

LAWMAKERS CRAFT QUICK FIX FOR CONTROVERSIAL N.Y. COMP TRUST RULES / PAGE 3

ERIC DINALLO OPTIMISTIC INSURANCE EXCHANGE CAN BE REVIVED / PAGE 3

FEDERAL RULES SHIELD PROTECTS FIRMS AGAINST PRODUCT SUITS / PAGE 4



In Brief

P/C profits fall in first quarter

The U.S. property/casualty insurance industry's aftertax net income fell 49.4% to \$8.2 billion in the first quarter of 2008 compared with the same period a year earlier, according to an analysis released by the Insurance Services Office Inc. and the Property Casualty Insurers Assn. of America. The decline reflected a \$600 million underwriting loss, compared with an \$8.3 billion underwriting gain during the first three months of 2007. In addition, investment gains declined 18.8% to \$12.2 billion compared with the 2007 first quarter.

Online health records get privacy standards

Groups sponsoring personal electronic health record platforms, including Google Inc.,

See **IN BRIEF** page 30

SPOTLIGHT MIDYEAR MARKET REPORT

Property rates fall despite losses; subprime woes' dual D&O effect; E&O pricing depends on risk; liability and workers comp rate cuts start to slow; energy still paying for Katrina; marine competition

heats up; commercial auto severity rises; reinsurers more disciplined. **Page 11**



AP PHOTOS

Tugboats move the Exxon Valdez in 1989 from a reef where the tanker ran aground, causing a massive oil spill. The U.S. Supreme Court last week reduced by \$2 billion the amount of punitive damages that Exxon should pay.

Exxon Valdez ruling sets punitives limit

Marine law decision may have wide impact

By **MARK A. HOFMANN**

WASHINGTON—The U.S. Supreme Court's ruling that punitive damages against Exxon Shipping Co. cannot exceed compensatory damages stemming from the grounding of the Exxon Valdez nearly 20 years ago provides clarity to marine insurers and may shape potential lower court rulings, legal experts say.

That's true even though the 5-3 decision applied only to punitive damages levied under maritime law. Whenever the Supreme Court addresses the issue of punitive damages, or any other liability issue, state courts often follow its reasoning, even if the decision does not apply to state law, according to legal experts.

The case—*Exxon Shipping Co. et al. vs. Grant Baker et al.*—stemmed from the damage caused by the March 1989 oil spill in Alaska's Prince William Sound when the Exxon Valdez ran aground.

After years of litigation, the 9th U.S. Circuit Court of Appeals said Exxon should pay \$2.5 billion in punitive damages. Exxon appealed the verdict using three main arguments: that maritime law doesn't allow corporate liability for punitive damages caused by its managerial agents, in this case Capt. Joseph Hazelwood; that the federal Clean Water Act pre-empts punitive damages; and that the punitive damage award was excessive under maritime law.

See **PUNITIVES** page 29

Employers welcome compromise on ADA

House bill's narrower focus alleviates fears

By **MARK A. HOFMANN**

WASHINGTON—The House of Representatives last week overwhelmingly approved a revised bill that would expand the scope of the Americans with Disabilities Act, allaying the business community's concerns about a previous version of the bill.

Major employer groups had opposed the earlier bill, the ADA Restoration Act, fearing it would make ADA protections too broad. But after months of discussions with groups representing the disability community, the U.S. Chamber of Commerce, the National Assn. of Manufacturers and other business organizations threw their support behind a revised plan.

That revision, renamed the ADA Amendments Act, won House approval on a 402-17 vote.

On the eve of the vote, the Office of Management and Budget issued a statement of administration policy,

saying the White House "strongly supports the overall intent" of the bill. While the policy statement raised some concerns about the bill's language, it did not recommend a presidential veto.

A version of the legislation has been introduced in the Senate, but no vote has been taken.

Under current law, a covered disability is defined as a physical or mental impairment that "substantially limits one or more of the major life activities" of an individual. A person also would be considered disabled if there is "a record of such an impairment" or he or she is "regarded as having such an impairment."

The earlier bill did not include the already existing requirement that a disability substantially limit a major life activity, leading some employment law experts to fear that the measure would lead to

See **ADA** page 30

IRS provides answers to questions on HSAs

Guidance seen speeding adoption by employers

By **JERRY GEISEL**

WASHINGTON—New Internal Revenue Service guidance that answers dozens of questions employers have raised about health savings accounts will further boost the burgeoning HSA market, experts say.

The much-anticipated guidance resolves everyday issues that include whether employees receiving services from onsite corporate medical clinics are eligible to open HSAs, what employers can do when they mistakenly make a contribution to an employee's HSA, whether HSA debit cards can be

coded to pay only medical expenses and when HSA funds can pay Medicare Part D premiums.

"The areas of uncertainty have gotten a lot narrower," said Tim Stanton, a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart P.C. in Chicago.

"The good news is that we have gotten answers to a lot of questions," said Karen Frost, a consultant with Hewitt Associates Inc. in Lincolnshire, Ill.

By resolving so many issues, experts say the guidance will speed up employers' already rapid adoption

6.1M

EMPLOYEES enrolled in HSA-linked high-deductible health insurance plans in 2007.

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REPORTING ON CORPORATE RISK AND EMPLOYEE BENEFIT MANAGEMENT NEWS

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N.Y. considers reviving insurance exchange

Officials see capital markets as key potential investors that could ensure success for venture

By JUDY GREENWALD

NEW YORK—Two decades after its collapse, it may be time to rebuild the New York Insurance Exchange, state officials and observers say.

Lessons learned from the failure of its first incarnation, twenty years of technological innovation and fresh interest from the capital markets may combine to make a revived exchange a success, they say.

New York Insurance Superintendent Eric Dinallo last week said capital markets are among those who may be interested in reviving the NYIE as a Lloyd's of London-style market for reinsurance syndicates.

The first NYIE opened in 1980 to great anticipation. Just seven years later, however, it closed its doors, a victim of a soft market, poor claims experience and inadequate capitalization, among other factors.

At its height in 1984, the exchange was ranked



Mr. Dinallo

COLLATERAL RULE: New York moves closer to finalizing rules that would ease collateral requirements that are applied to non-U.S. reinsurers. **PAGE 27**

as the eighth-largest U.S. reinsurer with \$345.6 million in annual premiums, said Peter H. Bickford, a New York-based attorney who was the exchange's general counsel from its beginning until 1985.

Mr. Dinallo, who has been shopping a revival and holding one-on-one meetings for several months, said he believes the lessons learned

from the exchange's first life, combined with new factors, could make it a success the second time around.

He said he envisions NYIE syndicates working on high-end reinsurance. "I'm not talking about protecting mom and pops, but very large-scale transactions," said Mr. Dinallo in pointing to the World Trade Center's property coverage as an example.

The idea of reviving the exchange has attracted some high-level attention, including New York Gov. David Paterson, who discussed the possibility at a Lloyd's-sponsored dinner last week.

Other market observers say better transparency and the market's greater sophistication are among factors that could make a revived NYIE a success.

Mr. Dinallo said the legal and statutory struc-

See **EXCHANGE** page 27

N.Y. crafts quick fix for comp trusts issue

Permanent solution still needed, say observers

By ROBERTO CENICEROS

ALBANY, N.Y.—Legislation overhauling New York state workers compensation group trust regulations gives self-insured employers breathing room while they push for a permanent financing solution for the trusts, employers said.

The legislation passed last week temporarily eases assessments that the New York State Workers' Compensation Board levies against solvent self-insured employers to pay for trusts that have failed, observers said.

New York's trusts are pools that provide coverage for employers typically too small to justify self-insuring independently. The SWCB assesses solvent group trusts and large, independent self-insured employers to help finance the unfunded claims of defunct trusts while it pursues members of failed trust under their joint and several liability obligations.

The failure of several trusts managed by Bermuda-based Compensation Risk Managers L.L.C., which agreed earlier this month to surrender its New York third-party administrator license, added to concerns about growing assessments and shortcomings in regulating the groups, observers said.

Assessments climbed from \$8 million to \$67 million over three years, said Ken Pokalsky, senior director of government affairs for the Business Council of New York State Inc.

So labor and business representatives joined lawmakers in crafting the legislation during lawmakers' final hours in the current session.

Large, independent self-insured employers lobbied to establish two guarantee funds. That would have divorced them from liability for claims filed by injured employees against the defunct group trusts. One guarantee fund would have backstopped large self-insureds and the other would have backed group trusts.

Instead, the legislation that emerged calls for setting up a task force comprised of regulators, claimants, labor representatives, business leaders and self-insured groups. They are to continue overhauling group trust regulations.

Also under the legislation, the SWCB can borrow more than \$52 million from the state's Uninsured Employers Fund to offset this year's assessments, but does not address future assessments.

While that gives self-insured employers some breathing room, it still leaves individually self-insured companies and solvent group trusts ultimately responsible for the "legacy liabilities" of defunct groups, observers said.

The SWCB has said 12 trusts failed since 2006, leaving an estimated \$363 million in liabilities.

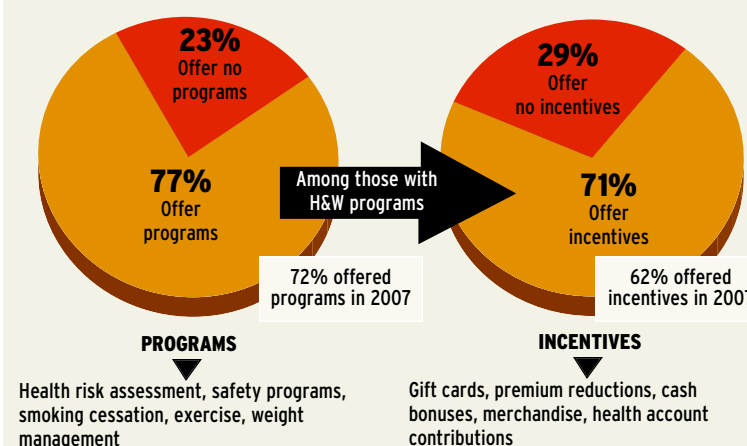
"We are disappointed that a more permanent fix to this financing issue...wasn't completed," Mr. Pokalsky said. "But the fact of the matter is, it wasn't going to be done" because of an ongoing lawsuit challenging the SWCB's authority to assess solvent groups.

"So this was probably the best outcome we could have had," Mr.

\$363M

IN ESTIMATED LIABILITY facing the New York State Workers' Compensation Board from the 12 trusts that have failed since 2006.

HEALTH AND WELLNESS INCENTIVES INCREASE



More employers using wellness incentives

Rewards offered for participation, completion

By JOANNE WOJCIK

Major U.S. employers' use of incentives in health and wellness programs is on the rise, growing to 71% in 2008 from 62% last year, according to a survey.

In addition, more employers are successfully measuring return on investment in their wellness programs, according to the survey by the Washington-based ERISA Industry Committee and National Assn. of Manufacturers in conjunction with IncentOne Inc., an incentive technology provider based in Lyndhurst, N.J.

Among employers offering incentives, the average incentive value was estimated to be just under \$200 per person per year in 2008. This question was not asked in 2007.

Gift cards are the most popular type of incentive, used by 28% of employers, compared with just 17% last year. In 2007, premium reductions were the most popular incentive, used by 41% of employers.

This year, the use of premium reductions as incentives dropped to 26%.

This finding suggests that there isn't yet agreement on the most effective type of incentive, researchers said.

Participation is the most common behavior employers are rewarding with incentives. The survey found 48% of employers offer incentives for participation in health and wellness programs and 38% reward employees for completing a program. By contrast, just 12% of employers offer incentives for goal achievement.

Researchers said there were two primary reasons employers may choose to link incentives with program enrollment, participation and completion rather than with goal achievement. First, it's easier to track and confirm enrollment, participation and completion than whether participants achieved spe-

See **TRUSTS** page 28

See **INCENTIVES** page 26

Federal regulations provide vehicle for tort reform efforts

Despite roadblocks, White House finds ways to pre-empt state laws

By JUDY GREENWALD

WASHINGTON—Manufacturers have found themselves shielded from product liability suits by a relatively new source.

With the Bush Administration blocked in its efforts to enact tort reform legislation, federal agencies have attempted to shield businesses from such suits, observers say.

They have done so by inserting language in the preambles of federal regulations that pre-empts state product liability suits. The basic idea is that federal laws and regulations supersede state laws and regulations when they conflict.

Opponents say that by pre-empting litigation in state courts, the practice upsets the valuable symbiosis between federal regulation and

the civil justice system.

They also argue that pre-emption puts too much power in the hands of unelected bureaucrats working at federal agencies.

But proponents, who object to characterizing the preambles as a major break with previous administrations' actions, say pre-emption avoids jury decisions that may overlook or ignore federal regulators' expertise and, particularly in the case of pharmaceuticals, diverting valuable resources from research and development toward litigation.

The issue of federal pre-emption has been a focus of three congressional hearings in recent months, and some believe Congress may ultimately try to limit it.

It is also the focus of a case, *Wyeth vs. Diana Levine*, that will be heard



by the U.S. Supreme Court in its next term (see story, page 28).

According to the Washington-based American Assn. for Justice, formerly the Trial Lawyers Assn. of America, limits on lawsuits have been included in 52 rules proposed or adopted by federal agencies since 2006.

Most have been issued by the Food and Drug Administration, but others include the National Highway Traffic Safety Administration, the Department of Homeland Security and the Federal Railroad Administration.

The FDA was the first to insert the pre-emption language in a January 2006 regulation regarding prescription drug labeling, according to the AAJ. The rule's preamble says the FDA "believes that under existing pre-emption principles the FDA approval of labeling...pre-empts conflicting or contrary state law."

The preambles have had an effect, said James M. Beck, a product liability defense attorney with Dechert L.L.P. in Philadelphia, who tracks the issue. Since pre-emption language has been included in FDA preambles, it has been asserted successfully in about half the court cases in which it has been proposed,

"which is a much better ratio than the industry enjoyed in pre-exemption cases prior to that rule," Mr. Beck said. He said the percentage is not higher in part because "some plaintiff attorneys get appointed to the bench."

Plaintiff attorneys, consumer groups and state legislators are among those that oppose federal pre-emption.

Until this development, "the tort system has co-existed quite peacefully with the federal regulatory system for decades and decades," while businesses have innovated and thrived, said Brian Wolfman, director of the Public Citizen Litigation Group in Washington.

This symbiosis has led to incremental regulatory changes, "while at the same time, consumers harmed by faulty products" have

See **SHIELD** page 28



Boeing Co. is joining a growing list of large employers that are moving away from defined benefit pension plans and toward defined contribution plans.

Boeing to phase out cash balance pensions

New employees to get enhanced 401(k) plans

By JERRY GEISEL

CHICAGO—Aerospace giant Boeing Co. next year will start phasing out its cash balance pension plan and enhance its defined contribution plan, as the exodus of big employers from defined benefit plans continues.

Nonunion employees hired on or after Jan. 1, 2009, will not be eligible for the cash balance plan. Instead, Chicago-based Boeing will enhance the defined contribution plan for those employees. Boeing will

make an automatic contribution of 3%, 4% or 5% of pay to the plan, with the contributions based on employee age. Additionally, Boeing will fully match employees' contributions, up to the first 4% of pay, and will match 50% of employee contributions on the next 4% of pay.

Currently, Boeing matches 75% of employee contributions, up to 8% of pay.

Boeing last week said it is overhauling its pension

See **BOEING** page 6

54%
OF FORTUNE 100
companies offer a
defined benefit plan
to new employees

Error & Omissions

• An item in the June 23 issue, "Mental Health Parity Bill Clears Hurdle," provided an incorrect effective date for provisions in legislation requiring group health care

plans to provide the same coverage for mental disorders as other medical conditions. If enacted, the requirements for calendar-year plans would take effect Jan. 1, 2010.

Physician/insurer relations improve

Spirit of cooperation helps change health care system, experts say

By GLORIA GONZALEZ

SAN FRANCISCO—Health care provider and insurer relationships are beginning to improve, a necessary step in creating performance networks that provide critical information about the quality and cost of care provided by physicians, observers say.

The sometimes adversarial relationship between payers and providers that has barred change and accountability in the health care system is showing signs of thawing. Some providers now are willing to meet with insurers to discuss these issues, which would not have happened a few years ago, said Dr. Kevin Weiss, president and chief executive officer for the American Board of Medical Specialties in Evanston, Ill.

"It's a very real firewall that we need to take down," Dr. Weiss told

attendees of America's Health Insurance Plans' 2008 annual meeting in San Francisco June 18-20.

The willingness of insurers to adopt New York Attorney General Andrew Cuomo's model for physician ranking programs was praised by physician groups such as the



Chicago-based American Medical Assn., which has engaged in disputes with health insurers about claims payment practices and consolidation in the industry.

Aetna Inc. was the first insurer to agree to implement Mr. Cuomo's model on a nationwide basis. Its physician ranking program, known as Aetna Aexcel, lists physicians in

12 specialty categories who have passed certain clinical quality and cost-efficiency measures.

The Hartford, Conn.-based insurer also revised its appeals process for doctors dissatisfied with their ratings, said Gerald Bishop, senior medical director, health care delivery, West region, for Aetna in Sacramento, Calif. Doctors can now appeal aspects of the rating based on efficiency standards, which are generated by claims data. If, for example, there is a dispute about whether a physician treated a particular patient for a particular condition, the insurer will review and perhaps modify the rating.

"In keeping with our goal of being fair and transparent, we have expanded our appeal process," he said.

The insurer has pledged to review

See **NETWORKS** page 26

Bermuda plans to reclassify insurers

Captives that write large amount of third-party business will be affected

By COLLEEN MCCARTHY

SOUTHAMPTON, Bermuda—Bermuda plans to refine its classification of insurers and reinsurers that write a significant amount of third-party business and tighten its regulation of the companies.

The move will enable Bermuda officials to regulate the diverse range of companies more appropriately, said Shelby Weldon, director of insurance compliance for the Bermuda Monetary Authority, speaking at the Bermuda Captive Conference held at the Fairmont Southampton Resort June 16-19.

Bermuda classifies insurers and

reinsurers in four classes, with Class 1 made up largely of single parent captives, Class 2 mainly multiple-owner captives, Class 3 for insurers and reinsurers that write more than



20% of unrelated third-party business and Class 4 for large commercial insurers and reinsurers.

The proposed changes will affect only Class 3 companies.

Under the proposal, Class 3 companies would be divided into three sub-classes, 3, 3A and 3B, "which will more clearly reflect the nature of their business and risk profiles," Mr. Weldon said.

"It's critical that we identify these companies up front and regulate them appropriately," he said.

Under the changes, Class 3 would only include captive insurers whose percentage of unrelated business is between 20% and 50% of net premiums written, said David J. Doyle, partner, Conyers Dill & Pearman, in Hamilton, Bermuda.

See **BERMUDA** page 26

200,000 REASONS A SPRINKLER HEAD DOES NOT DOUBLE AS A COAT RACK.

WAUSAU PACKAGE AT WORK. Recently, we received some interesting property claims. Hotel guests, trying to expand their closet space, enlisted the help of sidewall sprinkler heads, using them as makeshift coat racks. The weight of the clothing damaged the fusible element of the sprinklers, setting them off and causing more than \$200,000 in water damage. When our loss



prevention experts located the source of the problem, they quickly advised clients to place a warning sign next to sidewall sprinklers to prevent similar damage. Simple, but effective. That kind of industry knowledge and attention to detail can be found throughout Wausau, in any of our areas of expertise – from hospitality to construction. And with Wausau Package, you can leverage that expertise to get comprehensive coverage tailored to the specific needs of your business. It's all part of Wausau TotalValueSM and our commitment **PRICE ≠ COST.** to lowering your total cost of risk. A commitment backed by the financial strength of Liberty Mutual. To learn more, contact your Wausau Signature Agency representative or your appointed Wausau producer.



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Incentives: Wellness efforts rewarded

CONTINUED FROM PAGE 3

cific program goals, they said. Second, employers are steering clear of regulatory caps on monetary incentives for health and wellness programs imposed under the Health Insurance Portability and Accountability Act. HIPPA regulations set no limits on incentives for participation, but they limit incentives for programs that require participants

to meet a health-related standard.

The survey found that 77% of employers currently offer formal health and wellness programs, an increase of 7% over 2007. More than half of those currently without programs plan to add them within the next six to 12 months.

Although only 36% of the employers responding to the survey have attempted to measure return on investment, there has been a sig-

nificant increase in the success rates of those that have. Approximately 26% of employers that attempted to measure ROI did so successfully, up from just 14% in 2007.

The Web-based survey, which is in its second year, included responses from 281 respondents representing 225 different companies. The survey was taken earlier this year.

To obtain a copy of the survey, visit www.incentone.com.

Boeing: Shift from DB plans continues

CONTINUED FROM PAGE 4

program for several reasons, including market trends and reduction of financial risk.

"This new approach addresses new employee preferences for retirement programs that offer flexibility and portability and responds to market trends and practices of peer companies. At the same time, it allows us to better manage our retirement plan expenses and reduce financial risk," Rick Stephens, senior vp-human resources and administration, said in a statement.

The changes will not affect the more than 525,000 current and former employees and retirees of Boe-

ing who participate in its pension and savings plans.

Boeing, which last year reported net income of \$4.1 billion on revenues of \$66.4 billion, joins a long and growing list of major corporations—including Hewlett-Packard Co., IBM Corp. and Sears Holdings Corp.—that have phased out defined benefit plans.

Prior to Boeing's announcement, the most recent large company to phase out its defined benefit plan was McLean, Va.-based Gannett & Co. Inc. The company earlier this month said that, in an effort to cut costs, it will freeze the plan and beef up its defined contribution plan effective Aug. 1.

Last year, just 54% of Fortune

100 companies offered a defined benefit plan to new salaried employees, a sharp decline from 2002 when 83% did so, according to a recent Watson Wyatt Worldwide survey.

Benefit experts say the corporate move away from defined benefit plans is being driven by several factors, including a desire to reduce retirement plan expenses; less corporate tolerance of the unpredictability of required pension contributions, which can fluctuate significantly with changes in interest rates and investment results; and concern that pension plans costs could significantly increase in the future if longevity continues to rise.

Commentary

New, improved airport: Same old lost luggage

Earlier this year, London's Heathrow Airport—the world's busiest international airport—opened its newest terminal, Terminal 5, amid great fanfare and anticipation.

T5 was designed to house the majority of British Airways' intercontinental flight operations, reducing congestion and delays at the airport's other terminals. It was intended to be a showcase for modern airports, with state of the art facilities for passenger check-in, security screening, passport control and baggage handling.

As students of risk management know, there is a mathematical rule that describes a direct correlation between the scale of hype surrounding an event and the problems that will mar it. Heathrow Terminal 5 was no exception.

The first to notice problems were T5's employees, many of whom could not get into the secure areas on the morning of opening day. It was an omen of things to come. The first passengers arriving for departures March 14 faced long queues in the new check-in area, which was understaffed. Soon, the first arrivals landed and passengers made their way to the new baggage marvel that promised to deliver bags almost as fast as passengers could arrive to claim them. The conveyor belts became clogged.

By mid-afternoon, the baggage-handling system for check-ins failed.

The effect of these problems snowballed, resulting in tens of thousands of flights canceled, thousands of passengers stranded and tens of thousands of bags mislaid. Several top executives of the airport's operator lost their jobs, airline executives were uniformly critical of the poor performance and the head of the International Air Transport Assn. labeled the T5 opening "a national embarrassment." T5 became a textbook case of reputational risk.

In light of this, I was a little anxious about flying to Heathrow earlier this month. I need not have worried; by June, many of the problems at T5 were sorted out. The terminal operated efficiently, and it was a pleasure to be in the bright, new facility after past visits to the gloomy, tattered and tarnished rabbit warren that exemplifies the airport's older buildings.

Naturally, it was in one of the older terminals where my problems began.

Flights to and from the United States continue to go through Terminal 4, and that is where I checked in to return to Chicago. While the check-in lines were short, I wondered if the airport and airlines "A-team" staff were all working in the new building.

I checked in online, so I only had to present my boarding receipt, passport and suitcase at



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the counter before moving through the shortest security line I have ever experienced at Heathrow, and boarding my flight. Fast forward eight hours.

At O'Hare, I passed through customs and went to collect my suitcase. Unlike T5, O'Hare has no pretensions that its baggage system is state of the art or swift. But after 30 minutes of watching other passengers pull their bags off, with no glimpse of my own, I knew something was amiss. When the carousel stopped, I was certain.

Like many frequent fliers, I knew the drill. I made my way to the luggage counter and reported a lost bag. The man consulted his computer and said, "We have no record that you checked a bag."

Indeed, I could not find a luggage receipt. Unlike T5's baggage woes, I was not done in by technological glitches or the failure of newfangled systems. Rather, I lost my bag the old-fashioned way: Human error. The check-in agent in T4 took my bag, put tags on it marking it as "heavy" and BA's frequent-flier club, handed me my documents and, dazzled by this sleight of hand, I barely watched as my suitcase chugged into the bowels of the world's largest airport...with no means of sending it onto my plane, let alone locating it in the maze beneath the airport.

That was over a week ago. I check in daily, speaking with people who likely are thousands of miles from Heathrow and the online status report of "tracing in progress" is becoming a euphemism in my mind for "your suit and shoes almost fit and we like the gifts you bought your daughters." I started a claim for compensation and was assured "you will hear from us in several weeks."

In a month, I have to go back to London. Maybe this time I'll travel without luggage and when I get to T4, AKA the Terminator, maybe they'll take me to the Grotto of Lost Luggage and I'll be reunited with my bag. One can dream.

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Business Insurance OPINIONS

Compromise on ADA makes sense for all

THE VALUE OF nontraditional political alliances was proved again last week when the House of Representatives approved a measure that restored the Americans With Disabilities Act to its framers' intent.

In doing so, the ADA Amendments Act expanded the act's scope from the ever-narrower application that had resulted from a series of Supreme Court decisions. Normally, one would expect employers to welcome a reduction of their liability. But as we report on page 1, when it became evident that lawmakers would attempt to overrule the high court with a bill that employers found too broad, they sat down with groups that represent the interests of disabled people in an effort to work out a compromise acceptable to all. That they did was recognized by the House's overwhelming approval of the amendments act.

As we have noted before, today's political climate makes going it alone in the legislative arena more difficult for businesses and insurers. And as we noted before, a most unusual coalition of reinsurers, consumer groups, environmentalists and free-market advocates has had some success in blocking efforts to expand the scope of the National Flood Insurance Program to cover wind damage as well as flood damage. The ultimate success of that coalition remains to be seen, as House and Senate conferees work out differences between their NFIP reauthorization bills. The House version contains the expansion to require an offer of wind coverage, the Senate does not.

The political alliance between the business and disability advocates communities, though nontraditional, has promoted the interests of both groups. We hope it is a sign of the shape of things to come, and that its success in the House will be replicated in the Senate as soon as possible.

HSA guidance resolves key issues for employers

RARELY DO WE PRAISE the Internal Revenue Service, but the IRS deserves congratulations for its recently released guidance about health savings accounts.

As we report on page 1, the IRS last week resolved an array of real-world questions, such as whether an employee who receives services through an onsite corporate medical clinic remains eligible to enroll in a high-deductible health insurance plan linked to an HSA.

That the IRS has resolved so many questions isn't surprising, given its approach. That approach, though, was surprising for a government agency, in that the IRS sought out benefit experts to get their input on HSA issues where federal guidance was needed. It also fielded questions through an HSA hot line. That solicitation of questions—with a view toward developing guidance—is a common-sense approach that more agencies would be wise to follow.

Indeed, the IRS' track record in developing HSA guidance is laudable. The guidance has been prompt, fair and comprehensive. The fact that the IRS has been able to move so swiftly in this area has, no doubt, accelerated employers' adoption of HSA-based health care programs. It also likely will save all involved a significant amount of time that would have been spent asking and answering HSA-related questions.

We hope the IRS extends this rapid, yet comprehensive, approach to developing guidance in other benefits areas as well.

Today's political climate makes going it alone in the legislative arena more difficult for businesses and insurers.



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THIS WEEK'S RESULTS

Will the management shakeup at American International Group Inc. benefit its policyholders?



NEXT WEEK'S QUESTION

Q: Was the Supreme Court right to reduce the Exxon Valdez punitive damages award?

BI Online Poll tool is sponsored by Wausau Insurance Cos.

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Mind the gap in self-insured health plans

As more employers self-fund their health plans, it's important to understand the variety of risks that often go unrecognized, writes Rhoda D. Orin. The majority of the problems stem from stop-loss policies that provide coverage for self-funded plans. It is vital that self-insured employers understand the terms of the policy and purchase IBNR coverage to avoid any risk of being uninsured for any claim that falls into the gap and exceed stop-loss limits, she says.

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How far can prices fall?

Property rates plunge further despite losses

Double-digit declines common

By KRISTIN GUNDERSON HUNT

The U.S. commercial property market is “awash” with capacity that—despite a streak of tornadoes and extensive flooding this year—looks to change only if a significant natural catastrophe occurs, experts say.

Businesses renewing their property coverage at midyear generally are seeing substantial rate declines amid heightened competition from insurers, say risk managers, brokers and insurers.

Alexandra Glickman, area vice chairman for Arthur J. Gallagher Risk Management Services in Glendale, Calif., said rates are dropping more now than they were last year at this time. On average,

she said rates are down 15% to 30% from 2007, when rates were down about 5% to 7% from 2006.

“The market is awash with capacity, so companies are competing for business and rates are falling,” said Randall Schreitmüller, vp of market relations at Johnston, R.I.-based Factory Mutual Insurance Co., which does business as FM Global.

Experts attribute the soft property market to the fact that there has been no catastrophic natural disaster on the U.S. mainland since Hurricane Katrina in 2005.

“It’s classically a buyer’s market,” said Jim Rubel, executive vp of the global property practice at Lockton Inc. in New York. “But with one puff of wind, all that can change. The market will effectively change two minutes after a (large enough) hurricane is over.”

Rates are case-specific, though, and a function of a property’s location, construction type and

See **PROPERTY** next page



Subprime problems don't turn D&O market

Financial, real estate risks see price hikes; rates soften for others

By DAVE LENCKUS

The prospect of big executive liability losses stemming from the subprime mortgage mess has not scared directors and officers liability insurers from cutting rates and broadening some coverage for risks not blamed for the problem, insurance experts and risk managers say.

Underwriters looked closely at all risks during July 1 renewals to ensure they do not have even an indirect subprime exposure, such as an investment portfolio packed with subprime-mortgage backed financial instruments that are now valueless, brokers and insurers say.

“Underwriters are becoming more cautious,” said Carl Pursiano, a New York-based senior vp

with Liberty International Underwriters, a unit of Liberty Mutual Group Inc.

But “the market still is incrementally soft,” said Mike Klaschka, a New York-based principal in the management risk practice at Integro Insurance Brokers Ltd. Potential subprime-related losses that financial risks pose for D&O insurers “are not leaching into the nonfinancial side” in the form of higher rates, he said.

Financial institutions and real estate-related companies—the risks facing the vast majority of securities suits—were hit with rate hikes of up to 200% and retention increases of up to 100%, market executives say.

At the same time, capacity for those risks has shrunk, they say.



financial institutions have fallen 50% in the past year to between \$200 million and \$250 million.

“Almost all of the larger institutions have some problem; it’s a matter of degree,” said Steven Anderson, executive managing director with Beecher Carlson Holdings Inc. in New York.

But those problem risks are not worsening market conditions for everyone.

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Midyear Market Report

THE BIG SPOTLIGHT

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IN COMMERCIAL AUTO**
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MORE DISCIPLINE**
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Property: Competitive market continues as storm losses remain low

CONTINUED FROM PREVIOUS PAGE

loss history, Mr. Rubel said. Additionally, there is more competition for well-engineered and well-maintained properties with great claims histories, Ms. Glickman said. Ed Pierce, senior manager of risk management consulting for Blue Cross & Blue Shield of Florida Inc. in Jacksonville, Fla., said Blue Cross had a positive June 1 renewal experience this year, even after adding close to \$100 million in property value to its portfolio located predominantly in Florida. He said rates remained fairly sta-

ble, and premiums increased only with higher values. He added that “excellent facilities,” few property losses and a long-term relationship with its primary insurer helped maintain stability in the sometimes hard-to-place Florida market. “We just watch the market and we have to react to what it’s doing, and fortunately we’ve had good success,” Mr. Pierce said. Terry Fleming, director of the division of risk management for Montgomery County in Rockville, Md., is preparing for the July 1 renewal of the public entity’s \$6 billion portfolio. He said the market seems competitive and capacity

seems strong, with insurers offering substantial discounts from last year’s rates. He wouldn’t comment on the percentage drops he’s seeing with negotiations still pending, but said he is “very pleased” with the quotes. Mr. Fleming said he’s especially pleased with the multiyear deals that have been offered. Depending on the terms, he said he prefers multi-year deals because they are easier to budget, especially since public entities have to plan their budgets in advance. Mr. Pierce said he, too, would have considered a multiyear program, but one was not offered to

Florida BCBS, which currently has a one-year program. Lockton’s Mr. Rubel said he’s seeing a few more multiyear deals, but they remain uncommon. Gary Tiepelman, senior vp of underwriting at Scottsdale Insurance Co., said he has had to make some changes to remain competitive. According to Mr. Tiepelman, the Scottsdale, Ariz.-based insurer is about 10% short of the volume it had last year given account losses and rate changes. While rates have been adjusted downward, he said there have been no significant changes in coverage.

Recent events such as the April earthquake in the Midwest have had little effect on the property market. Ronda Whaley, vp of property brokerage for Brown & Riding Insurance Services Inc. in Los Angeles, said California quake coverage is seeing 10% to 35% rate decreases from a year ago depending on a property’s risk and location. She said the average rate decline is 25%. While definitely softer than a year ago, the market seems to be hitting a plateau, she said. The National Oceanic and Atmospheric Administration is comparing this year’s tornado-related deaths to 1998 and Midwest flooding to 1993, Mr. Tiepelman said such losses still are unlikely to harden the market. “If we get enough of these things, we might start to see some settling of rates,” he said. Ms. Glickman said if this year’s hurricane season is benign, she sees meaningful rate decreases extending into next year, although not at the same pace as recent months. She said underwriters are reaching a point where their cost of capital is such that they cannot and will not continue to support such decreases. “There is a cost of capital that has to be respected and understood,” Ms. Glickman said. Despite generally soft property pricing, buyers should continue their research, build relationships and ensure their properties are in the best shape possible in case a catastrophe does strike. “It’s not time to be complacent,” Mr. Rubel said. “It’s time to do your homework.”

Risk management

FM Global’s Mr. Schreitmueller said buyers should invest their savings from lower premiums into additional risk management measures, including how to better protect their supply chains. As companies expand their reach globally, supply chain issues should be of greater concern. “Experienced buyers use opportunities like this to their advantage,” Mr. Schreitmueller said. “Insurance buyers can look at this as an opportunity to invest their savings into risk improvement,” he added. In a recent report, NOAA said best management practices can maximize “ecosystem resilience” to climate change risks that include more heat waves, droughts and heavy downpours in addition to hurricanes. In the past, Ms. Glickman said, the property insurance market has been like a ping pong ball, “up and down and all over the place.” She said a more stable market would be preferable and makes it easier for policyholders trying to budget for their exposures. “My genuine hope is we end up with a saner market,” Ms. Glickman said. “The definition of insanity is repeating the same actions over and over again.” For now, though, Mr. Fleming of Montgomery County said he’ll take the gains in capacity and savings in rates. “It’s a cyclical process, and this year it’s our turn,” he said.



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Most E&O risks see double-digit rate cuts as capacity rises

But underwriters increase prices for financial institutions, other accounts linked to subprime mortgage crisis

By DAVE LENCKUS

The subprime mortgage debacle has split the errors and omissions liability insurance market just as it has the executive management liability market, according to insurance experts.

E&O market conditions remained soft during July 1 renewals for all risks except those directly connected to subprime mortgages, experts said.

"I can tell you that underwriters are not happy about this, but I haven't seen any renewals to indicate that anything is changing," said Sandy Coddling, a New York-based managing director and co-leader of the E&O practice for Marsh Inc.

Competition has been fueled by new market entrants attracted by good loss experience over the past

several years, according to market experts.

Except for risks tied to the subprime mortgage crisis, rates typically fell by double digits, capacity was overabundant and the coverage that underwriters were willing to offer was broader, experts said.

However, insurers have walked away from accounts rather than risk underwriting them at a loss, said Kevin Kalinich, a Chicago-based co-national managing director of Professional Risk Solutions at Aon Corp.

For example, Liberty International Underwriters, a unit of Liberty Mutual Group Inc., refused to cut rates more than 5%, according to Bruce Eisler, a senior vp in New York. As a result, its account retention rate slipped several points, he said.

With no change in subprime



exposures, financial institutions faced rate hikes of 10% to 20%, experts say. Real estate and credit rating companies also faced rate hikes, they said.

However, financial institutions that could differentiate themselves from subprime lenders were able to negotiate reduced rates, said Mike Klaschka, a New York-based principal in the management risk practice at Integro Insurance Brokers Ltd.

Other professionals continued to enjoy the soft market conditions,

though the market favors some risks more than others.

For example, rates for technology risks with no growth in revenue were flat or moderately lower, while those with a booming business faced flat to slightly higher rates, Mr. Klaschka said.

Miscellaneous professional risks—a category of dozens of professional groups such as consultants, staffing companies and franchisors—negotiated 5% to 20% rate reductions, experts said.

E&O underwriters continued to lower rates for attorneys, though smaller law firms negotiated rate cuts that were double those obtained by large firms with 300 or more attorneys, Mr. Coddling said. Large firms with good claims experience received more modest 5% to 10% rate cuts because underwriters expect some will face claims related

to packaging subprime mortgage securities, he said.

In a major coverage concession, many insurers waived a requirement that policyholders warrant that they are unaware of circumstances that could lead to claims, Mr. Kalinich said. Policyholders dislike warranties because they provide insurers a shield against paying claims.

In addition, when increasing their limits, many miscellaneous professional accounts persuaded insurers to apply the higher limits to prior acts, Liberty's Mr. Eisler said. Liberty allows that on a case-by-case basis, he said.

Many miscellaneous professional accounts also persuaded insurers to remove bodily injury and property damage exclusions for little or no additional premium, according to Mr. Eisler.

D&O: Subprime losses drive up some rates but fail to turn market

CONTINUED FROM PAGE 11

"It's a tale of two markets," Mr. Sheehan said.

"It's a little bit surprising, but it is soft," said Steve Shappell, managing director of the legal and claims practice for Aon Corp. unit Aon Financial Services Group in Denver. There is "a lot of capacity and a lot of competition," including underwriters entering the market, he said.

Attracting insurers, he said, is a 40% dismissal rate of securities cases, which is nearly twice the rate it was before the 1995 securities litigation reform act, and the approximately \$12 million median value of claims, including indemnity and legal costs.

And underwriters' combined ratios remain below 100%, Mr. Anderson said. "So, they're making an underwriting profit."

To compete for business, under-

writers are willing to cut rates 5% to 40%, and substantially more in some cases, depending on how aggressively the account was marketed at its previous renewals, market executives say.

Soft rates

For Side A-only coverage, risks with no subprime exposure and no likelihood of filing for bankruptcy can negotiate 10% to 15% rate cuts, said Dan Vecchio, managing direc-

tor and national practice leader for professional risk with Wells Fargo Insurance Services Inc. in Chicago.

Excess rates also continue to fall—sometimes to as low as 60% to 70% of the underlying rate, market executives report.

Some buyers are trying to further capitalize on the soft market by breaking up their excess coverage into additional layers, which makes the highest layers cheaper than if the current structure were main-

tained, brokers said.

Some buyers are using the money saved to purchase additional limits, Mr. Vecchio said.

Michael Liebowitz, director of insurance and risk management at New York University, said he negotiated a double-digit rate decrease even though the university has not been loss-free. Its losses, however, largely have been within its deductibles.

Defense contractor Ensign-Bickford Industries Inc. obtained an 81.5% premium reduction from an insurer that bested the incumbent's offer by more than 20 percentage points, said Rick Roberts, the company's Simsbury, Conn.-based corporate risk manager.

Besides the soft market, Mr. Roberts attributed the reduction to marketing Ensign-Bickford's coverage for the first time in at least five years and the company being privately held.

Mr. Roberts also said the total premium Ensign-Bickford paid for D&O, employment practices liability, crime and fiduciary liability coverage this year amounted to 75% of its 2007 cost for just D&O coverage.

"The vast majority of the savings were in the D&O and EPLI, but I don't recall a renewal of this magnitude of premium reduction on a percentage basis in my career," Mr. Roberts said.

Meanwhile, underwriters were willing to negotiate better terms and conditions, market executives said. For example, insurers will waive the policyholder warranty requirement, agree to broad severability terms and drop most exclusions, except those barring fraudulent conduct and profiteering, market executives said.

NYU's Mr. Liebowitz said he negotiated a post-policy reporting period of 90 days, compared with the 30 to 60 days insurers offered in previous years, and elimination of a sublimit on punitive damages.

BRAINS & BRAWN

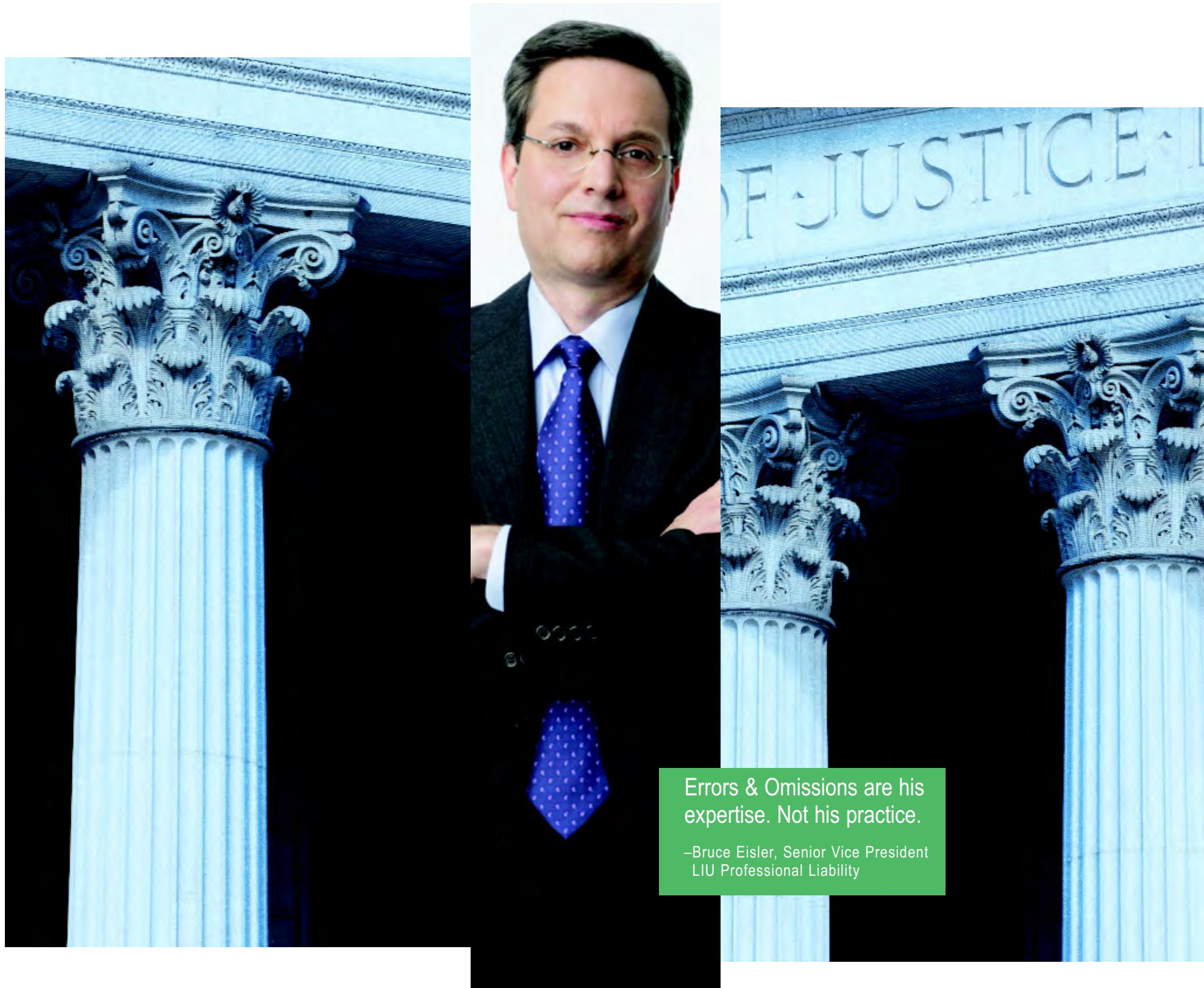
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Liability market remains soft, but rate decreases begin to slow

Subprime mortgage-related concerns prompt underwriters to examine collateral requirements in greater detail

By SALLY ROBERTS

The end of the soft casualty insurance market may be in sight.

Although risk managers renewing their primary and excess liability programs at midyear still saw average rate declines of 3% to 10%, in many cases the reductions were not as great as six months ago, observers say.

After three years of substantial rate cuts, liability underwriters are asking for more detailed information before giving out larger reduc-

tions. In some cases, they are walking away from accounts that are priced too thinly, observers say.

Underwriters this renewal season also are paying especially close attention to policyholder collateral requirements in light of the recent credit crisis.

Capacity is still plentiful, however, and the marketplace remains competitive. As a result, observers say rates are unlikely to increase until at least 2009, absent some unforeseen market-turning event.

"We are looking at the rate

LIABILITY REPORT



decreases given out over the last several years and have started to come to the conclusion that we've got to start slowing that down," said Louis Iglesias, chairman and chief executive officer of AIG Risk Management Group in New York. "I don't think the market has that much more to give."

Primary general liability rates at the American International Group Inc. unit decreased an average of 8% during midyear renewals, Mr. Iglesias said.

Lead umbrella rates are renewing with single-digit rate declines, said Douglas Worman, president and CEO of AIG Excess Casualty Group in New York. "Very sophisticated

clients with lots of moving parts could be flat to down 3%, while when you get into some of the lower revenue companies with not as many moving parts, that's down anywhere from 5% to 9%," he said.

"I really don't see a lot more room in the whole market for more decreases considering we're going to continue to see losses in this business on a consistent basis as we have for the past 40 years," Mr. Worman said.

"I think if it hasn't already, it's beginning to bottom out and, at some point in the near future, it's going to start going the other way," said Joseph Harris, chief underwriter for primary casualty in the Americas for XL Insurance in New York.

Depending on the risk characteristics and loss experience, XL renewed casualty programs, which include workers compensation, general liability, product liability and auto liability, with rate decreases averaging 5% to 10%.

"We have seen some (business)

where rate decreases of 35% to 40% have been achieved," Mr. Harris said. "On June 1, we let a couple of accounts go away," he said. "We chose to let them go because the market had taken them to a price and level that didn't make sense from our perspective."

Buyer's market

Although there are some signs that the soft casualty market may be coming to an end soon, brokers say capacity remains plentiful and competition is fierce. As a result, buyers are continuing to see decreases on their casualty programs, albeit in smaller increments.

"It remains a buyer's market. I don't think it's the same magnitude of decreases or softening we saw towards the latter parts of last year, but it is still very favorable," said Jonathan Zaffino, managing principal of Integro Ltd.'s casualty practice in New York.

Continued next page

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"We see some hiccups and hesitation on certain accounts that we've beat the hell out of the past few years in terms of getting further reductions, but the market is certainly in a soft stage right now and will probably remain that way into 2009," said Anthony DeFelice, managing director in the casualty practice at Aon Risk Services in New York. "But we are hearing things now, for the first time that (casualty underwriters') results are starting to creep up."

David S. Hershey, risk manager of New York-based conglomerate Lexa International Corp., said he was able to secure a 10% reduction on his casualty program June 1 vs. the 15% to 20% rate cut he obtained last year. Lexa's largest unit is New Hampshire-based Sprague Energy Corp.

'I really don't see a lot more room in the whole market for more decreases considering we're going to continue to see losses in this business on a consistent basis as we have for the past 40 years.'

Douglas Worman, AIG Excess Casualty

"The underwriters were asking far more detailed questions than they have in the past when negotiating a 10% reduction," Mr. Hershey said. "It appeared they had an added threshold to justify to their file before providing that."

Eric Silverstein, managing director of casualty at Beecher Carlson in Atlanta, said there's a different message being sent by senior management to underwriters compared with six months ago.

At yearend, the message to underwriters was to "try to hold that rate as much as possible, but if you get into competition or are pushed hard and the experience is good, do what you have to do to maintain the business," Mr. Silverstein said.

That has changed, he said. "If there's a certain benchmark that an underwriter needs to meet, if you request within that benchmark it's fairly easy to get. If you're in excess of it, it's become much more difficult to get, even if it's just 1%," Mr. Silverstein said.

Overall, brokers say terms and conditions are remaining steady although underwriters remain flexible and willing to negotiate.

Another area where casualty underwriters are taking a closer look is collateral, observers say. Underwriters require collateral from insureds on large-deductible casualty programs to hedge the risk of the insured not being able to reimburse the insurer for the deductible should a loss occur. In such cases, the insurer pays the entire claim and the policyholder then reim-

burses the insurer for the deductible.

The recent credit crunch—as a direct and indirect result of the subprime mortgage crisis—however, has hurt some companies' credit ratings. As a result, underwriters are, in some cases, imposing stricter collateral requirements.

Collateral is "the discussion of the day," Integro's Mr. Zaffino said. Insurers are "taking a hard look" at underlying losses and the amount of the collateral as well as the form

of collateral being used. They want "to make sure they are not overexposed to credit risk from difficult clients."

"Obviously there's a lot of noise around the collateral issue," Aon's Mr. DeFelice said.

"I think what's happening now is that, because of the credit crunch our clients are under, collateral is more under the microscope than it's ever been before," Mr. DeFelice said.

For example, clients whose credit

ratings have been downgraded are not getting as many credits back on their collateral from insurers, he said.

"Collateral was an issue this year for us primarily on the calculation," Lexa's Mr. Hershey said. "The carrier came back with an initial request for an additional amount of collateral, which we viewed as a significant number. After going back and forth several times, it resulted in no increase in collateral necessary. We thought we were able

to justify those numbers."

"Just the fact that (the insurer) made the request in the first place was kind of astonishing," Mr. Hershey said.

"We're certainly mindful of the changing economic conditions and as we analyze our insured's credit worthiness, it's certainly a part of our thought process," X.L.'s Mr. Harris said. "We're not asking for more collateral as a result of that, but certainly it's something we're very mindful of."

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Energy insurance rates slip as global capacity increases

But prices for most risks remain much higher than pre-2005 levels

By GLORIA GONZALEZ

Energy risks generally are receiving substantial rate reductions during their midyear renewals as abundant capacity has combined with an absence of major storms in the Gulf of Mexico energy production region.

Rates for offshore energy risks are declining by 20% to 30% and onshore operations are experiencing rate declines in the 15% to 20% range, brokers and insurers say. Liability risks, meanwhile, are seeing rates fall 5% to 10%, observers say.

Buyers are seeing favorable renewals because of increased capacity in London and Bermuda, although underwriters still are keeping premiums well above pre-2005 levels. Four major Gulf of Mexico hurricanes that year led to price hikes as high as 500% in 2006.

"A 20% to 30% reduction off those numbers is not nearly as significant as it might sound initially," said Tony Mayer, managing director

of Marsh Inc.'s energy, mining and power group in Houston.

Underwriters also are willing to provide additional windstorm limits to maintain premium levels, he said.



Insurers say they are comfortable with pricing as they continue to recover 2005 storm losses.

"Rates remain adequate in just about every sector," according to Frank Costa, New York-based president of AIG Oil Rig Division, a unit of American International Group Inc.

"Underwriters are still in a deficit position. That's why you see underwriters maintaining underwriting

discipline in the Gulf of Mexico," he said.

"We're still comfortable that we're in a reasonable range of pricing level(s), although those continue to deteriorate with single-digit rate reductions" for primary casualty risks in the energy sector, said Mike Gwozdz, Boston-based chief underwriting officer, energy, for Liberty Mutual Group's specialty line business.

One energy risk manager, who asked not to be identified, obtained a 7% reduction on the business' casualty program, which he attributed to the soft market and correction of prices charged following the 2001 terrorist attacks and the 2005 hurricanes.

The risk manager unsuccessfully sought a 10% to 15% reduction on this year's renewal, and said his company will seek a double-digit rate cut during its next renewal and may put a new Bermudian insurer on its program.

While other areas were receiving



Since the rate hikes that followed the disastrous 2005 hurricane season, offshore platforms in the Gulf of Mexico have seen insurance costs fall.

rate cuts, rates for offshore construction energy projects remain flat as there are a limited number of insurers willing to cover the risks. "We're not seeing any radical departures from the construction side," said Jack Probolus, controlled insurance program marketing director for Liberty Mutual in Boston, whose group develops wrap-up programs for large construction projects.

Few buyers are purchasing business interruption coverage because of the high cost, already established emergency plans for their Gulf of Mexico operations and the substantial rise in commodity prices, Marsh's Mr. Mayer said. "The thought of losing one production facility doesn't impact them as greatly with the high oil and gas prices," he said.

Since more than 80% of Gulf of Mexico energy risks renew by July 1 as buyers have moved their renewal dates into the first and second quarters, any effect from what is expected to be an active hurricane season will not be felt immediately. "What

we've seen for 2008 is really what would be in place for the beginning of 2009," Mr. Mayer said.

A few buyers reduced deductibles and retentions, but not enough to call it a trend, brokers and insurers said. Underwriters generally want to maintain sizeable retentions in exchange for flat or reduced rates.

To fully benefit from the soft market, buyers should provide detailed information on their energy operations, insurers and brokers say. For offshore energy platforms, they should provide specific details on the location, age and height of their platforms as well as their storm protocols.

If underwriters do not have this information, they assume a worst-case scenario and price accordingly, AIG's Mr. Costa said.

"We really value those producers, brokers and customers who focus on the basics and get all those basics as complete as possible at the beginning of the process," Liberty Mutual's Mr. Gwozdz said.

Marine insurance rates drop to seven-year low

Limits rise as market entrants vie for business

By GLORIA GONZALEZ

Marine buyers are benefiting from abundant capacity that is spurring insurers to make hefty rate reductions, particularly on cargo and certain hull risks.

Double-digit premium rate decreases are common in most segments of the market, although cargo business is particularly competitive with brokers reporting reductions of up to 60% as new insurers enter the market.

Reductions of 50% to 60% are common for brown-water hull rates, while blue-water hull risks have experienced smaller declines due to recent losses and reduced capacity, brokers say.

"We're almost back to pre-9/11 rates," said Jane A. Keegan, enterprise risk manager for the Port of

Oakland in California.

Exasperated insurers say an oversupply of capacity is driving rates that do not reflect a policyholder's risk profile, particularly those with an unfavorable loss history.



"As a result, you're seeing terms and conditions that don't make sense," said Nigel Fitzgerald, North American marine manager for Liberty International Underwriters in Houston.

Underwriters today are ignoring

Continued next page

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certain historical losses when developing pricing, said Timothy Rea, principal with the marine group of Integro Ltd. in Atlanta. "There's way, way too much capacity," he said. "Underwriters are just throwing their hands up."

Cargo and brown-water hull capacity is entering the market from insurers looking to diversify their business, brokers say.

"The new markets are absolutely going for that market share and profitability be damned," said Guy Claveloux, managing director and marine practice leader, Americas, for Marsh Inc. in New York. "Some markets are trying to hold the line and, as a result, will lose some of their business."

'The new markets are absolutely going for the market share and profitability be damned.'

Guy Claveloux, Marsh Inc.

Insurers are trying to maintain underwriting discipline, said Peter Knowles, vp of RLI Marine, a unit of RLI Insurance Co., in San Francisco. "We know we can't drive the prices down too badly."

In addition, buyers can secure higher limits than previous years. For example, vessels carrying oil can secure limits of \$250 million rather easily, said Bill Rowland, vp, XL Energy and Offshore Energy in New York. "That was an unheard of limit just a few years ago."

Buyers need higher limits because their cargo is worth more. "A tanker full of oil is worth a lot more than it was a year ago, so they just have a higher exposure," said Richard Decker, president of AIG Global Marine, a New York-based unit of American International Group Inc.

In terms of policy language, marine insurers are paying more attention to removal-of-wreck clauses because of unanticipated losses in the hundreds of millions of dollars, said Joseph O'Connor, senior vp, marine and energy for Valiant Insurance Group in New York.

Hurricanes always are a major factor, but even Midwest floods can affect the marine market, Mr. Claveloux said. If flooding nears record levels and duration of 1993, the market would experience cargo and hull losses as barges break way or vessels collide with bridges, he said.

A natural catastrophe or terrorist event could reverse the market's decline, although current pricing likely will continue through mid-2009, the Port of Oakland's Ms. Keegan said. "It's not going to be as cheap as it is today."

Should there be two major catastrophes this year, rates likely would be flat in 2009, Mr. Rowland said.

"There just doesn't seem to be an end in sight" to falling marine rates, Integro's Mr. Rea said.

Workers comp price reductions start to slow

Some buyers seek to lock in current low rating levels through multiyear contracts

By **ROBERTO CENICEROS**

Buyers renewing their workers compensation coverage are seeing double-digit rate declines and more competition for their business.

But weakening insurer results and unfavorable investment conditions could make it harder for underwriters to continue cutting prices as steeply as they have, insurers say.

Don Pickens, Boston-based Liberty Mutual Group's executive vp and chief underwriting officer for national markets, said his data

already shows that the rate of price cuts has slowed from six months ago.



To lock in current pricing, some buyers are signing two-year contracts, brokers and insurers report.

Because of the soft market, there is little incentive for employers with guaranteed-cost contracts to move away from those arrangements, several observers add. Yet large buyers accustomed to analyzing and controlling their own risks and claims generally are not abandoning loss-sensitive contracts, although some accounts are moving to guaranteed-cost programs.

Double-digit price decreases are common, but the actual percentage depends on a policyholder's loss history and how much of a rate cut

the business obtained a year ago, said Tom Nazar, a senior vp and casualty specialist in Chicago office of Willis Group Holdings Ltd.

Buyers that received the largest discounts during last year's renewal likely are seeing smaller declines this year, and vice versa, said Mr. Nazar, who is seeing average workers comp rate reductions of 10% to 15%.

Brokers and insurers, however, differ on the size of the reductions.

See **WORKERS COMP** next page



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Workers comp: Prices fall but rate reductions show signs of easing

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Rate decreases of 15% are uncommon, although buyers are asking for that, Liberty Mutual's Mr. Pickens said.

But Norman G. Hainlen, a broker at PrideMark-Everest Insurance Services Inc. in Santa Ana, Calif., said markets are very aggressive with recent renewals seeing workers comp rate cuts of at least 10% and those with favorable loss histories as high as 15%.

One client that provides shelf stocking services for large retailers in a dozen states, for instance, saw a 10% rate drop for its June 30 renewal, Mr. Hainlen said.

Harrah's Entertainment Inc. obtained a 10% reduction of primary and excess premiums for its June 1 renewal, with similar retention and payroll levels at the gaming company as last year, said Marc Kamler, manager of insurance and risk services for the risk management division of Harrah's in Cordova, Tenn. Harrah's buys insurance in some states and self-insures in others.

For Advocate Health Care Network, the price of its guaranteed-cost program for its for-profit businesses fell 2%, but its payroll grew 10% from last year, said Gregory A. Browne, director of insurance and risk management for Oak Brook, Ill.-based Advocate.

Following a 10% decline last year, the Port of Oakland reduced its excess workers comp coverage by another 15% for its May 20, renewal, said Jane A. Keegan, enterprise risk manager for the California port.

More insurers bid for the business this year than last year, Ms. Keegan said.

New insurers and existing insurers bringing more capacity to the market are pressuring pricing, several sources said.

"Pricing is still extremely soft," and insurers would rather reduce their price than allow competitors a chance to win the business, said Tony Tam, managing director in the national casualty practice for Marsh Inc. in New York. "The carriers realize they would much rather give, let's say a 15% reduction, rather than (have an account) go

out to market."

Yet most insurers still are underwriting responsibly, several sources said. They are not behaving as they did in the late 1990s, when they underpriced their products in pursuit of a cash-flow underwriting strategy, Mr. Tam said.

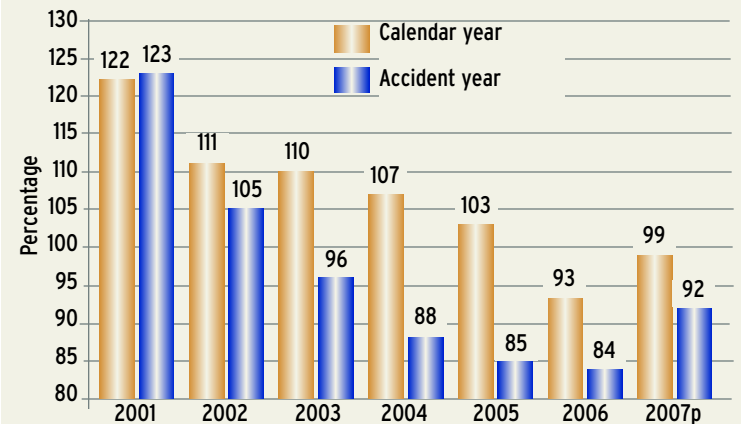
In its recent 2008 State of the Line report, NCCI Holdings Inc. said workers comp insurers enjoyed solid underwriting results in 2007 and 2006.

For 2007, they experienced a 99% calendar year combined ratio, Boca Raton, Fla.-based NCCI found. While that is a six percentage point deterioration from 2006, it was the "first time in memory" that workers comp insurers produced an underwriting profit for two consecutive years, NCCI said in its report.

While an NCCI spokesman would not speculate on how the continued price decreases may affect insurers' 2008 results, NCCI said in the report that it is optimistic about workers comp underwriting in the short term even though insurers face several uncertainties.

UNDERWRITING PROFITS

The combined ratio for workers comp business is expected to remain below 100% in 2007



p=preliminary
Source: NCCI Holdings Inc.

Some of the uncertainties include low investment yields, medical cost increases and an underwriting cycle that has peaked, meaning that insurer premium volume has stopped growing.

Insurers' higher 2007 combined ratio plus challenges such as medical inflation could slow price-cutting even though rates wouldn't necessarily become firm, said Tony Ciofani, executive vp and chief underwriting officer for PMA Insurance Group, a Blue Bell, Pa.-based multiline insurer specializing in workers comp coverage.

The deterioration in the combined ratio does pressure insurers to control pricing as they have less room for error when setting terms, Mr. Pickens said.

For now, however, brokers say that there is no indication prices will firm over the next six months.

In addition to differing on the magnitude of price decreases, brokers and insurers differ on whether many accounts are looking to reduce their deductibles or move to guaranteed-cost programs.

They do agree that, under current market conditions, fewer buyers are opting to retain a greater share of their risk.

"We are not losing the ability to retain our large clients on loss-responsive plans," said PMA's Mr. Ciofani. "But market conditions make it more challenging to attract traditional middle-market customers" away from guaranteed cost programs.

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Rising claim severity could halt commercial fleet rate cuts

But prices continue to fall at mid-year as profitable business attracts more insurers to auto liability market

By **JEFF CASALE**

Small to midsize commercial auto fleets renewing their coverage continue to see single-digit rate declines amid greater competition, but rising claims severity could put a floor under pricing, experts say.

From 2003 through 2007, the overall U.S. commercial auto line produced an underwriting profit, according to a report by Hartford, Conn.-based Conning Research & Consulting Inc., which said the line had nearly a 95% combined ratio for 2007.

"It's a part of the industry where we're seeing a lot of competition, and that competition has become more intense as it's been a profitable area for companies," said Greg Meyer, senior vp of auto product management for small businesses for Schaumburg, Ill.-based Zurich

ny decided to remain with its current insurer, said John Beyer, director of risk, fleet and travel at Safelite AutoGlass.

The company had retained a sizable deductible since 2001 after it faced a coverage crisis.

At that time, the mobile windshield repair company had a no-deductible program and its insurer refused to renew the coverage after Safelite posted several high-loss years. So, Mr. Beyer decided to go with a \$250,000 liability retention program including property dam-

age and injury payments. Still, Mr. Beyer thought Safelite could do better.

Loss control

"We rebuilt the whole loss-control program," Mr. Beyer said. "We started a new driver training program, added stricter motor vehicle report screenings, implemented post-accident drug testing, added backing sensors to the vehicles. We had to get our loss control and safety standards up to speed."

Today, Safelite retains \$1 million

in liability through a program underwritten by Zurich and has substantially reduced its annual insurance costs, he said.

For small and midsize commercial fleets, underwriting has become "flexible," said Michael Faralli, senior vp and placement leader for New York-based Marsh Inc.'s mid-market northeast zone transportation unit.

Mr. Faralli, who deals mostly with mixed fleets of cars, trucks and heavy duty equipment, said he expects this market trend to last

another six to 12 months.

Ron Alexander, commercial product manager for Mayfield Village, Ohio-based Progressive Casualty Insurance Co., agrees with that outlook.

"Different companies have different policies and contracts and how flexible that contract is, is important," Mr. Alexander said.

"As a buyer, you don't want to be worried about flexibility and you want an insurance company that is working with you, rather than against you," he said.



North America. "Because it has been a successful area, companies are taking steps to improve pricing."

Direct premiums written in 2007 topped \$29 billion, according to the National Assn. of Insurance Commissioners.

Typical coverage offered by commercial auto insurers includes liability, comprehensive and collision. Excess liability also may also be purchased as well as owner-operator coverage. In some cases, occupational accident coverage also is available as part of a bundled package with some insurers.

In general, coverage terms have not changed for most policies, insurers say.

Small and midsize commercial fleet insurance rates have been declining since 2005, said David Blessing, vp and chief underwriting officer of Boston-based Liberty Mutual Group Inc.'s eastern division national market.

However, the Conning Research report said competitive conditions within the market along with rising severity of claims will begin taking its toll on the line soon.

"Loss frequency and claim frequency trends have been down and declining for a number of years, but that's not the total picture," said Liberty Mutual's Mr. Blessing. "You also have the severity picture and, from what I'm seeing, severity might be outstripping the frequency declines."

Insurers and brokers say the rise in severity of claims could slow or halt additional commercial fleet rate cuts.

Some larger fleets see limited competition for their accounts.

Safelite AutoGlass in Columbus, Ohio, for example, this year sought competitive bids for its fleet of 3,000 vehicles. After considering the few quotes offered, the compa-



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INSURANCE/REINSURANCE



Reinsurance rates continue to fall, capacity remains plentiful

But price cuts less severe than primary market as reinsurers appear to take firmer stand on rating levels, observers say

By JUDY GREENWALD

Reinsurance rates are continuing to decline and retention levels are remaining stable during midyear renewals, but observers say there is a "disconnect" as reinsurers exercise greater pricing discipline than their primary counterparts.

"Thus far, renewals have been going fairly smoothly," said Richard DiClemente, president and chief executive officer of New York-based THB Intermediaries Inc. Rates overall are dropping 10% to 25%, but

"capacity's readily available and there should not be too much difficulty in getting coverage together for the renewals."

"Negotiations have been reasonably relaxed for both parties," said Brian McGuire, senior vp at U.S. RE Corp. in Pearl River, N.Y. "I think clients set their objectives and what they want to buy, and reinsurers have been fairly accommodating to that extent."

"Rates are off, capacity is considerable" and retentions may have bottomed out, said John Gilbert,



chairman of Holborn Corp. in New York, who estimates rates are down 5% to 15% overall.

Steve McElhiney, president of Dallas-based reinsurance intermedi-

ary EWI Inc., said, "We were able to get all the capacity we were looking for, at the terms and conditions that we were targeting" and experienced "no difficulties whatsoever in the market. We find reinsurers very responsive and quick to quote accounts."

Yet some observers say there is a divide between the primary and reinsurance markets, with the primary market being more competitive.

"I think if there's a kind of underlying theme, it's overcapacity on

the (insurer) side and a disconnect between reinsurance pricing and carrier pricing," Mr. DiClemente said.

More managing general agencies are obtaining underwriting authority, "so there's less business flowing to the insurance companies themselves, and it's forcing the insurance companies to be extremely competitive to retain what they have or attract new business," Mr. McGuire said.

"It seems to me that the primary markets are a little ahead in the soft market and the reinsurers are trying to resist," said Eric Brosius, senior vp and manager of reinsurance for Liberty Mutual Insurance Co. in Boston.

"If a buyer goes out and asks for all the possible coverage they can get at an extremely low price, the reinsurance market is still digging in its heels and saying, 'That doesn't make sense,'" Mr. Brosius said.

Typically in a very soft market, "discipline falls apart," but now reinsurers are "trying for the most part to make sensible decisions and say 'No' when they think they should say 'No,'" he said.

"You're always going to get one outlier potentially on a program but, by and large, the market has shown some resolve," said Dave Cameron, Minneapolis-based executive vp at Benfield Group Ltd.

"There are some forces that are adding to the normal discipline," particularly "weak returns from the stock market," said Sean Mooney, chief economist of Guy Carpenter & Co. L.L.C. in New York. "That means the companies are making less money on the investment side of the house, so they definitely don't want to give away the store on the underwriting side."

But "we don't see a lessening of standards by the reinsurers, or a free fall in pricing by any means, but that being said, there's certainly an eagerness to quote accounts," Mr. McElhiney said.

Rod Fox, chairman and CEO of reinsurance intermediary Alpha Re in Shelton, Conn., said that while reinsurers "may appear to be more disciplined, I'm not sure they are across the board, or as much as they might appear."

Reinsurers who had been writing business in one layer now are more willing to write across all coverage lines "and capacity is outstripping demand a little bit," he said.

Observers say rates are particularly soft in property lines.

Stacy Armstrong, Mount Laurel, N.J.-based senior vp at GMAC Re Corp., who focuses on property catastrophe business, said Florida catastrophe business may be down 10%, "but it's really hard to gauge because everything's shifting around" in terms of retentions and attachment levels. "There has been a little more softening" at July 1 renewals than was seen at June 1 renewals, "but not much difference," she said.

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Reinsurance: Rates continue to decline

CONTINUED FROM PAGE 22

Property per risk rates are down about 15%, while property catastrophe rates are down 10% to 20%, depending on the portfolio, said John Ehinger, president and chief operating officer of Willis Re Inc. in Philadelphia.

Mr. McGuire said the hours clause of coverage in reinsurance contracts often has been extended to 96 hours from 72. Otherwise, terms and conditions remain the same. "It's really just a matter of price," he said.

Furthermore, Mr. Fox said, reinsurers are asking for more detailed information about the business they write, particularly for catastrophe business. "They really want to get excellent data. You see this in a softening market—a flight to quality, where reinsurers want to do more business with the quality companies."

Additionally, hedge fund investor-driven special-purpose vehicles have created more competition

in the property catastrophe segment, said Mr. Ehinger. Property cat business is "easier for them to enter in and play in" because it requires less staff and arguably less underwriting expertise, he said.

Mr. Mooney said while investment banks are pulling back from investing their own capital, hedge funds and private equity funds have a continued interest in risk that is not correlated with their existing portfolio.

Observers say they expect the Midwestern flooding to have a limited impact on the market, but nothing like Hurricane Katrina. "I think it is much more regionalized and might affect fewer carriers," Mr. McElhiney said.

Meanwhile, casualty lines are "having some softening, but I think a lot less than in the property cat arena," and generally is still a stable reinsurance market, Mr. Brosius said.

"The casualty side of the industry has remained a little bit steadier even though we are seeing a good

deal of competition," with rates dropping about 5% to 15%, Mr. DiClemente said.

"Casualty, I think, is a little bit of a sleeper," and softened before the property market softened, said Mr. Ehinger. Working layer business is off 7% to 10%, while workers compensation catastrophe business is down 10% to 15%, he said.

For the moment, many observers say the outlook remains unchanged barring major catastrophes.

"I don't think the (underwriting) climate will change without any type of major catastrophe or catastrophes occurring on the insurance company level," Mr. McGuire said.

However, Holborn's Mr. Gilbert said he expects reinsurers to take a stronger stand on rates in the "relatively near future regardless of any large, natural catastrophes that might come along" because "there have been a series of significant individual risk losses that have hit reinsurers, and it's coming at a time when investment returns are down."

Comings & Goings

BROKERS

Willis Group Holdings Ltd. has announced three senior appointments in its Global Specialties division in London:

- **Keith Anderson** will assume the role of chief financial officer. Most recently, he worked at Aon UK, where he was CFO of the UK Specialty and UK Retail divisions.

- **Nick Dunlop** has been appointed sales director for the division. Previously, he was the director for global markets North America.

- **Giles Wilkinson** has been named marketing director. He will continue in his role as client advocate and as chairman of Aerospace Japan.

Stephens Insurance L.L.C. is expanding

its Austin, Texas, office with the addition of **Greg Meserole** and **Matt Burns** as senior vps providing insurance and risk management services to businesses, municipalities and individuals. Previously, both Mr. Meserole and Mr. Burns were managing directors at Higginbotham & Associates.

Mr. Meserole



Mr. Burns

Aon Corp. has announced several senior-level promotions:

- **Bruce Shanefield** in Miami and **J.R. Shamley** in Tampa, Fla., have each been named senior vp, health and benefits, Southeast region. Both previously were vps.

- In New York, **Mike Colhoun** and **Rick Stanley** have each been appointed senior vp, health and benefits, Northeast region. Both previously were vps.

- In North Carolina, **Steve Wyatt** in Raleigh and **Terri Vaughan** in Winston-Salem have each been appointed senior vp, retirement, Southeast region. Both previously were vps.

- **John Shish** has been appointed senior vp, human resources outsourcing, central/west region, in Rolling Meadows, Ill. Most recently, he was a vp.

- **Brent Crane** in Salt Lake City and **Michael Rask** in Seattle have each been promoted to senior vp, health and benefits, central/west region. Both previously were vps.

- In Washington, **Melissa Bruns Burke** has been promoted to senior vp, human capital, Southeast region. Most recently, she was a vp.

- In Winston-Salem, **Scott Herman** has been promoted to senior vp, employee benefits outsourcing, Southeast region. Most recently, he was a vp.

Lockton Cos. has named **Kevin McDaniel** as president of its St. Louis office. Most recently, he was an executive vp and a member of the executive committee. Mr. McDaniel succeeds **Whity Meyer**, who has been named chairman.

Hub International Arizona has announced that **Richard Milne** has been named chairman of HUB Arizona. Replacing Mr. Milne as HUB Arizona president is **Tom Hartley**. Previously, Mr. Hartley was president of Moreton & Co.'s

Arizona operations.

Lansing, Mich.-based **FinCor Solutions** has appointed **Terry Johnson** senior director responsible for client retention and new business development for property/casualty insurance and medical professional liability. Previously, Mr. Johnson served as director of underwriting for MHA Insurance Co.

Also at FinCor, **Patricia Lawrence** was named senior director. Before her promotion, Ms. Lawrence was director of customer service and sales support.

INSURERS

Salvatore Pollaro has been appointed to head **Zurich Financial Services Group's** management solutions group. Most recently, he led the directors and officers and fiduciary business.

George Town, Cayman Islands-based **United America Indemnity Ltd.** appointed **Leigh Oates** as senior vp and chief actuary. Ms. Oates most recently served as chief actuary of ACE Overseas General, a unit of the ACE Group of Cos.

Also at UAI, **Matthew B. Scott** has been appointed as senior vp of casualty brokerage of Diamond State Group, a UAI subsidiary. Previously, he was vp, business development of Diamond State Group.

W.R. Berkley Corp. has named **William E. Haines** president and CEO of Carolina Casualty Insurance Co. in Jacksonville, Fla. Previously, he served as a regional vp of Admiral Insurance Co. Mr. Haines succeeds **William F. Murray**, who will now lead **Regional Excess Underwriters L.L.C.** as president.

REINSURANCE

Anthony A. Sasso has been named chief underwriting officer of the property business at **Folksamerica Re**, a unit of White Mountains Re Ltd., in Hamilton, Bermuda. Most recently, Mr. Sasso was senior vp of the domestic property treaty unit.

Michael Pipkin has joined **Miller Insurance Services Ltd.** as a director of its reinsurance business unit in London. Most recently, Mr. Pipkin was an executive director at Willis.

OTHER PROVIDERS

Buck Consultants has made several senior-level appointments:

- **Anthony Reinzi** has been named principal in the New York office. Most recently, he was senior vp and regional health practice leader with the Segal Co.

- **William White** has joined as a principal in Buck's compensation consulting practice in New York. Previously, he was president of his own company, William L. White & Co.

- **Michelle McFadden** has been named director in the firm's Secaucus, N.J., office. Previously, she served as senior vp of operations for the Pinnacle Cos.



Ms. McFadden

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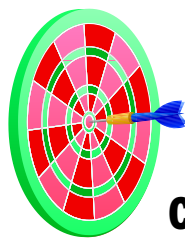
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Business Insurance would like to report on senior-level changes at commercial insurance companies and service providers. Please send news and photos of recently promoted, hired or appointed senior-level executives to: **Allison Martinat, Business Insurance,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

International NEWS

Global premiums grow despite economic woes

Swiss Re study shows life products lead growth

By MICHAEL BRADFORD

Worldwide insurance premiums grew 3.3% last year to \$4.06 trillion in a marketplace that remains sound despite a challenging economic environment, a Swiss Reinsurance Co. study concludes.

The latest Swiss Re Sigma study,

business showed robust growth of 10.2% in emerging markets but fell 0.3% in industrialized countries, according to the study by the Zurich, Switzerland-based reinsurer. Overall, global nonlife premium growth was 0.7%.

Looking ahead, "nonlife insurance premiums are expected to fall in the industrialized economies," Daniel Staib, one of the study's authors, said in a statement.

"However, non-life premiums will continue to grow in the emerging economies, albeit at a slightly lower rate than in the recent past," he said.

A concern for nonlife insurers is rising global inflation, which will increase claims costs in liability insurance and other long-tail business lines as well as hamper profitability, the statement noted.

The study is available at www.swissre.com.

2007 PREMIUM GROWTH WORLDWIDE

	Life	Nonlife	Total
Industrialized countries	4.7%	-0.3%	2.5%
Emerging markets	13.1%	10.2%	11.8%
World	5.4%	0.7%	3.3%

Source: Swiss Reinsurance Co.

World Insurance in 2007, shows that growth came primarily from life insurance business in industrialized and emerging markets, and, to a lesser extent, from nonlife business in the emerging markets.

Life insurance premiums worldwide increased 5.4%, while nonlife

AIRMIC delays claims-paying index

U.K. group backs off from previous plan to rank insurers

By ADRIAN LADBURY

EDINBURGH, Scotland—The Assn. of Insurance & Risk Managers has shelved plans to publish a ranking of insurers' claims paying capabilities and willingness, saying that such a tool would not be its members' interests.

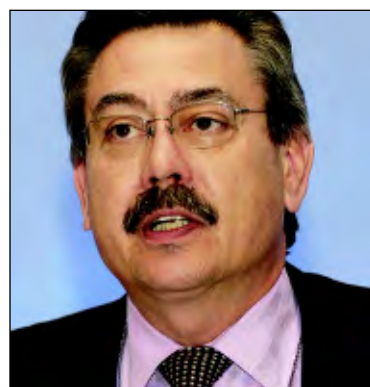
On the opening day of its annual conference, held June 17 and 18 in Edinburgh, Scotland, AIRMIC gave an update on its eagerly awaited claims performance index project, which was formally introduced during last year's conference in London.

The association said during a press conference that it first will publish a guide for commercial insurance buyers that highlights the "hallmarks of best claims practice" and that it hopes will be ready by the end of this year. That guide will then be used to help develop a claims performance index next year.

AIRMIC said that the index, however, will be qualitative rather than quantitative. It therefore will not assign numeric scores to specific companies, but instead will express an opinion on whether a company's claims operation meets "minimum requirements."

When the project was publicized last year, it was dubbed a "willingness to pay" index. It was suggested at the time that the project could deliver a hard-edged index of insurers' claims-paying capabilities.

At the time, some insurers publicly stated that they welcomed AIRMIC's planned initiative. But pri-



BIE/RICHARD COOKE

Ranking insurers' willingness to pay claims would not be of "real benefit" to risk managers, said AIRMIC's Kip Berkeley-Herring.

vately some insurers and brokers said that they could not see how such a ranking could work in practice and that it could create unnecessary conflict in the market.



In recent months, AIRMIC hinted that it had decided against the quantitative approach and would adopt a more qualitative strategy—a shift confirmed at the conference.

AIRMIC said all seven of its insurance partners have agreed in principle to support the revised project and that it will approach other insurers "later in the process" to win their support and cooperation.

"We do not think that (the ranking) approach will be of real benefit to the risk manager," said Kip Berkeley-Herring, group risk manager at B.T. Group P.L.C. and chairman of AIRMIC's insurance steering group.

"After extensive discussion with our members and insurance partners, we have decided that this is the best way forward," said AIRMIC Technical Director Paul Hopkin. "Ultimately, it will be for the individual buyer to assess each insurer."

"We decided that a conventional league table benchmarking exercise would be exceedingly difficult to administer and would inevitably oversimplify matters. An insurer that meets the needs of one buyer admirably may not be right for another. There's no substitute for human judgment, but this index should ensure that it is very well informed," said Mr. Hopkin.

The guide AIRMIC hopes to publish by year-end will describe in more detail what insurance buyers should look for when they evaluate an insurer's claims service.

This should include the resources at its disposal, its information technology systems, processes, operational standards and willingness to accommodate the client's internal needs, AIRMIC said. The subject will be discussed at a special AIRMIC members' convention in October.

In the meantime, the association has agreed to the "outline shape" of the claims performance index, which it said will comprise two key elements: an audit of insurance companies' claims capabilities, using the guide as a benchmark; and an assessment of clients' experiences of companies' claims services.

AIRMIC said that it had not yet decided whether to make the index publicly available. "Currently, it is a three-way thing (among AIRMIC, the members and insurers). It depends on what the results look like," said Chief Executive John Hurrell.

Most U.K. buyers don't let brokers take extra pay in full

Though many allow partial payments by insurers

By SARAH VEYSEY

EDINBURGH, Scotland—Most U.K. risk and insurance managers have not given their brokers permission to receive the full additional commissions from insurers sought by some brokers and have expressed a desire for greater transparency of intermediaries' earnings, according to a survey by the Assn. of Insurance & Risk Managers.

ance & Risk Managers.

Last year, brokers Marsh Inc., Willis Group Holdings Ltd. and others joined Aon Corp. in charging insurers an additional fee of 2.5% for business placed on behalf of U.K. insurance buyers. The additional commission, only chargeable with clients' prior consent, is not contingent on profit or volume but is said to be for unspecified services.

But only 9% of insurance buyers in the United Kingdom have agreed to allow their brokers to retain additional commissions in full when asked, according to a survey of members carried out by AIRMIC

ahead of its conference in Edinburgh.

More than half—56%—of the 157 members polled by AIRMIC said they had negotiated a smaller amount of additional commission than that proposed by their broker, while a "significant minority" have refused to have any additional commission be charged on their business, according to AIRMIC.

The U.K. Financial Services Authority is consulting on whether to change its rules to improve the transparency of broker remuneration, including whether to make such disclosure mandatory.

Two-thirds of AIRMIC members surveyed—or 67%—said they support automatic disclosure of broker remuneration, while making disclosure mandatory on request was supported by 24%.

Some 71% of respondents rated their brokers' transparency on compensation as "excellent" or "good," while just 6% described their brokers' performance in this area as "poor."

Under U.K. rules, corporate insurance buyers have the right to request disclosure of broker pay, and their brokers must respond to that demand. But such disclosure is

not currently automatic.

Claims performance is another area of concern for U.K. insurance buyers, according to the survey.

When asked to rank their biggest concerns, 57% of respondents cited claims performance as a major issue, according to AIRMIC.

Risk managers' support for the creation of a claims performance index—an idea under development by AIRMIC (see related story)—has increased over the past year, according to the survey.

This year, 82% of risk managers surveyed said they favor the idea, compared with 69% last year.

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Networks: More physicians cooperating with insurers

CONTINUED FROM PAGE 4

and expand its provider list every two years and give the providers opportunities to request information to understand the process better and highlight any errors, Dr. Bishop said. Insurer representatives have met with physicians who have questions or concerns about the standards, but only a few physicians have asked for additional information, he said.

"We made an earnest effort to educate physicians," Dr. Bishop said. But "you can't meet with everyone."

Insurers should make the point that they are rating doctors to include them in the networks rather than to exclude them.

Dr. Kevin Weiss,
American Board of Medical Specialties

In addition, some providers may be designated as Aexcel physicians without meeting thresholds determined by volume, clinical quality and efficiency standards if there are limited provider options in certain geographical regions, he said.

Aetna currently has about 700,000 members in Aexcel networks in more than 30 markets in the United States.

The Aexcel network has proved to be an effective cost savings tool for employers, Dr. Bishop said, noting that even 1% savings generated by the network can amount to substantial savings for a large employer with premiums in the \$50 million to \$100 million range.

The use of the network has made the biggest difference in utilization of elective procedures, he said. Members will not use the networks in emergency situations, but they can compare providers of similar quality and make cost-effective decisions for nonemergency cases, he said.

The AMA has developed a chart that compares Aetna's description of its ranking program to the association's principles for pay-for-performance programs. The chart is designed to help physicians effectively identify and analyze the problems and positive practices of the Aexcel program. The AMA has also developed charts to rank programs of UnitedHealth Group Inc.'s UnitedHealthcare unit and Wellmark Blue Cross Blue Shield.

Insurers should make the point that they are rating doctors to include them in the networks rather than to exclude them. The perception of exclusion in the ranking programs may create feelings of hostility, ABMS' Dr. Weiss said.

Professional provider organizations are improving their efforts to monitor the quality of physicians, with certain organizations requiring physicians to demonstrate that they have maintained the necessary competencies to provide high-quality and safe patient care, Dr. Weiss said. "You no longer have a lifetime certificate," he said.

Some members of the physician community have come to the realization that they need to improve the quality of care provided to their patients and perhaps get health insurers out of the business of rating providers, Dr. Weiss said.

"Physicians aren't practicing well," he said. "We've gotten a little bit sloppy and a little bit lax, but it's because everyone is working very hard in a fragmented system."

AHIP gathering draws 3,600

SAN FRANCISCO—About 3,600 people attended America's Health Insurance Plans' 2008 annual meeting held June 18-20 in San Francisco, which was the scene of a protest by parties advocating a single-payer, government-run health care system in the United States.

A coalition of health care organizations promoting state and federal bills that would provide comprehensive health coverage for U.S. residents conducted the boisterous protest. The coalition has criticized insurance companies for denying health care to sick individuals. About 1,000 people joined the protest, according to the California Nurses Assn.

"They have every right to express their views," a spokesman for AHIP said. "Our conference was focused on what can be done to improve the

affordability, accessibility and quality of health care."

Los Angeles City Attorney Rocky Delgadillo attended the protest and discussed his efforts to combat the allegedly unlawful business practices of health insurers. He has filed civil actions against WellPoint Inc. and Health Net Inc. for alleged fraudulent business practices by rescinding—or canceling policies retroactively—individual coverage after receiving a substantial claim.

The AHIP meeting featured sessions on marketplace trends, business operation and health information technology, wellness and prevention, consumerism, and driving quality and innovation in the health care system.

The next meeting will be held June 3-5, 2009, in San Diego.

—By Gloria Gonzalez

Bermuda: Class 3 insurers to be reclassified

CONTINUED FROM PAGE 4

Class 3A would include small commercial insurers that write unrelated business that exceeds 50% of net premiums written, as long as that business does not exceed \$50 million. The majority of existing Class 3 insurers are expected to be reclassified as class 3A, he said.

Class 3B would include commercial insurers whose unrelated premiums are both greater than 50% of net premiums written and are more than \$50 million.

As of Dec. 31, 2007, there were more than 504 Class 3 companies in Bermuda, with total capital and surplus of more than \$66 billion, according to BMA data. These companies represent a significant portion of the international insurance entities licensed in Bermuda, writing more than \$42 billion in gross premiums and representing approximately 34% of the total number of active insurance companies in the domicile, Mr. Doyle said.

Based on 2006 BMA data, there were 32 Class 3 commercial insurers that each write more than \$50 million in total net premiums representing approximately 40% of the total net premiums for the whole Class 3 sector, Mr. Doyle said.

"The emphasis will be on identifying these companies with greater proportions of commercial business and bringing them in line with how we regulate Class 4 companies," Mr. Weldon said.

The changes also include increased regulatory supervision, offsite and onsite assessments, and new statutory filing requirements across the subclasses within the category, Mr. Sheldon said. Captive management firms also will be subject to BMA inspections, he said.

To meet the regulatory demands, the BMA is adding additional resources, and aims to bring in 40 additional staff members by 2009, Mr. Weldon said.

The reclassification legislation, Insurance Amendment (No. 2) Bill 2008, passed the Bermuda Cabinet

on June 18 and was scheduled to be addressed in Parliament June 27, a BMA spokesperson said.

The BMA expects the measure to pass, Mr. Weldon said.

If passed, Class 3 insurers and reinsurers would be required to submit a new application to the BMA for reclassification by Dec. 31. The BMA expects to have all the new licenses issued by March 31, 2009.

Conference draws 490 to Bermuda

SOUTHAMPTON, Bermuda—

Nearly 490 members of the captive insurance industry participated in the June 16-19 Bermuda Captive Conference at the Fairmont Southampton Resort in Southampton, Bermuda.

During opening remarks, Bermuda Premier Ewart F. Brown called on the domicile and the insurance industry to create more career opportunities for native Bermudians.

"Bermuda is working with the Assn. of Bermuda Insurers and Reinsurers to mentor young people and prepare them for careers in their place of birth," Dr. Brown said.

Panel discussions covered topics ranging from regulatory and tax updates to cultivating a captive as well as other trends in the offshore captive market. Sessions featured representatives of major insurance and reinsurance companies, captive managers and owners, attorneys, regulators and risk management consultants.

Next year's conference will return to the Fairmont Southampton from June 21-24, 2009.

For additional information, go online to www.bermudacaptive.bm.

—By Colleen McCarthy

Bermuda holds position as No. 1 captive domicile

SOUTHAMPTON, Bermuda—

While facing intense competition from other domiciles, Bermuda by far is still the world's largest captive insurance company domicile.

As of the end of last year, Bermuda had 958 captives, giving it a big lead over runner-up Cayman Islands, which had 765 captives at year-end 2007, and third-ranked Vermont, which had 567.

In all, Bermuda captives generated \$21.9 billion of gross premiums in 2007, up slightly from \$21.5 billion in 2006, said Traver Alexander, research officer for the BMA who conducted the joint study with the Bermuda International Business Assn. and presented the information at the Bermuda Captive Conference.

In addition, 29 new captives were licensed in Bermuda last year compared with 15 formations in 2006.

There is a growing geographical diversity in the location of underlying risks insured by Bermuda captives with 57% from North America and 14% from Europe in 2007, Mr. Alexander said.

"While the U.S. remains very important as a major source of business, U.K., Europe, Latin America and Asia are also significant markets for Bermuda" with respect to captives, he said.

Business written by Bermuda-based captives consisted of casualty at 54%, property at 44% and financial and other at 2%.

—By Colleen McCarthy

\$21.9B

GROSS PREMIUMS
from Bermuda
captives in 2007



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Exchange: N.Y. officials see momentum building for revival of NYIE

CONTINUED FROM PAGE 3

ture for the exchange is still in place. "You just have to make sure there's enough capital demand to make something that's viable," he said.

Ideally, the exchange would be ready to launch when the market hardens, he said. "We should be doing all the work and getting the commitments now," he said.

One critical difference between now and 1980 is today's interest by hedge funds, private equity funds and investment banks in insurance as a risk that is uncorrelated with their portfolios, Mr. Dinallo said.

Another is the vast improvement in technology, so "you can actually have transparency and a robust back office that works," which was not the case earlier, he said.

The state statute calls for no one to have more than 20% of an individual syndicate, thus creating a mandated spreading of risk, said Mr. Dinallo. His hope is that "with the right participants with the right capital," the exchange's syndicates will be rated by the rating agencies, "so you

can basically have participations go in and out of syndicates year by year," making participation in it tradable.

Despite its failure the first time around, observers say the time may be right for the concept to work.

Pam Ferrandino, executive vp, practice leader, casualty for Willis North America in New York, said the exchange is a concept Willis would be interested in supporting. "The marketplace now is obviously very different than it was when the idea was in place last time for a host of reasons," she said.

In addition to its greater trans-

parency and improved technology from both a capital and an insurance perspective, the "understanding of how insurance capital is managed and utilized is much more advanced today than it was 20 years ago" said Ms. Ferrandino, who observed that the concept of catastrophe bonds, for instance, came into play in the 1990s.

Frank Nutter, president of the Washington-based Reinsurance Assn. of America, said, "If the insurance exchange can be structured in a way to ease the administrative and regulatory burden of reinsurers doing business in New York or in the

U.S., we would be very supportive of that, given it's just a conceptual idea at this point. While it exists in legislation," implementation specifics have not been decided, he said.

Sharon Emek, a New York-based partner in insurance agency CBS Coverage Group Inc., said such an exchange must be transparent and have sufficient controls. "I think it's a good idea, so long as everyone's clear it's not going to be done the way it was done when it was initially enacted," said Ms. Emek, who is past chair of the Independent Insurance Agents & Brokers of New York.

Observers say such an exchange

would be a good way to keep capital in the United States.

"It just seems like an opportunity to capture some of that (capital) and keep it in New York City," said James Veach, an insurance attorney with Mound Cotton Wollan & Greengrass in New York.

As for the next step, Mr. Dinallo said he would like to establish a working group or groups of potential investors and brokers to investigate the concept.

"By the end of the summer, I'd like to have a series of meetings to see where people really are," Mr. Dinallo said.

N.Y. may ease reinsurance collateral rule

By MEG FLETCHER

NEW YORK—The time appears ripe for New York Insurance Superintendent Eric Dinallo to submit to Gov. David Paterson the final version of a regulation that would ease geographically determined collateral requirements, a department spokesman said.

The submission could come as early as this week, the spokesman said.

"You cannot compete in the international market when you are openly discriminating against foreign firms," Gov. Paterson said on Thursday, one day after attending a dinner hosted by Lord Peter Levene, the chairman of Lloyd's of London, Mr. Paterson's spokesman said.

The New York Insurance Department last October proposed that collateral requirements for highly rated non-U.S. reinsurers operating in the state be eased and that the state impose a sliding scale for collateral on other reinsurers, along with several other minimum requirements.

Currently, non-U.S. reinsurers must post collateral that matches their exposures to U.S. risks. Many U.S. insurers and reinsurers have opposed any relaxation of the rule, citing financial stability concerns.

The Insurance Department said previously that the proposed regulation would increase market capacity, potentially lower rates and spur reform nationally.

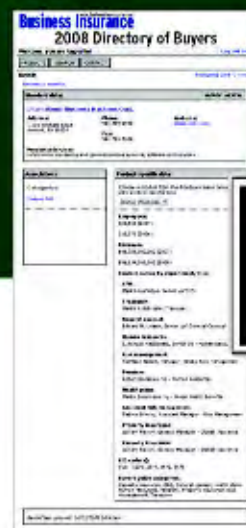
If the governor's Office of Regulatory Reform accepts the proposal, it could be enacted before the end of the year.

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Shield: Federal rules used for tort reform

CONTINUED FROM PAGE 4

been able to recover damages and be compensated under the legal system, Mr. Wolfman said.

Dr. Aaron S. Kesselheim, an internal medicine instructor at Brigham Women's Hospital in Boston, said, "The threat of lawsuits helps, or at least should help, encourage manufacturers to act appropriately when new data emerges" about a drug's side effects after being approved by the FDA.

The basic problem is that the FDA has neither the resources nor the authority to step into manufacturers' shoes "to warn patients and physicians about new information that emerges after the drug hits the marketplace," Dr. Kesselheim said.

Utah state Rep. David Clark, R-Santa Clara, said the FDA has a defined role in ensuring the safety of medicines and foods. "It does not allow (the FDA) the opportunity to supersede and retract existing state laws" that give citizens the right to redress their grievances through the courts, said Rep. Clark, who is chairman of the National Conference of State Legislatures' standing committees.

There is a "lack of accountability that is built into the regulatory process" with pre-emption, said Susan Parnas Frederick, NCSL federal affairs counsel. "It oversteps the boundaries of what the role of a regulatory agency ought to be."

Others, however, believe pre-emption is warranted.

"The basic pre-emption argument

is really a matter of common sense," said James A. O'Neal, a product liability defense attorney with Faegre & Benson L.L.P. in Minneapolis. "It doesn't make sense to impose on manufacturers a (lot) of different, and sometimes conflicting, regulations, even when that regulation is in the form of state tort verdicts."

Michael D. Shumsky, a product liability defense attorney with Kirk-

'It doesn't make sense to impose on manufacturers a (lot) of different, and sometimes conflicting, regulations, even when that regulation is in the form of a state tort verdicts.'

James A. O'Neal, Faegre & Benson

land & Ellis L. L.P. in Washington, said litigation ties up resources. Particularly in the drug context, product liability suits are a barrier to bringing more affordable medicines to market. "So really, businesses and consumers alike have a strong interest in pre-emption issues," he said.

John E. Calfee, resident scholar at the American Enterprise Institute in Washington, said pre-emption of litigation under state laws, particularly in the case of the FDA, is a good idea.

"Juries are more hostile to both

the FDA and the industry than they were years ago," he said. "I think there's a bigger risk than there used to be that juries will force the manufacturers to add unnecessary or unwise" warnings concerning use of prescription medications.

"Agencies are carrying out the responsibility delegated to them by Congress," said Alan E. Untereiner, a defense attorney with Robbins. Russell, Englert, Orseck, Untereiner & Sauber L.L.P. in Washington. "They're not free agents. They're implementing federal statutes and carrying out federally authorized programs."

Observers say that while the technique of using a preamble to establish pre-emption may have started in 2006, it does not represent as dramatic a break with the past as its opponents contend.

The FDA has been filing amicus briefs asserting pre-emption with regard to medical devices since at least 1999, Mr. Beck said. "It's not really political as much as a reaction by the administrative agency to the plaintiffs lawyers making new claims that directly attack administrative actions" that seek to undermine FDA decisions, he said.

The problem with amicus briefs, though, is that "courts don't have to follow them," and they have been "ignored as often as listened to," he said.

However, since it began publishing pre-emption preambles in the federal register, "the FDA's position has been accorded respect" by the courts, Mr. Beck said.

Trusts: N.Y. agrees quick fix on workers comp trust issue

CONTINUED FROM PAGE 3

Pokalsky said.

The Business Council and the New York Self Insurer's Assn. said they will pursue eliminating the liability of solvent self-insured groups and individual self-insured employers for claims against defunct trusts.

"It's a temporary measure and I think we can live with it for the time being," said Steve Perroots, chair of the NYSIA and a senior director for claims at Marriott International Inc. in Bethesda, Md.

"In some ways, it's a good thing," Mr. Perroots said. "It gives us an opportunity to get more involved in the process and make sure our concerns are addressed with the task force in anticipation of a more permanent regulation being adopted next year."

Among its measures, the legislation would:

- Prohibit launching new trusts until next year.
- Mandate that trusts annually file detailed financial reports and rates that actuaries have determined to be sound, which the SWCB can disapprove.
- Establish penalties for trusts that submit fraudulent information and felony charges for repeat violators.
- Establish a new license that trust managers must obtain from the SWCB. Previously, the managers were licensed as third-party

administrators by the state's Insurance Department.

- Require trust managers to post a \$500,000 security deposit per trust.
- Force trusts to file a plan to be fully funded by 2014 or terminate by 2015.

The legislation "puts the trusts on a more businesslike basis," said Ellen Kiehl, assistant executive director for the Professional Insurance Agents, in Glenmont, N.Y. "There should be

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improved transparency" of trust operations, she said.

An ongoing suit filed on behalf of 13 trusts managed by Latham, N.Y.-based First Cardinal L.L.C. played a role in preventing the legislation's crafters from creating separate backstops for trusts and large self-insured employers, Mr. Pokalsky said.

The suit argues that the SWCB's cannot legally assess solvent trusts to pay for failed trusts' obligations. A judge hearing the case issued an injunction against SWCB's attempt to collect the assessments.

Uncertainty raised by the suit would have stymied issuing bonds to set up two guarantee funds, Mr. Pokalsky said. Absent bond funding, "front loading" with large employer assessments of self-insured employers would have been needed to finance the two guarantee funds, he said.

That would have cost at least as much as paying the assessments to the SWCB, Mr. Pokalsky said.

High Court showdown for Wyeth, woman who lost forearm

WASHINGTON—The U.S. Supreme Court's ruling in a drug labeling case also could affect federal pre-emption of state product liability lawsuits, observers say.

The major focus in *Wyeth vs. Diana Levine*, on which the court will hear arguments during its fall term, is whether federal regulations pre-empt the lawsuit against the drug manufacturer.

According to court papers, Ms. Levine in 2000 was suffering nausea from a migraine when she was injected intravenously with an anti-nausea drug, Phenergan, in a method known as "IV push."

While the label on the drug warned that extreme care must be taken to avoid introducing the medicine into the patient's arteries to prevent serious injuries, including gangrene, it did not foreclose push injections entirely.

In Ms. Levine's case, the drug was injected inadvertently into an artery, which became gangrenous. Eventually, her forearm was amputated.

Ms. Levine sued, contending the label's inadequate warning caused her injuries. Madison, N.J.-based Wyeth, however, argued that the Food and Drug



AP PHOTOS

A jury sided with Diana Levine, shown in 2004 resting her prosthesis in her lap, in the loss of her forearm due to faulty drug labeling instructions. Drug maker Wyeth is taking the decision to the U.S. Supreme Court.

Administration's approval of the label pre-empted the lawsuit.

A jury issued Ms. Levine an award that later was reduced to \$6.8 million. In its 2006 ruling, a majority of the Vermont Supreme Court also sided with Ms. Levine.

"We hold that the jury's verdict against defendant did not conflict with the FDA's labeling

requirements for Phenergan, because defendant could have warned against IV-push administration without prior FDA approval, and because federal labeling requirements create a floor, not a ceiling, for state regulation," the state Supreme Court ruled.

"This is going to be a key case dealing with the pre-emption issue, particularly in the drug field," said Gerie Voss, regulatory counsel for the American Assn. for Justice in Washington.

She said she hopes the U.S. Supreme Court "will read the law correctly and will find that Congress always intended to have consumers hold pharmaceutical companies accountable" for their actions.

John E. Calfee, resident scholar at the American Enterprise Institute in Washington, said "most of the litigation has been over drugs that have been pulled from the market" in the past 10 to 15 years. However, he said that may be changing.

"I think *Wyeth vs. Levine* is an indicator," Mr. Calfee said. "If Levine wins, then I think we can expect to see other cases in which juries will be asked to add (drug) contraindications, and that can be pretty harmful."

The FDA "tends to be too careful and put on too many warnings anyway, and so if a jury can add a warning that the FDA doesn't want, then probably it's a warning that'll do more harm than good. There's such a thing as having too many warnings," said Mr. Calfee.

"Whatever opinion comes out is likely to have enough wrinkles in it that lawyers can spend a lot of time talking about what it means," said James A. O'Neal, a product liability defense attorney with Faegre & Benson L.L.P. in Minneapolis. "I don't think it's going to wipe out a major sector of litigation in one fell swoop" because the facts of individual cases differ.

James M. Beck, a product liability defense attorney with Dechert L.L.P. in Philadelphia, said a ruling in Wyeth's favor would be a "very significant event," whatever the grounds for the decision.

"The basic legal proposition (of federal pre-emption) has been established and, from a defense point of view, that in and of itself is a huge step forward." On the other hand, a Levine victory would be a "serious setback for pre-emption in the defense of these products," Mr. Beck said.

—By Judy Greenwald

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HSA: IRS guidance answers many employer questions

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of HSA-linked consumer-driven health care plans. Enrollment in HSA-linked high-deductible health insurance plans climbed to 6.1 million as of Jan. 1, a 35% increase from a year earlier, according to America's Health Insurance Plans, a Washington-based trade group.

"Some employers were reluctant to put in the arrangements until they had, in black and white, answers to questions that had been raised," said Sharon Cohen, an attorney with Watson Wyatt Worldwide in Arlington, Va.

"This will be another boost to HSA growth," said Andy Anderson, of counsel with Morgan, Lewis & Bockius L.L.P. in Chicago.

Experts concur that the biggest issue addressed by IRS Notice 2008-59, which was released last week, involves onsite clinics. Such clinics have proliferated in recent years for a variety of reasons, including corporate belief that care can be delivered at a lower cost in a clinic compared with physician offices and other medical settings while reduc-

gibility. The IRS, in its guidance, provides a specific example: a hospital that allows its employees to receive care at its facilities for all of their medical needs at little or no cost.

"In short, the care provided can't be too comprehensive," said Watson Wyatt's Ms. Cohen.

Still, the IRS has not fully resolved the onsite clinic-HSA eligibility issue, Ms. Cohen said, noting there can be arrangements that fall between the IRS-provided examples of a design that passes muster and another that does not. "What if you are in between the examples? How much care is too much? There still is some vagueness, but at least some guidance has been provided," she said.

Among numerous other issues, the guidance makes clear that an employer can try to recover contributions it mistakenly made to an employee's HSA. In that situation, the employer could approach the financial institution holding the money to ask for return of the funds. If that effort was not successful by the end of the year in which the contribution was made, the employer could include the amount as income on an employee's W-2 statement.

The guidance also addresses another issue: Can employers provide HSA enrollees with debit cards that are coded to allow payment only of health care expenses. The issue arose because federal law allows enrollees to withdraw funds from their HSAs for any purpose, though they are taxed and the employee is hit with a 10% penalty tax for distributions not related to health care if the employee is younger than 65.

Resolving the issue, the IRS said restricting debit card payments to health care expenses would pass muster as long as enrollees can access their HSA account through online transfers, withdrawals from automatic teller machines or writing a check. Even before the latest guidance, though, some vendors were limiting debit card use to qualified medical expenses.

"You are OK if you provide access to account funds through other means," said Kathy Klug, director of compliance with Affiliated Computer Services Inc. in Minneapolis.

The guidance also makes clear that so long as an HSA enrollee is at least age 65, the enrollee can withdraw funds from the HSA to pay for Medicare Part D prescription drug premiums. However, if the enrollee is younger than 65 and has a spouse older than 65, the spouse's Medicare Part D premiums would not be considered eligible medical expenses, and distributions used for that purpose would be included in the enrollee's taxable income.

'Some employers were reluctant to put in the arrangements until they had, in black and white, answers to questions that had been raised.'

Sharon Cohen,
Watson Wyatt

Punitive: Supreme Court limits damages

CONTINUED FROM PAGE 1

The high court split on the first issue—thus letting the lower court ruling stand, rejected the second argument but accepted the third, and, in a vote in which Associate Justice Samuel Alito took no part, agreed that the damages were excessive and reduced the punitive award to \$507.5 million, the amount of compensatory damages.

Writing for the majority, Associate Justice David Souter noted that, while punitive damages in most cases are smaller than the underlying compensatory damages, the real problem facing courts is the unpredictability of punitive damage awards. Courts are concerned with fairness as consistency and the wide range of punitive damage awards could be unacceptable, he wrote.

"Given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases," he wrote.

Insurance industry observers hailed the ruling.

"The ocean marine insurance companies were looking for a clear standard for punitive damage awards in order to efficiently and effectively underwrite liability coverages for maritime parties," said James M. Craig, president of the

"I think it's pretty important for the insurance industry and for corporate defendants, but perhaps particularly for the insurance industry," said Thomas Brunner, a partner and head of the insurance practice at Wiley Rein

L.L.P. in Washington. "That's because it tends to increase the predictability of punitive damage awards and that's always been an important concern to insurers. It simply applies to maritime law on the one hand, but on the other hand it's the first chance the Supreme Court has had to explain what it thinks is appropriate as a matter of common law rather than permissible as a matter of constitutional law."

In this case, the high court "was actually acting like a state Supreme Court," said Victor Schwartz, general counsel of the American Tort Reform Assn. in Washington. "State Supreme Courts have supremacy over shaping the common law of torts, and the (U.S.) Supreme

Court has supremacy to shape the common law of admiralty. So they're acting as a common law court shaping the common law.

"The ruling is only binding on federal courts deciding admiralty cases. But, at least in my view, it could be persuasive to some state courts in shaping their common law of product liability or other tort law because Justice Souter very perceptively addressed an issue which is of concern to the state courts, and that is the problem of the so-called outlier verdict," Mr. Schwartz said.

Mr. Schwartz noted that some state courts have followed the Supreme Court's lead in setting guidelines for expert scientific testimony under the high court's *Daubert vs. Merrell Dow Pharmaceuticals Inc.* ruling, even though the high court's decision applied only to federal courts.

"I believe that will happen here because Justice Souter's opinion is an extremely well-reasoned opinion," he said.

"It will be very persuasive to many lower courts in other areas beyond maritime law," agreed Curt Cutting, partner at Horvitz & Levy L.L.P. in Los Angeles. "Any Supreme Court opinion is something lower courts are going to take seriously. It's more than that—the reasoning of the court's opinion is not based on anything particular to maritime law. The court has expressed a concern about unfairness that rises when you have unpredictable punitive damage awards, and that's something that is an issue in any area of the law where punitive dam-



AP PHOTOS

'Given the need to protect against the possibility...of awards that are unpredictable and unnecessary...we consider that a 1:1 ratio...is a fair upper limit in such maritime cases.'

Associate Supreme Court
Justice David Souter

HIGH COURT'S POSITION ON PUNITIVES EVOLVES

The U.S. Supreme Court's *Exxon Shipping vs. Baker* decision curbing punitive damages in maritime law marks yet another step in the high court's move away from permitting unrestricted punitive damage awards, such as when it let stand a punitive damage award that was 526 times the underlying compensatory damages award in its 1993 decision in *TXO Production Corp. vs. Alliance Resources*.

1996: BMW of North America vs. Ira Gore. Faced with a lower court's award of punitive damages 500 times that of the underlying compensatory damages, the Supreme Court rules for the first time that punitive damages can be so disproportionate to compensatory damages as to violate constitutional guarantees.

2003: State Farm Mutual Automobile Insurance Co. vs. Curtis B. Campbell et al. The Supreme Court rules that, under most circumstances, a punitive damage award that is more than a single-digit multiple of the underlying compensatory award violates constitutional due process guarantees.

2007: Philip Morris USA vs. Mayola Williams. The Supreme Court rules that juries can take into account evidence of harm allegedly inflicted by a defendant on people other than the named plaintiffs in determining the "reprehensibility" of the defendant's misconduct, but cannot use punitive damages to punish a defendant directly for harm to others not named in the suit. In June 2008, the Supreme Court agreed to review the case again to see if the Oregon Supreme Court ignored its directive to apply constitutional review of the punitive damages award, which exceeded the single-digit multiple cited in *State Farm*.

2008: Exxon Shipping Co. et al. vs. Grant Baker et al. The Supreme Court held that punitive damages awarded under federal maritime law could not exceed the underlying compensatory damages.

ages are permitted."

"That analysis right there can be exported to other contexts," said Amar Sarwal, general litigation counsel for the U.S. Chamber of Commerce. "We can go to state courts" and say they should apply the same approach, he said.

An attorney who prepared a brief opposing Exxon's stance disagreed.

"Basically, we're actually kind of happy about the case. It really doesn't have much application beyond maritime cases," said Jeffrey Robert White, senior amicus counsel for the Center for Constitutional Litigation in Washington. He said the court left the original 9th Circuit ruling alone that punitive damages applied in maritime law and said that the Clean Water Act did not pre-empt punitive damages. He added that the court said this ratio applied to maritime cases.

"That really doesn't spill over to other cases," he said.

Exxon Shipping Co. et al. vs. Grant Baker et al. U.S. Supreme Court. No. 07-219; June 25, 2008.

READ the complete IRS



guidelines at B/I's
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ing how long employees receiving care must be away from their jobs.

The interaction of clinic cost-sharing features and HSA eligibility requirements was unclear until the new guidance was issued. Under federal law, HSAs must be linked to high-deductible health plans, with employees being subject this year to deductibles of at least \$1,100 for individual coverage and \$2,200 for family coverage.

And since many onsite clinics provide services at little or no cost to employees, many employers were uncertain if those low cost-sharing requirements would make employees ineligible for HSAs.

The IRS answer is that employees' HSA eligibility is unaffected by access to free or low-cost care at onsite clinics so long as the clinic does not provide "significant" medical benefits. Annual physicals, immunizations, allergy injections, nonprescription painkillers and treatment of on-the-job injuries would not be considered significant.

The breadth of services allowed without running afoul of the HSA cost-sharing requirements "gives the green light to a lot of onsite clinic" arrangements, said Jay Savan, a principal with Towers Perrin in St. Louis.

On the other hand, employees with access to onsite corporate clinics that provide extensive services at little or no cost would lose HSA eli-

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American Institute of Marine Underwriters in New York, which filed an amicus brief in the case. "AIMU's brief pointed out that insurers themselves are subject to claims for punitive damages and therefore had an interest in a clear rule," he said.

"I think the key thing to take away from it from the U.S. marine insurance industry perspective is that after this case, punitive damages in the maritime context will be limited to the amount of compensatory damages," said Joseph Grasso, a partner in Wiggin & Dana L.L.P.'s Philadelphia office who prepared AIMU's brief while at another law firm. "That certainly gives the U.S. marine insurance industry more of the certainty they were concerned about."

News
In Brief

CONTINUED FROM PAGE 1

Microsoft Corp. and Dossia, along with other technology companies, medical providers and health insurers have agreed to a set of standards intended to help protect personal information and enhance consumer participation in online personal health records. The standards, developed by public-private partnership Connecting for Health, require participating entities to create easy-to-understand privacy policies on their Web sites, notify users of information breaches and limit disclosure to third parties.

Judge narrows claims in AIG, Starr share fight

A federal judge has dismissed several of the counterclaims brought by New York-based American International Group Inc. against Starr International Co. Inc. in a dispute over Starr's control of AIG stock. U.S. District Court Judge Barbara S. Jones granted Starr's motion to dismiss four of AIG's charges, including breach of contract, but denied its efforts to dismiss three others, including breach of fiduciary duty and trust.

Willis warns clients about lost data

Willis Group Holdings Ltd. is investigating the loss of computer data backup tapes containing client information that went missing while in transit to a storage facility. The London-based brokerage sent letters to affected clients last week informing them of the loss and explaining that Willis is working with local law enforcement authorities to recover the tapes. A spokeswoman would not specify how many clients were affected, saying only that it was "a portion" of its customer base.

New Jersey passes comp reform bills

New Jersey lawmakers passed several bills last week intended to reform the state's workers compensation system. Among other things, the bills, introduced by Senate Labor Committee Chairman Paul Sarlo, D-Wood Ridge, would make it a criminal offense for

companies to neglect providing workers comp benefits. The bills also would speed up hearings on certain medical claims and allow judges to pursue fines and contempt of court charges against insurers and attorneys that delay paying claims by dragging out court cases.

High court to hear pregnancy bias case

The Supreme Court has agreed to determine whether employees who received less credited service time while on pregnancy leave than disabled workers can regain that lost time retroactively for purpose of determining the scope of employee benefits. The case, *Noreen Hulteen et al. vs. AT&T Corp.*, applies only to women who became pregnant before the Pregnancy Discrimination Act took effect nearly 30 years ago. The 9th U.S. Circuit Court of Appeals last August ruled that four current and former AT&T Corp. employees—who took partially uncredited pregnancy leave before the Pregnancy Discrimination Act's 1979 effective date—were entitled to regain the lost time retroactively.

Noted

American International Group Inc. said it has decided to retain airline leasing and remarketing unit International Lease Finance Corp., ending speculation the operation would be sold....**Workers compensation benefits** increased an average of 4.1% across the United States and 1.8% across Canada between 2007 and 2008, according to the U.S. Chamber of Commerce's 2008 Analysis of Workers' Compensation Laws....**Marsh Inc.** has hired Greg Arms, former chairman and chief executive officer of Willis Group Holdings Ltd.'s global employee benefits practice, to be the new global head of its employee benefits practice....**CIGNA Corp.** has appointed David Cordani president and chief operating officer. He also will remain president of CIGNA HealthCare, which he has overseen since July 2005....**Aetna Inc.** has established an office in Shanghai, China, as the insurer seeks to identify opportunities to offer health insurance products in the country....**ConAgra Foods Inc.** asked the Labor Department for permission to fund employee benefit risks through its Arizona-domiciled captive. ConAgra wants to use Risk Resources Ltd. to reinsure life insurance and accidental death and dismemberment policies written by Prudential Insurance Co. of America. Those policies cover about 22,800 employees.

ADA: Employers welcome compromise legislation

CONTINUED FROM PAGE 1

unwarranted claims and litigation (BI, Feb. 4).

The ADA Amendments Act, however, restores the requirement that a disability materially restricts one or more major life activities, and it provides a partial list of such activities. Like the earlier bill, the amended measure protects individuals "regarded as having such an impairment," but makes clear that ADA protections do not apply to minor or transitory conditions. It also prohibits courts from considering mitigating measures in determining whether an impairment is substantially limiting.

Earlier court rulings held that a person whose impairment could be mitigated through the use of devices or medication would not have ADA protections. With the effective narrowing of the law's protections, employer groups found themselves in agreement with advocates for the disabled that the courts had gone too far.

READ the full content of the bill at Business Insurance's Knowledge Center at www.BusinessInsurance.com

"We certainly did oppose the bill as introduced, and we believe it would have been far too sweeping an amendment to the ADA," said Michael Eastman, executive director-labor law policy for the U.S. Chamber of Commerce in Washington. "However, we recognized that the disability community has identified some real problems with the court's interpretations of the ADA. That's one of the principal reasons we were willing to sit down with them and try to reach a common ground," he said.

"From our perspective, this was about trying to correct this problem in the courts without opening up the ADA so broadly that every trivial impairment would be covered. I believe the compromise achieves that," Mr. Eastman said.

"We came to a very delicate, negotiated deal," said Keith Smith, director-employment and labor policy for the Washington-based National Assn. of Manufacturers, which had opposed the earlier bill. "It revamped the bill as it was introduced. The main aspect of this negotiated compromise legislation

TOP DISABILITY DETERMINATIONS

Total compensation paid to individuals grouped by category during 2007

Impairment basis*	Dollar benefits
Regarded as disabled	\$10,414,276
Other disability	\$9,124,502
Cancer	\$5,230,782
Depression	\$3,862,417
Nonparalytic orthopedic impairment	\$3,756,075

*Charges may be filed alleging multiple impairments.
Source: EEOC

is it provides clarity for employers."

Lawrence Lorber, a partner in the Washington office of Proskauer Rose L.L.P. who specializes in labor law, said the measure "will expand the coverage of the ADA really back to where it was in 1998," before the series of Supreme Court and lower court decisions reduced coverage from the original ADA drafters' intent. "The courts said if there were mitigating measures, the person wasn't disabled. The notion—which I agree with—was that was not what Congress intended."

If enacted, the ADA Amendments Act will "put a burden again on the human resources people who administer" its application, Mr. Lorber said. While it, like any other new law, likely will spawn some litigation initially, he said he doubted the change would significantly increase litigation over the long term.

"With any legislation like this we'll expect some litigation," said NAM's Mr. Smith. "But if you look at the overall product of the bill, that's something we're proud to be behind."

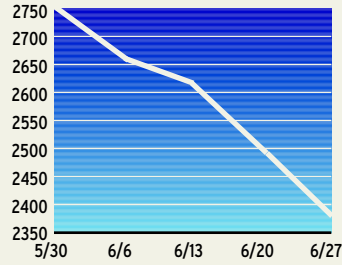
"It's definitely got momentum, and we're hopeful the Senate will recognize the efforts that have taken place in the House" and move quickly on the House bill, Mr. Smith said.

Stock Index

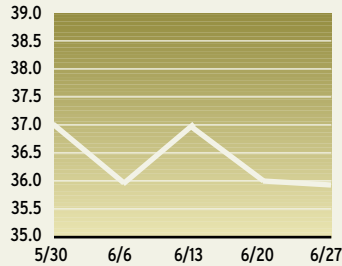
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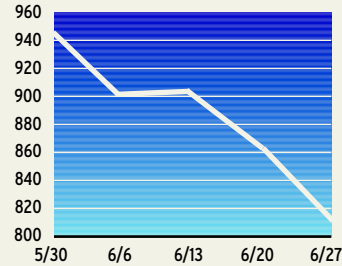
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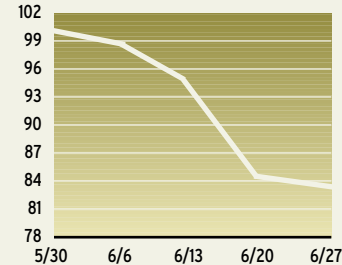
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DOW JONES	11346.51	-4.19%
S&P 500	1278.38	-3.00%

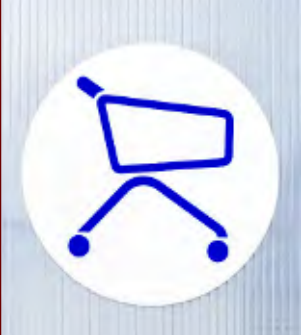
LARGEST GAINS

Fairfax Financial Holdings	4.34%
MMC	1.71%
SCPIE Holdings	1.64%

LARGEST LOSSES

MBIA Inc.	-25.40%
Ambac Financial Group	-21.46%
XL Capital Ltd.	-16.18%
Meadowbrook Insurance	-14.10%
AIG	-13.55%

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Fraudster collared over bogus comp claims

A former Baptist minister apparently forgot about the "thou shalt not" in the biblical admonitions about bearing false witness and stealing.

He pleaded guilty to several workers comp-related fraud charges in a Virginia circuit court last week.

The Rev. Charles Shifflett is facing up to 310 years in jail and a \$50,000 fine after pleading guilty to 20 felonies and one misdemeanor in Culpeper County Circuit Court.

Rev. Shifflett pleaded guilty to nine felonies in connection with obtaining money by false pretenses from Calvary Baptist Church in Culpeper County from 2002 to 2005, according to the county district attorney's office.

Rev. Shifflett served as pastor of the church from 1988 to 2005.

In November 2000, he injured his back while unloading a pony for a function at the church. He then filed a workers compensation claim to Church Mutual Insurance Co. and began collecting temporary benefits.

However, according to court documents, Rev. Shifflett overstated his income for the purposes of calculating a workers compensation award, thus filing a fraudulent claim. He didn't stop there and in 2005 filed another back injury claim with Brotherhood Mutual Insurance Co.

In all, Rev. Shifflett was charged with three counts of workers compensation fraud, five counts of obtaining money under false pretenses from two separate insurance companies and three counts of filing false state tax returns. His sentence is currently pending.



Mars Inc., maker of M&M's candy, faces a trademark infringement suit from popular New York City street performer the Naked Cowboy over an ad campaign.



REUTERS

M&M's advertisement spurs (birthday) suit

New York's not big enough for the Naked Cowboy and the blue M&M.

Well-known street performer Robert Burck, also known as the Naked Cowboy, is suing M&M's candy maker Mars Inc. for \$6 million for trademark infringement, according to the lawsuit in U.S. District Court in New York.

Mr. Burck, who over the past 10 years has been routinely seen in Times Square wearing white cowboy boots, a cowboy hat and tight white underwear while playing a white guitar, is irked that Mars used his likeness to promote its popular candy. Mr. Burck filed the suit in February after video billboards in Times Square displayed a blue M&M dressed in his signature

skimpy outfit.

According to the suit, the advertisement that was created by Chute Gerdeman Inc., which is also named in the suit, could lead people to believe —"incorrectly"—that the Naked Cowboy endorses M&M candy.

U.S. District Court Judge Denny Chin denied Mount Olive, N.J.-based Mars's motion to dismiss the suit and allowed Mr. Burck to move ahead with his false endorsement claim.

Mr. Burck has allowed other companies such as Chevrolet to use his likeness for endorsements and advertisements in the past the suit says. A pretrial conference is set for July 11.



Germ facility faces sticky situation

While duct tape is surely one of the most versatile products known to humanity, even the ubiquitous tape's most ardent proponents may question whether it is the ideal material for securing bio-terror bacteria.

But according to the Atlanta Journal-Constitution, that's exactly what's happening at the Centers for Disease Control and Prevention's infectious disease laboratory. The containment door to a room where scientists experiment with so-called "Q Fever" bacteria is sealed with duct tape.

The tape, which has been there about a year, was put up after the facility's ventilation system malfunctioned, which allowed potentially contaminated air to escape. No workers were injured.

Q fever causes high fevers and can be fatal. The bacteria that causes it is considered a potential bio-terror weapon because of the ease with which it can be spread.

The duct tape remained in place even after the ventilation system was fixed. "It's an enhancement," said Patrick Stockton, safety and occupational health manager for the CDC, told the newspaper. "We could take it off."

Considering the public derision that met the federal government's suggestion a few years back that people protect themselves from terrorist attacks by wrapping living quarters in plastic and duct tape, that might not be a bad idea.

Disaster might be too bad to be true

News of a natural disaster immediately grabs the attention of risk managers, brokers and underwriters. But the next alert they receive telling of an alleged catastrophe might just grab control of their computer.

That's because the folks who control the Storm Worm botnet, which infects hard drives and turns otherwise benign machines into spam-spewing monsters, have branched out into the world of fiction.

Whereas cyber criminals once tried to

attract the unwary with e-mails bearing real news in the subject lines, now they are creating their own catastrophes, both natural and manmade.

According to a posting on McAfee Inc.'s Avert Labs Blog, www.avertlabs.com/research/blog, the subject lines include such attention-grabbers as "Eiffel Tower damaged by massive earthquake" and "Donald Trump missing, feared kidnapped."

"This clever social engineering technique plays on people's inquisitiveness

in news of natural disasters and celebrities," according to McAfee researcher Kevin McGhee, who posted the warning. "All the links go to a fake pornotube page hosted on legitimate sites that have been hacked."

So, if a catastrophe seems too spectacular to be ignored, approach it with extreme caution. That fictional catastrophe could turn out to be an all-too-real computer catastrophe for those who make the mistake of opening the e-mail.





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