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February 23, 2004

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Trial examines WTC form selection

By GLORIA GONZALEZ

NEW YORK—A Willis Group Holdings Ltd. broker testified last week that he had ordered the use of a policy form that would classify the Sept. 11, 2001, destruction of the World Trade Center's twin towers as two occurrences almost two months before the terrorist attack.

Timothy Boyd, an assistant vp for Willis of New York Inc., said he informed colleagues on July 12, 2001, that a Travelers Property Casualty Corp. form would be used to lead the WTC insurance coverage, even though his colleagues expressed serious concerns about the form and an internal review of its provisions had not been completed at the time.

Mr. Boyd gave his testimony during the long-awaited trial in New York to determine whether the insurance program is governed by a Willis policy form that would treat the loss as one event, or by the Travelers form that WTC leaseholder Silverstein Properties Inc. argues would entitle the policyholder to two limits, or $7 billion (*BI*, Feb. 16).

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

Willis was retained by Silverstein to secure coverage ahead of the closing of its 99-year lease on the WTC complex on July 24, 2001. Mr. Boyd, the coordinating broker for the placement, sent out an underwriting submission that included the Willis form, known as Wilprop. As of early July 2001, however, he was having trouble securing coverage due to limited capacity and insurers' concerns about the WTC's exposure to a terrorist attack.

Mr. Boyd described his efforts to persuade Travelers to participate in the program, including an e-mail in which he tried to sell a Travelers underwriter on the prestige of insuring the trade center. The Willis broker told the court he spent several days negotiating terms with Travelers and was finally able to secure the company's participation, on the condition that the program be led by the Travelers form.

Although the Wilprop form defines the term

See TRIAL/page 30

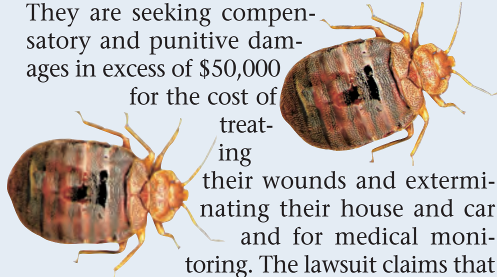
Lawsuits over bedbugs a nightmare for hotels

By JOANNE WOJCIK

Hospitality industry risk managers are painfully discovering that their mothers weren't kidding when they warned them while tucking them into bed at night as children not to let the bedbugs bite.

These pesky little critters are plaguing the hospitality industry, leading to complaints and even litigation, with the latest lawsuit filed earlier this month against Ocean City, Md.-based Harrison Group Ltd., which owns and operates a beachfront Holiday Inn in that city.

The complaint, filed Feb. 6 in Montgomery County Court in Pennsylvania by a family of four, claims that their two hotel rooms were infested with bedbugs, and that they not only were bitten while staying at the hotel last August but took the pests home with them. They are seeking compensatory and punitive damages in excess of $50,000 for the cost of treating their wounds and exterminating their house and car and for medical monitoring. The lawsuit claims that bedbugs can transmit HIV, hepatitis and other bloodborne illnesses.



The lawsuit comes on the heels of a claim brought in December in New York City by two Mexican businessmen who allege they were attacked by bedbugs when they stayed in the five-star Helmsley Park Lane Hotel last June.

The 7th U.S. Circuit Court of Appeals last fall upheld a Cook County, Ill., jury's $372,000 punitive damage verdict against Greenville, Texas-based Accor Economy Lodging Inc., operator of the Motel 6 hotel chain, in a case involving two Chicago trade show attendees who found their downtown hotel room overrun with bedbugs in November 2000.

Though the damages sought in the bedbug suits seem small when compared to other types of injury claims that could be presented, they may not be insurable, as was the case with the Motel 6 suit, court papers say.

The jury awarded each plaintiff only $5,000 in compensatory damages but

See BUGS/page 29

401(k) sponsors blast proposed transaction cutoff

SEC targets late trading

By JUDY GREENWALD

Pension plan sponsors charge that a proposed Securities and Exchange Commission rule designed to curb late trading abuses would discriminate against their defined contribution plan participants.

The proposed rule, called Amendments to Rules Governing Pricing of Mutual Fund Shares, would set a 4 p.m. EST deadline for mutual fund transactions. Opponents of the regulation, which include some large employers, say that it would place 401(k) participants at a potentially costly disadvantage to other investors. They argue that if the rule were promulgated, it would force employees to place their 401(k) orders much earlier in the day than other investors, leaving them unable to respond quickly to stock market changes.

In addition, according to an estimate by the Denver-based National Defined Contribution Council, which represents pension plan service providers, the delays created as investments are sold and then placed in transit before they are reinvested could also cost current plan participants more than $150 million in lost interest.

See 401(k)/page 28

Late News

IBM workers entitled to retroactive accruals

Judge G. Patrick Murphy of the U.S. District Court for the Southern District of Illinois ruled that his July 2003 decision that IBM Corp.'s cash balance plan discriminates against older employees should be applied retroactively. IBM argued that if any relief is awarded, it should be prospective, citing a 1978 Supreme Court decision that prospectively barred employers from requiring female pension plan participants to make bigger contributions to the plan than male participants. But, according to Judge Murphy, "The prohibition against age discrimination existed long before the appearance of cash balance plans....There has not been a change in law." IBM maintains that its plan is legal.

Grand jury indicts Oklahoma regulator

A multicounty grand jury indicted Oklahoma Insurance Commissioner Carroll Fisher last week on charges that he mishandled continuing-education funds and illegally operated a charity formed to buy shoes for needy children. Mr. Fisher's assistant, Opal Ellis, who was named in the two indictments along with Mr. Fisher, also is accused of embezzling the education funds for her personal use and embezzling vending machine profits in two separate indictments. Mr. Fisher, through his attorney, declined to comment. J.W. Coyle, the attorney who is representing Ms. Ellis, said, "Neither one of them is guilty of any wrongdoing."

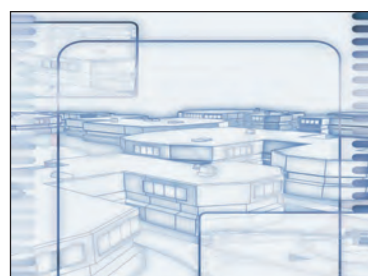
PHOTO: AP/JIM BECKEL

Mr. Fisher

See LATE NEWS/page 31

Spotlight report

ENTERPRISE RISK MANAGEMENT



LEADING RISK MANAGEMENT CONSULTANTS

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NEWSPAPER

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Wording of severability clause allows full recision: Judge

Court says insurer can rescind Cutter & Buck D&O coverage

By ROBERTO CENICEROS

SEATTLE—A directors and officers liability policy's severability provision does not prevent Genesis Insurance Co. from rescinding coverage for Cutter & Buck Inc. and all of its directors and officers, a federal judge ruled.

The Feb. 11 decision stems from Seattle-based sportswear company Cutter & Buck's bid to block Genesis from rescinding its D&O coverage following a 2002 restatement of earnings (*BI*, Jan. 20, 2003). Genesis, a unit of Stamford, Conn.-based General Reinsurance Corp., wrote a $10 million primary D&O policy for Cutter & Buck.

Although D&O recision lawsuits have become more common over the last two years amid several corporate accounting scandals, there have been few court rulings on the issue of whether misrepresentation by one director or officer can void coverage for so-called "innocent" insureds who do not know about the misrepresentations, attorneys note.

Genesis argued that, under the policy's "partial severability" clause, knowledge held by anyone signing an insurance application can be attributed to other officers and directors, even if they are innocent, said Daniel Standish, a partner at Wiley Rein & Fielding L.L.P. in Washington, who represents Genesis.

In 2000, Cutter & Buck accounted for several product shipments as sales transactions even though distributors in 2001 sent the goods back to the company, according to court records. In 2002, a new Cutter & Buck chief executive officer, Fran Conley, discovered the transactions and launched an investigation. In addition, she notified the insurer of potential claims stemming from the problem.

Cutter & Buck later issued a statement explaining that its standard accounting controls were circumvented and that former managers may have received incentives for overstated results. A series of shareholder suits followed, and Cutter & Buck tendered a claim to Genesis, court papers show.

Cutter & Buck then restated financial statements going back four years. Genesis later notified its client that it would rescind its coverage after obtaining court documents indicating Cutter & Buck officers knowingly participated in the fraudulent sales transactions, according to court documents.

In her ruling earlier this month, District Court Judge Marsha J. Pechman in Seattle found the sportswear company had "made material misrepresentations with an intent to

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IRS clarifies COBRA rules in Medicare situations

By JERRY GEISEL

WASHINGTON—An employee's dependents who are receiving COBRA health care coverage do not have the right to a second round of coverage when the employee becomes eligible for Medicare, the Internal Revenue Service says.

Revenue Ruling 2004-22 limits to 18 months—not 36 months, as many plan administrators had thought—an employer's obligation to offer health care continuation coverage to dependents under provisions of the Consolidated Omnibus Budget Reconciliation Act in so-called "second COBRA qualifying events" that involve Medicare entitlement of the employee.

The ruling is a surprise to some benefit experts and means that employers will have to change their administrative practices, while the length of coverage that beneficiaries are eligible for will be reduced from what employers had provided.

"It is a favorable outcome for employers," said Mark Hamelburg, an attorney with Mercer Human Resource Consulting in New York.

"This virtually pulls Medicare out of the list of second qualifying events" for COBRA, added Andy Anderson, a consultant with Hewitt Associates Inc. in Lincolnshire, Ill.

To be sure, though, the ruling will affect only a small percentage of COBRA beneficiaries—spouses and other dependents of older employees who lose their group coverage, such as by quitting, and then later become eligible for Medicare.

"This is a narrow group of people," said Mark Straus, a consultant with Watson Wyatt Worldwide in Universal City, Calif.

Still, as Mr. Straus notes, the ruling involves real-world situations, and the IRS has provided useful guidance for plan administrators.

The IRS ruling involves what are called second COBRA qualifying events. Under COBRA, an employer is required to offer continuation coverage for 18 months to employees and dependents if certain qualifying events occur, such as the termination of employment, and the employee loses group health insurance coverage.

In other situations, such as marital separation and divorce or the death of an employee, dependents have the right to COBRA coverage

See COBRA/page 31

Noneconomic damages OK in termination claims, U.K. appeals court rules

By CAROLYN ALDRED

LONDON—A U.K. court ruling allowing noneconomic damages in an unfair dismissal case overturns a long-standing legal principle and exposes employers to new liability, attorneys say.

The U.K. Court of Appeal's 2-to-1 decision on Feb. 11 allows victims of workplace bullying who are unfairly dismissed to seek noneconomic compensation, such as for stress, injury to feelings or loss of reputation. Previously, employment tribunals and courts have awarded damages only for calculable economic losses in cases of unfair dismissal.

The Industrial Relations Act 1971, which protects workers against unfair dismissal, states that compensation for such claims should be "such amount as the (employment) tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal, in so far as that loss is attributable to action taken by the employer."

The ruling "is an important decision which overturns 30 years of received wisdom and allows employees to recover noneconomic damages, opening the door to stress claims following dismissal,'' said Anthony Fincham, a partner in the London-based law firm of CMS Cameron McKenna. "It will have a real impact on employers and broadens companies' liability," Mr. Fincham said.

The case involved an unfair dismissal claim brought by Christopher Dunnachie, an environmental health officer who had worked for the city council of Kingston upon Hull, England, from 1986 to 2001. He resigned after a prolonged period of harassment and undermining by

See DISMISSAL/page 27

Inside Business Insurance

PBMs under fire over rebates

Some plan sponsors argue they should benefit from the financial incentives PBMs receive from drug companies. Page 4

Fallout from scandals hits banks, insurers

Corporate scandals have created a crisis for financial institutions and their insurers, a panel says. Page 4

To liven up Tinseltown, along came Paulie

Paul Winston suggests ways in which many of the year's top films could have been improved. Page 6

Enterprise risk approach offers opportunities

Risk managers should embrace enterprise risk management as a way to better their organizations'–and their own–standing. Page 8

Losses from accidents hit energy insurers

A trio of losses hit energy insurers in January, but observers are divided on their likely impact on rates in that market. Page 25

Online

The full **Directory of Risk Management Consultants** is available online. The searchable directory allows registered subscribers to find information on consultants using various search criteria.

• A searchable **Datebook** calendar lists upcoming industry seminars and meetings and allows you to add information on your own event.

• New **Opinion Poll** for readers: Does your organization have a workplace policy on personal e-mail communications?

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REPORTING ON CORPORATE RISK AND EMPLOYEE BENEFIT MANAGEMENT NEWS.

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PBM critics focus on drug discounts, rebates

Some plan sponsors suing to share in cost savings

By SALLY ROBERTS

Prescription benefit managers are coming under fire from various plan sponsors and state lawmakers for the rebates and other financial incentives they receive from drug manufacturers and retail pharmacies.

By negotiating big volume discounts with drugmakers, PBMs are able to offer plan sponsors prescription drugs at lower costs. But some employers and state legislatures say the extra rebates PBMs allegedly pocket from drugmakers and pharmacies based on business volume not only influence what drugs are included in formularies but also should be made fully transparent and passed on to employers.

As part of this effort, one major benefit consulting firm recently negotiated a contract with Medco Health Solutions Inc. under which the Franklin Lakes, N.J.-based PBM will pass on to the consultant's newest employer coalition all of its pharmacy discounts and drug rebates.

In other cases, plan sponsors are turning to the courts.

"PBMs have a fiduciary duty to their customers…and, as a result of that, they are not entitled to nor permitted to take benefits, kickbacks, inducements or the like, which should, in fact, inure exclusively to the benefit of their principals," alleged Jeffrey Krinsk, an attorney in the San Diego law firm of Finkelstein & Krinsk L.L.P.

Mr. Krinsk is representing two unions, the Organization of New York State Managerial Confidential Employees and United University Professions, in a lawsuit against St. Louis-based Express Scripts Inc.

The suit, filed Dec. 31, 2003, in New York State Supreme Court, charges that Express Scripts illegally pocketed profits in the form of additional undisclosed discounts and rebates from drug manufacturers, retail pharmacies and its own bulk mail-order pharmacies that should have been passed on to union members.

"We are concerned that the rising costs of prescription drugs are simply being passed along to the consumer," Barbara Zaron, president of the OMCE, said in a statement. "In this case, we believe that Express Scripts, which was hired to manage

See PBMs/page 30

Senate to consider malpractice legislation, then class action reform

By MARK A. HOFMANN

WASHINGTON—The Senate leadership's decision to push ahead with medical malpractice liability reform legislation this week means that class action reform legislation won't come to the floor as quickly as its supporters had hoped.

Nevertheless, supporters of class action reform are downplaying the significance of the Senate Republican leadership's decision to delay consideration of a reform bill. In fact, some say it will give them more time to drum up support for the Class Action Fairness Act, a version of which has already passed the House.

PHOTO: ROLL CALL

Senate Majority Leader Bill Frist, R-Tenn., had pledged to make class action reform a top priority in the chamber's current session.

The Senate will begin consideration of the Healthy Mothers and Healthy Babies Access to Care Act, S. 2061, Monday as it returns from its Presidents' Day recess. Senate Majority Leader Bill Frist, R-Tenn., had for months indicated that class action reform would be one of the first orders of business after the recess but decided to revisit malpractice liability reform instead.

The bill, aimed at limiting the liability of health care professionals providing obstetric and gynecological services, would limit noneconomic damages in such cases to $250,000. It would also introduce a sliding scale for lawyers' contingency fees in such cases and set stringent standards for awarding punitive damages in such suits.

Sen. Frist, himself a surgeon, has scheduled a cloture vote on the bill for late Tuesday afternoon. Invoking cloture—which limits debate on a given piece of legislation and thus blocks any filibusters—requires the support of at least 60 senators. An effort to invoke cloture on a broader medical malpractice reform bill failed last summer despite the fact that similar legislation had already won House approval *(BI*, July 14, 2003). Senate failure to

See LEGISLATION/page 29

Bermuda institute honors longtime market proponents

HAMILTON, Bermuda—The Bermuda Insurance Institute has named David Ezekiel as market leader of the year and presented Kathryn J. McIntyre with its lifetime achievement award.

Mr. Ezekiel, chairman of captive management firm International Advisory Services Ltd., was honored for his lobbying efforts to the Bermuda government on behalf of the island's international business community. He serves as chairman of the Assn. of Bermuda International Cos. and guided IAS through the financial turmoil experienced by its one-time parent, Mutual Risk Management Ltd.

Ms. McIntyre is the former publisher and editorial director of *Business Insurance*. Retired but still active on various insurance industry boards, she is being presented the lifetime achievement award because of her strong support of Bermuda as an insurance market.

Ms. McIntyre

PHOTO: DAVID SKINNER

Mr. Ezekiel

Through Ms. McIntyre's efforts, *Business Insurance* was the first industry publication to recognize Bermuda as a substantial market, the institute said in a statement.

The awards will be presented during the institute's gala black-tie dinner, scheduled for March 20 at the headquarters of XL Capital Ltd. in Hamilton.

—*By Michael Bradford*

Professional Liability Underwriting Society D&O Symposium

More governance suits seek to hold banks accountable

By GAVIN SOUTER

NEW YORK—The financial scandals that have engulfed many corporations and their financial advisers have created a crisis for financial institutions and their insurers, according to a panel of experts.

Huge settlements or damages payments are likely as sophisticated institutional investors seek compensation for their losses through shareholder litigation, they say.

And the insurers that covered the banks with broadly worded errors and omissions policies should face up to the prospect of paying substantial claims, they said.

Investment banks offered their corporate clients an array of sophisticated services during the 1990s that often included tax and debt strategies, and, when several of the deals turned sour, it was inevitable that the banks would be pursued by investors in the companies, said Melvyn I. Weiss, senior partner at Milberg Weiss Bershad Hynes & Lerach L.L.P. in New York.

"They stuck their necks out there, and we are trying to chop them off," he said. "These big institutions are going to be held accountable, and I see multibillion-dollar recoveries, in many cases."

The increase in the number of services that investment banks began to offer in the 1990s led to the increase in litigation against the banks, agreed J. Michael Rediker, senior member of plain-

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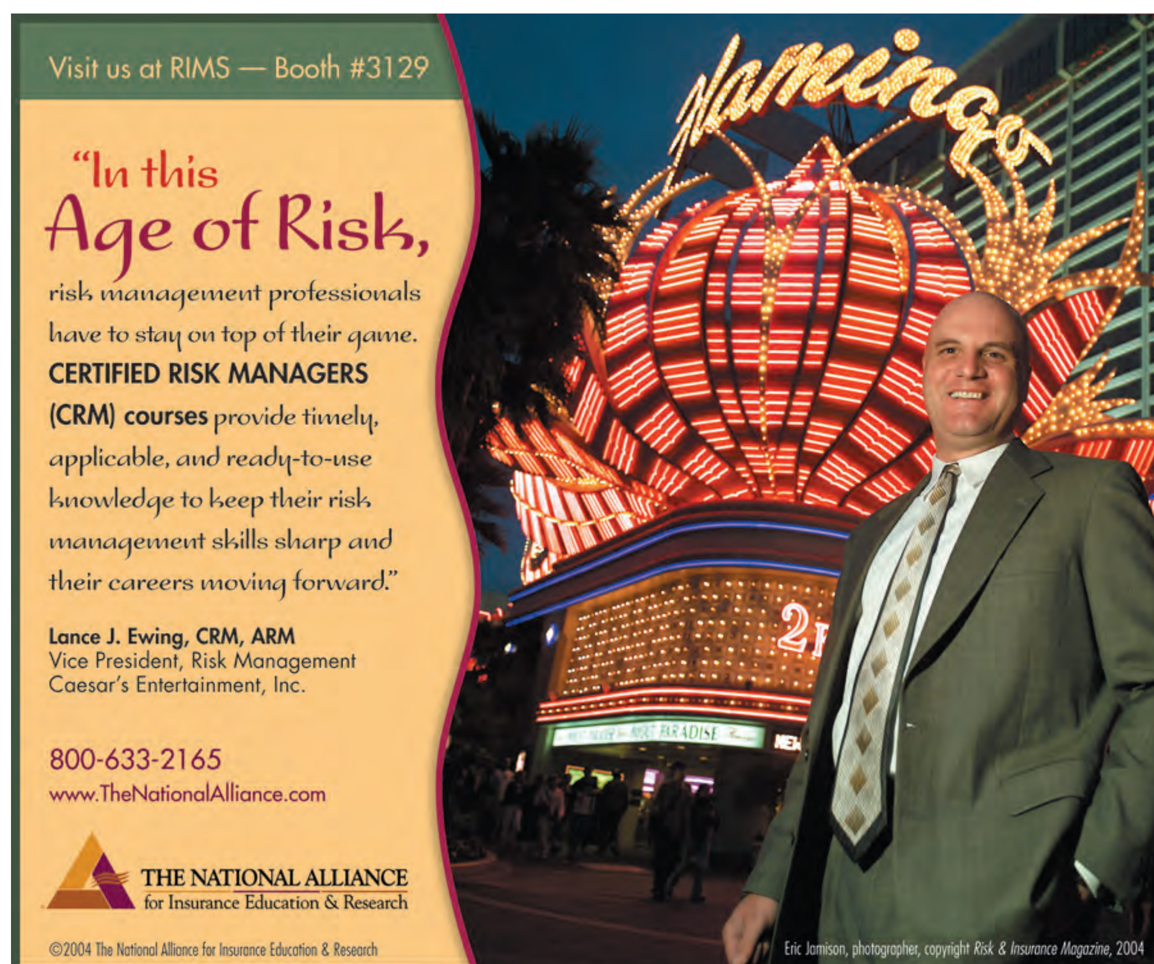
PLUS

Coverage continues on page 22

Errors and omissions

- The sponsor of the Healthy Mothers and Healthy Babies Access to Care Act was misreported in the Feb. 16 issue. Sen. Judd Gregg, R-N.H., introduced the bill.
- Due to an editing error, the name of Jack Faris, president of the National Federation of Independent Business, was misspelled in the Feb. 16 issue.



Paul Winston

Insurance movies snubbed at Oscars

In less than a week, the 76th Annual Academy Awards will be presented, honoring the best picture, actor and actress, music, writing and makeup, among other motion picture achievements in 2003.

Every time the annual awards are handed out, I kick myself for not seeing more of the nominated movies for best picture. But with approximately 5,000 movies to choose from worldwide each year, I guess it's not surprising that Bruce Willis and Quentin Tarantino movies are not at the top of most critics' lists this year. Thank goodness "The Lord of the Rings" is a trilogy so that I see at least one nominated movie a year (now that the series has run its course, next year I'll be in trouble).

But I'm not the only one who's overlooking important movies.

Once again, the Academy of Motion Picture Arts & Sciences is snubbing mainstream risk management and insurance-themed movies.

Paul Winston

In the 2002 awards, "Memento," a movie about an insurance claims investigator with an unusual method of leaving himself reminder notes, was nominated for best screenplay but was not recognized with an Oscar. In 2003, "About Schmidt," a film about a retired actuary's search for a decent son-in-law, garnered best actor and best actress nominations but, alas, did not result in awards.

Now, in 2004, "Runaway Jury," a thriller about a fixed jury and a civil suit against gunmakers, didn't even get a nod. And what about "Along Came Polly," a film about the nutty lives of D&O risk analysts, has not even been nominated. It's an outrage! What? You say it was not released until 2004? Oh. Well, then I guess it still stands a chance of winning an award for best picture next year.

While we wait for that compelling bit of cinéma vérité to get the honors it is due, I invite you to consider how much greater the chances of risk and benefit management films vying for Oscars would be if some of 2003's blockbusters had spent a little time in rewrite. Consider, for example, these 2003 gems:

"American Wedding." A comedy about the foibles of a same-sex couple who battle with friends and family over their decision to marry. In a surprise tragic twist, their marriage in a civic ceremony in San Francisco is later declared illegal by a California court.

"Finding Nemo." The story of a young Canadian heifer that is culled from the herd and winds up somewhere in the United States, separated from her family. This lighthearted adventure follows the agriculture officials who scramble to locate the lost cow, which may have a rare disease.

"Holes." This film tracks the surreal daily lives of an actuarial department that, over a period of years, alternates between plugging holes in reserves and then digging out those funds and releasing them to improve the bottom line—only to have to repeat the cycle all over again. Endlessly.

"House of Sand and Fog." A film about the nightmarish world of real estate risks, in which a former Iranian general buys a home in California that contains a host of construction defects, including defective polybutylene pipes that caused water damage and the spread of mold. Frustrated in his efforts to get an insurance claim paid for the damage, he snaps, with tragic and violent consequences.

"The Last Samurai." An epic film about a small band of brake repair firms, boiler insulating companies and asbestos removers who find they are the last surviving plaintiffs in asbestos litigation. They strive to adhere to their traditions but ultimately are destroyed as modernism (a metaphor for litigation) rolls over them.

"Lost in Translation." A film about an HR executive who is asked to travel to a distant office to explain how changes in the company's health care plan work. Yet for some reason, he is unable to convey to the workers why shifting more costs to them and less to the employer is a good thing. It's as if they were speaking different languages.

"A Mighty Wind." A satirical "mockumentary" about efforts to organize a folk music reunion concert as a last ditch effort to raise funds for the continued hurricane research activities of Professor William Gray of Colorado State University.

"Terminator 3." A sci-fi flick about a cyborg, played by Arnold Schwarzenegger, sent from the future to unravel California's workers comp mess before it drives the state economy to ruin. After battling his way to the governor's office, he still faces hordes of attorneys and lawmakers before his job is done, clearly setting the stage for a sequel.

Now, I guess you know why my family never lets me pick out the movies to rent.

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AMERICAN BUSINESS MEDIA

Editorial

ERM offers valuable opportunities

INCREASED INTEREST in managing enterprise risk is good news for all risk managers.

Clearly, this enhanced interest presents a welcome opportunity for risk managers to raise their profile within their enterprises by taking on broader responsibilities. That's true whether or not the new responsibilities bring with them a new title—chief risk officer—as well.

That's not to say that this opportunity comes without its own set of challenges, some quite formidable. As the Spotlight report beginning on page 10 underscores, even the definition of enterprise risk management still varies from organization to organization.

While some organizations are appointing chief risk officers to coordinate their enterprise risk management activities, a common definition of a CRO remains hard to pin down. Organizations define CRO responsibilities differently, and businesses' risk management requirements obviously vary.

That should not, however, deter risk managers from helping to promote enterprise risk approaches. The concept is both logical and—with new corporate governance requirements laid down by the Sarbanes-Oxley Act—timely.

A common thread in the fabric of every successful risk management program is communication. The best risk managers create a culture that avoids "silo" thinking and instead links various operating units to the common goal of minimizing human and financial loss. In essence, a good risk manager spreads this gospel throughout his or her organization. Enterprise risk management takes this to a logical next level.

Enterprise risk management is clearly no one-size-fits-all affair. It must be tailored to the unique risk profile and needs of the organization. The risk managers who can grasp this will have an opportunity both to enhance the well-being of their employers and raise their profile within the organization to a level unimaginable only a few years ago.

Encouraging CDHP news

WHILE ADMITTEDLY far from definitive, a new study on the impact of consumer-driven plans on health care costs is encouraging.

As we recently reported, the study by Aetna Inc. found that medical costs in a nine-month period last year stayed virtually flat for 14,000 enrollees in consumer-driven plans that Aetna offered to 19 employers.

The average 1.5% increase in the consumer-driven plans studied by Aetna compares to the double-digit cost increase that was typical last year for other employers with different plan designs.

We wouldn't hang our hats on one study, especially one that involved such a short time period or such a relatively small number of health plan enrollees.

Still, the outcomes reported by the study do seem on target. Consumer-driven plans, in striking contrast to other plan designs, we think, encourage more careful and better employee use of health care services.

Consumer-driven plans offered by Aetna, as well as those by a growing number of other insurers and vendors, feature a high-deductible health insurance component linked to an employer-funded health reimbursement account that employees can tap to cover some, but not all, of their out-of-pocket costs. Employees can roll over unused HRA balances at the end of the year to pay for succeeding years' uncovered expenses.

Clearly, enrollees have a powerful financial incentive—building up account balances to reduce their exposure to uncovered costs—to use health care services prudently.

And that appears to have happened. Consumer-driven plan enrollees were, for example, much more, likely, compared with employees in other plans, to obtain preventive care services, Aetna reported, while their utilization of lower-cost generic drugs jumped.

By contrast, the incentive to use health care services carefully in plans, which until at least recently had little cost sharing, is lacking. It is no wonder that health care plan enrollees have done so little questioning of providers on whether, for example, certain services are needed, or why brand name drug use has been so high when equal quality, lower-cost alternatives have been available.

Certainly, consumer-driven plans do not address all the forces—like the near-monopolistic power medical providers enjoy in some communities—which have driven up health care costs.

But we think they are a promising start and we eagerly await more research to better determine their ability to keep costs under control.

Schillerstrom

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Enterprise Risk Management

Spotlight Editor: Roberto Ceniceros

New approach is gaining advocates in widening range of industries

By SALLY ROBERTS

While the banking industry may have paved the way in the use of enterprise risk management as a means to identify and control risk across an entire organization, other industries are quickly following suit.

Finding that ERM just makes good business sense, such industries as insurance, health care, consumer products and pharmaceuticals have hopped on the ERM bandwagon, consultants say.

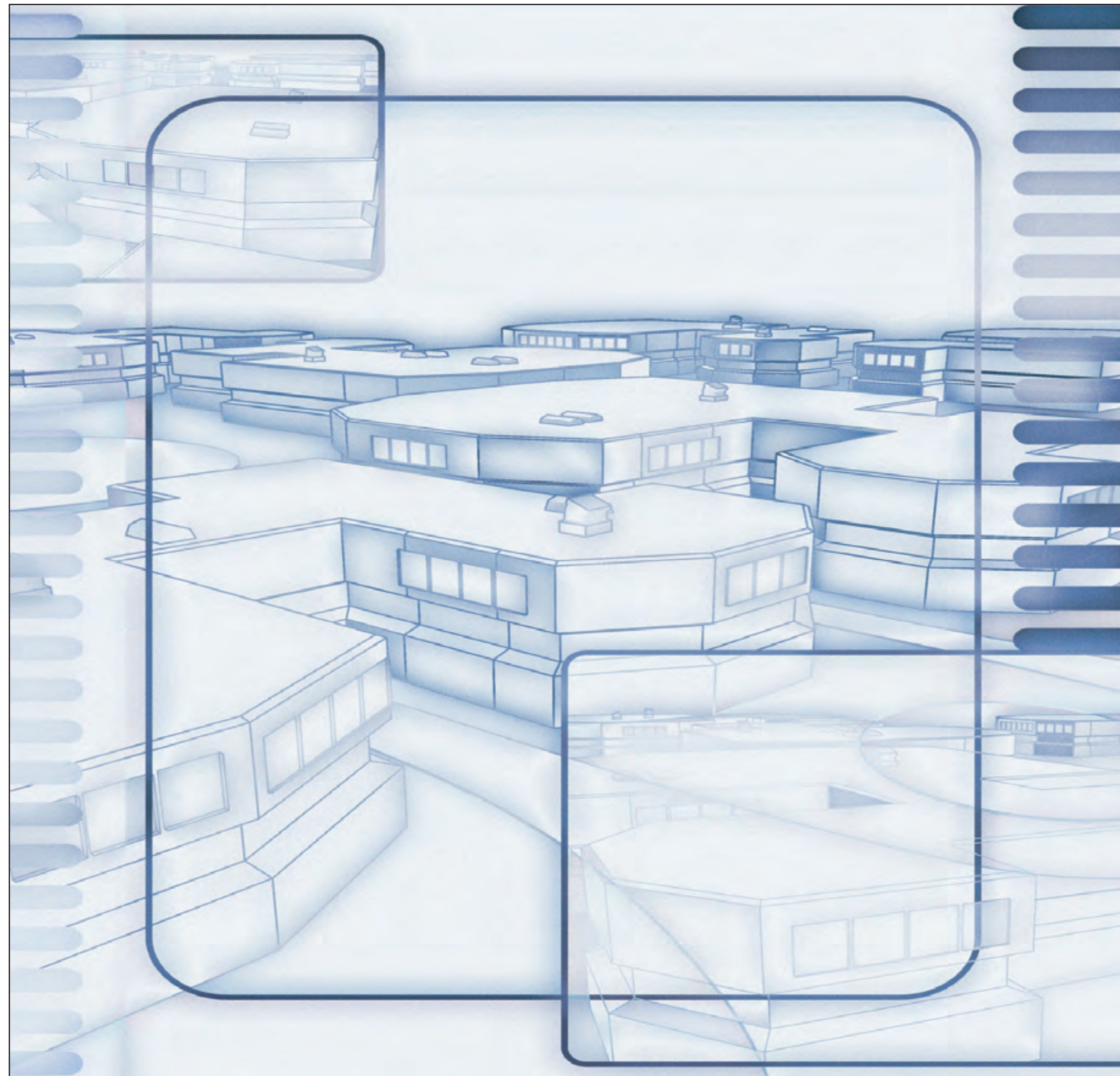
Finding that it just makes good business sense, such industries as insurance, health care, consumer products and pharmaceuticals have jumped on the ERM bandwagon.

And spurred on by the 2002 Sarbanes-Oxley Act and greater emphasis on corporate governance in general over the last couple of years, many other industries also are beginning to embrace the risk management concept, they note.

"Any publicly traded company is looking at ERM today," said Michael Chagares, leader of Marsh Inc.'s U.S. business risk consulting practice in Washington. "It's all about the reporting requirements on their financial statements" certifying that the organization's financial and operational condition is fairly represented and accurate, he said, referring to provisions set forth in Sarbanes-Oxley.

And "there's some very large private companies—even though they have no push from Sarbanes-Oxley and no push from public shareholders and no push from corporate governance standards—that are putting this in place as well because they want to make sure…they are not surprised," Mr. Chagares said.

See GROWTH/page 16



ERM assignments keep large consultants busy

By ROBERTO CENICEROS

Savvy risk managers say they try to squeeze value-added services out of their brokers and other vendors before paying for risk management consulting services.

But risk management consultants in a variety of niches say business is brisk as clients seek their help on projects such as meeting insurers' current underwriting standards or complying with the Sarbanes-Oxley Act of 2002.

The boom in business is also being driven by customers seeking alternative market options. Even though insurance rates have stabilized following the increases of recent years, they are holding steady at plateaus that are driving clients to explore cost-reduction measures, the consultants say.

Financial modeling of retentions and risk-bearing capacity "heated up this past year," as more customers sought assurances their dollars were being spent efficiently, said Mark P. Charron, a principal and leader of risk management consulting for Deloitte Consulting in Hartford, Conn.

"People are taking a step back and saying, 'This is the new plateau, where my costs are going to be, so are we doing the right thing?' " he said.

Mr. Charron said he is "extremely busy" helping companies to identify corporatewide risk concerns and determine what controls, if any, are in place. The Sarbanes-Oxley Act calls for corporations to assess their risks and identify controls for those risks, consultants say. That, in turn, is propelling the spread of enterprise risk management, they add.

Consequently, Mr. Charron said Deloitte's enterprise risk services group often pulls him in to help assess a broader array of customer concerns than risk management consultants traditionally have evaluated.

See CONSULTANTS/page 18

The full Directory of Risk Management Consultants is available online, in the directories area of *www.businessinsurance.com*. The searchable directory allows registered subscribers to find information on consultants by using various search criteria. PDF copies of this and other *BI* directories can be purchased by e-mailing the Crain Information Center at *biorders@crain.com*.

COSO offers framework for complying with Sarbanes requirements

By MICHAEL BRADFORD

As public companies work to comply with the Sarbanes-Oxley Act, they may find helpful guidance in a framework designed to aid companies that are embracing enterprise risk management.

Components of the framework, which was established by the Committee of Sponsoring Organizations, are being implemented by companies that must comply with corporate governance and financial disclosure requirements in sections 404 and 409 of the 2002 federal law. By the end of this year, most public companies must have introduced the controls required by the law.

Companies must comply with the corporate governance and financial disclosure requirements in sections 404 and 409 of the new federal law by the end of this year.

Under Section 404, companies must identify all the significant processes that could affect financial statements and have methods in place to ensure the integrity of their financial reporting. In addition, chief executive officers and chief financial officers must publicly acknowledge their responsibilities for maintaining controls on financial reporting and must report on the effectiveness of those controls.

Section 409 requires organizations to develop a process for disclosing material changes in their financial condition on a "rapid and current basis" in an easy-to-understand format.

COSO, an organization created in 1985 to sponsor the National Commission on Fraudulent Financial Reporting, originally was charged with studying the causes of fraudulent financial behavior and devel-

See SARBANES/page 14

Ranking of leading risk management consultants page 12

Exactly what does a chief risk officer do? page 18

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LARGEST OVERALL RISK FIRMS

Reflects both independent and nonindependent risk consultants [1]

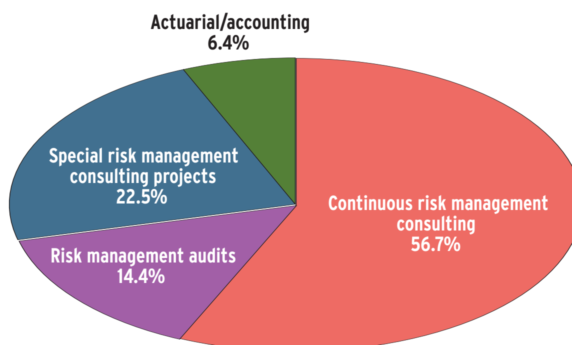
Company	2003 unbundled revenues from risk management consulting
Marsh's Risk Consulting Practice	$205,000,000
Deloitte & Touche L.L.P.	$87,500,000
PricewaterhouseCoopers L.L.P.	$84,720,000
Mercer Oliver Wyman [2]	$52,367,438
Ernst & Young L.L.P.	$42,700,000

1 Companies need not derive majority of revenues from unbundled risk management consulting, but those deriving 50% or more of such revenues from actuarial, captive, environmental, property loss or safety consulting are not ranked 2 Reflects April 2003 merger of Oliver, Wyman & Co. and the financial services strategy and actuarial consulting practices of Mercer Inc.

Source: *BI* survey

CONSULTING REVENUES BY TYPE

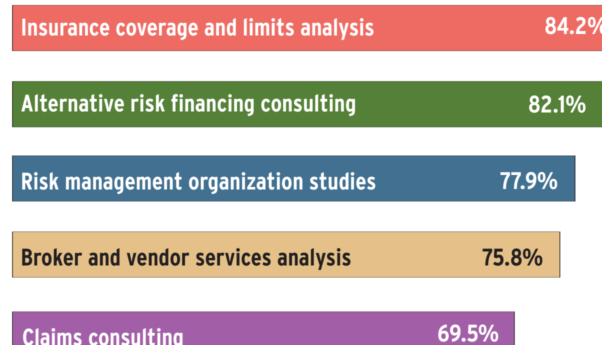
Percentage breakdown of revenue sources for all companies listed in the Directory of Risk Management Consultants



Source: *BI* survey

MOST COMMON SERVICES

Percentage of all companies in the Directory of Risk Management Consultants that provide each



Source: *BI* survey

Largest independent U.S. risk management consultants

Companies deriving a majority of their gross revenues from unbundled risk management consulting [1]

Rank	Company/Address	Telephone/Fax/Web site	2003 unbundled revenue from risk management consulting	Unbundled clients	Professional staff	Principal officer
1	RMI Consulting Inc. 20 Soundview Marketplace Port Washington, N.Y. 11050	516-767-7373 Fax: 516-767-7486 *www.rmiconsulting.com*	$11,400,000	500	31	MaryAnn Sackman, president
2	Bickmore Risk Services 1020 19th St., Suite 200 Sacramento, Calif. 95814	916-244-1100 Fax: 916-244-1199 *www.brsrisk.com*	$8,270,000	150	50	Linzie E. Kramer, president/litigation manager
3	J.H. Albert International Insurance Advisors Inc. dba Albert Risk Management Consultants 72 River Park Needham Heights, Mass. 02494-2631	781-449-2866 Fax: 781-449-5340 *www.albertrisk.com*	$7,800,000	600	34	Alfred H. Nagelberg, Stuart T. Cowart, co-presidents
4	Taylor Risk Consulting 16415 Addison Road, Suite 800 Addison, Texas 75001	972-447-2055 Fax: 972-248-1729 *www.taylorrisk.com*	$5,000,000 [2]	95 [2]	15	Michael Peachey, managing director
5	North American Risk Management Inc. 100 First Ave. S., Suite 266 St. Petersburg, Fla. 33701	727-287-1564 Fax: 727-287-1666 *www.narm.biz*	$4,900,000	138	53	H.R. Schade, president
6	Alpha Risk Management Inc. 60 Cutter Mill Road Great Neck, N.Y. 11021	516-829-3500 Fax: 516-829-6029 *www.alphariskmanagement.com*	$3,550,000	69	17	Herbert H. Feldman, president/CEO
7	Robert Hughes Associates Inc. 508 Twilight Trail, Suite 200 Richardson, Texas 75080	972-980-0088 Fax: 972-233-1548 *www.roberthughes.com*	$2,668,716	223	16	John R. Oakley, president
8	RCS Services 8550 Katy Freeway, Suite 123 Houston, Texas 77024	800-807-7475 Fax: 713-461-2457 *www.rcsservicesinc.com*	$2,300,000	230	10	Patricia McCall, president
9	Kevin F. Donoghue & Associates 190 High St. Boston, Mass. 02110	617-482-7015 Fax: 617-556-4030 *www.kfda.com*	$2,200,000	140	16	Kevin F. Donoghue, president
10	Insurance Buyers' Council Inc. & First Risk Management/IBC Inc. 9720 Greenside Drive, Suite 1E Cockeysville, Md. 21030	410-666-0500 Fax: 410-666-6177	$1,973,946	135	11	Adam P. Sielicki Jr., president/treasurer

1 *Business Insurance* defines independent consulting operations as those that are not owned by insurers or brokers. Companies deriving 50% or more of their revenues from actuarial, captive, environmental, property loss or safety consulting are not ranked 2 Estimated

Source: *BI* survey

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Sarbanes: COSO offers framework for compliance

Continued from page 10

oping recommendations to control it. After developing a set of internal reporting controls for public companies, COSO turned to the development of a framework to help organizations better manage risk on an enterprisewide basis.

A draft of COSO's "Enterprise Risk Management Framework" was released last year, and a final version is expected later this year. The enterprise risk management recommendations in the comprehensive draft, as well as the controls outlined in COSO's initial work, are providing organizations with guidance in complying with Sarbanes-Oxley.

Risk managers at companies preparing for Sarbanes-Oxley compliance "should be reading everything they can get their hands on," said James Kallman, executive vp at the National Alliance for Insurance Education & Research in Austin, Texas.

And the COSO report contains "valuable information and good ideas" that can help as companies work toward implementing the Sarbanes-Oxley requirements and developing systems that can keep them in compliance, Mr. Kallman pointed out.

Indeed, COSO "fits in perfectly" with the effort to comply with Sarbanes-Oxley, said Donald Watson, vp of enterprise risk at ACE Asset Management Inc., a New York-based unit of ACE Ltd.

The COSO framework details eight components that can be used to develop an enterprisewide program that experts say can help organizations to address the Sarbanes-Oxley mandates. The components cover: risk management philosophy; strategic, operational, reporting and compliance objectives; identification of factors that could lead to losses; risk assessment; loss control and risk sharing; response to losses; gathering and communicating information; and monitoring risk management programs.

"Enterprise risk management plays well to Sarbanes-Oxley, which is looking into internal controls," said William J. Kelly, director of PricewaterhouseCoopers L.L.P.'s Insurance Risk Management Solutions Practice in New York. "It's certainly a way for insurance and risk management to be a window into that whole issue."

"It would be a missed opportunity for the risk manager not to understand and see an important role in enterprise risk management and Sarbanes-Oxley, because both are interrelated," Mr. Kelly remarked.

Randy Nornes, managing director for Aon Corp. in Chicago, pointed out that a company's risks are linked so closely to its quality controls that the Sarbanes-Oxley issue of financial integrity is one "where a risk manager can dive right in."

Mr. Kelly explained that Section 404 is "first and foremost, focused on financial reports. From a risk management standpoint, there are immediate connections" between the financial-integrity requirements and such areas as self-insurance reserves, captive insurance company accounting and other insurance-related matters that could affect the company's financial disclosures.

Information and communication, which make up one of the COSO components, also play an important role in Sarbanes-Oxley compliance, Mr. Kelly stressed. Risk managers have to make sure management has sufficient information on a host of issues that include risk funding, claims reporting and liabilities that could impact financial security, he said. In addition, they must make sure the information is "enough to help them make informed decisions," he said.

The Securities & Exchange Commission endorsed the COSO framework as 'one that makes sense for addressing financial reporting.'

The COSO framework can help companies in that regard partly by providing guidance for developing communications procedures that can collect and channel information to the proper levels of an organization.

The Section 409 requirements also demand the creation of systems for controlling information, according to Mr. Nornes. The rules mean "you have to know things quickly," he said. "So you need a framework" to help develop a system for rapid dissemination of information, he said.

Mr. Watson of ACE said that COSO "sets out a framework that, I think, is a terrific set of core values." It is the "core of what I think enterprise risk should be," he said.

COSO's guidance on risk identification is well suited to the demands of Sarbanes-Oxley Section 404, Mr. Watson noted. The act makes it necessary to identify and articulate to management the key controls and processes for controlling risks.

What follows risk identification is an assessment, which entails asking, "Do we have the controls, and are we applying them correctly?" he said. The COSO framework is "an excellent building block" to establish an enterprisewide system to address those questions, Mr. Watson emphasized.

Lon V. Leneve, president and chief financial officer at Portland, Ore.-based Compli, which provides companies with an Internet-based enterprisewide compliance management system, said that companies working toward Sarbanes-Oxley compliance also should pay attention to the first set of controls that COSO developed to prevent fraudulent financial reporting.

He pointed out that the Securities & Exchange Commission, while not making a direct recommendation, has endorsed the COSO framework as "one that makes sense for addressing financial reporting."

Mr. Leneve cautioned, though, that the framework is "sort of a higher-level theoretical approach that needs to be converted to a practical approach. It's an opportunity for the risk manager to take it and find the best way to implement it into their company."

"You can't just take it and overlay it exactly," Mr. Leneve said of the framework. The components need to be understood and properly applied in an approach to building compliance with Sarbanes-Oxley, he noted.

Christopher E. Mandel, chief risk officer for the Risk & Insurance Management Society Inc., said that the same is true of COSO's enterprise risk management framework.

Mr. Mandel, who is a former RIMS president, has long been a proponent of the enterprise risk management approach. He said the COSO framework is well suited to guide an organization toward compliance with the act, but he emphasized that it is only a "starting point."

"I know some people who are actually applying it, in some cases wrongfully so, just as it is," Mr. Mandel said. "It needs substantial customization."

Mr. Watson said that to apply the COSO framework without customization wouldn't work. "It's too dramatic of a change in any organization," he said.

Mr. Nornes of Aon pointed out that the COSO framework, while it is helpful with regard to Sarbanes-Oxley compliance, is not the sole risk management means to that end.

"It's more common sense than rocket science," he said about building a framework to meet compliance. "It's taking things that people do intuitively and documenting them, then filling in the gaps that naturally occur."

There are some home-grown approaches that some companies have put together, Mr. Nornes said. "They put a team together, identify the risk and take action," he said.

"You can do it another way, but Sarbanes-Oxley is all about documenting processes," Mr. Nornes said. And whichever method an organization chooses to meet compliance requirements, it will have to answer any questions about its actions by laying out the process it used to make disclosures or other moves, he warned.

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Growth: More companies turning to ERM

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"Boards and executive management are far less tolerant of surprises today…because the rating agencies aren't tolerant, the media's not tolerant and their shareholders are not tolerant," he said.

William J. Kelly, a director with PricewaterhouseCoopers L.L.C. in New York, said he knows of no industry segment today that has not shown an interest in ERM.

Mr. Kelly said that, in addition to Sarbanes-Oxley, a soon-to-be published ERM framework developed by PwC for the Committee of Sponsoring Organizations, or COSO, detailing the essential components of ERM and the context in which they are effectively implemented, also is sparking interest in ERM. COSO is an organization created in 1985 by the National Commission on Fraudulent Financial Reporting to study the causes of financial reporting fraud.

"There's a lot of misunderstanding and lack of consensus of what ERM even is," Mr. Kelly said. "People have talked about holistic risk management for as many years as I've been around in the business, but it has meant different things to different people."

Even in draft form, the COSO framework has precipitated interest in ERM within the past year, he said.

But it wasn't always that way. ERM got its start in the banking industry in the mid-1990s, when regulators began looking at the industry's risk management practices as a means to promote more effective banking supervision and safer and more sound internal control systems, consultants say.

Because banks were in the risk-taking business and were familiar with credit and market risks, becoming more proactive on an operational risk level, while difficult from a cultural standpoint, was a natural progression, they say.

And it wasn't long before other industries began to take notice.

"The pioneers in this, obviously, were people in banking and other noninsurance financial services," said Thomas Conway, a partner with Ernst & Young's Insurance and Actuarial Advisory Services Group in Chicago. "But over the last several years, insurers have started to embrace this a little bit more, and there's a lot of different reasons for that," he said. "I think one of them clearly is a lot of the newer management in insurance companies is being brought in from other noninsurance financial services. So you've got people coming into the industry from banking, mutual funds and trading industries, and they're used to having those tools in place."

Helene Pouliot, a principal with Tillinghast in Toronto, said she is seeing more insurers improving upon their ERM processes because they see the benefits of doing so.

"Executives find that it's just good business management to do risk management," Ms. Pouliot said. "They find it gives them competitive advantage if they know and understand their business better, and they can also make better decisions with a risk management process in place. They find it's easier to assess merger and acquisitions with that process, and it helps them manage their capital better because they understand their risk better."

But it's not just the financial services industry that is enamored of ERM, consultants say. With the push toward better patient care and safety, hospitals, too, are embracing the ERM concept.

> **'Executives find that it's just good business management to do risk management.'**
>
> *Helene Pouliot*
> *Tillinghast*

"The motivating factor for ERM is primarily the push for patient safety initiatives and for hospitals and physicians to step up and take responsibility for medical errors that were not expected but were sometimes predicted," said Barry Couch, president of HealthSure Insurance Services, a Temple, Texas-based consulting company.

With the growth of ERM in the health care industry, HealthSure last fall launched HealthSure Consultants L.L.C., a sister company to assist hospitals in implementing ERM within their organizations.

"It just seems appropriate that ERM made its way to health care so that, from department to department and from the operating room all the way to the boardroom, we have a seamless recognition and acknowledgment that to err is human…but we should take responsibility for events that were not totally unexpected but did occur," Mr. Couch said.

Larry Smith, vp-corporate risk management services for MedStar Health Inc., was hired by the Columbia, Md.-based hospital system three years ago because MedStar wanted to take a more integrated approach to risk management.

"They did not see it simply as an office to purchase insurance and manage claims but an office where we were in a better position to quantify our risks and 'monetize' our risks…and then figure out the tradeoff in terms of insurance vs. self-insurance vs. other financial vehicles to get us where we needed to be," he said.

While Mr. Smith has not introduced a formal ERM program, he is incorporating ERM principles in the way risk management is evolving at the hospital system, he said.

For example, risk management recently was involved in the corporate decision to shut down one of its obstetrics practices, Mr. Smith said.

An assessment of MedStar's medical malpractice claims over a 10-year period revealed that obstetrics was the system's biggest risk area. While half of the $80 million MedStar paid in malpractice claims over that 10-year period was attributable to OB, OB represented only a small part of the hospital system's clinical practices, Mr. Smith said.

After translating the liability associated with OB into a per-delivery cost of about $400, executives determined that one of MedStar's OB centers should be closed down.

"That's where risk management was involved in the decision-making process in deciding whether a production unit should stay or go," Mr. Smith said. "It's a much different role than picking up the pieces once they are broken."

"Since then, with our board's support, we've initiated a very aggressive program in changing the way we do clinical care in OB," Mr. Smith said. The department chairs of the four hospitals that do obstetrics at MedStar were gathered together and told that, as production managers, they were responsible for producing a better and more cost-effective outcome when it came to liability.

"Every time they do that, they should be improving quality too, and, as they improve quality, they improve our visibility in the community and our reputation in the community and our ability to attract other physicians and nurses. It's a snowballing effect, and a lot of that came from concern over liability," Mr. Smith said.

Other industries also are embracing ERM, consultants say.

"A segment that I never thought would…be interested in ERM, and perhaps the hottest segment we have right now, is consumer products," Marsh's Mr. Chagares said. Within the consumer products industry, "there's commodity issues and supply chain issues, so if you're dealing with a company that makes a certain product and it depends on a certain commodity and it's global, then that's an interesting issue," he said.

The pharmaceutical industry also is interested in implementing ERM, Mr. Chagares said. From the time that the development of a new drug is proposed through its approval and appearance in the marketplace and the period of time that its patent is valid, there's "a tremendous future type of forward-looking risks inherent in that business," he said.

Companies, in general, "are becoming far more proactive and looking ahead and asking, 'How can we manage risks more proactively? How can we not be surprised?'" Mr. Chagares said.

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Consultants: Larger firms busy with ERM assignments

Continued from page 10

uated. "It's changed my landscape," he said.

Other large consultants say they too are busier with ERM assignments. But smaller, independent risk management consultants are not likely to see that business, said Jill Sherman, a consultant for T.E. Brennan Co. in Milwaukee and immediate past president of the Society of Risk Management Consultants.

SRMC members often operate small firms that may not have the resources to help clients implement enterprise risk management practices, Ms. Sherman said. Some independent consultants may be involved, though, depending on staff resources, she said.

Even if they are not working on enterprise risk management programs, independent consultants say they are plenty busy.

"With all of our accounts, we only have one (client) we are helping with true ERM," said James W. Barber, chief executive officer of Port Washington, N.Y.-based RMI Consulting Inc. RMI helped that client create its own ERM department.

RMI is ranked No. 1 among *Business Insurance*'s top 10 independent U.S. risk management consultants and ranked No. 7 in the overall risk consulting category. Its gross revenues generated by unbundled risk management consulting grew to $11.4 million in 2003 from $8.9 million in 2002.

The client that RMI helped to create an enterprise risk department is a large pension fund managing "tens of billions of dollars in assets," Mr. Barber said. Among other responsibilities, the ERM department helps the pension fund evaluate potential liabilities stemming from investment risks.

Many new accounts are turning to RMI for risk management consulting services because underwriters have increased their rates or curtailed coverage or because a client suspects that an insurer's claim denial is unreasonable.

"They don't look to get help from the person who sold them the insurance they are having the problem with," Mr. Barber said. "They look for an impartial party, and that is what is fueling the growth of insurance consulting."

Customers also are looking for help with the loss control recommendations underwriters make at renewal time. Underwriters today are making many more recommendations than they have at past renewals, Mr. Barber said.

"Some of those recommendations get pretty impractical," he said.

When an insurer insists on a costly change, RMI often looks for alternative loss control measures to appease the underwriter or helps the client find a different underwriter.

"You work on both (measures) simultaneously to see which produces a better result," Mr. Barber said.

Some consultants say they are busy with projects peculiar to the industry niches they serve.

Many companies in the oil and energy industry, for example, are in a growth mode fueled by mergers and acquisitions, said Gabriel Lugo, senior vp for Charles Taylor Consulting P.L.C. in Addison, Texas.

Consequently, energy companies and investment bankers participating in those mergers and acquisitions want help conducting due diligence analyses before participating in deals. They want help understanding the outstanding liabilities and risk transfer arrangements in place for potential acquisition targets, Mr. Lugo said.

That work is keeping the consulting company busier than a year ago, he added.

Because insurance rates are not softening, clients also are seeking help to self-insure or find alternative risk transfer mechanisms, Mr. Lugo said. Captive formation is popular for clients seeking an alternative, he said.

But risk managers say they first try to get as much value-added service as possible from their brokers.

"I'm trying to get all I can out of them for free," said Deborah Shulman, director of corporate risk management for SCAN Health Plan in Long Beach, Calif.

For example, a consultant provided by her broker, Lockton Cos. Inc., helps Ms. Shulman manage her workers compensation claims. But Ms. Shulman also contracts with The Paris Group L.L.C., a Marina Del Rey, Calif.-based risk management consultant. The Paris Group is installing a customized occurrence-reporting system, she said.

Jeff Huebner, manager of risk finance and captive operations for the California State Automobile Assn. in San Francisco, doesn't contract with independent consultants.

But Mr. Huebner insists that all his vendors—from brokers and reinsurance intermediaries to actuaries and captive managers—provide risk management consultations, he said. They can't just sell him one specific service without assisting with big-picture items such as developing and implementing a loss control strategy.

"If you can't add value beyond the transaction, then we don't want to work with you," Mr. Huebner said.

fine, thank you.

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Likely to evolve as nature of ERM develops

Chief risk officer role still being defined

By MARK A. HOFMANN

What's in a name?

When the name is "chief risk officer," the definition is far from uniform. While there's general agreement that chief risk officers can play an integral role in implementing enterprise risk management, there's no hard and fast rule as to exactly who performs the function. In fact, exactly what the function entails varies greatly from company to company.

Part of the reason for the nebulous role of the chief risk officer is that the nature of enterprise risk management itself has yet to be fully defined, pointed out John Roskopf, senior vp at Willis of Illinois in Chicago.

"The problem with the chief risk officer is that you have to adopt an enterprise risk management philosophy in order to have a chief risk officer, and that is something that is not real concrete, and the role of the chief risk officer is not really concrete," said Mr. Roskopf. "My experience has been that risk managers need to work harder at selling this concept to senior management; they have to sell it in terms of what are their deliverables going to be, what is the end product and what is the cost benefit."

"I think a lot of companies are still seeking. There's no clear picture yet of what a CRO is and what a chief risk officer should do," said Steven Brassem, vp-risk management for Hoofddorp, Netherlands-based MIH Group, an international communications company. "If you look at different companies, you would find a widely differing scope of functions."

Having someone carry out a CRO's duties is key to promoting enterprise risk management, said Mr. Brassem, whose responsibilities include developing and monitoring ERM for MIH. "It's specialization. It's not so much risk management itself; it makes sure that there is a common understanding of risk management processes within an international group. I think, definitely, that you need somebody special to take that responsibility. It's not something that you can just do on the side," he said.

"What you're seeing is the chief risk officer is the person who most exemplifies the main focus of the organization," said William J. Kelly, director at PricewaterhouseCoopers L.L.P. in New York. In a financial institution—and financial institutions have been in the forefront of designating CROs—the CRO tends to be someone with a market/credit or similar financial background, he said. In other firms, the CROs might have more of a technology background, he said.

"I think the function is necessarily a combination of different stakeholders in the organization. If they can effectively and efficiently come together, then whether or not there's somebody called a chief risk officer or not becomes academic. But if you want all those disparate groups to communicate effectively, sometimes it's necessary to first designate someone to make that happen," said Mr. Kelly.

"Especially in this economic environment, senior management needs to see what the cost benefit is, and they need to get their arms around the concept. Either risk managers aren't selling properly or senior managers have too narrow a perspective. One of the problems is that we tend to think of the role of CRO as a very huge, daunting task when, in reality, it can be very effective if taken in a series of smaller steps. You don't set out to conquer Mount Everest," said Mr. Roskopf.

"It doesn't matter who does it as much as it matters that it gets done. Right now, by and large, it is not getting done," he said.

"Enterprise risk management—ERM—has the potential of taking the art and science of risk management to a higher level and making a critical impact on an organization's bottom line and even on its very survival," said Richard G. Berthelsen. Mr. Berthelsen is director of risk management education at the American Institute for CPCU/Insurance Institute of America in Malvern, Pa. "Without ERM, the success of an organization could be as much dependent on luck as on hard work and skill. In many cases, it is the CRO who champions ERM. Without a CRO, many organizations that could benefit most from the holistic approach of ERM have been slow to implement it. Therefore, the CRO, as distinct from the CFO or COO, transcends compartmentalized thinking and can be

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CRO: Position of chief risk officer still being defined

Continued from page 18

critical to an organization's success," he said.

"In many organizations, it has been common practice for financial managers to control financial risk, risk managers to control operational property and casualty risk, and marketing managers to control market risk," said Mr. Berthelsen. "Rarely did these departments coordinate their risk management efforts. However, when the person responsible for risk evaluation in each of these departments reports to one person, the CRO, things change. The CRO can break down the traditional organizational silos within which each department viewed its risk in relative isolation. Then he or she can identify and analyze the risks caused by the interdependency among departments. Ultimately, the CRO can implement an integrated risk management approach for the entire organization. This integrated approach is ERM."

This approach is gaining popularity in the boardroom even though what ERM entails varies among companies, say observers.

"The enterprise risk concept has now started to get pushed down from the top by the board of directors, and there's a gap that's forming between the risk manager's perspective and the questions being asked about risk," said John Schaefer, vp-enterprise risk management for ABD Insurance & Financial Services in Redwood City, Calif. "That gap is essentially up for grabs. Some people, like risk managers, are trying to fill that gap; you have CFOs trying to fill the gap, you have auditors trying to fill that gap. The important activity, no matter how that organization is structured, is to have a way to coordinate the different perspectives, so that one person can answer the board's questions about what are the greatest risks facing the company and how are we dealing with those."

> **Someone with a CRO 'moniker could easily become a scapegoat for just about anything that goes wrong that can be easily classified as a risk issue.'**
>
> *Christopher E. Mandel*
> *Risk & Insurance Management Society Inc.*

Mr. Schaefer said he is not comfortable with the idea of the CFO serving as CRO. "The problem I have with a CFO assuming the role of a chief risk officer is that they may tend to look primarily at financial risks and not coordinate activities with other parts of the organization," he said.

"Too often risk management is concerned with managing oily rags by the furnace. Not that that's not important, but the other issues have much more to do with the financial viability of the company," said Willis' Mr. Roskopf.

Still, there's no universally accepted definition of what those issues are and who will handle them, noted Christopher E. Mandel, chief risk officer for the New York-based Risk & Insurance Management Society Inc.

"In many financial institutions—as an example where CRO titles are more common—CROs are often focused on financial risks like credit or currency or interest rates," said Mr. Mandel.

"In other industries, the focus is often different and related to the core operating focus of those companies. Frankly, these roles are all over the board and have very little consistency to them, allowing parishioners to define the roles consistent with the specific needs of the organization and culture of their companies," he said.

"Enterprise risk management is not just industry-specific but firm-specific," said Susan Meltzer, assistant vp-risk management Sun Life Assurance Co. of Canada in Toronto and, like both Messrs. Kelly and Mandel, a former RIMS president.

"Therefore, the basic duties of a chief risk officer necessarily have to be different," said Ms. Meltzer. "In my organization, we have a CRO, and I'll proudly say it's not me, because we need, in my industry, an actuary as our CRO—bottom-line requirement. By definition, that can't possibly be the CRO for Ford."

"The basic purpose of having a CRO isn't very different in any organization," she said. "To me, enterprise risk management is all about taking a disciplined approach to managing the specific risks of an organization. What's different from what a chief risk officer is doing from what the traditional risk manager is doing is perspective. The traditional risk manager is focusing on one aspect of risk, which is hazard risk, where the chief risk officer is trying to coordinate the company's approach to a portfolio of risk, which may or may not include financial risks," she said.

"Calling it CRO is kind of moot," said Ms. Meltzer. "Titles depend on the company, too. How can you, from the outside of a firm, impose a title? If a company doesn't have a chief legal officer, why should they have a CRO?"

Mr. Mandel said that being named chief risk officer can carry a few risks of its own.

"The issue of CRO as a title is one of some debate and controversy. While I'm sure few risk managers would not want to assume such a lofty title, it is, in my opinion, fraught with personal risk inasmuch as it implies that one with such a moniker could easily become a scapegoat for just about anything that goes wrong that can be easily classified as a risk issue. However, assuming it is a position well defined that focuses on process ownership and not risk ownership, it is both workable and desirable as a title and position. Obviously, it gets you higher in the food chain of authority and decision making, allowing you more ability to garner and direct resources where needed. It also sends a clear signal to other management that the management of risk is a high priority and a major function within the entity," he said.

PLUS: Lawsuits targeting banks

Continued from page 4

tiffs law firm Haskell Slaughter Young & Rediker L.L.C. in Birmingham, Ala.

"Banks became one-stop shops, with commercial and investment banks under one umbrella. If there was a conflict of interest, it was because of that development," he said.

However, the banks have also been targeted by investors because they are perceived as having the financial wherewithal to make the huge payments that investors' suits are seeking, said Brad Karp, a defense attorney and a partner at Paul, Weiss, Rifkind, Wharton & Garrison L.L.P. in New York.

Regardless of the factor driving the increased litigation, any insurers that offered broad E&O coverage to the banks face some catastrophic claims, noted Michael Mitrovic, president of the worldwide financial claims division at American International Group Inc. The New York-based insurer curbed its financial institution E&O coverage offerings several years ago, Mr. Mitrovic said in an interview after his presentation.

If banks are found to have devised financial transactions that were not properly disclosed in public documents—as suits often allege—the institutions and their insurers will be hit with huge damage awards at trial, he said.

"There is no exit strategy other than paying a substantial amount of dollars," Mr. Mitrovic said.

In some cases, the banks and their insurers are exacerbating their problems by refusing to settle the charges they face, said Mr. Weiss.

"They should get to the settlement table far sooner than they are. Our clients become more inflamed the longer it goes on," he said.

And given the changes in securities laws that allow institutional investors to take control of shareholder lawsuits, defendants face opponents that have the resources to aggressively seek substantial damages and that are under public pressure to secure large recoveries, Mr. Weiss said.

PLUS symposium on D&O draws 1,200 to New York

PLUS

NEW YORK—More than 1,200 people attended the Professional Liability Underwriting Society D&O Symposium, held Feb. 11-12 in New York.

Underwriters, brokers and other directors and officers liability insurance professionals attended sessions ranging from a statistical breakdown of D&O claims to discussions of litigation issues and industry trends.

Next year's symposium will be held Feb. 2-3 in New York. For more information, contact PLUS' Kristine Schmidt at 800-845-0778.

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Professional Liability Underwriting Society's D&O Symposium

Time not right to lower D&O rates, underwriters say

By GAVIN SOUTER

NEW YORK—Despite mounting pressure from buyers to soften rates, directors and officers liability insurers should push for more rate increases, a panel of D&O insurance executives says.

After several years of substantial hardening, D&O rate increases are now slowing and in some cases rates are falling, yet underwriters need additional premium to deal with increasing claims and exposures, they say.

Although D&O rates have increased substantially over the past several years, those rate increases are decelerating as more capacity comes into the market, according to several speakers at the Minneapolis-based Professional Liability Underwriting Society's D&O Symposium in New York earlier this month.

Yet D&O insurers continue to face huge liabilities, they warn.

There are more than 50 open securities lawsuits where plaintiffs are seeking more than $500 million in damages, said Greg Flood, chief operating officer at National Union Fire Insurance Co. of Pittsburgh, Pa., a subsidiary of American International Group Inc. in New York. "That's billions of dollars," he said.

And with the recovery of the stock market, D&O exposures are increasing, said Anthony Giacco, senior vp at Executive Liability Underwriters, a Hartford, Conn.-based unit of XL Capital Ltd.

"With the increased market caps we have with the rising stock markets, exposures are increasing. I can't see the logic in bringing down excess rating when market cap rises," he said.

Even with the rate increases of the past three years, D&O prices are still too low, said Robert Cox, senior vp at Chubb Specialty, a unit of Chubb Corp. in Warren, N.J.

In addition to general claims trends and increased exposures, rates also have to keep pace with claims inflation, he said.

D&O rates need to at least to be maintained at their current levels, said John Rafferty, vp and national D&O manager at Hartford Financial Products, a Chicago-based unit of Hartford Financial Services Group Inc.

"We've had 2003, which most might feel was an OK year, but it's ridiculous to think that we should be doing anything other than, at worst, holding the line," he said. "We've got to show discipline; one year of feeling a little bit better means nothing."

Even with the price increases of the past several years, D&O liability insurance provides the best coverage available for companies and their boards, said Mr. Cox of Chubb. "I don't see anything on the horizon that is going to be an improvement on the D&O policy," he said.

However, insurers and brokers need to concentrate more on what coverage boards of directors want rather than just focusing on the D&O coverage requirements of corporate entities, he said.

> **'With the increased market caps we have with the rising stock markets, exposures are increasing. I can't see the logic in bringing down excess rating when market cap rises.'**
>
> *Anthony Giacco*
> *Executive Liability Underwriters*

"Issues such as severability have much more relevance to directors than to corporate entities, yet most of our sales efforts are directed at corporate entities. At some point we will have to start asking the question: 'What do board members want?'" Mr. Cox said.

D&O coverage directed specifically at protecting independent directors rather than corporate entities will be demanded by more and more board members, predicted Michael Cavallaro, managing director of ARC Excess & Surplus L.L.C., a brokerage in New York.

Independent directors are sophisticated and often wealthy and they will require policies that offer them extensive protection in the face of increased corporate governance requirements, he said.

Brokers have an important role to play in ensuring that D&O programs are underwritten professionally, said Mr. Rafferty of Hartford. Brokers should approach the market with more realistic proposals for the lead primary insurer and excess insurer on D&O liability programs, he said.

"We are seeing disingenuous primary quoting going on," Mr. Rafferty said. Brokers are presenting programs led by insurers that the brokers know will ultimately not be able to take the lead on a program as a means of putting pressure on the insurers that do have the expertise to lead a program, he explained.

"All we want to do is deal on the merits of the issue," said Mr. Flood of National Union.

The session was moderated by Jeffrey R. Lattmann, managing director at Marsh Inc. in New York.

To be interactive, one has to know how to listen.

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Between the Lines

Compiled by Joanne Wojcik

Kerry's captive connection

Shortly before Sen. John Kerry, D-Mass., criticized former Vermont Gov. Howard Dean for trying to turn the state into "a snowy Bermuda" by promoting captive development there, Vermont regulators issued captive license number 657 to Heinz-Noble Inc., a captive formed by H.J. Heinz Co.

PHOTO: EPA/ANDREW GOMBERT

Ms. Kerry

Sen. Kerry's wife, Teresa Heinz Kerry, is the widow of Sen. John Heinz, a Pennsylvania Republican who was heir to the H.J. Heinz ketchup and condiment fortune. She inherited an estate currently estimated at more than $500 million when Sen. Heinz died in a 1991 plane crash. She married Sen. Kerry in 1995.

While Ms. Kerry is probably more interested in running the Heinz family's $1.6 billion philanthropic foundations than the company's risk management or risk financing functions, the connection is still ironic given the senator's apparent bias against captive insurers.

Birth of a lawsuit

A single mother of three is suing the doctor who delivered her last child, the hospital where it was delivered and a clinic that provided follow-up care, asserting the baby should never have been conceived.

Melinda Duran, a resident of Longmont, Colo., filed the medical negligence lawsuit in Boulder District Court on Feb. 1, naming Longmont United Hospital, her gynecologist and other doctors involved in a failed tubal ligation she underwent as permanent birth control in June 2001. A year later, Ms. Duran, 28, discovered she was pregnant.

Ms. Duran is seeking damages for medical costs, pain and suffering, and 18 years' of child care costs for her now 13-month-old son, Daniel, according to her attorney, Mark Herber, of Jorgensen, Motycka & Lewis in Longmont. She suffered complications during delivery that required a hysterectomy.

While more than 40 states have awarded damages for such a cause of action, none so far has awarded costs associated with child-rearing, he said.

Avian flu compensable in Singapore

The government of Singapore has added the deadly bird flu to its list of compensable occupational diseases under its workers compensation law.

Any manual laborer or nonmanual laborer earning less than $1,600 Singapore ($955) who contracts the disease in the course of employment can claim workers comp benefits, the Manpower Ministry said in a statement.

Avian influenza has spread to 10 countries in Asia, leading to at least 20 deaths in Thailand and Vietnam and the slaughter of millions of chickens across the region.

PHOTO: AFP

A worker picks up dead pigeons in Singapore.

Art imitating life's risks

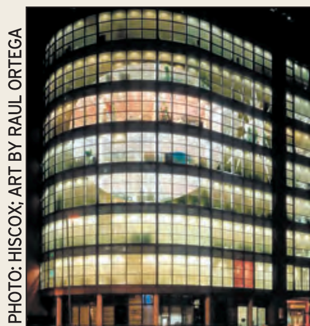

PHOTO: HISCOX; ART BY RAUL ORTEGA

The Hiscox Building in London was the site of an art exhibit recently.

Risk-related photographs, including one of a bomblike shape projected onto the Hiscox Insurance Co. building, were the talk of the town in London last week at an art exhibition hosted by the Lloyd's underwriting agency. Robert Hiscox, the company's chairman, is a patron of modern art and shares his collection with other fans at an art cafe.

Last week's exhibit also featured video installations, including one in which Hiscox employees revealed the biggest risks they had ever taken, from "getting my belly-button pierced" to "fleeing Tibet."

Tips and feedback from readers are welcomed. Please send information to jwojcik@businessinsurance.com.

Products & Services

Consumer-driven dental plans subject of book

AURORA, Colo.—A book designed to help benefit managers control costs using consumer-driven dental benefit plans is available from Dr. Michael D. Fisher of Dental Ingenuity, a dental benefits consulting firm in Aurora, Colo.

The book, "Direct Reimbursement," presents a cost-based examination of dental benefit plan performance, as well as case studies of employers that have used the consumer-directed dental plans.

For more information, contact Dr. Fisher at 303-617-1452 or *mfisher@dentalingenuity.com.*

Tool aids compliance with governance rules

CHICAGO—Open Text, an enterprise content management platform provider, has launched software to help companies comply with corporate governance requirements.

New features added to Chicago-based Open Text's Livelink system are designed to help companies provide the detailed risk and internal control assessments and data required under such laws as the 2002 Sarbanes-Oxley Act.

The enhanced features include the ability to produce Excel or extensible markup language documents by uploading information from existing databases such as Deloitte & Touche L.L.P.'s Risk and Control Knowledgebase. Another feature, Risk Register, allows users to identify, assess and monitor mitigation efforts for company risks.

For more information, contact Richard Maganini, director of public relations, at *rmaganin@opentext.com* or visit the company's Web site, *www.opentext.com.*

Database designed to detect claims fraud

ORANGE PARK, Fla.—Coppock Technologies Inc. has developed a Web-based database tool to detect claims fraud.

The online database, the Risk Management Indexing System, allows risk managers to enter information about their own claims into a database, which the system compares against claims entered by other organizations. The system flags similar claims—such as those involving a common claimant—and alerts users, who can communicate with each other about the claims.

More information can be obtained by contacting Chief Executive Officer Shawn Coppock in Orange Park, Fla., at 904-272-4800 or *coppocks@coppocktech.net.*

Highmark offers plan for expat workers

PITTSBURGH—Highmark Blue Cross & Blue Shield has launched a benefit plan for expatriate workers.

The BlueWorldwide Expat plan was designed for employees of U.S. and multinational companies who are working abroad for extended periods of time. Employees receiving health coverage through the plan can obtain such benefits as translation services, referrals to an international provider network, medical evacuation and help with currency conversion for payments.

For more information, visit the Pittsburgh-based company's Web site at *www.highmark.com.*

Risk map assesses exposures of overseas filmmaking

LOS ANGELES—Entertainment broker Aon/Albert G. Ruben Insurance Services Inc. has developed a risk-mapping tool to help movie production companies assess the risks associated with filming overseas.

When filmmakers shoot in foreign countries, they face a host of risks including crime, political risks and disease epidemics, said Chris Palmer, director of risk control for Aon/Albert G. Ruben in Los Angeles, during a teleconference announcing the launch of the new tool.

Aon/Albert G. Ruben's new risk map measures key elements of risk for each country including crime, organized crime and corruption, kidnap and ransom, disease, medical care, political risk and the overall threat level.

The map can be accessed at no charge at *www.aon.com/albert-gruben/globalfilmrisk.*

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Three explosions roil energy market

January losses of about $1 billion likely to affect rates but not capacity

By PETA MILLER
and SARAH VEYSEY

LONDON—Brokers and underwriters agree that a trio of energy losses in January—said to be the most costly to hit the market since 2001—will have an impact on rates rather than capacity.

There is less consensus, though, about whether prices will go up or down.

On Jan. 1, a gas plant in Moomba, South Australia, was shut down after suffering an explosion and fire caused by the failure of a heat exchange nozzle.

The coverage for the plant was purchased by Adelaide, Australia-based oil and gas producer Santos Ltd., the plant's majority owner. Coverage was subject to a deductible of $1.5 million Australian ($1.2 million) on the property part of the policy and a 45-day waiting period on the business interruption component, Santos said.

Munich, Germany-based Allianz Global Risks, the international operation of German insurer Allianz A.G. Holding, has confirmed that it led the policy with a 17.5% share of the program.

A spokesman for the company in London said he could not predict the eventual size of the loss.

And Munich Reinsurance Co. of Munich, insurer Wellington Underwriting P.L.C. of London and mutual Oil Insurance Ltd. of Bermuda have also confirmed they have exposure to the loss but have declined to reveal their line sizes. London-based insurer Hiscox P.L.C. and Zurich, Switzerland-based Swiss Reinsurance Co. are also believed to have shares of the loss, but both companies said they would not comment on individual losses.

Munich Re has reported that it is holding $320 million Australian ($252.0 million) in reserve for the loss, and, according to loss adjusting figures on a central London energy loss database, the latest insured loss estimate for the explosion is $291 million.

Within a few weeks, another explosion, this time at an Algerian gas plant, is believed to have caused a loss that sources say will exceed the $500 million limit on its insurance and reinsurance program.

The Jan. 19 explosion at the Skikda-based plant, owned by La Société Nationale Sonatrach, killed 23 workers and injured 74, the Algiers-based company said.

The three liquefied natural gas units of the plant destroyed in the blast were insured locally and reinsured internationally, according to sources.

Units of ACE Ltd. in Hamilton, Bermuda; American International Group Inc. in New York; and Munich Re co-led the reinsurance program, sources say.

According to market sources, the total loss is likely to amount to between $700 million and $1 billion.

A third loss hit the market a day

See ENERGY/page 28

PHOTO: NEWSPIX

A New Year's Day explosion and fire shut down the gas plant in Moomba, South Australia. Allianz Global Risks led the coverage on the plant.

Award for unforeseen psychiatric ills made in U.K. work bias case

By SARAH VEYSEY

LONDON—Employers may be liable for psychological injuries caused to claimants in discrimination cases even when that psychological damage is not reasonably foreseeable, according to a test case heard recently in the U.K. Court of Appeal.

In the case of *Laing Ltd. vs. Essa*, the Court of Appeal ruled that Yassin Essa, a construction worker, should be awarded compensation for injury to feelings as well as racial discrimination and financial loss.

Mr. Essa, who is black, was the victim of a single racially abusive remark while working for Laing Ltd. on a construction site in 1999.

As a result of the upset caused to him by this remark, Mr. Essa left work at the site immediately. He also claimed that he became clinically depressed because of the remark and was unable, as a consequence, to look for new work.

An employment tribunal awarded Mr. Essa three weeks' pay and ruled that any further loss he claimed to have suffered as a result of the incident—and the alleged clinical depression—was not foreseeable and, therefore, not recoverable from his former employer.

Mr. Essa took the matter to the Employment Appeal Tribunal, which ruled that Mr. Essa should be awarded damages for injury to feelings.

Laing then appealed that decision in the Court of Appeal.

The Court of Appeal ruled late last month that all that needed to be established for compensation to be due was a causal link between the discriminatory act and the psychiatric illness, and that it did not matter whether that illness was foreseeable.

The case could mean that discrimination claims prove more expensive for employers than previously expected, according to the London-based law firm of CMS Cameron McKenna.

"If there are unexpected and extreme reactions to even a single discriminatory act, an employer could be liable for substantial damages," the law firm said in a statement.

Storm series pounds parts of New Zealand

By ELIZABETH FRY

WELLINGTON, New Zealand—A fierce storm that lashed New Zealand's lower North Island last week likely caused $100 million New Zealand ($70 million) in insured damage, according to the Insurance Council of New Zealand.

PHOTO: EPA

Flooding stranded dairy cows in Foxton, New Zealand, last Tuesday.

But that figure could double after losses are tallied from a second storm that hit two days later and a third wave of heavy rainfall that began Saturday, according to David Smith, chief executive officer of Auckland-based IAG NZ Ltd., a unit of Insurance Australia Group.

The storms were "quick and furious," said Rian Vanschalkwyk, manager of Wellington Regional Council's emergency services. In the city of Wellington, winds peaked at 103 mph, he said. "Rainfall in the surrounding areas of Wainuiomata and Wairapa were at near-record levels," he said, with nearly a foot of rain falling in 48 hours.

"In the greater Wellington area, as in the rest of the lower North Island, the biggest problems were floods and landslides that closed state highways and (rail lines). Numerous bridges were washed away, water supplies were flooded for three days straight in some regions, and power was intermittent," said Mr. Vanschalkwyk.

Late last week, the Insurance Council estimated the first storms would result in $100 million New Zealand in insured damage. Of that total, about one-third would likely be related to business interruption, according to Chris Ryan, chief executive of the council.

Mr. Smith of IAG, who will become president of the Insurance Council in March, said it's particularly difficult to assess damage to farms, with heavy rain and winds continuing. Uninsured losses will also be significant, he said. "On average, the council estimates 25% of Kiwis are not insured. In some smaller communities, noninsured homes may be as high as 40%."

According to Mr. Vanschalkwyk, about 40% of the area's small businesses are either uninsured or underinsured.

World Updates

E.U. panel rejects quarterly reporting

The European Parliament's Economic Affairs Committee has voted down a proposal that would have required publicly traded companies to issue quarterly financial reports. The provision, contained in Article 6 of the proposed Transparency Directive, was opposed by insurer groups such as the Comité Européen des Assurances and the Assn. of British Insurers. In a statement, the European Parliament said the committee decided the requirement would "impose an unnecessary burden on companies and encourage management to focus on short-term profitability."

U.K. teachers' union warns of field trip risks

One of the United Kingdom's largest teachers' unions is advising its members not to take students on field trips because of the risk of litigation over accidents. Eamonn O'Kane, general secretary of the National Assn. of Schoolmasters & Union of Women Teachers, said in a statement that "in an increasingly litigious society which no longer appears to accept the concept of a genuine accident, our first responsibility must be to protect our members' interests."

ZFS returns to profit

Zurich Financial Services Group recorded net income of $2.1 billion for 2003, compared with a $3.4 billion loss in 2002. ZFS' 2002 result stemmed from investment losses and a $3.5 billion special charge related to restructuring, among other factors. Zurich, Switzerland-based ZFS' gross written premiums rose 18.1% in 2003, to $48.9 billion.

Converium posts double-digit gains

Converium Holding Ltd. posted net income of $185.1 million in 2003, a 73.3% increase over the previous year. Zug, Switzerland-based Converium said that the improvement stemmed from "stringent underwriting discipline and the current favorable environment." Converium, the former Zurich Re, recorded gross written premiums of $4.22 billion in 2003, up 19.5%. Investment income improved 4.1%, to $251.4 million.

Briefly noted

Hannover Re Group has successfully placed a bond issue of 750 million euros ($960.0 billion) in European capital markets. Proceeds will be used to buy back the $400 million of subordinated debt issued by its Wilmington, Del.-based subsidiary, Hannover Finance Inc., in 1999, among other things, the company said.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

Petition of Dan Yoram Schwarzmann and Douglas Nigel Rackham, as Foreign Representatives of La Metropole S.A.,

Debtor in Foreign Proceedings.

In the petition under Section 304

Case No. 03-17495-CB

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on January 29, 2004 the Honorable Cornelius Blackshear entered an Order for Relief giving full force and effect in the United States to the UK Solvent Scheme of Arrangement ('Solvent Scheme') of La Metropole S.A. ('Metropole'), and granting further relief as follows:

(a) all parties are enjoined from relinquishing or disposing of any property of Metropole, or the proceeds of such property, to third parties, except as provided in the Solvent Scheme proposed in the English Court, a copy of which is annexed to the Petition as Exhibit A;

(b) all parties are enjoined from commencing or continuing any proceedings (including, without limitation, arbitration, mediation or any judicial, quasi-judicial, administrative or regulatory action, proceedings or process whatsoever) against Metropole or any of its property, except as provided in the Solvent Scheme;

(c) all parties are enjoined from enforcing any judicial, quasi judicial, administrative or regulatory judgment, assessment or order or arbitration award and commencing or continuing any act or any action or other proceedings (including, without limitation, arbitration, mediation or any judicial, quasi judicial, administrative or regulatory action, proceedings or process whatsoever) to create, perfect or enforce any lien, set-off or other claim against Metropole or any of its property, except as expressly permitted in the Solvent Scheme;

(d) all parties are enjoined from invoking, enforcing or relying on the benefits of any statute, rule or requirement of federal, state, or local law or regulation requiring Metropole to establish or post security in the form of a bond, letter of credit or otherwise as a condition of prosecuting or defending any proceedings (including, without limitation, arbitration, mediation or any judicial, quasi judicial, administrative or regulatory action, proceedings or process whatsoever) and such statute, rule or requirement will be rendered null and void for such proceedings; provided, however, that nothing in the order shall in any respect affect any security in existence at the Effective Date of the Solvent Scheme (as defined in the Solvent Scheme) or the replacements for such security; and

(e) the Petitioners may conduct the Discovery Pursuant to Ancillary Proceedings.

United States counsel for La Metropole S.A. can be reached at the following address to answer any questions.

James C. McCarroll, Esq.
KRAMER LEVIN NAFTALIS & FRANKEL LLP
919 Third Avenue, New York, New York 10022
Tel: 001 (212) 715-9100
Fax: 001 (212) 715-8000

LEGAL NOTICE | **LEGAL NOTICE**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

Petition of Christopher John Hughes and Ian Douglas Barker Bond, as Joint Provisional Liquidators of

Kingscroft Insurance Company Ltd., Walbrook Insurance Company Limited, El Paso Insurance Company Limited, Lime Street Insurance Company Limited and Mutual Reinsurance Company Limited,

Debtors in Foreign Proceedings.

An Ancillary Case under Section 304 of the Bankruptcy Code

Case Nos. 92-B-41974 (PCB) through 92-B-41977 (PCB) and 92-B-44623 (PCB) Jointly Administered

NOTICE OF MOTION FOR MODIFICATION OF PERMANENT INJUNCTION PURSUANT TO BANKRUPTCY CODE SECTION 304(B) IN AID OF AMENDING SCHEME OF ARRANGEMENT

PLEASE TAKE NOTICE that pursuant to an order of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), a hearing will be held on March 19, 2004 at 2:30 p.m., or as soon thereafter as counsel may be heard (the "Return Date"), before The Honorable Prudence C. Beatty in Room 701 of the Bankruptcy Court, located at The Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004, to consider the motion (the "Motion") of the Scheme Administrators of Kingscroft Insurance Company Limited, Walbrook Insurance Company Limited, El Paso Insurance Company Limited, Lime Street Insurance Company Limited and Mutual Reinsurance Company Limited (collectively, the "Scheme Companies") for entry of an order pursuant to 11 U.S.C. §§ 105(a) and 304(b) modifying the Bankruptcy Court's Permanent Injunction Order, dated December 14, 1993 (the "Original Section 304 Order"), in order to encompass within its terms, and thereby give full force and effect in the United States to, the proposed Amending Scheme of Arrangement, dated December 5, 2003 (the "Amending Scheme") between the Scheme Companies and their respective Scheme Creditors, comprising General Scheme Creditors and Protected Scheme Creditors (as those terms are defined in the Amending Scheme).

The Scheme Companies currently are subject to a Scheme of Arrangement, dated September 8, 1993 (the "Original Scheme") and effective December 15, 1993. The directors of the Scheme Companies, including the Scheme Administrators, have proposed certain amendments to the Original Scheme, through the operation of an Amending Scheme pursuant to Section 425 of the Companies Act 1985 of Great Britain and, in respect of Mutual Reinsurance Company Limited only, Section 99 of the Companies Act of Bermuda. At separate meetings of General Scheme Creditors and Protected Scheme Creditors for each of the Scheme Companies, held on January 29, 2004, the requisite statutory majorities of each of those classes of Scheme Creditors approved the Amending Scheme, and a hearing to sanction the Amending Scheme is scheduled to be held before the High Court of Justice of England and Wales on February 24, 2004 and before the Bermudan Supreme Court on February 27, 2004. If sanctioned and implemented, the Amending Scheme will make certain amendments to the Original Scheme that would affect the rights and obligations of the Scheme Companies' Scheme Creditors, including the manner in which Scheme Creditors' disputed claims will be adjudicated.

By the Motion before the Bankruptcy Court, the Scheme Administrators seek to modify the Original Section 304 Order so as to extend its permanent injunction in order to implement the provisions of the Amending Scheme in the United States. Copies of the Scheme Administrators' Motion to Modify the Original 304 Order and the proposed Order granting the Motion, as well as copies of the Amending Scheme and the accompanying Explanatory Statement, including the proposed changes to the Original Scheme, are available to review and download from the Scheme Companies' website at www.kwelm.com. These documents also may be obtained by fax or written request to the Scheme Administrators' counsel at the address listed below.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion must be made in writing describing the basis therefor and shall be filed with the Bankruptcy Court electronically in accordance with the General Order M-182 by registered users of the Bankruptcy Court's electronic case filing system, and by all other parties in interest, on a 3.5 inch disc, preferable in Portable Document Format (PDF), Word Perfect or any other Windows-based word processing format, with hard copy to the Chambers of The Honorable Prudence C. Beatty, and served upon Cadwalader, Wickersham & Taft LLP, 100 Maiden Lane, New York, New York 10038 (Attention: Gregory Petrick and Ingrid Bagby), counsel to the Scheme Administrators so as to be received at 4:30 p.m., New York time at least three (3) business days prior to the Return Date.

Dated: New York, New York
February 11, 2004

CADWALADER, WICKERSHAM & TAFT LLP
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Attorneys for Christopher John Hughes and Ian Douglas Barker Bond, as the Scheme Administrators

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Dismissal: U.K. court OKs noneconomic damages

Continued from page 3

his colleague and line manager, which amounted to constructive dismissal, an employment tribunal ruled in May 2002.

The tribunal awarded Mr. Dunnachie £123,328 ($232,227), including £10,000 ($18,830) for injury to feelings. However, the award was reduced to £51,700 ($97,351), which at the time was the statutory cap for unfair dismissal claims. The city council appealed, and the employment appeal tribunal overturned the award for injury to feelings.

Mr. Dunnachie next appealed that ruling to the Court of Appeal, despite the fact that, having received the maximum award possible, he would see no financial benefit from his efforts. The Court of Appeal earlier this month reinstated the £10,000 noneconomic compensation award, ruling that it was "not excessive." The decision, though, gives the city council leave to appeal to the House of Lords, "in order that a definitive answer may be given."

"This was a bad case of workplace bullying, compounded by an equally serious refusal by management to deal with it. The blow to a conscientious employee's self-esteem which such treatment delivers may well be the unkindest cut of all, worse in many ways than the monetary loss," the decision states.

"There was no professional evidence that the distress and its effects had amounted to a recognized psychiatric condition, but Mr. Dunnachie had been reduced by his treatment to a state of overt despair," the decision notes.

In a statement, the Kingston upon Hull City Council said: "The court has given the city council leave to appeal because the case is considered to be a very important point of law. The council now needs to consider its position to determine whether or not it will lodge an appeal to the House of Lords, and it has three months to decide."

The decision marks a significant change in employment law.

"Previously, injury-to-feelings (awards) were only made in cases of discrimination. Now, injury-to-feelings awards can be made in cases of unfair dismissal where there has been real injury caused to an employee due to the manner of the dismissal," according to the law firm of Samuel Phillips & Co.

Such damages "will not be awarded as a matter of course. It is likely to arise in cases of constructive dismissal where there is evidence of bullying or harassment that drives an employee out of his job," according to a statement issued by the Newcastle upon Tyne, England, law firm.

The development "will have widespread implications for other cases of unfair dismissal," according to Dave Prentis, general secretary of the London-based trade union UNISON.

Court of Appeal, (2004) EWCA (Civ) 84, decided Feb. 11, 2004.

Study finds consumer plans help to reduce health costs

By JOANNE WOJCIK

Enrollees in consumer-directed health plans are more likely to be older and sicker, not young and healthy, as many benefits experts had expected, according to evidence presented at a recent Galen Institute briefing in Washington.

Furthermore, the utilization of preventive services increases by as much as 60% for those enrolled in these new plans.

Despite these facts, consumer-directed plans do, in fact, lower costs for employers, according to the findings of several health plans presenting at the briefing.

"Accusations that those selecting consumer-directed health plans are the 'healthy and wealthy' just don't hold up against actual experience," said Greg Scandlen, director of the Galen Institute's Center for Consumer Driven Health Care, in a statement.

"Workers who are older and more likely to need health services see greater value in the control they get over their health choices. And they aren't skimping on preventive services but are making wiser choices on discretionary expenses, are reducing emergency room and outpatient visits and are using generics more often," he said.

Among other findings presented at the briefing: patients chose generic prescription drugs up to 50% more often; and satisfaction and re-enrollment rates are high, up to 98%.

The briefing—"Reports from the Field about Consumer Choice Health Care"—held Feb. 11 in Washington, included presentations from Aetna Inc., Definity Health Corp., Destiny Health, Assurant Inc., Lumenos Inc. and Vivius Inc.

The Alexandria, Va.-based Galen Institute is a not-for-profit research organization devoted exclusively to health policy.

Presentation details are available online at *www.galen.org*.

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Energy: Losses will have impact on rates

Continued from page 25

later, when an explosion ripped through a chemical factory in Surabaya, Indonesia's second-largest city. The insured loss estimate for the plant, which is owned by P.T. Petro Widada, a unit of the Indonesian chemical firm P.T. Petrokimia Gresik, is expected to total $75 million, according to the energy loss database.

These three events mean the energy market has already racked up almost $1 billion in insured losses in the first month of the year—more than half the current total loss figure for 2003. That figure is estimated at around $1.7 billion, according to London-based Aon Ltd.

But Tim Fillingham, chairman of Aon Limited Energy, a unit of Aon Ltd. in London, said he does not necessarily believe this will put an end to the market softening seen at the end of last year.

Because of the limited number of insurance companies involved in the losses, those that do not have a share may take this opportunity to bid aggressively for choice risks, Mr. Fillingham said, noting that there is already some evidence of this happening.

"It appears that the losses are in the hands of fewer people, which raises interesting issues," he said.

If the losses blow through the reinsurance programs of the insurers involved, they might have to reinstate the programs by paying further premiums, he said.

Those insurers may then attempt to raise rates in a bid to find the money to pay the additional premiums, he noted. But other insurers, those without these losses on their books, may see this as a competitive opportunity to bid for what they perceive as the best risks.

"We are seeing signs of underwriters clearly differentiating between the good clients and the worse ones," Mr. Fillingham said, adding that "underwriters will target those risks and are being very aggressive."

Stuart Brown, managing director of Swiss Re's capital solutions practice for energy, though, said he believes these losses could act as a "reminder" and push rates back up.

And one London-based energy underwriter who did not want to be identified said that while rates had been softening for onshore energy business at the start of the year, "some people are now saying they will have to dramatically rerate the book" in the wake of the losses.

Capacity in the energy market at the start of the year was "comfortable" for clients, and there was some softening in prices and rates, Mr. Brown said.

And he said that while there were no major losses in 2003, "these two coming right after one another, seem to have been a wake-up call for market participants."

"It is early to tell because deals now being priced were submitted before the end of the year, but there is lots of talk about prices stabilizing or even firming," Mr. Brown said.

For the majority of risks, there is sufficient capacity, Mr. Fillingham said. And research conducted by Aon Ltd. revealed that, for most lines of energy business, working capacity has increased from last year's levels.

The London energy underwriter said that the energy market capacity at the beginning of the year increased, probably because of capacity coming in from Bermudian companies.

Benjamin Gentsch, executive vp for specialty lines for Zug, Switzerland-based Converium, said the reinsurer regards much energy business as still underpriced, particularly for a line of business that the company considers to be "volatile." Converium, he said, participates only to a very small degree in energy reinsurance for this reason.

401(k): Transaction cutoff

Continued from page 1

Furthermore, implementation of the rule could be costly, opponents say.

R. Keith Overly, executive director of the Columbus-based Ohio Public Employees Deferred Compensation Program, estimates the rule could cost his self-administered plan $250,000 in recordkeeping software and hardware upgrades and in changes to its forms and other written documents.

Employers who submitted comments to the SEC opposing the 4 p.m. "hard close" include: Palo Alto, Calif.-based Sun Microsystems Inc.; Santa Clara, Calif.-based Intel Corp.; Hoffman Estates, Ill.-based Sears, Roebuck & Co.; Plano, Texas-based J.C. Penney Co. Inc.; and New York-based Viacom Inc.

An SEC spokesman said a public meeting would be held once staff members develop and present their recommendations to the SEC commissioners. No date has been scheduled for the meeting, said the spokesman.

Meanwhile, in response to recent mutual fund scandals that have rocked the industry, Congress is also considering several bill that address the issue.

The SEC says its current rules have failed to prevent late trading, an illegal practice that involves placing an order to buy or sell a fund share after normal market hours—or 4 p.m. EST. Late trading enables a trader to profit from market events that occur after 4 p.m. and are not reflected in the day's closing price.

Under the current system, employees who participate in qualified retirement plans have until 4 p.m. EST to submit their investment orders. Plan administrators and recordkeepers then audit, reconcile and batch that day's plan transactions before sending the data in a single file to the relevant mutual fund companies, in a process that takes several hours.

However, under the proposed SEC rule, the mutual fund companies or their designated transfer agents would actually have to receive the orders by 4 p.m., meaning plan sponsors need to receive participants' orders much earlier in the day.

This change, plan sponsors and others contend, would put 401(k) plan participants at a disadvantage to other investors because unless the order is placed several hours before the close of trading, it will take at least an extra day to execute orders.

By contrast, individual investors still would be able to execute a trade right up until the 4 p.m. deadline, they say.

"It's unfair to our associates," because they would in essence have to place their orders between 9 a.m. and 10 a.m. EST, said Bruce A. Hill, J.C. Penney's senior vp and director of human resources and administration. Plan participants should not be put at a disadvantage just because they are not self-employed, he said. There "should be an equal playing field," he said.

The rule "will relegate our participants to second-class-investor status," said Ohio Public Employees' Mr. Overly. Other investors will have "much more flexibility," said a Sears spokesman.

NDDC Executive Vp Albert E. Brust said the SEC proposal would be a "step back in time," because the industry worked for many years to enable transactions to be executed on a daily basis.

Delaying trades creates an additional risk should there be a change in the market, and "we don't think you should be putting this additional risk on participants when, frankly, they had nothing to do with the abuses with trading after hours," said Judy Schub, managing director of the Bethesda, Md.-based Committee on Investment of Employee Benefit Assets, which is part of the Assn. of Financial Professionals.

Furthermore, mutual funds that offer plan administration services will still be able to offer same-day trading, which will give them a competitive advantage over independent administrators. This could drive others out of the business, and the subsequent reduction in competition will ultimately lead to higher costs for plan participants, she said.

Not all employers oppose the change, though.

Howard Whitehead, general manager-human resources for Smyrna, Ga.-based Murata Electronics North America Inc., said he favors the 4 p.m. hard close.

"I think the key for us, from a plan sponsor's perspective, is we need to be able to assure our employees that they're being treated as fairly as anyone," including those who are putting money into mutual funds. The government is stepping in because the mutual fund companies have failed to come up with an equitable solution of their own to the problem of late trading, Mr. Whitehead said.

A day's delay placing an order should not make a significant difference to plan participants, because usually they invest for the long-term, he said.

Observers say they are unsure whether the rule will be implemented as it stands.

Aliya Wong, director of pension policy at the U.S. Chamber of Commerce in Washington, which opposes the proposal, said, "I think they will probably move away from the 4 o'clock hard close to some extent—probably not as far as most people would like," though.

Jan Jacobson, director of retirement policy for the Washington-based American Benefits Council, said the SEC might wait for Congress to act before issuing a rule.

In November, the House passed H.R. 2420, the Mutual Funds Integrity and Fee Transparency Act of 2003, which was introduced by Rep. Richard Baker, R-La. This comprehensive bill includes an exception to the hard close for intermediaries who have procedures in place designed to prevent the acceptance of late trades, such as time stamps that indicate when the order was placed. Intermediaries would also be subject to an independent annual audit.

The Senate, though, is considering its own bills on the mutual fund industry, and the Senate Banking, Housing and Urban Affairs Committee has scheduled related hearings, Ms. Jacobson said. If the Senate does pass its own version, any differences with the House bill would have to be reconciled, she said.

"I think (the SEC) may wait for legislation if it appears legislation is going to happen this year," she said. "If it doesn't, they may feel pressured to provide a rule to eliminate late trading, so they could come up with the hard close," said Ms. Jacobson, who said the council favors a technological approach such as the one proposed in the Baker bill.

Coverage: Recision approved

Continued from page 3

deceive" during the underwriting process for the 2001 through 2003 policy periods, according to the decision. These misrepresentations alone constituted grounds for Genesis' recision, she ruled.

Furthermore, the judge found that the policy's severability provision did not bar the insurer from rescinding coverage for all Cutter & Buck officers and directors, as an officer who signed a renewal application was aware that it contained misrepresentations.

Steve Lowber, a former Cutter & Buck chief financial officer who signed the coverage renewal application, in 2003 pleaded guilty to wire fraud related to false information in the company's earnings restatements, according to court documents.

"The language in the severability of application provision allows for only one reasonable interpretation," Judge Pechman wrote. "Under this interpretation, Steve Lowber's knowledge of the material misrepresentations in the renewal application is imputed to otherwise innocent directors and officers because Lowber signed the renewal application."

Over the years, D&O insurers in marketing policies have maintained that severability clauses protect innocent directors and officers, said Michael A. Rossi, an attorney at Insurance Law Group in Glendale, Calif.

But during the past two years, some insurers have argued in coverage disputes that exclusions also apply to innocent directors and officers in coverage disputes, said Mr. Rossi, who specializes in advising commercial policyholders. Therefore, it has grown increasingly difficult to negotiate severability/nonrecision clause wording guaranteeing that insurers will not rescind for innocent directors and officers, Mr. Rossi said.

He said he advises clients to push for language stating that the insurer can rescind coverage only for those who have knowledge of material misrepresentations.

Because recision disputes are difficult to win in court and they generate bad publicity, Genesis pursues them only when absolutely necessary, said Kevin LeCroix, president of Genesis Professional Liability Managers, an underwriting manager in Cleveland.

"We only pursue them when we feel that is the responsible thing to do, given obligations to our capital backers," Mr. LeCroix said.

Cutter & Buck did not return calls seeking comment. The company stated in a press release that it is disappointed by the ruling and is weighing its options, including an appeal.

Cutter & Buck Inc. vs. Genesis Insurance Co.; U.S. District Court for the Western District of Washington, No. CO2-2569P.

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Bugs: Bloodsuckers bedevil hospitality industry

Continued from page 1

$186,000 in punitive damages, which generally are not insurable, after finding the hotel management had done little or nothing to address the problem, of which it had been aware since 1998.

Accor's risk manager declined to comment on the litigation.

The negative publicity such claims generate also poses a reputational risk to the hotels involved. To draw attention to the scourge, the plaintiffs and their lawyers in the New York case, Franks & Sattler L.L.P., held a press conference announcing the suit just before Christmas.

Steven Eckhaus, an attorney at Eckhaus & Olson in New York representing Helmsley Enterprises Inc., called the suit "a publicity stunt," but he declined to comment further.

"If you're in the hotel business and talk about bedbugs, no one will want to go to your hotel," said Dr. Charles R. Kelley, director of sales-special markets in charge of risk management at Outrigger Enterprises Inc. in Honolulu. "It's like talking about food poisoning in the restaurant industry."

Dr. Kelley, who is also a medical doctor, has published a booklet and developed a training program to educate Outrigger hotel managers and employees about the problem. "We have dead bedbugs in jars that we take around and show the housekeepers so they learn to identify the problem quickly," he said.

He also has established a relationship with a local exterminator.

Although Outrigger, which operates 49 hotels in the South Pacific, has not yet been sued, "we've been threatened," Dr. Kelley said.

Outrigger averages 17 complaints a year in Hawaii alone, he said. To prevent litigation, the hotel chain has reimbursed guests for medical treatment, the cost of their stays and, sometimes, transportation, including airfare.

Unfortunately, Outrigger's liability insurer doesn't pay for any of these costs because the chain, like many sizable businesses, has a large deductible, Dr. Kelley said.

While Dr. Kelley is taking an aggressive stance in addressing the problem, other hotel risk managers say it is not a big enough risk to keep them up at night.

"Of all the claims we've received over the last 12 months, I have not seen any related to bedbugs," said Lance Ewing, vp-risk management at Caesars Entertainment Inc. in Las Vegas and president of the Risk & Insurance Management Society Inc.

> **'If you're in the hotel business and talk about bedbugs, no one will want to go to your hotel. It's like talking about food poisoning in the restaurant industry.'**
>
> *Dr. Charles R. Kelley*
> *Outrigger Enterprises Inc.*

"We have not had a rash of those kinds of claims," Mr. Ewing said, adding, "No pun intended."

Brad Wood, vp of risk management for Marriott International Inc. in Bethesda, Md., said if there have been claims, none has been large enough to come to his attention. But Mr. Wood said he has heard it discussed as a topic in the hospitality industry.

"It's something that certainly one has to pay attention to, and one has to train people on what to look for," said David Mikulina, assistant vp of risk management at Hyatt Corp. in Chicago. "You want your people to be aware of what it is, like anything else that could be amiss. Awareness is what you're training for."

Mr. Mikulina added that the bedbug problem is not exclusive to the hotel industry.

Indeed, exterminating companies nationwide say they're receiving more calls than ever concerning bedbugs, which, by and large, have not been a problem in the United States since World War II.

"We've had infestations in 35 states," said a spokeswoman for Atlanta-based exterminator Orkin Inc. The company's Web site describes how widespread the bedbug problem has become: "Bed bugs, best known for their part in a charming nighttime rhyme, are making a resurgence in the United States. This resurgence first occurred in hotels, followed by infestations in homes, apartments, college dormitories, condominiums, aircraft and even cruise ships."

Although there is no way to determine the actual cause of the resurgence, the National Pest Management Assn. in Dunn Loring, Va., is attributing the increase to several things, which include global travel and the mobility of the pest. Bedbugs are extremely movable, hitchhiking on clothing, bedding and suitcases.

Adult bedbugs, scientifically known as *Cimex lectularius Linnaeus*, are about the size of a small ladybug and are brown, flat, oval and wingless. They subsist on human blood, though they can survive for as much as a year without a meal, and their bites cause itching and irritation.

"There are many hoteliers unaware of the bedbug problem," said Outrigger's Dr. Kelley, who warned that "they can be there for a while before it becomes a real nightmare."

Photo: David Almquist, University of Florida

Legislation: Med mal

Continued from page 4

invoke cloture on S. 2061 would probably kill medical malpractice reform in the current Congress.

Supporters of class action reform see no reason to panic over the schedule change.

"We're always concerned about delay relating to good legislation that will help the business community," said Lance J. Ewing, president of the New York-based Risk & Insurance Management Society Inc. "However, the advantage to us is that we now have time to continue our lobbying efforts," said Mr. Ewing, who is also vp-risk management for Caesars Entertainment Inc. in Las Vegas.

"I'm not trying to attach any great significance to it," said Melissa Shelk, vp-federal affairs for the American Insurance Assn. in Washington. "Medical malpractice has been an area of great interest to the leadership, and (Sen. Frist) did say he was going to bring up something this year. This bill is targeted at ob/gyns only," she said.

"I don't think there's a lack of interest on the part of the leadership" on continuing to push for class action liability reform, said Ms. Shelk.

The delay did not bother Sherman Joyce, president of the American Tort Reform Assn. in Washington. "The leadership is committed to both health care liability as well as class action reform," he said. "At this point, the highest levels of the Senate leadership are trying to resolve scheduling matters. Our understanding is that they're committed to trying to enact legislation in both areas."

Charles Taylor, assistant vp-government relations for the Property Casualty Insurers Assn. of America in Washington, noted that some proponents of class action reform fear that foes will attempt to kill the bill by attaching nongermane amendments to it. The current version of the class action bill, S. 2062, incorporates compromises worked out late last year between the Senate leadership and three Democratic lawmakers who had initially opposed the measure. The addition of those three Democrats meant that 62 senators—two more than necessary for cloture—at least nominally supported the bill. An attempt to invoke cloture on the bill last fall failed by a single vote (*BI*, Oct. 27, 2003).

But Mr. Taylor pointed out that some Democratic opponents of the bill have already said they might attempt to add to the bill amendments dealing with unrelated issues, such as the minimum wage and the extension of unemployment insurance benefits, in hopes of scuttling it.

"I think the Republican leaders would somehow like to work with the Democrats" to keep those amendments out of play, he said. "That is certainly our hope. Frankly if the bill were to go to the floor and one or two or more of those amendments get tacked on, it might sidetrack the bill. We hope this won't sidetrack the bill, we hope that the leaders of both parties are able to come to some agreement," said Mr. Taylor.

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Trial: WTC broker testifies on selection of form

Continued from page 1
"occurrence" and the Travelers' form does not, Mr. Boyd told the court that he did not ask Travelers for a definition of that term to be included in the Travelers form.

Mr. Boyd said he was not familiar with the Travelers form so he asked colleagues for their opinions. His colleagues told him the Travelers form was restrictive and difficult and advised him not to use it. He said he then tried to convince Travelers to use the Wilprop form, but Travelers insisted on using its form, though the company did agree to make technical amendments to its form, if necessary.

In an e-mail sent the morning of July 12, Mr. Boyd asked his colleagues if any of them had compared the Travelers and Wilprop forms. He said he had decided to use the Travelers form and wanted to find any provisions that would be problematic for his clients.

Lawyers for Swiss Reinsurance Co. and the other insurers questioned why Willis' Timothy Boyd told his London brokers to use the Travelers policy form, even though his own colleagues had concerns about the form.

"I was getting some flak from my colleagues that the (Travelers form) was not the best form for our clients," he said.

That afternoon, Mr. Boyd sent them another e-mail saying he was switching to the Travelers form despite their concerns to fulfill the lending requirements of Silverstein's lender, General Motors Acceptance Corp.

Lawyers for Swiss Re and the other insurers questioned why Mr. Boyd told his London brokers to use the Travelers form, even though his own colleagues had concerns about the form. Mr. Boyd responded that he decided to switch the form because Silverstein needed Travelers to fill gaps in various coverage layers while satisfying GMAC's demand for insurers with minimum AA ratings from Standard & Poor's Corp. He also testified he could not wait for the results of an internal review of the form because coverage needed to be in place prior to the closing deadline.

"We were rapidly approaching the deadline," Mr. Boyd said. "I didn't have the luxury of a lot of time."

Willis formally bound insurance authorizations on July 17, with the coverage effective July 19, according to Mr. Boyd. He testified on differences between the policy conditions referenced in the Willis binder and the Wilprop form that Silverstein lawyers argue is evidence that the Wilprop form was no longer being used. Mr. Boyd also noted that he underlined, italicized and set in bold the name "Travelers" in subsequent documents to underscore the fact that Travelers was the lead insurer.

Lawyers for the insurers challenged Mr. Boyd on several fronts, including why he did not inform representatives of WTC owner the Port Authority of New York & New Jersey, GMAC and Silverstein lease partner Westfield America Inc. about the switch to the Travelers form. He testified he did not tell them because he understood Silverstein to be the lead insured for the transaction. He said he sought and received approval to make the switch from Silverstein's risk manager, Robert F. Strachan.

He was also confronted with several e-mails that lawyers for the insurers contend demonstrate the decision to use the Travelers form was not finalized. In a July 20 e-mail to a third-party underwriter, Mr. Boyd said Willis was having some issues with a different insurer and might need to replace the insurer. In the e-mail, he attached the original underwriting submission, which included the Wilprop form.

Mr. Boyd maintained, though, that he sent the entire original submission as a matter of consistency and that the Wilprop form was off the table at the time. He also said he told the underwriter the Travelers form was being used during phone conversations. He stated that though details of the Travelers form were still being worked out, Travelers' form was the operative form, per Travelers' demand.

Mr. Boyd also sent an e-mail July 25 to Paul Blackmore, a senior broker for Willis in London working on the Silverstein placement, telling him Willis had been trying to weed Travelers out of the program up until the last minute of binding. Mr. Blackmore is scheduled to testify after Mr. Boyd.

Mr. Boyd testified that the statement to Mr. Blackmore was not entirely accurate and was merely a response to a criticism from Mr. Blackmore about not receiving key documents from Mr. Boyd before that day. Mr. Boyd added he had studied the impact of removing Travelers from the program earlier that month but realized this would leave too many coverage gaps.

He also acknowledged Willis received two revised binders from other insurers on the WTC program, Bermuda-based ACE Ltd. and XL Capital Ltd., that referenced Wilprop as the policy form in late July and early August. While Mr. Boyd said he told a colleague that the forms needed to be fixed, he admitted he did not seek to have ACE and XL switch to the Travelers form because he was waiting for the modifications to the Travelers form to be completed.

Earlier last week, Peter Lefkowitz, an employee of the Harbor Group, a company that performed insurance reviews for GMAC, testified GMAC never required the policy to be written on a particular form, which was not unusual because several forms would have satisfied its loan requirements. "It didn't matter what form it was on," he said.

Mr. Lefkowitz said he was shown a copy of the Wilprop form during a meeting July 9 and was told it was going to be used for the marketing of WTC insurance, but he was not aware of the Travelers form until after Sept. 11, 2001. He said he asked Mr. Strachan for a copy of the policy form on the morning of Sept. 12, 2001, but Mr. Strachan told him it was not finalized and that Travelers was being difficult because they wanted to use their own form. He told Mr. Strachan to fax him whatever documents he had and later received a fax from Mr. Strachan that included portions of the Wilprop form. During that conversation, Mr. Lefkowitz said he asked Mr. Strachan if he had considered the implications of two occurrences. He quoted Mr. Strachan as saying, "No, I never thought of that."

Also testifying last week was Beth Ann Hermann, GMAC's director of insurance operations at the time of the attacks. She said she was asked to call Mr. Lefkowitz about the insurance situation on the WTC complex. Although she admitted taking notes during their conversation, she testified she could not recall if Mr. Lefkowitz told her that Mr. Strachan was faxing the policy form and whether that form was the Wilprop form. She also participated in several conversations over the ensuing days about the coverage situation but testified that she had no recollection of the details of these conversations.

Outside the presence of the jury, the judge asked her whether she was told by anyone not to have any recollections of these meetings or to have as few as possible. Ms. Hermann said she was told to be as honest and truthful as possible.

PHOTO: AP

The 16-acre site where the World Trade Center stood is scheduled for redevelopment.

PBMs: Discounts, rebates eyed

Continued from page 4
the program for the state of New York, is making extra money at the expense of our members."

Express Scripts would not comment directly on the litigation, but a spokesman did say the company "has complied with the provisions of our contract with the state of New York in delivering lower costs on prescription drugs to our clients."

Whether PBMs have a fiduciary responsibility is an issue that nine state legislatures have taken up since 2003, according to the Pharmaceutical Care Management Assn., the Washington-based trade group representing PBMs.

Maine is the only state so far that has enacted legislation that extends fiduciary duties to PBMs. That law, among other things, requires PBMs to pass rebates on to customers and to disclose financial terms between PBMs and drug manufacturers.

But in September, the PCMA sued the state, seeking to overturn the law.

"Most importantly, (Maine's law) gives a huge advantage to the big drug companies because they'd be able to know our negotiating and pricing strategies with all their competitors, which in the end…would mean higher drug prices for consumers," said Mark Merritt, president and chief executive officer of PCMA.

When asked whether employers should be privy to such information, Mr. Merritt said: "A client is going to get what they want. If they don't get it from one of our PBMs, they're going to get it from another PBM."

In one of the latest examples of PBM transparency, Medco Health has agreed to pass along all to Rx Collaborative, Towers Perrin's latest employer coalition, all of the coalition's discounts and drug rebates.

Under the deal, Rx Collaborative will pay Medco a flat rate based on the number of members in a particular health plan, Towers Perrin confirmed.

Neither firm would comment further about the arrangement.

Whether fully passing through pharmacy discounts and drug rebates to plan sponsors will resolve the contentious issue remains to be seen, but observers do have some concerns with the approach.

If PBMs were to walk away from rebates, they would have to demonstrate some other value added to plan sponsors, said Patricia Wilson, a health consultant with Associates & Wilson in Rosemont, Pa., which helps employers contract with PBMs. "That's slightly problematic for PBMs because, for a lot of them, that's not what they do. They're not attempting to safeguard patient health, and they are not necessarily attempting to get patients on the lowest-cost appropriate product," she said. "It's difficult to demonstrate value because that's not where their mind-set is at."

"It's a difficult proposition going forward, and I think that's what Towers Perrin is trying to get at," Ms. Wilson said.

"One of my concerns, if it's fully transparent and the PBM is passing on 100% of all the different revenues they get,…(is) will that PBM have the same incentives going forward to negotiate tough with drug companies and with the (retail companies) to improve discounts?" asked Sean Brandle, a vp with The Segal Co. in New York.

"If you trend your costs out three or four years, would you be better under the current system with negotiating every two years and getting the state-of-the-art deal the PBM can offer or just paying a fee and letting the PBM do business as usual?" he asked.

Mr. Brandle also questioned how a plan sponsor could be assured, under a straight fee arrangement, that it was getting 100% of the rebates. Not only would PBMs have to be willing to open all their books, he said, but plan sponsors also would "have to pay someone to go in and audit, so (they) can relax and say, 'Gee, yes, I did get the full benefit of those financial arrangements,' " he said.

Senior Editor Joanne Wojcik contributed to this article.

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Late News

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KKR further reduces stake in Willis

Kohlberg Kravis Roberts & Co. L.P. has sharply reduced its ownership in London-based Willis Group Holdings Ltd. through a secondary stock offering. Willis announced last week that Profit Sharing (Overseas) Ltd. Partnership—an affiliate of KKR—and Fisher Capital Corp. L.L.C. sold 20 million shares of Willis' common stock priced at $38.27 a share in a secondary public offering valued at $765 million. That offering brings KKR's ownership of Willis down to 7.5% from 23%, Willis said. KKR originally obtained a 74.3% stake as part of its 1998 leveraged buyout of the brokerage.

Senate names conferees on pension funding reform

Senate members have been named to a congressional conference committee that will try to iron out differences in stopgap pension funding measures and agree on a compromise bill. The Senate conferees are Senate Finance Committee Chairman Charles Grassley, R-Iowa; and Sens. Judd Gregg, R-N.H.; Mitch McConnell, R-Ky.; Max Baucus, D-Mont.; and Edward Kennedy, D-Mass. Both the House- and Senate-passed bills would permit employers in 2004 and 2005 to use yields of a long-term corporate bond index to value pension liabilities, though the measures differ with regard to deficit-reduction contribution relief provisions.

Ohio lawmakers approve state-run med mal insurer

Legislation that would allow Ohio's insurance director to create a state-run medical malpractice insurer unanimously passed the state Senate last week. H.B. 282 would authorize Insurance Director Ann Womer Benjamin to establish the Medical Liability Underwriting Assn. should the medical malpractice market worsen, Ms. Womer Benjamin said. The MLUA would write primary insurance coverage for doctors unable to find professional liability coverage.

FM Global reports surge in profits

Johnston, R.I.-based Factory Mutual Insurance Co. reported profits of $666 million in 2003, more than double its profits in 2002. The insurer, which does business as FM Global, reported in force premiums of $3.9 billion, an 18.8% increase over 2002. FM Global reported a combined ratio of 66.4% last year.

Coface creates North American unit

Paris-based credit insurer and credit management services company Coface Group has extended its U.S. operations with the creation of Coface North America Insurance Co. Coface Holding Co. N.A. announced that it created the new company by buying the capital stock of Arkwright Insurance Co. from Factory Mutual Insurance Co. Coface North America is currently licensed in 21 states. Coface acquired Chicago-based CNA Financial Corp.'s commercial credit unit in late 2002.

Premium, investment gains bolster Arch profits

Hamilton, Bermuda-based Arch Capital Group Ltd.'s profits more than quadrupled in 2003, reaching $280.6 million. The 2003 gain compares to $59.0 million in profits in 2002 for the insurer and reinsurer. Arch's gross premiums written more than doubled last year, to $3.23 billion. Arch's results were helped by $23.1 million in investment gains after a loss of $2.6 million on investments the year before.

Snowbarger named interim PBGC director

Vincent Snowbarger, a former Republican congressman and Kansas state legislator, has been named acting executive director of the Pension Benefit Guaranty Corp. Mr. Snowbarger, who has served as PBGC assistant executive director since July 2002, is serving as an interim replacement for Steve Kandarian, who left the agency last week to return to Boston to spend more time with his family and to return to the private sector.

Hub posts gains for 2003

Hub International Ltd. reported revenues of $286.4 million for 2003, a 30.2% increase over 2002. Profits at the Chicago-based brokerage increased 24.2% to $36.5 million. In 2003, Hub benefited from organic growth, revenue and profit contributions from brokers acquired in 2002, and a stronger Canadian dollar, Martin P. Hughes, the company's chairman and chief executive officer, said in a statement. Hub has substantial operations in Canada.

Briefly noted

Carl Coleman, former insurance department manager for the New Orleans school system, and Texas contractor Jeff Pollitt last week pleaded guilty to **felony bribery charges** in U.S. District Court in New Orleans. Mr. Coleman admitted to accepting cash bribes from Mr. Pollitt, who was hired to repair three schools damaged by fires in 2001....The **Mississippi Supreme Court** held last week that a lower court had erred in allowing the creation of a mass tort action in Jones County, Miss. The suit involved 56 plaintiffs and 46 physicians, who had prescribed the heartburn drug Propulsid, but none of the defendants and only one of the plaintiffs lived in Jones County. Tort reform advocates have long criticized Mississippi for giving plaintiffs attorneys free rein to file mass tort suits in the most plaintiff-friendly local courts.

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COBRA: IRS puts limits on eligibility

Continued from page 3

for a maximum of 36 months.

The law and regulations also say that if a second event were to occur that entitles a beneficiary to COBRA while the individual is receiving COBRA, the beneficiary then would be entitled to a maximum of 36 months of COBRA.

For example, assume a man quits his job and opts for COBRA for himself and his spouse. During the sixth month of COBRA coverage, the man dies. His widow then would have the right to 30 more months of COBRA, or a maximum of 36 months of coverage.

The IRS ruling involves another qualifying COBRA event: eligibility for Medicare. Under the law, when an employee retires or quits and becomes eligible for Medicare, the employee's spouse and dependents have a right to COBRA for 18 months.

The IRS ruling involves situations when an older employee quits and his spouse opts for COBRA. At some point during the COBRA coverage period, the employee turns 65 and becomes eligible for Medicare.

Plan administrators had interpreted the law as requiring employers to offer COBRA to the spouse for a total of 36 months because a second COBRA qualifying event—the employee becoming eligible for Medicare—occurred while the spouse was on COBRA.

But the IRS says the spouse has no right to 36 months of COBRA coverage because the Medicare entitlement, in this case, is not a qualifying event as entitlement did not cause a loss of coverage.

In its analysis, the IRS refers to legislation Congress enacted in the early 1980s involving employees who continue working past 65, the age at which individuals first become eligible for Medicare.

Under those Medicare secondary payer measures, group health care plans continue to be the primary payer for employees who stay on the job after age 65. Employees 65 and older are entitled to the same health care coverage as those under 65.

If the employee in the Internal Revenue Service example had not quit, there would have been no loss of coverage for the spouse—due to the Medicare secondary payer laws—when the employee became eligible for Medicare.

As a result, the Medicare entitlement of an employee is not a second qualifying event for a spouse because that event would not have resulted, on its own, in a loss of group coverage for the spouse, according to the IRS.

What the IRS is saying, noted Mercer's Mr. Hamelburg, is that there has to be an actual loss of coverage for entitlement to Medicare to be a second COBRA qualifying event.

"When you are dealing with multiple events, the event actually has to result in a loss of coverage. COBRA is a two-part test. You need a qualifying event, and the event has to cause a loss of coverage. Sometimes, that second part is forgotten," Mr. Hamelburg said.

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Online Poll

[2/16-2/20]

Do you think your organization will offer a defined benefit pension plan a decade from now?

Yes	10.3%
Yes, but only to employees now covered by the plan	17.9%
No	65.4%
Not sure	6.4%

BI Stock Index

[2/17 - 2/23]

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Percentage change of *BI* Stock Index vs. key indicators

BI Stock Index	2328.69	-0.33
Dow Jones	10619.00	-0.08
S&P 500	1144.11	-0.15

Largest gains

Philadelphia Consolidated	11.24%
Hilb Rogal & Hobbs	5.35%
Brown & Brown	5.33%
Willis Group Holdings Ltd.	4.25%
CIGNA Corp.	3.85%

Largest losses

Gainsco Inc.	-10.00%
Baldwin & Lyons Inc.	-7.24%
Meadowbrook Ins. Group	-7.16%
NYMagic Inc.	-7.14%
Fairfax Financial	-5.90%

Weekly change by market segment

Brokers	0.69%
Insurers/Reinsurers	-0.91%
Managed Care Organizations	-0.70%

Source: FinancialContent Inc. (http://financialcontent.com)