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Business Insurance

February 21, 2011

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In Brief

94% of health care law waivers approved

Federal regulators have approved 94% of requests—mainly from sponsors of "mini-med" and other limited benefit plans—for waivers from having to meet a key requirement of the health care reform law, according to information released in conjunction with a congressional hearing. The waivers are needed because most, if not all, mini-med plans run afoul of federal rules in the health care reform law that set a minimum annual dollar limit on essential benefits that health care plans must provide in 2011, 2012 and 2013.

Asbestos, pollution losses up 50% in 2009

Asbestos and environmental losses jumped approximately 50% in 2009 after a 47% decline in 2008, according to

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SPOTLIGHT

ENVIRONMENTAL RISKS

Courts fail to clean up pollution cover rules; cover evolves; avoiding pollution issues in M&As; sustainability projects pose risks; *BI* listing of environmental liability insurers

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EMPLOYMENT PRACTICES

Gender bias claims not slowing down

Employer policies help, but rising awareness fuels complaints

By JUDY GREENWALD

Gender discrimination claims persist as a risk for employers despite widespread implementation of company policies on the issue and greater employer sophistication in this area.

Greater awareness among workers, legislative developments and demographic trends are among factors that explain why neither the total number of claims filed with the Equal Employment Opportunity Commission nor the percentage of gender discrimination claims has declined, observers say.

According to the EEOC, gender discrimination charges accounted for 29.1% of all charges in fiscal 2010. Since 2000, they have registered in a relatively narrow range between 29.1% and the 31.5% reported in 2000.

The total number of charges filed with the EEOC has increased 25.1% since 2000, to 999,922 in 2010, which many attribute at least in part to the economy. Individuals can file charges claiming multiple types of discrimination.

Meanwhile, litigation in this area continues, including the class action lawsuit brought by female employees in *Wal-Mart Stores Inc. vs. Betty Dukes et al.*, which the U.S. Supreme Court has agreed to consider.

Other litigation includes *Shirley "Rae" Ellis et al. vs. Costco Wholesale Corp.*, a class action originally filed in 2004 against the Issaquah, Wash.-based retailer. Women who allegedly were denied promotion to assistant manager or manager positions at Costco brought the suit, which has been stayed pending disposition of *Wal-Mart.*

BEST PRACTICES
How to avoid gender bias claims, mitigate them when they arise.
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INTERNATIONAL

AP PHOTO

In the Shiite Muslim village of Diraz, Bahrain, protesters react last week to a government crackdown on demonstrations that have demanded political reform.

Firms coping with unrest

Companies activate crisis plans in Mideast

By MICHAEL BRADFORD

MANAMA, Bahrain—As unrest spreads across northern Africa and the Middle East, risk managers with operations in the region have been taking steps to protect their employees and property and, where possible, to prevent significant disruptions to their business should things turn ugly.

Demonstrations—violent at times—flared last week in countries across the region, inspired by Egyptian President Hosni Mubarak's departure from power this month. Anti-government protesters took to the streets in Bahrain, Iran, Libya and Yemen to demand political changes.

The demonstrations in Egypt left hundreds dead and injured

See **UNREST** page 17

FEDERAL LEGISLATION & REGULATION

Industry lacks voice in Wall Street reform process

Key insurance appointments remain unfilled

By MARK A. HOFMANN

WASHINGTON—Concern is growing on Capitol Hill and beyond over the Obama administration's delay in filling two key insurance-related positions established by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

A bipartisan group of lawmakers sent a letter last week to President Barack Obama and Treasury Secretary Timothy Geithner concerning the issue. Led by Reps. Ed Royce, R-Calif., and Jim Himes, D-Conn., the group noted that the financial services reform law creates a Federal Insurance Office within the Treasury Department, and that the FIO director and an insurance expert are to serve as members of the Financial Stability Oversight Council.

AP PHOTO

Lawmakers wrote to Treasury Secretary Timothy Geithner and President Barack Obama about two vacant insurance-related positions.

"While we appreciate the size and the scope of the implementation task before you, we are concerned that, six months after enactment, the positions of the FIO director and the council's insurance-designee remain unfilled," lawmakers said in the letter.

Other lawmakers, including one of the principal architects of the financial services reform bill—Rep. Barney Frank, D-Mass.—have asked that the FSOC postpone decisions regarding the insurance industry until its representatives have been appointed to the panel.

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RISK MANAGEMENT SUMMIT: *Business Insurance*'s Risk Management Summit targeting industry innovations begins March 15 in New York. Eligible risk managers can visit *www.BusinessInsurance.com/RMSummit* or contact Event Manager Rebecca Briggs at *rbriggs@BusinessInsurance.com* for details or to register.

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9. Obama proposals would increase competition for drugmakers
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RETALIATION: How to avoid the suits often tied to claims of gender bias. *www.BusinessInsurance.com/webcasts.*

UPDATED: *BI*'s Health Care Reform section includes the latest news and information on legislative repeal efforts.

DIRECTORY: Environmental Liability Insurers directory is updated for 2011. Available in the Research Center.

Business Insurance (ISSN 0007-6864) Vol. 45, No. 8, is published weekly, except combined issues the second and third week of August, the fourth and fifth week of November, and no issue the last week of December, by Crain Communications Inc., 360 N. Michigan Ave., Chicago, Ill. 60601-3806. Periodicals postage is paid at Chicago and at additional mailing offices. POSTMASTER: E-mail address change to customerservice@businessinsurance.com or mail to Business Insurance Circulation Department, 1155 Gratiot Ave. Detroit, Mich. 48207-2912. $5 a copy and $125 a year in the U.S. $130 in Canada and Mexico (includes GST). All other countries, $230 a year (includes expedited air delivery). Canadian Post International Publications Mail Product (Canadian Distribution) Sales Agreement No. 40012850, GST No. 136760444, Canadian return address: 4960-2 Walker Road, Windsor, ON N9A6J3. Printed in U.S.A.

FEDERAL LEGISLATION & REGULATION

Budget seeks PBGC change, reinsurance tax

Proposal would let PBGC set premiums

By JERRY GEISEL

WASHINGTON—A proposal being drafted by the Pension Benefit Guaranty Corp. would transfer the authority to set premiums based on the risk posed by employers and their pension plans from Congress to the PBGC.

While very much a work in progress, the proposal, outlined last week as part of the Obama administration's 2012 federal budget plan, would be a dramatic change in the way employers are assessed premiums, if approved by Congress. The premiums are used to help fund the PBGC's insurance program, which guarantees participants' vested benefits when companies run into financial difficulty and the agency takes over their underfunded plans.

Under the current, decades-old premium structure, employers pay an annual base, flat-rate premium regardless of their financial strength. The premium is $35 per plan participant this year.

In addition, employers with underfunded plans pay what is called a variable-rate premium of $9 per $1,000 of plan underfunding. The premium rate is not adjusted to reflect the quality or type of assets held in an employer's pension plan.

The insurance program's huge deficit is the catalyst for the overhaul, fueled in recent years by the PBGC's takeover of pension plans—underfunded by billions of dollars—sponsored by companies including United Airlines and auto parts manufacturer Delphi Corp. when they slid into bankruptcy reorganization.

The single-employer program is more than $20 billion shy of the amount needed to pay the benefits guaranteed to participants in the failed plans it has taken over.

While the PBGC is in no immediate danger of running out of money because the promised benefits will be paid out over many years, eventually it will unless revenue is increased.

Instead of seeking yet another increase in its base premium rates, PBGC Director Joshua Gotbaum says there is a better and a fairer approach.

"The question is not of when premiums will be increased, but how it is done," he said in a statement, adding that basing premiums on individual employer risk is a better and more equitable approach than an across-the-board premium hike.

While many details still are being worked out, the thinking is the premium paid by an employer would be based in part on its credit rating. Mr. Gotbaum noted, for example, that a pension plan sponsored by a company with a top credit rating doesn't present the same level of risk as one with a subpar rating.

Benefit experts, though, have numerous concerns about such a methodology. For example, it isn't clear how premiums would be calculated for privately held companies that have no debt and no credit rating.

"How do you determine creditworthiness in every case?" asked Cindy Frater-

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AP PHOTO

President Barack Obama's 2012 budget has sparked a debate over reinsurance transaction taxes.

Groups clash over offshore tax treatment

By MARK A. HOFMANN

WASHINGTON—President Barack Obama's proposed fiscal 2012 budget has reignited a debate over the tax treatment of certain reinsurance transactions.

The Risk & Insurance Management Society Inc. and other organizations that also belong to the Washington-based Coalition for Competitive Insurance Rates wasted no time in sending a letter to congressional leaders last week, saying the proposal "essentially imposes an isolationist tariff on international insurance companies conducting business in the U.S."

But a group of 13 domestic insurers that belong to the Coalition for a Domestic Insurance Industry say the move is necessary to prevent insurers from moving offshore.

Although the president's proposed budget does not go into detail, it holds that disallowing the tax deduction for excess nontaxed reinsurance premiums paid to affiliates would cut the federal deficit by more than $2.6 billion between 2012 and 2021.

The administration offered a similar proposal in its 2011 budget (*BI*, Feb. 1. 2010). Congress, however, did not take up the issue last year, and did not vote on a separate measure offered by Rep. Richard Neal, D-Mass., that resembled the administration approach.

"On its face, it certainly does appear to help the Neal bill," said John R. Phelps, RIMS secretary and board liaison to the external affairs committee. "But the process is dynamic, so we're a long way from seeing that bill either enacted or deleted," said Mr. Phelps, who also is director-business risk solutions at Blue Cross and Blue Shield of Florida Inc. in Jacksonville.

Mr. Phelps called the proposal "harmful to consumers. It's a matter of simple economics—if the use of foreign reinsurers is stifled, it reduces the number of possible risk transfer markets. This increases costs and is passed along to the individual and commercial consumers."

"We're in some pretty tough economic times, and we should be focused on creating jobs by stimulating business and you don't do that by increasing their costs," Mr. Phelps said.

"On the surface, there's no appetite for any tax," said Eli Lehrer, vp in the Washington office of the Chicago-based Heartland Institute, also a member of the Coalition for Competitive Insurance Rates. But, he said "taxes like this one are the kind that are the easiest to slip in in the dead of night. The risk isn't that this will build mass support. Instead, it's just that it will be snuck by to patch a revenue hole and the budget right now is full of revenue holes."

But a proponent of the change said it would benefit the economy.

"Fundamentally we've seen the deficit consistently increase and the need for revenue increase," said William R. Berkley, chairman and CEO of Greenwich, Conn.-based W.R. Berkley Corp. and a spokesman for the Coalition for a

See **OFFSHORE** page 20

WELLNESS

Minnesota employers join in weight-loss challenge

Statewide contest modeled after show 'Biggest Loser'

By JOANNE WOJCIK

MINNEAPOLIS—More than 400 Minnesota employers and other groups are competing in a statewide weight-loss challenge they hope will improve the state's health.

Inspired by the popular reality television series "Biggest Loser," the challenge was organized by the Alliance for a Healthier Minnesota, a group formed by nine of the state's largest employers that competed against each other in a similar contest last summer.

Because of the success of last year's 12-week challenge, in which more than 10,000 contestants collectively shed 35,000 pounds and logged tens of millions of minutes of exercise, the alliance expanded the competition this year to include any employer or group of individuals in the state that wants to shape up and slim down.

As a result, more than 400 teams have been sponsored by local chambers of commerce, churches, schools, families—even the Minnesota Vikings and members of the state legislature are competing in the Minnesota Biggest Loser Challenge, which began Jan. 23 and runs through April 15.

The challenge is the latest of several wellness initiatives spearheaded by the alliance. The organization also has produced a TV documentary on the state's obesity epidemic and conducted statewide polling to gauge public opinion about health and wellness.

But the Minnesota Biggest Loser Challenge probably is the most visible of the alliance's campaigns because of its connection to the TV show and to Minnesota's own General Mills Co., which is donating a pound of food to charity for every pound of excess weight lost by challenge participants.

The winners of this year's challenge also will have the opportunity to visit the "Biggest Loser" set in Los Angeles, said Rick Kupchella, co-founder of the alliance. He said the alliance's objective is to encourage all employers in the state "to work in concert around the idea of improved health and wellness, not just within their own workforces."

In the first alliance-supported Biggest Loser Challenge, contestants could measure their individual progress against that of other individuals, other teams within their company and against other employers.

Similar benchmarking is available for the latest competition, though the number of contestants increased from 10,000 last summer to nearly 25,000 this year.

Because of the large number of participants and the volume of information being collected, the alliance has contracted with RedBrick Health Corp., a Minneapolis-based health and wellness company that offers a "challenge engine" as part of the software product it sells to employers.

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INSURERS

U.S. insurers expect to add staff: Survey

But industry layoffs exceeded predictions in earlier polls

By RODD ZOLKOS

While a new study shows U.S. insurance companies are increasingly optimistic about hiring prospects in the year ahead, it also shows many didn't meet the staffing projections they'd offered in previous surveys.

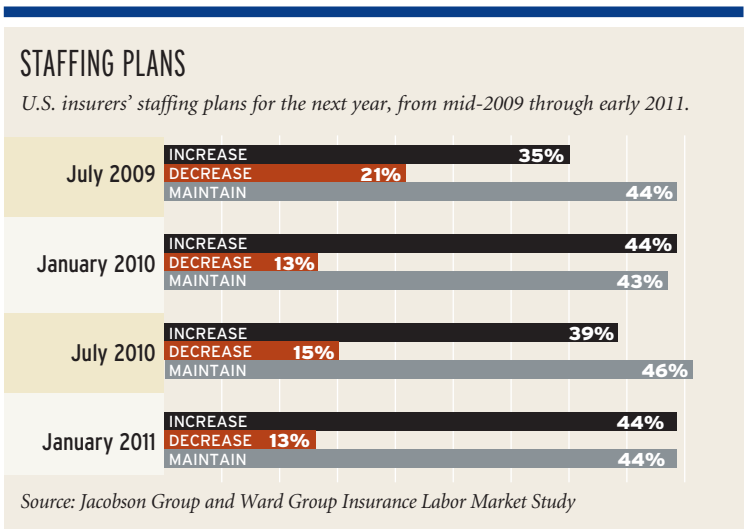
The latest "Insurance Labor Market Study," conducted by the Cincinnati-based consulting firm Ward Group and Chicago-based staffing and executive search firm the Jacobson Group, found that 44% of the U.S.-based insurance companies surveyed indicated they expect to add staff during the next year.

The percentage expecting to add staff was up from 39% in the previous Jacobson/Ward study, conducted six months ago.

But, said Greg Jacobson, co-CEO of the Jacobson Group, "What we found in this study vs. six months ago is that companies did not necessarily follow through on the plans for hiring that they had indicated previously."

The most recent survey also indicated that more companies reduced staff than had been anticipated previously.

"There were a significantly greater number of downsizings than one year ago," Mr. Jacobson said. "I think throughout the year last year, confidence waned, but now we're seeing confidence pick up," he said.



The newest insurance labor survey, released this month and conducted in January, found that 44% expect to maintain their staff size during the next 12 months, with 13% anticipating staff decreases, down from the 15% who indicated that they expected staff cuts in the study six months earlier.

Jeff Rieder, president of Ward Group, said industry staffing growth fell short in 2010 of what the January 2010 survey had projected. "A year ago we felt that overall there would be growth of 0.8% in staffing, but overall we found there was only growth of 0.6%," he said.

Much of the growth that occurred was driven by life/health companies, Mr. Rieder said, particularly health insurers adding staff to meet the anticipated demand produced by health care reform.

If companies follow through

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MERGERS & ACQUISITIONS

U.K. insurer buy nears completion

Achilles bid for Brit wins approval from regulators

By SARAH VEYSEY

Former Lloyd's executive Nick Prettejohn would succeed John Barton as Brit's leader if Achilles' buyout bid for Brit is successful.

AMSTERDAM—Achilles Netherlands Holdings B.V. last week cleared important hurdles in its proposed acquisition of Lloyd's of London firm Brit Insurance Holdings N.V. and reduced the required acceptance rate to 80% for the deal to proceed.

One day after the deal received approval from the Financial Services Authority, the U.K.'s insurance regulator, and Lloyd's, Achilles reduced its required acceptance rate to 80% from the previous 95%.

$1.38B
Achilles' proposed offer values Brit at about £888 million ($1.38 billion).

At that point, Achilles said it had already received approval from more than 75% of Brit's shareholders. Achilles also extended the deadline to approve the takeover to March 5.

Sources had said that they expected the FSA and Lloyd's approvals to prompt more U.K shareholders to accept the £888 million ($1.38 billion) buyout.

In addition, an announcement expected this week of the size of a contingent value payment that makes up part of the deal also may spur remaining Brit shareholders to accept Achilles' offer, sources said.

Under the terms announced earlier, Brit shareholders would receive £10.25 ($16.40) per share in cash plus a contingent value payment of up to 25 pence (40 cents) per share.

Achilles, an Amsterdam-based holding company formed on behalf of funds managed by Apollo Management VII L.P. and funds advised by CVC Capital Partners Ltd., last October reached an agreement with Brit's board over terms that ended its long-running bid for the company.

Achilles first approached Brit last June, but Brit rejected its first two offers.

Brit, which is based in Amsterdam, underwrites multiline insurance and reinsurance through a Lloyd's syndicate and a U.K. insurance company.

Achilles recently announced that, if the takeover goes ahead, it plans to appoint a former Lloyd's executive to head Brit. Nick Prettejohn was CEO of Lloyd's for

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INTERNATIONAL

Code launched for credit cover

Capacity pullbacks during 2008 crisis spark conduct plan

By SARAH VEYSEY

BRUSSELS—A voluntary code of conduct for buyers, brokers and underwriters of credit insurance, which grew from the reduction or withdrawal of the coverage during the credit crisis, was rolled out in Brussels last week.

Members of a credit insurance think tank that was set up after the 2008 credit crisis, during which many buyers of credit insurance saw their limits reduced or withdrawn, drew up the code. Many buyers "felt that their credit insurer did not act as a real partner in hard times but took away the umbrella when it started raining," according to the code's introduction.

The group, Credit Management Think Tank 2015, includes brokers, buyers and insurers; and the major credit insurers have given their tacit support to the code, said Jean-Louis Coppers, CEO of Ghent, Belgium-based CRiON, an independent credit insurance brokerage, member of the Aon Corp. network and one of the founders of the think tank.

Credit insurance policies usually are underwritten in such a way that insurers can withdraw or reduce limits if they have concerns about a company's creditworthiness (*BI*, Jan. 31).

The code has six main aims: to enhance competition, stimulate transparency, minimize fraud, change buyers' perception, better align the credit insurance lines offered to companies' needs, and increase the longevity of the buyer-insurer relationships.

The Code of Conduct for the Credit Insurance Sector is intended to act as an extension of the policy agreement between the policyholder and the credit insurer, and also covers the conduct of brokers, Mr. Coppers said.

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EMPLOYMENT PRACTICES

Judge backs medical marijuana firing

AP PHOTO

The ACLU says it will appeal a ruling upholding the firing of Joseph Casias for using medical marijuana.

By ROBERTO CENICEROS

GRAND RAPIDS, Mich.—The American Civil Liberties Union said it will appeal a ruling by a federal judge who found that Wal-Mart Stores Inc. does not have to accommodate employees who are legally registered to use medical marijuana.

The case involves Joseph Casias, a 2008 associate of the year at a Battle Creek, Mich., Wal-Mart store who was fired after he tested positive for marijuana use following a knee injury.

Mr. Casias was legally registered to use marijuana to treat pain associated with an inoperable brain tumor and cancer. But he did not ingest the drug at work, according to the ACLU.

In 2008, voters passed the Michigan Medical Marihuana Act, which the ACLU claims protects workers like Mr. Casias. But U.S. District Court Judge Robert J. Jonker said the law doesn't mandate that businesses accommodate employees.

The Feb. 11 ruling came after a recent finding by a Michigan magistrate, who said neither an employer nor the employer's workers compensation insurer is required to pay for medical marijuana that is reasonably necessary to treat an injured worker.

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Credit: New conduct code sparked by 2008 crisis

CONTINUED FROM PAGE 4

Participating credit insurance companies and policyholders will sign the code and brokers will countersign it.

The code, which launched in Belgium but is intended to be rolled out across Europe in the coming months, will be signed for each policy issued by participants. Every year, the think tank will report on the level of compliance with the code, Mr. Coppers said.

The code is not legally binding on participants. Rather, it is a "gentlemen's agreement," said Mr. Coppers.

One of the code's main tenets is the exchange of information between underwriter and policyholder, said Mr. Coppers.

During the 2008 financial crisis and its aftermath, most credit insurance buyers, not just the financially weak, were affected by reductions in coverage, Mr. Coppers said.

'We need transparency from all sides.'

Jean-Louis Coppers, CRiON

Underwriters and brokers also felt frustrated by the lack of information being given to them by buyers, he said.

"We need transparency from all sides," Mr. Coppers said.

Transparency is important not only to enable the credit insurance to function better, it also is a focus for insurers that are readying themselves for the implementation of Solvency II, the risk-based capital regulatory regime for insurers and reinsurers in the European Union that is slated for introduction at the end of 2012, said Paul Becue, a member of the think tank and general manager of Euler Hermes Services, part of Paris-based Euler Hermes S.A.

The think tank was set up last June and decided that an industrywide code would be beneficial, rather than waiting for governmental or E.U. initiatives, he said.

The think tank will continue to meet and will produce a paper in June with proposals for new insurance products, said Mr. Coppers.

Achilles: Deal to buy Brit moves close to agreement

CONTINUED FROM PAGE 4

six years. He then served as CEO of Prudential P.L.C. in the United Kingdom and Europe, and most recently has been a nonexecutive director at London-based Legal & General Group P.L.C.

Mr. Prettejohn would succeed John Barton, whose term as Brit's chairman would end when the deal has been completed.

Brit is not the only Lloyd's company to be a takeover target. Also this month, Chaucer Holdings P.L.C. said it had received several approaches.

Private equity company Terra Firma Capital Partners III L.L.P. said it is considering making an offer for Chaucer, which underwrites multiline insurance and reinsurance and operates two syndicates at Lloyd's.

In 2009, Brit withdrew a bid for Chaucer after Chaucer declined to recommend the deal to its shareholders.

And in January, Guernsey-based Canopius Group Ltd. made an unsolicited offer for Bermuda-based Omega Insurance Holdings Ltd.

Omega, which operates syndicate 958 at Lloyd's, said there was no guarantee of a formal offer being made, but it also said it would consider any approach that it deemed to be of benefit to its shareholders.

Canopius manages syndicates 4444, 260 and 839 at Lloyd's, and has a specialty lines company that underwrites on behalf of syndicate 4444.

Commentary

Ideology trumps logic in comp clampdown

ROBERTO CENICEROS

Senior Editor Roberto Ceniceros can be reached at: rceniceros@businessinsurance.com

Much has been written about how new tea party-favored politicians might shape the U.S. Congress this year.

But a right-wing shift in state houses is showing more immediate impact with the introduction of bills that are downright nutty as ideology and emotional politics fuel disregard for unintended consequences.

Legislation has been introduced in several states, for instance, that would prohibit illegal immigrants from receiving workers compensation benefits.

As I've reported before, similar bills have failed during past years. Sometimes sponsors of the legislation eventually learned that they would hand illegal immigrants the right to sue in civil courts, from which workers comp systems shield employers. But ideology now is at work.

An insurance industry source told me he wanted to alert tea party-leaning legislators in Montana that denying illegal immigrants access to the workers comp system could backfire.

Montana recently saw a big swing to the political right and a bill that would deny illegal immigrants workers comp benefits is moving ahead there.

My source was warned to save his breath. The legislation's supporters don't want to be confused with the facts, he told me.

This is part of a broader pattern unfolding in some states.

Take Idaho, where I live, for example. It is among a dozen or so states where tea party supporters convinced Republican legislators to push forward "nullification" legislation.

Nullification laws would declare the Patient Protection and Affordable Care Act unconstitutional, or null and void.

Opposition to the federal health care law isn't unreasonable any more than is a desire to stop illegal immigration, but the nullification concept is.

It is based on an arcane doctrine that dates back to the 18th century and says that states can nullify federal law in certain circumstances. As one of my colleagues said: "I thought we settled that argument with the Civil War."

We did, but some people apparently didn't get the memo.

The Idaho attorney general's office reported that nullification is illegal and passing such a bill essentially would reject Idaho's portion of federal Medicaid funding, which could leave 223,000 people without health care.

But neither the consequences nor the opinions of legal experts and constitutional scholars matter to those screaming for nullification and their allies in Idaho's legislature.

In some instances, reason is winning out, though.

Arizona lawmakers listened to doctors and the medical industry and yanked a bill last week from the Senate Judiciary Committee agenda. It would have required hospitals to confirm in nonemergency cases that a person seeking medical care is in the country legally.

As one of my colleagues said: 'I thought we settled that argument with the Civil War.'

Doctors said they don't want to become immigration authorities and some argued that immigrants with diseases such as tuberculosis could spread health problems if they didn't receive treatment.

I recall a risk manager once explaining to me that some of the problems that made California's workers comp reform so necessary in 2003 and 2004 stemmed from reform legislation employers fought for 10 years earlier.

Legislation that California employers backed in 1993 contained language that said an injured employee's doctor is presumed correct in all treatment decisions. By the time employers figured out the provision's consequences, their losses already had mounted for a couple of years and they continued to do so years later.

So it pays to listen to people warning of potential unintended consequences and at least consider the implications. But that isn't something the ideologically driven want to hear.

"We're a growing company. And, with Zurich's help, we're already a global one."

Joseph G. Mahler, Chief Financial Officer
FuelCell Energy, Inc.
Connecticut, USA

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Business Insurance OPINIONS

Tie PBGC premiums to the risk plans pose

IF THERE is logic in the way premiums are set for the Pension Benefit Guaranty Corp.'s insurance program that protects employees' and retirees' pension benefits, it escapes us.

All employers, regardless or their financial condition or how well-funded their pension plans are, pay the same base premium, $35 per plan participant per year.

The premium rate—$9 per $1,000 of plan underfunding—for employers with underfunded plans also is not adjusted to take into account the financial strength of a plan sponsor or how plan assets are invested.

The approach proposed by the administration is fairer than an across-the-board increase.

The PBGC's program is insurance in name only. Risk, which is the basis for how premiums are set for just about any insurance program, is absent here.

To its credit, the Obama administration is looking into how the program, which is well over $20 billion short of the amount needed to pay benefits in plans the agency has taken over, can be overhauled to make it a true insurance program where employer premiums have some correlation to the risks their plans pose to the PBGC.

As we report on page 3, the proposal would allow the PBGC to set premiums based on the employer's financial health and the pension plan's circumstances.

Business groups are raising legitimate issues, such as how to measure the financial health of employers with no debt and no credit rating. As yet, there is no answer to that and many other questions.

But the PBGC has pledged a careful and open-door process as it assembles the proposal, while any changes would be phased in.

Given the deficit, premiums have to increase. We agree with PBGC Director Josh Gotbaum that the approach proposed by the administration is fairer than an across-the-board increase.

Don't let up in fight against gender bias

EMPLOYERS ARE HIGHLY LIKELY to have implemented policies barring gender discrimination and have become much savvier about the dangers of gender discrimination and how to address them.

That is why it doesn't seem fair that the number of charges filed with the federal Equal Employment Opportunity Commission alleging gender discrimination continues to increase along with the general increase in EEOC charges, while the percentage of total charges accounted for by gender discrimination remains essentially unchanged, as we report on page 1.

There are various theories to explain this, including a greater number of female workers, the litigiousness of today's workforce, more legislation in this area and aggressive stances by federal agencies including the EEOC. Unfortunately, all of these factors are pretty much beyond employers' control.

Particularly worrisome for employers is litigation on this issue, including the massive class action lawsuit in the *Wal-Mart Stores Inc. vs. Betty Dukes et al.*, which the U.S. Supreme Court has agreed to hear.

What's an employer to do? The best approach is to continue to do the good job many already are doing. This includes establishing a clear anti-discrimination policy, encouraging good communications between workers and managers, promptly addressing any concerns, and striving to make the workplace more diverse.

WRITE

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THIS WEEK'S RESULTS

Q Is AIG's latest reserve boost for Chartis cause for concern?

AP PHOTO

Yes 63%

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NEXT WEEK'S QUESTION

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ADVERTISING: Boston: 617-292-4856; Chicago: 312-649-5224; Denver 303-898-4043; New York: 212-210-0136
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Published at 360 N. Michigan Ave., Chicago, Ill. 60601-3806, Fax: 312-280-3174, *biweb@crain.com.* Offices: 711 Third Ave., New York, N.Y. 10017-5806, Fax: 212-210-0704; Suite 814, National Press Building, Washington, D.C. 20045-1801, Fax: 202-638-3155; 6500 Wilshire Blvd., Suite 2300, Los Angeles, Calif. 90048-4947, Fax: 323-655-8157; 967 Bermuda Court, Sunnyvale, Calif. 94086-6750, Fax: 408-774-1155; 21 St. Thomas St., London SE1 9RY, U.K. Fax: +44-(0)20-7457-1440; 12524 Acuff Court, Olathe, Kan. 66062, Fax: 312 280-3174. 77 Franklin St., Suite 809, Boston, Mass. 02110-1510; Fax: 212-210-0704. $5 a copy and $97 a year in the U.S., $130 in Canada and Mexico (includes GST). All other countries, $230 a year (includes expedited air delivery). E-mail subscription correspondence and address changes to *customerservice@businessinsurance.com* or mail to Business Insurance Circulation Department, 1155 Gratiot Ave., Detroit, MI 48207-2912. Send subscription correspondence to Circulation Department, *Business Insurance,* 711 Third Ave., New York, N.Y. 10017-5806. Microfilm copies available: University Microfilms, 300 Zeeb Road, Ann Arbor, Mich. 48013. Microfiche copies: Bell & Howell, Micro Photo Division, Old Mansfield Road, Wooster, Ohio 44691. Portions of the editorial content of this issue are available for reprint or reproduction in other media. For reprints or reprint permission, please contact Lauren Melesio/Crain Communications at 212-210-0707 or e-mail *BusinessInsurance-@reprints.crain.com.*

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Courts fail to clean up pollution coverage rules

After four decades, clarity of definitions still lacking

By JOANNE WOJCIK

The battle over whether commercial general liability insurance policies cover pollution risks continues after nearly four decades of litigation, introduction of a series of pollution exclusions, and the start of an environmental market designed specifically to address this exposure.

Despite a few notable victories by either insurers or policyholders, significant issues remain, such as how the terms "sudden and accidental" and even "pollution" are defined by most state courts. Pollution cases generally are litigated in state courts because insurance is state regulated, legal experts say.

Moreover, the number of substances that can cause property damage and/or bodily injury—such as lead paint, mold and defective drywall—have increased and that has broadened the range of cases where courts are asked to interpret the definition of "pollution" in CGL policies.

Already, the decisions stemming from traditional environmental pollution cases, such as those involving cleanups of hazardous waste under the 1980 Superfund law, are being dredged up in new litigation over coverage for defective Chinese drywall.

And if the U.S. Supreme Court upholds *American Electric Power Co. Inc. et al. vs. State of Connecticut et. al.* and allows plaintiffs to file nuisance suits over greenhouse gas emissions, it could trigger another wave of pollution coverage litigation that will make the battles before now seem insignificant by comparison, coverage experts say.

Gerald Oshinsky, a partner at Jenner & Block L.L.P. in Los Angeles and a veteran policyholder attorney in the longstanding coverage dispute, said "the global warming cases are just fancy pollution cases. These cases put my kids through college, and now they're putting my grandkids through private school. The way things are going, they're going to put my great-grandkids through school, too."

Exclusions

Although the pace of litigation seeking coverage for pollution risks under CGL policies picked up substantially after the passage of Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known as Superfund, insurers began carving out pollution risks from CGL coverage using endorsements as early as 1970, said Laura Foggan, a Washington-based partner at Wiley Rein L.L.P. who has represented insurers in coverage battles throughout her 25-year career.

But that first exclusion that the New York-based Insurance Services Office Inc. approved to limit pollution coverage in CGL policies sparked an ongoing debate over the meaning of "sudden and accidental." A narrow exception to the 1970 standard pollution exclusion preserves the coverage if such discharges are "sudden and accidental."

"The creative advocates for policyholders managed to get some coverage by giving a nontemporal meaning to the word 'sudden,'" Ms. Foggan said.

They did this by comparing it with a provision in 1950s boiler and machinery property policies that defined "sudden" as "unexpected," said John Nevius, a partner and policyholder attorney at Anderson Kill & Olick P.C. in New York. When the "sudden and accidental" exception to the pollution exclusion started appearing in CGL policies, "it was inconsistent with how it had been used in boiler and machinery property policies," he said.

> 'The creative advocates for policyholders managed to get some coverage by giving a nontemporal meaning to the word "sudden." '
>
> Laura Foggan, Wiley Rein L.L.P.

Reversing years of pro-insurer rulings, the Oregon Supreme Court in 1996 found the absolute pollution exclusion of 1986 to be ambiguous and granted coverage to the policyholder in *St. Paul Fire & Marine Insurance Co. and St. Paul Mercury Insurance Co. Inc. vs. McCormick & Baxter Creosoting Co. et al.*

The decision in Oregon conflicted with a precedent-setting 1993 decision by the Florida Supreme Court in *Dimmitt Chevrolet Inc. vs. Southeastern Fidelity Insurance Corp.* that found the term "sudden" includes a temporal aspect, or time-sensitive element, upholding the exclusion.

Score tied

The number of state courts that have upheld the 1970 pollution exclusion are equal to the number that have rejected it, putting the insurer vs. policyholder victory tally at 13 apiece, according to Munich Reinsurance Cos.' 2010 "Environmental Coverage Case Law" report, a source cited by most insurance coverage lawyers.

This mixed outcome led to the creation starting in 1986 of the "absolute pollution exclusion," which barred coverage for all pollution, whether gradual, sudden or accidental. In 1988, ISO introduced an optional "total pollution exclusion" endorsement with the CGL policy that tried to restrict coverage even further.

But these broader exclusions have not been universally adopted by the courts, either. In fact, eight states have upheld the exclusion, nine have rejected it and seven have had conflicting high court decisions, according to Munich Re's report.

In an increasing number of cases, the decisions now turn on how the applicable pollution exclusion defines the term "pollution." The absolute and total pollution exclusions define "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

"If you have courts that apply the exclusion only to traditional environmental pollution, then the question becomes, 'What is traditional environmental pollution?' If a court concludes that the pollution exclusion applies across the board to all hazardous substances, then the litigation ends. If not, then the litigation continues," said Randy J. Maniloff, a partner at White & Williams L.L.P. in Philadelphia who represents policyholders.

"Sometimes they take what's called the 'we'll-know-it-when-we-see-it' approach," Mr. Maniloff said.

Federal court rulings

He cited a case tried in federal court, *Pipefitters Welfare Educational Fund vs. Westchester Fire Insurance Co.*, in which the 7th U.S. Circuit Court of Appeals examined potentially universal application of the absolute pollution exclusion. The 1993 case involved the spill of 80 gallons of PCB-laden oil from a transformer that Pipefitters, an employee benefits fund, had sold to a scrap metal dealer. The dealer cut the transformer open, causing the PCBs to spill onto the premises.

"Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some

See **POLLUTION** next page

Environmental Risks

SPOTLIGHT

Pollution: Courts fail to clean up cover rules

CONTINUED FROM PREVIOUS PAGE

absurd results," the appeals court wrote. "Reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution."

By contrast, in *New Salida Ditch Co. vs. United Fire & Casualty*, the 10th U.S. Circuit Court of Appeals ruled in October that dirt, rock and soil could be considered pollution when it is dumped into a waterway. It cited the U.S. Clean Water Act, which treats any material placed in a waterway that adversely affects water quality as a pollutant.

These divergent opinions demonstrate that, at least in these pollution coverage cases, "courts are looking not to whether or not a particular substance is a pollutant, but to whether it is pollution in the allegations of the underlying complaint," said William Stewart, a partner in the national insurance coverage group of Nelson Levine de Luca & Horst L.L.C. in Blue Bell, Pa.

Decades of litigation have resulted in one major change: Environmental insurance coverage designed specifically to cover this kind of liability (see related story).

As far as the more recent cases involving Chinese drywall, the courts will have to decide whether gases emitted by the faulty drywall, which smell like sulfur and cause metal to corrode, is a discharge within the scope of the pollution exclusion, said Seth Lamden, a partner at Howrey L.L.P. in Chicago who represents policyholders in insurance coverage litigation.

So far, policyholders have been successful in Louisiana, which has found the exclusion does not apply because it was intended to address traditional contamination events, he said.

A similar argument could be made in the sole insurance coverage case to stem from a suit over global warming: *AES Corp. vs. Steadfast Insurance Co.*, which is slated to be heard by the Virginia Supreme Court early this year, he said.

Arlington, Va.-based AES is among 24 oil, energy and utility companies tangled in a public nuisance suit brought by the Native Village of Kivalina, a governing body of an Inupiat Eskimo village in Alaska, over alleged damage to the village caused by global warming. Steadfast has argued that it has no duty to defend or indemnify AES because global warming damage alleged in the underlying suit, *Native Village of Kivalina vs. Exxon Mobil Corp.*, was not caused by an accident, which is needed to trigger liability coverage for AES. Also at issue is Steadfast's application of the pollution exclusion and whether the court rules that greenhouse gases are "pollutants."

No quick resolution expected

As long as U.S. courts remain split on the pollution exclusion's applicability, litigation over whether the CGL policy covers environmental risks will continue, coverage experts say.

The other reason these cases won't go away is because "there's so much money involved," said Mr. Oshinsky. "It's never cheap to clean up, and injury claims are often large."

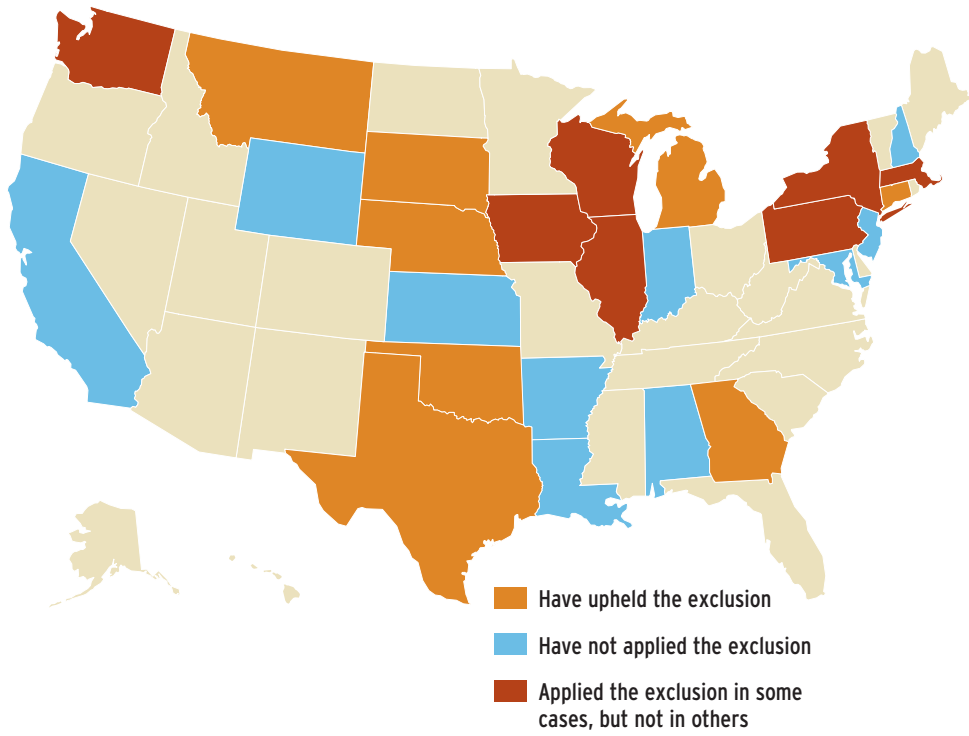
Under Superfund, only $1.6 billion was budgeted to be spent by the federal government, with the remaining "hundreds of billions of dollars" being picked up by polluters and their insurers.

"I think litigation over the pre-1986 CGL policies will continue for a fair amount of time," said John Beauchamp, product line head of environmental at Beazley P.L.C. in Philadelphia. "There are always going to be disputes as far as interpretation and intent of the commercial general liability policy. You could have a policyholder attorney saying one thing and the coverage lawyer saying another."

"As the insurers have more success in getting judgments throughout the country stating the total pollution exclusion is not ambiguous, that is going to continue to drive demand for stand-alone environmental insurance or in getting CGL carriers to address the exposure in the CGL form," Mr. Beauchamp said.

APPLICATION BY STATE

Various state high courts have taken differing approaches when ruling on the application of the absolute pollution exclusion, which bars coverage for all pollution, whether gradual, sudden or accidental.



Source: MunichRe

Environmental policies have evolved to limit exposure, litigation

By JOANNE WOJCIK

Unlike commercial general liability policies, coverage litigation involving environmental insurance is rare because these policies, which grew from the CGL pollution coverage battles, are specifically designed to pay such claims, coverage experts say.

"There's very little litigation involving pollution insurance policies, unlike CGL policies where parties were trying to find coverage through an exclusion," the "sudden and accidental" exception to the standard pollution exclusion, said Ken Cornell, senior vp for environmental at Allied World Assurance Co. Ltd. in Pembroke, Bermuda.

"We've looked at the historic CGL litigation wars and the lessons we've learned are don't offer unlimited defense, offer claims-made vs. occurrence-based coverage with defense inside the policy limits, renew the policies more frequently, and provide environmental consulting services to better understand the risk," said William Hazelton, senior vp at ACE Environmental Risk in New York.

"Case law, claims experience, what may be coming down in terms of regulatory drivers" all are driving forces behind the growth of the pollution insurance industry, which includes more than 30 coverage markets, said Ursula Knowles, senior vp at brokerage Marsh Inc. in Hoboken, N.J.

Ms. Knowles, who started out in the insurance industry as an environmental engineer, said today's engineers and underwriters often work together to assess emerging risks and develop new products. As a result, pollution legal liability insurance, initially designed to cover third-party risks, has expanded to also cover some first-party pollution exposures. These policies even pay for cleanup on a property owner's own site—something that numerous policyholders have fought to cover under their CGL policies, despite their "owned property" exclusions.

"If you compare what was available 20 to 25 years ago to what is available today, they are very different insurance policies," Mr. Hazelton said.

By the early to mid-1990s, most insurers in the pollution legal liability market were writing first-party on-site cleanup coverage based on information derived from detailed environmental assessments that policyholders were required to undergo before coverage could be bound.

"The industry became very savvy and began to look at environmental and consulting very seriously," Mr. Hazelton said.

To limit insurers' exposure and the potential for litigation, pollution insurance policies also have shorter coverage periods than most CGL policies, perhaps a year or two, and are written on a claims-made basis, covering only claims filed during the policy period.

Today's pollution insurance policies cover bodily injury, third-party property damage, on-site and off-site cleanup, business interruption expenses, costs to transport contaminated materials, and nonowned disposal site coverage to protect operators of landfills or other locations where the contaminated materials eventually are deposited.

Some of the early environmental insurance policies grew from the need to reclaim "brownfields," tainted inner-city sites such as abandoned factories that could be redeveloped for another purpose if the contamination could be removed or contained.

"If there's a way to put a cost around it and for the insured to attempt to control it, there may be coverage," Ms. Knowles said.

While the first pollution policies were sold primarily to insurance buyers who were required to demonstrate financial responsibility for cleanup of a contaminated site, often as part of a property transaction, today's market is much broader as environmental insurers seek to grow market share by offering a product that appeals to a wide-ranging class beyond those required by government regulations to buy insurance.

For example, when mold became a hot issue, environmental insurers expanded coverage to include coverage for mold claims, which appealed to the broader real estate industry, Allied World's Mr. Cornell said.

But even as insurers try to attract more buyers by broadening the applicability of environmental coverage, many commercial insurance buyers still don't see a need for it and, when necessary, continue to litigate under their CGL policies, said Dave Dybdahl, president of American Risk Management Resources Network L.L.C., an environmental risk consultant based in Middleton, Wis.

"Lawyers that sue insurers for pollution claims under CGL policies find it convenient to refer to these policies as environmental insurance. That's not true," Mr. Dybdahl said. "There is also a perception in the risk management and the legal community that environmental insurance policies don't pay claims. That's also not true."

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How to avoid pollution liability when firms merge

By MIKE TSIKOUDAKIS

A thorough risk management evaluation and environmental insurance are well-established ways for companies to avoid environmental liability exposures when they acquire commercial properties, experts say.

While the company making an acquisition may not have caused contamination on a property, federal law can hold that company liable for cleanup and remediation of the site, experts say.

M&A activity, which typically experiences an uptick after a recession, is expected to increase 36% worldwide for 2011, according to an October survey of 150 global businesses conducted by Thomson Reuters Corp. and Freeman Consulting Services, a unit of Freeman & Co. L.L.C.

Environmental compliance standards also may have taken a backseat for companies that struggled during the recession, some observers say. That, coupled with an increase in M&As, may bring environmental liability concerns during transactions to the forefront for many risk managers.

"There's been an uptick in M&A activity and a heightened awareness on the environmental concerns and incorporating the environmental issues into their whole investment and risk management strategy," said Anthony M. Wagar, senior vp and national sales leader of Willis North America's environmental practice in New York.

"Most business operations will have some type of environmental exposure, and due to the economic conditions of the target company, they may have been exacerbated over the last couple of years," said Andrea Grossman, New York-based vp of M&A for Willis North America, a unit of Willis Group Holdings P.L.C.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, better known as the Superfund law, gives the U.S. Environmental Protection Agency the power to pursue potential responsible parties that may have contaminated a property and hold them liable for cleanup and remediation costs. The legislation is retroactive and responsibility is not limited to companies that caused the contamination; the owner of an acquired the property also may be liable.

Environmental cleanup and remediation costs for companies that acquire contaminated properties can soar well into the millions of dollars, experts say.

Whether an acquiring company can use the previous owner's liability coverage for protection against environmental exposures is a hotly contested issue, said Laura Foggan, a partner at Wiley Rein L.L.P. in Washington.

When disputes do arise, the courts are tending to uphold nonassignment clauses in insurers' policy terms—meaning that coverage protecting the seller cannot be transferred to the buyer, which means acquiring companies "should not anticipate that this type of coverage would be available," Ms. Foggan said.

"We'll still see some more litigation, and possibly that's because more attention should be given by companies acquiring property that may have environmental liability to the whole question of risk management and purchase of appropriate coverage," Ms. Foggan said.

When acquiring a property with environmental liabilities, those exposures can be negotiated into the selling price of the property and funded by indemnification by the seller, experts say.

> **'The most important thing for risk managers to know is that environmental policies can and should be manuscripted to address the particular needs of the deal.'**
>
> Peter M. Gillon,
> Pillsbury Winthrop Shaw
> Pittman L.L.P.

"Insurance is meant to protect a good deal from going bad," said Sam Babington, managing director of the private equity niche and area executive vp for Arthur J. Gallagher Risk Management Services Inc. in Norwalk, Conn. The best-case scenario when negotiating environmental liabilities in M&As is for the buyer to be indemnified for any exposures on the property, he said. However, that is not always the case and environmental insurance is used to bridge any gaps, he said.

In addition, Mr. Babington said, indemnification, which often is in the form of money set aside specifically for that potential liability, is only as good as the indemnifying party is solvent, he said.

"Environmental liability insurance policies can sometimes be the one thing that saves an M&A deal," said Matthew J. Pateidl, vp of environmental risk at Lockton Cos. L.L.C. in Kansas City, Mo., who noted that environmental liabilities often are the last item to be addressed in an M&A and can derail a deal.

Risk managers and the insurance markets need to get involved early during the negotiating process of M&As, he said.

"The most important thing for risk managers to know is that environmental policies can and should be manuscripted to address the particular needs of the deal," said Peter M. Gillon, partner in the insurance advisory and recovery practice at Pillsbury Winthrop Shaw Pittman L.L.P. in Washington.

"The most common mistake that risk managers suffer is not negotiating for best available terms," said Mr. Gillon, who noted that environmental liability insurance is competitively priced.

The coverage also is readily available due to increased capacity and competition, brokerage Marsh Inc. said in a recent report.

The first step for a risk manager is to perform due diligence to determine if there are any environmental liabilities on a property in a potential acquisition by performing a thorough Phase 1 environmental site assessment—a noninvasive process performed by a third party that tries to eliminate what the industry calls "recognized environmental conditions" prior to the property transaction, experts said.

If problems are identified, a Phase 2 assessment is required, which may require soil samples to confirm or identify contamination, which needs to be included as part of the deal and may need to be removed.

If environmental exposures are discovered during the Phase 1 and Phase 2 assessments, it is important to determine which party is responsible for the liabilities during the purchase negotiations, Lockton's Mr. Pateidl said.

Insurance tools, such as environmental insurance coverage, often provide the best cost-benefit for buyers and sellers involved in M&A deals, Mr. Pateidl said.

"For X amount of premium, I can buy several million dollars of limit vs. having several million dollars tied up in an escrow account," Mr. Pateidl said of environmental insurance covering a proposed acquisition. "As long as you can successfully negotiate terms and conditions that are agreeable to all parties, the insurance policy is the most economical way to put a box around the environmental liabilities in the deal."

For more information on environmental liabilities in M&A deals, view *Business Insurance*'s May 25 webcast, "Buyer Beware: Managing Environmental Liabilities in Mergers & Acquisitions" at *www.BusinessInsurance.com/Webinars*.

Environmental liability cover creates certainty in M&A deals

By MIKE TSIKOUDAKIS

There are four basic environmental insurance policies to address environmental liabilities in mergers and acquisitions that risk managers can consider while negotiating purchase agreements.

Environmental liability insurance is readily available and competitively priced, with similar policy forms available from a variety of insurers, experts say.

The basic building blocks of environmental insurance coverage used in property transfers are environmental impairment liability, contractors pollution liability, fixed-price remediation insurance and lender liability, David Dybdahl, president of American Risk Management Resources Network L.L.C. in Middleton, Wis., said in a recent *Business Insurance* webcast, "Buyer Beware: Managing Environmental Liabilities in Mergers & Acquisitions."

David Dybdahl of American Risk Management Resources Network L.L.C.

Environmental impairment liability provides coverage of remediation costs from previously unknown contaminants at a specific site, along with third-party bodily injury and property damage. The policy covers no-fault cleanup costs, which means the policy would be triggered if a regulatory body required the site to be cleaned up.

One thing the policies do is "take on potential change in regulations," which removes regulatory uncertainty when buying a property, said William Hazelton, senior vp of ACE Environmental Risk in New York. The environmental unit of ACE Ltd. offers a similar product, premises pollution liability coverage, which is used in the vast majority of property transaction deals, and has policy terms up to 10 years and limits up to $50 million per claim, Mr. Hazelton said. The policy covers pre-existing contaminants at a specific site or new conditions that may develop after the buyer acquires the property.

Contractors pollution liability insures the operations of a contractor but does not cover first-party, no-fault, on-site cleanup, Mr. Dybdahl said.

Fixed-priced remediation insurance—also called remediation cost cap policies—insures known conditions and cost overruns of a specific remedial plan, and lender liability addresses the concerns of lenders who have security interests in a location.

Risk managers should perform Phase 1 and Phase 2 environmental risk assessments of sites using a third-party consultant before negotiating environmental liability coverage in M&As, experts say.

"These risk assessments are key to protecting businesses from future environmental exposures," said Michele Schroeder, head of environmental risk management and solutions for Zurich North America Commercial in Schaumburg, Ill. "They give risk managers the power to decide if they are prepared to deal with a possible future claim or loss."

The unit of Zurich Financial Services Group typically offers risk managers its Z Choice Real Estate Environmental Liability product, which covers a fixed-site location. The product is customizable to a particular deal and offers coverage for on-site cleanup costs resulting from existing unknown contamination, new pollution events and third-party liability, among others, with policy terms up to 10 years and limits up to $50 million.

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Liberty International Underwriters-Environmental 55 Water St., 18th Floor, New York, N.Y. 10041	212-208-4100 *www.liu-usa.com*	2001	N/P	N/P	$25,000,000	William McElroy, senior vp
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Philadelphia Insurance Cos. 1 Bala Plaza, Suite 100, Bala Cynwyd, Pa. 19004-0950	800-873-4552 *www.phly.com*	2009	25	N/P	$15,000,000	Susan Doering, vp/director
RLI Environmental 9150 S. Hills Blvd., Suite 290, Broadview Heights, Ohio 44147	440-746-0999 *www.rlienvironmental.com*	2009	7	$2,500	$10,000,000	Craig Lass, director
Rockhill Insurance Co. 700 W. 47th St., Suite 350, Kansas City, Mo. 64112	816-412-2834 *www.rhkc.com*	1989	35	$2,000	$6,000,000 to $7,000,000	Kenneth A. Schneider, senior vp-environmental
RSUI Group Inc. 945 E. Paces Ferry Road, Suite 1800, Atlanta, Ga. 30326-1125	404-231-2366 *www.rsui.com*	1998	29	$5,000	$5,000,000	Nancy Davies, senior vp/ professional department manager
XL Insurance Co. 505 Eagleview Blvd., Exton, Pa. 19341	800-327-1414 *www.xlenvironmental.com*	1984	160	$2,500	$50,000,000 per occurrence	Richard Corbett, president
Zurich North America 1400 American Lane, Schaumburg, Ill. 60196	866-219-3402 *www.zurichna.com/environmental*	1992	N/P	N/P	N/P	Julie Dunai, senior vp/head-environmental practice

1 Estimated. 2 Commercial general liability and pollution legal liability, $20,000; commercial general liability and professional liability, $20,000; contractors pollution liability, $5,000; contractors operations and professional services, $20,000 (claims-made); $22,500 (occurrence only for the contractors pollution liability); pollution legal liability, $10,000. N/P=not provided.

Source: BI survey

Researched by Kevin Edison

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New risks develop as green building projects expand

By JEFF CASALE

Sustainability is the new buzzword among building and design professionals as several trade and interest groups have established certifications for companies to show they're green, but the projects carry some risks.

"Sustainability encompasses an enormous territory," said Rodney J. Taylor, Orlando, Fla.-based managing director of Aon Corp.'s environmental services group. "There was a point where everyone was rushing to become sustainable, but the economic downturn forced people to find ways to survive rather than becoming sustainable. Now that focus on sustainability seems to be returning."

There are 894 sustainable certification initiatives set up around the globe, according to the Winnipeg, Canada-based International Institute for Sustainable Development. Probably the most widely known is the U.S. Green Building Council's Leadership in Energy and Environmental Design certification, which is awarded for sustainable buildings.

"A lot of trade associations are trying to create best practices for their industry," said John Beauchamp, Philadelphia-based senior underwriter with Beazley P.L.C.'s specialty lines division.

There are several sustainability initiatives (see box) that are set up by trade groups such as the American Society of Heating, Refrigeration and Air-Conditioning Engineers Inc., for example, that provide best practices standards for their industry to improve the performance of building design and system operations.

Certifications usually are issued by third-party evaluators after a project is completed.

With little historical data on the benefits of sustainable projects, including savings in energy costs and life span of the materials used, there are several layers of risk that businesses, communities, designers, builders and contractors must consider as part of a green building project.

"When doing a sustainability project, you really have to think about if you're going to get a return on your investment as there really isn't a lot of data out there that shows what works and what doesn't," said Frank Westfall, Philadelphia-based vp and product specialist for ESIS Inc., a third-party administrator unit of ACE Ltd.

Risks vary depending on a company or individual's function within a sustainability project, insurers say. For example, a property owner could be uninformed or have unrealistic expectations of a project, while contractors and designers risk making uninsurable performance or certification guarantees and/or warranties on sustainable projects.

"From a contractor's perspective, the biggest risk is failure to deliver on the features you promised," said Mr. Westfall. "If you promised a gold LEED-standard building, for example, and it doesn't meet those requirements, that's a problem."

For project owners, the potential of not securing a certification is a real risk to consider, insurers said. Aspects of a sustainable certification include energy savings, improved productivity and worker retention, though it's not clear how those returns on investment can be measured, experts said.

A missed certification could include a loss of tenants and loss of tax credits, insurers said, adding that while there is insurance coverage available for errors and omissions, insurers are not keen to insure failure to deliver a specific certification.

"People who design and build these projects have a clear liability if the project fails to deliver what was promised in the contract," Mr. Taylor said. "The insurance industry really hasn't caught up with that. Insurers are not willing to insure the failure of delivery."

Maybe the most significant aspect of sustainability projects and programs is that they are done on a voluntary basis. In the U.S., there isn't any legal requirement to participate in green building and planning, which is partly why there isn't much data on how efficient these projects are.

"Just because you have a LEED-certified building doesn't mean that you are in a sustainable building," Mr. Taylor said. "You might get points for building on a brownfield, being close to public transportation, bike racks and more windows to reduce electricity use, but that doesn't necessarily mean that you have a sustainable building."

A sustainable building is designed to reduce the overall impact of the building on human health and natural environment by efficiently using energy, water and other resources; protecting occupant health and improving employee productivity; and reducing waste pollution and environmental degradation, according to the U.S. Environmental Protection Agency.

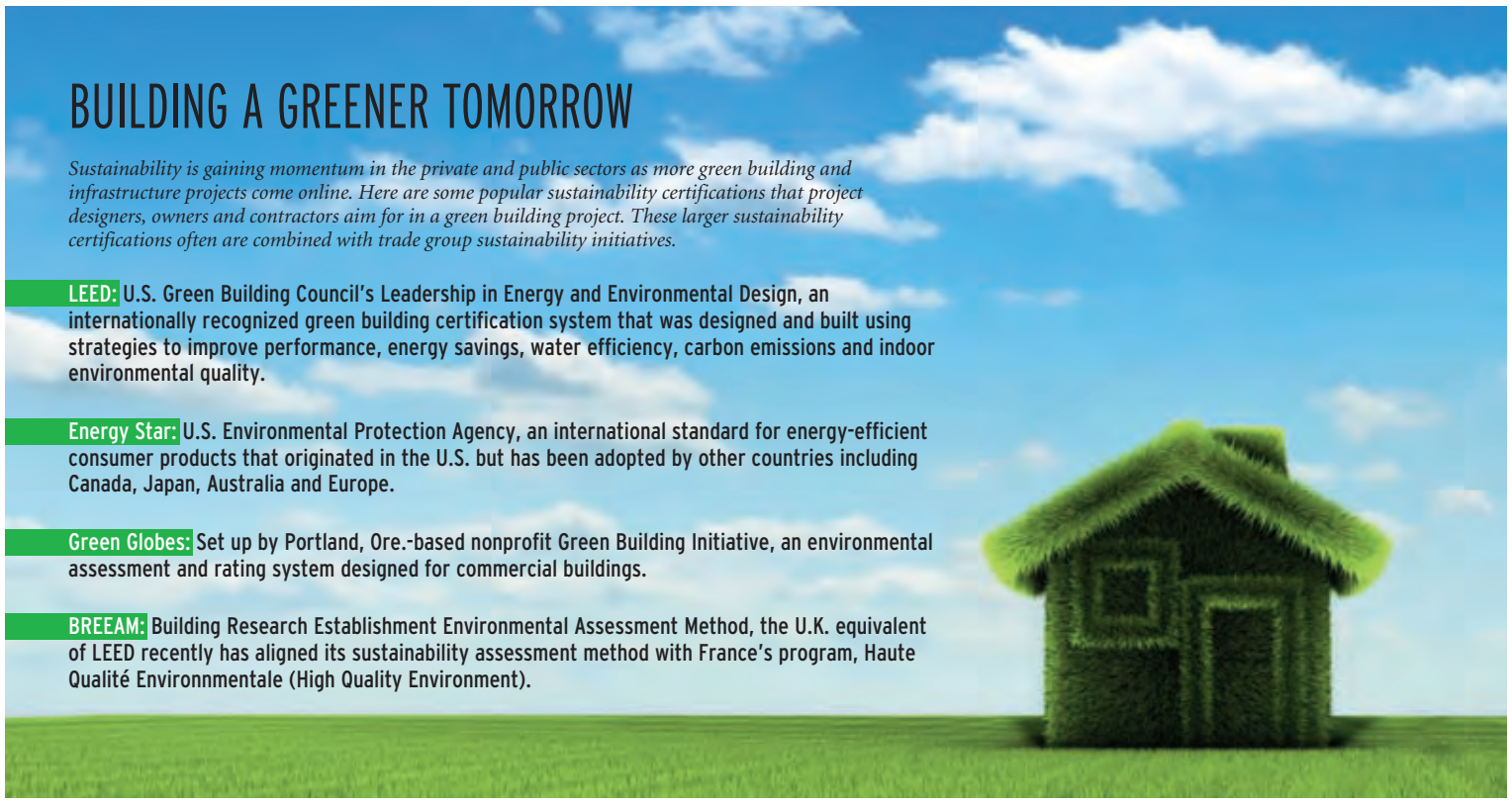
Further, green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building's life cycle from siting to design, construction, operation, maintenance, renovation and deconstruction, according to the EPA. The green building practice expands and complements the classical building design concerns of economy, utility, durability and comfort.

Energy design and efficiency is a huge exposure in a sustainability project, said Jonathan Halloran, Schaumburg, Ill.-based national director of Zurich North America's construction division.

For example, a structure designed and built to improve the amount of energy used to heat and cool it could be flawed if the heating, ventilating and air conditioning system is too small or the wrong materials are used. Part of this, he said, could be due to being in a rush to complete the project and keep the client happy, or it could be due to unfamiliarity with sustainable building.

Sustainability still is evolving, experts on the issue said, as are the risks associated with it. As more projects come online during the next few years and more data becomes available, they hope certifications will start to gain more credibility.

"(Sustainability) is forcing forward thinking," Mr. Beauchamp said. "We're dealing with a cultural change and we are just starting to scratch the surface on this subject. There are not a lot of guiding principles and we are still developing ways to measure sustainability."



UP Comings & Goings CLOSE

SARA SCOTT

NEW JOB TITLE: Denver-based producer for Lockton Cos. L.L.C.

PREVIOUS POSITION: Denver-based senior vp of sales of specialty benefits for UnitedHealthcare.

GOALS FOR NEW POSITION: A first priority is to help my clients deal with rising health care costs, health risk management and plan design. I also advise clients on risk management issues.

INDUSTRY OUTLOOK: Health care reform has kind of sucked the air out of the room for my clients. They can't focus as much as they would like to on broader strategic issues, like how to manage rising trends, how to manage risks, and how to focus on the property and casualty side of business. I am really excited about bringing my experience to help them think strategically about claims cost control and strategic health management to really impact their bottom line.

FIRST MARKET EXPERIENCE: I started in the industry as a group sales rep for Unum 10 days after I graduated from college. My five years there taught me the importance of work ethic and using product innovation to solve problems for clients. Those experiences were invaluable preparation for the dramatic change of health reform.

WHAT YOU WANTED TO BE GROWING UP: I wanted to be a doctor. I liked the idea of helping people.

OUTSIDE THE INDUSTRY, A DREAM JOB: I would love to host a travel show. I love to travel and talk about it.

MOST PASSIONATE ABOUT: Travel. I think traveling to foreign countries gives you a unique perspective on the world you couldn't get any other way. For me, it makes me thankful and proud to be an American, with all the opportunities we have here.

FAVORITE BOOK: "Fierce Conversations; Achieving Success at Work & in Life, One Conversation at a Time" by Susan Scott. No relation. It's about being authentic when you communicate.

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Unrest: Firms activate crisis plans for Mideast

CONTINUED FROM PAGE 1

by some accounts, with significant property damage to retail and hospitality businesses. Large industrial risks experienced business interruption losses but relatively little property damage, sources said.

Deaths, injuries and property damage were also reported in other countries in the region where demonstrations were held.

Some companies with operations in the area have lost sight of the potential political risks they face in emerging economies, said Adrian Lewers, head of the political risks and contingency team at Dublin-based Beazley P.L.C. "But you cannot disconnect the two—economic and political risk are fundamentally intertwined," he said.

The events unfolding in the Middle East and north Africa are an example of what can happen quickly, he said, and this has brought the focus back on political risks in even the most "successful" emerging markets.

"The most important thing you can do in countries like this is have a business contingency plan in place," said Jorge Luzzi, director of corporate risk management at tire maker Pirelli & C. S.p.A. in Milan.

The main focus of the plan should be on how to remove employees from an area that is experiencing political violence or, if conditions permit, how to keep them working, Mr. Luzzi said.

That approach paid off for Pirelli at its Alexandria, Egypt, plant when demonstrations escalated there, he said. Pirelli moved expatriate families to Europe and moved some managers to neighboring locales such as the United Arab Emirates, Mr. Luzzi said. Enough staff remained at the Alexandria plant to keep it operating at 30% of its normal capacity, he said.

A contingency plan should include how employees could finish work in time to comply with curfews or complete some tasks at home, Mr. Luzzi said.

Jones Lang LaSalle Inc. acted in the early days of the Cairo demonstrations by moving expatriate employees to Europe and closing offices so local workers did not have to go into Cairo, said Janice Ochenkowski, managing director of global risk management at the Chicago-based real estate firm.

"With everyone being concerned with safety and the future of the country, there was very little business going on anyway," she said.

Jones Lang LaSalle does business throughout the Middle East, Ms. Ochenkowski said, and operates offices in Abu Dhabi and Dubai, United Arab Emirates. Procedures are in place to stay in touch with employees and clients in the region should protests threaten operations, but as of late last week, tensions had not risen to the point at which the company felt it needed to take steps to move employees or close offices, she said.

Julia Graham, chief risk officer of DLA Piper U.K. L.L.P. in London, emphasized that reliable intelligence information on the region where trouble could arise is critical to making sure employees are kept safe.

She uses several information services and depends heavily on updates from Stirling Assynt (Europe) Ltd., a London-based firm that specializes in Middle East political risk. The information includes projections of where demonstrations might erupt and how businesses should react, she said.

"That knowledge, for me, is really very helpful," Ms. Graham said.

Control Risks, a London-based risk services firm, is in the position of ensuring the safety of its employees who were sent into a chaotic situation in Bahrain to advise companies there on how to keep their staffs safe.

Rebecca Scorzato, senior manager at Control Risks' Washington office, said the company is in daily contact by telephone with its consultants there "to ensure that the appropriate resources are in place to protect them. We did the same thing in Cairo and it proved very successful."

Oil giant BP P.L.C. moved 350 people out of Egypt during the protests there, a spokesman for the London-based oil company said, but has yet to take steps in other countries, some of which also have seen disturbances.

BP has operations in Abu Dhabi, Algeria, Jordan, Libya and Oman.

"We've been monitoring everything closely," the BP spokesman said, but no evacuations had been ordered as of late last week.

Kevin C. Wilkes, practice leader, security risk consulting with Willis North America in Pittsburgh, a unit of London-based broker Willis Group Holdings P.L.C., urged companies not to overlook the importance of an emergency travel plan for expatriates and employees traveling in the region.

"It really is a big exposure for many of our clients," Mr. Wilkes said. "Unfortunately, many companies we come across may have a crisis team in place, but they haven't considered the dangers or risks that employees may come across" outside their immediate work area. "They are neglecting the global workplace."

If disruptions such as those in Egypt occur in regions where businesses operate, a company would be well-advised to set up a temporary travel emergency command center to help employees deal with the crisis, Mr. Wilkes said. The center should provide critical information to employees and operate until the crisis is resolved, he said (see box).

Ms. Ochenkowski said Jones Lang LaSalle relies heavily on its local management to coordinate the emergency movement of employees.

"We're in frequent communication with our regional management," she said, where decisions are made on whether employees should stay put or be moved out of a threatening situation.

DLA Piper also leaves a lot of risk management to local managers, who are experts on conditions where they live and work, Ms. Graham said.

"I do not run anything without the local team," she said. "This is very much a locally engaged and managed event."

Sarah Veysey contributed to this report.

MANAGING A CRISIS

Companies operating in countries where anti-government protests could turn violent, such as recent demonstrations in various north African and Middle East countries, should establish a temporary command center to ensure the safety of traveling employees and expatriates, Willis North America advises.

Kevin C. Wilkes, Pittsburgh-based practice leader of security risk consulting with the unit of Willis Group Holdings P.L.C., said such a command center should:

- **Be run by a crisis management team consisting of personnel from human resources, operations, corporate communications, security, senior executives and, if needed, outside security consultants.**
- **Push timely alerts and updates on situations to employees, their families and key stakeholders in the organization.**
- **Operate around the clock to ensure that traveling employees depart the region safely and the safety of expatriates is assured.**
- **Monitor and manage the situation until the danger passes.**

Mr. Wilkes said traveling and expatriate employees should check in with the command center at predetermined times or when possible by telephone or e-mail to allow the employer to monitor their whereabouts and help them remain safe.

—By Michael Bradford

How employers can avoid gender discrimination charges

By JUDY GREENWALD

Employers can take several steps to prevent gender discrimination charges and, if they are made, address them and limit any potential damages, experts say.

The first step is an effective policy.

Keep it simple, said Robin E. Shea, a partner with law firm Constangy Brooks & Smith L.L.P. in Winston-Salem, N.C. Simply say, "We will not discriminate" on the basis of protected categories.

Employers' anti-discrimination policies should not be "too elaborate," Ms. Shea said. "In fact, sometimes, I think, too much detail can cause problems, because if the employer doesn't follow it to the letter, they get into trouble for not following their policy," she said.

But employers must move beyond merely having a policy, say observers.

If "you just have a paper policy nobody really pays attention to, or nobody spends much time emphasizing or enforcing, that's when, in my view, problems can arise," said Paul E. Starkman, a partner with law firm Arnstein & Lehr L.L.P. in Chicago.

"Make sure that the policy is adhered to, and that decisionmakers generally aren't making decisions based on stereotypes about gender roles," said Richard D. Tuschman, a partner with law firm Duane Morris L.L.P. in Miami. "For example, an employer should not pay a man more because he's the breadwinner of the family if, in fact, that's the case, which in many cases these days, it's not." That "would be discriminatory," he said.

If managers are trained "to promptly spot and correct a problem, more often than not it's not going to grow into litigation," said Mr. Starkman.

Ms. Shea said employers "do need to make sure, as a matter of practice, that they are conducting regular harassment training. Probably once a year would be ideal."

Tracey A. Kennedy, a partner with law firm Sheppard, Mullin, Richter & Hampton L.L.P. in Los Angeles, said, "I think many employers see training as too costly," but "it's the difference between investing in something and paying for it at the back end" in the form of lawsuits.

Mr. Starkman said employers should have "a good structure and procedures in place where employees can have a place where they feel safe about raising these issues, even if they don't need to or want to file a formal complaint."

Gregg M. Lemley, a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart P.C. in St. Louis, said employers also should be wary of "unexplained disparities in pay for people who are performing similar work."

Many companies "aren't really making an effort to be sure they have consistent benchmarks to be sure there's no adverse impact" with regard to either the salary at which they hire people, or in how their salary increases over time, he said.

Ms. Shea suggested that employers conduct a pay audit annually to look for "any discrepancies that can't be explained," and make appropriate corrections.

Communications also are important.

Ms. Shea said sometimes employers "don't do a very good job" of explaining that someone failed to get promoted not because they were being discriminated against, but for another "very good reason."

"You just have to sit down sometimes with the employee, and say, 'Here are your qualifications. This is why we thought (another employee) was more applicable to this position," she said. "Nobody ever wants to do this because it has the potential of being an unpleasant conversation, but I think this makes a big difference to people if you can try to explain those things to them."

This issue should be considered during recruitment as well, said Martha J. Zackin, of counsel to Boston-based law firm Mintz, Levin, Cohn, Ferris, Glovsky & Popeo P.C. It is "very tempting for people who do recruitment to go by word of mouth and recruit the people that you know, who are like you." Instead, employers should seek to have a more diverse workforce.

Mr. Miles said once a complaint is made, "it's important to have an interactive dialogue with the employee to understand exactly what their problem is and what they're expecting to be done about it."

"Certainly, if the concern hasn't been brought to the attention of the employer" before a charge is filed, "it's very important that the employer promptly investigate the allegations and make a determination if there's any merit to the allegations" and try to address it, said Emily S. Borna, a partner with law firm Jackson Lewis L.L.P. in Atlanta.

If the employer finds that there has been disparate treatment "or adverse action because of someone's protected status," it should be resolved right away and appropriate action taken to stop it, Ms. Borna said.

Furthermore, if the person bringing the charge still is in the workplace, it is important "to be sure there's no unlawful retaliation" against that person, said Ms. Borna. "But at the same time, that person isn't entitled to special treatment...or to be insulated from any action if there's wrongdoing on some other basis," she said.

AVOIDING GENDER DISCRIMINATION

Steps that employers can take to prevent gender discrimination charges or address them once they have been made include:

- Establish a clear, simply stated policy.
- Avoid gender stereotypes, such as assuming a man is the family's breadwinner.
- Train employees on avoiding gender discrimination at least annually.
- Establish a complaint procedure that employees can use without fear of repercussions.
- Conduct pay audits to uncover and address unexplained pay disparities.
- Establish good communications to explain employment decisions that could cause worker disgruntlement.
- Make a concerted effort to hire a diversified workforce.
- Once a charge is made, act promptly to correct any disparate treatment.
- If the employee who has filed a complaint still is in the workforce, avoid unlawful retaliation but do not give special treatment.

Bias: Gender-related EEOC claims not slowing down

CONTINUED FROM PAGE 1

In addition, Novartis A.G. last July agreed to pay $175 million to settle a class action that accused the Swiss pharmaceutical firm of unfair treatment of 5,600 female sales representatives regarding pay and promotion.

On Jan. 31, Sanford Wittels & Heisler L.L.P., the same law firm that filed the Novartis case, filed suit in federal court in New York on behalf of a senior human resources manager at Toshiba Corp. seeking $100 million from a U.S. unit of the Japanese firm for alleged gender bias against women in pay and promotions.

Observers say a good policy, ongoing training and adequate complaint procedures are steps that employers can take to address the issue (see story).

Basic sociological factors may be at work, say observers.

There are more women in the workplace than 15 or 25 years ago, and there are more women in jobs traditionally filled by men, said Gerald L. Maatman Jr., a partner with Seyfarth Shaw L.L.P. in Chicago.

Increased litigiousness also is a factor.

Some employers may be doing a better job "of trying to eliminate the causes of those kinds of charges," said Paul E. Starkman, a partner with law firm Arnstein & Lehr L.L.P. in Chicago. But employees are "going to be more likely to sue than they would have in the past. It's kind of a countervailing thing, and that may explain part of why you're not seeing some kind of a dramatic shift away from these types of claims."

The perception of gender discrimination can lead to charges, say observers.

Many point to the oft-cited statistic that women make 77 cents for every dollar paid to men, although they say this does not take into account factors that include women's greater tendency to enter lower-paying professions as well as their greater likelihood of taking time off to raise families.

"You are not comparing apples to apples," said Richard D. Tuschman, a partner with law firm Duane Morris L.L.P. in Miami. "Nevertheless, there is that perception that women are underpaid as a routine matter, and that is the perception that led to the Lilly Ledbetter Fair Pay Act," and can lead to charges of gender discrimination, he said.

Referring to *Wal-Mart*, Robin E. Shea, a partner with law firm Constangy Brooks & Smith L.L.P. in Winston-Salem, N.C., said, "It looks like the big cases have to do with equal pay and failure to promote" or the "perception that women are hitting the glass ceiling."

New laws also have affected charges brought by the EEOC, say observers.

AP PHOTO

Betty Dukes, shown in 2010, is the lead plaintiff in a suit against Wal-Mart Stores Inc. The Supreme Court has agreed to decide whether Wal-Mart must face what could be the largest gender bias class action ever certified.

David Gevertz, a shareholder with law firm Baker, Donelson, Bearman, Caldwell & Berkowitz P.C. in Atlanta, said, for instance, that complaints related to maternity leave under the Family and Medical Leave Act of 1993 are classified under the category of gender discrimination

In addition, more men are alleging sexual harassment in the workplace, which also falls within the gender discrimination category.

The U.S. Supreme Court's 1998 decision in *Joseph Oncale vs. Sundowner Offshore Services Inc.*, in which the court made it clear that same-sex harassment is prohibited, "has broadened the base to some degree" of charges filed with the EEOC, said Emily S. Borna, a partner with law firm Jackson Lewis L.L.P. in Atlanta.

Observers say other factors affecting the number of gender discrimination charges include more aggressive stances on the issue by federal agencies, including the EEOC and the Department of Labor.

Philip K. Miles III, an associate with law firm McQuaide Blasko in State College, Pa., said in addition, "Although we do live in a more enlightened age, you still have just the remnants" of earlier times.

"Management and leadership in business today are still comprised of people who maybe grew up in a different time in which gender discrimination was more prevalent," said Mr. Miles.

Meanwhile, observers say the nature of gender discrimination charges has changed.

Diana L. Hoover, a partner with law firm Hoover Kernell L.L.P. in Houston, said in recent litigation, "I had not seen any genuine quid pro quo" where women were pressured to become involved in an affair. Instead a charge is more likely to stem from a consensual relationship that ends unhappily.

Also, "You don't see the overt, belittling language to women in the workplace, where the boss is putting (a woman) down, or giving her lousy duties and the men good duties," said Ms. Hoover.

Gender discrimination today is "definitely more subtle. It used to be quite blatant," said Mr. Starkman.

And e-mail has become a more frequent source of gender discrimination claims, say observers.

Claims can be sparked by e-mailed jokes that are inappropriate for the workplace, "which of course the complainant will print up and keep to use to show there's discrimination in the workplace," Ms. Hoover said.

"The prevalence of social media makes it so easy to send such material that it's not surprising at all you haven't seen a big drop in these types of claims," Mr. Starkman said.

Products & Services

CNA enhances coverage for management liability

CHICAGO—CNA Insurance Cos. has enhanced its management and professional liability package of policies for private companies and nonprofit organizations.

Epack Extra includes various enhancements added to the policy package since its release more than 10 years ago, the Chicago-based insurer said in a statement.

Epack is a product suite available to private companies and nonprofit organizations that covers a wide range of exposures, including directors and officers liability, employment practices liability, professional liability, media liability and others.

In addition, Epack Extra bridges three coverage groups—management liability, professional liability and crime—and includes technology errors and omissions, network security and privacy, and crime. Policy limits can be shared among coverages or provided on a scheduled limit basis, the insurer said.

The package also includes preclaim assistance for investigation costs related to reported incidents; a mediation provision; and broad definitions of claim, loss and insured persons, among others.

For more information, contact Michelle Aliperti-Urbielewicz, assistant vp of underwriting, at 609-395-4013 or *michelle.aliperti@cna.com*.

Chartis adds salary cover to umbrella policy

NEW YORK—Chartis Inc. has expanded its commercial umbrella coverage with a salary reimbursement enhancement.

Developed by Chartis' excess casualty unit, the enhancement aims to mitigate uninsured costs for employers whose employees are required to testify during trial or arbitration proceedings, the New York-based unit of American International Group Inc. said in a statement.

"When employees are required to testify in a legal proceeding, their absence results in lost productivity and potential revenue loss," Christopher Kopser, president of excess casualty, said in the statement. "Meanwhile, the employer bears the same operating expense."

The endorsement reimburses the insured in proportion to the base salary for the days that the employee misses work to prepare testimony, appear at a hearing, or attend a trial or arbitration, Chartis said.

The policy endorsement offered by Chartis can be added to existing or new commercial umbrella liability policies at no additional cost and salary reimbursement is available up to an aggregate limit of $10,000.

For more information, contact Albania Lara, director of marketing, excess liability, at 212-458-3613 or *albania.lara@chartisinsurance.com*.

IronPro offers tech E&O policy

NEW YORK—IronPro has introduced specialty professional liability coverage for information technology and computer companies.

TechDefender offers coverage of a broad range of exposures in the technology sector, including technology errors and omissions, the New York-based professional liability unit of Ironshore Inc. said in a statement.

"Technology is a highly specialized, unique industry sector driven by the commitment to innovation pursued on a daily basis," Tom Monaghan, senior vp of IronPro, said in the statement. "With the fast pace of new and specialty product and service offerings, the technology industry is susceptible to the potential of greater liability risk."

The coverage is designed for custom software developers, Internet and application services providers, website developers, technology consultants, telecommunications companies and others, the insurer said.

The policy provides limits up to $15 million and includes coverage such as network security, privacy and Internet media, and can respond to reimburse privacy breach expenses and business interruption costs.

For more information, contact Mr. Monaghan at 646-826-6730 or *tom.monaghan@ironshore.com*.

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ADVERTISER INDEX

Issue of February 21

PBGC: Proposal would allow group to set own premiums

CONTINUED FROM PAGE 3

rigo, a principal with Pricewaterhouse-Coopers L.L.P. in Chicago.

Others question the logic of such an approach.

"A company may not be so financially healthy, but its pension plan is fully funded. What is the risk to the PBGC?" asked Aliya Wong, executive director of retirement policy at the U.S. Chamber of Commerce in Washington.

Benefit lobbyists are troubled not only by the approach, but also by the idea of giving the PBGC authority to set premiums.

"It is a conflict of interest. The PBGC has a strong interest in increasing premiums, but there would be no representation of employers on the PBGC's board," said Mark Ugoretz, president of the ERISA Industry Committee in Washington.

Others said there are far better approaches that lawmakers could take to improve pension plan funding and reduce the PBGC's exposures. For example, if Congress eliminated or reduced the federal excise tax, which can be as high as 50%, on reversions when companies terminate overfunded plans, it would give employers a strong financial incentive to make more than the required minimum contributions to their plans, some said.

"If you knew the contributions would not be locked up, employers would be more wiling to put in additional contributions," said Mark Warshawsky, director of retirement research with Towers Watson & Co. in Arlington, Va.

"If you want to induce companies to better fund, take away that confiscatory" reversion tax, said Ethan Kra, chief actuary for Mercer L.L.C. in New York.

In the absence of a developed legislative proposal, though, some said it is too soon to pass judgment.

"It is our nature to be open-minded, but we will withhold judgment until we see more of the specifics," said James Klein, president of the American Benefits Council in Washington.

And Mr. Ugoretz applauded Mr. Gotbaum's open-door approach. "He wants input. We had a frank discussion with him and appreciate his willingness to discuss ideas," Mr. Ugoretz said.

Mr. Gotbaum said the PBGC will continue to refine its proposal and that ultimately it will be up to Congress to decide if the plan is a better approach compared with current law.

It isn't known yet how receptive Congress would be in turning over premium-setting power to the PBGC, though there are legislators who would be interested in discussing the approach, the Chamber's Ms. Wong said.

PBGC PREMIUMS

Premiums charged for the single-employer insurance program by the Pension Benefit Guaranty Corp. have risen sharply in the past 35 years.

1974: PBGC established as part of Employee Retirement Income Security Act. Annual premium for PBGC pension termination insurance program set at $1 per plan participant.

1978: Premium set at $2.60.

1986: Premium set at $8.50.

1988: Base premium set at $16. Additional variable-rate premium of $6 per $1,000 of unfunded vested benefits imposed for underfunded plans with total premium capped at $50 per plan participant.

1991: Base premium set at $19. Variable-rate premium raised to $9 per $1,000 of unfunded vested benefits, with underfunded plans' maximum total premium capped at $72 per participant.

1994: Premium cap on underfunded plans starts to phase out.

2006: Base premium set at $30, automatically increasing annually to match wage growth.

2007: Premium set at $31.

2008: Premium set at $33.

2009: Premium set at $34.

2010: Premium set at $35.

Source: Pension Benefit Guaranty Corp.

Offshore: Groups clash over taxes

CONTINUED FROM PAGE 3

Domestic Insurance Industry. "This particular loophole is a fairly straightforward issue," and lawmakers of both parties support the change, he said.

"We point out that the reinsurance industry has largely migrated offshore and say, 'If this loophole is not closed, the insurance industry will move offshore as well,'" Mr. Berkley said.

Such a tax would be "a win for everyone except the non-U.S.-domiciled reinsurers," said Mr. Berkley, who said his group estimates that the change would raise between $17 billion and $20 billion over 10 years.

In one of the few other provisions dealing with property/casualty insurance, the proposed fiscal 2012 budget calls for changing part of the Homeland Security Act of 2002 that requires the Federal Aviation Administration to provide additional federal insurance coverage—hull loss, hull damage, and passenger and crew liability—to air carriers insured for third-party war risk liability.

"Now that commercial underwriters are expressing a stronger interest in writing a small but limited amount of war risk, the budget proposes to establish a $150 million deductible for hull and liability exposures in all FAA war risk policies," according to the budget document. The goal, according to the proposal, is to encourage the commercial market to underwrite most aviation war risks.

The budget calls for the Justice Department to allocate $250 million over four years to "provide incentives for state medical malpractice reform," but does not go into detail. It also calls for "a more aggressive effort to reform our medical malpractice system to reduce defensive medicine, promote patient safety and improve patient outcomes."

Loser: State challenge

CONTINUED FROM PAGE 3

RedBrick CEO Kyle Rolfing said the company recently enhanced the product in response to customer demand.

"They were having internal competitions, but they were being conducted and tracked manually," Mr. Rolfing said. "It was old-fashioned and labor-intensive, so we built a 'challenges engine' and embedded it into our core offering. Employers can still define the focus areas they want, such as weight loss, nutrition, exercise, preventive care or any combination."

The program operates similarly to the popular website Facebook, allowing individual employees to set up groups, or teams, and then send invitations via e-mail to their co-workers asking them to join or be "friended."

"Employees get an e-mail asking them to join and they can either ignore it or accept it, just like on Facebook," Mr. Rolfing said.

The software, which has been adopted by several other RedBrick clients in addition to the Biggest Loser Challenge participants, "has dramatically increased engagement" in wellness programming, Mr. Rolfing said.

Even though the focus of Minnesota's Biggest Loser Challenge is on weight loss, there is a greater objective, said Dr. Marc Manley, chief prevention officer at Blue Cross & Blue Shield of Minnesota.

"It's also about physical activity and healthy eating. It cuts across the whole spectrum of people who need to make changes."

The Minnesota Blues won last summer's challenge by losing more than 3,780 pounds, or 2.8% of body weight per employee, and logging nearly 1.73 million exercise minutes. The prize was "bragging rights" at the Minnesota State Fair, where the insurer presented a check donated by General Mills for $25,000 to Second Harvest Heartland, a Minnesota food bank.

This year, BCBS of Minnesota has more than 800 employees competing.

Aside from losing weight, the contest also is sending the message to employers throughout the state that "managing health overall is good for our employees and for our companies' bottom line," Dr. Manley said. He cited a study the insurer and the Minnesota Department of Health conducted that found obesity and modifiable behaviors of physical inactivity and unhealthy eating increase risk for chronic diseases such as heart disease, cancer and Type 2 diabetes (see related story).

"We're interested in building a community of healthy people," said Jill Hamilton, manager of Hennepin County's HealthWorks wellness program, articulating her employer's reasoning for joining this year's challenge. Hennepin County, which includes the Minneapolis/St. Paul area, has 1,243 participants vying to win Minnesota's Biggest Loser Challenge.

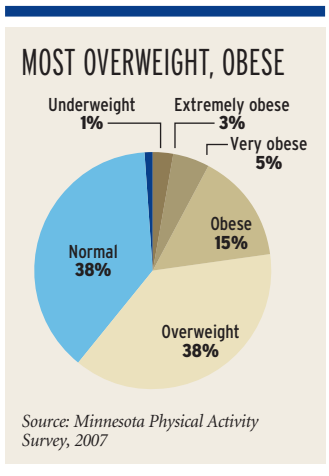
Two-thirds of Minnesota residents overweight, obese: Survey

By JOANNE WOJCIK

MINNEAPOLIS—Nearly two-thirds of Minnesota residents are overweight or obese, yet only about half have work environments that encourage physical activity or healthy eating, a survey has found.

Only 46% of Minnesota employers provide financial incentives, such as discounts on fitness center memberships or health insurance premiums for participation in wellness activities, according to "Physical Activity and Healthy Eating in Minnesota: Addressing Root Causes of Obesity," a study published by the Minnesota Department of Health and Blue Cross & Blue Shield of Minnesota.

The study also found that just 42% of Minnesota workers have access to on-site fitness centers, walking paths or even attractive stairwells at their place of employment.



Source: Minnesota Physical Activity Survey, 2007

The study, published last May, found that about 2.2 million adult Minnesotans are either overweight or obese. Thirty-eight percent are overweight, meaning they have a body mass index between 25 and 29.9. Fifteen percent are obese, defined as having a BMI of 30 or more. Five percent are very obese, with a BMI of 35 to 39.9; and 3% are extremely obese, with a BMI of 40 or more.

Sixty-nine percent of adult Minnesotans who are obese and nearly 29% of those who are overweight realize their weight raises their risk for future health problems, according to the study. In fact, 69% of obese and 53% of overweight individuals reported they are trying to lose weight.

However, the study also found that obese and overweight individuals are not getting much help with their efforts from the medical community. While 70% of obese or overweight individuals' doctors have asked about their activity levels, only 56% say their medical providers discuss their diet.

As far as healthy eating opportunities go, just 24% of Minnesota workers say they can buy fruit or vegetables at a low or reasonable price through a worksite food service. Twelve percent reported that the prices for such healthy fare are too high, while 3% said they are not available at all.

Fortunately, 63% of employed Minnesota adults bring meals to work, and home-prepared meals have been found to contain more nutrients than meals prepared away from home, according to the study's authors. Moreover, the majority of adult Minnesotans have features at their workplace that support bringing healthy meals, including a microwave (93%); a refrigerator (91%) or a break room (85%).

The study, which attempted to measure the prevalence of physical activity, unhealthy eating and obesity, was derived from responses to the "Minnesota Physical Activity Survey, 2007" and the "2008 Minnesota Healthy Eating Survey."

For more information, visit *www.health.state.mn.us/divs/hpcd/chp/cdrr/obesity/pdfdocs/ReportBCBSaddressrootcausesobesity.pdf*.

News In Brief

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an analysis by A.M. Best Co. Inc. It estimated that asbestos losses ultimately will cost the U.S. property/casualty insurance industry about $75 billion and environmental losses will cost about $42 billion. Previously, Best estimated asbestos losses for the industry would be $65 billion, and environmental losses of $56 billion.

Senate backs repeal of 1099 reporting

The U.S. Senate has approved legislation that would repeal the health care reform law requirement that employers furnish 1099 statements whenever they do more than $600 in business with a corporate vendor. The provision is part of the broader bill, S. 223, that the Senate approved last week on an 87-8 vote.

ERM more popular among financial firms: Survey

Enterprise risk management continues to gain favor among financial institutions, according to "Navigating in a Changed World" by Deloitte Touche Tohmatsu Ltd. It found that 52% of the financial institutions surveyed reported they had an ERM program in place, and an additional 27% said they were implementing ERM. In 2008, 36% of the respondents said they implemented ERM, and 23% were in the process of doing so.

Kentucky licenses 25 captives in 2010

Kentucky licensed 25 captives in 2010, bringing the state's year-end total to 127 as Kentucky continued its rapid growth as a captive insurance company domicile. A majority of the new captives were small and qualify for favorable tax treatment under Section 831(b) of the Internal Revenue Code. Under that section, up to $1.2 million in premiums can be paid to the captive without the premiums being included in the captive's taxable income. The number of new captives licensed last year was down somewhat from the record 39 captives licensed in 2009 and 35 in 2008.

HHS pegs early retiree reimbursements at $3.6B

The Department of Health and Health Services said it expects to distribute about $3.6 billion in reimbursements during fiscal 2011 to employers and other sponsors of early retiree health care plans. The remaining $1.4 billion of the $5 billion fund authorized under last year's health care reform law would be distributed during fiscal 2012, HHS said.

Indices show recovery of cat bond market

The Swiss Re Cat Bond Performance Indices indicate the cat bond market has recovered, Swiss Reinsurance Co. Ltd. said in a report. Key global index metrics "indicate that the cat bond market has fully recovered from the financial crisis and is currently comparable to the pre-crisis environment of 2007. Increased demand for cat bonds has pushed the market value of the index above the par value for the first time since August 2005 and to the second-highest year-end market value, $12.2 billion." for 2010.

NFIP remains high-risk: GAO

The National Flood Insurance Program once again has made the Government Accountability Office's list of high-risk federal operations. In a report, the GAO said the NFIP is not likely to generate enough revenue to repay the billions of dollars borrowed from the Treasury Department to cover claims from hurricanes in 2005 or future catastrophes. The lack of revenue underscores structural weakness in the program's funding, according to the report.

Aon unit settles case over reinsurance in Iran

Aon International Energy Inc. has agreed to a $36,000 settlement with the U.S. Office of Foreign Assets Control in placing coverage and paying premiums for facultative retrocession reinsurance associated with petrochemical projects in Iran in 2005. OFAC administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes. The settlement is the first publicly announced resolution of an enforcement action involving the reinsurance industry, said Deirdre G. Johnson, a partner with law firm Crowell & Moring L.L.P.

FIO: Industry lacks voice in Wall St. reform process

CONTINUED FROM PAGE 1

The council has the power to determine that nonbank financial companies—including insurers—present systemic risks to the economy and must be subject to heightened supervision. Insurers, however, have argued that they don't present systemic risk.

The presidentially appointed member with insurance expertise would be one of 10 voting members of the council, and the only one not heading a federal agency. The FIO director, and an already designated representative of state insurance regulators, would serve as a nonvoting council adviser.

President Obama has yet to appoint the insurance expert and no one has been nominated to head FIO. John M. Huff, director of the Missouri Insurance Department, represents state insurance regulators on the council.

The FSOC recently sought comments on proposed criteria that regulators would use to determine whether a nonbank financial company poses a systemic risk.

The Risk & Insurance Management Society Inc. "is continuing to focus and support the development of a Federal Insurance Office," said John R. Phelps, RIMS secretary and board liaison to the external affairs committee.

"We recognize the benefits for large commercial companies; we know it's a process to get there," said Mr. Phelps, who also is director-business risk solutions at Blue Cross and Blue Shield of Florida Inc. in Jacksonville. "It's not something that's a matter of waving a magic wand. Our most fervent hope is that the leadership for that office will be people who are experienced and have a thorough understanding of the insurance and risk management industry."

"The whole debate is very useful in underscoring the big point that we have, which is that insurers are distinctly different from other financial services institutions," said Leigh Ann Pusey, president and CEO of the American Insurance Assn. in Washington.

> **'The FSOC has now met three times without the benefit of insurance expertise.'**
>
> David Sampson, Property Casualty Insurers Assn. of America

Appointing the insurance industry members is "critically important because we are in a regulatory design phase," Ms. Pusey said. "Having someone in that process with an insurance perspective is critical."

Jimi Grande, senior vp in the National Assn. of Mutual Insurance Cos.' Washington office, said NAMIC has "much greater concern with the absence of the insurance expert on the FSOC than we do getting FIO up and running."

He said Congress made it clear in Dodd-Frank that lawmakers did not believe insurers pose a systemic risk.

"With a room largely filled with banking regulators, it will be easy for them to try a one-size-fits-all approach and snare insurers into their jurisdiction," Mr. Grande said.

The Property Casualty Insurers Assn. of America "remains very concerned that the FSOC is working on extremely important issues relating to determinations on systemic risk without two of the three insurance representatives in place," David Sampson, president and CEO of the Des Plaines, Ill.-based group, said in an e-mail.

"The FSOC has now met three times without the benefit of insurance expertise," Mr. Sampson said. "During the last FSOC meeting, deliberations began over a proposed rule for nonbank financial institutions that could affect insurers. We continue to urge the White House and Department of Treasury to appoint the insurance expert and the FIO director promptly so that the FSOC implications for the insurance sector be appropriately considered."

"I certainly agree with the Royce letter," said Joel Wood, senior vp of the Council of Insurance Agents & Brokers in Washington. "They'll get it filled and this shall pass," he said.

"In the meantime, I know there is extreme anxiety among insurers about the lack of insurance expertise while decisions are being made about what constitutes a systemically risky company. There will be much greater long-term value as well from the FIO, so we're anxious to see that filled," Mr. Wood said, expressing confidence that the administration would choose "very competent individuals."

Hiring: Staff additions seen

CONTINUED FROM PAGE 4

with plans they indicated in the latest survey, 2011 should see industry employment grow approximately 0.9%, Mr. Rieder said, though he added that surveyed firms have demonstrated that their hiring plans at the start of the year could be tempered by company performance during the year.

In addition, hiring might fall short of projections because of companies' continuing difficulty recruiting employees for certain positions, he said. While the survey showed recruiting getting easier in most disciplines than a year ago, respondents indicated that actuarial, executive, technology, product management, underwriting, and sales and marketing positions are among those still difficult to fill.

Rather than the 0.9% 2011 employment growth that the survey would suggest, "My gut instinct tells me we're going to see that number a little closer to 0.6% or 0.5%," Mr. Rieder said.

Of the top reasons given for anticipated staff increases over the next year, 30% of those surveyed cited business expansion, 26% cited anticipated increases in volume, 23% said they are understaffed and 15% said they planned to add staff in order to improve service.

Of those planning staff decreases, 20% cited automation, 16% said they are overstaffed, 15% cited reorganizations and 14% said they expected to cut staff due to anticipated decreases in volume.

The Ward Jacobson study surveyed 106 companies, 82% of which were property/casualty insurers and 18% were life/health companies. It was the fourth such survey conducted by Chicago-based staffing and executive search firm Jacobson Group and Cincinnati-based consulting firm Ward Group.

The results of the "Insurance Labor Market Study" can be found at *www.wardinc.com*.

Business Insurance END PAGE

Contributing: Jeff Casale, Judy Greenwald, Mike Tsikoudakis, Sarah Veysey

Subway in 'footlong' food fight

The Subway restaurant chain says the term "footlong" it uses for its sandwiches is proprietary, but an Iowa-based convenience store chain begs to differ.

Ankeny, Iowa-based Casey's General Stores Inc. is offering what it calls a "footlong," made-to-order sub sandwiches that it has rolled out in 180 of its 1,600 Midwest stores to date.

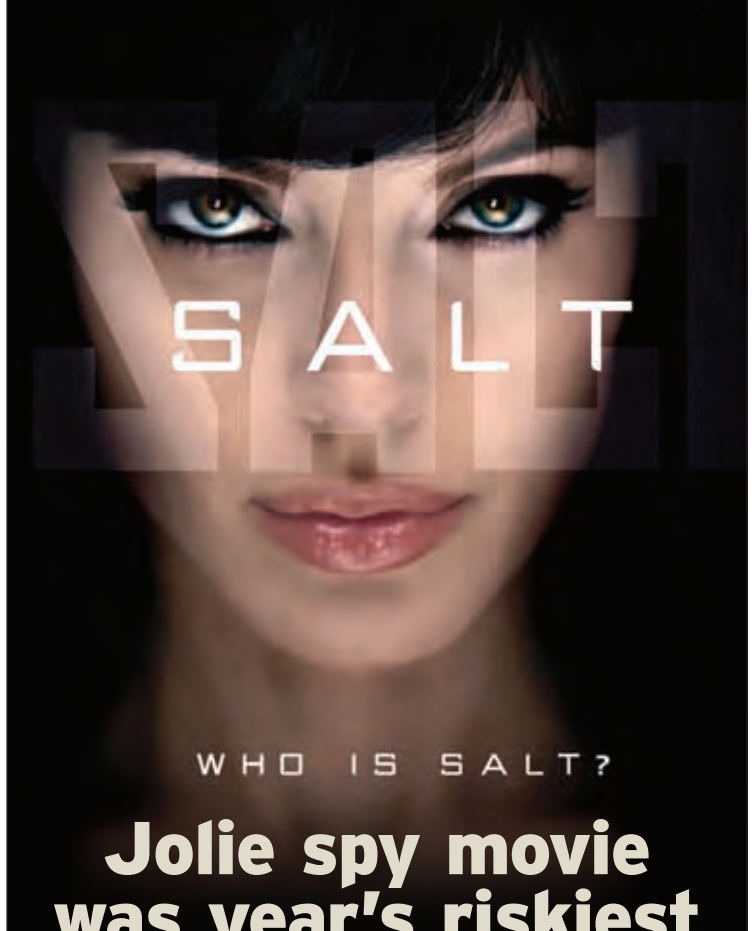
But an attorney for Subway, which is operated by Milford, Conn.-based Doctor's Associates Inc. and has 32,800 franchises in 92 countries and territories, wrote to Casey's in late January ordering the chain to "cease and desist" from using the term "footlong" in association with sandwiches.

"There are serious concerns with respect to infringement…due to the design of your menu, menu titles, arrangement of the menu and sandwich choices," according to Subway's letter. "Additionally, the offers of soup and pizza as well as the design of the advertising offers are all designed to cause confusion to the average consumer."

After briefly digesting this letter, Casey's filed suit in mid-February in federal court in Des Moines, Iowa, seeking a jury trial. It seeks a declaration that using the term "footlong" does not violate "any right currently owned by Subway."

The lawsuit says Subway has unsuccessfully sought to establish trademark rights for the term "footlong" for its sandwiches, a move several other restaurant chains have opposed.

"Subway's attempts to restrain Casey's from fairly competing by using generic terms, including the term 'footlong,' constitutes unfair competition," Casey's says in the suit, which seeks unspecified damages and expenses.



Jolie spy movie was year's riskiest

Fireman's Fund Insurance Co. says the action-packed movie "Salt," starring Angelina Jolie, was the riskiest film of 2010.

Ms. Jolie, starring as CIA agent Evelyn Salt, who's on the run after being accused of being a Russian spy, performed her own stunts in the Sony Pictures Entertainment action flick.

"When the artist is going to be involved in their own stunts, it's considered risky for us as the insurance carrier," Wendy Diaz, Fireman's Fund director of entertainment underwriting, reportedly said. "But it's also somewhat risky for the production company."

Delay costs for an injured cast member can soar into the millions of dollars, the Novato, Calif.-based insurer said in a statement. For a big-budget film, it can cost the production company $250,000 a day that the injured cast member is unable to work.

"Part of my role as a risk services consultant is to work with movie studios to analyze scenes that include stunt work, explosions, chase scenes, weapons and more, to ensure the safety of the cast and crew," said Paul Holehouse, entertainment risk consultant at Fireman's Fund, a unit of Munich-based Allianz S.E. that's been underwriting risks for Hollywood films for 85 years.

Ms. Jolie reportedly suffered a small cut between her eyes during the filming and was treated and released from a local hospital.

"I returned the next day with this big bandage on my head, they had to paint (the bandage) out," Ms. Jolie told reporters. But after only a few minutes, "they were like, 'You're really not fighting very well,' so they sent me home."

Amazing slap shot nets penalty

An Indiana man crossed a line in a contest and it cost him $50,000.

Richard Marsh netted a 175-foot slap shot during an intermission contest at an Indiana Ice minor league hockey game , making him the winner of $50,000, which he pledged to a charity even before taking the ice this month.

Mr. Marsh's accomplishment was short-lived, however, after a private insurance company responsible for the prize disqualified him for making the shot, determining that he had stepped over the designated line.

Although Northbrook, Ill.-based Allstate Insurance Co. was the insurance company sponsoring the event, the Indiana Ice hockey team, a member of the United States Hockey League, said in a statement that it was not the company responsible for providing the insurance money.

The insurer responsible for the prize money remains unnamed.

Meanwhile, in a good-faith gesture, Indiana Ice said it would make a donation to St. Vincent Cardiovascular Services and the American Heart Assn. on behalf of Mr. Marsh.

"We are doing it because it was a close call and a generous gesture by a loyal fan," Paul Skjodt, president and CEO of the Indiana Ice, said in a statement.

Iron bars for ex-Maiden frontman?

Former Iron Maiden frontman Paul Di'Anno pleaded guilty to benefits fraud in the U.K.

His reputation as a hell-raiser precedes him, but former Iron Maiden frontman Paul Di'Anno is facing jail after pleading guilty to benefits fraud.

The self-styled "wildest man in rock" was sacked from the heavy metal band in 1981, but he has continued to perform.

Mr. Di'Anno, whose real name is Paul Andrews, pleaded guilty recently at Salisbury Crown Court in England to falsely claiming a range of incapacity benefits between 2002 and 2008 involving benefits totaling about £45,000 ($72,000). Mr. Andrews claimed sciatica left him unable to work, but inspectors from the U.K. Department of Work and Pensions got an anonymous tip that led them to a YouTube clip of Mr. Andrews performing.

"Benefit fraud is a crime. This money is intended to provide valuable support to those most in need, not line the pockets of people already earning substantial amounts from their celebrity status," a spokesperson for the agency said in a statement.

Mr. Andrews is to be sentenced in March .

"You have got the sense and courage to plead guilty to these matters, but you have to understand that they are very serious. Although all sentence options will be open, you should prepare yourself for a prison sentence—and an immediate one at that," Honorary Recorder Judge Andrew Barnett, who presided over the case, reportedly told Mr. Andrews.

Mr. Andrews, 52, declined comment as he left the court hearing.

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