for fear of lawsuits, so there is no way to find and fix problems could be prevented. The alarming and usually misleading advertisements by lawyers looking for people to join class action lawsuits frighten patients, who stop taking the advertised medicine, and deter doctors from prescribing that medicine, even if it is the most effective medicine for that patient. Money spent on lawsuit defense is money not spent on research into new treatments.

People with real injuries wait years for compensation, much of which their lawyer takes as the fee. Many injured people receive no compensation, because a lawyer won't take their case or they refuse to play the lawsuit "lottery." People with serious injuries included in class action lawsuits receive less than the costs of their continuing care, because awards are shared with many people with minor or nonexistent injuries.

Victor E. Schwartz
General Counsel
American Tort Reform Assn.
Washington

Ordinary consumers are hurt the most by defects in our current legal system. This is why: First, excessive liability creates unnecessary increases in the cost of products. Perhaps the easiest example is the ordinary stepladder. Wallpapered with excessive warnings, each stepladder's liability insurance costs are estimated to be as much as 17% of the cost of the product. If that were an actual state tax, people would know about it and protest it. Consumers are also hurt because innovation—

Continued on page 16

Courts: May have significant role in changing system

Continued from page 10

I don't think you're changing the law if you apply the law more effectively."

Corporate defense attorney Richard K. Wray, chair of the product liability practices group at Sachnoff & Weaver Ltd. in Chicago, agrees. Given, for example, that product liability law was not developed under British common law, upon which the U.S. common law is founded, "I think it's fair game for courts to adjust and adapt," Mr. Wray said.

In many cases, that is fine with consumer advocacy group Public Citizen.

"Historically, consumer advocates are pretty satisfied with how judges have made law; they get it right," said Jackson Williams, legislative counsel for the Washington-based organization.

Mr. Williams said he generally is not "suspicious" of judicially imposed changes in tort law, unlike when "corporate attorneys have pushed proposals through the legislature."

Public Citizen does not support all judicial modifications of the tort system, such as limiting punitive damages and joint-and-several liability. But the consumer group has not taken a stance on a few judicially imposed reforms that some attorneys cite as the most noteworthy issues that courts have addressed.

Inactive dockets

Topping most of those attorneys' lists are the inactive dockets that several state courts have created for asbestos claimants who allege they were exposed to the substance and cite abnormalities in their lung X-rays but who have not developed any medical problems.

According to a September 2002 interim report released by The Rand Corp., a nonprofit research organization based in Santa Monica, Calif., 65% of the compensation paid to asbestos claimants over the previous decade went to individuals with noncancerous conditions. Rand reported there is widespread agreement that a majority of those claimants are "functionally unimpaired."

In a 2001 report, the American Academy of Actuaries reported that 90% of new asbestos claimants in 2000 were unimpaired.

Courts in Baltimore, Boston, Chicago, New York, Seattle and Syracuse, N.Y., have established inactive dockets to conserve asbestos defendants' assets for the sickest claimants. With their cases moved to inactive dockets but still in the court system, unimpaired claimants do not have to worry about meeting claim-filing statute-of-limitations requirements if they ever develop asbestos-related illnesses.

The Michigan Supreme Court is expected to rule soon on whether to create an inactive docket for asbestos claimants.

'Historically, consumer advocates are pretty satisfied with how judges have made law; they get it right.'

Jackson Williams
Public Citizen

Judges in Cleveland, Greenville County, S.C., and Portland, Ore., have opted not to create inactive dockets but instead are dismissing lawsuits filed by unimpaired claimants in a manner that allows them to refile their claims if they later become sick.

Such approaches to handling lawsuits filed by unimpaired asbestos claimants are "the best example" of how courts have modified tort law, Mr. Behrens of ATRA said.

How another state court handled the same issue ranks as the worst example, many attorneys agree.

A West Virginia court consolidated claims filed against more than 100 defendants by thousands of asbestos claimants, some of whom were seriously ill and others who had no functional impairment. All but one defendant settled. A jury found the remaining defendant, Dow Chemical Co.'s Union Carbide Corp. subsidiary, potentially liable (*BI*, Oct. 25, 2002).

While clearing the West Virginia court's docket of asbestos claims, the consolidation of the claimants violated the defendants' constitutional due process rights, attorneys complain.

"And that encourages more weak claims in that jurisdiction," Mr. Schoenfeld asserted.

Other reforms

In many other circumstances, court rulings have had the effect of reforming tort law, according to attorneys. Those rulings have affected:

- **Punitive damages.**

In reviewing a Utah case, the U.S. Supreme Court last April strongly suggested that most punitive awards of more than nine times the underlying compensatory award would be unconstitutional (*BI*, April 14, 2003).

Meanwhile, of the approximately 36 states that have raised the burden of proof standard imposed on plaintiffs seeking punitive damages in any kind of civil case, about eight have toughened their standards through court rulings, according to Mr. Behrens. All of those states moved to a tougher standard requiring clear and convincing evidence rather than a preponderance of evidence.

And while courts in the District of Columbia and Maryland still have not moved away from the more lenient standard, courts there require plaintiffs seeking punitive awards to prove that the defendants acted with malice. "It's difficult to get punitive damages in Maryland," Mr. Behrens said.

- **Joint-and-several liability.**

About two-thirds of the states have either abolished joint-and-several liability or restricted its application to defendants that were at least 50% liable for a plaintiff's injury. About a half-dozen of those reforms were imposed through court decisions, according to Mr. Behrens.

In a related move, Michigan courts in the 1980s adopted a kind of limitation on joint-and-several liability that state lawmakers later codified and legislatures in other states subsequently adopted, though sometimes in a watered-down fashion, noted insurer attorney Darrell M. Grams, a partner at Duane Morris L.L.P. in Detroit.

Under Michigan's sophisticated user standard, a product liability plaintiff cannot hold liable a supplier of the manufacturer whose finished product allegedly harmed the consumer, Mr. Grams explained.

- **Junk science.**

Following the U.S. Supreme Court's 1993 and 1997 rulings that clarified that federal trial judges must evaluate the scientific underpinnings of expert testimony before deciding whether to admit it, courts in about 30 states have adopted similar standards. The high court's rulings were not binding on states, because the rulings dealt with federal rules of evidence rather than U.S. constitutional issues, Mr. Behrens noted.

How big a role courts will play in reforming the tort system in the future is largely up to trial attorneys and their clients, observers agree.

While focusing on the specifics of their individual cases, more trial attorneys also have to raise arguments about the fairness of tort standards so that higher courts can consider those standards if the cases move into those courts, observers said.

Referring to trial attorneys and their clients, Mr. Grams said: "I think there needs to be much more strategic thought given to try to effect change."

At least one jurist, however, does not see a need to reform the tort system either judicially or legislatively—with one caveat.

"I'm not sure that tort reform and caps are as necessary as some people would suggest if judges would just do their job," said Justice Thomas A. Wiseman, a senior U.S. District Court judge and a law professor at Vanderbilt University in Nashville, Tenn.

"Judges must exercise control when juries go too far and set a verdict aside," Judge Wiseman said. But, he added, juries "generally get the right result, though it might be for the wrong reason."

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Q: What aspect of society is hurt the most by our current legal system?

Continued from page 14

particularly for vaccines and medicines—is curbed because of potential unlimited liability. Finally, consumers may be limited in their choices of existing products and services. In the next 10 years, this may impact sellers of fast food and consumers who want those products. Patients also are limited in their access to medical services because of the costs of malpractice insurance.

Mr. Schwartz is a partner at Shook, Hardy & Bacon L.L.P. in Washington.

John Sullivan
President
Civil Justice Assn. of California
Sacramento, Calif.

When you look at real hurt, it's our sick and our young who are paying a huge price day in and day out. Lawyers looking for multimillion-dollar verdicts and settlements are driving companies away from vaccine research and production. Fear of lawsuits kept hospital administrators from passing on warnings about a job-hopping nurse who confessed to killing 30 patients in hospitals in New York and Pennsylvania.

Richard Thornburgh
Former U.S. Attorney General
Washington

Let me note, as I have before, that I have great faith in the American legal system. While aspects of the civil justice system need improvement, the process as a whole remains the best of its kind in the world. All agree that people who are harmed by the negligence of others should be made whole. That said, Americans of all racial, ethnic and economic backgrounds are hurt by shortcomings in our current legal system. Unfettered and often irresponsible litigation can hurt all of us. Businesses large and small often pay more in insurance and litigation costs even when their products or services are safe, and they invariably pass along those costs to consumers. Medical providers pay significantly more in insurance costs because of the mere threat of costly litigation and often practice costly and unnecessary defensive medicine, putting the availability of medical care in jeopardy and causing costs to skyrocket. Development of new products and medicines is often foregone because of the threat of lawsuits. And American businesses suffer in competition with foreign companies operating in lower-cost business climates. Thus, harms caused by out-of-control tort litigation often are inflicted on the very people that the legal system was supposed to protect.

Mr. Thornburgh is counsel at Kirkpatrick & Lockhart L.L.P. in Washington.

Myth: Opponents say existing tort system works fine

Continued from page 10

ship dues, publication sales and foundation contributions to tackle health, safety and democracy issues. The battle against tort reform is a democracy issue similar to campaign finance reform and voting rights measures, Ms. Claybrook said.

Reform opponents claim that proponents are waging a war void of statistical research. They say the media and reform proponents often rely on anecdotal stories to paint a picture of an out-of-control legal system.

Consultant Tillinghast, a unit of Towers Perrin, in a study released in December, found, though, that tort costs rose to $233 billion in 2002, up 13.3% from 2001. Tort costs had already increased 14.4% from 2000 to 2001 (*BI*, Dec. 15, 2003).

The study, "U.S. Tort Costs: 2003 Update," blamed the rising costs on asbestos-related liabilities, shareholder lawsuits, medical malpractice cases and class action litigation.

But the study data includes some costs, such as insurance company overhead, that shouldn't be pinned on the tort system, Ms. Claybrook said.

Tort reform foes also argue that tort reforms would eliminate corporations' motivation to ensure that their products are not dangerous. The existing tort system requires responsible parties to internalize the costs of injuries attributed to their carelessness, they say.

Tort reform, in contrast, seeks to shift some of the cost of injuries to victims and government programs, the opponents say.

"The whole purpose (of tort reform) is to limit the liability and accountability of business, and there is no attempt to the limit the authority of businesses to sue other businesses," Ms. Claybrook said.

Reform opponents also argue that reforms such a caps on damage awards resulting from medical malpractice lawsuits do not lead to lower insurance rates.

"The premiums that doctors are being charged are not related at all to actual claims payouts," said Joanne Doroshow, executive director of the Center for Justice and Democracy in New York. "They are driven by the insurance cycle."

Rates rise during a hard market based on insurers' investment returns and competition in the insurance market, Ms. Doroshow argued. She noted that she spends much of her time researching insurance issues.

But not all observers of the insurance industry find such conclusions to be compelling.

Putting a cap on pain and suffering awards does affect premiums by mitigating claim severity, said Michael Seitz, vp of risk management for Fairview Health Systems in Minneapolis.

"It may only take 10% or 15% off the whole settlement, but at least it stops what I consider the runaway jury and adding on more settlement costs," Mr. Seitz said.

Fairview is an integrated health system with seven hospitals, 40 physician clinics and 275 doctors. Mr. Seitz purchases reinsurance for medical malpractice coverage provided by Fairview's Bermuda-based captive.

Reform opponents also like to point out that medical malpractice insurers have asked for rate hikes in several states following the adoption of caps on damage awards for medical malpractice cases.

So capping such damages does nothing to help doctors struggling with insurance costs, Ms. Doroshow said. Instead, she said, state insurance commissioners need to control fluctuating insurance rates.

But Mr. Seitz noted that it takes many years for damage caps to have significant impact. In the short term, losses shoot up rapidly as plaintiffs' attorneys hurry to file claims before caps take effect. That leaves insurers to catch up with an avalanche of lawsuits.

Still another argument posed by reform opponents centers on a decline in the number of cases going to trial when compared to overall population growth. They see the decline as proof that the current system functions well to limit needless lawsuits.

For example, research prepared for a "Symposium on the Vanishing Trial," sponsored by the Litigation Section of the American Bar Assn., found that, in 1962, there were 31 civil trials heard in federal district courts per million individuals in the U.S. population. By 2002, the number of cases per million in population dropped to 16 and similar decreases occurred in state courts, according to the researchers.

Yet the same research also found that, in 1962, there were 295 civil filings in federal district courts per million in population. By 2000, the number of filings per million in population shot up to 923. The researchers also noted that although there has been a decline in trials by most measurements—including the number of attorneys and the amount of money spent on law—"the legal world has been growing vigorously."

But the overwhelming majority of cases filed each year represent genuine issues of harm and the overwhelming majority of resulting legal decisions represent justice, according to a Dec. 9, 2003, letter written by ABA President Dennis W. Archer.

In the letter, Mr. Archer criticized two prominent news organizations for relying on anecdotal evidence to paint a false portrait of the tort system. In his letter, Mr. Archer says the current systems works well to protect fundamental rights.

"There are multiple remedies for corporations, government agencies, hospitals and the like who believe they are sued unfairly," wrote Mr. Archer.

THE "STELLA AWARDS" FOR 2003

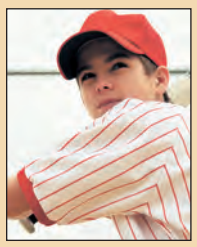
The Stella Awards recognize the most outrageous lawsuits of the year. The awards—named for Stella Liebeck, who was awarded $2.9 million in compensatory and punitive damages for spilling McDonald's coffee on her lap (an amount later slashed by a judge)—are the creation of humorist Randy Cassingham. His copyrighted summaries of the cases can be found at *www.stellaawards.com*

● The City of Madeira, Calif., is suing Taser Inc., manufacturer of a stun gun, seeking to hold it responsible for any wrongful death verdict the city must pay after a police officer mistakenly drew her pistol instead of her Taser and shot an unruly suspect she was trying to subdue in the back of her patrol car.

● A Portland, Ore., man filed suit against a dog sitter who allowed his pooch to escape, seeking $60,000 in compensatory damages and $100,000 for emotional distress. The man incurred such a hefty tab during his two-month search for his pet, a former stray, by placing costly display ads in newspapers, hiring four animal psychics and a witch, and ultimately losing his business because he was distracted and distraught.

● A Mobile, Ala., woman sued a storage company for negligence, seeking $10 million after a manager shut and padlocked her unit, unaware she had moved into it and was living there. Inexplicably, she did not bang on the door or call out when the door was shut, though awake at the time. She was locked inside for 63 days, subsisting on food supplies at hand. Even though the jury found her 100% at fault, it still awarded her $100,000.

● A Catholic priest filed a lawsuit seeking $65,000 from a man for violating the confidentiality agreement of a sex-abuse settlement made years earlier for that amount. The former victim had learned that the priest was again working with children, violating the terms of the settlement. He brought the matter to the church and, after it refused to intervene, to the local press.



● A Mission Viejo, Calif., high school student sued the school, seeking $50 million in damages. The student claims that amount would be his future expected earnings as a professional baseball player—an outcome frustrated by the fact that he was kicked off the team after being charged with securities fraud. As a result, he contends, his talents would go undiscovered by pro scouts.

Source: *www.stellaawards.com*

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Q: What single tort reform would have the most beneficial impact on reducing the cost of our civil justice system?

Dr. Richard E. Anderson
Chairman and Chief Executive Officer
The Doctors Co.
Napa, Calif.

Limits on pain-and-suffering awards, now intangible, incalculable and unpredictable, would eliminate the element of destructive randomness that now defines these awards and allow a sustainable insurance system to indemnify deserving plaintiffs.

Gary A. Baxter
Assistant Treasurer
and Director of Insurance
Weyerhaeuser Co.
Federal Way, Wash.

While liability tied to asbestos claims currently is the largest single factor in the rise of tort costs, I believe that establishing caps on large claims awards for medical malpractice would have the most beneficial impact in reducing future costs.

U.S. Rep. Rick Boucher, D-Va.
Washington

Class action reform would have the most beneficial effect in reducing the cost of litigation and the burdens placed on our judicial system because it is both achievable and broadly benefits businesses by reforming a significant abuse of our current system.

Class action system abuse at the state level imposes a widespread cost on our litigation system, consumers, defendants and corporate shareholders. Without limiting the rights of any plaintiff, this reform would allow for cases to be removed from the most abusive state courts, in which defendants are often forced into costly settlements for even the most frivolous suits.

The bill would provide for better oversight by neutral federal judges and would reduce the likelihood of extortion and collusion. Unlike other proposed legal reforms, class action abuse affects every sector of our economy. Many cases have a nationwide economic effect.

Rep. Boucher was an original co-sponsor of H.R. 1115, the Class Action Fairness Act.

Steven Gerber
Attorney at Law
Gerber & Samson L.L.C.
Wayne, N.J.

My view is that the single tort reform that has both the best possibility of adoption in the near future and which, if adopted, would significantly impact costs, is the class action reform contained in pending federal legislation. The proposal would permit the transfer of many class actions now brought in state courts to the federal courts. Enactment of this proposal would substantially reduce state venue shopping by the plaintiffs bar and diminish the possibility of multiple lawsuits involving similar class claims being litigated in several court systems. Not only would adoption of this reform reduce costs of defense for the business and insurance communities, it would also increase even-handed litigation treatment because of the federal judiciary's well-established rules and procedures for handling complex, multidistrict litigation. This is the sort of tort reform that would help "level the playing field."

While a variety of other "tort reforms" have been proposed that might also have positive impacts (e.g., the implementation of damages caps in certain types of cases and the elimination of fee-shifting for successful plaintiffs under certain statutes such as the antitrust laws and the employment discrimination laws), only class action reform has the possibility of short-term adoption by Congress and a concomitant reduction in costs for products liability and mass tort cases.

Trish Henry
Senior Vp, ACE INA
Government Affairs
ACE INA Holdings Inc.
Philadelphia

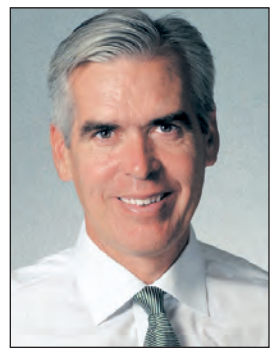
Asbestos litigation reform would have the most significant effect because of its broad reach across thousands of defendants in virtually every aspect of the American economy. Its impact has been compared to the devastation caused by events such as Enron, WorldCom and Sept. 11 combined. Asbestos litigation is not serving the true victims of exposure, and it really has become an embarrassment for our civil justice system.

Jim Hirt
Executive Director
Public Risk Management Assn.
Alexandria, Va.

For public entities, tort claim caps are one of the most significant. As tort claims costs are passed on to public entity residents or users, a reduction in costs with a claims cap could possibly be one of the easiest ways to equitably distribute the benefits of tort reform for all citizens.

Philip K. Howard
Chairman
Common Good
New York

The single most important legal reform: Restore the responsibility for judges to make rulings on who can sue for what. Today, law changes from jury to jury. People have no idea where they stand. Without constant judicial rulings—e.g., maybe you have a claim for your broken leg but not for $10 million—there's no body of law developing that keeps justice on an even keel.



Mr. Howard is vice chairman of Covington & Burling in New York.

Ted Jeske
Risk Manager
Historic Tours of America
Key West, Fla.

We cannot change human behavior by legislating against it. We tried that with Prohibition in the 1920s, and it failed miserably. What we can change is allowing people to bring these frivolous lawsuits into our courts with impunity. We should change the tort law so that if a plaintiff brings in a frivolous lawsuit, the plaintiff must pay the legal fees of the defendant and all court costs. In addition, there should be some sort of reprimand for the attorneys as well who bring these cases before the courts.

Continued on next page

LIABILITY CASES THAT LED TO CHANGE

Cases from 1971 to the present that have affected the business community.

■ **The anti-miscarriage drug DES is taken off the market in 1971 after a string of lawsuits reveals it increased risk for cancer, infertility and other serious health problems.**

■ **Ford Motor Co. recalls 1.5 million Pintos and 30,000 Mercury Bobcats for fuel system modification in 1978 after the**

PHOTO: FORD

"Pinto trials" in which the automaker was ordered to pay $125 million in punitive damages. The award was later reduced to $3.5 million.

■ **R.G. Industries goes out of business in 1986 after the Maryland Court of Appeals holds the gunmaker liable for deaths and injuries caused by an R.G. product, an inexpensive revolver.**

PHOTO: KRT

■ **Playtex agrees to stop making super-absorbent tampons linked to toxic shock syndrome to reduce a $10 million punitive damage award in 1987.**

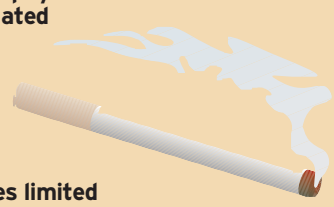
■ **After 11 punitive damage awards totaling $24.8 million, A.H. Robins files bankruptcy and agrees to pay for removal of all Dalkon Shield IUDs.**

■ **Domino's halts 30-minute delivery policy after a $78 million punitive damage award to car crash victim in 1993.**

PHOTO: KRT

■ **Dow Corning files for bankruptcy protection in 1995 and agrees to pay $3.2 billion to settle suits over silicone breast implants. The silicone implants are taken off the market pending tests of their safety.**

■ **All 50 states in 1998 settle their lawsuits against the major tobacco companies, recovering $246 billion over 25 years to pay for tobacco-related health care costs. The multistate Master Settlement Agreement also imposes limited restrictions on the marketing of tobacco products.**



■ **Mass tort litigation triggered by asbestos injury claims from 1982 to the present bankrupts numerous manufacturers and prompts insurers to make massive additions to reserves.**

Sources: *Business Insurance*, Center for Justice & Democracy

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Continued from previous page

Dan Kugler
Assistant Treasurer-Risk Management
Snap-on Inc.
Pleasant Prairie, Wis.

The contingency fee system needs reform. Today, I believe this system generates too many frivolous lawsuits, and plaintiffs attorneys should be required to pay for legal actions brought where the lawsuit is won by the defendants. This would control legal actions that look to hit the jackpot. The current system does not expose plaintiffs to the risk of paying expenses if they lose their action.

Glenn Lammi
Chief Counsel
Washington Legal Foundation
Washington

The Washington Legal Foundation believes that while tort reforms in the legislative realm are worth pursuing, the single largest "reform" that would reduce the cost of our justice system would be for our judiciary, especially at the state level, to take action to protect the integrity of the law. They can do this by applying legal principles and judge based on the rule of law, not on what might be politically expedient or what they would do if they were elected legislators or regulators.

Gerald L. Maatman Jr.
Partner
Seyfarth Shaw L.L.C.
Chicago

A "loser pays costs/fees" system like in Japan. First, if the courts applied laws against frivolous lawsuits more vigorously, more plaintiffs lawyers would be sanctioned, and eventually it would have a deterrent effect on the filing of meritless lawsuits. Second, if the laws were amended to require the losing party to bear the true costs and/or attorneys' fees of the winning party, this would have a major impact in case selection and prosecution by plaintiffs lawyers. It's been known as the English rule of attorneys' fees.

Dr. Donald J. Palmisano
President
American Medical Assn.
Chicago

A national cap on noneconomic damages in medical liability lawsuits, similar to reforms already working in California for over 25 years under the state's MICRA (Medical Injury Compensation Reform Act of 1975) law, will best benefit our broken system. Capping noneconomic damages at a quarter-million dollars per incident in medical liability cases is a proven performer—we know it works in California. Currently, we have a system where trial lawyers are the main beneficiaries of medical liability lawsuits—and the victims left in the wake of the trial lawyers' greed include all who benefit from America's health care system.

Dave Parker
Risk Manager
Pima County, Ariz.

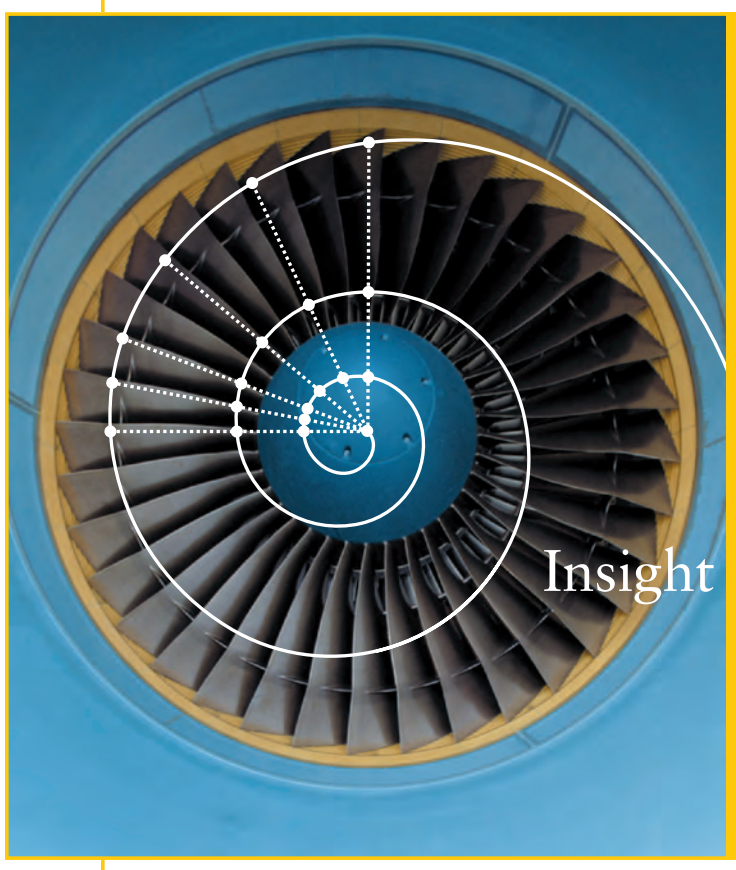
Trying to identify the single most beneficial reform is next to impossible. Prior efforts have focused on punitive damages and medical malpractice. However, general damages, such as pain and suffering, drive many more cases and are routinely used by juries to "send a message." Most states with strong governmental immunity laws have used tort caps to control risk, most without horror stories of abuse.

By capping only noneconomic damages, the likelihood of straining other social programs is greatly reduced. Arizona has also abandoned joint-and-several liability, making each party responsible for only their portion of the award. The U.S. Supreme Court is already recognizing the problems related to punitive damages; therefore, I'd lean toward appropriate tort caps as the most beneficial reform.

If I asked five different people, I would get five identical answers—attorneys. As one observer put it, "An attorney can move to a small town and he'll starve. However, if two move to the same small town, they'll both make money." But I'm not sure you can blame attorneys for the resistance to change. If the general populace believed there was a problem, their representatives would work to do something about it.

I've watched several tort reform movements and a whole lot of cases as they evolved, and I believe it is driven more by an entitlement attitude that is becoming even more pervasive. The general populace doesn't necessarily mind reasonable controls and restrictions for others but wants to preserve their own options if they ever end up in the same place.

There is also a general feeling that any time something goes wrong and someone is hurt or damaged, that it has to be someone's fault. The community mindset must change before meaningful tort reform is possible.



The Golden Mean is a mathematical ratio employed for centuries by architects, musicians, and artists to build symmetry in their works. At Endurance, we also seek to establish the patterns that impact our insurance and reinsurance clients worldwide. Combining our expertise with sound scientific principles, our devotion to the fundamentals helps ensure we will be around when our clients need us the most.

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Endurance

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Texas, Florida watching effects of med mal reforms

By MICHAEL BRADFORD

In a tale of two states' medical malpractice reforms, proponents in one are calling it the best of times, while those in the other say that not much is likely to change.

While tort reformers can claim success in both Texas and Florida, the laws that cap noneconomic damages in the two states are vastly different. In Texas, a constitutional amendment will protect the limits on damages. The Florida law, though, is widely viewed as falling well short of what was needed.

Texas reformers are enthusiastic over their Legislature's passage last year of a law that caps noneconomic damages against individual physicians in medical malpractice cases at $250,000. Noneconomic damages against hospitals and other facilities are limited to $500,000.

In Florida, noneconomic damages in most medical malpractice cases are capped at $500,000, but tort reform advocates point out that the cap is "pierceable." In cases in which a judge decides that the cap would represent a "manifest injustice," a claimant can recover up to $1 million against a medical provider and as much as $1.5 million from a nonpracticioner defendant.

The caps "weren't enough to do the job," said Jeff Scott, associate general counsel at the Florida Medical Assn. in Tallahassee. "Rates are still going up," he said of malpractice insurance costs.

There is a far greater sense of accomplishment in the Lone Star State.

The Texas tort reform law gained a measure of protection when voters ratified an amendment to the state's constitution that confirms the constitutionality of the caps. Those who worked to pass the reforms acknowledge that timing was a big factor in their success in Texas.

"The stars were lined up right," said Charles W. Bailey Jr., president of the Texas Medical Assn. in Austin. That alignment meant pro-reform Republicans were in control of the Texas House of Representatives and Senate and Republican Gov. Rick Perry also backed the changes.

The caps on noneconomic damages 'weren't enough to do the job' in Florida. 'Rates are still going up' for medical malpractice coverage in the state.

Jeff Scott
Florida Medical Assn.

To convince voters that a constitutional amendment was needed to protect the caps, the medical association and other reformers worked hard to spread their message, Mr. Bailey said. "We had a very intense grass-roots campaign," he explained, with doctors, medical students and "a small army of patients" hammering home the theme that huge awards were eroding access to care by driving away health care providers.

Although industry sources say it will take some time for the impact of the new law to be realized, at least one insurer has lowered rates as a result of the reforms that were effective last summer. Texas Medical Liability Trust in January decreased medical malpractice rates by 12% for some of its policyholders.

Meanwhile, in Florida, "from an insurer perspective, there was not much to crow about in this reform," said William Stander, the Tallahassee-based regional manager with the Property Casualty Insurers Assn. of America.

In accordance with the law, the state's Department of Financial Services has mandated that all insurer requests for rate increases be reduced by 7.8%. But rates will continue to rise, Mr. Stander pointed out, because insurers are requesting large increases.

That gives the trial bar, which opposed the caps, the opportunity to claim that, even with the caps, rates will continue to go up, Mr. Stander said.

"The Academy of Florida Trial Lawyers has always held the position that there should never be caps on damages of any kind," said Richard M. Shapiro, president of the Tallahassee-based group and president of Shapiro Law Group in Bradenton, Fla.

Statistics don't show that huge medical malpractice awards are handed out by "runaway juries," said Mr. Shapiro, who claims insurers are crying wolf. "I truly believe there is no crisis and would love to see insurance companies open their books and prove that they are losing money," he said.

Sherman Joyce, president of the American Tort Reform Assn. in Washington, said that "it remains to be seen" what impact the Florida reforms will have. The overarching issue, he said, is whether the law will survive or challenges will eventually lead to it being overturned.

While the Florida reforms may have come up short in the minds of some reform advocates, others say that some gains are better than none.

"We are pleased with what eventually passed," said Leslie Dughi, director of government affairs at the Florida Chamber of Commerce in Tallahassee. "We were pleased because there are some limits, even if it doesn't get the doctors where they want to be. The problem is, the caps are pierceable," she said of the potential for awards to be greater than $500,000.

Conversely, in Texas, not all reform advocates are ecstatic about what passed in that state.

Frank Galitski, executive director of the Texas Alliance for Patient Access in Austin, pointed out that while the cap is protected, the amount of the cap is not. He said that reform advocates are hopeful that, as long as the current group of legislators remains in place, opponents won't be able to build support for raising the cap.

Marianne Fazen, president and chief executive officer of the Dallas-based Texas Business Group on Health, said the association of 208 employers would have supported the caps only if the legislation had also contained quality-of-care provisions and some accountability requirements for the Texas Board of Medical Examiners.

Those features were not part of the final bill, and the caps by themselves probably "are not going to lower the cost that much," Ms. Fazen said of malpractice insurance. "There is the chance that they will harm people who are the victims of bad practice," she said.

As for other states seeking similar reforms, proponents in Texas and Florida emphasize that any success will be the result of teamwork and persistence.

"We stayed on our message—it's about access to health care," Mr. Bailey of the TMA said of the effort in Texas.

"The battle was a very steep incline," said the TAPA's Mr. Galitski. There was no single entity out there that could bring about the change by itself, he said, but by working together, reformers were able to get their message across.

Mr. Stander said that in the wake of Florida's effort, the lesson is that, for the insurance industry, "we have to do a much better job of media and public relations" when laying out a case for such reforms.

Q: What's the biggest obstacle facing tort reform advocates?

Charles Chamness
President
National Assn. of Mutual Insurance Cos.
Indianapolis

Achieving the appropriate balance of reforms in our current political environment is critically important. Plaintiffs attorneys have three things on their side. First, there are many decent folks representing truly injured plaintiffs, and nobody wants to limit their access to the courts. This legitimate concern, which we share, makes reform more difficult.

Second, plaintiffs attorneys have made enormous amounts of money from class action litigation. The tobacco settlement is the most prominent example of this. Many have become fabulously wealthy and have reinvested their windfall in the political process in an attempt to prevent the reforms that would end their "Learjet lawyer" lifestyle. Third, it is difficult to make the case that business, consumers and employees are the victims in the more outrageous cases. Evidence of this impact is mounting. Consider the most recent Tillinghast study setting out the continuously escalating costs imposed on every citizen in this country due to the tort system. Tillinghast has determined that in 2002 the overall cost reached $233 billion, or $809 per person. Unexpected passage of tort reforms in Mississippi and other problem states last year suggests that the public is beginning to understand. Finally, a recent survey conducted in Washington shows that a majority of residents believe that medical malpractice liability has gone too far.

Joseph A. Gerber
Co-Chair, Crisis Management Department
Cozen O'Connor
Philadelphia

Fear is the biggest obstacle facing tort reform advocates. In any dispassionate review of factors weighing in favor of tort reform, most Americans—also consumers of a vast array of products and services—recognize the wisdom, indeed the financial imperative, of tort reform. Fear emerges when the discussion moves from the global analysis of statistics to the far more individual "what if?" questions.

What if someone I love or am responsible for, e.g., a spouse or child, receives a grossly incorrect dosage of medicine in a hospital and enters a permanent vegetative state? What then? How do caps/limitations serve my (their) best interests in that situation? "What if?" questions can apply to a host of similar issues tied to defective goods and substandard services that could result in serious, permanent, maiming and disabling injuries. What then?

How does tort reform jibe with notions of indemnity, just compensation or making one whole?

The American consumer remembers all too well the clamoring for overhaul of the U.S. health care system. Twenty years later, those same consumers talk wistfully about the good old days before shortened hospital stays and referrals. All reforms look wonderful from a distance—that is, until your ox is gored.

Lisa Rickard
President
U.S. Chamber Institute for Legal Reform
Washington

The hardest thing about legal reform is getting people to realize the hidden costs of lawsuit abuse. The costs are huge, but they're spread across the population to the tune of $809 per person. The benefits are also big, but they're concentrated in the hands of one small group—a few wealthy plaintiffs attorneys who pocket up to half of their clients' winnings.

In some class actions, the attorney gets hundreds of millions of dollars in fees, while the plaintiffs get coupons. In one recent example, *Ramsey vs. Nestle Waters North America Inc. dba Poland Spring Water Co.*, a class action was brought against Poland Spring Water Co. charging that its water does not really come from a spring deep in the woods of Maine. The settlement calls for discounts or free water to Poland Spring customers over five years and contributions of $2.75 million to charities. In addition, the named plaintiff received $12,000. The lawyers, however, received $1.35 million.

So each of these wealthy, powerful attorneys has an enormous stake in preventing legal reform, and they use their political connections to protect their own interests. They claim to be acting in the interests of their clients, but most of these attorneys don't even know their clients. One infamous plaintiffs attorney boasted that he has the best practice in the world because he has no clients.

Anyone who wants an entertaining but revealing look at the world of greedy class action lawyers should read John Grisham's novel, "The King of Torts." It dramatizes how plaintiffs attorneys are ripping off the American public and shows how little their activities have to do with justice or fairness or helping the little guy.

Paul Rothstein
Professor of Law
Georgetown University
Washington

The appearance, which is an illusion, is that

Continued on next page

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tort reform benefits only big business and hurts the truly injured and the rest of us. People must be made to understand that if you hurt business, you hurt everybody, because jobs disappear, fewer taxes are paid, our position in international competition is harmed, the economy suffers, there are no funds to pay the truly injured, health insurance plans disappear, beneficial products are not made, etc., etc., etc.

Thomas L. Vance
Risk Manager
City of Anaheim, Calif.

There is little question that the biggest obstacle facing tort reform advocates is the attorney community. I would say specifically the plaintiffs trial lawyers but, in reality, the defense attorney industry would also be decimated by a significant reduction in civil litigation. And of course, the fuel driving this huge resistance to change is the billions of dollars in annual fees that the system deposits in the pockets of these courtroom jousters. Simply, huge sums of money can buy huge amounts of power and influence.

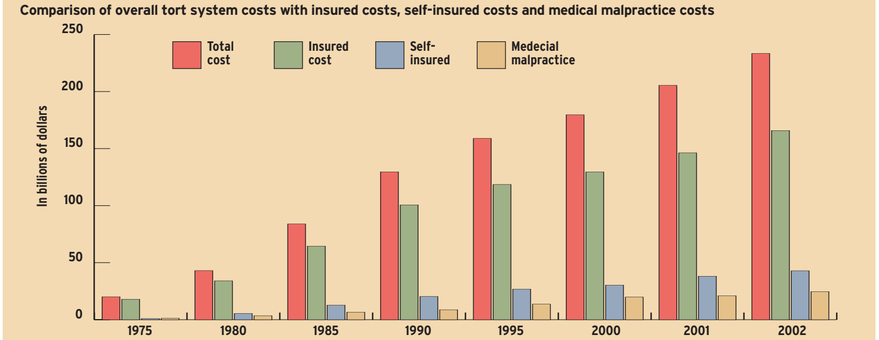
Generally speaking, the same individuals who could pass the laws necessary to change the system are the same individuals who need the financial support to attain and hold public office. And as to public sentiment, whenever any meaningful tort reform litigation does come under serious consideration, the money always seems to be available to "inform" the general public about how such reform will take away money from the poor "victims," money to which they are "entitled" regardless of the facts or of the simple principles of right and wrong. It is no secret that we have become, in only one or two generations, an entitlement society, and there seems to be no end in sight to this regrettable trend.

Mario P. Vitale
Chief Executive Officer
Willis North America Inc.
New York

A major obstacle is an insufficiency: the lack of widespread, grass-roots demand by citizen-voters to effect tort reform. It may seem overly simplistic to link votes and voters, but until people become sensitized, informed and sufficiently motivated to press their concerns on lawmakers, until such time as tort reform becomes a ballot box issue, the case of tort reform may continue to be slow going over scorched earth.

TORT SYSTEM COSTS GROWING

Comparison of overall tort system costs with insured costs, self-insured costs and medical malpractice costs



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E. Paul Kanefsky 212-756-0225 (pkanefsky@EdwardsAngell.com)
Geoffrey Etherington III 212-756-0237 (getherington@EdwardsAngell.com)
Charles R. Welsh 860-541-7762 (cwelsh@EdwardsAngell.com)
John P. Dearie, Jr. 212-756-0255 (jdearie@EdwardsAngell.com)
Huhnsik Chung 212-756-0222 (hchung@EdwardsAngell.com)
John D. Hughes 617-951-3373 (jhughes@EdwardsAngell.com)
Theodore P. Augustinos 860-541-7710 (taugustinos@EdwardsAngell.com)
Laurie A. Kamaiko 212-756-0277 (lkamaiko@EdwardsAngell.com)
Janet M. Helmke 860-541-7749 (jhelmke@EdwardsAngell.com)
Thomas F. X. Hodson 860-541-7709 (thodson@EdwardsAngell.com)
John B. Rosenquest III 860-541-7711 (jrosenquest@EdwardsAngell.com)
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Employer concerns slow growth in mandatory ADR

By SALLY ROBERTS

The number of employers mandating alternative dispute resolution for workplace disputes is not growing, despite employers' success with such programs.

Although mandatory arbitration agreements have helped save employers time and money by avoiding costly litigation, some concerns surrounding the provisions are hindering widespread use.

The lack of consistent case law on the provisions' enforceability, the limited appeal rights with arbitration judgments and some philosophical concerns are several of the factors discouraging the use of mandatory arbitration agreements.

Legal observers agree, though, that, when properly used, mandatory workplace ADR programs can be a cost-effective and efficient alternative to litigation.

"Will it solve the tort liability problem? No. Will it help? Yes, given the right circumstances," said Mitchell L. Lathrop, an attorney with Duane Morris L.L.P. in San Diego, referring to workplace arbitration agreements.

Houston-based Halliburton Co. is one company that has had great success with its mandatory workplace ADR program.

Under Halliburton's dispute resolution program, which it implemented a decade ago, four options are provided: an open-door policy, under which an employee may speak to his or her immediate supervisor or to a higher-level manager in the chain of command; a conference, which permits an employee to meet with a company representative from the DRP office to talk about their dispute and to choose a method for resolving it; formal mediation; and formal arbitration.

Everyone working for Halliburton is covered by the DRP except those working outside the United States and those covered by collective bargaining agreements. All U.S. employees are automatically covered by the program upon acceptance of employment; no employee signature is required.

An employee who accepts or continues employment at Halliburton, by accepting compensation for employment, agrees to resolve all legal claims against Halliburton through this process rather than through the court system.

"We had a sexual harassment case in Houston in 1992 that took five years to get to trial, and we spent about $400,000 in legal fees to win," said William L. Bedman, Halliburton's assistant general counsel for human resources. Despite being vindicated, "we realized at the end of the trial that the only people who really won were the defense lawyers. It just didn't seem that $400,000 in five years was the best way to invest shareholders' money," Mr. Bedman said.

After implementing its mandatory ADR program the next year, the company has saved both time and money.

In the first 10 years of the program, about 7,700 disputes were handled, Mr. Bedman said. Of those, about 90% got resolved within the company, and the remaining 10% were resolved through mediation or arbitration. And of the 593 cases brought in 2003, 66% were resolved within one week and 83% were resolved within four weeks, he said.

And, whereas "in some years we would spend as much as $10 million in outside defense costs, most of the time now it's way less than that, by a couple orders of magnitude," Mr. Bedman said.

The advantages of ADR "are cost, speed and, to a slightly lesser degree, the expertise of the decision-makers," said Michael P. Foradas, a partner with the law firm of Kirkland & Ellis L.L.P. in Chicago. The main downsides, from an employer's perspective, are less expansive appeals rights, the fact that ADR resolutions do not set precedent and, in some cases, cost, Mr. Foradas said.

Arbitrations involve fees and arbitrator expenses that can, in certain circumstances, be as expensive as litigation.

According to the Washington-based American Arbitration Assn., 700 to 800 employees use the organization to administer mandatory workplace ADR programs, and that figure has stayed relatively constant over the last several years, said Robert E. Meade, senior vp.

In speculating about why there hasn't been more growth in the programs, Mr. Meade suggested that there is a prevailing belief among employers that mandating arbitration makes it easier for individuals to file complaints.

Employment lawyers also point out that multistate employers can be deterred by varying court opinions regarding the fairness and enforceability of arbitration requirements.

For example, last year the 3rd U.S. Circuit Court of Appeals—which has jurisdiction over Delaware, New Jersey and Pennsylvania—struck down a heavy equipment operator's arbitration agreement. The employer's agreement, among other things, included a 30-day time limit for an employee to present a claim.

In 2002, though, the Texas Supreme Court upheld Halliburton's arbitration program, ruling it was enforceable under state law.

"Most employers would love (mandatory arbitration agreements) to be valid alternatives to litigation," said Sarah A. Kelly, a member of the law firm of Cozen O'Connor in Philadelphia. Generally, though, "there is too much uncertainty about the enforceability of arbitration agreements. It's difficult for an employer—especially for an employer with operations in more than one state—to be certain that the agreement will be enforced," Ms. Kelly said.

"The administrative ease, the cutdown on discovery and all the things that were viewed to be abusive in litigation and caused employers to favor workplace arbitration, the tide is turning a little bit," said Gerald L. Maatman Jr., an employment attorney with Seyfarth Shaw in Chicago.

"Some (employers) are saying, 'Gee, I'd rather take my chances in court, because, at the end of the day, I have to jump through so many hoops to satisfy the case law in what's a fair agreement that it's almost not worth it'—especially when balanced against the issue of 'I'm stuck with any decision by an arbitrator,'" he said.

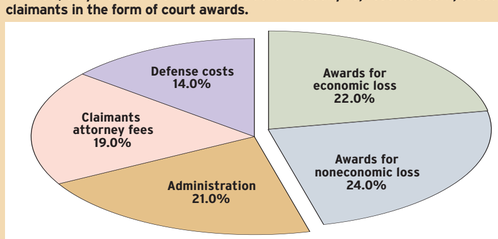
For Louisville, Colo.-based Storage Technology Corp., the decision not to implement mandatory ADR for workplace disputes was a philosophical one.

"There really is a speedup of a resolution, but our human resources department, in conjunction with our legal department, really looked at it and decided it just wasn't the right thing for our employees," said Sherry Pixler, StorageTek's risk manager.

"In thinking about the rights of the employee, they didn't even want to give the feeling that they might be signing any of their rights away," Ms. Pixler said.

ALLOCATION OF TORT COSTS

In 2003, only 46% of the insured tort dollar actually represented compensation to claimants in the form of court awards.

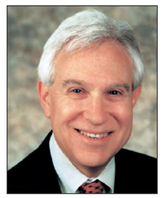


Source: Tillinghast-Towers Perrin

Q: At which level of government are tort reforms best aimed?

Craig Berrington
Senior Vp and General Counsel
American Insurance Assn.
Washington

The American judicial system needs reform at the federal and state levels. For example, a federal approach makes sense to make sure that national, multistate class action cases are moved to federal court, where they belong. The pending class action reform bill in the U.S. Senate would do just that. For some issues, a federal and state approach is necessary, such as for the ongoing efforts on medical malpractice reform and asbestos litigation reform. Where the court system is particularly unfair—the "judicial hellholes" so familiar to the business community—much of the focus is instead at the state level. Regardless of the locus of reform, it is imperative for the health of the American economy that we have a legal system that is fair to plaintiffs and defendants. We will continue to advocate for a much reform as is possible in state legislatures and the halls of Congress.



Jack Farris
President
National Federation
of Independent Business
Washington

Reformers have had the most success recently at the state level, and that trend will probably continue for the next few years. The trial lawyers have such a lock on the Democratic Party, particularly in the U.S. Senate, that efforts at tort reform will most likely be more productive on a state-by-state basis. Texas recently passed a ballot initiative allowing caps on damages, and the issue of tort reform played a significant role in the Mississippi governor's race, with the trial lawyer-endorsed incumbent losing to a pro-reform candidate. Despite these successes, reforms at the federal level are crucial. Congress must provide liability protections for small businesses by capping punitive damages and eliminating joint-and-several liability and needs to reform our class action system and alleviate the medical liability crisis.

Maurice R. Greenberg
Chairman and Chief Executive Officer
American International Group Inc.
New York

Without meaningful tort reform at both the state and federal levels, U.S. liability costs will continue upward unchecked. While action on the federal level is needed, many of the worst abuses take place at the state level. A handful of states are notorious for excessive awards and hand-in-glove relationships between trial lawyers and local judges. The trial bar makes it a practice of shopping around for friendly courts, and this situation needs to change.

Currently, the U.S. Chamber of Commerce is spearheading a major tort reform effort on the state level with good results. They ranked states by the quality of their legal systems, targeting the worst states.

Business already pays careful attention to the risks of operating in countries around the world with corrupt legal and regulatory systems. They will also think twice before investing in a state where the judicial system is in the pocket of the plaintiffs' bar. With every state hungry for revenues, the most serious tort offenders will either fix their systems or sacrifice much-needed job-creating business investment.

Karen Ignagni
President and Chief Executive Officer
AAHP-HIAA
Washington

While tort reform efforts should be aimed at both federal and state levels, reform efforts at the federal level are particularly important to promote a uniform medical liability system across the country. Uniformity would prevent situations in which attorneys shop for friendly judges or where states have widely inconsistent approaches to resolving disputes.

Noteworthy tort reform efforts are being pursued at both the federal and state levels. At

Continued on next page

Continued from previous page

the federal level, for example, Rep. James Greenwood, R-Pa., introduced a bill that includes limits on noneconomic and punitive damages and attorneys' fees. This bill passed the House of Representatives in March 2003.

At the state level, a vast majority of states, including California and recently Texas and Florida, have enacted some form of tort reform. Moreover, state tort reform bills are increasingly being introduced.

Frank Nutter
President
Reinsurance Assn. of America
Washington

Members of the Reinsurance Assn. of America strongly support tort reform efforts at both the state and federal levels. Nonetheless, some reforms, such as the pending Fairness in Asbestos Injury Resolution Act, can be accomplished only through federal legislation.

The RAA believes that an acceptable program for asbestos reform must achieve certain fundamental principles—there must be certainty and finality with respect to claims, and the resolution must be accomplished at a reasonable economic cost. Federal interstate commerce power must be used to pre-empt state tort actions to create an exclusive remedy for asbestos injuries under the act.

Another example of reform that requires federal legislation is the effort to bring class action cases of national interest into the federal courts. This can be accomplished only by an act of Congress to amend the law that authorizes and defines the diversity jurisdiction of federal courts. This reform effort seeks to stop abusive forum shopping, mitigate local bias in favor of plaintiffs and prevent the application of a single state's law on a national basis.

Some aspects of tort reform are best left to the states, and RAA members support many of these efforts. Additional reforms that would have a substantial impact are the adoption of a "loser pays" rule or an "offer of judgment" statute and the elimination of joint-and-several liability.

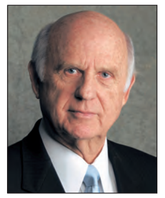
Walter Olson
Senior Fellow
Manhattan Institute
New York

Trial lawyers lose because they can't be everywhere at once. If they have to worry only about fighting running skirmishes at the state level, they'll usually do pretty well at blocking reform.

But when a big campaign goes on for federal-level tort reform, even if it fails—which it usually seems to—a bunch of states will often manage to pass serious reforms, as happened last year in Texas and elsewhere. Washington also has an indispensable role to play in setting ground rules for state-court lawsuits against out-of-state defendants, not to mention the large class of cases that arise under federal law.

Ralph Wayne
President
Texas Civil Justice League
Austin, Texas

Tort reform is best accomplished at the state level and must be aimed at the trial court system. Unfortunately, trial judges and appellate courts created the tort law crises of the 1980s and 1990s, and state legislatures all over the country have been faced with the economic consequences. Those state legislatures should be allowed to act without the threat of congressional pre-emption, especially since much better reforms come out of state legislatures than from Congress in the first place.



LARGEST JURY AWARDS OF 2003

No. 1 $11.86 billion
State of Alabama vs. Exxon Mobil Corp.
Montgomery County, Ala. (11/14/2003)

No. 2 $934.4 million
Beckman Coulter vs. Dovatron Int'l Inc.
Orange County, Calif. (9/24/2003)

No. 3 $520.6 million
Eolas Technologies Inc. vs. Microsoft Corp.
U.S. District Court-Northern District of Illinois (8/22/2003)

No. 4 $416. 9 million
Saudi Basic Indus. Corp. vs.
Mobil Yanbu Petrochemical Co.
New Castle County, Del. (3/21/2003)

No. 5 $383.3 million
International Paper vs.
Affiliated FM Insurance Co.
San Francisco County, Calif. (7/14/2003)

No. 6 $318.7 million
Volumetrics Medical Imaging Inc. vs.
ATL Ultrasound Inc.
U.S. District Court-Middle District of North Carolina (8/25/2003)

No. 7 $254.6 million
Buettner vs. Bertelsmann A.G.
Santa Barbara County, Calif. (12/11/2003)

No. 8 $250.0 million
Whittington vs. U.S. Steel
Madison County, Ill. (3/28/2003)

No. 9 $218.6 million
Telxon Corp. vs. Smart Media of Delaware
Summit County, Ohio (9/18/2003)

No. 10 $188.7 million
Fuller-Austin Insulation Co. vs.
Lloyd's of London
Los Angeles County, Calif. (5/5/2003)

Source: Verdictsearch.com

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Tort reform efforts not confined to United States

Despite the global appetite for U.S. exports ranging from entertainment to business services, the U.S. tort system remains decidedly an acquired taste. Even though many tort systems are far less generous than their U.S. counterpart, some—like Australia's—have taken steps to rein in awards.

Australia

Australia's federal government as well as its seven states and two territories have almost completed a program, launched last August, of implementing tort reforms covering personal injury and negligence damages.

Skyrocketing liability claims costs and the consequent insurance capacity crisis of 2002 led the Australian federal government to push for a unified national legal framework for personal injury compensation. At the time, claims could be filed in eight different jurisdictions, and claimants could seek compensation through a variety of avenues, including torts and contract disputes. And the cost of public liability claims had risen to 12.5% per year, when overall inflation was 3.0%, calculated Dallas Booth, deputy executive of the Insurance Council of Australia. Public liability insurance covers organizations for property damage and bodily injuries suffered by individuals other than their employees.

In October 2002, an expert panel headed by New South Wales Supreme Court Justice David Ipp recommended several wide-ranging changes to personal injury and negligence laws. The recommendations included capping personal injury damage, redefining "negligence" and providing a blueprint for nationwide reform.

Australian states responded by implementing most of the panel's recommendations, although the states have interpreted them differently.

These reforms could be bolstered this year by a major federal initiative. The Trade Practices Act (Personal Injuries and Death) Bill 2003 was introduced into Parliament in December in a bid to prevent people from using the Trade Practices Act as a way of bypassing state tort law reforms.

Although the Australian Senate rejected the bill, the measure should be reintroduced shortly.

In the meantime, all Australian jurisdictions have reformed the law for calculating damages for personal injury and have introduced caps on awards. In addition, most states and territories have reformed their negligence laws.

In general, the new measures narrow the definition of "negligence," and they cap awards for lost earnings. In addition, courts are allowed to hold a plaintiff who contributed to his or her own injury up to 100% liable. And a claim for psychiatric harm can be made only if the plaintiff has suffered a recognized mental illness.

While it is too early to estimate the impact of the reforms, Mr. Booth said that the ICA is seeing some reduction in claims numbers. But he said he remains concerned about the inconsistency in the state laws. "That will make it little difficult for risk managers. They can now apply broad principles, but, in some cases, they will have to modify their risk management programs to take account of local laws," he said.

Kevin Mutch, group risk manager of the Melbourne-based operations of the global resources company Rio Tinto Ltd., said he views the reforms positively. He predicted that they will result in a reduction in claims, but he said he does not believe the reduction will be as dramatic as has been anticipated.

The state inconsistencies are a major irritant to risk managers—especially those who run programs for national and global businesses, Mr. Mutch said. "Now you not only have to cope with different legal environments around the world, we have a dog's breakfast of different legislative environments in our own backyard," he said.

That is not a concern shared by Mike Kelly, manager-risk control and insurance at the Melbourne-based packaging company Amcor Ltd. The inconsistencies, he said, "don't make life harder for risk managers because, in reality, every state has its own legislation in an absolute plethora of areas, so this won't make much difference. Moreover, even if legislation is interpreted differently—and that might mean there are minor variances in the way things are handled—we would use a local solicitor to advise us on those nuances so we can handle the claims properly."

Canada

A February 2002 decision by the Canadian Supreme Court to reinstate a $1 million Canadian ($629,000) punitive damage award shocked Canadian legal and insurance experts, even though the same award would barely cause their American counterparts to blink.

The Canadian tort system has mechanisms in place to prevent the large and often-controversial damage awards seen in the United States, but risk managers believe the culture of the U.S. system has had a significant impact on the Canadian system.

"The direction (the tort system is) going in is, I believe, strongly influenced by the U.S.," said Nowell Seaman, manager-risk management and insurance services at the University of Saskatchewan in Saskatoon. "We don't keep pace, but we see a delayed effect north of the border."

Although there is no statistical data to quantify the trend, risk managers believe the rising number of claims being filed in Canada is, in large part, fueled by the high number of claims and large damage awards seen in the United States. The number of Canadian claims is still small compared with the number of U.S. claims, but there is a growing tendency for juries to award the highest damages possible under the law, they say.

In Canada, pain-and-suffering awards are capped at about $280,000 Canadian ($210,000), but there is no fixed cap for punitive damages, legal experts say.

The Canadian Supreme Court reinstated the $1 million Canadian punitive award given to a family whose house burned down because it accepted the jury's finding of reprehensible misconduct by the family's insurance agency, according to court documents. But the court also ruled that punitive damages should be imposed only if there is malicious or reprehensible conduct involved and should be awarded in an amount reasonably proportional to the harm caused or the degree of misconduct.

Punitive damages "are rigorously controlled," said Robert Patzelt, risk manager for Bedford, Nova Scotia-based Scotia Investments Ltd. "Your behavior would have to be egregious for a court to award punitive damages."

The advent of class action lawsuits in Canada has been influenced by the proliferation of similar lawsuits in the United States, risk managers say. Several provinces such as Ontario now allow class action lawsuits, although such suits are subjected to a complex certification process.

"Class action lawsuits are probably the most significant import from the U.S.," said Susan Meltzer, risk manager of Toronto-based Sun Life Assurance Co. of Canada.

Another impact of the U.S. tort system is the rising cost of insurance in Canada, because U.S.-based insurers are raising Canadian companies' premiums to offset losses in the U.S. market, insurance experts say.

"The rising premiums have impacted Canadian businesses—not as much as in the U.S., but it has impacted insurance costs," said Paul Mitchell, an attorney for the Kelowna, British Columbia-based Pushor Mitchell law firm, which specializes in insurance law. "Canada is subject to rising costs caused by the U.S. tort system because it is built into the price of the product."

Progress has been slow in all areas of tort reform, partly because tort reform efforts take place at the provincial level and partly because many observers are not convinced of the need for tort reform in Canada, risk managers say.

"In general, court awards for damages are lower in Canada than in the U.S., so there seems to be less call for tort reform north of the border," Mr. Seaman said.

United Kingdom

Even though British companies and their insurers are suffering the increasing costs of personal injury claims, differences between the English and U.S. legal systems will prevent a tort crisis from reaching the United Kingdom, lawyers say.

A recently published study of personal injury litigation in the United Kingdom shows that personal injury claims costs increased by more than 30% between 2001 and 2003—to about £7 billion ($12.49 billion)—with a predicted 15% annual increase for the next five years.

But the number of personal injury claims—which in the United Kingdom includes work-related claims—filed in the year ending March 2003 increased only by 2.3%, according to the London-based market analyst Datamonitor P.L.C., although public liability claims rose by almost 9%.

"While this refutes the notion that the U.K. is gripped by a U.S.-style compensation culture, personal injury claims costs are the main concern for insurance companies," according to Datamonitor's 2003 survey on U.K. personal injury litigation.

In a survey published by The Stationary Office, the United Kingdom's largest publisher of official and regulatory information, more than half of U.K. companies reported an increase in claims in two years.

But the Law Society, which represents lawyers in England and Wales, says that "the perception of an increasing trend of people bringing injury claims is not backed up by facts."

According to the society, the proportion of lawyers undertaking personal injury work decreased from 28% of the profession in 1999 to 21% in 2002.

Gary Barker, head of practice development for the London-based Law Society, points out that while the cost of individual claims has increased, the numbers of compensation claims filed in England and Wales probably has fallen.

The cost of individual claims has risen for a number of reasons, including several precedent-setting court rulings that have increased damages awarded to claimants and a reduction in the level of state benefits granted to successful claimants, said Mr. Barker.

But fears that the introduction in the United Kingdom a few years ago of conditional fee arrangements—also known as "no win, no fee" arrangements—for plaintiff lawyers would lead to an explosion of U.S.-like litigation have proved unfounded, according to lawyers.

The conditional fee system in England and Wales is not quite the same as the contingency fee system in the United States, because the losing party always pays the winning party's costs in the United Kingdom. Under the English system, a plaintiff lawyer receives no fee for a losing case but receives an enhanced fee for a successful claim.

The fact that a losing claimant is responsible for both parties' legal costs makes litigation less attractive in England than in the United States, and it makes a would-be plaintiff "think twice" before litigating, said Alex Guisler, joint managing partner of the law firm of Duane Morris in London.

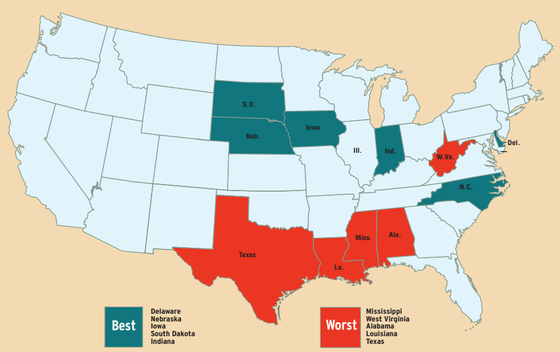
The fact, though, that the losing party in the United Kingdom is responsible for the winning party's costs also provides an incentive for defendants to settle out of court, noted Mr. Guisler, who represents the U.K. operations of U.S. and European multinational companies.

"If there is a chance that the defendant may lose, it may be much cheaper to settle early than run up huge costs defending a case when the damages may be far less than the fees," he noted, pointing out that the choice is often a commercial decision as much as a legal one.

Carolyn Aldred, Elizabeth Fry and Gloria Gonzalez contributed to this report.

THE BEST AND THE WORST

The states doing the best–and the worst–job at creating a fair and reasonable litigation environment, according to the U.S. Chamber of Commerce.



Source: "2003 U.S. Chamber of Commerce State Liability Systems Ranking Study"

Q: What must reform advocates do to improve their strategies?

Ted Boutrous
Partner
Gibson, Dunn & Crutcher
Los Angeles

Tort reform advocates should set three top priories—establishing limits on punitive damages, setting limits on noneconomic damages and limiting state class actions involving interstate commerce—and concentrate all of their energy, resources and passion on achieving them.

Newt Gingrich
Former Speaker
of the House of Representatives
Washington

PHOTO: GETTY

Reform advocates must continue to do the following, both interactively and iteratively: (1) constantly listen to average Americans to determine the right language to explain what is wrong with the current system and what would be right about a reformed system; (2) develop a system for finding examples of the human cost of trial lawyer predation and get the news media and the analytical community to focus on those examples and connect those costs of predation with its impact on the average American; (3) create and popularize a different system that most Americans believe protects their rights while assuring them that if they have a problem, they can access justice from the court system at a lower cost and with greater fairness than the current system allows; (4) create a network of analysts and activists who are prepared to explain trial lawyer predation and highlight the destructive patterns that are building as the trial lawyers gain more resources to develop more systematic predation and as the cynicism of their planning and predation grow deeper; (5) develop a broad coalition committed to transforming the current increasingly destructive system into a more popular and more supportable system so the choice becomes binary between an unacceptable present and a desirable future; (6) focus resources on making it increasingly less acceptable for supporters of predatory trial lawyers to defend the current destructive behaviors; and (7) recognize that large-scale change takes time and therefore remain cheerfully persistent in the pursuit of reform, notwithstanding periodic disappointments.

Mr. Gingrich is chief executive officer of The Gingrich Group L.L.C., a consulting firm based in Atlanta and Washington.

Michael S. Greve
John G. Searle Scholar
Director, Liability Project
American Enterprise Institute
Washington

"Reform advocates" in general should disconnect the reform agenda from corporate priorities, which are grossly distorted and bound to be ineffective. It is quite probably true that tort reform cannot happen without corporate America; but then, it certainly cannot happen so long as the agenda is dictated by corporate America. Two decades of largely futile efforts prove that point.

Corporations for which tort reform is truly a priority should recognize that the cause is now wholly partisan. We have 1.2 of two parties against tort reform; the objective must be to reduce that ratio to 1.0, by ruthlessly punishing wayward Republicans.

Reform advocates have wrongly ignored the cultural dimension. For example, a faithful movie rendition of John Grisham's "King of Torts" would do more to turn public opinion than yet another expensive public relations campaign against "frivolous" lawsuits, which everyone, including Sen. John Edwards, is already against. There are scores of "Erin Brockovich" movies; why can't there be scores of anti-trial bar movies?

Steven B. Hantler
Assistant General Counsel
DaimlerChrysler Corp.
Auburn Hills, Mich.

Advocates must bring to the legal reform effort the same focus, discipline, and accountability that any successful business employs to achieve results. Unfortunately, too much emphasis has been placed on mere activity rather than on results. It does not really matter how many letters or patch-through telephone calls have been placed to a U.S. senator. The only thing that matters is the result—that senator's vote on all cloture petitions and on the passage of a piece of legal reform legislation. Of course, the result that really matters is the enactment of that legislation.

Legal reform advocates must demand results they can measure from every legal reform group, lobbyist, lawyer and public relations firm that they retain. But this would still not be enough. It has been a struggle obtaining the votes for legal reform legislation in state and federal legislatures and, when legis-

Continued on next page

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BI NewsFlash

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Q: What must reform advocates do to improve their strategies?

Continued from previous page
lation has been obtained, it has also been a struggle preserving it in the courts. The reason is that the trial lawyers' lobbying group strikes fear in the hearts of elected officials who vote or decide against trial lawyer interests. Those who vote or decide against trial lawyer interests face stiff opposition from the Assn. of Trial Lawyers of America during their re-election bids. The linchpin of a winning legal reform campaign is to neutralize the fear created by the trial lawyers.

Sherman Joyce
President
American Tort Reform Assn.
Washington

Reform advocates need to continue to diversify their coalitions in order to demonstrate to policymakers that there is broad support for reform. When policymakers realize that there is broad support for reform from a variety of people and organizations, they are more likely to listen, and success generally follows. This can be an advantage over the personal injury bar, which consistently lobbies to protect its own interests. They believe that anything that fosters litigation and fattens up their back pockets is a good thing.

Dan Kugler
Assistant Treasurer-Risk Management
Snap-on Inc.
Pleasant Prairie, Wis.

Advocates need to tie tort reform to the costs generated by this system. Studies such as those by the Manufacturers Alliance/MAPI and Tillinghast-Towers Perrin identify both the cost to us as consumers and the effect on U.S. companies as employers as a result of how the system makes U.S. firms less competitive in the global economy.

More attention today is being brought to the notion that the U.S. tort system and other regulatory burdens placed on U.S. firms are significantly reducing our effective competitiveness in the world. We really need to address the issue to stay competitive in the global marketplace.

Gerald L. Maatman Jr.
Partner
Seyfarth Shaw L.L.C.
Chicago

Effective strategies may be state-specific or issue-specific. To defeat some of the typical rhetoric of those opposed to reform, advocates need to satisfy the "silent majority," who may mistakenly regard any changes as benefiting business at the expense of sick, injured and disabled persons who access the tort system for possible redress. Communication of the reform measures must navigate these shoals by demonstrating that the suggested changes will benefit both plaintiffs and defendants with improvements to the civil justice system.

Clayton Traylor
Senior Staff Vp for Construction Codes and Standards/State & Local Operations
National Assn. of Home Builders
Washington

Aligning advocates and educating the public and the courts will help tort reform advocates improve their strategies. NAHB has incorporated these key components into its Civil Justice Reform Initiative.

It is important that groups with similar tort reform goals share resources and tactics and work together to advance a unified, though not necessarily identical, message. The trial lawyers have been using this strategy for years and reform groups are playing catch-up, but we are steadily closing in.

Reform advocates also need to educate the public on the broad societal and economic consequences of excessive litigation. A key point is demonstrating that consumers or plaintiffs are often taken advantage of by overzealous trial attorneys.

Educating the judiciary is another strategic necessity.

State court judges often lack a basic understanding of the residential construction industry, but they are asked to preside over complex construction defect litigation. Educating judges about our industry, the players and the highly specialized, ever-changing laws so they can make better-informed decisions is a priority for NAHB's Civil Justice Reform Initiative.

Q: Are businesses doing enough to promote tort reform efforts?

Ken Crerar
President
Council of Insurance Agents & Brokers
Washington

Frankly, the business community could do a better job of building relationships with legislators who can make a difference on these issues. The problem is that the business community has multiple issues before policymakers, whereas the trial bar has only a few. The kind of political involvement that politicians respect the most is when people get out their checkbooks and make a contribution. Trial lawyers get it on this front, and we've got to do a better job down in the trenches of political activism.

Lance J. Ewing
President
Risk & Insurance Management Society Inc.
New York

In the last few years, the efforts have been greater, but before then, businesses may have looked at these awards as a cost of doing business and occasionally you got stung with a huge verdict. Now, it is a case where litigation has replaced baseball as the national pastime and business has paid much more attention. The business community should not give up their efforts and with a more willing Congress and White House, this is probably the best environment to pass reform. The Risk & Insurance Management Society Inc. is working hard to complete the tort legislation before the end of the 108th Congress.

Mr. Ewing is vp-risk management for Caesars Entertainment Inc. in Las Vegas.

Lewis Leigh
Executive Director
Washington Cities Insurance Authority
Renton, Wash.

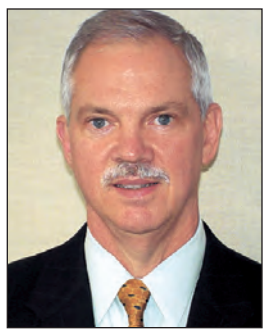
Washington state businesses and governmental agencies have formed a Liability Tort Reform Coalition, a combination of medical associations, construction (condo) interests, local and state government agencies, restaurant associations, etc., to collectively present an omnibus bill to the Legislature. The most aggressive coalition in years, it promotes liability reform across the state social spectrum. As part of the lobbying effort, group representatives are visiting newspaper editorial boards, broadcasting radio and TV spots and conducting public surveys to influence the general public.

Edward D. Murnane
President
Illinois Civil Justice League
Chicago

No, and they probably never will. The tort system is the livelihood of the trial lawyers and they will do whatever it takes and spend whatever it takes to elect their friends and supporters to legislative offices, to judicial positions, to Congress and governorships. They will drop everything when called upon to act. Cases will be put on hold and trial lawyers will flock to the state capitols to testify and lobby and make their case. They will bring people in wheelchairs and with bodily disfigurements and they will bring widows and orphans to underscore the plight of "victims."

The business community, on the other hand, has products to make and sell, plants to keep functioning, jobs to create and finance, distribution systems to manage and—well, yes—government policies and actions to monitor. Promoting tort reform is important to many, perhaps most, businesses, but it will never have the priority that blocking tort reform has among the beneficiaries of the system.

Carl Parks
Senior Vp-Federal Government Relations
Property Casualty Insurers Assn. of America
Washington



Businesses can always do more. Unfortunately, obtaining meaningful reforms will require businesses to invest more money to overcome the contingency fee money that fuels the plaintiffs bar lobbying. They need to show their customers how litigation is affecting what consumers pay for what businesses sell. Most businesses are small businesses that have direct contact with customers. These businesses can do a lot to educate consumers about the money that the plaintiff bar is taking from them.

Likewise, businesses can get a multiplier effect from uniting behind tort reform organizations like the American Tort Reform Assn. and its state affiliates. If more business owners could find a way to run for state legislatures, those legislatures would become more like society at large, instead of mirroring the state trial bar association.

Businesses need to increase their involvement in the political process at the state and federal level to promote tort reform and counter the trial lawyers.

George L. Priest
John M. Olin Professor of Law and Economics
Yale Law School
New Haven, Conn.

The single worst development in modern tort law is that many businesses are now adopting the tactics of the trial lawyers—litigation, including class action litigation—to pursue competitive interests. The recent antitrust class action by Wal-Mart and hundreds of the nation's retailers against Visa and MasterCard was only successful because Wal-Mart convinced the courts to expand class action availability. There are many other examples of businesses seeking an expansion of liability to promote their own interests. Some years ago, MetLife sought an unjustifiable expansion of insurance coverage law in its pursuit of recovery against Aetna. When business pursues a short-term advantage by joining the trial lawyers, the tort reform cause is truly lost.

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Commentary

Election risks tough to manage

A staunch Republican friend and I, an equally rabid independent, were discussing Democratic primary results and Bush administration policies. We conjectured what all that might mean in the November elections and how risk and employee benefit managers might vote if they considered only how the election's results would affect them professionally.

Taking the party line, my friend said the president was taking some undeserved criticism. We discussed that notion for a minute, and then he paused. He uttered this thought, and I have since wondered whether other stalwart Republicans secretly think likewise.

"You know," my friend said, "it's too bad the Republicans don't get a choice of candidates this year."

Dave Lenckus

I wondered if that musing signals a crack in the dike of Republican support for Mr. Bush. Could this be a pinhole leak that could grow in the president's current reservoir of hard-line support?

I believe there are many problems with President Bush's policies that demand risk and benefit managers' attention, as well as the scrutiny of the GOP faithful.

Topping the list is his priorities in the war on terrorism, which, if not corrected soon, could come back to haunt both risk and benefit managers.

The president was on target after the Sept. 11 terrorist attacks when he launched the U.S. invasion of Afghanistan to root out and destroy Osama & Co. and the Dark Ages government that supported those terrorists. But before that job was done, President Bush redirected his attention to another target—one that former Treasury Secretary Paul O'Neill says was in the president's sights since inauguration day—Iraq.

Eventually, we captured the delusional Iraqi leader who had been boxed in his capital city for more than a decade. The rationale for the change in focus, the president now says, is that Saddam had the *potential* to obtain weapons of mass destruction that the president previously asserted Iraq already had.

Somehow, I don't feel safer even though Saddam has been removed. Neither should risk managers.

Sure, national and corporate security is tighter, and everyone is more on guard these days. Meanwhile, an incredibly dangerous threat to the United States—the terrorist mastermind behind actual deadly and economically devastating attacks against U.S. interests both stateside and abroad—remains at large.

At the same time, we can't overlook the multibillion-dollar cost of President Bush's war on Iraq, which some regard as a personal vendetta against his father's nemesis. Pair that with the kind of tax reform that the elder President Bush once called "voodoo economics," and employee benefit managers should shudder.

The president's spend-more-and-tax-less economic policy looks very much like an effort to starve government programs—i.e., Social Security—to the point that they will have to be cut drastically.

Besides losing a leg of their own retirement security, employee benefit managers have to consider how labor would respond to such a development. My bet is that labor would turn to employers and demand more retirement security.

Is the economy going to be so strong that employers could afford that? If not, what impact would such labor unrest have on productivity? Or is the president's support of moving U.S. jobs overseas meant to quell such labor problems before they begin by diminishing job security?

Given all these concerns, I wonder whether voters will seek an alternative leader come this November. That's hard to predict, but I am concerned that risk and benefit managers might also have issues with the leading opposition candidate.

Sen. John Kerry currently looks like the Democratic nominee-to-be. Particularly troubling, however, are remarks he made in January, when former Vermont Gov. Howard Dean was the early Democratic front-runner. Sen. Kerry criticized Dr. Dean for creating a business climate in Vermont that has encouraged the formation of tax shelters. Sen. Kerry was referring to captive insurers.

Ouch.

Senior Editor Dave Lenckus can be reached at dlenckus@BusinessInsurance.com.

Comings & Goings

Agents/Brokers:

Thomas Hicks Armor has been appointed managing director of brokerage Synaxis Killebrew Lyman & Woodworth in Chattanooga, Tenn. Before joining Synaxis, Mr. Armor was president and chief executive officer of Galaxy Health Alliance.

BB&T Insurance Services, based in Raleigh, N.C., has made two senior-level appointments.

Wes Dasher has been appointed chief agency executive officer. He will be responsible for all field and agency operations. Before his promotion, Mr. Dasher was agency manager of BB&T-Boyle Vaughn.

Southgate Jones has been named chief sales executive officer and will be responsible for BB&T Insurance's large-account strategy, claims management, loss control and personal insurance strategy. Mr. Jones will continue as agency manager of BB&T-Asura in Research Triangle Park, N.C.

Insurers:

Graham Ward has been named chief financial officer of London-based Arch Capital (UK) Ltd., a subsidiary of Arch Insurance Group (US). Before joining Arch, Mr. Ward was finance director at Liberty Mutual Insurance Co.

Schaumburg, Ill.-based Zurich Global Energy has named **Mel Causer** as senior vp of exploration and production. Mr. Causer, who will be based in Houston, previously was vp and regional manager for AIG Oil Rig.

Surplus lines:

Doug C. Flake has been named partner at Alexander Morford & Woo Inc., a Redmond, Wash.-based excess and surplus lines broker. Previously, Mr. Flake was branch manager and vp.

Managed care:

Kenneth L. Watkins has been named chief financial officer of PacifiCare Behavioral Health, a subsidiary of Cypress, Calif.-based PacifiCare Health Systems Inc. Before joining PacifiCare, Mr. Watkins was CFO for Universal Care Inc.

Other suppliers:

Roanoke, Ind.-based American Specialty Cos. has named **Joe DesPlaines** as president and chief operating officer of its risk management operations. Previously, Mr. DesPlaines was president of FEI Behavioral Health.

ACE Risk Management, a division of ACE USA, has named **Hale Holden III** as senior vp of the northwest region, where he will be responsible for large accounts. Before joining Philadelphia-based ACE Risk Management, Mr. Holden was a senior vp of Discover Re Managers.

Business Insurance would like to report on senior-level changes at commercial insurance companies and service providers. Please send news of recently promoted, hired or appointed senior-level executives to: Joe Walker, Business Insurance, 360 N. Michigan Ave., Chicago, Ill. 60601-3806; jwalker@ crain.com.

Photos should be sent to: Kathy Barnes, Business Insurance, 360 N. Michigan Ave., Chicago, Ill. 60601-3806; kbarnes@crain.com.

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Opinions vary on whether benefits of government-backed reinsurer outweigh its drawbacks

Pool Re competition exemption debated

By PETA MILLER

LONDON—Not all in the U.K. insurance industry agree with the provisional conclusion of the Office of Fair Trading that the benefits of the United Kingdom's government-backed terrorism reinsurer continue to outweigh any competition-distorting side effects of the arrangement.

U.K. buyers and brokers, with some qualifications, express support for Pool Reinsurance Co. Ltd. and the proposal of the OFT, the government's competition watchdog, that Pool Re be exempted from the 1998 Competition Act because, they say, the system offers fairly priced coverage that is certain to pay out.

The OFR will make a final decision about the proposed exemption following a public consultation period through March 10.

But insurers operating in the terrorism market are divided on the issue. Some say they believe the pool remains the most viable option in the absence of a credible alternative, while others maintain that capacity is available and the government should withdraw.

The OFT, which has powers to investigate suspected infringements under the act, has acknowledged that some of the rules that govern Pool Re—which is backed by the U.K. Treasury and offers reinsurance to direct insurers—do have competition-distorting effects. But it said that the benefits provided by Pool Re, which since its formation in 1993 has ensured that all commercial properties have access to terror coverage, outweigh the negative impact of any competition distortion.

"We are very pleased with Pool Re," said David Gamble, executive director of the London-based Assn. of Risk & Insurance Managers.

"Companies have to have insurance in order to carry on doing business; it is a very good example of insurance as an enabler without which a lot of buildings would not be going up in the City," Mr. Gamble said, referring to London's business district.

David Larkin, formerly the head of insurance at the London office of Chicago-based real estate company Jones Lang LaSalle and currently a property insurance consultant to Archibald Reid (Insurance Brokers) Ltd. of London, also said he supports the pool and its continued exemption from competition law because of the certainty it gives buyers compared with commercial companies.

Broker Paul O'Connor with London-based Miller Insurance Services Ltd. said he favors the exemption but has some qualifications.

"As a terrorism broker, it would be nice to have competition, but, realistically, none of the markets would be in a position to compete," Mr. O'Connor said.

He noted, though, that the pool's rating system is based on location rather than type of risk, which means, he said, that the stand-alone market, in some cases, offers a different view of a risk and a better price than do those insurers backed by Pool Re.

"Because everything is priced by general insurers, there is a slight dis-

See POOL RE/next page

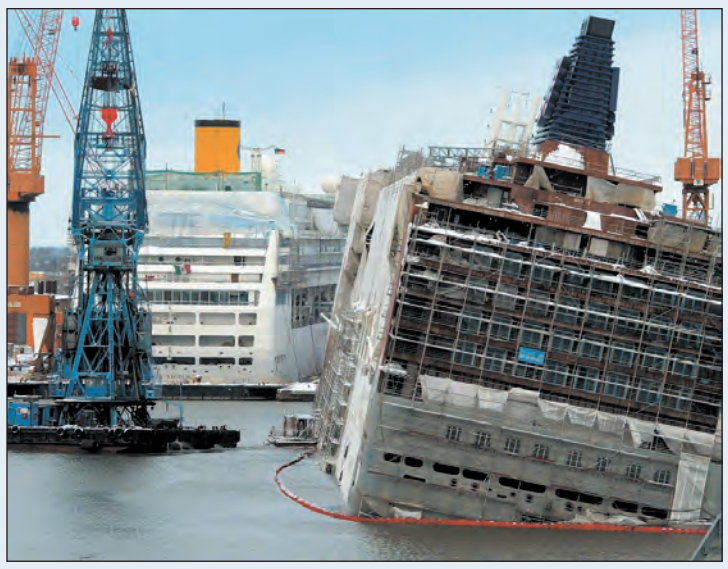


PHOTO: EPA/INGO WAGNER

The partial sinking of the Pride of America cruise liner in Bremerhaven, Germany, in January is one of a series of recent shipyard accidents.

Hull committee focuses on safety of shipyards

By SARAH VEYSEY

LONDON—A series of shipyard accidents in recent months is prompting London marine underwriters to request more detailed risk information from the facilities when issuing or renewing hull insurance policies.

The Joint Hull Committee, which represents Lloyd's of London and London company market hull underwriters, has developed a warranty—JH 143—that requires shipyards to undergo a risk assessment prior to policies being issued or renewed.

That warranty was launched in November 2003, said John Noble, chief executive of the London-based Salvage Assn. Since then, 14 shipyards have undergone such an inspection, he told delegates at a seminar in London last week sponsored by British Maritime Technology Ltd.

After a relatively benign period of losses from 1970 until 2002, hull underwriters in the past two years have been hit by more than $400 million in claims for hull losses caused by shipyard accidents, Mr. Noble said.

Those claims include an October 2002 fire on the cruise ship Diamond Princess while it was in Mitsubishi Heavy Industries' Nagasaki, Japan, shipyard. The damage resulted in claims of more than $250 million.

In January 2004, the Norwegian Cruise Liner Pride of America took on water and partially sank while in the Lloyd Werft Bremerhaven GmbH shipyard in Bremerhaven, Germany, during a severe storm. The ultimate cost of damage to the cruise ship, which was expected to be salvaged last week, is not yet known.

See SHIPYARDS/page 31

P&I rate hikes seen 'til 2006, but breaks likely for good risks

By SARAH VEYSEY

LONDON—Although most protection and indemnity clubs plan to raise rates at Feb. 20 renewals to offset poor underwriting results, shipowners with favorable loss experience still might find some pricing flexibility, brokers say.

Improving investment market returns are enabling clubs to have slightly more rating flexibility, experts suggest. Even so, rate increases are likely to continue until 2006, a rating agency says.

Underwriting losses have been improving among P&I clubs, but the mutual insurers' losses "remain unacceptably high," according to a report on the sector by Standard & Poor's Ratings Services in London.

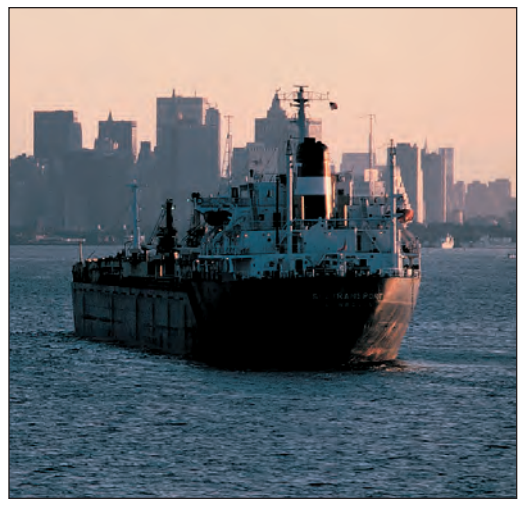
S&P predicts that the International Group of P&I Clubs, a reinsurance pool of the largest clubs, may not return an underwriting profit and "acceptable" combined ratio—probably of about 105%—until February 2006.

For the 2002/03 year, the International Group posted a combined ratio of 112%, and for 2003/04 that figure was likely to have improved to between 105% and 110%, said Rowena Potter, a credit analyst at S&P in London and one of the authors of the report.

As a result, shipowners will face rate increases at February 2004 and 2005 renewals as the International Group seeks to restore free reserves and improve its underwriting returns, predicted Ms. Potter.

All but a few P&I clubs are charging general increases of up to 20% at Feb. 20 renewals, brokers say. P&I clubs renew on Feb. 20 because that is traditionally the date at which Baltic Sea shipping lanes are no longer ice-bound.

But despite general rate hikes, P&I clubs at this year's renewals are likely to be less strict about imposing high rate increases on good risks, said Stephen Hawke, executive director, marine division, at Aon Ltd. in London.



"Those (shipowners) with good (loss) records might get more flexibility," he noted.

Simon Collins, P&I manager at Lloyd's of London broker Tyser & Co. Ltd., agreed that the mutuals are looking more favorably at good risks this year than last.

While such risks are not seeing rate decreases, they may be enjoying smaller increases than expected, noted Mr. Hawke. At the same time, he added, shipowners with bad loss

See P&I CLUBS/page 31

World Updates

Premium volume grows in London market

The London company market wrote premiums of more than £5.56 billion ($9.92 billion) in 2003, up 32.4% over 2002, according to the International Underwriting Assn. The Ins-Sure back-office bureau, which processes most of the premiums and claims in the London company market, reported the statistics, according to the IUA. The bureau processed claims of £2.89 billion ($5.16 billion) in 2003, down 18.6%.

Reinsurance rates may be near peak

European reinsurance rates will likely peak in 2004, according to investment bank BNP Paribas. After several years of increasing rates, the main listed European reinsurers generally experienced flat Jan. 1 renewals, according to research by the Paris-based bank. The reinsurers are due to report on their renewals later this month. Rates are not expected to decrease dramatically in 2005, but there is greater uncertainty about 2006, according to the report.

SVB unit to write smaller liability risks

Lloyd's of London-based SVB Holdings P.L.C. has launched an operation to provide capacity for small and midsize liability risks. Novae Underwriting Ltd. writes professional indemnity, directors and officers liability, medical malpractice, general liability and legal expense business on behalf of SVB through its syndicate 2147. Peter Matson, a founder of Professional Risks Insurance P.L.C., has been named to head the company.

Ex-Skandia executives questioned on funds

Three former executives of Sweden's Skandia Group have been questioned by police about the possible misuse of company funds. Ola Ramstedt, former head of Skandia's life and pensions arm, Skandia Liv, and Ulf Spaang, Skandia Group's former finance director, were arrested this month by Swedish police and later released. Former Skandia Group Chief Executive Lars-Eric Petersson also was questioned. In May 2003, Skandia commissioned an investigation into certain operations, including benefits and incentives paid to senior executives. That investigation found some senior managers had carried out "unsuitable, unethical and, in some cases, probably illegal acts," the company said.

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Pool Re: Proposed competition exemption debated

Continued from previous page

tortion, because who is to say they are specialized in terrorism?" Mr. O'Connor said.

Damien Cannings, commercial underwriter at the Manchester, England, office of Leeds-based Markel U.K. Ltd., a division of London-based Markel International Ltd. and a member company of Pool Re, said he believes there has not been much competition for Pool Re-type business since the system announced it would broaden its coverage in 2002 to take into account the terrorist attacks of Sept. 11, 2001.

From the beginning of last year, the pool began offering coverage on an all-risks basis, including impact by aircraft and damage from biological, chemical and nuclear contamination. With the expanded coverage, Pool Re also doubled its rates.

Mr. Cannings acknowledged that it is hard to compete with the depth of coverage Pool Re can offer at prices that other underwriters cannot meet. He stressed, though, that the pool sets rates not to win new business from the competition but to offer affordable terrorism coverage.

Quentin Prebble, a class underwriter at Lloyd's of London Liberty syndicate 282 who writes bespoke, or customized, terrorism insurance coverage, said he too favors Pool Re and its continuing exemption.

"The benefit of cheaper, broader cover is of greater general benefit to everybody than the need to offer individuals the opportunity to buy on a bespoke basis," Mr. Prebble said.

But two underwriters spoke out against the pool.

Ben Garston, a partner with Lloyd's of London underwriter Managing Agency Partners Ltd., which writes stand-alone terrorism coverage, said, "If you believe in free and open markets, you should not have government-subsidized insurers dominating a class."

There is "plenty of capacity" from sources other than Pool Re in the Bermuda, European, Lloyd's and U.S. markets to meet the demand for terrorism coverage from U.K. commercial property owners, he added.

Mr. Garston noted that Lloyd's alone can provide up to £250 million ($461.7 million) per building in coverage and coverage worth £1 billion ($1.85 billion) is possible with the involvement of other international markets. Consequently, he said, Pool Re is "a bit of an anachronism."

And a Pool Re member company underwriter at Lloyd's who did not wish to be named added that the pool's rules are very strict and do not allow members to offer stand-alone coverage.

"It is a bit of nonsense. At some stage, the government will want the private sector to take the business back," the underwriter said. "Unless it allows the private sector the flexibility to offer stand-alone cover, that won't happen."

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REQUEST FOR PROPOSALS

POSTDOCTORAL BENEFITS PLAN

The University of California is requesting qualified brokers to participate in a bidding process for brokerage and administrative services for a systemwide Postdoctoral Health and Welfare plan effective January 1, 2005.

Organizations wishing to bid must meet certain minimum pre-qualifying criteria in order to be considered, including but not limited to:

- Must have a minimum of five years of experience in the health and welfare brokerage field in California, including a regional office in California.
- Your firm or subcontracted firm for administrative services must have a minimum of five years experience with premium and eligibility administration.
- Confirm that your firm has or will obtain a fidelity bond equal to 10% of premium, not to exceed $500,000.
- Confirm that your firm will maintain general liability coverage with a minimum of $1,000,000 per occurrence and $25,000,000 aggregate.

To obtain a Pre-Qualification Packet, please send an e-mail to:

POSTDOC-L@UCOP.EDU

Include your company name, address, your full name, title, business email address and telephone number in the email.

The deadline for contacting the University of California to participate in the Pre-Qualification process is 12:00 PM (PST), Friday February 27, 2004. The deadline for submitting the completed questionnaire is 12:00 PM (PST), Monday, March 1, 2004. Commission or service fees of any kind will not be payable by the University.

EOE/AA

REQUEST FOR PROPOSALS

REQUEST FOR PROPOSAL (RFP) GROUP HEALTH PLANS

The Board of Administration, Los Angeles City Employees' Retirement System (LACERS) is accepting bids for the following plans to cover approximately 10,000 retirees of the City of Los Angeles, effective January 1, 2005:

- Insured Commercial and Medicare + Choice HMO plans
- Insured PPO and Medicare Supplement plans
- PBM Services
- PPO and Prepaid (DHMO) dental plans

An organization that wishes to submit a proposal must submit a signed, written request to receive the RFP. This request and confirmation must be received at the fax number shown below no later than 5:00 p.m. (PST) on Wednesday, February 25, 2004, without exception.

Ms. Sandra L. Dyson
Chief Health Benefits Administrator
Los Angeles City Employees' Retirement System
360 E. Second Street, 2nd Floor
Los Angeles, CA 90012
(213) 473-7282

It is the responsibility of the organization to confirm and document LACERS' receipt of this request and confirmation by the above deadline. The deadline for proposal submission is 5:00 p.m. (PST) on Wednesday, March 24, 2004. Details on proposal submission are in the RFP. Commission or service fees of any kind will not be payable by LACERS.

REQUEST FOR PROPOSALS

ARIZONA STATE RETIREMENT SYSTEM (ASRS) SEEKS RETIREE MEDICAL BENEFITS PROGRAM

The ASRS intends to issue RFP No. RT04-016 to provide retiree medical benefits to retirees and eligible dependents. The ASRS has more than 22,000 enrolled retirees and disabled members with more than 65,000 eligible. The ASRS seeks proposals from qualified health care insurance companies to assist the ASRS in providing health care plans.

The date of release of the RFP is February 9, 2004. There will be a Pre-Proposal Conference on February 20, 2004, at 1:30PM, MST, at the ASRS located at 3300 N. Central Avenue, Phoenix, AZ 85012 in the 10th Floor Board Room.

To obtain the RFP, send a request to the attention of Pat Klein, Retiree Medical Benefits Program RFP, ASRS, 3300 N. Central #1400, Phoenix, AZ 85012; Fax: 602-240-2102 or email: **PatK@asrs.state.az.us.**

Signed hard copy proposals are due by 3:00PM, MST on March 12, 2004. Faxed or E-Mailed proposals WILL NOT be considered.

ANNOUNCEMENT

A NEW WORKERS' COMPENSATION INSURER FOR BUSINESSES SITUATED IN NEW YORK STATE

On December 9th, 2003 First Pavilion Insurance Company published its intention to form a stock insurance corporation under the provisions of the Insurance Law of the State of New York. The Company plans to write excess insurance policies with a primary concentration in the worker compensation market. Its business plan is directed at qualified self insured companies, group trusts and the development of captive insurers with excess coverage and fronting needs.

First Pavilion anticipates filing for flexible retro, retention and uniquely collateralized large deductible plans in NY and anticipates finalization of its licensing and capitalization requirements in early Spring 2004. Preunderwriting, applications and Program Administrator inquiries will be accepted beginning December 22, 2003.

First Pavilion's principal offices are located in New York City and Glen Rock, New Jersey.

Contact: Michael A. Paone
266 Harristown Road, Suite 200
Glen Rock, NJ 07452
mpaone@firstpavilion.com

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LEGAL NOTICE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF DAN YORAM SCHWARZMANN, AS ADMINISTRATOR OF **FOLKSAM INTERNATIONAL INSURANCE COMPANY (UK) LIMITED**, DEBTOR IN A FOREIGN PROCEEDING
CASE NO. 02-14070 (PCB)

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 5, 2004, THE BANKRUPTCY COURT ENTERED AN ORDER (THE "ORDER") CONTINUING THE PRELIMINARY INJUNCTION ORDER PURSUANT TO 11 U.S.C. §304 ORIGINALLY ENTERED IN THIS CASE ON SEPTEMBER 9, 2002. THE ORDER SHALL REMAIN IN EFFECT PENDING A HEARING SCHEDULED TO BE HELD ON SEPTEMBER 13, 2004 AT 2:30 P.M. (THE "RETURN DATE") BEFORE THE HONORABLE PRUDENCE CARTER BEATTY, UNITED STATES BANKRUPTCY JUDGE, IN THE UNITED STATES BANKRUPTCY COURT LOCATED AT ONE BOWLING GREEN, NEW YORK, NEW YORK. ALL PAPERS SUBMITTED FOR THE PURPOSE OF OPPOSING THE CONTINUATION OF THE ORDER AFTER THE RETURN DATE SHALL BE FILED WITH THE COURT, WITH A COPY TO THE CHAMBERS OF THE HONORABLE PRUDENCE CARTER BEATTY AND SERVED ON COUNSEL FOR THE PETITIONERS LISTED BELOW, SO AS TO BE RECEIVED AT LEAST FOURTEEN (14) DAYS PRIOR TO THE RETURN DATE. ANY PERSON WISHING TO OBTAIN A COPY OF THE ORDER SHOULD CONTACT COUNSEL TO THE PETITIONERS.

CHADBOURNE & PARKE LLP
ATTORNEYS FOR THE PETITIONERS
30 ROCKEFELLER PLAZA
NEW YORK, NY 10112
(212) 408-5100
ATTN: HOWARD SEIFE, ESQ.

LEGAL NOTICE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF ROLF ÅBJÖRNSSON, AS OFFICIAL RECEIVER OF **ATERFORSAKRING AB LUAP**, DEBTOR IN A FOREIGN PROCEEDING
CASE NO. 03-10945 (PCB)

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 5, 2004, THE BANKRUPTCY COURT ENTERED AN ORDER (THE "ORDER") CONTINUING THE PRELIMINARY INJUNCTION ORDER PURSUANT TO 11 U.S.C. §304 ORIGINALLY ENTERED IN THIS CASE ON FEBRUARY 19, 2003. THE ORDER SHALL REMAIN IN EFFECT PENDING A HEARING SCHEDULED TO BE HELD ON SEPTEMBER 13, 2004 AT 2:30 P.M. (THE "RETURN DATE") BEFORE THE HONORABLE PRUDENCE CARTER BEATTY, UNITED STATES BANKRUPTCY JUDGE, IN THE UNITED STATES BANKRUPTCY COURT LOCATED AT ONE BOWLING GREEN, NEW YORK, NEW YORK. ALL PAPERS SUBMITTED FOR THE PURPOSE OF OPPOSING THE CONTINUATION OF THE ORDER AFTER THE RETURN DATE SHALL BE FILED WITH THE COURT, WITH A COPY TO THE CHAMBERS OF THE HONORABLE PRUDENCE CARTER BEATTY AND SERVED ON COUNSEL FOR THE PETITIONERS LISTED BELOW, SO AS TO BE RECEIVED AT LEAST FOURTEEN (14) DAYS PRIOR TO THE RETURN DATE. ANY PERSON WISHING TO OBTAIN A COPY OF THE ORDER SHOULD CONTACT COUNSEL TO THE PETITIONERS.

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P&I clubs: More rate hikes seen

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records will likely be penalized by higher-than-average increases.

Despite differentiating among shipowner risks, most P&I clubs generally are trying to stick to the general increase they have set to offset the poor underwriting results of the past few years, another marine broker says.

Nigel Russell, managing director of the marine division of HSBC Insurance Brokers in London, said one of the biggest questions in the runup to this year's P&I renewals is: "Will they get the increases that they need?"

The renewal season has being going well so far, according to Terje Tellefsen, head of P&I underwriting at Arendal, Norway-based P&I club Assuranceforeningen Gard-gjensidig.

The fact that Gard is seeking a relatively low rate increase—7.5%—at renewals has been popular with shipowners, Mr. Tellefsen said. But he added that the club would not simply underwrite for market share and that the quality of the shipowner was an important factor in renewals.

Joseph Hughes, chairman and CEO of the American Steamship Owners Mutual P&I Assn. Inc. in New York, said that all clubs are hoping to get rate increases to restore an underwriting equilibrium. This is particularly important since investment markets are still somewhat uncertain, he noted.

The International Group purchases an excess reinsurance contract, which is led at Lloyd's and underwritten by several major reinsurers, and widely described as the largest reinsurance contract in the world.

Under the terms of that contract, brokers said, for the 2004 year clubs will each take a $5 million retention. On top of that, the group will pool members' claims up to a limit of $50 million, which is up from $30 million last year. And on top of that sits $500 million in commercial reinsurance.

In 2004, the International Group hopes that a protected cell captive that it is setting up in Bermuda will become active. That protected cell company, Hydra Reinsurance Co. Ltd., would also enable the International Group to retain a share of the $500 million of the reinsurance risk above the group's pooling limit.

Because the International Group members come from different legal jurisdictions, setting up the captive has been a lengthy and complicated process.

But it is hoped that the captive would become active during 2004 and that cessions may even be made retroactively, Ms. Potter noted.

Hydra will certainly play a part in the group's reinsurance protection going forward, predicted one London-based broker who did not want to be identified.

The existence of the captive will allow the International Group to be "more robust in (its) debate with the commercial reinsurance market," according to HSBC's Mr. Russell.

In the medium term, said Aon's Mr. Hawke, the captive would enable the group to take on more retained risk at a level that, historically, has had good underwriting results and not too many claims.

It is hoped, he said, that if claims in that layer are low for the next couple of years the captive company would be able to generate more funds and eventually take on more risk.

This, experts say, would eventually lessen the International Group's reliance on the commercial reinsurance market.

The captive would give the group greater flexibility, said Mr. Hughes of the American Club.

And the protected cell structure would give individual members of the group more flexibility in how they structure their finances, he noted.

Shipyards: Seeking safety warranties

Continued from page 29

The fire on the Diamond Princess prompted greater interest by underwriters in issues of shipyard safety, such as fire prevention and security on ships under construction, noted Mr. Noble.

Among the steps that shipyards can take to comply with the new warranty are imposing a ban on smoking among shipyard workers and using temporary sprinkler systems while a ship is being built.

And while shipyards are required to have safety manuals, in some cases where accidents have occurred, these manuals had not been studied by workers, he contends.

Another issue that has become pertinent for underwriters is the way that shipyards manage contracted labor, he noted, because much of the labor on modern shipbuilding projects is outsourced to subcontractors.

The Joint Hull Committee created JH 143 to try to ensure that certain loss prevention standards were being met at shipyards, Mr. Noble said. The Salvage Assn. has been involved in several of the inspections, he said.

John Lillie, who worked with the Joint Hull Committee to design the warranty and who is managing director of the Salvage Assn., said there are many steps that shipyards can take to comply with the demands of the warranty.

For example, he said that imposing a ban on smoking among shipyard workers is one step that could be taken to reduce fire risks.

Mr. Lillie added that fire loss control measures, such as the use of temporary sprinkler systems while a ship is being built, can also reduce risks.

The Joint Hull Committee warranty applies to all aspects of management practices at shipyards, he noted.

The creation of the warranty was very much driven by the insurance market, noted Mr. Noble.

In some cases, brokers have asked the Salvage Assn. to perform a risk assessment of a shipyard before renewals, added Mr. Lillie.

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Privacy: Employers' fine line

Continued from page 1

ery single e-mail that talks about safety and ladders." Tracking these down means going through e-mails that may include employees' personal communications, he said.

Observers also note that while employee privacy is usually not the main complaint in suits filed against employers, it is frequently tacked on to sexual harassment and other complaints. Employee privacy complaints can be difficult to have dismissed on summary judgment, though, because there is generally a dispute about the basic facts involved, say attorneys.

Numerous state and federal laws govern privacy. The federal laws alone that touch on privacy include the Electronic Communications Privacy Act, the Health Insurance Portability and Accountability Act and the Americans with Disabilities Act. Furthermore, companies that conduct business internationally face stricter privacy standards.

Policies address access

Observers say the first step employers should take is to establish a policy that explicitly gives employers the right to access any organization property, including computers. The policy must clearly establish that employees should have no expectation of privacy, say attorneys.

The extent to which employers make it known that there should be no such expectation "goes a long way towards defending an employer against liability," said B. David Joffe, an attorney with Boult, Cummings, Conners & Berry in Nashville, Tenn.

The policy of San Antonio-based SBC Communications Inc. is, "if they're using a company-paid resource in the workplace, then the company does reserve the right to look at that," said a spokesman. The policy is included in SBC's business conduct code, which employees sign every year, he said.

Employers "want their employees to feel comfortable in the workplace. On the other hand, the workplace is generally not a private locale, and the importance of these policies is to let employees know that," said Lisa M. Jacobsen, an attorney with Buchalter, Nemer, Fields & Younger in Los Angeles.

But employers generally are not rigid when it comes to allowing occasional personal use of company computers. Observers say employers recognize that with the time people spend at their jobs these days, it may be unreasonable to prohibit personal use of computers.

"I think it's a question of degree, and absent a particular problem, I don't believe employers object to the occasional e-mail to contact family members or friends," said Peter J. Preston, an attorney with Sedgwick, Detert, Moran & Arnold in Chicago.

"We tell them the system is pretty much for business use, and you can make occasional personal use of it, as long as it doesn't interfere with the work" and upset colleagues, said Dave Rainey, a Boston-based ethics officer for New York-based Verizon Communications Inc. Employees are encouraged, he said, to get a supervisor's permission before using computers for personal reasons.

Eyes on the Web

Many employers are using monitoring and filtering software for their Web sites and e-mail. According to a 2002 survey by Framingham, Mass.-based IDC, an information technology industry analyst, 67.7% of employers with 1,000 of more employees have implemented monitoring and filtering measures on their computer systems.

Software can monitor the sites an employee visits and restrict access to chosen sites, said Susan Getgood, senior vp, marketing, for U.K.-based SurfControl Inc., whose U.S. headquarters is in Scotts Valley, Calif.

Many companies, for instance, block access to pornographic sites, while a smaller number blocks access to shopping sites, said Ms. Getgood, whose firm markets this type of software. Access can also be customized so that, for instance, employees can access certain sites during their lunch hour.

Observers say employers rarely inspect computer use unless there is evidence of a particular pattern of activity or a reason for suspicion, such as an employee complaint. Otherwise, "they're not going to delve too deeply into anything that's private. They really have no reason to," said Mr. Joffe.

PHOTO: COURTESY OF BAXTER INTERNATIONAL

Legal experts say workplace privacy policies, such as that of Baxter International, can help avert employee privacy lawsuits.

The range goes from companies that do no monitoring, to those that conduct intermittent monitoring, "to monitoring when there's a specific purpose or target," such as when an employer gets a tip that a fellow employee is "cooking the books," said Miriam Wugmeister, an attorney with Morrison & Foerster in New York.

"I think that a lot of employers look for patterns in use," she said. "I think most employers don't regularly have (information technology) staff go through to see who's looking at pornographic sites." They look for bigger patterns, such as employees who spend 90% of their time looking at a gambling site, or other patterns of "egregious misconduct."

At Deerfield, Ill.-based Baxter International Inc., any patterns that emerge as a result of filtering are brought to the attention of the company's employee relations group, which does "the auditing, monitoring and enforcement" of the health care products manufacturer's privacy policy, said Heather Humphrey, director of privacy compliance. Baxter's privacy structure also includes 30 privacy liaisons worldwide. "They're our troubleshooters, our implementers, that really drive the day-to-day operations of privacy in that structure."

A privacy policy that establishes access to e-mail can work to an employer's advantage. Patricia J. Stambelos, an attorney with Ford & Harrison in Los Angeles, said in one case she handled, a Buddhist employee filed suit against his company, charging it with a hostile work environment because he was offended by the workplace environment, including office banter.

His case was seriously undercut, though, when a search of his computer revealed hundreds of temporary Internet files whose content bordered on pornography. Ms. Stambelos said she sent boxes of the pictures to his attorney, along with a "very low settlement offer."

Benefits: City's vote bucks cover trend

Continued from page 4

the people who needed it," she recalled.

The practice of covering other adults in an employee's household dates back to the 1960s and 1970s, when labor unions succeeded in getting them included in collective bargaining agreements, according to Randy Abbott, a senior consultant at Watson Wyatt Worldwide in Philadelphia.

But, at the time, Mr. Abbott said, the overarching rule was that it had to be an individual for whom the employee was entitled to take a federal tax deduction, which would have precluded covering domestic partners.

Many of these programs were phased out in '80s and '90s, as health care costs rose and the plans became more difficult to enforce and manage, Mr. Abbott recounted.

"So, as plan sponsors looked to ease administrative burdens and get out of collecting proofs and other documentation, and as health care costs continued to rise, these collateral dependent arrangements virtually disappeared. They are extremely rare today," he said.

Even Xerox's program has evolved into domestic partner coverage per se and no longer includes other collateral dependents, according to Ms. Darling.

Another argument that was used against extending coverage in Colorado Springs was that it would increase health care costs for the city, even though employees would be paying 100% of the tab.

"Premiums only cover a small part of costs in self-funded health plans," explained Jim Crockett, manager of risk and benefits at Denver Water, which offers domestic partner coverage to its 1,000 employees. He said that while "only four or five" of the utility's employees purchase the coverage, administrative costs are higher for those individuals because premiums are paid on a post-tax rather than a pre-tax basis.

The city of Colorado Springs also self-insures its health benefits, a spokeswoman said.

A group's overall claims experience also could be impacted should the additional individuals covered be high users of health care, Mr. Abbott suggested.

"It definitely costs more to cover these people than it does not to cover them," acknowledged Mr. Piro of Hewitt. He pointed out, though, that typically "the expense associated with covering a domestic partner is less than the expense associated with covering a spouse," because there usually are no maternity costs.

Pensions: PPF plan welcomed

Continued from page 3

CBI, which has lobbied the government for a risk-related component to the levy, is concerned about the delay in introducing such an aspect.

"Otherwise, we will be in the unacceptable position of well-managed funds with sufficient resources effectively underwriting other schemes," he noted.

"We appreciate the efforts to reassure business on this point, and we recognize these issues are difficult to resolve. But we are not convinced that there needs to be further delay," Mr. Greenhalgh said.

The London-based Engineering Employers Federation, which represents employers in the manufacturing sector, said the U.K. government should exercise caution in implementing the PPF, as the potential cost to employers could deter them from offering defined benefit plans.

"Whilst employers appreciate the necessity of providing pension scheme members with insurance arrangements to protect their accrued benefits, this must be done in a way that does not impose further financial burdens on companies providing such schemes," David Yeandle, deputy director of employment policy at the EEF, said in a statement.

"As members are the ultimate beneficiaries of these insurance arrangements, it is only reasonable that employers should be able to share the cost of financing the PPF by recovering at least part of the levy from members," he said.

Wendy Beaver, European partner at Mercer Human Resource Consulting in London, said that employers with well-funded plans would welcome the government's proposal to eventually incorporate a risk-related element into the levy. Under such an approach, well-funded plans would be charged less than underfunded ones, which creates an incentive for companies to fund plans adequately.

Raj Mody, a consultant at Hewitt, Bacon & Woodrow in Leeds, England, said that while employers with well-funded plans might be frustrated by the delay in incorporating the risk-based factor, designing such a levy will be a complicated process. He noted that the approach may be fine-tuned once a pattern of claims on the fund begins to emerge.

And while employers with well-funded plans will welcome the risk-related component, the measures needed to calculate that charge may, in fact, impose another cost burden, noted Alan Smith, an actuary at Hazell Carr Pensions Consultancy in London.

The calculation of the levy will likely require that companies conduct an actuarial valuation every year, which can be a costly process, he noted.

Although employers may be disappointed that a risk-related levy will not come into force right away, most recognize the need for the fund to be set up as soon as practicably possible, said Paul McGlone, a principal and consulting actuary at Aon Consulting in London.

Because the image of occupational pension plans has been damaged by some high-profile failures of underfunded plans, Mr. McGlone noted, the move to set up a PPF will likely boost employee confidence.

The London-based Trades Union Congress welcomed the government's PPF proposal. The fund, it said, "will protect employee pensions when a company goes bust. Collective insurance is the sensible way to protect pensions."

Peta Miller contributed to this report.

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Trial: Was WTC destruction one occurrence or two?

Continued from page 1

program, "Mr. Strachan responded loud and clear what form by faxing portions of the Wilprop form," Mr. Ostrager told jurors at the trial's opening.

Silverstein's case "not only conflicts with common sense but with all of the evidence," he argued.

Lawyers for Silverstein, however, countered that the program was in the process of being switched to the Travelers form in the weeks before Sept. 11 and that the various insurers were either aware of that or had waived approval of the form. Swiss Re in particular was unhappy with the Wilprop form and had fewer objections to the Travelers policy, said Herbert Wachtell, a lawyer with Wachtell, Lipton, Rosen & Katz, representing Silverstein.

It was only after the terrorist attack that the insurers realized the Wilprop form's occurrence definition would treat the loss as one occurrence, Mr. Wachtell told jurors.

"Post-9/11, that's what these insurance companies decided they wanted," he argued. "What you have here is the insurance companies trying to exploit that circumstance and take a position totally contrary to what they took before 9/11."

Mr. Strachan's fax of the Wilprop form after the attack, he maintained, was a mistake.

"Bob Strachan on Sept. 12 was not being all that clear…We can all remember the shock and horror of that day," Mr. Wachtell told jurors. "In the midst of that turmoil, Strachan was being pressured: 'You must tell me what the policy form is.' He didn't know."

The trial, which is expected to last eight weeks, is the latest stage of a battle that began soon after the terrorist attack, when Swiss Re filed a declaratory judgment action against Silverstein.

The ensuing coverage litigation, drawing in all 22 insurers on the 12-layer program, arose from the fact that the program's policy wording had not been finalized at the time of the Sept. 11 attack. Most of the insurers issued only binders allowing Silverstein to close on its 99-year lease of the WTC complex on July 24, 2001. A couple of the insurers—Allianz Insurance Co. and an Industrial Risk Insurers affiliate—issued actual policies using their own forms, which were not concurrent with either the Wilprop or Travelers forms.

Coverage questions for some of the insurers have been settled over the past two years. Hamilton, Bermuda-based ACE Ltd. and XL Capital Ltd., whose binders specifically cited the Wilprop form, settled with Silverstein on a one-occurrence basis in 2002. A federal appellate court last year upheld rulings that three other participants—Hartford Fire Insurance Co., Royal Indemnity Co. and St. Paul Fire & Marine Insurance Co.—are bound under the Wilprop form that Willis provided, even though the binders themselves do not mention Wilprop.

The appeals court also affirmed that the Wilprop form's definition of occurrence—losses attributable to one cause "or to one series of similar causes"—requires that the WTC's destruction be treated as a single occurrence.

The dozen insurers who have proceeded to trial against Silverstein represent the bulk of the program's $3.5 billion limit, including Swiss Re, which wrote $778 million of the total, and Lloyd's of London underwriters, who wrote $684 million.

'What you have here is the insurance companies trying to exploit that circumstance and take a position totally contrary to what they took before 9/11.'

Herbert Wachtell
Wachtell, Lipton, Rosen & Katz

The arguments the two sides offered last week follow the positions they have taken since the coverage litigation began.

Silverstein contends that by mid-July 2001, it had dropped the Wilprop form and acquiesced to Travelers' demand that its form govern the program. Facing its closing deadline, Silverstein needed Travelers to fill gaps in various layers while satisfying GMAC's demand for insurers with minimum AA ratings from Standard & Poor's Corp., Mr. Strachan testified.

A Willis broker e-mailed the Travelers form to Swiss Re on July 23, 2001, and a subsequent Swiss Re binder—while not mentioning a particular form—should be understood to incorporate the Travelers terms, Silverstein contends. Lloyd's underwriters, meanwhile, issued binders waiving approval of policy forms, Mr. Wachtell argued.

Swiss Re denies ever agreeing to the Travelers form, and the insurers charge that Silverstein and its lawyers developed the two-occurrence theory after the Sept. 11 attack. They pointed last week to several pieces of evidence suggesting that Silverstein believed that Wilprop was the operative form and that the loss was one occurrence. In addition to Mr. Strachan's Sept. 12 faxes of the Wilprop terms, these included:

- A Sept. 14, 2001, notice-of-loss from Willis reporting a single Silverstein deductible of $1 million for the WTC claim, indicating a single occurrence.
- Handwritten notes Mr. Strachan made soon after the attack. In one note, he calculates the amount Silverstein would recover from a single $3.5 billion limit after required payments to the Port Authority and GMAC. In another, he observed, "underinsured WTC, budget v. end of the world," which insurers argue shows that Silverstein knew its $3.5 billion limit was far below the complex's replacement cost.

In his testimony, Mr. Strachan said he had not seen the Travelers form before the attack and did not know it contained no occurrence definition.

"You certainly were not thinking you might get two limits at the time you made these notes?" asked Eric Roth, a Wachtell, Lipton partner.

"No, I did not think that," Mr. Strachan replied.

- Testimony that representatives of the Port Authority, GMAC and Silverstein lease partner Westfield America Inc. were never told anything about a switch from the Wilprop form to the Travelers form, even after Westfield's then-risk manager, Nancy Townsend, submitted the Wilprop form to her own broker, Marsh Inc., and contacted Mr. Strachan with Marsh's comments.

"I felt it was my decision, so I did not feel I needed to share that," Mr. Strachan testified.

Ms. Townsend took a different view in her own testimony.

"If Mr. Strachan wanted to change the form of the property insurance from the Wilprop form to a different form, you would want to have known about that?" Mr. Ostrager asked her.

"Yes, I would have," Ms. Townsend said.

Witnesses expected to testify this week include Willis brokers involved in the World Trade Center placement.

Consumer driven: Growth likely

Continued from page 1

approach. However, I have yet to see a prepackaged model that I feel will bring about the change that is needed in order to truly impact the system. We must walk before we sprint on this one," said Gary Earl, vp-benefits at Caesars Entertainment Inc. in Las Vegas.

Mr. Earl also said he doesn't think employees are ready to assume the responsibility for health care purchasing decisions.

"I see that, without proper guidance, education, communication and support, we could potentially see a financial—as well as general health status and eventual employee dissatisfaction—backdraft by people choosing to hoard allowances for the rainy day," he said.

"Worse yet could be the potential impact of the 'chosen frozen,' who will simply freeze in light of the massive amount of education and decision-making that they are not accustomed to or prepared for," Mr. Earl added.

Another reason for consumer-directed health plans' slow start is that many insurers had been waiting for guidance on certain issues before launching such plans, according to a spokesman for the AAHP/HIAA in Washington.

"Now the new (health savings account) law and the June guidance from Treasury will create yet another breed of consumer-directed health plans," the spokesman predicted.

The health reimbursement account, an integral component of consumer-directed health plans, was approved for use by the Internal Revenue Service in June 2002. Health savings accounts, or HSAs, were approved for use under the Medicare Prescription Drug and Modernization Act of 2003.

"The HSA legislation makes it easier and more attractive for people to have HSAs, and they can get more interested in that concept," agreed Helen Darling, president of the NBGH in Washington.

The managed care industry also sought support from the federal government to boost its growth in the early 1970s, and passage of the HMO Act of 1973 stimulated the growth of those plans, industry experts point out.

The act was designed to provide financial assistance, to pre-empt restrictive state laws and to mandate that employers who were covered by the Fair Labor Standards Act offer their employees an HMO option.

After the passage of the act, enrollment in HMOs climbed from just 3 million in 1971 to about 10 million by 1980, according to research from the Minneapolis-based managed care research firm InterStudy.

When insurers entered the managed care market in the mid-1980s, HMOs got another boost. By 1987, there were 650 HMOs, half of which were national, with 25.7 million members.

The entry of insurers is also expected to foster the growth of the consumer-directed health plan market.

Since 2000, when Minneapolis-based startup Definity Health launched the first consumer-driven health plan, more than 20 companies have begun offering such plans, including health insurers Aetna Inc., CIGNA Corp. and Blue Cross of California, as well as the managed care giants Humana Inc., Anthem Inc. and UnitedHealth Group.

While InterStudy estimates enrollment in consumer-directed health plans at somewhere between 1 million and 1.5 million today, a recent Forrester Research Inc. report predicts that consumer-directed health plans will have 2.7 million members by 2005 and will constitute as much as 24% of the health insurance market by 2010.

The terms "consumer-directed" and "consumer-driven," which both carry a negative connotation for many, also have been inhibiting growth, according to research conducted by the AAHP/HIAA last year.

The word "'driven' implies a 'last-ditch' option and 'no choice,' as if someone is 'pushing you' to that plan. 'Directed' means you have limited options. In addition, it implied being controlled by the insurers and not that you were in control," states the findings from focus groups AAHP/HIAA conducted with small business owners.

To better market the plans, their name should be changed to include the word "choice," the AAHP/HIAA research determined, and the organization now refers to consumer-directed health plans as "consumer choice health plans."

"Americans love the word 'choice'…because that implies you have more control," concurred Ms. Darling, whose organization has also begun using the new moniker.

While growth in this innovative health plan model admittedly has been slow, it will likely take off as more and more of these plans hit the market, benefit experts say.

Already the industry is creating another permutation of consumer-directed health care with the introduction of the pharmacy-only consumer-directed health plan late last year by Definity Health in conjunction with prescription benefit manager Medco Health Solutions Inc. and Evolution Benefits, a provider of debit card technology.

Some believe that the pharmacy-only consumer-driven plan may be a productive way to introduce people to the concept.

"There may be some who believe the pharmacy benefit is a good place to start with this," said Len Greer, vp-special markets for Medco in Franklin Lakes, N.J. "It's also something people are comfortable with."

Because prescription drug costs are probably the fastest-rising component of overall health care costs, it is a fitting area in which to begin the re-education process, said Scott Keyes, a senior consultant at Watson Wyatt Worldwide in Minneapolis.

"It's a way to get the consumer to ask the question 'What does this cost?' And if you look at the behavior that employers are trying to initiate, it's that question," he said. "Until a consumer starts asking, 'What does this cost?' employers will pay an unlimited amount or an unlimited cost."

"We do not expect to see an overnight switch to this type of model," said the AAHP/HIAA spokesman. He noted that interest in managed care waxed and waned with economic conditions and changes in health care costs.

"It is important for the health insurance industry to continue evolving and to continue to provide as many options as possible so that people can make the choice that best suits them," he said. "Whether that's the delivery model or the cost-sharing structure, there should be as many options out there as possible."

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Medicare: HMO interest rises with fees

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plans it offers in Broward and Palm Beach counties. The Jacksonville, Fla.-based insurer's plans had been charging, respectively, monthly premiums of $49 and $58.

- Empire Blue Cross & Blue Shield, which has about 52,000 enrollees in its Medicare Advantage plans in New York, will eliminate the current $95 monthly premium for enrollees in Westchester and Rockland counties, while the $140 monthly premium for enrollees in Nassau county will be cut to $22.
- Health Net says 65% of its 171,000 enrollees will see premiums either reduced or eliminated, while 90% are in plans in which copayments for physician and hospital services will be reduced.

Additionally, Health Net, which now operates in Arizona, California, Connecticut, New York and Oregon, says it expects to expand its Medicare Advantage service area later this year.

- Highmark Blue Cross & Blue Shield in Pittsburgh, which has about 185,000 Medicare Advantage enrollees, will reduce premiums, on an annual basis, from $50 to $690, depending on where the member lives.
- PacifiCare Health Systems Inc. of Cypress, Calif., whose Secure Horizons unit is among the largest Medicare Advantage plans, will improve prescription drug coverage for about 82% of its 700,000 enrollees.

This wave of premium reductions, benefit improvements and market expansion is a sea change from the premium hikes, benefit cutbacks and market withdrawals of the last few years. Insurers' previous qualms about Medicare threatened the future of a program that delivered huge savings for employers with retiree health care programs and better benefits for retirees.

For example, Los Angeles County has saved millions of dollars annually by encouraging retirees to enroll in Medicare Advantage plans rather than the county's more expensive Medicare supplemental plans. Even with paying retirees' Medicare Part B premiums—now $66.60 a month—the county still comes out way ahead financially when the retirees opt into Medicare Advantage plans, said Kathy Migita, director of health care benefits for the Los Angeles County Employees Retirement Assn. in Pasadena, Calif.

But the ability of other employers to reap such savings dimmed in recent years as a 2% cap on annual government rate increases took its toll. Congress imposed that cap under a 1997 law.

Health plans, whose cost increases far outstripped the 2% government rate cap, withdrew en masse from hundreds of markets and elsewhere boosted premiums to enrollees and cut benefits.

Not surprisingly, enrollment in the plans, which was climbing by more than 10% a year in the mid-1990s, plummeted. As of Feb. 1, enrollment in Medicare Advantage plans stood at 4.6 million, down from its peak of 6.2 million in 2000, while the number of participating plans stood at 145, down from the highpoint of more than 300 a few years ago.

As the program began to wither, the opportunity of employers to cut their own costs—by giving retired workers financial incentives to enroll in the plans and leave much more expensive corporate-sponsored Medicare supplemental plans—eroded.

"The savings certainly have diminished," said Joe Martingale, a consultant with Watson Wyatt Worldwide in New York.

But the recent big government rate increase—and the prospect for another major one next year—dramatically changes the attractiveness of the program for insurers as plans are reversing course and boosting benefits, cutting premiums and looking to expand into new areas.

Medicare Advantage is once again an "absolutely compelling program for employers to evaluate," said Aetna's Ms. Rawlings.

"This is very good news and certainly it will lead to an increase in enrollment," added Jonathan Nemeth, a senior vp with Aon Consulting in Somerset, N.J.

Still, even with the spate of premium reductions, benefit improvements and future market expansion, employers are likely to move slowly before entering new agreements with the plans.

"I think employers will be a little gun shy, given how much disruption there was in the past," said Brian Sitzel, director-health and welfare for Mellon's Human Resources & Investor Solutions in Secaucus, N.J.

"I don't see employers rushing in and offering new plans until they see there is a sustained commitment by government" to this program, concurred Kirby Bosley, head of Mercer Human Resource Consulting's health and group benefits practice in Los Angeles.

But at least, the attrition of the program has been stopped, Ms. Bosley added.

Council: Suits challenge laws

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federal court targeting the three other jurisdictions that have countersignature laws—South Dakota, West Virginia and the U.S. Virgin Islands.

The South Dakota law requires the payment of a commission equivalent to the lesser of at least 5% of the total premium or 25% of the commission to the countersigning agent.

The West Virginia statute mandates the payment to the countersigning agent of the lesser of at least 10% of the total premium or 50% of the commission.

And the Virgin Islands forbids nonresident agents and brokers from soliciting business as well as requiring those who somehow do generate business to pay the lesser of at least 10% of the premium or 50% of the commission to a countersigning agent.

"Brokers want to add value to their relationship with corporate buyers," said Joel Wood, senior vp-government affairs with CIAB in Washington. But countersignature laws have the opposite effect, he said.

"It protects no one, it adds no value, it slows down transactions and the corporate buyer ultimately ends up on the hook," Mr. Wood said.

The Risk & Insurance Management Society Inc. also takes a dim view of the laws.

"RIMS' position in regard to this is the same as it was when the matter came up in Florida," said Janice Ochenkowski, vp-external affairs for New York-based RIMS.

"We believe that anything that makes it easier and more efficient for our members to conduct business is supported by RIMS. We think it's a good thing, and we believe it will be particularly beneficial for our members who have multiple state operations," said Ms. Ochenkowski, who is also senior vp-global finance for the Chicago-based real estate management firm of Jones Lang LaSalle Inc.

"It would be better if these jurisdictions would modernize their own laws, but in the absence of such wisdom, we'll take every legal action necessary," said Mr. Wood.

Aetna: Costs studied

Continued from page 4

and a 12.8% rise in generic drug use, compared with utilization prior to joining the plan.

Additionally, the utilization of preventative services rose sharply among members studied. Aetna said that the use of preventative care, including routine physical exams and gynecological exams, rose by 30%, compared with a 14% increase for a similar population in other plans.

But because the results are preliminary, Aetna could not say whether the members in its study had similar or different preventative care benefits under their former plan.

Additionally, nine months may be a relatively short period to evaluate the behavior of a consumer-driven health plan population, consultants say.

Two years of experience would provide a better picture, because consumers often behave differently the first year they are moved to any new plan, Watson Wyatt's Ms. Lair said. Additionally, consumers develop a different attitude toward their HRA spending a year after employers first contribute to them, she said.

Aetna acknowledged that its study on the consumer-driven plan is preliminary and said it would continue its evaluation.

A press release on the study is available at www.aetna.com, but the full study is not yet available.

Letters to the Editor

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text is a transient product of the essentially political process of interpretation. That's fine for humanities professors, who do not live in the real world anyway. It does not work for underwriters and their insureds.

Instead of a solemn forum in which parties search for truth (or a just approximation of it) the courts are now postmodern battlefields on which sophists like the authors of the Perspectives article turn "no" into "yes." (Or "Congress shall make no law..." into "Congress shall make no law unless we agree with its goals...")

Why bother with complicated policy forms at all? Let's just flip a coin and set the rate accordingly. Ah! But then some lawyer would sidle up and whisper: "It depends what the meaning of 'heads' is."

Christopher J. Barr
President
Financial Special Risks Ltd.
Yardley, Pa.

No need for advocate if broker does its job

To the editor: The Jan. 12 article, "Advocacy Firms Help Cure Benefit Troubles," really concerned me. Employers working with a full-service employee benefits brokerage firm could include these types of issues in the annual employee benefits strategy, and the proper educational program could be implemented to ensure employees understand their benefits and do not set unrealistic expectations on payment. This would be part of a standard service, with no incremental charges.

Additionally the Health Insurance Portability and Accountability Act restricts the sharing of medical information without the proper authority, and these types of advocacy services might ultimately create legal problems for employers, employees, providers and the advocacy firms themselves.

There is no cookie cutter approach to resolving very sensitive health care claims issues when it concerns a loved one. Employers need to leverage their broker relationship by expecting an annual benefits strategy, wherein commitment is made and measured on a regular basis. Building a strategy will ultimately take employers where they need to be.

Esther F. Leal
Vp
Gallagher Benefit Services Inc.
Itasca, Ill.

NAIC not listening to consumers: Hunter

To the editor: In his Feb. 2 letter to the editor, "Effective Modernization Requires Consensus," former National Assn. of Insurance Commissioners President Mike Pickens calls on the American Council of Life Insurers to move back from calling for federal regulation approaches. He claims that the NAIC has made progress by consensus toward regulatory modernization.

In fact, the NAIC has not listened to consumers at all during this process and has made an unabashed attempt to head off any federal regulatory steps by gutting consumer protections.

The NAIC has clearly decided that the best way to save state regulation is to try to attract insurers by regulatory weakness and turning its back on consumers.

This "save the village by burning it" strategy will fail to placate ACLI and other pro-federal industry elements. Instead, it will result in consumer groups, like the Consumer Federation of America, abandoning their long-held state regulatory preference.

We predict that the NAIC's shortsighted approach will not head off the industry push for a federal system (we expect to see evidence of this soon) and will indeed hasten it by decimating any consumer support the NAIC and the states still cling to.

This is a very dangerous time for state regulation. The NAIC's choice to sacrifice consumers' interests on the altar of turf maintenance will hasten its demise.

J. Robert Hunter
Director of Insurance
Consumer Federation of America
Washington

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Late News

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still accounted for a record percentage of the gross domestic product, according to government projections. The projections by the Centers for Medicare and Medicaid Services estimate that total U.S. health care spending last year climbed 7.8% to $1.67 trillion, down from a 9.3% increase in 2002. As a percentage of the GDP, health care spending last year hit 15.3%, CMS projects, up from 14.9% in 2002.

AIG records double-digit gains

American International Group Inc. reports that its net income jumped 68% to $9.27 billion in 2003. In 2002 the insurer's profits were reduced by a $1.8 billion aftertax reserve charge. AIG's commercial insurance operation recorded a 28.4% increase in net written premiums in 2003, to $35.21 billion. The operation's combined ratio also improved to 92.43% from 105.95% in 2002.

Allianz plans bond issue to raise $1.2 billion

Allianz A.G. Holding plans to raise $1 billion euros ($1.24 billion) through a bond issue. The move is part of a capital-raising plan Allianz announced last year. Proceeds will be used to strengthen the insurer's capital base, a spokesman said.

USI revenues up, profits more than double

USI Holdings Corp.'s revenues were $354.8 million in 2003, up 8.1% over 2002. At the same time, the brokerage's net income surged 223% to $35.3 million in 2003, compared with the previous year.

Aon sees growth in revenues, profits

Aon Corp. reported gross revenues of $9.81 billion for 2003, an 11.4% increase over 2002. Revenues derived from commissions and fees increased 11.3% to $6.88 billion in 2003, while investment income rose by 25.8% to $317 million. The brokerage reported profits of $628 million, a 35% increase over 2002.

Aetna returns to profit after big loss in 2002

Aetna Inc. reported $933.8 million in net income for 2003, compared with a $2.52 billion loss for 2002. The 2002 loss reflects the adoption of a new accounting standard related to goodwill. Revenues for the managed care company decreased 9.6% to $18 billion. For the fourth quarter, Aetna's net income increased 154.1% to $249.5 million, while revenues decreased 3% to $4.57 billion. The company said the revenue decline reflects lower health membership and reduced net investment income.

Reserve additions fuel net loss for CNA

CNA Financial Corp. reported a $1.43 billion net loss for 2003 despite a fourth-quarter profit. CNA's 2003 loss, which compares with 2002 net income of $155 million, reflects more than $2 billion in reserve strengthening and other charges, which were reported in its nine-month results. For the quarter, the insurer reported $174 million in net income, a 248% increase over the same period in 2002. CNA reported a 1.2% increase in property/casualty net premiums written for the year, to $7.09 billion.

HRH reports increase in earnings, revenues

Hilb Rogal & Hobbs Co. reported total revenues of $563.6 million in 2003, an increase of 24.5% from 2002. Net income rose to $75.0 million for 2003, an increase of 15.1%. In the fourth quarter of 2003 revenues rose to $142.7 million, an increase of 10.9%. Net income for the quarter rose 19.5% to $19.4 million.

Briefly noted

Paris-based **SCOR S.A.** recorded premium volume of 3.69 billion euros ($4.61 billion) for 2003, down 26% from the previous year....**William Ralph Wilkerson III**, 2003 chairman of the Council of Insurance Agents & Brokers, died Feb. 7. Mr. Wilkerson, 58, was chairman and chief executive officer of Haas & Wilkerson Insurance of Shawnee Mission, Kan....**Diann Howland**, pension policy adviser on the Senate Finance Committee, is leaving the committee this month to join the Washington-based American Benefits Council as vp of retirement policy....The **Pension Benefit Guaranty Corp.** has taken over and terminated the underfunded pension plan of bankrupt Fleming Cos. Inc., a large wholesale grocery distributor and convenience store operator based in Lewisville, Texas. The Fleming plan, which has about 17,600 participants, is underfunded by about $374 million, of which the PBGC expects to be liable for about $358 million. Four other plans sponsored by Fleming and its subsidiaries are continuing.

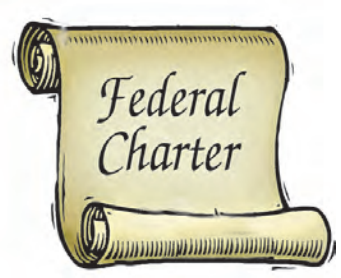
Check out *BusinessInsurance.com*

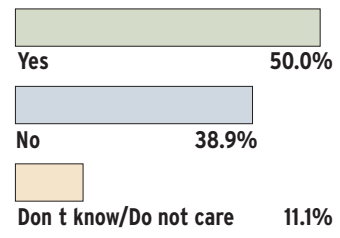
Items in the Late News column originally appeared in *BI*'s Daily News feature on *www.businessinsurance.com.* Visit the *BI* Web site to sign up to receive *BI*'s Daily News by e-mail.

Online Poll

[2/9 - 2/13]

Should Congress consider legislation this year that would allow insurers to seek federal rather than state charters?





BI Stock Index

[2/9-2/13]

Up-to-the-minute data for all 87 companies that comprise the *BI* Stock Index can be found at *www.businessinsurance.com.*

Percentage change of *BI* Stock Index vs. key indicators

***BI* Stock Index**	**2336.31**	**1.21**
Dow Jones	**10627.80**	**0.33**
S&P 500	**1145.81**	**0.27**

Largest gains

PMA Capital Corp.	33.82%
Gainsco Inc.	21.21%
PacifiCare Health Systems	16.61%
Odyssey Re Holdings	12.83%
CNA Financial Corp.	9.50%

Largest losses

ESG Re Ltd.	-16.67%
Health Net Inc.	-11.40%
Navigators Group	-10.58%
Fairfax Financial Holdings	-10.08%
CIGNA Corp.	-6.19%

Weekly change by market segment

Brokers	1.19%
Insurers/Reinsurers	1.05%
Managed Care Organizations	1.36%

Source: FinancialContent Inc. *(http://financialcontent.com)*

Disability: Market competitive

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and to industry segments that have less volatile incidents," he said.

UnumProvident remains a preferred company from which to obtain a quote, said Gary Earl, vp of benefits for Las Vegas-based Caesars Entertainment Inc. Mr. Earl purchases coverage for 55,000 employees and is beginning the second year of a three-year contract for disability coverage purchased from New York-based Metropolitan Life Insurance Co.

He believes in long-term partnerships and has no intention of changing insurers, Mr. Earl said. But UnumProvident recently called on him twice seeking his business, Mr. Earl said, indicating that the insurer is not leaving all large-account business.

But as disability insurance utilization rises, UnumProvident probably realizes it is easier to manage the accounts of smaller groups and they provide greater profit margin potential, he said.

Among the factors pressuring insurers to raise rates is that disability claims usually rise along with unemployment.

Along with low investment returns, disability insurers must now contend with the economy's impact on claims activity, said Steve Cyboran, a health actuary for The Segal Co. in Chicago.

Insurers "are all coming out with significant increases on their disability," Mr. Cyboran said. "I don't think this is unique to Unum."

Mr. Cyboran said he has seen several renewal accounts where insurers asked for 30% increases, and even one where the insurer sought a 100% increase.

But after reviewing their experience and determining their losses were not out of line, employers convinced the insurers to forgo the increases.

In contrast to the complexities of changing health insurers, it is very simple to move from one disability insurer to another, said John Van Wie, a broker at Travers O'keefe Inc. in New York who places disability coverage. Therefore, if insurers hold a hard line on rate increases, the business likely will move.

Rising medical costs also are pressuring life and disability insurance renewals, said Ron Gendreau, vp of underwriting and profit management in Simsbury, Conn., for The Hartford Financial Services Group Inc.

The extent of that pressure, however, will depend on the price insurers set when they first acquire an account, Mr. Gendreau said. Some insurers may be under greater pressure because of past pricing, he said.

Yet seeking a significant rate increase is likely to send consumers shopping, Mr. Gendreau said.

"If you are asking for too big of an increase, the marketplace is more likely today than ever to go out and test if the increase is reasonable," he said.

The Hartford's strategy has long called for underwriting discipline and its renewal pricing has remained consistent over several years, Mr. Gendreau said. The insurer remains on target for renewal accounts and currently earns a profit from all segments of its long-term disability market, including from large-employer accounts, he added.

New York-based MetLife has sought steady rate increases over a few years, so that its current premium increases are actually lower than they were a year or two ago, said Todd Katz, vp for MetLife Disability in Bridgewater, N.J.

MetLife has been persistent in seeking and obtaining rate increases of 5% to 10% for accounts with more than 10,000 lives, he said. Claims incidence has not been a problem for MetLife, Mr. Katz said. But low interest rates are a factor in renewal pricing and can account for about a 5% increase, he said.