

## WORKPLACE VIOLENCE

# COUNTING THE COST OF SHOOTING OUTBREAKS

### Single incidents can have direct effect on workers compensation rates

BY ROBERTO CENICEROS

Mass workplace shootings result in millions of dollars in workers compensation-related costs.

Policyholders across Connecticut, for example, are paying higher workers comp rates this year due in part to a 2010 mass shooting that is expected to generate about \$7 million in total workers comp costs, according to Boca Raton, Fla.-based NCCI Holdings Inc.

In that Manchester, Conn., incident, a worker accused of theft at a beer distributor opened fire with two pistols, killing eight co-workers and seriously wounding two others before killing himself.

In another case, the city of Kirkwood, Mo., has incurred \$9.9 million in workers comp costs so far and claims remain open in a 2008 shooting in which a gunman opened fire at a city council meeting, killing five and wounding two, although one of the wounded died months later. Police shot and killed the gunman, who reportedly was dissatisfied with prior treatment by city officials.



AP PHOTO

A candlelight vigil was held in Manchester, Conn., in August, 2010, after a gunman killed eight co-workers. Such incidents take a financial toll as well as an emotional toll.

See **SHOOTINGS** page 33

## HEALTH CARE REFORM

# Reform rule may increase employer costs

### Out-of-pocket limit covers many payments

BY JERRY GEISEL

A new rule under the health care reform law limiting employees' out-of-pocket expenses will pose significant administrative challenges and could increase employer costs.

The rule would, for the first time, impose a flat dollar limit for all employer group health plans on how much in deductibles, coinsurance and copayments employees can be required to pay annually for health care services, including prescription drugs.

The requirement, issued last week and slated to go into effect in 2014, is included in the latest batch of health care reform law regulations from the U.S. Department of Health and Human Services.

Under those regulations, the maximum annual out-of-pocket limit on health care expenses that can be shifted to employees cannot exceed the maximum out-of-pocket limit allowed that year for high-deductible health care plans linked to health savings accounts.

These new limits on employees' out-of-pocket costs will apply first to nongrandfathered health care plans. Eventually, most grandfathered plans are expected



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# Advance planning vital in efforts to curb violence in public places

BY RODD ZOLKOS

As employers, educators and businesses try hard to reduce the risks of violent incidents at their sites, experts say the key to curbing violence is an informed risk management approach.

In addition to the physical and emotional toll in human life and well being, violent acts at workplaces and public venues pose significant liabilities for those on whose premises the events occur.

"The liabilities, the civil lawsuits, the other sorts of settlements — the liability loss is significant," said Rick Shaw, CEO of Awareness

Inc., a Lincoln, Neb.-based provider of threat assessment and incident management and prevention solutions. "The reputational damage can be pretty significant also."

Mr. Shaw cited a 2012 report from the Center for American Progress estimating that the 2007 shooting massacre at Virginia Polytechnic Institute and State University that left more than 30 dead cost Virginia Tech and state, local and federal governments \$48.2 million. Those costs, according to the report, included \$11.4 million in safety and security upgrades, an \$11.1 million settlement with

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## PUBLIC VIOLENCE

**Newtown, Conn., Dec. 14, 2012:** 26 killed and two injured at Sandy Hook Elementary School before the shooter kills himself.

**Aurora, Colo., July 20, 2012:** 12 killed, 58 injured in movie theater shooting.

**Tucson, Ariz., Jan. 8, 2011:** Six killed, 13 injured outside supermarket during a gathering for then-Rep. Gabrielle Giffords.

**Fort Hood, Texas, Nov. 5, 2009:** 13 killed, 30 injured at U.S. Army base by a psychiatrist.



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NEWS

CATASTROPHES

TRIA BACKERS GET READY FOR REAUTHORIZATION BATTLE

Bill introduced almost two years before expiration

BY MARK A. HOFMANN

Advocates of the decade-old terrorism insurance backstop say they expect a battle over legislation that would extend the federal program for five years.

Led by Reps. Michael Grimm, R-N.Y., and Carolyn Maloney, D-N.Y., a bipartisan group of lawmakers introduced the Terrorism Risk Insurance Act of 2002 Reauthorization Act of 2013 earlier this month.

H.R. 508 would extend the program through Dec. 31, 2019, from its Dec. 31, 2014, expiration and make no changes to the program.

Risk managers and insurers supporting the program established in 2002 in response to the Sept. 11, 2001, terrorist attacks on New York and elsewhere hailed lawmakers for introducing the bill so early in the session.

If it becomes law this year, market uncertainties likely to emerge before 2014 as underwriters struggle with insurance policies that may or may not enjoy government backing in the event of a catastrophic terrorist attack could be avoided.

However, supporters also say there is no guarantee that the program will be extended in its current form or another.

"The extension of TRIA has been a standing priority for RIMS and it

TIMELINE: FEDERAL TERRORISM INSURANCE BACKSTOP

**Nov. 1, 2001:** Terrorism Risk Insurance Act introduced.

**Nov. 26, 2002:** TRIA signed into law by President George W. Bush. Under the law, the federal terrorism insurance backstop would expire on Dec. 31, 2005.

**Dec. 22, 2005:** After months of debate, President Bush signs the Terrorism Risk Insurance Extension Act into law, extending the program through Dec. 31, 2007.

**Dec. 26, 2007:** The backstop is extended through Dec. 31, 2014, when President Bush signs the Terrorism Risk Insurance Program Reauthorization Act into law.

**Feb. 5, 2013:** A bipartisan House group introduce the Terrorism Risk Insurance Act of 2002 Reauthorization Act of 2013 to extend the program through Dec. 31, 2019.

Source: Library of Congress

was great to see its introduction so early in the year," said Carolyn Snow, secretary and board liaison

to the Risk & Insurance Management Society Inc.'s Government Affairs Committee.

"The longer the TRIA extension remains ignored, the more unstable the insurance market will become," said Ms. Snow, who also is director of insurance and risk management at Humana Inc. in Louisville, Ky. "Businesses across the country face a real risk of loss as a result of terrorism. Many private insurers are still unable to calculate this exposure and provide the necessary coverage. This makes a federal terrorism backstop crucial to the sustainability of corporate America."

"This is a first step, and an important debate will occur," said Nat Wienecke, senior vice president of the Property Casualty Insurers Association of America in Washington. "To the extent this puts (an extension) closer to the front burner, we see that as favorable."

"The introduction of the bill is significant because it starts the debate in a Congress that is prone to waiting 30 minutes before each deadline on each piece of major legislation they consider," said Jimi Grande, senior vice president in the Washington office of the National Association of Mutual Insurance Cos. "In the case of TRIA, every day they go into 2014

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WORKERS COMPENSATION



Predictive models aid comp pricing

Tech tool use expands to underwriting

BY SHEENA HARRISON

With insurers seeing lackluster investment income on workers compensation premiums, some are using predictive models to improve the accuracy of their underwriting and pricing.

Predictive models often are used in workers comp to reduce claim costs and duration. But as the technology evolves, insurers are looking for models to boost their comp underwriting results and help select profitable accounts.

Expanding predictive analytics to workers comp underwriting is the "next logical step" in the evolution of modeling, said Michael Gavin, chief strategy officer for Duluth, Ga.-based PRIUM, a medical cost management company.

"There's data there (and) there

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HEALTH INSURERS

WellPoint banks on former hospital executive to turn fortunes around

BY MATT DUNNING

WellPoint Inc.'s selection of Joseph Swedish as its next CEO will add a fresh perspective for the troubled company and may signal greater collaboration with providers, despite his lack of health insurer experience, analysts say.

Mr. Swedish, 61, takes the helm of the Indianapolis-based company on March 25, after eight years as president and CEO of Livonia, Mich.-based Trinity Health Corp.

His selection as WellPoint's next CEO came as a surprise to analysts and investors. While his health care career has spanned more than four decades, nearly all of it has been in the provider sector.

A day after WellPoint's Feb. 12 announce-



JOSEPH SWEDISH

President and CEO, Trinity Health Corp., 2004-2013

Board of Directors, Coventry Health Care Inc., 2010-2013

President and CEO, Centura Health, 1999-2004

President and CEO, Hospital Corp. of America, Central Florida & East Florida Divisions, 1994-1998

ment, the company's stock price fell more than 4.5%, and remained mostly flat as of Feb. 21.

"It definitely took me by surprise when they named him over (former Amerigroup Corp. CEO) James Carlson, who we thought was the

more obvious pick," said Tom Mason, a Charlottesville, Va.-based senior financial analyst at SNL Financial L.C. "But as I thought about it more, I think it does make sense in terms of the company's strategy, considering its concentration in Medicaid and some of the other underserved markets."

Mr. Swedish could not be reached for comment.

Previous CEO Angela Braly left last August amid pressure from investors dissatisfied with WellPoint's declining performance during her tenure.

"They've sort of been stymied over the last year or two, whether as a function of their

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ONLINE  
FEATURES

SOLUTION ARC

How brokerages can develop successful growth strategies

Business Insurance explores the changing brokerage landscape and how to find the right partners.  
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VIDEO



Broker Beat: Woodruff-Sawyer

The latest Broker Beat video features Woodruff-Sawyer & Co. CEO Charlie Rosson discussing high-tech risks.  
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video

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WHITE PAPER

Workplace violence



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violent incidents, and what to do if they should occur.

www.BusinessInsurance.com/  
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NEWS

RISK MANAGEMENT

Few insurance claims expected from European horse meat scandal

No consumer illnesses; insurance not triggered

BY SARAH VEYSEY

While there has been widespread outrage at the revelation that horse meat has been found in many beef products sold in Europe, and many large retailers have withdrawn the products, few insurance policies are likely to be triggered because no consumers have yet fallen ill.

And while there is a slim chance that a horse painkiller, phenylbutazone, may be present in some horse meat, it would have to be in large enough quantities to put human health at risk.

But the scandal will prompt companies to review their supply chains and potential damage to their reputations, and may prompt insurers to devise new products to fill coverage gaps, experts say.

The events have “shone a spotlight on the supply chain,” said Jon Miller, an associate in Jardine Lloyd Thompson Group P.L.C.’s food and agriculture practice in Birmingham, England.

Fears about horse meat in beef products surfaced in January, when horse DNA was found in beef burgers in the United Kingdom and Ireland. Leading retailers withdrew the products from sale.

In February, the U.K. Food Stan-



AP PHOTO

Testing on Findus beef lasagna revealed that some of the meals may have contained up to 100% horse meat.

dards Agency said tests showed that frozen lasagna sold by Luxembourg-based Findus Group in the United Kingdom contained up to 100% horse meat. Findus, which withdrew the product from sale, later said it contained no phenylbutazone.

The lasagna supplier, Metz, France-based Comigel S.A., withdrew all products sourced from Castelnaudary, France-based Spanghero S.A., which supplied the meat. Spanghero said it would sue the Romanian meat producer

that is its supplier.

Meanwhile, Swedish firms withdrew frozen lasagna meals and supermarkets in France, the Netherlands and Switzerland pulled many ready-made meals as a precaution.

French officials said horse meat had been found in frozen meals, and traces of horse meat also were reported in frozen meals sold in Austria, Belgium, Denmark, Finland, Germany, Norway, Sweden

See HORSE MEAT page 28

WORKERS COMPENSATION

Drug dispensation by doctors under scrutiny

Claims adjusters help rein in costs

BY ROBERTO CENICEROS

Despite a trend of linking workers compensation bill review services with pharmacy benefit manager technology, individual claims adjuster creativity remains critical for curbing doctor-dispensed medication costs.

That is because the technology has not eliminated the adjusters’ role in following up on claims for prescriptions dispensed by doctors, observers say.

After the potential expense associated with claimants’ addiction to narcotic pain medications, the pharmacy management issue that concerns payers most is the cost implications of doctors dispensing prescription drugs, according to a survey of claims payers released last month.

Tampa, Fla.-based CompPharma L.L.C., a for-profit consortium of pharmacy benefit managers, produced the survey of insurers, third-party administrators and employers who collectively tallied \$473 million in pharmaceutical costs during 2011.

Payers say doctor dispensing, which includes providing “repackaged” drugs and compound formulas, concerns them because physicians can look to increase revenues by charging more for medications than pharmacies do.

They also are concerned because medications provided in doctors’ offices bypass point-of-sale measures linking retail pharmacies with pharmacy benefit managers. Those measures help prevent potential problems, such as dangerous interactions with other medications a claimant is consuming.

“If a physician has a financial incentive to provide or refer a particular service, then there is a risk of overutilization, and that is certainly the case with (doctor) dispensing,” said Dr. Jacob Lazarovic, chief medical officer in Sunrise, Fla., at third-party administrator Broadspire Services Inc.

A 2011 report by workers comp ratings and research organization NCCI Holdings Inc. stated that “the volume of prescription drugs dispensed by physicians to workers compensation claimants has risen sharply in recent years —

EMPLOYMENT PRACTICES

Split-motive bias ruling favors employers

But plaintiff attorney fees could still be costly

BY JUDY GREENWALD

A California Supreme Court ruling will make it more difficult for plaintiffs to prevail in job discrimination cases, but a provision that permits courts to award plaintiff attorney fees still could prove costly for firms.

In its Feb. 7 ruling in *Wynona Harris v. City of Santa Monica*, the court held that in cases where there are discriminatory and nondiscriminatory reasons for taking an adverse job action and the employer shows it would have made the same decision even absent the discrimination, plaintiffs can prevail only when the dis-

criminatory factor is “substantial.” However, the court may not award damages, back pay or reinstatement in such cases, the state high court ruled unanimously.

But plaintiffs still could be

awarded declaratory or injunctive relief and, most significantly, reasonable attorney fees (see story, page 28), which observers say could discourage settlements.

“I think both sides got something in the ruling,” said Michael A.S. Newman, a partner with Barger & Wolen L.L.P. in Los Angeles.

But many observers say the ruling is more favorable to employers.

“I would say while this is not a home run for employers, it is probably a double or triple in terms of good news for employers,” said Anthony J. Oncidi, a partner with



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# GROUP CAPTIVES OFFER WORKERS COMP OPTIONS

Smaller firms can avoid market swings, state regulations for self-insured programs

BY SHEENA HARRISON

Group captives have become an attractive option in recent years among mid-market employers that want to self-insure their workers compensation risks.

The structure provides control over claims and premiums for companies that want to avoid rising costs in a hardening workers comp market. And experts say the mechanism is convenient for smaller firms that often can't afford to take on a high-deductible workers comp program or become a qualified self-insurer in their states of operation.

"You're basically taking yourself out of the ... swings in the traditional work comp market, and that becomes even more important when you're in these even more challenging states like New York, California or Illinois," said Duke Niedringhaus, an excess workers comp specialist and vice president at broker J.W. Terrill Inc. in Chesterfield, Mo.

Workers comp self-insurance has become a topic of interest among mid-market firms as insurers have pushed for workers comp rate increases in the past couple of years, said Christopher Flatt, New York-based leader of Marsh Inc.'s Workers' Compensation Center of Excellence.

"Our customers are looking for

## GROUP CAPTIVES

### BY THE NUMBERS

**\$200 million**

Estimated new premiums paid to group captives in 2012

**\$1.3 billion to \$1.5 billion**

Estimated total market for group captives in 2012

**4,000**

Estimated number of companies in group captives last year

**70%**

Percentage of the group captive market that has developed in the past decade

any way possible to minimize their total cost of risk," Mr. Flatt said. "So that would include ... their retained losses if they go into a self-insurance or a captive program, but also the risk-transfer elements that they're placing into the market."

Self-insurance options include high-deductible programs where an employer purchases excess workers comp coverage and agrees to pay comp losses that fall under a large deductible amount, or qualified self-insurance, where employers register as a self-insurer in the states where they operate and cover 100% of work comp losses out of pocket.

Those types of alternative risk financing programs can be attractive for large employers, which often can afford high retentions or the process of seeking self-insurance qualification from regulators in each of the states where they have operations, experts say. Both programs also can require employers to provide collateral — an expense that can be difficult for smaller employers to cover.

"If you're a mid-market company and your work comp premiums are \$750,000, taking \$500,000 of every occurrence is a pretty big retention compared to your overall premium," Mr. Niedringhaus said.

Group captive insurance programs allow mid-market employers

to pool their workers comp risks and premiums with other companies while covering themselves outside of the traditional insurance market, said Eric Silverstein, senior vice president of national accounts for Lockton Cos. in Atlanta.

"It gives you the ability to have a program without a tremendous amount of risk on a per-accident basis or on an aggregated basis," Mr. Silverstein said.

Mr. Niedringhaus estimates that member-owned group captives saw about \$200 million in new premiums in 2012. The model is attractive, he said, for companies with as little as \$150,000 in combined casualty line premiums for workers comp, auto coverage and general liability.

Benefits of group captives include dividends that are paid to captive members if claim costs fall below premiums paid to the captive, as well as safety programs and consulting that can help captive members improve their workers comp loss experience, sources say.

Captive Resources L.L.C., a Schaumburg, Ill.-based captive consulting firm, saw nearly \$100 million in new premiums last year for the 27 group captives that it advises, said Sandra Duncan, vice president of operations. The member-owned groups include 2,600 companies nationwide in a variety

of industries, including manufacturing, distribution, trucking and agriculture.

Captive Resources estimates that the total member-owned group captive market represents \$1.3 billion to \$1.5 billion in written premiums — about 70% of which has come from companies that joined in the past decade. Recent interest in group captives has been driven by the improving economy, greater credit availability, and a hardening workers comp market, she said.

"We think the growth will be even faster in the next five to 10 years," Ms. Duncan said.

Companies that are considering switching from a fully insured workers comp program to some form of self-insurance should research their options for at least six months before making any decisions, said Lockton's Mr. Silverstein.

That time frame, he said, can allow companies to understand the benefits and challenges of various self-insurance models, as well as consider whether they want to make a long-term decision to leave the traditional insurance market.

"It's not something that you just do for one year," Mr. Silverstein said. "It's something that you do for a series of years, and you need to understand the exit strategy for self-insurance."

## SELF-INSURANCE LOWERS PREMIUMS, IMPROVES COSTS

Two mid-market employers that participate in a casualty insurance group captive say the program has helped them reduce their workers compensation premiums and improve safety at their companies.

Grand Rapids, Mich.-based Lumbermen's Inc., a building material distributor, and Chicago-based Rapid Displays Inc., a designer and maker of point-of-purchase displays, both belong to Summit Insurance Ltd. The captive, which covers workers comp, auto liability and general liability, includes 82 members of various industries and is advised by Schaumburg, Ill.-based Captive Resources L.L.C.

Rapid Displays joined the captive in 1998, Chief Financial Officer Brian Greenburg said. The 450 employee company wanted to lower its workers comp costs, particularly



"The whole focus on safety culture becomes so much more important when you're part of a group captive than if you're in a fully insured program."

Steve Petersen, Lumbermen's Inc.

because most of the company's workforce at that time was located in California — a challenging market for workers comp costs.

The company also noticed that its workers comp loss experience was improving, but that lower claim costs were not being reflected in Rapid Displays' workers comp premiums, Mr. Greenburg said.

"It appeared, during those years, the insurance companies were profiting from our positive results and that we were not allowed to share in those upside profits," he said.

Lumbermen's, which has 270 employees, joined Summit in 2001 after experiencing volatile casualty insurance rates that didn't seem to improve when the company had pos-

itive loss experience, Chief Operating Officer Steve Petersen said. He said insurers also didn't seem to understand Lumbermen's distribution business and often associated the company's name with higher-risk companies, such as saw mills and lumber yards.

Both companies say they've benefitted from safety initiatives that Summit Insurance has developed to help members lower their claim costs and frequency. The captive includes funding for safety consultants to talk with members, and members confer with each other about safety best practices.

"The whole focus on safety culture becomes so much more important when you're part of a group captive than if you're in a fully insured program," he said.

The companies also have been able to receive dividends from Summit Insurance because their losses have been lower than premiums paid into the captive.

"Our cost of doing business today is much lower than it's ever been in the 15 years we've been in the captive," Mr. Greenburg said.

By Sheena Harrison

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# EMPLOYERS SHOULD GET DOWN TO BASICS IN RETIREMENT COMMUNICATIONS

Education efforts should focus on saving first, then on investments

BY JOANNE WOJCIK



“They may have credit card debt, their house may be under water, they may be struggling to pay for their kids’ education. So they’re not really focused on retirement. You need to look a little more holistically on how to get them to free up some cash so they can save more.”

Kent Allison,  
PricewaterhouseCoopers  
L.L.P.

Most American workers aren’t saving enough toward retirement because they are struggling financially — often living paycheck to paycheck — and do not have the discretionary cash needed to build a retirement nest egg, experts say.

A good retirement communications and education program recognizes this and offers plan members help with such financial fundamentals as budgeting and saving.

The most effective way to communicate these lessons is with a targeted approach that takes into consideration plan members’ ages and other demographic characteristics. The messaging also should be continuous, occurring throughout the year, experts advise.

Historically, retirement plan communications and education have been disproportionately focused on “the investment component — how and where you should be investing — as opposed to how much you should be saving. The fact is, the more you save, the more you’re going to have regardless of where you invest it,” said Brian Heinke, a Denver-based senior vice president at TrueNorth Inc., a subsidiary of IMA Financial Group Inc.

Employers have a fiduciary obligation “to keep participants educated about investment options and general information about their plan,” said Marsha Whitehead, vice president of marketing communications for the retirement services division of American United Life Insurance Co. in Indianapolis. “But employers should never assume that their employees know anything about investing, that they have a handle on their own personal situations, or even know how to make a budget,” she said.

The problem with most retirement plan communications is “nobody is asking the really important question: Why aren’t they saving in the first place?” said Kent Allison, a Florham Park, N.J.-based partner and national practice leader in PricewaterhouseCoopers L.L.P.’s financial education practice. “We need to look more broadly at the other financial issues workers are facing.”

In an attempt to “get under the hood to find out what’s happening at home,” PwC uses a financial wellness model similar to one used in health benefits, Mr. Allison said.

“You can’t just myopically focus on getting people into the plan and getting them diversified if you’re seeing lots of leakage out of the back-end of the plan,” such as by taking loans or making withdrawals to pay for short-term expenses, he said. “They may have credit card debt, their house may be under water, they may be struggling to pay for their kids’ education. So they’re not really focused on retirement. You need to look a little more holistically on how to get them to free

up some cash so they can save more,” Mr. Allison said.

“When you educate, you need to take into account their whole financial picture,” said Donna Norwood, senior vice president of defined contribution product management at Fidelity Investments in Boston.

Retirement plan communications and education also should be tailored to get the attention of the employees targeted, said Charlie Ledbetter, a principal and national business leader for Mercer L.L.C.’s defined contribution advisers in Denver. “You’re got to gauge the demographics and sophistication of the audience.”

“One of the best approaches is a real targeted one,” said Denise Foster, a principal and communications consultant at Milliman Inc. in Seattle. “It’s a lot about tailoring the message to the particular employee group.”

For example, “you don’t say the same thing to a 20-year-old as you do to a 60-year-old. They are at different stages of their lives,” said Diane Leary, a principal at Buck Consultants L.L.C. in New York. “How do you appeal to a 20-year-old? You might not use the word ‘retirement.’ Say ‘saving for the future.’ Show them compounded return on investment.”

By contrast, “with 60-year-olds, you want to talk about the spend-down options,” such as how much they should plan on withdrawing from their 401(k) accounts after retirement so that the money lasts as long as possible, Mr. Ledbetter said.

“In financial services, we use a lot of terms that don’t resonate with participants, and they shut down and stop learning,” said Genny Sedgwick, a principal and practice leader for defined contribution plan record-keeping at Milliman Inc. in Seattle. “People feel like they need to be the expert, and they realize they’re not. At the end of the day, participants just want you to guide them.”

Likewise, the medium also should vary based on the method through which employees like to receive communications, experts say.

Recent research conducted by OneAmerica found retirement plan participants younger than age 40 are more likely to use online retirement calculators and mobile apps, while plan members older than 50 found articles most helpful. The survey, published Feb. 4, 2013, also found that participants in the 20- to 30-year age range are more than twice as likely to read about financial issues via blogs and social media than are 40- to 50-year-olds.

Regardless of the mode of communications, the message should be delivered continuously throughout the year, experts advise.

“Investment education is difficult to convey in one-hour segments a couple of times a year. It’s like giving me an hour on how to repair my car and then asking me to drop the transmission,” said Susan Pool, a Wichita, Kan.-based senior vice president at TrueNorth.



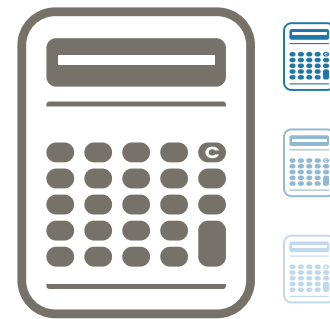
## RETIREMENT PLAN COMMUNICATION TIPS

### DO:

- Offer access to investment tools such as calculators
- Tailor the message to different demographic groups
- Use a multimedia approach including print, online and in person

### DON’T:

- Take a one-size-fits-all approach
- Provide specific investment advice
- Make promises of guaranteed investment returns



## CALCULATORS PREDICT FUTURE SAVINGS

Online calculators can be a useful tool for 401(k) plan participants to determine whether they are saving enough toward retirement, experts say.

The calculators take into account the amount of money a plan member is saving and employer matches, amortizing those sums over the number of years the member plans to work. The calculators also consider sums already amassed in a 401(k) account and expected defined contribution plan income.

In general, retirement income calculators recommend that plan members have enough money in their 401(k) accounts at retirement to replace 80% of their incomes. If the calculator determines a shortfall may occur, it recommends that the plan member either increase contributions or delay retirement.

Some calculators, such as that offered by Hartford, Conn.-based Prudential Financial Inc., are linked to members’ accounts so they can make contribution changes with the click of a button.

One-third of plan members who use Prudential’s calculator take action, usually increasing contributions by at least 4% of salary, according to Jamie Kalamarides, senior vice president for institutional investment solutions. “The best way to encourage people to save more today is to help them calculate their retirement income gap,” he said.

But relying solely on the assumptions made by 401(k) retirement income calculators can be dangerous, the Society of Actuaries warns. “Shock events” such as unexpected health crises or market downturns must be taken into consideration, the society warns.

Moreover, delaying retirement may not always be feasible, said Joe Tomlinson, a member of the SOA and managing member of Tomlinson Financial Planning L.L.C. in Greenville, Maine.

“Very often people end up not working as long as they planned. Illness, disability, the need to care for ill family members are all factors,” he said.

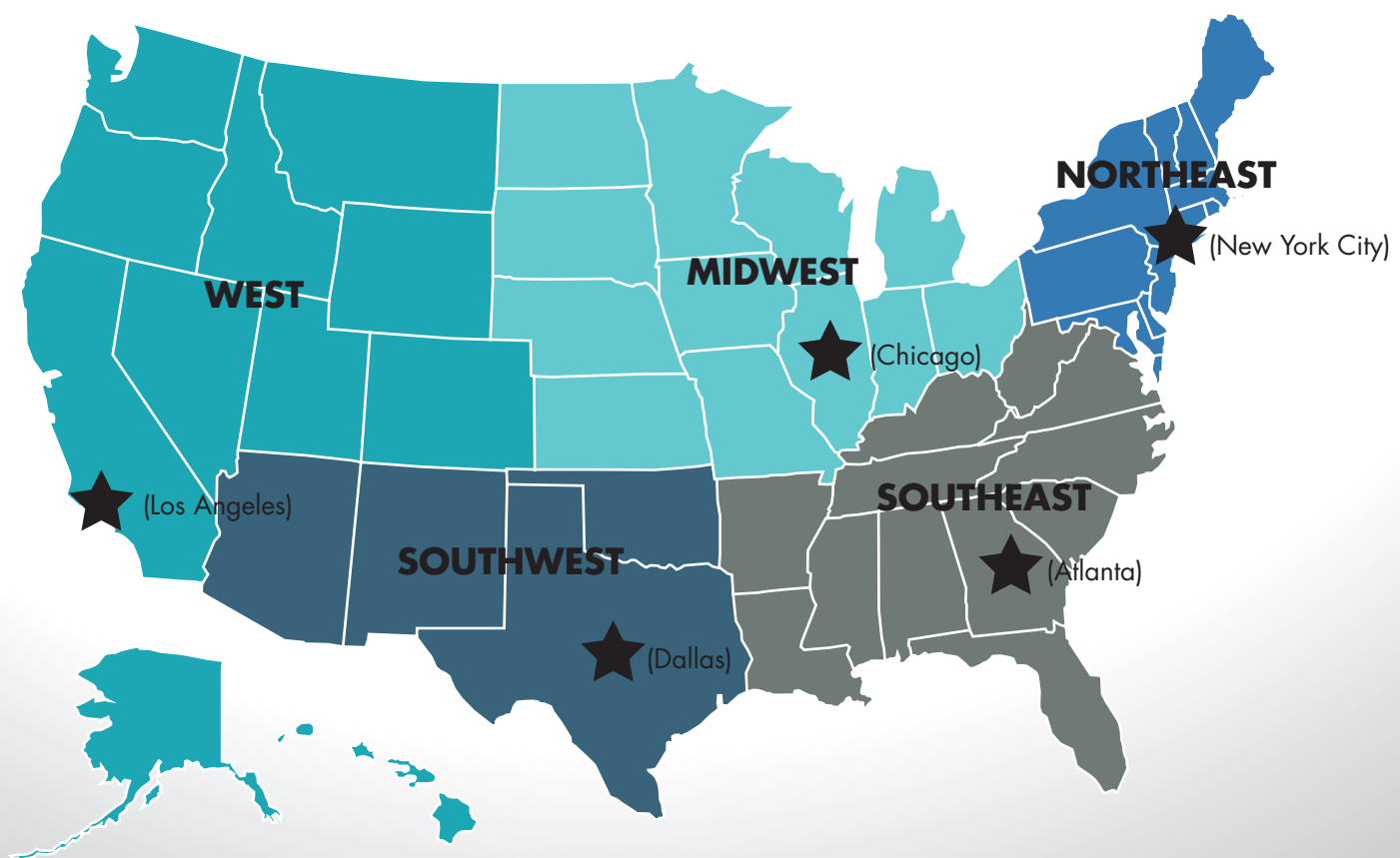
By Joanne Wojcik

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## IAG estimates Oswald losses at up to \$145M

■ Insurance Australia Group Ltd. said its claims from ex-Tropical Cyclone Oswald that hit Queensland and New South Wales in late January would range from 120 million Australian dollars to AU\$140 million (\$123.8 million to \$144.5 million). The Sydney-based insurer also said it expected claims from the bushfires that ravaged New South Wales, Tasmania and Victoria in early January to cost it about AU\$35 million (\$36.1 million). In a statement, IAG said its 2013 catastrophe reinsurance program has a maximum first-event retention of AU\$150 million (\$154.8 million).

## Use of physical rehab rising in U.K. settlements

■ The use of physical rehabilitation in the solution of personal injury claims in the United Kingdom is rising, according to a survey by the Association of British Insurers and the International Underwriting Association. Most insurers and lawyers surveyed by the two London-based insurance industry bodies said that the use of rehabilitation in the settlement of personal injury claims had increased in the past five years. The ABI and IUA, which in 2000 developed a voluntary code for the use of rehabilitation in claims settlements, surveyed 253 members of the London-based Association of Personal Injury Lawyers, 16 members of the Forum of Insurance Lawyers and 36 insurers. The organizations also talked to more than 50 insurance claims practitioners, they said.

## Political risk insurance in spotlight in Mideast

■ Recent unrest in the Middle East has brought the need for political risk coverage for large infrastructure projects into focus, according to a paper by Marsh Inc. Investors and lenders to projects in traditionally more stable areas, such as Europe, also are demanding political risk and associated coverage to minimize risks, Marsh experts said in the analysis. The insurance market is trying to devise innovative coverage to meet demand from buyers who are seeing the nature of risks they face changing. The high visibility of foreign investors' involvement in infrastructure projects can amplify the political risks they may face, said Julian Macey-Dare, international leader of Marsh's political risk and structured trade credit practice in London.

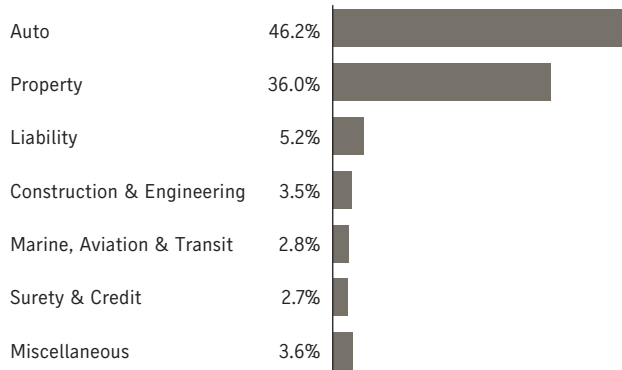
## PROFILE: SOUTH AFRICA

**\$7.29**  
BILLION

The South African insurance market has experienced rapid change over the past few years. Several new laws have been introduced that have increased the administrative burden for insurers and created the possibility of higher liability claims. The market includes some significant players, with the two largest property/casualty insurers taking a more than 40% share of the market. Corporate governance is becoming increasingly important in South Africa, and a code of conduct requires directors to ensure that companies are responsible corporate citizens.

◀ Property/casualty premiums, 2011

### MARKET SHARE PROPERTY/CASUALTY PREMIUMS 2011



### COMPULSORY INSURANCE

- Clinical trials
- Aviation liability
- Marine oil pollution
- Third-party auto
- Various professional indemnity
- Workers compensation, state-run

### NONADMITTED INSURANCE

Other than Lloyd's of London, all insurers offering coverage in South Africa must be registered locally. Policyholders represented by a local intermediary can buy coverage overseas, subject to certain administrative conditions, with the exception of third-party auto.

SOUTH AFRICA

### POPULATION

**50** million

### AREA

**470,693** square miles

### P/C MARKET WORLD RANKING

**24**

### UNEMPLOYMENT RATE

**24.9%**

### MARKET DEVELOPMENTS

UPDATED JANUARY 2013

- A major hailstorm hit Johannesburg on Oct. 20, 2012, causing up to \$115 million in damage, which is the largest catastrophe loss in South Africa in many years.
- The insurance regulator is in the process of developing a new solvency framework, the Solvency Assessment and Management regime. SAM will be based on Europe's Solvency II directive, but it will be adapted where necessary.
- As an interim measure, the minimum capital requirement for most property/casualty insurers has been doubled to \$1.2 million. However, contingency reserves are no longer required.
- The broker market in South Africa has seen significant consolidation. In 2011, Aon South Africa bought Glenrand MIB. In the same year, Marsh Inc. bought the brokerage business of Alexander Forbes Ltd., and the combined entity trades as Marsh Africa. In addition, Jardine Lloyd Thompson Group P.L.C. was awarded a full brokerage license and is operating as JLT South Africa.

## U.K. in-house auditors face more scrutiny

■ Internal auditors, under fire from regulators for failing to spot how banks were rigging the Libor interest rate, should report directly to company boards and have enough resources to do the job, a British industry body said. Auditors employed by companies to assess if big risks have been properly identified, controlled and reported are not subject to direct external regulation and have been discredited by a string of banking scandals. Internal audit is separate from the independent, external book checking that listed companies must undergo. Some internal auditors say privately that regulatory scrutiny will help strengthen their role and make them more "relevant." A new draft code for the industry, written by the Chartered Institute of

Internal Auditors in consultation with the Bank of England and the Financial Services Authority, goes out to public consultation until mid-April. The draft code, which is designed specifically to give guidance to the financial industry, says internal auditors should not be barred from assessing the management of any risk and their scope should be unlimited.

Reuters

## Swiss insurance market outlook stable: Fitch

■ The outlook for the Swiss insurance sector is stable, according to a report by Fitch Ratings Ltd. Underwriters in the nonlife market are highly disciplined, according to the report, and are focusing on underwriting performance to make up for low investment yields. Fitch said it expected the

sector to remain profitable in 2013. There is a high level of competition in the market, the report noted, which limits participants' potential for top line growth.

## European captives endure financial crisis

■ While the economic downturn has hit the investment portfolios of European captive insurers, they have fared better than commercial insurers in Europe, according to a report from A.M. Best Co. Inc. Moreover, Best said most European captives it rates should not have difficulties adapting to Solvency II's requirements when the proposed European regulatory regime is eventually implemented, although it remains a potential challenge for the sector. The Best report said captives typically have fairly conservative investment

policies and that European captives have not faced the same exposures to the sovereign debt and financial institutions of Greece, Italy, Ireland, Portugal and Spain as have their conventional insurer counterparts. The Best report said European captives often play a different role in risk management programs than do captives elsewhere in the world.

## Germany's Allianz posts higher profit, premiums

■ Allianz S.E.'s 2012 net income rose 103.1% over that of 2011 to €5.2 billion (\$6.95 billion), Munich-based Allianz said. Total revenue increased 2.7% to €106.4 billion (\$142.17 billion). Gross written property/casualty insurance premiums grew 4.7% to €46.9 billion (\$62.67 billion), Allianz said in a statement. Its combined ratio

Information provided by Axco Insurance Information Services.  
[www.axcoinfo.com](http://www.axcoinfo.com)

improved to 96.3% in 2012 from 97.8% in 2011, the insurer said.

## Swiss Re's net income up 61.6% in 2012

■ Swiss Re Ltd.'s 2012 net income increased 61.6% from 2011 to \$4.2 billion, the Zurich-based reinsurer said. Swiss Re said the result was driven by "strong premium and fee income growth" of 15%, rising from \$22.2 billion in 2011 to \$25.4 billion last year. It also said "favorable prior-year development" in the property/casualty business added to its bottom line.

## RSA Group's profits down 21.9% in 2012

■ RSA Group P.L.C. posted a pre-tax profit of £479 million (\$743.2 million) for 2012, down 21.9% from that of for 2011, the London-based multiline insurer announced. RSA said its results had been affected by adverse weather in the United Kingdom that included severe flooding, and earthquakes in Italy, among other things. For 2012, RSA's combined operating ratio was 95.4%, compared with 94.9% for 2011.

## Swiss Re seeks approval to open office in Colombia

■ Swiss Re Ltd. will apply to the Colombian superintendent of finance for approval to open a representative office in Bogotá. "Swiss Re intends for its Bogotá representative office to act as a sales base for treaty and facultative business in all reinsurance lines and will rely on support from Swiss Re offices in Miami and Mexico City," Zurich-based Swiss Re said in a statement. The "office will also provide local access to Swiss Re's hundreds of technical experts in all lines of business," according to the reinsurer said. The opening of the Colombia office is subject to the approval of the Colombian regulatory authorities. "Swiss Re previously operated a representative office in Colombia which it closed in 2009 during the global financial crisis," a Swiss Re spokeswoman said.

## India to ensure cover for Iranian crude processing

■ India will ensure its refiners have insurance for plants that run crude oil from Iran, a government source said, allaying fears that imports from the sanctions-hit country may have to be halted. State-run refiner Hindustan

Petroleum Corp. said it might not be able to use Iranian crude at its plants from June if insurers refused to renew insurance contracts on its plants because of western sanctions. India, one of Tehran's biggest clients and heav-

ily reliant on oil imports, already has had to organize emergency cover for ships carrying Iranian crude after sanctions made it difficult for domestic insurers to secure reinsurance. "As long as it is for Indian consumption, why

shouldn't we?" said the source, when asked if India would arrange insurance coverage for refineries that process Iranian crude. "Oil is as basic as food. Just as you need food, you need oil," added the source, who declined to be named

because of the sensitivity of the matter. The source did not give details, however, on how the insurance coverage would be arranged or how much cover would be offered.

Reuters

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- WORKERS' COMP
- CLAIMS SERVICES

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EDITORIAL

## TRIA BACKERS MUST PROVE THEIR CASE

Sometimes more of the same is the best that can be expected. In fact, that's especially true in the case of the federal government's terrorism insurance backstop program. As we report in this issue, a bipartisan team of House members introduced a bill this month that would extend the program through Dec. 31, 2019, from its current expiration of Dec. 31, 2014.

The measure would not expand the program one bit, simply extend it in its current form.

That's certainly to be desired. Ask just about any risk manager, commercial building owner, insurance broker or property insurer, and odds are you'll hear the program is critical for the national economy.

Without the program, insurers will not — and cannot be expected to — underwrite terrorism risk.

Despite the nature of the risk involved, there is absolutely no guarantee that the program will be renewed. It has been attacked from both the political left and the right in the past, and judging from previous administration budget proposals, the White House isn't terribly fond of it, either.

In the current cost-conscious mood on Capitol Hill, supporters of the program are going to have to redouble their previous efforts to win another extension.

The mere fact that reauthorization legislation has been introduced so early in the session should help, but the calendar alone isn't enough. The idea that the program is some sort of bailout has to be refuted. Insurers have a lot of skin in the game upfront. The federal funds wouldn't be available until losses from a truly catastrophic terrorist attack had mounted into the billions.

That certainly doesn't sound like corporate welfare, mainly because it isn't. Instead, the program is better placed in the context of national security. It helps guarantee that if something along the lines of the Sept. 11, 2001, attacks occur again, the nation would be able to rebuild the devastated areas.

We're glad an extension bill has been introduced so early in this Congress.

It gives proponents of the program, and we're certainly one of them, more time than has been the case in previous extension battles to make their case.

It's up to them to make the most of that added time, for this battle may be the most difficult of all the extension challenges that have gone before.

*Business Insurance* welcomes letters to the editor. The section is intended to be a forum for readers' opinions and comments. We reserve the right to edit letters for clarity or space. We will not publish unsigned letters.

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SCHILLERSTROM



COMMENTARY

## SPANISH-SPEAKING WORKERS TEACH TOUGH EMPLOYER LESSONS

Employer hiring of Spanish-speaking workers is showing up in workers compensation claims disputes.

Workers comp law doesn't evolve in a vacuum. So with all the recent news reports about a growing number of Latinos in the U.S. influencing politics, consumer trends and housing markets, it's no surprise that stepped-up use of Spanish-speaking Latino workers is similarly affecting the adjudication of workplace injury claims.

In a December 2012 decision, for instance, the Iowa Appeals Court upheld a finding that a 48-year-old welder with a limited working knowledge of English was permanently and totally disabled after falling from about 10 feet up and landing on a steel table.

A deputy workers comp commissioner hearing the case of *Merivic Inc. and Zurich North America v. Enrique Gutierrez* favorably weighed a vocational rehabilitation expert's report stating that Mr. Gutierrez's limited English skills — along with his "advancing age" and permanent work restrictions that prohibited performing physically demanding tasks — caused a 100% loss of earning capacity.

Interestingly, the commissioner relied on a 2007 Iowa Workers' Compensation Commission finding that immigrant workers were being penalized through reduced benefits for failing to learn English, purportedly due to their lack of motivation to learn the language.

The 2007 finding laid some responsibility on employers, saying they should anticipate that an injury would have greater return-to-work consequences on manual laborers with limited English skills who



**ROBERTO  
CENICERROS**  
SENIOR EDITOR

would find it harder to find post-injury jobs.

In *Merivic*, the employer sought to overturn the 2007 finding, arguing in part that it upended a decade of legal precedent on assessing motivation. But the appeals court ruled the employer sought to turn back the clock to a time when it was accepted that a claimant's failure to learn English was reason enough to reduce an

award. "That ship has sailed," the court said.

I've seen other recent court cases in which language has been an issue.

A Texas appeals court in *Delfingen U.S.-Texas L.P. v. Guadalupe Valenzuela* agreed that Ms. Valenzuela proved that Delfingen's workplace arbitration agreement was unconscionable because her employer failed to explain its contents in Spanish.

The February ruling stemmed from allegations that Ms. Valenzuela was wrongfully terminated because she sought workers comp benefits.

But not all cases have gone against employers.

In January, another Texas appeals court essentially upheld an employer's handling of its arbitration agreement in the case of *Superbag Operating Co. Inc. v. Donato Sanchez*. In that worker-injury case, the employer showed that it provided employees with Spanish-language versions of its policies.

There is a risk management lesson in that ruling.

# RISK IN FOCUS

## Emerging Specialty Risks

Employers bracing  
for a baby boomer  
backlash

PAGE 15

Genetic bias suits  
expected to emerge  
as problem

PAGE 16

Piracy risks  
change course  
in African waters

PAGE 17

Nanotechnology  
brings risks,  
opportunities

PAGE 18

# Deep trouble?

## Fracking pollution suits likely to trigger insurance coverage disputes

BY DOUGLAS McLEOD

**O**il and gas companies engaged in hydraulic fracturing face an array of risk management worries, ranging from potentially widespread environmental liability litigation to regulatory uncertainties and a limited pollution insurance market.

The few dozen fracking-related lawsuits filed so far against well owners and drillers — most alleging groundwater contamination — could turn into hundreds if pollution incidents recur as fracking operations expand, legal sources say.

The suits likely would trigger insurance coverage disputes — similar to those in previous pollution cases — over the applicability of pollution exclusions, the number occurrences at sites with multiple wells and allocation of losses among the various owners, contractors and others involved, lawyers add.

Regulation of fracking operations, now largely a state concern, also is likely to become increasingly “federalized,” with a U.S. Environmental Protection Agency study of fracking’s effect on drinking water supplies expected next year, added Carl J. Pernicone, a partner with Wilson Elser Moskowitz Edelman & Dicker L.L.P. in New York. Added regulation will open energy companies to new causes of legal action for alleged failures to comply with requirements, he said.

While energy companies have used hydraulic fracturing in oil and gas wells since the 1940s, advances in horizontal drilling have created a boom in shale development in the past decade. In a shale gas well, a rig may drill down a mile or more, then turn horizontally and drill out through a shale layer. A mixture of water, sand and chemicals is pumped into the well at high pressure, fracturing the shale and freeing trapped gas and oil.

Slumping natural gas prices have slowed drilling in the Marcellus shale, which runs from southern New York through Pennsylvania, Ohio and West Virginia. But other shale plays, including the Bakken in North Dakota, are seeing more activity, and Marcellus drilling is expected to pick up again in the next few years as gas prices rise.

Energy companies have hydraulically fractured 2,448 wells in Pennsylvania since the beginning of 2011, compared with 16,793 in Texas, 4,926 in Colorado and 2,145 in North Dakota, according to FracFocus, a registry of well sites and fracking chemicals that compiles information submitted

See **FRACKING** next page

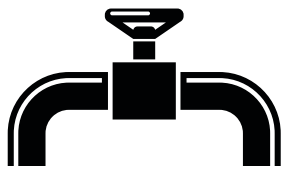
### EXPOSURES

Fracking exposures are real but coverage is not clear.

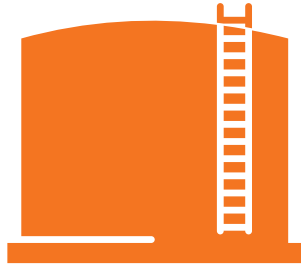
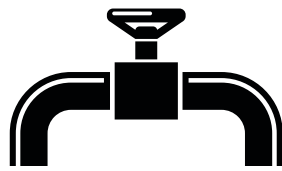
The insurance industry does not offer a specific “fracking coverage” that satisfies all the potential ramifications and related litigation of a claim alleging damages due to fracking activities.

However, given the potential repercussions of hydraulic fracturing, the coverage implications of fracking are extensive and may include seeking coverage under several insurance products:

- Commercial general liability
- Business interruption
- Contingent business interruption
- Pollution/environmental insurance
- Directors and officers liability insurance
- Operators extra expense coverage
- Workers compensation
- Earthquake insurance
- Reinsurance



## FRACKING FACTS



The U.S. has significant natural gas resources. According to a 2011 report from the Department of Energy's Office of Fossil Energy and the National Energy Technology Laboratory, the U.S. soil contains 1.44 quadrillion cubic feet of recoverable natural gas, mainly in shale rock formations located far below the Earth's surface.

In 2012, 32 states hosted natural gas drillers, and the industry continues to expand, as new technology unlocks resources that weren't accessible in the past. However, environmentalists argue that fracking poses a considerable risk and regulation is being considered in many states.

In 2012, 24 states considered 127 bills dealing specifically with hydraulic fracturing, according to the National Conference of State Legislatures. Of these, seven states have enacted regulatory laws and one state, Vermont, has banned the activity. Rule-making is expected to continue at the agency level in several other states. Proposed rules deal with a range of issues, including chemical disclosure, protection of water quality, and fees on the industry.

**30%-40%**

The number of oil and gas companies buying EIL policies has grown in the past two years, amounting to 30% to 40% of the industry as a whole.

## FRACKING

Continued from previous page

by 453 member energy companies.

Fracking has been controversial for its potential environmental risks, which can include contamination of groundwater with fracking fluid or methane leaked from faulty well casings; air pollution from methane emissions at well sites and fumes from drilling equipment and trucks hauling fracking fluid and wastewater; and accidental wastewater spills.

Energy companies are moving toward recycling the millions of gallons of "flowback" water produced by each well, but in addition to fracking chemicals, this wastewater can contain such naturally occurring substances as benzene — a carcinogen — and radioactive radium. If it is not recycled, fracking waste is disposed of in evaporation pits, which may leak or overflow, or by injecting it into disposal wells, a practice that has been linked to earthquakes in Texas, Oklahoma and Ohio.

At least three dozen liability lawsuits, many alleging drinking water contamination, had been filed against energy companies in a handful of states through mid-2012, the largest numbers being in Pennsylvania and Texas, according to a tally by law firm Edwards Wildman Palmer L.L.P.

Many more could follow if perceptions of water supply threats expand, Mr. Pernicone said.

"The water is the key thing," he said. "If there's a litigation breakout, alleged water contamination will likely be at the center of it."

For that reason, insurers see Marcellus shale drilling, often carried out closer to towns and cities, as riskier than more remote operations in North Dakota and Texas, said Jeff Hanneman, managing director of Aon Risk Solutions' environmental services group in Houston.

The potentially high cost of investigating and defending cases is as much of a worry for insurers as possible judgments and settlements, sources add.

"Their concern is more getting caught up in class action lawsuits that drag on for several years," Mr. Hanneman said.

"A suit alleging damages from fracking could be a long, protracted, complicated kind of process," agreed Mike Schneider, president of Houston-based agency Cravens Warren & Co.

Meanwhile, energy companies also face potentially tighter federal regulation, sources say. States have largely managed drilling regulation so far, with some, such as Pennsylvania, adopting pro-development policies. New York, by contrast, has banned fracking temporarily pending the release of environmental and health studies, expected shortly.

The U.S. Interior Department last year proposed new rules for fracking on federal land, including requirements that companies disclose fracking chemicals and have management plans for flowback water. The department last month delayed implementing the rules and is drafting a new proposal, expected this year.

The EPA also is in the midst of a comprehensive study of fracking's effects on drinking water supplies. The study, due in 2014, is examining the effect of the huge amounts of water withdrawn from rivers and aquifers for fracking operations, the potential for surface spills of fracking fluid and flowback water, and the impact of improper disposal of wastewater.

"You're going to see a lot more federal regulatory effort" aimed at fracking, Mr. Pernicone said.

Any new rules issued by Interior, the EPA or other agencies will increase litigation risk for oil and gas companies, he said.

Such rules "could very well provide the basis for claims," he said.

## FRACKING RISK COVERAGE LIMITED

Environmental impairment liability insurers aren't eager to write hydraulic fracturing risks, and many energy companies are relying instead on the limited pollution coverage offered under other policies, brokers say.

While a dozen or more large insurers will write EIL coverage for energy companies generally, only five or six will write primary EIL for well owners or contractors with significant fracking operations, said Jeff Hanneman, managing director with the environmental services group of Aon Risk Solutions in Houston.

The number of oil and gas companies buying EIL policies has grown in the past two years, amounting to 30% to 40% of the industry as a whole, Mr. Hanneman estimated, saying that the total is between 60% and 70% among Aon clients.

Insurers are selective about the risks they write, and rates depend partly on geography, he said. Underwriters are concerned about companies with operations in the Marcellus shale, where well sites often are near populated areas; and in Louisiana, with its history of

oil- and gas-related environmental litigation, he said.

Houston-based agency Cravens Warren & Co. advises its clients to have EIL coverage, but many decide against spending the money and rely instead on general liability policies, said Mike Schneider, the agency's president.

Insurers writing GL and operators extra expense coverage treat fracking risks more cautiously, said Arlin Beer, senior vice president with broker IMA Inc. in Wichita, Kan. Underwriters are focused on well casing integrity; fracking methods used and the number of frack "stages," or separate fracturing operations, at a single well; and whether a company has experience with the drilling and other contractors it uses, he said.

By Douglas McLeod

## COVERAGE DISPUTES EXPECTED

Insurance coverage disputes are bound to follow fracking liability suits, including arguments over the scope of pollution exclusions in general liability policies, lawyers say.

Along with operators extra expense policies, which cover cleanup costs from a well blowout, general liability policies also cover "sudden and accidental" pollution if discharges are discovered and reported within certain time limits — for example, discovery within 30 days and reporting to underwriters within 90 days.

Intended to exclude gradual seepage claims, such limits already have figured in what may be the first fracking-related coverage battle, a case between Ace American Insurance Co. and Warren Drilling Co. Inc. of Dexter City, Ohio, that was settled last month.

Warren alleged that it found out about drinking water contamination at a West Virginia site when it was sued by a property owner in 2010, two years after the property owner had complained to the well's owner and operator, a unit of Pittsburgh-based EQT Corp., which had hired Warren. Ace denied coverage, saying that Warren missed the 30-day discovery/90-day reporting limits of its GL policy.

Warren paid \$40,000 to settle the underlying liability claim last year after incurring \$155,091 in defense and expert witness costs, according to its filings in U.S. District Court in Columbus, Ohio.

Ace declined to comment on the terms of its settlement with Warren, and Warren officials could not be reached.

Warren is still suing EQT for indemnity under its drilling contract.

By Douglas McLeod

# Bracing for a baby boomer backlash

## More discrimination claims expected from older terminated workers

BY JUDY GREENWALD

**A**ge discrimination charges filed against employers, while certainly not new, continue to plague firms and are expected to increase, as financially strapped baby boomers linger in the workplace.

It is probably going to be a growth area for litigation, said Robin E. Shea, a partner with law firm Constangy, Brooks & Smith L.L.P. in Winston-Salem, N.C.

Baby boomers “don’t have enough for retirement, and so they’re having to work much longer than maybe the prior generation had to and, meanwhile, you’ve got younger people trying to come up in the workforce and move up into the organizations, and the older baby boomers don’t want to leave, because they can’t afford to,” she said.

This is “expected to create conflict over the next few years and, of course, severance packages aren’t nearly as sweet now as they were 10 years ago,” Ms. Shea said. Furthermore, “we would suspect baby boomers to be probably more litigious” than previous generations.

A report issued by The Conference Board Inc. on Feb. 1 said the percentage of workers between ages 45 and 60 who planned to delay retirement increased to 62% in 2012 from 42% in 2010.

David Gevertz, a partner with law firm Baker,

### HOW TO AVOID AGE DISCRIMINATION CLAIMS

- Don’t assume workers 65 or older should retire, suggest they do so, query them as to when they plan to retire, or ask if they are looking forward to retirement.
- Be sure reasons for terminating older worker are well-documented.
- Don’t assume older workers are incapable of learning new things.
- Give older workers terminated in reductions in force the opportunity to apply elsewhere in the company.
- When laying off older workers, be sure paperwork is in order, including release-of-liability forms in severance packages.
- Offer generous severance packages in return for signed releases of claims.
- Be honest about your reasons for letting an older worker go.
- Avoid making “ageist” comments.
- Immediately retract any negative comments.
- Examine demographic data in layoffs to be sure older workers are not disproportionately represented.

Donelson, Bearman, Caldwell & Berkowitz P.C. in Atlanta, said, “We’ve seen an increase in age discrimination complaints in the context of reductions in force. It’s gotten to the point where there have been so many successive

waves of reductions at the same companies” that they no longer strictly comply with the Older Workers Benefit Protection Act. Consequently, some employers “are not completing the demographic information that must be attached to a release of an age claim” under the act.

Age discrimination is “certainly an ongoing concern for employers, and one of the types of claims that we continue to see regularly” and most frequently as reductions in force continue, said Gregg Lemley, a shareholder with law firm Ogletree, Deakins, Nash, Smoak & Stewart P.C. in St. Louis.

Denise I. Murphy, an attorney with law firm partner with Rubin & Rudman L.L.P. in Boston, who predicted the number of age discrimination claims will accelerate, said: “What most people don’t understand is everyone over 40 is protected by the Age Discrimination Act and the Older Workers Benefit Protection Act.

“It’s very simple for someone who’s been terminated for whatever reason to establish a prima facie case of age discrimination. All they have to do is prove they were employed, they were age 40 and over,” they were the target of an adverse employment action, and were replaced with someone who was either not in a protected class or whose “difference in age was large enough to give an inference of age discrimination.”

### CHANGING DEMOGRAPHICS

**D**emographics are creating potential problems for employers in terms of age discrimination claims.

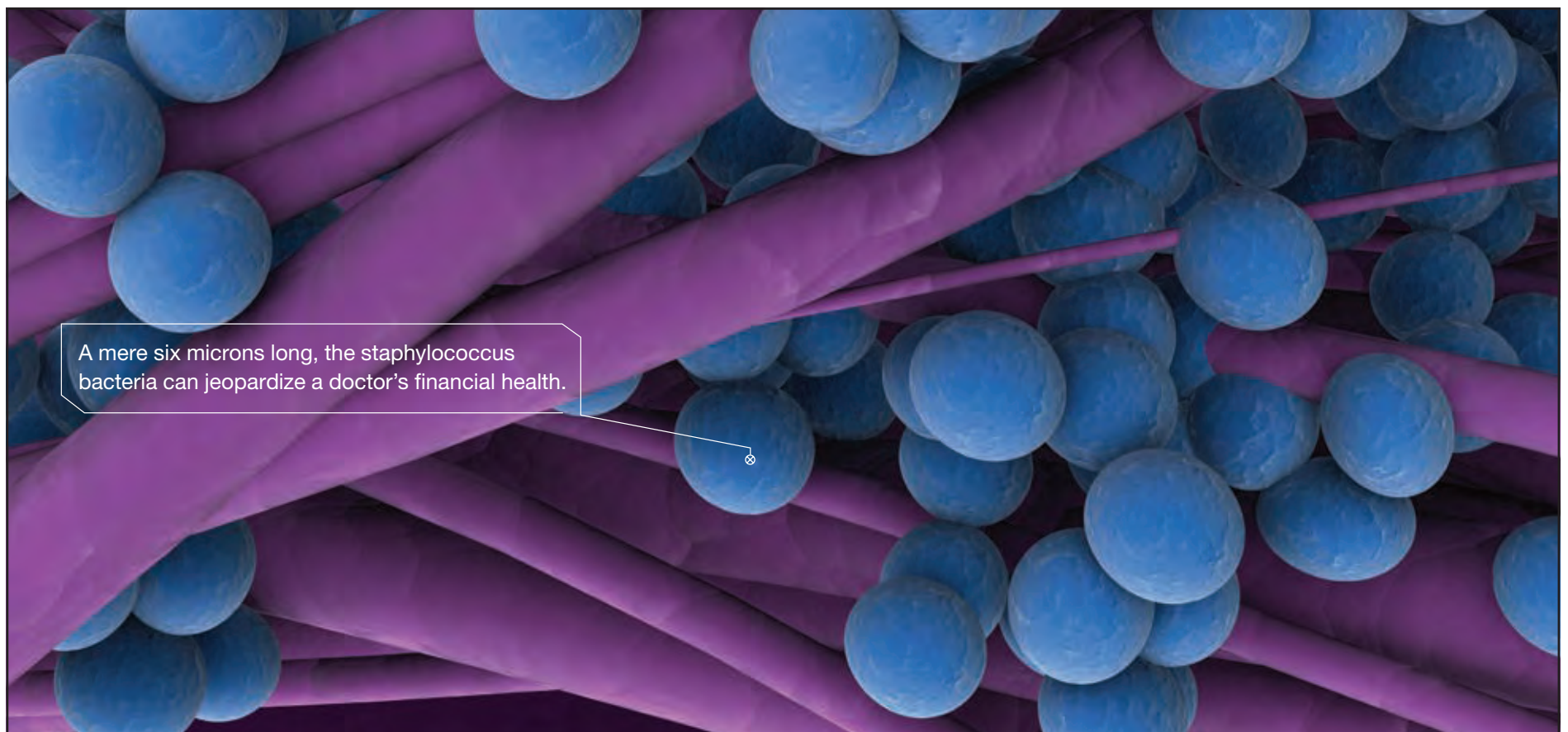
Between the 2000 and the 2010 U.S. census, for instance, U.S. residents age 60 and older increased to 18.5% of the population from 16.3% as baby boomers increasingly moved into the senior age brackets.

As the population ages, there is “going to be an increased focus” on age discrimination claims, said Diana Hoover, a partner with law firm Hoover Kernell L.L.P. in Houston.

Jeffrey D. Polsky, a partner with law firm Fox Rothschild L.L.P. in San Francisco, said “The workforce is obviously aging, and when an older employee leaves the workforce, more often than not they’re going to be replaced by somebody younger.”

Employers “need to ... be sure that they can link to a legitimate, nondiscriminatory reason why a particular employee wasn’t meeting their expectations,” he said.

By Judy Greenwald



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# Genetic discrimination expected to emerge as significant issue for employers

Employee lawsuits may include allegations of GINA violations

BY JUDY GREENWALD

## GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

Employers may not:

- Discriminate against employees or applicants based on genetic information.
- Harass someone because of their genetic information, regardless of whether the harasser is a supervisor, co-worker, client or customer.
- Fire, demote, harass or otherwise retaliate against an applicant or employee who has filed a charge of discrimination, participated in a discrimination proceeding, or opposed genetic discrimination.
- Obtain genetic information, including family medical history, except under certain exceptions.
- Disclose genetic information about applicants or employees.

Source: National Human Genome Research Institute, National Institutes of Health

“Plaintiffs lawyers haven’t yet figured out what to do” with GINA, said Gregg Lemley, a shareholder with law firm Ogletree, Deakins, Nash, Smoak & Stewart P.C. in St. Louis.

GINA “is a bit of a sleeper issue,” said Jeffrey I. Pasek, a Philadelphia-based member of law firm Cozen O’Connor. “Employers are hesitant to get into requesting genetic information” except incidentally, such as through their Family and Medical Leave Act or accommodation leave processes, or perhaps through workers compensation, he said.

Mr. Pasek said he anticipates cases in which an employee brings an Americans with Disabilities Act, FMLA or workers comp retaliation claim and decides to include a GINA claim as well.

David Gevertz, a partner with law firm Baker, Donelson, Bearman, Caldwell & Berkowitz P.C. in Atlanta, said that while GINA “hasn’t exploded” as an issue so far, “it’s slowly making its way through the system.”

Mr. Gevertz said the issue is a potential risk particularly within the health care industry, where “employers tend to ask questions about infectious diseases, and are dealing with all kinds of preventative health care for their employees, given the sick population that

they deal with.”

Mr. Lemley said one area of concern could be the pre-employment medical exam. Many employers require pre-employment medical exams, but do not communicate to the physicians that it is necessary to remove from their forms standard questions about family medical history, which technically violate GINA, he said.

Michael A. Kalish, New York-based member of law firm Epstein Becker & Green P.C., said he would expect more litigation as more plaintiff employment lawyers look over “their potential tools.”

Jeremy Gruber, president and executive director of the Cambridge, Mass.-based Council for Responsible Genetics said it also has taken time for litigation associated with other civil rights legislation, including the Americans with Disabilities Act, to unfold.

However, Mr. Lemley said: “In most contexts where GINA is going to arise, there are going to be limited damages and limited ability to prove damages,” to the extent it becomes attractive to the plaintiffs bar.

## PREPARE NOW FOR MORE LITIGATION

Employers can prepare themselves for the expected time when the Genetic Information Nondiscrimination Act of 2008 becomes a focus of litigation, experts say.

One way to avoid potential litigation related to GINA is for employers to “use the safe harbor language whenever they send an employee for any kind of employer-mandated medical examination,” said Robin E. Shea, a partner with law firm Constangy, Brooks & Smith L.L.P. in Winston-Salem, N.C.

Ms. Shea also said employers should make sure their firms’ wellness documents have been updated to include a disclaimer that says employees are not required to answer genetic-related information and that their refusal to answer such questions will neither affect their ability to participate in a wellness program nor make them ineligible for a reward.

Jeremy Gruber, president and executive director of the Cambridge, Mass.-based Council for Responsible Genetics, said employers “need to make sure that they train their (human resources) department and their managers specifically on GINA.”

“I suspect that without that type of training, most individuals in a decision-making capacity for employers won’t fully understand the particulars of the law and what it permits and doesn’t permit,” Mr. Gruber said.

Richard D. Tuschman, a shareholder with law firm Akerman Senterfitt L.L.P. in Miami, said, “I don’t see any reason why an employer couldn’t adopt a policy that prohibits employees from disclosing their genetic information so that, in other words, the employer could take a position that ‘Not only do we not discriminate on that basis, but we don’t want to know. It’s not something we have any interest in knowing.’”

Jeffrey I. Pasek, a Philadelphia-based member of law firm Cozen O’Connor, said firms “might assign somebody to sanitize the file and keep that information located not even in the medical file, but someplace else.”

By Judy Greenwald

# PIRATES CHANGE COURSE IN AFRICAN WATERS

Ever-evolving piracy risks require new risk management strategies

BY SARAH VEYSEY

Incidences of piracy reached a five-year low in 2012, thanks in part to the increased use of armed security teams on ships and the presence of European Union, United Kingdom and United States navies in dangerous waters, experts say.

But while attacks in the Gulf of Aden were reduced, there is an increasing threat from piracy in West African waters, where the risks differ somewhat.

During 2012, 297 ships were known to be attacked by pirates, compared with 439 in 2011, according to figures released by the International Maritime Bureau, part of the International Chamber of Commerce in London.

Last year, the IMB reported, 174 ships were boarded by pirates, 28 were hijacked and 28 were fired upon. There were a further 67 attempted attacks, it said. The number of people taken hostage on board fell to 585 in 2012 from 802 in 2012, the IMB reported.

Seventy-five ships reported attacks in the Gulf of Aden, compared with 237 in 2011. The IMB said it believed the presence of navies patrolling waters around Somalia had contributed to the reduction in pirate attacks there, as well as the use of security teams and crews' application of best management practices devised by international shipping organizations.

"This progress could easily be reversed if naval vessels were withdrawn from the area," said Pottengal Mukundan, director of the IMB.

The International Maritime Organization, the International Chamber of Shipping, the Baltic and International Maritime Council and several other international marine and shipping organizations in a joint statement said they welcomed the decrease in attacks in the Gulf of Aden and the western Indian Ocean.

"This decrease may be attributed to a combination of factors," they said, including "the presence of naval forces disrupting pirate operations, implementation of self-protection measures on board



REUTERS

In February 2011, the U.S. Navy destroyed a small boat being towed by a suspected pirate mothership following an attack on an oil tanker in the Arabian Sea. Efforts such as these have reduced piracy threats in the Gulf of Aden.

merchant ships and better situational awareness of where the threats are, coupled with more effective action ashore in Somalia by the Somali authorities and the international community."

But, the organizations said in their statement, they "remain convinced that the only long-term solution to piracy is to establish effective government and implement the rule of law in Somalia."

"There has been a big drop-off" in the number of successful pirate attacks in the Gulf of Aden in the past 12 months, said Nick Roscoe, a managing director in the global marine practice at Marsh Ltd. in London.

This is due in part to the presence of international navies, and the use of armed security guards on board many vessels also has deterred attacks, he said.

While Mr. Roscoe said shipowners have become better equipped to evaluate piracy threats, experts expressed concern about the rising threat of piracy in West Africa.

The IMB reported that there were 58 pirate attacks in the Gulf of Guinea in 2012. Nigeria accounted for 27 attacks of that total compared with just 10 reported incidents in 2011. Incidents also were reported in Togo, the Ivory Coast and Benin. The IMB added that there were 10 attacks in Nigeria and 20 in Benin in 2011, but that several attacks went unreported that year.

Piracy off the coast of West Africa is becoming a significant problem, according to Mr. Roscoe. The nature of piracy in that region often differs from East Africa, he said, with attacks being more focused on theft than on taking hostages and holding them for ransom.

The aim of many of the pirate attacks seen in West Africa has been to steal cargo, such as oil, said Will Miller, divisional director of special contingency risks at Willis Group Holdings P.L.C. in London.

So, for example, a tanker may be hijacked for a limited time while pirates pump off oil, he said, although there have been some incidents in West Africa where crews have been held for ransom.

West African states have more established law enforcement structures than Somalia, so there is less scope for a ship to be held for a lengthy period of time in West African waters, he said.

But local regulations can make it more difficult for shipowners to employ mitigation tools, Mr. Roscoe said. For example, it is illegal to carry arms within 12 miles

of the Nigerian coastline, so security guards cannot be used aboard ships or must be unarmed in Nigerian waters, he said.

Late last year, the Baltic and International Maritime Council issued interim anti-piracy guidelines for the Gulf of Guinea. The guidelines include carrying out a ship- and voyage-specific risk assessment before entering the waters of Nigeria and Benin, taking into account the threats of armed robbery, cargo theft and kidnapping, among other things.

In recent months, brokers and security providers have developed new products and services to address the problem of piracy.

Willis' Mr. Miller said the brokerage can provide clients with a tracking service and works with a ship's captain to advise them on reducing risks along their intend-

ed route. In addition, Willis advises ships' captains about weather patterns, as it is harder for pirates to attack during heavy storms.

Last year, Marsh launched an insurance facility for members of the Security Association for the Maritime Industry — private maritime security companies that increasingly are being engaged to help ships deter pirate attacks.

The SAMI facility was devised to plug gaps in coverage, and it includes general or public liability, professional indemnity, maritime employers liability, employers liability and personal accident coverages, Mr. Roscoe said. A noncore package also can be bought that comprises kidnap and ransom, hull and machinery and protection and indemnity insurances.

In January 2013, London-based Typhon Maritime Security Service launched a marine convoy escort service to offer what it describes as a naval-grade service to accompany ships through known pirate hotspots. The convoys travel in a "protected envelope" to make it difficult for pirates to launch an attack, it said.

Typhon CEO Anthony Sharp said the service was developed in part because the areas at risk are too vast for navies to patrol effectively.

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During 2012, 297 ships were known to be attacked by pirates, compared with 439 in 2011, according to figures released by the International Maritime Bureau, part of the International Chamber of Commerce in London.



# Widespread use of nanotechnology raises concerns over potential liability

Environmental damage, bodily injury claims could materialize

BY DOUGLAS McLEOD

**T**he biggest risk management worries about nanotechnology, experts say, are the unknowns. Despite scores of ongoing studies, the human health and environmental effects of nanomaterials used in hundreds of consumer and industrial products still are unclear.

This uncertainty — and hints of possible toxicity of some particles in studies — has raised the specter of potential liability exposures ranging from consumer class action and directors and officers liability suits to mass tort litigation.

Businesses are under pressure to produce products that take advantage of nanomaterials' superior characteristics, but "what the potential exposure could be in the future is unknown," said Peter Dion, product liability line of business director with Zurich North America in Schaumburg, Ill.

"The unknown and how to manage the unknown" are risk managers' biggest challenges, said Robert Gaus, senior vice president with Marsh Risk Consulting in Cleveland. "We are just not sure (about the exposure) from an industry perspective or a regulatory perspective."

Nanoparticles are defined as being less than 100 nanometers, or billionths of a meter, in a given direction; 1 inch equals about 25.4 million nanometers.

Researchers have created hundreds of different nanomaterials from scores of elements and compounds from aluminum to zinc oxide. The most commonly used particles are nanosilver, which has antimicrobial properties and is used in sportswear and cosmetics; various nanocarbon materials, used in electronics and to strengthen composite materials; and nanotitanium dioxide, which transforms UV light into heat and is used in sunscreens.

Worldwide, there are 2,304 nanotechnology businesses — 1,197 in the U.S. — including manufacturers of raw nanomaterials, nano-enabled consumer and industrial products, instruments and medical and pharmaceutical products, according to Nanowerk

L.L.C., a Honolulu-based news and information website.

Studies of some nanomaterials have raised concerns about possible adverse health and environmental effects. Animal studies have found, for example, that filament-like carbon nanotubes can be inhaled, lodge in the lungs and cause inflammation, findings that have triggered comparisons to asbestos. No research has yet shown that carbon nanotubes cause asbestos-like disease, however.

Nanosilver, meanwhile, has been found to be toxic to beneficial soil bacteria, suggesting that wide dispersal could cause environmental damage.

Scores of university and government research projects into environmental and health effects are under way, some of them through the U.S. Environmental Protection Agency, the U.S. Food and Drug Administration and other government agencies.

The EPA and FDA have faced criticism, though, for not sufficiently regulating the use of nano-scaled materials. At the end of 2011, for example, the EPA's own inspector general reported that it relied too much on industry-submitted data and lacked the ability to compile and disseminate information about nanomaterials.

EPA has proposed a blanket rule requiring 90 days' advance notice from companies planning to manufacture, import or use nano-scale substances to allow time for a health and environmental impact assessment. For now, though, the agency continues to review materials on a case-by-case basis, said John C. Monica Jr., a partner with Porter, Wright, Morris & Arthur L.L.P. in Washington, who writes about nanotechnology law.

The FDA last year issued draft guidance to companies for evaluating the safety of nanomaterials used in food additives and packaging and cosmetics. In addition, the National Institute for Occupational Safety and Health, has issued recommended workplace exposure limits for carbon nanotubes and nano-scale titanium dioxide.

Overall, "regulation has lagged behind research and development a lit-

tle bit," but has picked up in the past two years, said Clayton Shoup, workers compensation line of business director with Zurich in Schaumburg.

No nanotechnology liability lawsuits have been filed to date, but the lack of clear understanding of the possible effects of various nanomaterials has created concern about possible future exposures, insurance and legal sources say.

The most dire of these may be mass tort litigation involving alleged worker or consumer injuries from exposure to hazardous nanomaterials. Carbon nanotubes, with their physical similarity to asbestos fibers, have been most frequently cited as potentially presenting this risk. NIOSH also has identified titanium dioxide as a potential carcinogen, and the FDA is evaluating the safety of nano-scale titanium dioxide and zinc oxide in sunscreen products, agency documents show.

In the consumer products arena, carbon nanoparticles often are embedded in polymers or resins and thus present less risk than aerosolized particles that may be contained in health and beauty products, Mr. Gaus said.

Besides triggering personal injury suits, products containing allegedly dangerous nanomaterials also could give rise to medical monitoring claims, he added.

Tort actions would face legal hurdles, including proving that an injury was caused by a specific toxic material, legal sources say; asbestos cases didn't face this hurdle because asbestos triggers a signature disease, mesothelioma. Still, state courts have more lenient standards for causation testimony than federal courts, and suits still might be filed there, said Catherine Morris Krow, a partner with Orrick, Herrington & Sutcliffe L.L.P. in San Francisco.

Some doubt the possibility of an asbestos-like mass tort crisis, though. In part, this is because — unlike asbestos — nanomaterials are the targets of early and widespread toxicology study.

"I just don't see it happening," Mr. Monica said.

## NANOTECHNOLOGY PART OF EVERYDAY LIFE

Examples of industry sectors/products using nanotechnology

AUTOMOTIVE	Lightweight construction
	Catalysts and painting
	Tires
	Sensors
	Windshield and body coating
CHEMICAL	Fillers for paints
	Composite materials
	Impregnation of papers
	Adhesive
	Magnetic fluids
CONSTRUCTION	Building materials
	Insulation
	Mortar
	Flame retardants
	Surface coatings
ELECTRONICS	Displays
	Data memory
	Laser diodes
	Fiber optics
	Optical switches
ENERGY	Filters
	Lighting
	Fuel cells
	Solar cells
	Batteries
ENGINEERING	Capacitors
	Protective coatings for tools and machines
	Lubricant-free bearings
	Water remediation
	Green chemistry
ENVIRONMENTAL	Fuel-changing catalysts
	Packaging
	Storage life sensors
FOOD AND BEVERAGE	Additives
	Juice clarifiers
	Ceramic coating for irons
HOUSEHOLD PRODUCTS	Odor removers
	Glass cleaners
	Ceramics and metals
MEDICINE	Drug delivery systems
	Rapid testing systems
	Prostheses and implants
	Antimicrobial agents
	In-body diagnostic systems
SPORTS PRODUCTS	Ski wax
	Tennis rackets
	Golf clubs
	Tennis balls
	Antifouling coatings for boats
TEXTILES	Surface coatings
	Smart clothes (anti-wrinkle, stain resistant, temperature controlled)
WARFARE	Neutralization materials for chemical weapons

Source: Lloyd, Lekas and Schmitt, *Nanotechnology: An Industrial Ecology Perspective*. Wiley, 2010



a nanoparticle  $< 1/1,000,000,000$ ths  
of a meter in any direction

Nanoparticles are defined as being less than 100 nanometers, or billionths of a meter, in a given direction; 1 inch equals about 25.4 million nanometers.

# Workers protected from most nanoparticle risks

Workers handling nanomaterials are most exposed to any potential health hazards, but most companies are aware of the risks and take steps to contain them, insurance and legal sources say.

"The people most at risk are the people on the front lines," said Catherine Morris Krow, a partner with Orrick, Herrington & Sutcliffe L.L.P. in San Francisco. But occupational safety and health practices have come a long way since the early days of asbestos, she said.

"We're much better at protecting workers now than we were then," she said.

The National Institute for Occupational Safety and Health has published recommended safe practices for working with nanomaterials in research labs, and risk management experts advise the same steps for the nanotech industry. They include:

- Enclosing processes involving nanomaterials to isolate workers from them as much as possible.
- General exhaust ventilation systems and local vented enclosures where needed.
- Personal protective equipment, including protective clothing and respirators.

Some companies handling nanomaterials already are in high-tech

**"The people most at risk are the people on the front lines."**

Catherine Morris Krow,  
Orrick, Herrington & Sutcliffe L.L.P.

industries and are familiar with managing clean environments, said Peter Dion, product liability line of business director for Zurich North America in Schaumburg, Ill.

Many nanotech companies are small startups with 50 or fewer employees, and some small, thinly capitalized firms may be less able to invest in the safety equipment larger companies do, said John C. Monica Jr., a partner with Porter Wright Morris & Arthur L.L.P. in Washington.

"Those are the ones you have to worry about. Big companies are usually well on top of the issue," he said.

Even at small companies, though, "there's a very high level of knowledge" about the need for worker safety, especially in cases where venture capital investors are keeping an eye on operations, Mr. Monica said. "I think the word's gotten out there."

Meanwhile, although most of the attention to nanotech risks has been on potential liabilities, the industry also presents property risks, including the risk of a nanoparticle spill that contaminates a manufacturing facility.

Such an accident "could significantly affect business continuity for lots of industries," said Louis Gritzo, vice president and manager of research with FM Global in Johnston, R.I.

While many processes using nanomaterials take place in ventilated enclosures, "a big release of large quantities (of particles) is a risk we want to make sure doesn't bring business to a screeching halt."

FM Global engineers are work-

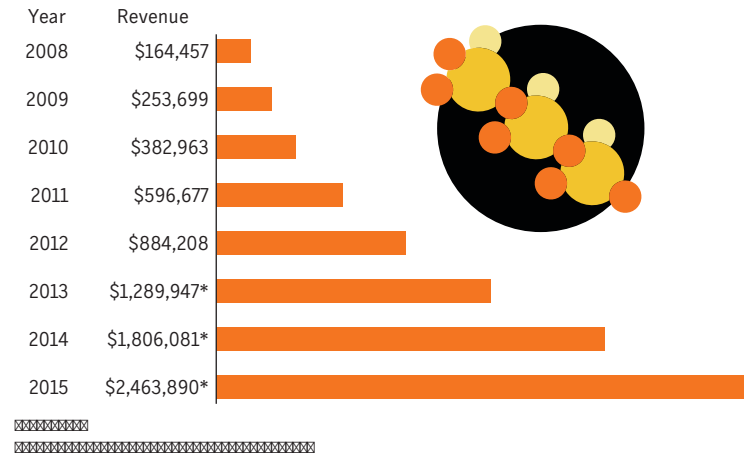
ing with clients on systems that will filter suspended nanoparticles out of the air, he said. The insurer also is identifying solvents that are effective at removing particles from surfaces, and has found one — sodium dodecylbenzene sulfonate — that works well in picking up carbon nanotubes from smooth surfaces.

The next step is testing its effectiveness on rougher surfaces, he said.

By Douglas McLeod

## NANOTECHNOLOGY: AN IMPORTANT REVENUE SOURCE

Total revenue generated by nanotechnology (in thousands of U.S. dollars)



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### OLDER AND UNEMPLOYED

Older workers are more likely to be jobless for a year or longer

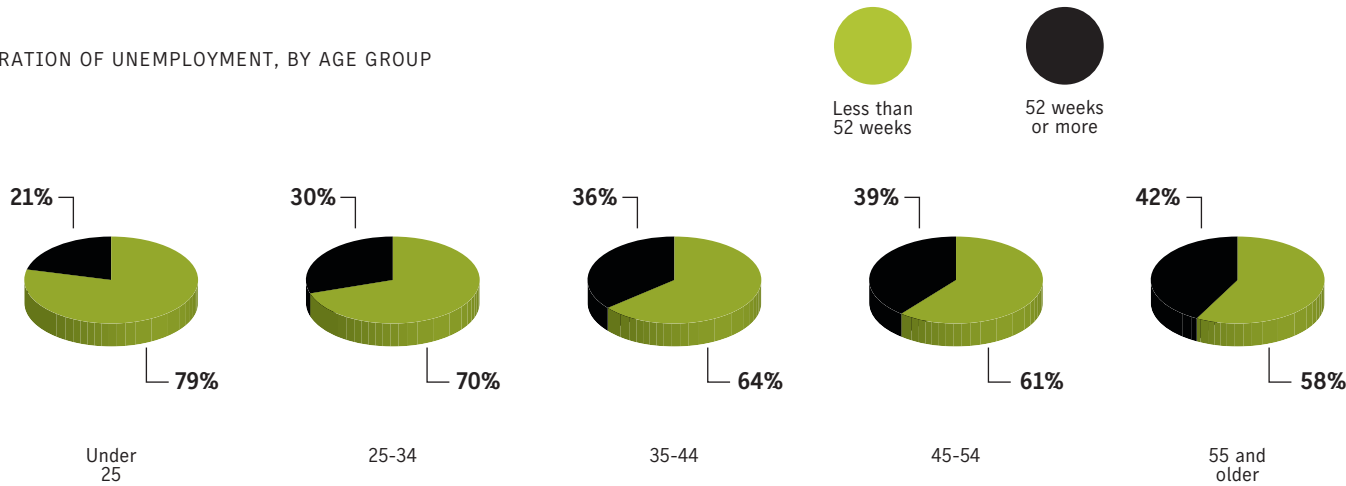
LABOR FORCE, BY AGE GROUP



PERCENTAGE OF ALL UNEMPLOYED, BY AGE GROUP



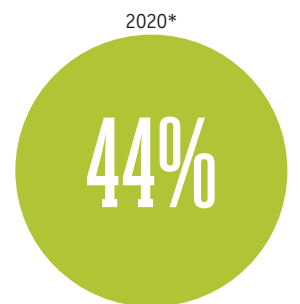
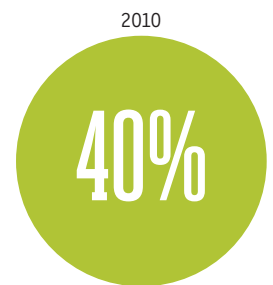
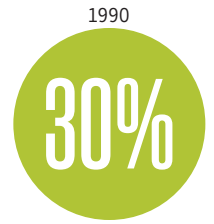
DURATION OF UNEMPLOYMENT, BY AGE GROUP



Source: U.S. Census Data Current Population Survey, 2012 annual statistics

### AGING WORKFORCE

The aging of the U.S. population is affecting the labor force as the percentage of workers 55 and older staying on the job grows.



\*Estimated  
Source: Monthly Labor Review, January 2012, using U.S. Census Population Statistics

# 23%

### AGE CLAIMS GROWING

As the working population ages, more age discrimination claims are expected.

23% of the discrimination claims filed in 2012 with the U.S. Equal Employment Opportunity Commission included age discrimination.

Source: U.S. Equal Employment Opportunity Commission

## Aging workforce, genetic risks loom

Age-related and genetic discrimination lawsuits are among the most significant emerging liability risks employers will be facing in coming years.

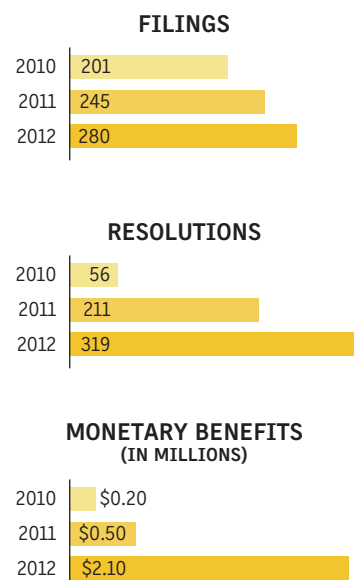
With their retirement incomes either slashed by a tough economy or deferred because of the graduated rise of the age to receive full Social Security benefits, baby boomers are staying in the workforce longer. Because they tend to remain jobless for longer periods than their younger counterparts, terminated older workers are filing

age discrimination lawsuits more frequently, and the payouts on those claims are becoming larger.

In addition, claims of genetic discrimination are expected to increase as the plaintiffs bar figures out ways to allege violations of the Genetic Information Nondiscrimination Act. However, perhaps because it is still something of a novelty in the court system, the investigation and resolution of genetic claims can be longer than a year to resolve.

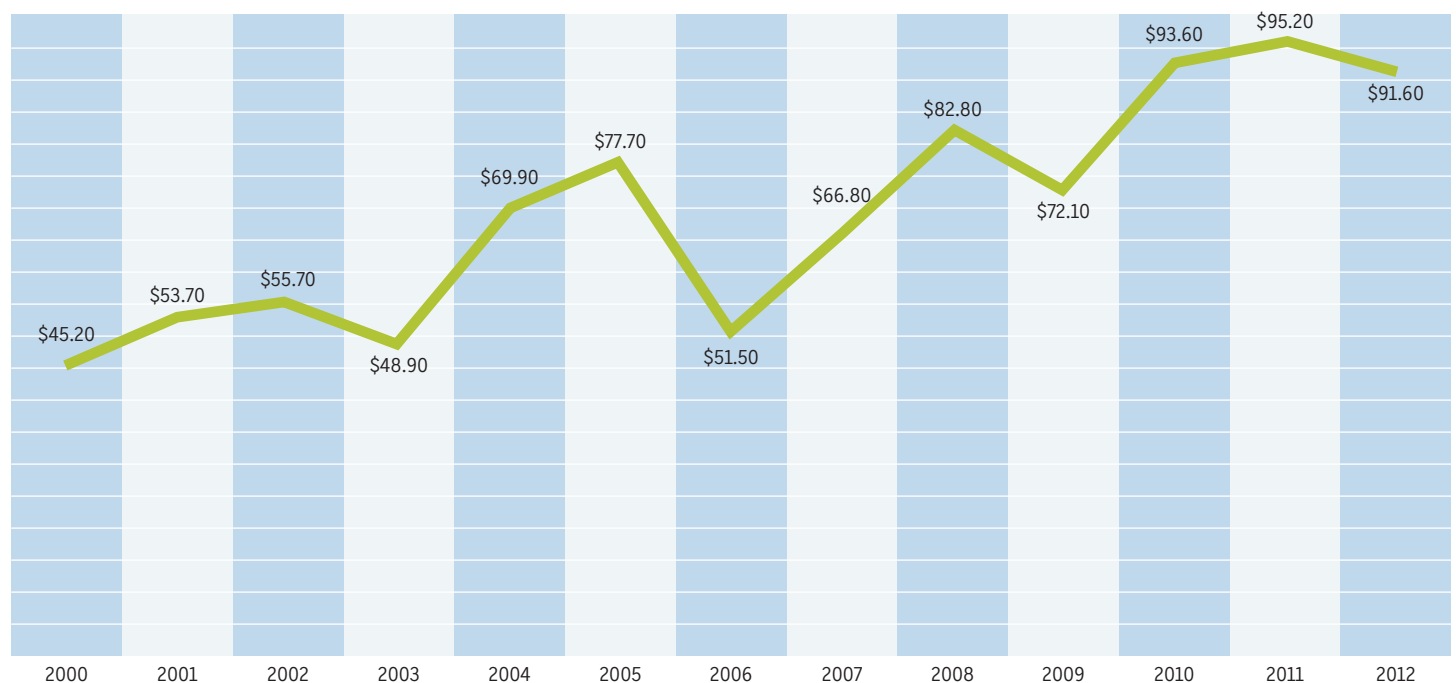
### GENETIC DISCRIMINATION

Complaints about genetic discrimination are increasing but the investigation and resolution of these claims may take longer than one year



### PAYOUTS RISING

Monetary awards paid out for age discrimination claims show an increasing trend. In billions:



Source: U.S. Equal Employment Opportunity Commission

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## Hiscox adds coverage for professional liability

Hiscox Ltd. has expanded professional liability offerings for its allied health care, architects and engineers, and miscellaneous professional liability policyholders.

In addition to standard forms, the program offers industry-specific policies for beauty salons and day spas, ambulance and medical transportation, real estate developers, contractors, consultants, trustees, and real estate and property managers, Hiscox said.

Brokers using the new forms are able to offer general liability coverage combined with these policies.

"The service professions are a key market for Hiscox, and we will continue to develop products that meet the needs of our brokers and their clients," Gary Head, chief underwriting officer at Hiscox USA, said in a statement. "Our research suggests that clients are increasingly looking for a 'tailor-made' policy to meet their unique needs."

For more information, contact Dan Gmelin, senior vice president and A&E product manager, at [dan.gmelin@hiscox.com](mailto:dan.gmelin@hiscox.com); Vince Josaphs, vice president and MPL product manager, at [vince.josaphs@hiscox.com](mailto:vince.josaphs@hiscox.com); or Mr. Head at [gary.head@hiscox.com](mailto:gary.head@hiscox.com) regarding allied health care.

## Ascent Underwriting offers cyber risk coverage

Newly formed specialist managing general agent Ascent Underwriting is offering coverage for emerging cyber risks aimed at the U.S., U.K., Canadian and European markets.

## PRODUCTS & SERVICES

### Beazley releases cyber breach response product

Beazley P.L.C. has launched Beazley Breach Response, a product aimed at helping companies recover from cyber breaches, for buyers in France and the United Kingdom.

Launched in the U.S. market in 2010, it includes data breach notification and credit monitoring services for individuals and separate limits for third-party claims, forensic and legal assistance, coverage for notification costs, and loss prevention services, among other things.

For French customers, a policy is available in French and there's a specialist underwriter in France, said Paul Bantick, a senior Lloyd's of London underwriter for Beazley's technology, media and business services team.

Its first product suite, CyberPro, is modular-based and specializes in nontangible risks such as cloud computing,

data privacy, network interruption, professional liability and intellectual property issues, London-based Ascent said.

Amlin P.L.C. is acting as the lead syndicate, but Ascent also has backing from four other Lloyd's of London syndicates.

Ascent is led by directors Gareth Tunggatt, who previously was underwriting manager for technology risks at the Barbican Insurance Group syndicate, and David Umbers, previously a senior partner at Lloyd's broker Safeonline L.L.P.

Ascent, a trading division of Safeonline, is awaiting Financial Services Authority and Lloyd's approvals. Its offices are at London Underwriting Centre, 3 Minster Court, Mincing Lane, London.

For more information on CyberPro, contact Mr. Umbers at 44 (0) 203 642 8250 or [david.umbers@ascentunderwriting.com](mailto:david.umbers@ascentunderwriting.com).

### Chubb releases guide on D&O loss-prevention

Chubb Corp. released a loss prevention guide to prepare organizations for potential merger and acquisition litigation.

The 21-page guide for directors and officers was written by Dan A. Bailey, a member of Columbus, Ohio-based law firm Bailey Cavalieri L.L.C.

"Merger and acquisition activity is up, and many companies and their directors and officers are being sued as a result of these transactions," Evan Rosenberg, Chubb senior vice president and global specialty lines manager, said in a statement. "While it's impossible to prevent the filing of a lawsuit, directors may be able to increase their defensibility" by following best practices in the guide.

"Director Liability Loss Prevention in Mergers and Acquisitions" is available at [www.chubb.com](http://www.chubb.com).

## DEALS & MOVES

### Ironshore acquires Excess Risk Reinsurance

Hamilton, Bermuda-based Ironshore Inc. has acquired Excess Risk Reinsurance Inc., a managing general underwriter specializing in stop-loss insurance.

Ironshore said Ridgeland, Miss.-based Excess Risk offers specific and aggregate excess loss coverage and access to nationally recognized organ and related transplant networks to meet the specialized insurance needs of self-funded employers through third-party administrators, brokers and consultants.

President Steven M. Parker and Executive Vice President David Dausman will continue in executive leadership positions under the new ownership.

Excess Risk Reinsurance, which was founded in 1989 as AJD Insurance Consultants Inc., was renamed in 2001. It has regional offices in Boston and Denver.

### Digital Insurance acquires benefits brokerage Capital Benefits

Atlanta-based Digital Insurance has acquired Capital Benefits Group L.L.C., an employee benefits brokerage in Nashville, Tenn., that serves mostly midsize employers throughout Tennessee.

Previously, Capital Benefits Group was the benefits partner of Tennessee Mass Mutual Agency. Founded in 1998, Capital Benefits has some 800 employer clients.

Digital Insurance said Capital Benefits Group President and CEO Harold Roe and his 16 staff members will join Digital Insurance and continue to operate offices in Nashville, Knoxville and Chattanooga, Tenn.

### Anderson Kill to open Vt. office to reach out to captive industry

Law firm Anderson Kill & Olick P.C. is opening an office in Burlington, Vt., in an effort to reach out to the captive industry, the New York-based firm said.

Marshall Gilinsky, a shareholder in the firm's insurance recovery group, will head the new office, which will focus primarily on insurance recovery, particularly on behalf of captive insurance firms in disputes with their reinsurance providers, the law firm said in a statement.

Vermont "is home to a great concentration of talented brokers, managers and actuaries serving captives and their parent companies," Mr. Gilinsky said in a statement.

### XL Group to expand reinsurance operations to Dallas, Philadelphia

Looking to expand its reinsurance operations in the U.S., XL Group P.L.C. announced it would open offices in Philadelphia and Dallas.

The Dallas office will be led by Dean Wolfe, who recently was promoted to Western regional manager of XL's property facultative Western region. Senior underwriter Margaret LoSapio will lead the Philadelphia office.

"We are fortunate to have the high caliber of internal talent required to take on these new responsibilities," John Welch, president and CEO of XL Reinsurance America Inc., said in a statement. "Dean and Margaret will draw on their depth of knowledge, wealth of experience and strong industry relationships to meet the needs of these important markets."

## Capital-management model focuses on the big picture

### TECHNOLOGY

#### HOW DOES IT WORK?



**BILL KENEALY**

BY BILL KENEALY

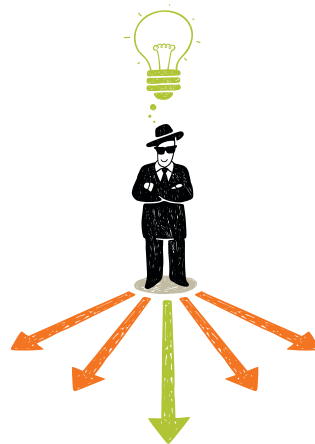
Getting a clear picture of the many risks facing a company is vital for risk managers across all industries.

Risk managers in the property/casualty insurance industry rely on economic capital management models to gauge operational, strategic, reserve and pricing risks and to better deploy risk mitigation strategies such as purchasing reinsurance.

MetaRisk 7.1, the new version of the capital management platform from reinsurance brokerage Guy Carpenter & Co. L.L.C., has several new features intended to help risk managers identify adverse risk scenarios.

"MetaRisk is meant to capture all the underlying exposure data and bring it together in a big picture and then help you assess the impact," said Don Mango, vice chairman of analytics.

For example, a risk manager looking to incorporate output



from catastrophe models from modelers such as Newark, Calif.-based Risk Management Solutions Inc. and Boston-based AIR Worldwide Corp. can now import that data directly into MetaRisk 7.1 through a new wizard-style interface.

"Accessing catastrophe model results directly is a huge leap for our own users and licensees," Mr. Mango said.

Another improvement to the platform is a patented reserve

runoff scenario generator, MetaRisk Reserve, which Mr. Mango likened to a catastrophe model for capital reserves. Using the tool, risk managers are able to assess financial risk drivers to more accurately gauge the effects of reserve risk on economic capital.

Similarly, the new version of MetaRisk contains a model that helps users gauge the likelihood of reinsurers defaulting under different economic scenarios. Insights into the creditworthiness of counterparties is increasingly important, considering pending regulations such the Solvency II framework in the European Union and the National Association of Insurance Commissioners' pending Own Risk and Solvency Assessment mandate.

"The credit risk functionality is a result of the level of detail that our users are demanding and Solvency II is requiring," Mr. Mango said.

# Maurice Greenberg writes his version of the AIG story

BY DOUGLAS McLEOD

No one would expect Maurice R. Greenberg's "The AIG Story" to be an impartial history of the insurer's rise and near-collapse, and it isn't.

After recounting Mr. Greenberg's four decades building American International Group Inc. into an industry giant, his book goes on the attack, targeting people he blames for his 2005 ouster as CEO and who brought AIG to its knees in the financial crisis.

Much of this ground will be familiar to anyone who has followed the company. But the book—published in January and written with George Washington University Law School professor Lawrence A. Cunningham—distills Mr. Greenberg's views.

The early chapters of "The AIG Story" trace the acquisition of its U.S. units and international expansion, and offer interesting anecdotes. In the early 1970s, for instance, Mr. Greenberg worked with the CIA and Howard Hughes to insure the Glomar Explorer, a vessel built to clandestinely raise a sunken Soviet submarine in the Pacific. Or the time Mr. Greenberg was stopped at the Hungarian border with rifles in the trunk of his car, gifts intended for the Hungarian finance minister; he made it through, and on a hunt with the minister the next day shot a stag.

The book also paints a clear picture of the hard-driving, profit-centered corporate culture Mr. Greenberg famously fostered at AIG, which is described in military terms by the World War II and Korean War veteran: He and his top deputies were a "band of brothers"; his management style was "command and control." There is even a military-style acronym: MOPs, for "mobile overseas personnel" — executives who move from country to country.

Although the book is written in the third person, Mr. Greenberg does not come off in these chapters as modest: He is a "pioneering internationalist," and AIG executives listen "in amazement" to his ideas for restructuring a subsidiary.

And while AIG's key executives are "a cadre of colorful characters," it is really only Mr. Greenberg's character that comes to life: single-minded and combative in justifying his actions and opinions.

These qualities are on display in the book's second half, which provides Mr. Greenberg's take on his and AIG's troubles.

AIG's board forced Mr. Greenberg out in 2005 amid investigations into improper accounting practices, including a sham reinsurance deal to boost AIG loss reserves. In 2009, Mr. Greenberg paid \$15 million — without admitting or denying guilt — to settle SEC civil charges related to the

transactions. He is still fighting civil charges filed in 2005 by then-Attorney General Eliot Spitzer.

Mr. Greenberg asserts these charges are baseless, the transactions in question immaterial to AIG's financial position. AIG "enjoyed a reputation for following conservative accounting," he writes; his ouster was a result of Mr. Spitzer's vindictive and politically motivated investigation, a supine board of directors and self-interested AIG lawyers.

Like many insurance industry observers, Mr. Greenberg views his departure as setting the stage for AIG's 2008 crisis. Risk management standards collapsed in his absence, he argues, permitting the financial products unit to take on huge unhedged credit default swap positions and the insurance units to invest in risky mortgage securities. Weak management then allowed the government to impose punitive terms for AIG's rescue, massively diluting the

value of its shares — in which Mr. Greenberg holds a large stake.

We'll never know whether AIG might have avoided the crisis had Mr. Greenberg remained CEO. (Mr. Greenberg has said that AIG should have stopped writing CDS contracts in 2005 when it lost its AAA credit rating, though a Congressional panel examining the bailout found no evidence that he advocated this



The AIG Story  
By Maurice R. Greenberg and Lawrence A. Cunningham  
(Wiley, 328 pages, \$29.95)

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What is clear is that Mr. Greenberg sees himself as a victim, and "The AIG Story" is, in part, his effort to settle scores.

*Mr. McLeod is a freelance writer and former Business Insurance staff reporter who has covered insurance and AIG for 30 years.*

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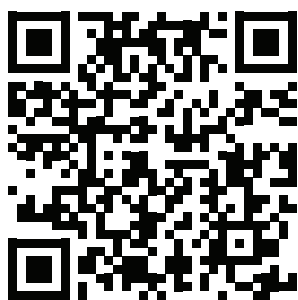
*Mr. McLeod is a freelance writer and former Business Insurance staff reporter who has covered insurance and AIG for 30 years.*

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## RIMS PRESIDENT TALKS 2013 GOALS

**Q** What will be some of your key goals or the areas you expect to focus on in your year as RIMS president?

**A** To answer that we need to back up just a little bit and realize what the evolution of RIMS has been in the past several years. There have been a lot of changes in RIMS, a lot of positive things.

I think growth will come from various areas in membership ... people in other professions within business that are doing risk management but don't see themselves as that, as well as the young professionals. We hope to continue to evolve our educational programming and networking opportunities as well. We've had some innovative reports that have come out over the past year and a half, two years, and we want to continue doing more of them. And, in addition to our work with strategic risk management and enterprise risk management, offering resources for traditional risk management methods has always been a staple of this society. I will ensure that we continue to focus the society's resources on helping all risk pro-

### Q&A

professionals achieve their goals.

Lastly, I think it's extremely important that we think globally. We want to be the risk management society for our members no matter where they are on the globe.

**Q** What sort of changes do you see RIMS undergoing in order to better serve its members in the face of a changing business and risk environment?

**A** It's not just the risk management profession but something we see in business in general — the next generation of risk man-

agers. There are many people that are in my circumstances that'll be looking at phasing out of the risk management profession in a few years and the challenge for us is to help young professionals understand that RIMS is the society where someone that is vibrant, that's innovative, that's energetic, there's a place for them in leadership in the risk management discipline and RIMS can be their voice.

**Q** You've been a RIMS member nearly 33 years. What advice would you share with newcomers to the profession?

**A** Well, this one's real easy for me. Never stop learning. It borders on just a colorful saying, but it really is true when you take it apart. Now, many people will hear that and think, well, that means you need to sign up for the RIMS educational programs, you need to look for certifications, and it's yes to all of that. But that's not really what I mean by never stop learning. That's a part of it. What you get in the classroom, what you can pick up in networking are all very important parts of it.



**JOHN PHELPS**

**DIRECTOR OF RISK SOLUTIONS, BLUE CROSS AND BLUE SHIELD OF FLORIDA INC.**

John Phelps, director of business risk solutions for Jacksonville, Fla.-based Blue Cross and Blue Shield of Florida Inc., is the 2013 president of the Risk & Insurance Management Society Inc. He recently spoke with Business Insurance Senior Editor Rodd Zolkos about his plans as RIMS president and what the society has meant to his career. Edited excerpts follow.

But learn within your organization. Why does the organization operate the way it operates? Where are the power points? Where are the potential weaknesses? That's also learning. The more you can learn about how your organization operates from strategy formation right down to getting the product out the door, the better risk manager you're going to be.

**Q** How has RIMS affected or benefited your own career?

**A** When I was a fledgling risk manager in Rochester, N.Y., I

needed a lot of help. I knew insurance contracts in and out but I needed help with what it meant to be in a risk management capacity for a company, and RIMS provided that through networking and the educational programs that they have.

I can remember my first RIMS conference and looking out over the exhibit hall and it just took my breath away. I'll never forget that moment, and it struck me how immense this industry is and how many lives it touches, benefits and provides value for. I was humbled just to be part of it and I still am today.

### COMINGS & GOINGS

## UP CLOSE: JON STEWART

**LEXINGTON, KY.-BASED PRESIDENT AND CEO**  
Kentucky Employers' Mutual Insurance

**PREVIOUS POSITION:** Lexington, Ky.-based executive vice president and chief financial officer at KEMI

**LOOKING FORWARD TO:** My role will be effective June 1. First of all, we have a great company and great staff. I think my first goal is to continue to build on their success. Obviously we are going to look for ways to improve efficiency and use technology to make us better. ... I've been the No. 2 person here for about six years. My goal is to build upon the success we've already seen.

**GOALS FOR NEW POSITION:** Expanding on some of the things we are doing today with technology and a mobile app. It's something that we are working towards to be a front-runner in Kentucky. We want to continue to push ourselves out there in the Kentucky market.

**CHALLENGES FACING INDUSTRY:** The largest challenge from a workers comp perspective is the use of opiate drugs. It's the use by the injured worker, being



prescribed and rightly so, but what ends up happening is you end up creating addicts. Over-prescription is an issue. You get someone who can go back to work and they are hooked on the opiate. It now creates a safety problem. That's not just in Kentucky; that's everywhere. It's an epidemic in the industry.

**FIRST EXPERIENCE IN JOB MARKET:** My first job in insurance was here at KEMI. I am a CPA and had ... a tax practice and had the opportunity to sell it. I came here to manage the financial aspect of KEMI.

**OUTSIDE THE INDUSTRY, A DREAM JOB:** One would be to play golf professionally in the senior tour. When that fails, I would probably want to be a sports agent for my kids. I have a son who golfs in college and a daughter who pole vaults.

**FAVORITE MEAL:** A filet from Malone's. It's one of the top 10 steakhouses in the country and it's local.

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## Nanotechnology poses new challenges



Mr. Segalla

Mr. Flascher

Like any new technology, risks are emerging with the proliferation of nanotechnology. Thomas F. Segalla and Troy S. Flascher of law firm Goldberg Segalla L.L.P. offer information for insurers, manufacturers, science and technology companies, and corporate decision-makers to consider when evaluating risks associated with nanotechnology.

BY THOMAS F. SEGALLA and TROY S. FLASCHER

Nanotechnology offers exciting potential to transform how we live our lives. From pharmaceuticals and pollution control to electronics and engineering applications, this revolutionary technology — which utilizes particles and structures as small as one ten-thousandth the diameter of a human hair — offers many benefits for health, the environment, scientific study, industry and the economy.

But with new technology comes new risk, and the risks associated with nanotechnology pose numerous new challenges for the insurance industry. Although no nanotechnology specific claims have been filed in the courts yet, some in the insurance industry have already labeled nanotechnology as an emerging risk, and, in addition to questions of coverage, complex concerns regarding regulatory oversight are on the rise, not to mention calls to ban nanotechnology outright.

With so many questions remaining unanswered — and with some projecting nanotechnology to have a \$3 trillion impact on the U.S. economy by 2015 — it is essential for insurers, manufacturers, science and technology companies, and corporate decision-makers to understand the potential risks and coverage implications posed by the increasingly rapid advancement and commercialization of nanotechnology.

### Insurance coverage implications

One industry leader has observed: “The insurance industry is concerned, not so much because experience shows that new technology developments tend to give rise to new loss scenarios, as because the extent of these potential claims can either be difficult or impossible to assess correctly.”

The risks are viewed as a function of the rapid growth and pervasiveness of nanotechnology, and of medical and scientific uncertainty concerning its effect on human health, safety and the environment. That’s attributed, as *Business Insurance* pointed out in 2007, to the very characteristics of nanoparticles that make the technology revolutionary — their size (incapable of measurement using normal techniques), reactivity and conductivity (more reactive and conductive than larger particles), and routes of exposure (dermal, inhalation, and ingestion).

Property/casualty insurance risks encompass occupational and environmental exposures, and consumer product engineering

and safety. Thus, from an insurance coverage perspective, the risks will implicate many common coverage forms, including: general liability; products liability; product recall; workers compensation; environmental liability; and property.

Lloyd’s of London has said that other types of policies may be affected by risks related to nanotechnology as well, including professional indemnity, medical malpractice, directors and officers liability, general liability, employer’s liability, and products liability.

A number of coverage issues that could prove critical for nanotechnology with respect to many forms of potential coverage — such as triggers, number of occurrences, pollution exclusions, and the definition of pollutants in the context of nanomaterials — were outlined in a thoughtful 2010 Law360 article by Ethan V. Torrey. All such coverage issues are important to consider in the context of an insured that could potentially be named as a defendant in a nano tort claim.

### Risk management concerns

Though it is assumed that claims are inevitable, insurance industry leaders agree that the industry will not be able to quantify potential losses related to nanotechnology risks, and that it is too soon to tailor policy forms to nanotechnology risks. This is because the technology occupies a broad field with non-uniform risk characteristics; there is a lack of common language or set of definitions for the technology; and there is presently a low exposure of risks to the general population.

Nevertheless, several risk management concerns have emerged from early industry discussions. For example, the industry has acknowledged that long-term loss accumulation generated by long latency periods for human health and environmental impact will result in a “stacking of limits” problem, caused by occurrence policies that have trigger obligations (e.g., manifestation, injury-in-fact, exposure, and continuous trigger theories) under multiple policies over several years. To solve this problem, several industry leaders advocate for “claims-made” coverage for nanotechnology risks.

The industry also is mindful of current trends in judicial interpretation of pollution exclusions, which require traditional environmental damage to invoke this defense to coverage. Thus, as the journal *Nature Nanotechnology* has noted, questions abound



Although no nanotechnology specific claims have been filed in the courts yet, some in the insurance industry have already labeled nanotechnology as an emerging risk, and, in addition to questions of coverage, complex concerns regarding regulatory oversight are on the rise, not to mention calls to ban nanotechnology outright.

whether the exclusion will afford protection in many loss scenarios, including consumer product, occupational exposure, product recall, and other contexts. Other questions that have been raised by insurers include whether nanoparticles will qualify as pollutants, and whether the loss results from a discharge, dispersal or release.

### Insurer recommendations

Lloyd’s, in assessing the effect of the potential risks, suggested the following coverage options:

1. Monitor and research emerging risks that would help account for unforeseen and unanticipated risks.
2. Price policies adequately and hold additional capital to take into consideration new risks and capital reserves.
3. Totally exclude coverage for nanotechnology businesses.
4. Exclude and write back into the policy with limited cover.
5. Only accept claims within a fixed period.

Continental Western Insurance Group, in 2008, issued the first nanospecific commer-

cial insurance exclusions in the United States, which provided that this:

“... endorsement excludes bodily injury, property damage, and personal and advertising injury related to the exposure of nanotubes and nanotechnology in any form. This includes the use of, contact with, existence of, presence of, proliferation of, discharge of, dispersal of, seepage of, migration of, release of, escape of, or exposure to nanotubes or nanotechnology.”

Other insurers, such as Lloyd’s and Swiss Re Ltd., have recommended that insurers issue short-term coverage, which is a way of avoiding risks associated with latent claims. The concept of fortuity is also implicated by nanotechnology claims. The known-loss doctrine, (which bars coverage for losses of which the insured was aware before policy inception) and the loss-in-progress doctrine (which bars coverage for losses in progress at policy inception) also may be implicated by nanotechnology claims. Studies of the health effects related to exposure to nanoparticles are ongoing, however, some studies already suggest that nanoparticles can be toxic. The extent to which the nanotechnology industry proceeds in spite of known risks to human health certainly may give rise to policy defenses based upon these doctrines.

### Asking the right questions up front

It is generally recognized, however, that the best approach to insurance-related issues and risk exposure is an up-front understanding of the potential risks. This is best achieved through defined underwriting and risk management protocol. For example, Zurich Insurance Co. Ltd. has established a Nanotechnology Exposure Protocol and explained:

“By working closely with corporate customers, collecting data on the specific nanoparticles they were using, learning about the specific applications where they’re employed, and then by combining this information, Zurich could form a global overview of nanotechnology and its various facets of risk. Such an activity would not only be a very good way to protect its business, but could form a basis for providing risk management advice to its customers going forward.”

Lloyd’s has made recommendations that the following questions be asked by the insurer of its nano-insureds:

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# HORSE MEAT

Continued from page 4

and Switzerland.

Last week, Vevey, Switzerland-based food giant Nestlé S.A. withdrew pasta meals from Italy and Spain because they contained horse meat.

Richard Parkinson, a supply chain expert at London law firm Pinsent Masons L.L.P., said all the companies involved will look at their contracts to assess their ability to recoup costs incurred with the recalls.

But the fact that no consumers had fallen ill because of horse meat contamination likely means companies that have withdrawn products will have little recourse to tap insurance.

"There is not much insurance that would respond, because this is a very particular set of circumstances," said one industry source who asked not to be named. "It would be very tricky to prove that the product is defective."

Under public liability policies, it typically is necessary to prove that claims were foreseeable, he said.

"Typically, product liability coverage will not respond to contractual claims unless the insured company has supplied a product which has caused physical injury or damage to property," said Richard Matthews, a partner at Eversheds L.L.P. in Leeds, England.

"Where it can be established that

# Major European recalls

There were 43 recalls of food products in the United Kingdom between Nov. 1, 2011, and Oct. 31, 2012, according to London-based law firm Reynolds Porter Chamberlain L.L.P.

So far in 2013, there have been 55 product "incidents" in the European Union, some of which required recalls, according to E.U. data.

In a recent meeting of the European Parliament's food safety committee, members of the entire Parliament called

for more tests of meat throughout the food chain and for member states to enforce the European Commission's rules on food labeling.

Major food safety crises in Europe include the outbreak of bovine spongiform encephalopathy, or "mad cow disease," in British beef that led to an E.U. ban on the export of British beef from March 1996 until May 2006. BSE can cause variant Creutzfeldt-Jakob disease in humans.

By Sarah Veysey

a 'contaminated supply' was mixed with unaffected sources of beef which contaminated the entirety of the intermingled product at a meat processing plant, then there may be scope for argument over the insurance position," Mr. Matthews said.

While some companies may have purchased contaminated product insurance to cover recall costs and lost profits, "whether these policies are triggered might depend on whether phenylbutazone is found in the horse meat, or some other evidence of risk of injury from consumption of the affected products is found."

The contamination must be shown to be harmful to human

health to trigger the coverage, said JLT's Mr. Miller. If it can be shown that food was incorrectly labeled, errors and omissions policies may respond, but food retailers typically do not buy such coverage, he said.

The insurance market is exploring developing coverage that might respond to an event such as the horse meat scandal, Mr. Miller said.

"The insurance industry needs to take note of this type of event," Tom Teixeira, life sciences practice leader at Willis Group Holdings P.L.C. in London, said in a blog post. "The ability to identify products that would add real protection for such an event will help

increase awareness and ultimately help to raise standards across the supply chain as well as provide adequate protection for quality issues."

Demand for product recall coverage is likely to increase during the next decade, said Connie Germano, Zurich-based regional casualty manager, middle market and life sciences, for Ace Ltd. in Continental Europe.

"Maintaining brand reputation and market position after a recall event, in particular, is crucial — but the potentially huge costs involved are not usually covered by standard liability policies," said Ms. Germano. "A serious accidental contamination or malicious tampering incident can, therefore, put a company out of business if they are not adequately prepared."

Risk managers can play an important role in making a risk assessment of a company's supply chain and validating the systems and processes in place, said Paul Hopkin, technical director of the London-based Association of Insurance & Risk Managers.

These events have again highlighted the importance of having risk managers involved in setting up and assessing supply chains, he said.

The events may have triggered some companies' disaster response plans that include damage to reputation and prompted companies not directly affected to review their disaster response plans, Mr. Hopkin said.

# PERSPECTIVES

Continued from page 26

- What nanotechnologies does the company use?
- What are the known hazards of those materials?
- What are potential hazards of those materials?
- Has the material's toxicity been studied?
- Has its environmental impact been studied?
- Does the company follow any voluntary nano-specific environmental, health and safety guidelines?
- Has the company performed a life cycle assessment related to its use of nanomaterials?
- Does the insured advise its customers about its use of nanotechnologies?

While insurance companies are certainly sensitive to the effect of the risks associated with insureds that are involved in nanotechnology, it is generally recognized that policyholders must take a proactive approach to protect against liability and adverse financial impact.

The following are recognized as important inquiries and considerations for insureds:

- What is the nature of the nano-materials being manufactured?
- Is an expert needed?
- What regulations are applicable and unique to the business?
- Perform a cost-benefit analysis concerning applicable disclosure.

■ Consider the internal impact of the manufacturing process on employees and on the work environment.

■ Understand insurance coverage issues.

■ Consider professional involvement in trade associations and governmental groups.

Such questions and relevant answers should be used by both insurers and policyholders, and reviewed with counsel, in assessing insurance-related questions and potential covered and noncovered claims.

The insurance industry knows from experience that the coverage implications of any emerging technology can be wide-ranging.

While changes in policy forms may be premature, the industry will need to continue to closely monitor the implications of nanotechnology.

And for those engaged in the surging business of nanotechnology, efforts should be taken to ensure compliance with known regulations and best practices concerning the technology and to ready their defenses for the likely inevitable nano tort claims.

*Thomas F. Segalla is a founding partner of the law firm Goldberg Segalla L.L.P. He can be reached at tsegalla@goldbergsegalla.com. Troy S. Flascher is an associate at Goldberg Segalla. He can be reached at tflascher@goldbergsegalla.com.*

# RULING: Employers favored

Continued from page 4

Proskauer Rose L.L.P. in Los Angeles.

Observers are divided about the case's influence outside California.

"I don't expect it to be the sort of precedent that will be able to be readily used" elsewhere, said Gerald L. Maatman Jr., a partner with Seyfarth Shaw L.L.P. in Chicago.

However, Mr. Oncidi said, "Whenever the California Supreme Court speaks, other courts take notice."

Meanwhile, the U.S. Supreme Court soon will consider a "mixed motive" case (see story).

Before the ruling in *Harris*, employees needed to show only that discrimination was a motivating factor for their firing. "Now, the employee is required to show the discrimination was a substantial motivating factor, and the additional adjective, 'substantial,' makes a huge difference in what the employee has to prove in order to prevail," Mr. Oncidi said.

"The court went even further, saying even if the employee proves that discrimination was a substantial motivating factor, the employee will have only a qualified win if the employer could

show that it would have made the same employment decision anyway for nondiscriminatory reasons, Mr. Oncidi said.

"The court fashioned its own standard, but I believe employers are in a better place than they were before this decision," said Linda E. Shostak, a partner with Morrison & Foerster L.L.P. in San Francisco.

It will be difficult, though, to determine what the court means by a "substantial factor," said Mark Askanas, a partner with Jackson Lewis L.L.P. in San Francisco.

In addition, the court's ruling on attorney fees is a concern.

"The threat of attorneys' fees is often the thing that compels employers to settle this

case as early as possible," said Robin E. Largent, a partner with Carothers DiSante & Freudenberger L.L.P. in Sacramento, Calif.

Paul D. Fogel, a partner with Reed Smith L.L.P. in San Francisco, cited a case in which he was involved that resulted in a \$25,000 plaintiff award and \$900,000 in attorney fees. He noted that the *Harris* ruling did not specify circumstances in which plaintiff attorney fees could be awarded.

# BASIS OF CALIFORNIA RULING



The California Supreme Court's ruling in *Wynona Harris v. City of Santa Monica* involved a probationary bus driver who had had two preventable accidents, reported late for work twice and was terminated shortly after she told her supervisor she was pregnant.

"When a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, back pay or an order of reinstatement," the California high court ruled.

"But the employer does not escape liability," the court said. In light of the state law's express purpose of deterring unlawful discrimination, plaintiffs may be awarded declaratory or injunctive relief and "reasonable" attorney fees and costs, the court ruled in remanding the case for further proceedings.

By Judy Greenwald

# UPCOMING HIGH COURT CASE



The issue of mixed-motive adverse job actions "has been percolating for many years" in the courts, said Anthony J. Oncidi, a partner with Proskauer Rose L.L.P.

In *Wynona Harris v. City of Santa Monica*, the California Supreme Court grappled with an issue the U.S. Supreme Court has addressed and will reconsider in *University of Texas Southwestern Medical Center v. Naïel Nassar M.D.* At issue in the April 24 oral arguments is whether he must prove only that discrimination was one motive in his inability to obtain a job to prevail.

In 1989, the court held in *Price Waterhouse v. Ann Hopkins* that Title VII of the Civil Rights Act of 1964 requires a plaintiff to prove that discrimination was a only "motivating factor" in the action. But in its 2009 ruling in *Jack Gross v. FBL Services Inc.*, the court held that under the Age Discrimination in Employment Act, a defendant is not liable for discriminatory motives if it would have taken the same action for other, nondiscriminatory reasons.

Observers said the California ruling falls between the two U.S. Supreme Court rulings on the mixed-motives issue.

By Judy Greenwald

"I don't expect it to be the sort of precedent that will be able to be readily used" elsewhere.

Gerald L. Maatman Jr.,  
Seyfarth Shaw L.L.P.

# PREDICTIVE: Modeling expands to comp underwriting

Continued from page 3

are algorithms there that can be applied to the underwriting process," Mr. Gavin said. "But I think we're at the very early stages of that. It's probably (only) the most innovative of claims organizations that are actually doing that."

Models and the data they analyze are constantly changing to help improve claims management and identify areas where employers can improve worker safety, said Gary Anderberg, Philadelphia-based practice leader for analytics and outcomes with third-party administrator Broadspire Services Inc.

"I think what we're doing is a lot of experimentation, trying different techniques to see what kinds of results that we get, where we think those are going to be useful for our clients and where they will take them beyond the kind of trending analysis and fairly basic techniques that we've been using up to this point," Mr. Anderberg said.

## Lagging investments

As companies look for ways to better use predictive models, insurers are considering whether they can use data collected by current models to reduce workers comp losses from inaccurate underwriting — particularly as insurers have seen minimal investment income in the past several years, Mr. Gavin said.

"They're going to have to be more disciplined than they've been historically in the underwriting process because it is the only place you can make money right now," Mr. Gavin said.

Lackluster investments have driven a recent influx of insurers considering predictive analytics for workers comp underwriting,

said Dax Craig, CEO of Valen Technologies Inc., a Denver firm that develops property/casualty predictive models.

"We're seeing a big pickup in interest and ... engagement from insurers where, historically, they have been less interested or even ... unenthusiastic," said Mr. Craig, whose company focuses primarily on workers comp models. "That has shifted tremendously over the past 18 months" in which insurers that previously "wouldn't entertain even a discussion now are racing to implement (predictive models). It's really a sea change."

Insurers using Valen's predictive model for workers comp underwriting can see a 5.5 percentage point loss ratio improvement over time, Mr. Craig said. He said models objectively and efficiently weigh a large data set to evaluate a company's workers comp risk — something he said can be a difficult task for underwriters.

"We really believe that predictive analytics' best use is in underwriting," said Mr. Craig, whose clients include small, midsize and large workers comp insurers. "It's really at the point of sale ... where those final decisions are made on how an insurance policy should be priced. And so our philosophy is that we help underwriters do that more effectively."

Claude Yoder, Hartford, Conn.-based head of global analytics for Marsh Inc., noted that underwriters still play a critical role for insurers that use predictive models to price and underwrite workers comp policies.

"On the commercial line side, it's still an underwriter-centric culture and there's a lot of need for underwriting to continue," Mr. Yoder said. "So I think the best companies are sort of marrying the science of predictive modeling with the art and judgment of

underwriting."

CNA Financial Corp. is working to evaluate potential customers in a similar way.

The insurer has a predictive model that analyzed nearly 22,000 workers comp accounts in the past two years, said Bill Boyd, senior vice president of the risk control department in Chicago. The model evaluates safety and health programs that can affect an employer's workers comp loss experience.

"We really believe that predictive analytics' best use is in underwriting."

Dax Craig,  
Valen Technologies Inc.



As part of the analysis, CNA has determined factors that make some companies safer than others, Mr. Boyd said. For instance, companies that have certain safeguards against falls from high places have a 38% lower injury rate than companies without those protections. And employers that have specific rules against cellphone

use while driving have 25% fewer workers comp claims than companies without such guidelines.

"This data is used in our underwriting process in terms of predicting accidents and, thus, it's used as we determine the quality of an account, which is part of our underwriting and pricing analysis," Mr. Boyd said.

In addition, Mr. Boyd said the analysis has helped CNA recommend safety measures for customers that can reduce workers comp losses.

"It enables us to better help the customer understand their current exposure (and) the current cost of risk, and then (help) us prioritize where to make the investment which would have greater impact in reducing their risk," said Mr. Boyd, speaking as a member of the American Society of Safety Engineers.

Underwriting models could play an increasing role in helping employers improve safety, Marsh's Mr. Yoder said. That's because companies could implement safety standards to improve their predictive model scores with insurers and lower their comp rates.

"As a company, you can play it back to the insurance market to say, 'You should think of me differently because we've taken strides to actually improve our loss profile,'" Mr. Yoder said. "And it might be directly related to the insurance company's own underwriting model, because (the employer is) aware of the different dimensions that go into creating that model."

Valen's Mr. Craig said he expects more insurers will look to predictive modeling to bolster their underwriting results as they search for a competitive edge in a difficult workers comp market.

"It's evolving significantly," Mr. Craig said.

# TRIA

Continued from page 3

tends to cause market unease and disruption."

But he and others foresee considerable challenges ahead.

"This is the opening of what promises to be a long and thorny debate," said Mr. Grande. "It is incredibly important that Rep. Grimm got it started so early."

Advocates also say the program could be changed.

For example, an internal House Financial Services Committee document, says the panel will monitor the program "for its ongoing impact on economic development and the private terrorism insurance marketplace." The panel "will examine the private sector's capacity to assess and price for terrorism risk" and "may consider proposals" that would phase out the program "by encouraging private industry to develop dedicated capital for underwriting terrorism risks, and significantly reducing the potential federal exposure and participation in terrorism insurance over time."

Joel Wood, senior vice president of the Council of Insurance Agents & Brokers in Washington, said Rep. Randy Neugebauer, R-Texas, the chair of the Financial Services Committee's Subcommittee on Housing and Insurance, has said that he understands that "this is as much if not more of a 2013 issue as a 2014 issue," and that he recognizes the uncertainty could be disruptive to corporate consumers.

"It has been somewhat challenging in recent months to talk about TRIA on Capitol Hill when everybody perceives this to be an end-of-2014 issue," he said.

Mr. Wood said industry lobbyists agree there "are obviously no guarantees for a straight extension. It is going to be an uphill challenge." Insurers will have to do a "much better" job in underscoring to conservatives that the law's recoupment mechanism, which requires insurers to repay a considerable portion of federal support in the event the program is triggered, represents "substantial skin in the game for the industry."

While early introduction of the bill is "appropriate" recognition of the importance of continuing the program, supporters have to be realistic about severe fiscal issues facing Congress, said J. Stephen Zieleski, senior vice president and general counsel of the American Insurance Association in Washington.

Reauthorization of TRIA is "probably not top of the priority list now" and there are "very good arguments for continuing the program as is," Mr. Zieleski said.

"We all know the program is not a bailout. The industry has a significant stake in the program, being required to cover basically 20% of the costs upfront, which translates into a \$30 billion event. If you really analyze the program, it's a shared responsibility program with the industry having a big upfront stake," he said.

# WELLPOINT: Insurer banks on former hospital exec

Continued from page 3

centralized processes or just pure circumstances, but they've certainly had some trouble," said Jennifer Lynch, a research analyst at New York-based BMO Capital Markets. "Going outside the company could provide them with some fresh perspective and help move them forward."

Analysts expressed some uncertainty regarding Mr. Swedish's transition into the chief executive position at WellPoint, as it will be his first time leading both a health insurer and a for-profit company.

"I do think it will be a challenge for him, coming from a nonprofit organization to a for-profit company, in terms of dealing with the pressure of making your

estimates every quarter and keeping the stock price moving higher," Mr. Mason said.

But Mr. Swedish's hospital system background — particularly nonprofits — could be a better long-term fit for WellPoint than investors might immediately recognize.

"To be fair, Mr. Swedish brings 40 years of experience and success in the health care industry," Ralph Giacobbe, a New York-based health care research director at Credit Suisse Group A.G., said in a note to investors. "Given the evolving landscape in a post-reform environment, (WellPoint's decision) perhaps

signals bigger plans around more collaboration with providers in terms of accountable care or potentially vertical integration,"

he said.

As key health care reform implementation deadlines loom in 2014 and beyond, analysts said Mr. Swedish's provider expertise should be advantageous to WellPoint's coordination of medical care with hospital systems and physicians, as well as negotiations on reimbursement rates.

"With the upcoming accountable care organizations that have to be rolled out for Medicare, the medical loss ratios already in play and the industry's focus in moving from fee-for-service towards value-driven types of arrangements, it looks like this is where WellPoint in particular is looking for guidance and strategy moving forward," said Vishnu Lekraj, a Chicago-based research analyst at Morningstar Inc.

In the near-term, Mr. Swedish will be tasked with marshaling WellPoint's adjustments to a health care market that includes

public health insurance exchanges, analysts said. The roll-out of the exchanges — established under the Patient Protection and Affordable Care Act — could be a greater competitive risk to WellPoint than its peers, analysts said.

Nearly half of WellPoint's 2012 medical membership comprises small-group and individual policyholders, the same consumers most likely to seek insurance through a public exchange.

Insurers' exchange-based policies must be finalized this summer for federal and state administrators to start the open enrollment period in October for the 2014 plan year.

"Especially coming in with only a couple months of lead time before plans are due for submission to the exchanges, that timeline is certainly going to be one of Mr. Swedish's biggest challenges," Ms. Lynch said.



Previous CEO Angela Braly left last August amid pressure from investors dissatisfied with WellPoint's declining performance.

# OUT-OF-POCKET: Health reform rule may add to costs

Continued from page 1

to lose that status because they will no longer meet health care law requirements.

In 2013, the maximum out-of-pocket limit for HSA-linked high deductible plans for an employee with single coverage is \$6,250 and \$12,500 for family coverage. The Internal Revenue Service is expected to announce the 2014 limits in May.

Currently, the limits many employers set on how much out-of-pocket expenses employees are required to pick up are much lower. According to Aon Hewitt research, the average 2012 out-of-pocket limit on health care expenses employees were required to pay — excluding prescription drugs — was a little more than \$2,100 for individual coverage and \$4,500 for family coverage.

“There are not many plans now with (out-of-pocket) limits higher” than what the new rule will set, said Rich Stover, a principal with Buck Consultants L.L.C. in Secaucus, N.J.

The reason is companies realize providing employees an affordable health plan greatly helps them retain their most productive workers and maintain positive staff morale.

Typically, however, group health



plan out-of-pocket limits exclude copayments, such as the flat fees plan enrollees pay when they see a medical provider.

“Say you have a \$5,000 limit for individual coverage. If there are a lot of copayments,” the maximum out-of-pocket limit will be pierced, requiring employers to pick up costs above that limit, said Michael Thompson, a principal with PricewaterhouseCoopers L.L.P. in New York.

“It is a benefit enhancement that will have a cost. It is not a huge cost,” but it adds up, when combined with other cost increases

resulting from changes required under the health care reform law, Mr. Stover said.

Overshadowing the cost increases resulting from the new limit on out-of-pocket expenses, though, are the administrative challenges the new requirement will pose.

Administrative issues “will be a big deal,” said J.D. Piro, a senior vice president at Aon Hewitt in Norwalk, Conn.

One big administrative challenge will be coordinating different health care providers so they are aware of all the health care expenses that employees are pick-

ing up. That is because the federal regulation sets an overall limit on out-of-pocket expenses employees can be required to pay, regardless of the type of health care service or expense.

For example, except for a one-year transition period for employers that carve out coverage for things such as prescription drugs, out-of-pocket expenses for all health care services would have to be combined to determine if the out-of-pocket annual limit was reached.

“You’ll have to bring in all these vendors and get them to talk to

## OUT-OF-POCKET LIMITS

The amount of health care expenses employers can require employees to pay in a year will be capped starting in 2014.

- The cap will be tied to the maximum legal out-of-pocket limit in high-deductible health plans linked to a health savings account.
- The 2013 out-of-pocket limit for high-deductible HSA-linked plans is \$6,250 for workers with single coverage and \$12,500 for family coverage.
- The Internal Revenue Service will set the 2014 HSA limit later this year.
- In 2014, the limit on employees’ out-of-pocket health expenses will extend to all nongrandfathered employer health plans and include deductibles, coinsurance and copayments.

Source: Department of Health and Human Services

one another” to revise their administrative systems, Mr. Piro said.

And PwC’s Mr. Thompson said there is another real-world problem that involves employees in health care plans that impose copayments on doctor office visits. In that situation, the employee pays the provider at the time of service.

Providers, though, would have no way of knowing whether the employee had hit the health care plan limit on out-of-pocket expenses for that year and, thus, would not be liable for the copayment.

“Coordination is something that is going to be needed,” Mr. Piro said.

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### LEGAL NOTICE

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CHANCERY DIVISION

IN THE MATTER OF THE REHABILITATION OF LUMBERMENS MUTUAL CASUALTY COMPANY, AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AND AMERICAN MOTORISTS INSURANCE COMPANY. CASE NO. 12 CH 24227.

Notice is given that Andrew Boron, as Rehabilitator (the "Rehabilitator") of Lumbermens Mutual Casualty Company ("LMC"), American Manufacturers Mutual Insurance Company ("AMM"), and American Motorists Insurance Company ("AMICO") intends to file a Motion for Substantive Consolidation (the "Motion") and a Memorandum of Law in Support Thereof (the "Memorandum"), asking the Court to substantively consolidate the estates of AMM, AMICO, and LMC.

If granted, the Motion may affect your interests. The Motion, the Memorandum, and additional information will be published at:

[www.osdchi.com/open/lumbermens.htm](http://www.osdchi.com/open/lumbermens.htm)

(the "Rehabilitator's Website") by February 15, 2013. The Court has been asked to establish a briefing and hearing schedule and procedures for objections or responses to the Motion, if any. The proposed schedule contemplates filing of the Motion by February 13, 2013; filing and actual service of all parties' objections or responses by March 24, 2013; filing of the Rehabilitator's reply brief by April 8, 2013; and hearing of the Motion during the week of April 15, 2013. It is expected that the Court will rule on this proposed schedule on February 20, 2013. Once entered, the Court Order establishing a briefing and hearing schedule and objection procedures will be published at the Rehabilitator's Website within two (2) days. Failure to file and serve an objection or response within the timeframe provided in the Court's Order will constitute waiver of the right to object or respond. Interested parties are encouraged to visit the Rehabilitator's Website frequently for updates.

### LEGAL NOTICE

IN THE SUPREME COURT OF BERMUDA IN THE MATTER OF CALIDAD INSURANCE LIMITED AND IN THE MATTER OF THE COMPANIES ACT 1981

NOTICE IS HEREBY GIVEN that on 8 February 2013 the Supreme Court of Bermuda sanctioned a scheme of arrangement between the Company and its scheme creditors pursuant to section 99 of the Companies Act 1981 (the "Scheme"). On the 15 February a copy of that sanction order was delivered to the Registrar of Companies in Bermuda. The Scheme is therefore effective as of 15 February 2013 and in accordance with the terms of the Scheme, the Final Claims Submission Date is 5pm (London time) on Thursday 16th May 2013.

The Scheme documents, the Claim Form and other information regarding the Scheme are available from the Scheme Website -

[www.calidad.bm](http://www.calidad.bm).

Scheme creditors with any questions concerning the action they should take should contact Richard Finney of R&Q at 110 Fenchurch Street, London, EC3M 5JT, by telephone on +44 (0) 207 780 5871 or by email: [richard.finney@rqih.com](mailto:richard.finney@rqih.com).

DATED: 15 February 2013

### LEGAL NOTICE

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK IN RE PETITION OF DAN YORAM SCHWARZMANN AND MARK CHARLES BATTEN, AS PROVISIONAL LIQUIDATORS OF INDEPENDENT INSURANCE COMPANY LIMITED, DEBTOR IN A FOREIGN PROCEEDING (CASE NO. 03-13869 (SMD))

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 14, 2013, THE BANKRUPTCY COURT ENTERED AN ORDER (THE "ORDER") CONTINUING THE PRELIMINARY INJUNCTION ORDER PURSUANT TO 11 U.S.C. §304 ORIGINALLY ENTERED IN THIS CASE ON JULY 31, 2011. THE ORDER SHALL REMAIN IN EFFECT PENDING A HEARING SCHEDULED TO BE HELD ON APRIL 25, 2013 AT 10:00 A.M. (THE "RETURN DATE") BEFORE THE HONORABLE STUART M. BERNSTEIN, UNITED STATES BANKRUPTCY JUDGE, IN THE UNITED STATES BANKRUPTCY COURT LOCATED AT ONE BOWLING GREEN, NEW YORK, NEW YORK. ALL PAPERS SUBMITTED FOR THE PURPOSE OF OPPOSING THE CONTINUATION OF THE ORDER AFTER THE RETURN DATE SHALL BE FILED WITH THE COURT, WITH A COPY TO THE CHAMBERS OF THE HONORABLE STUART M. BERNSTEIN AND SERVED ON COUNSEL FOR THE PETITIONERS LISTED BELOW, 50 AS TO BE RECEIVED AT LEAST FOURTEEN (14) DAYS PRIOR TO THE RETURN DATE. ANY PERSON WISHING TO OBTAIN A COPY OF THE ORDER SHOULD CONTACT COUNSEL TO THE PETITIONERS.

CHADBOURNE & PARKE LLP ATTORNEYS FOR THE PETITIONERS 30 ROCKEFELLER PLAZA NEW YORK, NEW YORK 10112 (212) 406-5100 ATTN: HOWARD SEIFE, ESQ., FRANCISCO VAZQUEZ, ESQ.

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## AIIG reports \$4 billion loss in 2012 fourth quarter

American International Group Inc. reported a net loss of \$3.96 billion for the fourth quarter of 2012, compared with net income of \$21.48 billion for the same period of 2011. AIG said its fourth-quarter 2012 results were affected by a \$4.4 billion net loss related to the sale of its former commercial aircraft leasing unit, International Lease Finance Corp. Moreover, fourth-quarter 2011 results were buoyed by a one-time income tax-deferred tax asset valuation allowance release of \$19.3 billion, AIG said. Catastrophe losses also hurt AIG's results, with the company citing \$2.0 billion in catastrophe losses from Superstorm Sandy in the quarter.

## P/C insurers could see better results in 2013

Despite losses caused by Superstorm Sandy, there are signs that the property/casualty insurance industry will enjoy improved results in 2013, according to an analysis by A.M. Best Co. Inc. Among other things, net written premiums continue to increase, as does policyholders' surplus. Meanwhile, Barclays Capital Inc. said property/casualty insurance prices should continue to firm in 2013. Commercial property/casualty prices are expected to increase 3% year over year in the early part of this year.

## 401(k) plan account balances hit record high in 2012

Boosted by a strong equities market, employees' 401(k) plan account balances surged to a record high last year, Fidelity Investments said in an analysis. The average 401(k) account balance was \$77,300 at the end of 2012, up from \$69,100 at year-end 2011, a nearly 12% increase.

## Okla. work comp reform bill includes opt-out provision

Oklahoma lawmakers unveiled a widely anticipated bill that would allow employers to opt out of the state's workers compensation system, among other sweeping reforms. Businesses nationwide have supported allowing employers in Oklahoma to create health plans as alternatives to participating in the state-mandated workers comp system in hopes passage of legislation in Oklahoma will provide a platform to expand the concept in other states.

## HHS to run health care exchanges in more than half of states

The federal government will be running health insurance exchanges in more than half of the states, including several of the largest, when a key provision of the 2010 health care reform law kicks in next year. In all, the U.S. Department of Health and Human Services will be running exchanges in 27 states. Sixteen states and the District of Columbia have received conditional approval to run their own exchanges.

## Crop insurance claims payouts for 2012 drought losses hit \$14.2B

Crop insurance indemnity payments associated with last year's drought hit a record \$14.2 billion and will continue to climb as insurers work to finalize the remaining claims, but they are still much lower than some predictions issued last summer, National Crop Insurance Services Inc. said. In a statement, it said the Congressional Budget Office predicted \$16 billion in expected indemnities as a result of last year's catastrophic weather but now foresees a sharp decline in indemnities this year with a return to more normal weather conditions.

## U.S. property insurance rates may increase by up to 10%

U.S. property insurance rates are expected to increase up to 10% in the first half of this year, Aon Risk Solutions said. Global catastrophe losses totaled \$65 billion in 2012, with October's Superstorm Sandy contributing \$25 billion in insured losses.

## Primary D&O rates up 4.1% in fourth quarter: Marsh

Primary directors and officers insurance rates increased 4.1% in the fourth quarter of 2012, and buyers should prepare for more price firming this year, Marsh Inc. said. While overall rate reductions were achievable until the fourth quarter, excess insurers now are more disciplined when considering capacity. Increased regulatory enforcement activity by the U.S. Department of Justice and the U.S. Securities and Exchange Commission, a greater focus on Foreign Corrupt Practices Act violations, whistle-blower activity, and mergers and acquisition litigation are factors in the increase in rates.

## More employers likely to offer annuity to lump sum conversion

The number of employers that may give terminated vested pension plan participants or retirees the opportunity to convert their monthly annuity benefit to a cash lump sum payment could soar, according to Aon Hewitt. Twenty-five percent of employers surveyed said it is "somewhat likely" they will amend their defined benefit plans to give certain participants such a conversion option, while 14% said they are "very likely" to make such an offer.

# COMPOUNDS: Doctor drug dispensing under scrutiny

Continued from page 4

putting upward pressure on (workers comp) costs."

That is where claims adjusters can jump in to try to rein in costs.

For years, many payers have directly routed injured workers' retail pharmacy store bills to pharmacy benefit managers, who can scrutinize prescription utilization to apply cost-containment measures and safety checks.

But payers eventually learned that routing bills for prescription medications from doctors to a pharmacy benefit manager was problematic, said Joe Paduda, principal and workers comp managed care consultant at Health Strategy Associates in Madison, Conn. Those bills can go directly to adjusters or payers rather than to a pharmacy benefit manager.

In the payer claims systems, physician-dispensed pharmaceutical expenses are typically stored or coded as "professional services" rather than as line item pharmacy expenses, making it difficult for payers to know how big of an issue it really is, said Brian Carpenter,

Tucson, Ariz.-based vice president of pharmacy benefit clinical services at Coventry Workers' Comp Services.

It is challenging for adjusters, who are not pharmacy experts, to scrutinize such bills, particularly when large caseloads prevent looking at each line item for every claim, sources said. But "over the last couple of years, payers have grown more expert" at routing doctor-dispensed drug bills to a pharmacy benefit manager, Mr. Paduda said. "More payers are now sending those bills (to their pharmacy benefit manager), but I would say ... probably less than half of the payers are now doing that."

Over the past 18 months or so, there has been an increasing trend where pharmacy charges on medical provider bills are flagged by "bill review engines" for more specialized review, Mr. Carpenter said. The resulting prescriptions are then analyzed with pharmacy benefit manager "clinical and pricing rules" to ensure clinical appropriateness, and price reductions are applied when permitted by state laws, he said.

"It's become the standard now," Mr. Carpenter said.

### Adjusters still necessary

The technology has not eliminated the adjusters' role, though. They can still employ several strategies, depending on state laws such as those regarding fee schedules and the directing of injured workers' medical care.

For doctors in a payer's medical provider network, for example, the adjuster can notify them that if they charge excessive fees for medications, they will be excluded from the network, Mr. Paduda said.

"Adjusters are looking for creative ways to address the issue by routing patients away from those physicians or very heavily scrutinizing all medical care being delivered by those physicians," Mr. Paduda said. "The idea is if a doctor is looking to make a lot more money off dispensing, they are probably looking to make a lot more money by over-utilizing or prescribing" other services.

Adjuster creativity also comes into play when deciding whether to

call in managed care services, such as case managers or utilization review and peer review, that ultimately influence what drugs might be prescribed, Mr. Lazarovic said.

Adjusters also can discuss with claimants why they might tell their physicians that they would rather fill a prescription at a pharmacy, said Jennifer Kaburick, director of workers comp product management for St. Louis-based Express Scripts Inc. "Adjusters are the injured worker's primary point of contact," she said. "They have established a relationship with the injured worker."

But doctors are fighting back.

A January release from the Florida Medical Association blasted a Florida Division of Workers' Compensation report and NCCI research, calling claims that doctor dispensing drives up insurance rates "bogus." For several years, "insurance carriers have engaged in what appears to be an anti-competitive scheme of intimidation against dispensing physicians — physicians who are simply trying to treat their patients effectively and efficiently," the FMA said.

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# SHOOTINGS

Continued from page 1

Multimillion-dollar workers comp losses can be expected after mass workplace shootings because of wounds requiring hospitalization and physical therapy, survivors' needs for psychological help, wage replacement expenses, benefits paid to family members and litigation, sources said.

"You could easily have a \$10 million to \$20 million comp event," said Duke Niedringhaus, vice president at broker J.W. Ter-rill Inc. in Chesterfield, Mo.

The cost severity of mass shootings shows the balance-sheet protection that workers comp insurers provide policyholders by assuming statutory or unlimited liability for such claims, Mr. Niedringhaus said.

Civil litigation adds to the costs of mass workplace shootings.

After a 2003 rampage in Meridian, Miss., for example, Lockheed Martin Corp. sought to limit its liability to workers

comp costs, court records show. In that incident, a plant worker shot 14 co-workers, killing six before committing suicide.

Families of the deceased sued in civil court, alleging Lockheed allowed an employee known for racial hatred and threatening behavior to bring weapons onto its property. By proving an intentional tort, the plaintiffs could have circumvented an exclusivity provision in Mississippi law limiting employers' liability to workers comp benefits.

Two years later, the 5th U.S. Circuit Court of Appeals ruled the shooter acted outside the course and scope of his employment. The court concluded that the state's workers comp law provided the exclusive remedy in the case, although sources familiar with the

litigation said Lockheed reached confidential settlements with the plaintiffs.

Despite headlines about mass shootings, though, most workplace homicides are not crimes of passion committed by disgruntled co-workers, according to 2012 research by NCCI.

Most workplace homicides result from robberies committed by people outside the organization, the workers comp research and ratings organization concluded by evaluating data collected through 2009.

U.S. Bureau of Labor Statistics data shows that of 518 workplace homicides in 2010, 77 involved two or more workers killed. Homicides accounted for 11% of U.S. workplace fatalities in 2009, according to NCCI.

With workers comp systems capping employer liability, a single shooting death might generate a relatively small claim if, for example, there were no young children eligible for survivor benefits through their college years, sources said.

A claim for a back injury requiring surgery could generate greater workers comp costs than death benefits for a deceased worker who did not have young dependents, said John A. Mastropietro, chairman of the Connecticut Workers' Compensation Commission.

The average cost among 28 shooting-related indemnity claims closed during 2012 by Sedgwick Claims Management Services Inc. was \$105,000, according to the Memphis, Tenn.-based third-party administrator.

However, workers comp system costs mount when mass shootings affect several employees.

Connecticut, for example, raised loss costs paid by policyholders by 7.1% for 2013 based on an experience period that included 2010, the year of the beer distributor shooting, said Laura Backus Hall, state

# 11%

Workplace homicides accounted for 11% of all private industry fatalities in the United States in 2009, according to an NCCI Holdings Inc. analysis of U.S. Bureau of Labor Statistics data.

# Balancing safety with commerce

BY MIKE TSIKOUDAKIS

Public places such as retail stores, classrooms and office buildings walk a fine line to provide the right amount of security to avoid a violent attack.

As best practices to avoid such risks evolve, risk managers rely on traditional protocols to mitigate threats of violence at their locations.

In particular, retailers must strike a delicate balance of providing enough security and pre-crisis management protocols without scaring patrons away.

Security and safety efforts depend on location, said a risk manager at a national discount retailer who did not want to be named.

"Some of the areas where crime is higher, we may have security officers located within the store," the risk manager said.

"If it's a high-shrink store, we'll have more cameras in our stores," the source said, noting that cameras are strategically placed in high-theft areas.

Protecting public properties is difficult and "best practices are still evolving," said Janice Ochenkowski, managing director of global risk management for Jones Lang LaSalle Inc. in Chicago.

"The best response is to apply standard risk management protocols and implement them to respond to various types of events through various practices," she said.

Risk managers should understand their geographic area, along with the risk profile of the building, its owners and tenants, Ms. Ochenkowski said.

And crisis response plans should account for the unpredictable nature of a violent attack.

One best practice is to closely monitor world events that might affect an organization, and perform tabletop exercises that test crisis plans with staff, security and local emergency responders, Ms. Ochenkowski said.

For high-profile properties such as Wall Street in New York, physical, electronic and communications security often is required in leases, said Paul Michael Viollis, CEO of Risk Control Strategies Inc. in New York.

"There's a huge disparity with respect to best practices as you look at public places," he said, noting that spaces that have open levels of security such as college campuses, shopping malls and movie theaters, have a different culture of security and "create the greatest challenge."

"There's a business case (where) you have to marry the complexities and the requirements of security to the business model itself and the required revenue stream. That's much more challenging," Mr. Viollis said.

Retailers can create policies around employee training to spot suspicious incidents and individuals, and make sure electronic surveillance systems are properly monitored, he said.

To minimize the effects on employees and productivity after a violent attack, organizations should devise a post-crisis management plan (see box), said Bob VandePol, president of Crisis Care Network in Grand Rapids, Mich.

"It's important to have a plan in place and exercise that plan so that you have significant muscle memory that enables the plan to be activated without adding additional chaos and confusion to the lives of those who already had that happen to them," Mr. VandePol said.

## ROAD TO RECOVERY

Leaders can tap the ACT communication process to help an organization recover after a violent attack:

- Acknowledge and name what happened
- Communicate pertinent information with confidence and compassion
- Transition to a future focus

Source: Crisis Care Network

relations executive for NCCI in Boca Raton, Fla. While typical workers comp expenses drove most of the need for the rate increase, the shooting had a "measurable impact" on 2013 rates, she added.

In addition to benefits, employers also face workers comp legal

battles.

After the Connecticut beer distributor shooting, a deceased worker's fiancée argued that she was entitled to workers comp benefits. The employer disputed the claim, arguing that workers comp survivor benefits are normally provided only to family members.

A trial commissioner ruled in favor of the woman as a "dependent in fact," coupled with the claim payer's failure to respond to the claim within the legally required time, Mr. Mastropietro said.

The employer appealed, but then settled the claim, he said.

# VIOLENCE

Continued from page 1

victims' families and \$7.4 million for survivor mental health services.

To reduce the risks of violent acts, it's essential to consider factors such as location, operations, clientele and existing security measures, said Tracy Knippenburg Gillis, global reputational risk and crisis management practice leader at Marsh Risk Consulting in New York. "Owning or managing a public place has inherent risk in it. A lot of different things can happen where people get harmed," Ms. Gillis said.

At the Los Angeles Unified School District, officials have launched an ongoing security evaluation since the December Sandy Hook Elementary School shootings in Newtown, Conn., said Gregg Breed, the district's chief risk officer. The Los Angeles school district and its district police department "continue to evaluate the current safe school plans and best practices," Mr. Breed said.

"You want to do everything you reasonably can, realizing you can't do everything," said Ronald D. Stephens, executive director of the National School Safety Center in Westlake Village, Calif. "If the crisis you did experience goes to court, they're going to ask you, 'What did you do?'"

Responses to recent violent events have included calls for heightened gun control and consideration of putting armed guards in schools and other facilities. But, some experts say, the most effective step is creating an environment of risk awareness and risk assessment similar to that created around terrorism risks after the Sept. 11, 2001, attacks. "What tends to get dismissed or minimized is we already know an awful lot about the individuals who are likely to commit these awful crimes," said Stephen G. White, president of workplace and campus threat consultants Work Trauma Services Inc. in San Francisco.

Many workplaces and universities are assembling multidisciplinary teams to assess individuals thought to pose a risk, Mr. White



## HEAR MORE

Access the tablet edition of *Business Insurance* on an iPad to listen to Ronald D. Stephens, executive director of the National School Safety Center, discussing a risk management approach to preventing school violence.

said. "It's not profiling," he said. "It's risk assessment. And then, risk management."

Speaking of shooting incidents like those at Virginia Tech or Sandy Hook Elementary Mr. Shaw said, "Those were very preventable. The signs were out there. It's all about connecting the dots."

W. Barry Nixon, executive director of the National Institute for the Prevention of Workplace Violence Inc. in Lake Forest, Calif., said to address workplace violence, it's essential that the organization "acknowledge and accept that the possibility of violence occurring in their workplace is real."

They then can assemble a cross-functional team to develop a plan and identify vulnerabilities, he said.

In the workplace or elsewhere, a "culture of risk awareness" is essential to reducing the risk of violence, said Susan Morton, senior vice president with Marsh Risk Consulting's reputational risk and crisis management practice in Boston. "How do I recognize potentially risky behavior and what do I do about it?"

Ms. Gillis said, "You can apply that again to a mall. The policies, the process, who to call, what to look for if you're not comfortable with the way a certain group is acting."

Ms. Morton said it also is important to remember that "sometimes workplace violence can be external. It can be an estranged spouse, for example."

At Los Angeles public schools, Mr. Breed said, "Let's say you have someone who has a restraining order against another person. If they notify the school, we take appropriate steps to make sure that person doesn't get on campus. That should be a best practice."



## Snowplow driver gets no love

**K**ids might love the piles of snow resulting from efforts to clear parking lots after the blizzard that hit the Northeast recently, but a group of merchants in one New Hampshire town had little love for such a snow pile this Valentine's Day. Instead, they saw it as possible grounds for legal action.

According to reports, some business owners in the Depot Square shopping center in Hampton, N.H., took exception to the fact that snow removed from the parking lot was dumped in parking spots closest to their shops, fearing the blocked spots would cost them business during the Valentine's Day rush.

The contractor hired to clear the privately owned lot said he just did what he was told by the lot's owner, according to reports, while town officials said there was nothing they could do, as the lot is private property. Meanwhile, the affected business owners were talking to a lawyer and considering a lawsuit.

While the snow will eventually melt, the merchants' cool feelings toward the parking lot owner might linger.

## With age comes lower insurance rates

**D**espite the possible consequences, one in 10 parents said they'd lie to lower Junior's car insurance rates.

According to a survey by Gocompare.com Ltd., 12% of parents surveyed said they would insure their child's automobile under their name to reduce the premium the child would have to pay, the Newport, Wales-based insurance comparison service said in a statement.

The practice, where a lower-risk party, such as an older driver, insures the vehicle for a younger, higher-risk party, who is the actual driver, is known as "fronting" and is considered insurance fraud in the United Kingdom.

Lying to insurers could invalidate a policy and, worse, could lead to criminal charges, Gocompare said.

Regardless, 13% of parents surveyed confessed to having lied on their own insurance application, and nearly one-quarter said they would consider lying to their insurance company to reduce their premiums, Gocompare said.

The survey showed that 87% of respondents acknowledged that they understood that their insurance claim could be rejected as a result of lying to their insurer.

## STAR'S AUTO CLAIM ADDS UP TO A MILLION FOR INSURER



FEATURFLASH/SHUTTERSTOCK.COM

Cost of repairs to actor Rowan Atkinson's car amount to much more than a hill of beans.

**A**ctor and comedian Rowan Atkinson bought his rare McLaren F1 high-performance automobile in 1997 with earnings from his first Mr. Bean film, but repairing the car after a 2011 accident cost far more than a hill of beans, according to reports. News accounts say repairs to the car cost £910,000 (\$1.4 million), took more than a year and were done only after Mr. Atkinson's insurer considered whether it was cheaper to repair the car or replace it with a new one.

While Mr. Atkinson paid £640,000 (\$1.0 million) for the supercar in 1997, its value has increased significantly since then with one selling last year for £3.5 million (\$5.5 million).

Mr. Atkinson broke a shoulder when he spun off the road and crashed the McLaren — capable of speeds up to 240 mph — into a tree in August 2011. According to reports, it took technicians four weeks to assess the damage and determine the cost of repair.

In a story in the Daily Telegraph, Mr. Atkinson said getting back into the car after 16 months was "like putting on a familiar sweater."

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## What's in a name? A lot if it's Tiffany

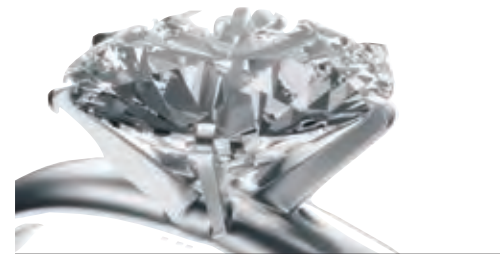
**T**iffany & Co. says there's a reason it's hard to imagine Audrey Hepburn cooing over a display of its diamond rings while leaning over a shopping cart full of value-pack socks and three-gallon drums of Cheez Doodles.

The Manhattan-based fine jeweler filed a lawsuit against Costco Warehouse Corp. in federal court recently, accusing the company of a litany of illegal business practices including trademark infringement, counterfeiting, dilution and false advertising for selling rings branded as Tiffany merchandise.

According to the lawsuit, filed in federal court in New York, Tiffany learned of the counterfeit rings from one of its customers in November 2012. An investigation allegedly revealed that the Issaquah, Wash.-based wholesale chain for a year had been selling several styles of rings under the Tiffany name.

"We now know that there are at least hundreds, if not thousands, of Costco members who think they bought a Tiffany engagement ring at Costco, which they didn't," Jeffrey Mitchell, a New York-based partner at Dickstein Shapiro L.L.P. representing Tiffany in the lawsuit, said in a statement.

In its statement, Tiffany emphasized that the company "has never sold nor would it ever sell its fine jewelry through an off-price warehouse retailer like Costco, either directly or indirectly."



## Clinic sets stage for fraud scheme

**N**o-fault insurers couldn't help but find fault with a group of individuals and a medical group in Queens, N.Y., after they bilked the companies out of thousands of dollars in fake medical claims.

A grand jury recently indicted five individuals and a Queens-based medical clinic for allegedly filing and collecting on bogus injury claims stemming from staged automobile accidents. According to the indictment, the medical group paid two "runners" to coach individuals posing as victims to exaggerate their injuries, steering them to Queens Integrated Medical Care in Queens Village, where they received unnecessary medical treatment.

Under New York's no-fault auto insurance law, drivers are required to purchase at least \$50,000 in medical insurance coverage to pay claims from auto accidents, regardless of who is found to be at fault. Several auto insurers paid out more than \$150,000 in the scam, according to the indictment.

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