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DEBT CEILING CRISIS WOULDN'T IMPERIL MOST P/C INSURERS / PAGE 3

NFL, HELMET MAKER SUED OVER EX-PLAYER BRAIN INJURIES / PAGE 3

COLLEGE ATHLETE SOCIAL MEDIA MONITORING CREATES DILEMMA / PAGE 4

In Brief

Transatlantic, Validus to discuss buyout bid

Transatlantic Holdings Inc.'s board said it is open to discussing Bermuda reinsurer and insurer Validus Holdings Ltd.'s recent unsolicited bid to buy the New York reinsurer. Meanwhile, Swiss specialty insurer and reinsurer Allied World Assurance Co. Holdings A.G. said it remained "fully committed" to its $3.2 billion June merger agreement with Transatlantic. Validus also stood by its offer, valued at around $3.5 billion when announced, and appealed to shareholders to vote against the Allied World deal.

Zurich says no cover for Sony data breach

Zurich American Insurance Co. has sued a Sony Corp. unit

See **IN BRIEF** page 21

CASE STUDY

ERRORS & OMISSIONS

[BEST PRACTICES]

Professional liability risks grow with green construction; guarantees can spur litigation. **PAGE 11**

WORKERS COMPENSATION

Drugs increase employer pain

Doctor training seen as antidote to growing usage

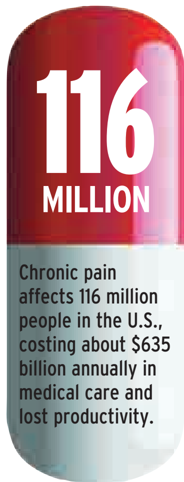
By ROBERTO CENICEROS

The nation's liberal consumption of narcotic pain relievers continues to gain recognition for its detrimental impact on injured workers—particularly those treated for chronic pain—and their employers.

Addiction, deaths and longer disability durations are among problems caused by overprescribing narcotic pain medications known as opioids to injured workers, while medical guidelines that could help alleviate the problem are rarely followed, occupational medical experts say.

Although the phenomenon drives employer costs, it is not limited to workers compensation cases, occupational medical experts say.

"It really needs to be appreciated as a public health and important medical treatment problem that goes well beyond workers compensation," said Dr. David Deitz, national medical director at Liberty Mutual Group in Boston. "We in the United States have a narcotic problem."



Chronic pain affects 116 million people in the U.S., costing about $635 billion annually in medical care and lost productivity.

Several factors are responsible, such as the widespread marketing of prescription drugs and doctors wanting to help patients suffering from chronic pain, the medical experts said.

A report released June 29 by the Washington-based Institute of Medicine states that chronic pain affects 116 million people in the United States, or more than the total

See **DRUGS** page 18

COVERAGE DISPUTES

AP PHOTO

Hartford Fire Insurance Co. argues it is not required to cover Crate & Barrel's parent under its CGL policy in consumer privacy litigation.

ZIP codes deliver liabilities

As retailer suits mount, will insurers cover?

By MIKE TSIKOUDAKIS

Retailers in California are engaged in coverage disputes with insurers over growing litigation alleging privacy violations for collecting customer ZIP codes during credit card transactions.

More than 150 lawsuits challenging the collection of ZIP code information have been filed against retailers that include Bed Bath & Beyond

See **ZIP CODE** page 17

PRESCRIPTION DRUG BENEFITS

Merger would build PBM powerhouse

$29.1B Express Scripts-Medco deal raises concerns on market share

By MATT DUNNING

ST. LOUIS—Express Scripts Inc.'s plan to buy its largest competitor, Medco Health Solutions Inc., for $29.1 billion would result in a seismic shift in the pharmacy benefits management marketplace.

The deal, jointly announced by the companies last week, would see Express Scripts pay $71.36 per share for its Franklin Lakes, N.J.-based rival, 28% more than Medco's closing stock price the day before the deal was announced.

If and when the sale is finalized, the combined company would be the largest player in the pharmacy benefits management industry, representing roughly 34% of the U.S. market and an estimated 1.6 billion prescriptions administered or dispensed in 2013, according to JMP Securities L.L.C. Its closest competitor, Woonsocket, R.I.-based CVS Caremark Corp., would have 20% of the market and an estimated 937 million prescriptions dispensed in 2013,

See **PBM** page 17

PBM COMBO

Express Scripts Inc. has proposed buying pharmacy benefit manager competitor Medco Health Solutions Inc. in a $29.1 billion cash-and-stock deal. The companies had more than $100 billion in combined PBM revenue in 2010.

EXPRESS SCRIPTS	
Unbundled PBM gross revenue	$44.97 billion
Net profit	$1.18 billion
Prescriptions filled	753.9 million
MEDCO HEALTH SOLUTIONS	
Unbundled PBM gross revenue	$65.96 billion
Net profit	$1.42 billion
Prescriptions filled	957 million

Source: Company reports

INDEX

Advertiser Index 19
Business Resources 16
Commentary 8
End Page 22
Opinions 8
Mid-Market Executive 6
Products & Services 16
Up Close 16

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Business Insurance

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Week of July 18, 2011

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2. AAA insurers could withstand downgrade: Moody's
3. R-T Specialty exec need not honor CRC noncompete clause
4. *Business Insurance* ranks the world's largest brokers
5. S&P puts AAA-rated insurers on negative review
6. N.Y. workers comp loss-cost rate to rise an average 9.1%
7. U.K. regulator levies record fine against Willis for lax controls
8. No duty to defend Sony in PlayStation hacking suits: Zurich
9. NCCI seeks loss-cost reduction for Illinois, citing reforms
10. Marsh launches global claims practice

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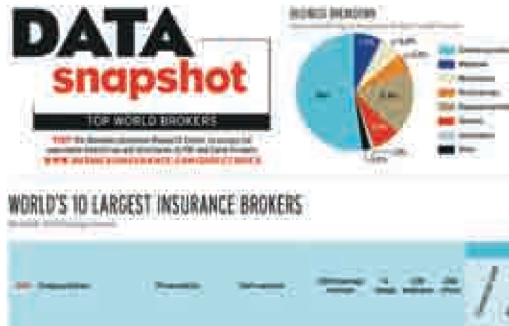

data

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COMINGS & GOINGS

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Aon Risk Solutions

Instability or *possibility?*

While terrorism remains a very real threat around the world, threats to business continuity are also coming from political violence in its many forms.

Organizations need to gauge the threat intensity of the political violence they face by looking at terrorism and sabotage; strikes, riots, civil commotion and malicious damage; and political insurrection, revolution, rebellion, mutiny, coup d'état, war and civil war.

Is your growth, continuity and profitability threatened? Learn about the countries where you do business by accessing the 2011 Aon Terrorism and Political Violence Map via **aon.com/mapregistration**

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FEDERAL LEGISLATION & REGULATION

P/C insurers would weather debt ceiling crisis

But bond exposure could cause problems for some companies

By MARK A. HOFMANN

WASHINGTON—Congressional failure to raise the federal debt ceiling by Aug. 2 should not significantly immediately affect property/casualty insurers, analysts and observers say.

Failure to raise the nation's debt ceiling is not synonymous with a sovereign default in which a government does not honor its debts. While a failure to raise the debt ceiling remains a possibility, the odds of a default are extremely remote, observers say.

In fact, said Robert P. Hartwig, president and economist of the New York-based Insurance Information Institute Inc., there is "zero probability the United States will default on its debt."

Mr. Hartwig said while there has been a "lot of confusion about what's going on Europe, the U.S. is not Greece." He said revenue flowing into the U.S. Treasury in August will greatly exceed what is needed to make the interest payments on existing debt.

Greece entered its debt crisis in 2010, raising the possibility that the country would not be able to meet its sovereign obligations. A rescue plan announced by European leaders last week could put Greece in temporary default because it calls for allowing creditors to swap existing Greek bonds for longer maturities at lower interest rates.

Standard & Poor's Rating Services said in mid-July that it had placed under review with negative implications its long-term counterparty credit and financial strength ratings and related issue ratings on all AAA-rated U.S. insurance groups because of their significant holdings of U.S. Treasury and agency securities.

Despite those holdings, S&P said the five insurance groups involved, which deal primarily in life and personal lines insurance,

See **DEFAULT** page 19

AP PHOTO

Speaker of the House John Boehner and President Barack Obama discuss the U.S. debt ceiling July 14 in Washington.

LIABILITY & LITIGATION

AP PHOTO

Former Lions linebacker Vernon Maxwell during a 1986 game. Mr. Mawell is one of a group of former football players alleging that the NFL withheld information of the potential consequences of concussions.

NFL sued over players' brain injuries

Helmet company also named in suit alleging negligence

By RODD ZOLKOS

LOS ANGELES—An attorney for retired National Football League players says their suit against the league and its official helmet manufacturer, which alleges they concealed information about concussions, is as much about raising awareness of brain injuries as winning compensation for the affected players.

The suit, filed last week in California Superior Court in Los Angeles, came as NFL owners and players sought to resolve differences in negotiations over a labor agreement and end a 4-month-old lockout.

Filed on behalf of 75 former NFL players including Mike Duper, Mike Richardson and Vernon Maxwell as well as the wives of some players, the suit alleges that the NFL has known of the potential consequences of concussions since the 1920s, but withheld the information from coaches, players, trainers and the public until June 2010.

In addition to the NFL, the suit also names Riddell Inc., the league's official helmet maker; its affiliates; and its parent, Van Nuys, Calif.-based Easton-Bell Sports Inc.

According to the suit, the players "did not know the long-term nature of concussions and relied on the NFL and (Riddell) to defend them."

An NFL spokesman said the league "will vigorously contest any claims of this kind."

Riddell replied to a request for comment with a statement that said, "We have not yet reviewed the complaint, but it is our policy to not comment

See **NFL** page 20

RISK MANAGEMENT

Improving risk standards at heart of RIMS effort

By MIKE TSIKOUDAKIS

NEW YORK—The Risk & Insurance Management Society Inc. signaled a change in direction recently when it won approval to develop risk management standards, a RIMS board member said.

The Washington-based American National Standards Institute Inc.'s executive standards council on July 8 approved RIMS as an accredited standards development organization, which enables RIMS to develop risk management standards, New York-based RIMS said in a statement.

"Risk management is on everyone's mind," said Lori Seidenberg, RIMS board member and vp of enterprise risk management at Centerline Capital Group in New York.

"We felt that becoming a standards organization was really the next logical step for us—to move forward and publishing standards that we feel are the best for risk practitioners," she said.

RIMS established its standards and practices committee in 2009 to ensure consistent, high levels of risk management practices for organizations worldwide, she said.

With RIMS' recent ANSI approval, "we hope to start publishing standards early next year," Ms. Seidenberg said. "Right now the committee is looking at areas where there could be some more clarification or maybe standards that need to be written on behalf of our members."

Chris Mandel, president of Excellence in Risk Management L.L.C. in Fair Oaks Ranch, Texas, and a former president of RIMS, said he was "quite surprised" by RIMS' move.

"When I was pushing ISO 31000, RIMS was standards-agnostic. That's why I'm surprised about this development," Mr. Mandel said. "But frankly, it's a good thing."

The challenge, he asked, is that as the ISO 31000 standard developed by the International Organization for Standardization emerges as the globally recognized risk management standard, how will RIMS differentiate itself?

Ms. Seidenberg said RIMS' standard development efforts will not even attempt to compete with the ISO standard.

With RIMS' recent ANSI approval, 'we hope to start publishing standards early next year.'

Lori Seidenberg, Risk & Insurance Management Society Inc.

"Our goal is to really work on other standards in the industry that maybe we need to define," she said. "We are definitely looking at things that we think can be refined or holes that we see out there."

Some gaps RIMS is looking to fill include standards for risk managers in dealing with broker compensation and fee disclosures, how to better place risks, enterprise risk management, strategic risk management and ethics.

RIMS' next step is to develop its own internal standards and decide which risk management standards the organization will take on first, Ms. Seidenberg said.

CYBER RISKS

Social media has schools on defense

NCAA signals need to monitor activity, but liability feared

By MATT DUNNING

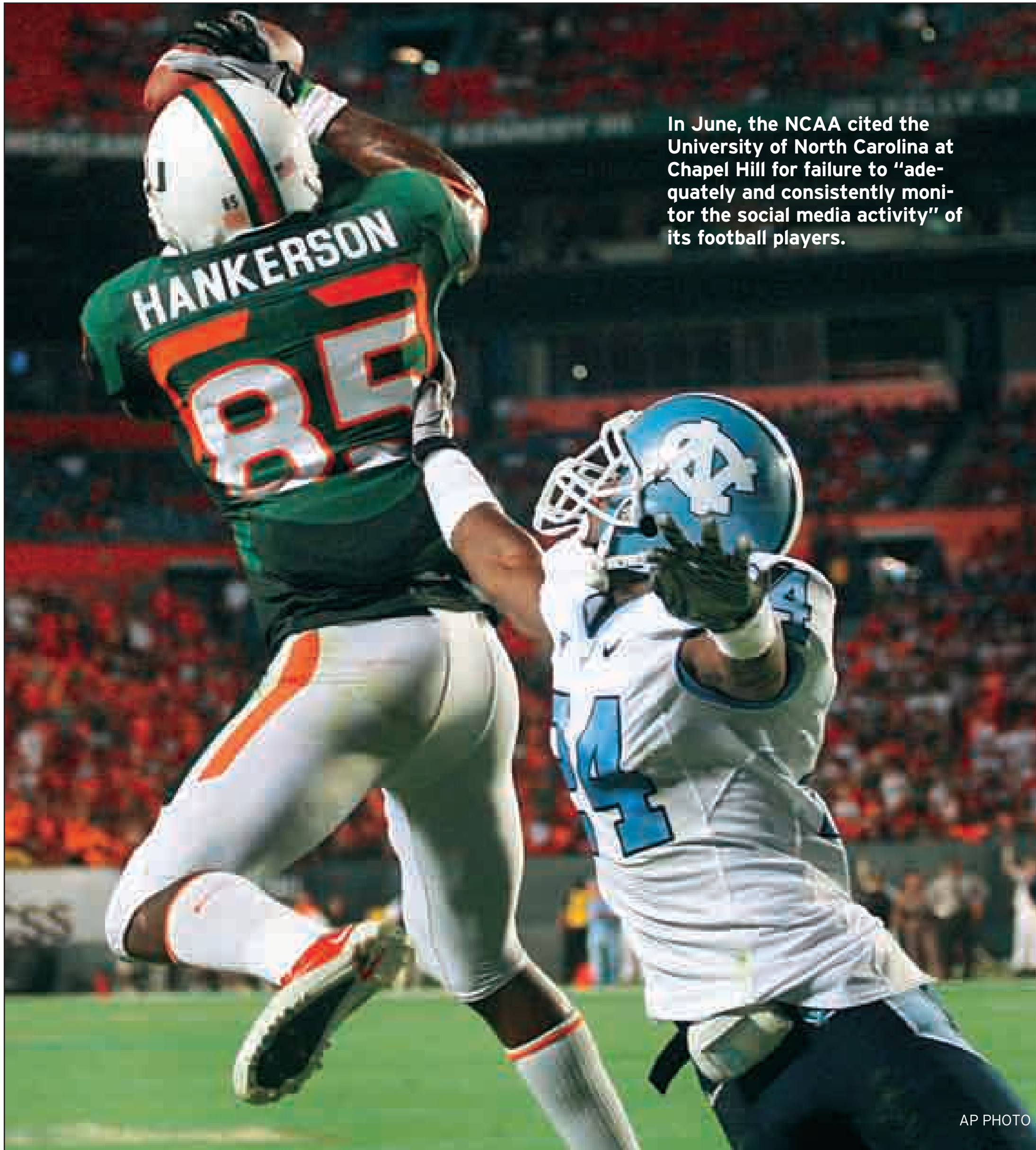
Many colleges and universities are monitoring student athletes' social media accounts for unsavory content, but some legal experts warn that such practices could expose the schools to litigation.

The schools, some using third-party firms (see story, page 10), scan social media posts for content that could cause image problems or draw punitive action from the NCAA.

Pictures or comments depicting the athletes—especially high-profile ones—drinking excessively, in a sexually suggestive manner or otherwise behaving irresponsibly can inflict serious harm on a student or school's reputation. Even worse, athletes bragging about inappropriate gains or business relationships could jeopardize their own eligibility and expose their team to substantial fines and penalties from the NCAA for violation of its amateurism rules.

Some athletic directors and coaches tout proactive monitoring as a way to protect the students and the institutions, even if it carries the risk of being sued for negligence, reputational harm or discrimination.

"Any school that is right now actively monitoring any of its students' social media accounts is probably looking at major legal liabilities," said Bradley S. Shear, Bethesda, Md.-based managing partner of the Law Office of Bradley S. Shear L.L.C., who handles social media cases and blogs on the subject.



In June, the NCAA cited the University of North Carolina at Chapel Hill for failure to "adequately and consistently monitor the social media activity" of its football players.

AP PHOTO

In June, the NCAA notified the University of North Carolina at Chapel Hill of several allegations against its Division I football team and staff, including academic fraud and receipt of improper benefits. Also included in the notice was a citation for failure to "adequately and consistently monitor the social media activity" of its players.

The NCAA does not require its member schools to monitor social media accounts of student athletes. Rather, it "encourages schools to do so," said a spokesman for the association.

"Their oversight can only help ensure individuals associated with the institution (i.e. staff, student athletes, etc.) are not violating NCAA rules nor jeopardizing the eligibility of student athletes on these platforms," the NCAA spokesman said.

See SOCIAL page 6

Participate in health care buying survey

Business Insurance is teaming with sister publication Modern Healthcare and other Crain Communications Inc. publications to survey employers on health care purchasing trends.

The "Healthcare Purchasing Power Survey," which Modern Healthcare has conducted for the past three years, is co-sponsored by the National Business Coalition on Health and the Leapfrog Group. It measures and ranks the health care purchasing power of major U.S. companies. This year's survey also asks major employers whether they're considering dropping health care benefits for employees because of alternatives created by the new federal health care reform law.

The survey is open to all non-governmental U.S. companies and organizations in any sector of the economy with a minimum of $1 billion in annual revenue. The survey will be sent to all Fortune 1000 companies.

The survey is active and runs through Sept. 12.

An electronic version of the questionnaire is available at *modernhealthcare.com/surveys*. It's also available on the NBCH's website, nbch.org, and the Leapfrog Group's website, *leapfroggroup.org*.

Other Crain Communications publications distributing the survey include Automotive News, Crain's Cleveland Business, Crain's Chicago Business, Crain's Detroit Business, Crain's New York Business, Staffing Industry Analysts and Workforce Management. The data collected in the survey will be shared with those publications.

A copy of the survey as well as last year's results can be obtained from Julie Weissman at 312-649-5459 or *jweissman@modernhealthcare.com*.

AGENTS & BROKERS

Willis receives record fine for lax anti-bribery measures

By MARK A. HOFMANN

LONDON—The Financial Services Authority has fined Willis Ltd. nearly £6.9 million ($11.1 million) for failings in its anti-bribery and anti-corruption systems and controls.

According to the FSA, the fine is the largest ever imposed by the agency in relation to financial crimes systems and controls.

Between January 2005 and December 2009, Willis Ltd. "made payments to overseas third parties who assisted it in winning and retaining business from overseas clients, particularly in high-risk jurisdictions. The payments totaled £27 million" ($43.6 million), the FSA said in a statement.

Until August 2008, Willis Ltd. failed to ensure that it had established an adequate commercial rationale to support payments to overseas third parties, failed to use adequate due diligence to evaluate the risk involved in doing business with third parties, and failed to adequately review its relationships to confirm whether it still was necessary and appropriate to continue the relationships, said the FSA.

The failures gave rise to an "unacceptable risk that these payments could be used for corrupt purpose, including paying bribes," the FSA said in a statement announcing the action.

However, the FSA also said that Willis had "taken significant steps to address the failings" and cooperated with the agency. Because of that, Willis was entitled to a 30% discount, without which the fine would have been nearly £9.9 million ($16 million).

"We set very high standards for ourselves as a company," Brendan McManus, who recently was named CEO of Willis Ltd., said in a statement. "We will only accept the very best practice in the systems and controls we apply to our operations."

$11.1M

The Financial Services Authority has fined Willis Ltd. nearly £6.9 million ($11.1 million) for failings in its anti-bribery and anti-corruption systems and controls.

"When we discovered some of our businesses had not got that right in the past, we were swift to engage with the FSA" to achieve the regulatory resolution, said Mr. McManus. "Our close co-operation has been recognized by the FSA, and we are grateful to them for that."

Mr. McManus said Willis Ltd.'s "compliance framework and its application across the business are now very robust and central to the leadership of the company. We can now move forward, stronger as a result."

More broker fines coming?

The fine against Willis Ltd. grew from a "thematic review," said a spokeswoman for the FSA. "We basically looked across the whole sector, and we're considering

See WILLIS page 10

NOBODY WANTS TO TAKE THE FALL FOR A FICTITIOUS CLAIM.

When a patron claimed to take a bad fall outside the entrance of a major retail establishment, the manager first went to her aid, and then came to us. Risk management planning had ensured there were anti-slip mats at the entrance and a surveillance camera, which captured the staged accident. The fraudulent claim was then denied and referred to the local authorities, protecting the customer from unwarranted losses and potential litigation. Whether it's responding quickly, keeping you informed, or helping to mitigate potential losses, our general liability experts are committed to helping you protect your business. That's our policy. For more information, contact your broker or agent or visit libertymutualgroup.com/gl.

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Mid-Market EXECUTIVE Helping C-level executives at midsized firms overcome critical risk and benefits challenges

Wellness efforts could cut costs in mid-market

Smaller employers running out of ways to save on health care

By JOANNE WOJCIK

Mid-market employers have been slow to embrace wellness, primarily because health insurers haven't been giving them full credit for the contribution such programs have been making to lower health care costs.

But even midsize employers that self-insure their health benefits have been reluctant to make significant investments in health promotion programs—such as health risk assessments, biometric screenings and health coaching—because it often takes several years for those initiatives to pay off.

That attitude may be changing, however, as midsize employers come to the realization that they've reached the end of their ability to cut costs through simple plan tweaks and cost-shifting to employees, benefit experts say (see related story).

"Unfortunately, community rating laws that many states have for small businesses do not allow for adjustments to premiums based on improvements in employees' health status achieved through wellness programs," said Craig Hasday, president of Frenkel Benefits L.L.C. in New York.

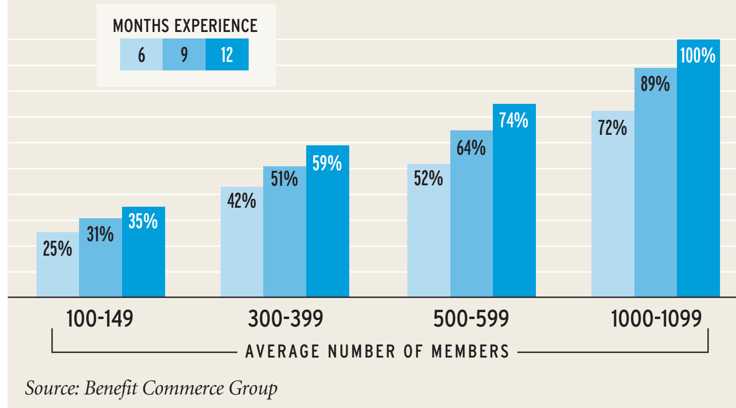
Some employers may get partial credit if they are experience rated, but true experience rating in health insurance usually doesn't occur until employers have 1,000 or more employees, according to Chris Hogan, president of Benefit Commerce Group, a benefit consultant based in Scottsdale, Ariz.

With community rating, which is common in small-group markets, the claims experience of individual groups is pooled with that of other similarly sized groups for underwriting purposes to come up with an average or "manual" rate. This is because groups with fewer than 1,000 lives are not considered "credible" by insurance underwriters and actuaries to base rates on their own experience.

PHOTO COURTESY OF LIMEADE INC.

LARGER GROUPS MORE CREDIBLE

The percentage of employers' claims experience applied to rate calculations



Source: Benefit Commerce Group

"The large employer is fully credible, and that data is what is used to set their future cost liabilities," he said. "If you go to a less credible segment, which is what the middle market is, many insurers blend the employer's experience with a manual rate. So improvements get lost in the wash because they are blended with the carrier's entire book of business."

As an example, he described a situation involving a 55-employee company that was especially proud of its worksite wellness program, which it estimated yielded a 2-to-1 return on investment.

"Their calculations were based on the assumption that they were 100% credible but, to the carrier, they were only 30% credible. So it only affected 30% of the renewal calculation," Mr. Hogan said. "That's why more employers don't implement wellness programs."

Wichita, Kan.-based Meritrust Credit Union broke away from its insurer out of frustration when it failed to see reductions in premium commensurate with the inroads it was making in its wellness program, according to Byron Stout, vp of human resources.

"We didn't start seeing results until we married the health plan and our wellness program together by going self-insured," he said. "A lot of frustration companies our size have is that they're just shooting in the dark."

But even after switching to self-insurance, most mid-market employers often are reluctant to

Continued on next page

Numbers show wellness programs more advantageous in mid-market

By JOANNE WOJCIK

Midsize employers have several advantages over their larger counterparts in implementing wellness programs and benefitting from their results, whether the employer is insured or self-insured, experts say.

Moreover, mid-market employers that incorporate wellness programs into their business strategies will see benefit costs slide while boosting morale and enhancing productivity, the experts say.

In fact, a recent initiative that Bloomfield, Conn.-based CIGNA Corp. introduced in the 50- to 250-member "CIGNA Select" group life market acknowledges the impact of wellness programs. Employers that achieve high participation rates in wellness programs could be eligible to receive premium discounts ranging from 2% to 6%, depending on the type of program, the company confirmed.

> 'We've developed this process, system and algorithms using insurers' own data' and asked them, 'Why isn't this being applied across the insurers' books of business?'
>
> Chris Hogan, Benefit Commerce Group

It comes down to math: 90% participation rates at a company with 250 employees can have a greater effect on an organization than a 90% participation rate at a 5,000-life company, experts note.

But not all insurers have been as willing to share with small and midsize employers the savings that wellness and health promotion programs can produce, according to consultants who work on their behalf.

That's why Scottsdale, Ariz.-based consultant Benefit Commerce Group, formed by two former insurance industry executives, developed its "trend neutralizer," which uses the same data that insurers use to show investors and analysts how a company's wellness and consumer-directed health strategies reduce their health care costs. The consultant uses that data to seek health care premium reductions for employers that have adopted similarly aggressive health promotions.

For example, if insurers' data shows that 75% to 99% of a company's employees participating in annual physicals with biometric screenings can shave 2% off medical inflation, then that reduction should be afforded to employers that have achieved that level of participation through lower premiums, said Chris Hogan, president of Benefit Commerce.

"We've developed this process, system and algorithms using insurers' own data" and asked them, "Why isn't this being applied across the insurers' books of business?" Mr. Hogan said.

"One thing that the industry has told employers for years is that consumerism and wellness will not impact your claims immediately, but it will in the future," said Scott Wood, a principal at Benefit Commerce. "Well, the future is now. It's kind of fun to turn that back on the carriers."

However, for at least one midsize employer, it took becoming self-insured before they fully realized the benefits of wellness on their health costs.

For example, Wichita, Kan.-based Meritrust Credit Union broke from its insurer when it failed to see reductions

See **SOLUTIONS** on page 18

Oklahoma business group seeks to promote worker wellness

By JOANNE WOJCIK

MUSKOGEE, Okla.—A task force launched recently by the Greater Muskogee Area Chamber of Commerce aims to make Okies from Muskogee among the healthiest and most productive workers in the nation.

The Muskogee Wellness Task Force was inspired by the City of Muskogee Wellness Initiative, which the city council adopted last year to improve the health status of community residents, said Sue Harris, president and CEO of the chamber.

"The next step was to get businesses involved to learn how having a healthier workforce will help improve their bottom line," she said.

Among other things, the task force will host a CEO Sunrise Breakfast on Sept. 6 to share documentation the task force has collected on the benefits of worksite wellness programs, such as lower absenteeism and health care costs and increased employee retention and morale, said Lisa Raasch, a member of the chamber's new task force and program manager of the city's wellness initiative, which is partially funded by the Oklahoma Tobacco Settlement Endowment Trust. The trust was set up in 2000 administer Oklahoma's share of a 1998 settlement between the states and tobacco companies for smoking-related illnesses.

"The CEO Sunrise Breakfast will help make business leaders aware of the simple changes they can make that don't cost a lot of money but can positively affect two different kinds of bottom lines," the individual's and the company's, Ms. Raasch said.

The task force also will offer suggestions for wellness initiatives that local businesses could adopt, such as smoking cessation, encouraging employees to exercise more or hosting worksite wellness fairs, she said.

"It really is a matter of changing the social norm in the workplace where taking care of a company's most precious resources is encouraged and appreciated," Ms. Raasch said. "We schedule regular maintenance for our equipment. We need to make sure we're also taking care of the health and efficiency of our employees."

A similar initiative is getting under way in New York, for which the Northeast Business Group on Health recently received a grant from the New York State Health Foundation to establish a Center for Workplace Health for small and midsize employers, said Laurel Pickering, the NEBGH's executive director.

"They need enlightenment," Ms. Pickering said. "There is a lack of knowledge in small and midsized companies about what they can do to encourage wellness, the benefits of wellness and what resources are available."

CONTINUED FROM PREVIOUS PAGE

commit resources to wellness unless a return on investment is guaranteed, according to Aron Minken, a director at PricewaterhouseCoopers L.L.P. in New York.

"When an employer transitions to self-insurance, it is possible to perform a financial analysis projecting the likely costs," he said. By contrast, "I think it's a little bit harder to project the savings from wellness programs," he said.

As a result, "for a middle-market company to spend $100,000 on wellness, it's a harder decision to reach, unless someone at the senior executive level believes in it. They hesitate to spend the dollars if they don't see an immediate payback," Mr. Minken said.

"Mid-market companies are looking for an immediate return on investment," said Robin Bouvier, a vp at Aon Hewitt Inc. in Boston.

A recent online study of financial executives' attitudes toward wellness programs conducted by Corporate Synergies Group Inc., an independent insurance broker and consultant that targets the lower middle market, and the Financial Executives Research Foundation supports this. Of the 159 executives from mostly midsize companies who were interviewed, 52% said they hadn't seen an ROI from their wellness programs and, of the 35% that did, 42% said it took more than two years to realize. Of the companies that have chosen not to implement wellness programs, more than half—52%—cited the ROI of these programs has not be proven.

"It's harder to measure the impact of wellness on smaller populations. They also don't have the manpower in-house to support the programs," said Chris Dickinson, chief revenue officer at Limeade Inc., a Bellevue, Wash.-based wellness program vendor.

Sometimes midsize employers balk at wellness programs when they find out how much of an upfront commitment is required, according to Ms. Bouvier.

"Oftentimes with a worksite wellness program, we actually see costs go up in year one because employees are accessing more detection services, which may lead to the use of more medical services," she said.

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3/10 (✓)

Oklahoma business group seeks to promote worker wellness

By JOANNE WOJCIK

MUSKOGEE, Okla.—A task force launched recently by the Greater Muskogee Area Chamber of Commerce aims to make Okies from Muskogee among the healthiest and most productive workers in the nation.

The Muskogee Wellness Task Force was inspired by the City of Muskogee Wellness Initiative, which the city council adopted last year to improve the health status of community residents, said Sue Harris, president and CEO of the chamber.

"The next step was to get businesses involved to learn how having a healthier workforce will help improve their bottom line," she said.

Among other things, the task force will host a CEO Sunrise Breakfast on Sept. 6 to share documentation the task force has collected on the benefits of worksite wellness programs, such as lower absenteeism and health care costs and increased employee retention and morale, said Lisa Raasch, a member of the chamber's new task force and program manager of the city's wellness initiative, which is partially funded by the Oklahoma Tobacco Settlement Endowment Trust. The trust was set up in 2000 administer Oklahoma's share of a 1998 settlement between the states and tobacco companies for smoking-related illnesses.

"The CEO Sunrise Breakfast will help make business leaders aware of the simple changes they can make that don't cost a lot of money but can positively affect two different kinds of bottom lines," the individual's and the company's, Ms. Raasch said.

The task force also will offer suggestions for wellness initiatives that local businesses could adopt, such as smoking cessation, encouraging employees to exercise more or hosting worksite wellness fairs, she said.

"It really is a matter of changing the social norm in the workplace where taking care of a company's most precious resources is encouraged and appreciated," Ms. Raasch said. "We schedule regular maintenance for our equipment. We need to make sure we're also taking care of the health and efficiency of our employees."

A similar initiative is getting under way in New York, for which the Northeast Business Group on Health recently received a grant from the New York State Health Foundation to establish a Center for Workplace Health for small and midsize employers, said Laurel Pickering, the NEBGH's executive director.

"They need enlightenment," Ms. Pickering said. "There is a lack of knowledge in small and midsized companies about what they can do to encourage wellness, the benefits of wellness and what resources are available."

CONTINUED FROM PREVIOUS PAGE

commit resources to wellness unless a return on investment is guaranteed, according to Aron Minken, a director at PricewaterhouseCoopers L.L.P. in New York.

"When an employer transitions to self-insurance, it is possible to perform a financial analysis projecting the likely costs," he said. By contrast, "I think it's a little bit harder to project the savings from wellness programs," he said.

As a result, "for a middle-market company to spend $100,000 on wellness, it's a harder decision to reach, unless someone at the senior executive level believes in it. They hesitate to spend the dollars if they don't see an immediate payback," Mr. Minken said.

"Mid-market companies are looking for an immediate return on investment," said Robin Bouvier, a vp at Aon Hewitt Inc. in Boston.

A recent online study of financial executives' attitudes toward wellness programs conducted by Corporate Synergies Group Inc., an independent insurance broker and consultant that targets the lower middle market, and the Financial Executives Research Foundation supports this. Of the 159 executives from mostly midsize companies who were interviewed, 52% said they hadn't seen an ROI from their wellness programs and, of the 35% that did, 42% said it took more than two years to realize. Of the companies that have chosen not to implement wellness programs, more than half—52%—cited the ROI of these programs has not be proven.

"It's harder to measure the impact of wellness on smaller populations. They also don't have the manpower in-house to support the programs," said Chris Dickinson, chief revenue officer at Limeade Inc., a Bellevue, Wash.-based wellness program vendor.

Sometimes midsize employers balk at wellness programs when they find out how much of an upfront commitment is required, according to Ms. Bouvier.

"Oftentimes with a worksite wellness program, we actually see costs go up in year one because employees are accessing more detection services, which may lead to the use of more medical services," she said.

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Opinions

EDITORIAL

RIMS ups clout via risk standards

CHALK UP another one for the Risk & Insurance Management Society Inc. as it increases its influence and visibility beyond its traditional realm.

That's because, as we report on page 3, the Washington-based American National Standards Institute Inc.'s executive standards council has approved RIMS as an accredited standards development organization.

ANSI's approval allows New York-based RIMS to shape standards for the profession.

The approval is the latest milestone in an ongoing effort by RIMS to create consistent high levels of risk management practices for organizations across the globe.

That effort included establishing a standards and practices committee in 2009.

"This approval, in conjunction with the efforts of our membership, will undoubtedly serve to foster a culture of risk management across sectors," Lori Seidenberg, RIMS board member and vp of enterprise risk management at New York-based Centerline Capital Group, said when RIMS announced the ANSI decision.

RIMS plans to begin developing standards in risk management next year. Among issues RIMS plans to examine are standards on how risk managers deal with broker compensation and fee disclosure, how to better place risks as well as standards on enterprise risk management, strategic risk management and ethics.

The task before RIMS is challenging but not impossible. After all, the ISO 31000 standard developed by the International Organization for Standardization is gaining global recognition. How that standard and RIMS' standards interact will be critical to RIMS' success in the area.

The move came shortly after RIMS raised its profile in a totally unrelated arena—the political arena. This spring, RIMS launched a political action committee—RISK PAC. The PAC will allow RIMS to support candidates who will help advance the discipline of risk management.

The launch of the PAC and the ANSI approval of RIMS as an accredited standards development organization demonstrate the risk management professional society's increasing clout and sophistication.

Neither development would have been likely even a few years ago.

The ANSI approval offers a new opportunity for RIMS to expand its influence. We have no doubt that RIMS will make the most of that opportunity.

LETTERS

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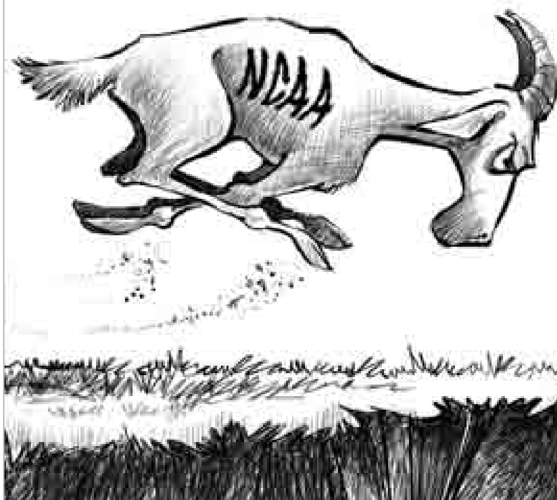

COMMENTARY

Self-insure and take the driver's seat

Midsize employers stung repeatedly by sizable increases in their insured health programs should be asking their brokers why they haven't suggested self-funding.

Large employers have self-insured their health benefits for nearly 40 years, made possible by the passage of the Employee Retirement Income Security Act of 1974. ERISA has enabled self-funded employer plans to keep the rate of increase below that of insured plans by enabling those employers to tailor their benefits and strategically direct wellness and disease management efforts.

JOANNE **WOJCIK**
SENIOR EDITOR

Benefit costs for self-funded employers have grown 26% over the past five years compared with 35% for those that buy health insurance, according to the Kaiser Family Foundation. But only 25.7% of employers with 100 to 499 employees self-insure, compared with 82.1% of employers with 500 or more employees, according to the U.S. Department of Health and Human Services. Just 13% of employers with fewer than 100 employees self-fund benefits, HHS reports.

By self-insuring, small and midsize companies could get a better handle on health care costs because they would have access to aggregated claims data—something insurers rarely share with insured employers.

They also would be protected by ERISA, which shields benefit plans from onerous state benefit mandates requiring that health plans cover an array of medical services. Moreover, their health plans no longer would be subject to state premium taxes, which will increase under federal health care reform.

By self-insuring, small and midsize companies would pay a nominal fee to insurers to handle claims instead of health insurance premiums. And to guard against potentially devastating catastrophic claims, small and midsize employers that self-insure could buy medical stop-loss coverage, a form of excess insurance that pays claims that exceed a certain threshold.

Maybe some brokers aren't telling their small and midmarket employer clients about self-insurance because it would significantly reduce their compensation, which is based on a percentage of premiums.

Moreover, insurers have been paying bonuses on top of commissions to brokers that bring them large volumes of business. So how likely is it that brokers will recommend that some accounts, especially those that have been the most lucrative, self-insure?

Brokers and consultants historically have maintained that self-insurance isn't an option for small and midsize companies because they do not have enough employees to provide a "credible" sample that actuaries can use to make accurate projections of health care costs. But with the use of predictive modeling and the availability of stop-loss coverage, it now is feasible to self-insure groups with a few as 50 employees.

Fortunately, as insurers reduce commissions to meet new minimum medical loss ratio requirements in the federal health care reform law, brokers' compensation is becoming more transparent, and many have begun recommending self-funding to their small and midmarket clients as a way to keep their business.

To run a successful operation, small and midsize employers need full control over all aspects of their business. Self-insuring health benefits will put them in the driver's seat.

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Social: Schools on defense

CONTINUED FROM PAGE 4

But, as Mr. Shear and other experts noted, the NCAA's encouragement to monitor social media coupled with its apparent willingness to punish schools for not "adequately and consistently" doing so seems to put schools in the awkward position of choosing between risking a failure-to-monitor sanction from the NCAA or potential legal liabilities from students and third parties.

"It opens up such a huge Pandora's box, and I don't think the NCAA really realizes what they've done here," Mr. Shear said.

The NCAA declined comment on the implications of its allegations against UNC.

Assessing exposures

The circumstances under which a school might find itself in court over an item of social media content are fairly easy to predict, experts said.

If a university athletic department actively monitors its students' social media accounts and fails to recognize or act on information that could have predicted or prevented a loss—property damage, personal injury or death—the school could be sued for negligence or dereliction of duty, said Stephen Marcellino, a partner in the New York and White Plains, N.Y., offices of Wilson Elser Moskowitz Edelman & Dicker L.L.P.

"Once you take on that kind of policing activity, it creates an obligation," Mr. Marcellino said. "One could easily posit a liability theory in terms of discharge of duty. It's almost a case of 'Be careful what you wish for.'"

On the other hand, acting too swiftly on information obtained through social media monitoring also might not be advisable. Even if every post by every student under surveillance were authenticated, experts worry whether school and athletic administrators can correctly interpret the content of each post.

Jennifer Whittington, executive director of the Bloomington, Ind.-based University Risk Management & Insurance Assn., said a student suspended or kicked off a team for a post that he or she did not author or that was taken out of context could file a claim against the school for reputational damage or lost future financial benefits linked to their athletic talents.

A university also could face litigation based on how it determines which students to monitor. Sheheryar Sardar, a partner at the New York-based Sardar Law Firm L.L.C. and author on using social media, said a school that monitors only some of its students—such as athletes—and not the rest could be accused of discrimination or violating students' 14th Amendment right of equal protection.

"It's just not advisable for any school to regularly monitor a student's social media use," said Alyssa Keehan, senior risk counsel for the Chevy Chase, Md.-based United Educators Insurance, a Reciprocal Risk Retention Group. "Social media, really, is just another medium for behavior; and just as you can't feasibly monitor every student's behavior 24/7, it's unreasonable to try to do that with social media postings."

"They're essentially assuming a duty of care that they can't enforce," Ms. Keehan added.

School policies

How universities have interpreted the NCAA's recommendation to monitor athletes' social media postings differs by campus.

After the NCAA's investigation in spring and summer 2010, UNC established a policy for all athletic programs mandating that each team designate a coach or administrator "who is responsible for having access to and regularly monitoring the content of team members' social networking sites and postings."

Kevin Best, a spokesman for the university's athletic department, said the policy is intended to catch content that could draw fines and penalties from the NCAA and to protect the reputation of the school and its students. However, he admitted the practice could create other legal exposures for the university.

"There is the potential for liability there, certainly," Mr. Best said.

The NCAA's recommendation notwithstanding, some schools choose not to monitor any student accounts, regardless of their extracurricular activities.

"We're not in the business of policing their activities as if they were at home," said Gary Langsdale, risk officer at Pennsylvania State University in State College, Pa. "If people want to post a comment about us or about whatever it is they want, they have to be accountable for it individually. We're not their parents."

Mr. Langsdale described the NCAA's position on social media monitoring as "an interesting conundrum."

Student athletes' social media postings at Oklahoma State University in Stillwater also are not actively monitored, said Mike Bale, the school's director of risk management.

Instead, the school's athletics handbook tells players that they ultimately are responsible for any content posted on their accounts, and are warned that coaches and school administrators—as well as future employers and graduate programs—can view it "just as easily as their peers." Mr. Bale said the NCAA's recommendation to monitor student athletes' use of social media is bound to cause confusion until the rule, and its intent, are better defined.

"Certainly, anytime you have instructions that are vague or aren't clear, they will be misinterpreted and they will be cause for concern to those affected," Mr. Bale said. "Terms like 'adequately and consistently' can and will be broadly interpreted. We may have to wait and see how the NCAA rules on several cases before we really know what it means for compliance purposes."

Third parties taking on monitoring burden

As access portals and other technology associated with social media continue to advance, many schools have turned to third-party firms to perform the work of combing student athletes' accounts for potentially embarrassing or harmful content.

One of the first companies to market its services to NCAA schools was UDiligence, a division of West Lafayette, Ind.-based MVP Sports Media Training L.L.C.

According to co-founder and CEO Kevin Long, UDiligence offers around-the-clock, automated social media surveillance based on keywords provided by the client school.

Mr. Long said the service diffuses privacy issues by requiring that its tracking software be installed by the students themselves, and that the company assumes no liability for any content it delivers to a client school.

"All we're doing is pulling the information that's posted to those accounts and providing it to the university," Mr. Long said. "The schools that we've discussed that issue with have determined that they would rather have the ability to try and prevent something than worry about the potential of missing something or not acting in time."

The University of Mississippi in University, Miss., has been a client of UDiligence since 2008.

Jamil Northcutt, the school's associate athletic director for internal operations, said the department began monitoring social media accounts of its student athletes not as a punitive act but as a means of educating them on responsible use of the medium.

Whether that monitoring places the school in jeopardy of legal action remains to be seen, Mr. Northcutt said, but the fast-moving nature of social media as a technology and cultural phenomenon leads him to believe that it is possible.

"Those issues potentially will come up soon somewhere," Mr. Northcutt said. "This is an ever-evolving thing now. It started out as an image-protection thing for the kids. Then it became all about compliance and now we're looking at liability. We just have to try and keep up to speed."

—By Matt Dunning

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Willis: Record fine levied

CONTINUED FROM PAGE 4

whether to refer any other firms for enforcement," the spokeswoman said.

Willis Ltd. is the second large insurance broker to be sanctioned by the FSA for lax anti-bribery and anti-corruption controls. In early 2009, Aon Corp.'s London-based Aon Ltd. was fined £5.3 million ($8.5 million) because the brokerage "failed to properly assess the risks involved in its dealings with overseas firms and individuals who helped it win business, and failed to implement effective controls to mitigate those risks," the FSA said.

As a result, between Jan. 14, 2005, and Sept. 30, 2007, Aon Ltd. made "suspicious payments" amounting to about $7 million to several overseas firms and individuals, the FSA found.

At the time, the fine was the largest financial crime-related fine levied by the FSA.

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CASE STUDY

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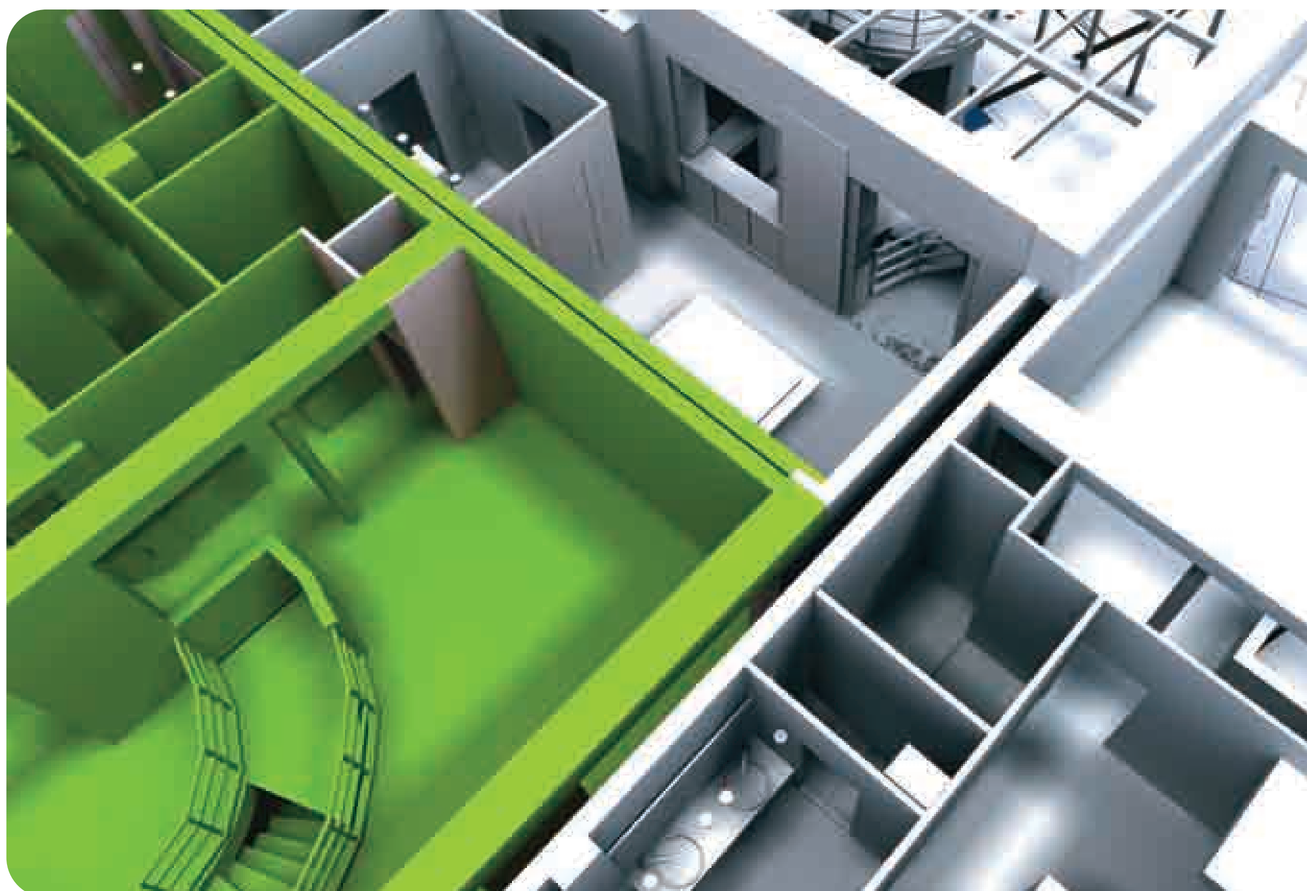

Professional liability risks grow with green construction

By JUDY GREENWALD

Challenges facing risk managers and insurers in developing errors and omissions coverage for "green" construction projects are similar to but also different than standard construction risks.

The difference generally is found in new technology and materials, which are untested and often experimental, and can lead to unfounded expectations, observers say.

Despite recent attention on the subject, "green building sustainable design has been around for decades," said Paul Ablan, Minnetonka, Minn.-based senior vp and managing director of professional liability at OneBeacon Professional Insurance, a unit of Hamilton, Bermuda-based OneBeacon Insurance Group Ltd.

Professionals long have sought to operate more efficiently and economically while taking the environment into account, but it is only in the past several years that sustainable design has gained more governmental and public focus, Mr. Ablan said.

"There are lots of buzzwords that are thrown around on these projects," including that they are "healthier, more energy efficient more environmentally friendly," said Edward B. Gentilcore, a partner at Duane Morris L.L.P. in Pittsburgh. "Translating those buzzwords into contractual language and then performance reality proves to be a challenge."

Mr. Ablan said the green construction focus "has brought to the table for us a whole new set of problems regarding what kind of damages may arise from green building projects, all the way from how do we define them in our insurance policies" to coverage of damages and the services provided.

"As I like to put it, green construction is regular construction risk with a twist," said Shari Shapiro, an associate with law firm Cozen O'Connor P.C. in Cherry Hill, N.J.

"In many cases, the risks that we're seeing for green construction are very similar to other risks that we see for non-green construction, but there are some unique exposures that are starting to emerge," said Lori Bailey, Boston-based head of professional liability for Zurich North America Commercial, a unit of Zurich Financial Services Group.

"The first is managing client expectations, particularly around the usage of new materials" and their life cycle has yet to be determined. "So just managing client expectations around that is certainly a challenge," Ms. Bailey said.

"One of the challenges that happens is you don't want the designer overcertifying, overguaranteeing something" that may be more the "builder's responsibility and vice versa," she said.

The standard of care that will be applied to the architect or design professional is an issue "if they're holding themselves out as certified under the (Leadership in Energy and Environmental Design) program," Ms. Shapiro said.

Observers note that architects and engineers professional liability insurance expressly excludes coverage for warranties and guarantees (see story, next page).

Another issue concerns product specifications for the construction, and using a standard product rather than a green product could result in an E&O claim, Ms. Bailey said.

Rod Taylor, New York-based managing director of Aon Risk Solutions' environmental services group, a unit of Aon Corp., said one potential problem is whether bamboo, which is used on walls, floors and elsewhere, is in fact obtained from fast-growth forests as claimed.

Mr. Taylor said another risk specific to green buildings is a vegetative roof, which involves installing a layer of dirt and planting grass. From a construction viewpoint, this is "fairly challenging" because the materials used are fairly heavy and require proper structural design and, once installed, must have a watering system in case of no rain, he said.

There have been problems in particular with irrigation systems causing leaks because of improper design, "and they end up being much more expensive than people thought they were going to be to maintain," Mr. Taylor said.

Ms. Shapiro said "to the extent that the green building incorporates new technology," that technology could become a product liability issue.

Robert Stanton, Chicago-based vp-risk management at Willis Group Holdings P.L.C.'s strategic outcomes practice, said the biggest obstacle facing contractors and design professionals in green construction "in a lot of instances" is owners who do not "truly understand what they want."

While some owners embark on green construction for public relations reasons and others seek operational savings, "a lot of times green design requires a higher upfront cost," Mr. Stanton said.

See GREEN next page

INSIDE: Warning to designers and builders: 'Beware of guarantees' [PAGE 13]

CASE STUDY

Building designers face more complex exposures

By JUDY GREENWALD

A major errors and omissions coverage issue facing architects and engineers is that once their job is finished, a green building or green project largely is out of their hands and they must rely on others to implement their plans.

With green construction, "you've just got another layer of complexity to the design process," said Dan Knise, president and CEO of Ames & Gough, a McLean, Va.-based insurance broker and risk management consulting firm.

"It's a very challenging time" for architects, said Laura Guagliardo. Naperville, Ill.-based senior claims counsel, design professionals, professional liability at Travelers Bond & Financial Products, a unit of the Travelers Cos. Inc.

"They need to be up on their game on what's out there, what's good and bad about various systems and products that are out there," Ms. Guagliardo said. "Generally, as prime designers, they have to make sure the people they bring in," including structural and mechanical engineers, "are also up on their game."

A major cornerstone of green construction is energy efficiency. This can involve computer-controlled heating, ventilation and air conditioning systems. An architect may design it properly, but if the people who use it are improperly trained and it does not work, the architect can be sued, Mr. Knise said.

Materials raise other potential liabilities, Ms. Guagliardo said. "Each element

of the building is something that needs to be considered, and it needs to be considered in various (geographical) areas. That's what the design professional does," she said. "It's dealing with all these different things that's the challenge" for them.

Homer Sandridge, Hunt Valley, Md.-based vp of professional liability at Travelers Bond & Financial Products, said using materials and systems that have not been around as long as the "tried and true" raises issues about how long they will last. "I think the biggest challenge to an architect is helping clients make these right trade-offs, and it's not easy."

He said mechanical, heating and electrical engineers are "just as much in the mix as architects" when it comes to potential liability in green construction.

"It doesn't do any good to have a building that has an extremely low energy usage because of design, and then install a traditional heating system that's way too big," Mr. Sandridge said. "The structure must allow the heating system to be a totally different one."

Mr. Knise said one growing area of the green building business is "commissioning," where architects and engineers fine-tune the system and train building managers in using it or where an outside firm does so. But this also risks "creating a whole new area of liability" for the architect and the commissioning firm, he said.

In addition, Mr. Knise said, architects should be leery of guaranteeing that a building will receive a specific certification under the Washington-based U.S. Green Building Council's Leadership in Energy and Environmental Design certification program. This is problematic because architects "don't control a lot of the factors" as to whether a building becomes LEED-certified, including issues such as waste disposal.

Shari Shapiro, an associate with law firm Cozen O'Connor P.C. in Cherry Hill, N.J., said, "You want to have a solid contract, where you're not overpromising the attributes of your services. If you're a design professional, for example, you want to make sure that the standard of care is that of a reasonable architect."

Lori Bailey, Boston-based head of professional liability for Zurich North America Commercial, a unit of Zurich Financial Services Group, said architects E&O coverage for green buildings "is generally considered low-frequency, high-severity line," with high severity especially true for large firms.

"It tends to be a very costly claim" involving issues that include improper design, contract mismanagement and improper coordination, perhaps because they deal with large structures "that tend to have a large price tag," said Ms. Bailey.

Claims also increase in a poor economy, she said. For instance, a situation could arise in which an architect and engineering firm are not paid by a client and then sue for payment, only to face a counterclaim that they were not paid because the work was poorly done, she said.

But there are steps architects can take to minimize claims, say experts. Carefully review the contracts, making sure to read the indemnification provisions and the limits of liability, Ms. Bailey said.

Architects should avoid making guarantees "that systems will only use a certain amount of power" or last a certain period of time, said Mr. Sandridge.

"Be cautious about the use of new, untried construction materials," said Mr. Knise. Some architects and engineers require their clients to sign a statement, "You told me to use this material that's never been used before," to make certain they limit their potential liability, he said.

Ongoing educational programs for architects and engineers as well as keeping their employees up to date on new techniques, products and best practices is another way to avoid potential liability, Ms. Bailey said.

Paul Ablan, Minnetonka, Minn.-based senior vp and managing director of professional liability at OneBeacon Professional Insurance, a unit of Hamilton, Bermuda-based OneBeacon Insurance Group Ltd., said design firms "have to be consistently aware of the changes" to certification requirements—not only those established by third-party organizations, such as the U.S. Green Building Council's, but those in various state or local jurisdictions concerning sustainable design for projects.

In addition, "we have several federal regulations that are now in place that set minimum limits of sustainable design for projects," Mr. Ablan said.

Green: Professional liability risks grow

CONTINUED FROM PREVIOUS PAGE

"Will the owner want to carry such costs until such time as they recoup the additional cost upfront?" he asked. This could lead to claims because of the "disconnect" between the parties' expectations, he said.

There may also be a misunderstanding about the owner's higher duty relative to upkeep of the property to ensure it continues to be a more efficient building to operate, he said.

Another factor that could lead to claims is that "some people still have the idea that they'll get a better class of tenant, or their employees will be more productive if they have a green building," Mr. Stanton said.

Another possible issue is "the potential for overreliance" on computer modeling to evaluate how much energy a building will use over time, said Bion D. Howard, a consultant with Building Environment Science & Technology in Valley Center, Calif. While there are disagreements over which computer model is best, "the real issue" is whether the consultant or engineer entering the data has "all the information, and do they know what they're doing?" he said.

The cost to replace a system is another potential coverage issue, said Mr. Stanton. For example, if "you have what is considered a prototypical, truly revolutionary" heating, ventilation and air conditioning system and it is damaged or breaks down, "what is the replacement cost of a prototype?" he asked. There also is the issue of systems that do not perform as well as initially expected.

Using an innovative system removes "one of the typical defenses that most designing professionals would usually use (during litigation), which is, 'We've used this on other projects without a problem,'" Mr. Stanton said.

Ms. Bailey said insurance challenges "can be overcome with a careful underwriting of the particular risk, and making sure our underwriters are asking the appropriate questions of our insureds and are really digging into the particular risk."

While Zurich's underwriters have "significant" construction expertise, none focuses exclusively on green risks, Ms. Bailey said. The insurer views it "as a subset of our construction practice," she said.

Ms. Bailey said in setting rates, there is "really no measurable difference between green and non-green. Any variance in pricing or terms is generally going to come down to the scope of the risk itself and involves various areas of practices, size and scope of project."

Insurance options

About 40 insurers underwrite professional liability risks in this sector, said Jeffrey Coe, Atlanta-based national practice leader for Marsh USA Inc.'s design industry group. About 80% of policyholders are small design firms that may buy $1 million or less in E&O coverage, he said. "But there are certainly many very large design firms and architectural firms and contractors that buy much more in the way of limits."

Most insurers that write E&O coverage for architects, engineers and contractors "can at least offer $5 million and many can go upwards in the $20 million range," Mr. Coe said.

Owners can rely on what the architects and engineers "bring to the table," buy excess coverage such as owners protective professional indemnity insurance, or buy a project-specific dedicated policy "that in effect replaces" the architects and engineers coverage, said Mr. Coe.

Capacity is "generally available," said Ms. Bailey. "It somewhat depends on the type of policy that you're looking for," she said. The available capacity "does tend to keep pricing rather competitive," although losses will have an impact on rates. She said up to $25 million in limits is available, with $25,000 being Zurich's preferred minimum retention.

"There's some discussion among the insurers that they're able to hold their rates a little better than they had been able to," but design firms with good experience can still find a competitive program, Mr. Coe said.

CASE STUDY

Construction guarantees create liability risks

Green builders urged to avoid promising LEED certs, savings

By MICHAEL BRADFORD

Building design professionals, contractors and others involved in green construction projects who adopt the mantra "beware of guarantees" are more likely to avoid errors and omissions claims.

As green building projects increase nationwide, experts say avoiding guarantees that promise certain energy savings, tax credits, certifications or other benefits that could fail to materialize will go a long way toward reducing the risk of claims.

Potential E&O claims could arise from a variety of directions. The use of improper materials or even those purchased from the wrong place can affect Leadership in Energy and Environmental Design certifications and result in a project's value being less than intended, while sloppy construction can generate a host of problems affecting LEED certification by the U.S. Green Building Council, sources say.

In addition, a green building project can lose its LEED certification, another potential source of E&O claims.

Claims already filed against design firms and contractors range from allegations of loss of tax breaks to the death of children who contracted a fatal illness from stagnant water (see box, page 14).

The biggest difference in sustainable projects and traditional construction is that there is "some level of functionality," such as energy savings, that is intended in a sustainable project, said Garrett Koehn, San Francisco-based president of Crump Northwest, a unit of Crump Insurance Services Inc. "That's where you can run into some problems."

For example, if intended savings from a project using solar energy don't materialize, claims could ensue, he said.

"We've seen contracts requiring guarantees," and they can lead to problems, said Karen Erger, vp-director of practice risk management at Lockton Cos. L.L.C. in Kansas City, Mo.

Kevin Collins, senior vp at Victor O. Schinnerer & Co. Inc. in Chevy Chase, Md., agreed that guarantees are risky because LEED certification depends on a review by a third party. The Green Building Council has the final say on how projects are certified, which

See **GUARANTEES** next page

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CASE STUDY

Guarantees: Create more liability risks

CONTINUED FROM PREVIOUS PAGE

is out of the control of the design professional and contractor.

If a lower certification than promised is awarded and a building owner claims losses—such as rental income based on a higher certification—an E&O claim is likely, Mr. Collins said.

In some cases, however, policyholders will find themselves left bare against E&O allegations related to guarantees, experts said.

Architects and engineers, for example, will find that their professional liability insurance "expressly excludes coverage for warranties and guarantees," Ms. Erger said.

Such risks require a vigilant eye on contract wording and careful communications among all parties in a green project, experts said.

"If you don't cull through and mitigate the exposure through contract-friendly language, you are putting yourself in the crosshairs," said Joe Gallagher, risk manager at St. Louis-based construction company Alberici Corp.

Among the first steps risk managers should take in identifying the risk of a loss from a green design or construction error is to make sure qualified people are working on the project.

"Evaluate a firm's capabilities in this area," Mr. Collins said. Building codes have begun to address green issues, and some are emphasizing that professionals working on sustainable projects should have certain qualifications and certifications, he said.

"Document expectations so that everyone is clear," Ms. Erger said. "There has been a huge influx of information on the benefits of sustainable design that has inflated expectations," she said.

Risk managers also need to be aware of other snares that could lead to claims, experts say.

Thomas Taylor, president of Vertegy, an Alberici unit that provides consulting services for sustainable projects, said the LEED rating system awards certification credits for design and construction that might not be obvious to everyone involved in a project.

The rating system awards credits for using recycled materials and regional materials in construction, Mr. Taylor said. "If those materials are not put into the design and the contractor is following the plan but doesn't achieve the credit, who's in error there?"

E&O insurers, meanwhile, should be aware of a whistle-blower provision in the LEED certification standards, Mr. Taylor said.

If someone with knowledge of a project reveals that LEED certification was based on the approval of requirements that actually were not met, the certification can be rescinded, he said.

> 'I can almost guarantee you that if an owner loses certification' under such a scenario, 'someone is going to want to get compensated for that.'
>
> Thomas Taylor, Alberici Corp.

"I can almost guarantee you that if an owner loses certification" under such a scenario, "someone is going to want to get compensated for that," Mr. Taylor said.

Other emerging E&O claim triggers arise from an international green building code being developed by the International Code Council, Schinnerer's Mr. Collins said.

The ICC, based in Washington, is devising its 2012 International Green Construction Code and plans to publish it in March.

"Under this code, the bar could be raised as to what minimum standards should be" for green projects, Mr. Collins said. "That's one real big issue."

Many green products and systems have little usage history. If they fail to live up to expectation, sources say E&O claims could result (see related story).

As for insuring the E&O exposure in green projects, some sources said innovative coverage is slow to arrive and insurers appear to be waiting on claims history and the outcome of litigation before offering comprehensive coverage.

"There's nothing terribly creative out there," said Brian Casey, senior vp and head of insurance and risk management for Bovis Lend Lease Holdings Inc. in New York.

Crump's Mr. Koehn said coverage needs to be written with some "finesse" for E&O exposures on green projects, and coverage for traditional risks will come up short if used to insure a sustainable project.

"If you take an off-the-shelf E&O policy, there's a good chance that there will be gaps," Mr. Koehn said.

"Markets on the E&O side are a little behind," Alberici's Mr. Gallagher said. While they have tried to "get their arms around these sustainable insurance issues," insurers' efforts have not led to much in the way of professional liability products that specifically address the green E&O exposure, he said.

Much of the coverage available for E&O exposures on green projects is through E&O policy amendments, sources said.

Insurers appear to be waiting for E&O claims to go to litigation so they can base policy language on the exposure that is revealed through lawsuits, Mr. Gallagher said.

Mr. Taylor agreed, but noted that in "looking from the other side of it, without precedent and no court settlements, how can they price the increased risk of E&O if that risk is not defined? How do they go to market or justify holding reserves?"

New technologies run risk of new E&O claims

Errors and omissions claims resulting from sustainable projects could surge if new technologies for the projects don't live up to expectations, experts say.

"There has been a huge increase in the number of manufacturers coming up with components for green projects," said Kevin Collins, senior vp at Victor O. Schinnerer & Co. Inc. in Chevy Chase, Md.

"There's not been a huge number of claims where there's been a problem," he said, but as the projects age, there are questions as to whether systems and products used in green projects can live up to promises about their performance.

If not, experts say, project owners could suffer financial losses and file claims if they lose Leadership in Energy and Environmental Design certifications because their facilities no longer meet sustainability requirements.

In some cases, building owners base rental rates on the certifications. Claims also could arise if, for example, a green system built to conserve energy fails to achieve promised savings.

"A lot of the technologies have not been tested," said Garrett Koehn, San Francisco-based president of Crump Northwest, a unit of Crump Insurance Services Inc.

"Some of the solar projects are huge," Mr. Koehn said. "Nothing has been built like this before, and that's one reason they buy insurance. I expect there will be things we can't see yet," he said of potential issues with new technologies.

—By Michael Bradford

GREEN BUILDING CLAIMS

According to Victor O. Schinnerer & Co. Inc., green building-related claims that have been brought against its policyholders include:

- **ARCHITECTS AND CONSULTING ENGINEERS** signed a contract stating that a three-school project with a sustainable design would "reduce operating costs by 50%" compared with schools of similar size. The school system brought a claim after energy usage was found to be comparable to other recently built schools, and alleged it was "hoodwinked" by architects and engineers.
- **A DEVELOPER** advertised "reduced operating costs and healthier and more productive occupants" to attract tenants to a building an architect had agreed to design to achieve LEED gold certification. Budget and time constraints prevented the certification and the developer sued the architect for breach of contract and breach of warranty.
- **A LANDSCAPE ARCHITECT** designed a garden area using "gray" water and a play area with a splash pad that used recirculated water that was treated. Drainage problems allowed garden water to stagnate and at times contaminate the splash pad. Two children died from illness caused by amoebae from the stagnant water, prompting a lawsuit from the parents that included claims of improper design.
- **A DEVELOPER** hired a design team for a project with sustainability features that would allow the developer to qualify for a state's green building tax credit. The program required LEED certification within a certain time, and the design team contractually agreed to time constraints and tight cost limitations. Project delays meant LEED certification was awarded too late for the developer to qualify for tax credits, and the developer sued the design team and contractor for the equivalent amount of the credit.

Source: Reprinted with permission from Victor O. Schinnerer & Co. Inc., which provides professional liability, property/casualty and management liability insurance for design firms involved in green projects.

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Products & Services

Marsh launches coverage for FCPA investigations

NEW YORK—Marsh Inc. has developed insurance coverage for Foreign Corrupt Practices Act investigations.

FCPA Corporate Response was developed by Marsh's financial and professional liability practice and provides cost of investigation coverage for individuals and the organization, the New York-based brokerage said in a statement.

The coverage is triggered when an anti-corruption investigation is launched under the FCPA as well as foreign regulations, such as the U.K. Bribery Act. It is available to companies of all sizes that conduct business globally, Marsh said.

"Responding to investigations launched under the (FCPA) and other anti-bribery statutes can require organizations to dedicate significant time and expense, including legal, accounting, auditing and consulting costs," Jack Flug, managing director in Marsh's FINPRO practice, said in the statement. "Loss mitigation strategies, strong compliance and due diligence are often not enough to address the FCPA risk to organizations and their directors, officers and employees."

While directors and officers liability insurance may cover individuals during an FCPA investigation, it does not cover the organization itself, Marsh said.

The insurer underwriting the policy was not disclosed.

For more information, contact Mr. Flug at 212-345-6493 or *jack.flug@marsh.com*.

Consultant provides online risk resource

RESTON, Va.—Risk and crisis management consulting firm Thomas A. Clayton Consultants Inc. has launched an online risk resource.

RiskBrief provides risk analyses, security ratings and assessments for more than 180 global locations, Reston, Va.-based Clayton Consultants said in a statement.

Specifically, RiskBrief offers analysis of security and kidnap risks in various locations worldwide. The analysis includes situation reports, terrorist threat alerts and crime statistics, among others, according to the statement.

The online risk intelligence resource is "a baseline decision-support tool" for users "to be constantly aware of their overall exposure to risk," said Armand Gadoury, managing director of Clayton Consultants, in the statement.

RiskBrief is available at *www.claytonconsultants.com* through an annual or quarterly subscription, which are $1,450 and $500, respectively, according to the firm's website.

For more information, contact Mr. Gadoury at 703-673-5581 or *riskbriefinfo@claytonconsultants.com*.

Lexington covers archaeological delays

BOSTON—Lexington Insurance Co. has launched insurance coverage for expenses and delays resulting from making an archaeological discovery during construction.

LexArchaeology offers first-party coverage for expenses and construction completion delays from the unexpected discovery of archeological materials, the Boston-based specialty insurance unit of Chartis Inc. said in a statement.

The policy is available as an endorsement to the insurer's project-specific builder's risk policy forms and provides coverage expenses such as archeological protective measures; technical consulting; and cleaning, cataloging and storing archeological resources, according to the statement.

Additional covered costs include loss of rental income or gross earnings the insured incurs as a result of the delay, Lexington said.

A policy with similar coverage, Heritage Resources, also has been developed for construction projects in Canada through Chartis Insurance Co. of Canada. The policy is available as an endorsement to Chartis Canada's project-specific builder's risk policy forms, Chartis said in a separate statement.

For more information on LexArchaeology, contact Frank Tricamo, product line manager Lexington's construction property unit, at 646-857-0132 or *frank.tricamo@chartisinsurance.com*.

For Heritage Resources, contact Trudy Chow, zonal construction manager for Chartis Canada, at 604-691-2931 or *trudy.chow@chartisinsurance.com*.

Guy Carpenter releases Slovenian hail model

NEW YORK—Guy Carpenter & Co. L.L.C. has released a hail model for the Slovenian insurance market.

The model will help insurers quantify their hail exposures and guide structuring and pricing of reinsurance programs in the country, the reinsurance brokerage unit of Marsh & McLennan Cos. Inc. said in a statement.

"The weather events of 2008, which combined the destructive forces of wind, flooding and hail, resulted in total estimated insured losses of €200 million ($283.1 million)," Guy Carpenter said in the statement.

"Three of the five events that occurred in 2008 resulted in losses to catastrophe programs, of which hail was an important component. In addition, two significant hail events occurred in May and June of 2009 that caused insured losses," Guy Carpenter said.

The Slovenian hail model includes hazard data and exposure, vulnerability and financial modules that allow users to import portfolio information, examine damage curves, and apply various types of deductibles and limits on a per-policy or per-risk basis.

For more information, contact David Lightfoot, international head of G.C. Analytics, at 206-621-3954 or *david.lightfoot@guycarp.com*.

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UP CLOSE Comings & Goings

THOMAS SCHOEN

NEW JOB TITLE: Atlanta-based vp of Southeast region commercial lines regional underwriting at Harleysville Group Inc.

PREVIOUS POSITION: Atlanta-based Southeast region niche manager at Harleysville Group.

LOOKING FORWARD TO: Spending time with underwriters to better understand the economics of writing insurance in the much-anticipated hard market. The transition from soft market to hard market traditionally has been very difficult on carriers. It requires a special balance of growth and underwriting discipline, particularly in the early stages of the market shift.

BEST THING ABOUT A BAD ECONOMY: As partnerships are tested, meaningful business relationships will not only survive, but flourish.

INDUSTRY CHALLENGES: As some in our industry are looking to further commoditize our products, it is important for producers to continue to take time to understand the individual needs of their clients and carriers. Agents who bring innovation and creativity to the marketplace are critical to the long-term success of our profession.

FIRST MARKET EXPERIENCE: Right out of college, I sold property/casualty insurance products to cabinet makers, sawmill owners and lumber yards.

OUTSIDE THE INDUSTRY, A DREAM JOB: Meteorologist. I have always been fascinated by weather, and I only would have to be right half the time.

HOBBIES: Golf, gardening, soccer.

MOST PASSIONATE ABOUT: My kids. The world through their eyes is amazing.

FAVORITE BOOK: "Beach Music" by Pat Conroy. (It's) a great story of the family by a fantastic writer.

EMAIL OR PHONE, AND WHY: Phone. I think tone is the key component to a difficult or challenging conversation. You just can't get tone in an email.

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ZIP code: Coverage for retailer lawsuits uncertain

CONTINUED FROM PAGE 1

Inc., Crate & Barrel, Target Corp. and Wal-Mart Stores Inc.

Forty separate class action suits on the subject were filed just 10 days after the California Supreme Court ruled in February that ZIP codes constitute "personal identification information," the collection of which violates the state's consumer privacy law, said Steve Fraser, senior technical claims officer at Marsh Inc.'s liability claims practice in San Francisco.

"This was not on anybody's radar," Mr. Fraser said. "This came out of the blue. I don't think anybody anticipated this."

While lower courts held consistently since 2008 that ZIP codes collected by retailers did not constitute personal identification information, the California Supreme Court ruled in *Jessica Pineda vs. Williams-Sonoma Stores Inc.* that ZIP code requests violate the state's Song-Beverly Credit Card Act of 1971, which prohibits businesses from asking cardholders for personal information during credit card transactions.

The plaintiffs argued that ZIP codes, along with other credit card information, could be cross-referenced against existing databases to identify home addresses.

Fines for collecting ZIP codes are $1,000 per incident, which California law defines as every time a store clerk asks a customer for his or her ZIP code, Mr. Fraser said.

In a lawsuit filed last month in Massachusetts, which has similar consumer privacy laws as California, arts and crafts retailer Michaels Stores Inc. is accused of violating customer privacy by requesting ZIP codes in making credit card sales.

The nature of the violations and requested relief from retailers already has pitted insurers against retailers, litigation that observers expect to grow.

In a May lawsuit filed in federal court in Chicago, Hartford Fire Insurance Co., a unit of Hartford Financial Services Group Inc., sought declaratory relief against Euromarket Designs Inc., the parent of Crate & Barrel, on grounds that it is not obligated under its commercial general liability insurance policy to pay claims defending lawsuits alleging consumer privacy violations.

Hartford, which declined comment, is the first insurer to ask the courts whether this particular type of claim is covered under the policy, attorneys and brokers said.

Insurers may take the stance that the acts in question are intentional and that the CGL policy does not cover fines and penalties, Mr. Fraser said.

"The distinction between an intentional act and intentional damage is something that exists throughout all of insurance," said William G. Passannante, shareholder and co-chair of the insurance recovery group at Anderson Kill & Olick P.C. in New York.

AP PHOTO

More than 150 lawsuits have been filed against retailers, including Target Corp., alleging privacy violations for collecting customer ZIP codes.

"When the retailers were collecting credit card information, did they know that the (California) Supreme Court was going to say that was a violation of the California credit card act? Probably not," Mr. Passannante said. "This type of claim—the claim that during a retail transaction someone collected information that subsequently leads to liability—is the type of claim that you would expect to be addressed by various liability policies."

Mr. Passannante advises risk managers to work with their brokers to ensure that retail operations have the broadest coverage possible. But even if a large retailer has broad policy forms, there is a "reasonable probability" that insurers would dispute any ZIP code violation claims retailers may make, he said.

There is an exception for collecting ZIP codes as part of credit card purchases made at the pump when buying gasoline; certain states require consumers to enter their ZIP code to verify the card for security purposes, experts say.

As high-profile hackings made recent headlines, some retailers also questioned whether coverage for ZIP code violations existed in their information network privacy or cyber liability policies, observers said.

Most cyber liability policies don't specifically address the wrongful collection of data, said Kevin Kalinich, national managing director of Aon Risk Solutions' financial services group in Chicago, an Aon Corp. unit.

He said some retailers argue that collecting ZIP codes is part of advertising, which could fall under the CGL policy's advertising injury coverage.

In response, insurers are changing their policies to make it clear as to whether ZIP code violations are covered, Mr. Kalinich said.

In addition, some insurers are adding endorsements to their network risk policies. "Some insurers have already developed those endorsements and they are already on some of the policies where you get a special endorsement to cover wrongful collection of data," he said.

Laura A. Foggan, partner at Wiley Rein L.L.P. and leader of the firm's insurance appellate group in Washington, said it is "unlikely" that policyholders will find coverage in their CGL policies for ZIP code violation claims.

"I cannot envision any way that a credible argument could be made about bodily injury or property damage liability coverage under a CGL policy," Ms. Foggan said. "So we're really talking about the question of the meaning of the advertising and personal injury coverage part."

Such insurance covers slander and libel. "Those characteristics just aren't present in the ZIP code cases that we're seeing," Ms. Foggan said.

Mr. Kalinich said risk managers should engage their counterparts across the organization to know what personally identifiable customer information is collected and evaluate its potential legal consequences. "I don't think (risk managers) can look at the ZIP codes as an isolated incident. You really have to look at how the services are evolving and how their particular retail company is utilizing technology," he said.

PBM: Merger would build powerhouse

CONTINUED FROM PAGE 1

according to the San Francisco-based firm.

"It certainly gives (Express Scripts) additional clout," said Constantine Davides, a Boston-based senior analyst at JMP Securities. "With the type of market share generated here, they're going to have significantly increased leverage against pharmaceutical manufacturers and the retailers in their network."

News of the proposed deal was accompanied by Medco's announcement that it would lose its contract with UnitedHealth Group Inc. in 2013, an $11 billion account comprising about 17% of its business.

Pros and cons

While the proposed deal is likely to be opposed by industry groups representing pharmaceutical manufacturers and retailers, analysts said the merged company's clients could benefit from its ability to apply pressure on supply partners and its expanded offering of products and services.

"More likely than not, I would think that employers are going to be better off if the companies are together, to the extent that their ability to squeeze their suppliers will more than make up for any higher margins that they earn," said Matthew Coffina, an equity analyst at Chicago-based Morningstar Inc.

Combining the companies would join very different philosophies on the administration of pharmacy benefits. Express Scripts' application of behavioral sciences in driving consumers toward diligent and more cost-effective prescription treatment—particularly generic medications and mail-order distribution—is a concept that would be relatively foreign for Medco clients, he said. Cost savings to be realized in improving generic penetration rates, mail order usage and prescription adherence "is certainly something for current Medco customers to be excited about," Mr. Coffina said.

At the same time, Medco's focus on clinical, therapeutic and pharmacogenomic research as well as its specialized pharmacists could provide employers enrolled with Express Scripts with ways to improve prescription adherence and reduce the frequency of adverse reactions from conflicting medications.

$11B

News of the proposed deal was accompanied by Medco's announcement that it would lose its contract with UnitedHealth Group Inc. in 2013, an $11 billion account comprising about 17% of its business.

"Most likely, the combination of their expertise will create a much stronger offering and would certainly be one of the market share gains if the deal goes through," Mr. Coffina said.

Antitrust considerations

Whether the deal will be completed is at best uncertain, as analysts expressed concern about potential antitrust challenges from the Federal Trade Commission, which must approve the sale.

The companies likely would argue that the increased bargaining leverage over health care providers, pharmaceutical manufacturers and retailers would result in lower prescription costs for employers, experts said. However, the sale also could result in the merged company gaining increased bargaining power over its customers.

"The antitrust issue is the key risk to the deal," JMP Securities' Mr. Davides said. "Express Scripts is going to have to prove that the deal is pro-consumer."

In its note to investors regarding the sale announcement, Morningstar said its analysts were "floored" by news of the proposed transaction. The note went on to characterize the deal as having a "less than 50% chance" of meeting the approval of the FTC.

"No one thought this deal could get past regulators," said Mr. Coffina. "It's surprising that they're even trying the deal, and it would be equally surprising if they actually get it done."

An unfavorable evaluation by the FTC could be a problem for some employers enrolled with either company, said Jeffery Gruen, Washington-based head of health care services at PRTM Management Consultants Inc. The FTC could force the companies to shed some accounts as a condition of approving the deal.

"Some of those clients might see some disruption and would need to get associated with a different PBM," Mr. Gruen said. "But that's going to be a small minority, if any."

Employer clients might benefit from the companies' merger if it passes regulatory review, but some industry observers said the deal—especially given its size and market share—could be a harbinger of more consolidation in the PBM market, which they said could be detrimental for employers in the long run.

"The longer-term risk is that this aggregation forces other PBMs to aggregate as well in order to compete," said Brenda Motheral, executive director of the Plano, Texas-based Pharmacy Benefits Management Institute. "Over time, employers really do have meaningfully fewer PBMs to choose from."

Laurel Pickering, executive director of the New York-based Northeast Business Group on Health, said a merger like that proposed by Express Scripts and Medco would decrease "competition in the PBM market, which usually isn't good for employers looking to get the most value from their PBM."

"Anytime you decrease competition in the market, it reduces the incentives companies have to provide better prices," Ms. Pickering said.

Drugs: Overprescription causes pains

CONTINUED FROM PAGE 1

people in the United States, or more than the total affected by heart disease, cancer and diabetes combined, costing about $635 billion annually in medical care and lost productivity.

Meanwhile, growing efforts to address prescription drug abuse include a program unveiled this spring by President Barack Obama's administration. The program aims to educate doctors on the misuse and "misprescribing" of opioids.

Applying medical guidelines would help eliminate unnecessary narcotics consumption and the problems it drives, the occupational medical experts say.

Injured workers could benefit from insured and self-insured employers working with their insurers, pharmacy benefit managers, nurse case managers, peer review doctors and others to identify claims where narcotic pain relievers are prescribed and to address the underlying medical problem rather than merely treating pain with narcotics, the medical experts said.

Most medical guidelines, such as those produced by the American College of Occupational and Environmental Medicine, or the Official Disability Guidelines encourage that approach, they added.

But very few doctors follow medical guidelines when prescribing narcotic pain relievers to injured workers, according to research that includes a study published this month by the Cambridge, Mass.-based Workers Compensation Research Institute.

The guidelines call for early intervention with treatments such as cognitive therapy that aim to help patients return to their daily activities as soon as possible, said Dr. Bernice Peplowski, interim medical director for the San Francisco-based State Compensation Insurance Fund.

SCIF recently drew complaints from the Sacramento-based California Society of Industrial Medicine & Surgery for revising its medical network contract language to require doctors treating its claimants to agree not to prescribe more than a 60-day supply of opioids without prior approval.

> The guidelines essentially direct that 'there is a place for opioids, but that place is for acute severe pain for a brief period of time or end of life (care).'
>
> Dr. Bernice Peplowski, State Compensation Insurance Fund

The drugs typically plateau in their effectiveness at 60 days and the guidelines call for limiting their use to that period, according to SCIF.

The guidelines essentially direct that "there is a place for opioids, but that place is for acute severe pain for a brief period of time or end of life (care)," Dr. Peplowski said. "That is where opioids are appropriate…because used in a fashion other than that, they can be destructive and harmful."

Doctors treating a unique patient needing narcotic pain relievers beyond the 60 days can request SCIF's approval, Dr. Peplowski said. Such a request gives SCIF's utilization peer review doctors an opportunity to help the treating physician develop a plan of care.

But the society, which represents medical providers that treat injured workers, said in a June 20 letter to SCIF that it is concerned the insurer is attempting to "place an improper restraint on providers' obligations to provide care by defining medical necessity, not on the basis (of) evidence-based guidelines, but rather as a matter of contractual obligation."

The fact that narcotics are overprescribed is undeniable, said Stephen J. Cattolica, the society's director of government relations. But others in the medical treatment chain, such as pharmacy distributors, also are responsible for the problem, he added.

It's not a matter of blaming doctors or patients, several occupational medical experts agreed. Several factors often influence doctor prescriptions.

A primary care provider may want to help a patient suffering from pain while not knowing all the problems associated with narcotics, Dr. Deitz said.

More doctor education is necessary, said Kathryn Mueller, a professor in the department of emergency medicine at the University of Colorado Denver's medical campus and one of the WCRI report authors.

About 10 years ago, accrediting organizations and some state medical boards pushed doctors to make certain that any pain was treated adequately, Dr. Mueller said. "So the push to take care of undertreated pain, which we agreed did exist, I think has unfortunately led to this situation where now they have to worry about maybe we are overprescribing," she said.

Applying the medical guidelines when prescribing narcotics could help, Dr. Mueller said.

The guidelines call for practices such as screening patients for their susceptibility to drug addiction and other risk factors, such as co-morbid psychiatric conditions. They also call for monitoring patients provided with long-term narcotics prescriptions through practices such as periodic urine tests.

The medical experts stressed, though, that the urine tests discussed in the guidelines are not the type provided by employers, such as for pre-employment screening. They are medical exams provided by the treating doctor to assure appropriate medication compliance.

But the WCRI report titled "Interstate Variations in Use of Narcotics" said that in most of the 17 larger states studied, psychological evaluation and treatment were provided in only 3% to 4% of cases.

The study examined 75,000 nonsurgical claims that had 360,000 pain medication prescriptions associated with them.

"Longer-term use of narcotics has a greater potential for overuse, abuse and diversion, and also puts injured workers at higher risk of disability and work loss, and even death from prescription drug overdose," the report concludes. "However, we found that few of those longer-term users of narcotics received the services recommended by medical guidelines for chronic opioid management, such as drug screening and psychological evaluation and treatment."

Solutions: Wellness programs beneficial

CONTINUED FROM PAGE 6

in premium commensurate with the inroads it was making in its wellness program, said Byron Stout, vp of human resources.

Eleven months after becoming self-insured and with providing financial incentives to encourage its 220 employees to be healthy physically, emotionally and financially, Meritrust Credit Union's health care costs are 24% below budget, Mr. Stout said.

In Meritrust's three-tiered wellness program, managed by the Wichita office of broker IMA Inc., employees receive points and financial incentives for exercising and healthy eating, reducing debt and boosting savings, or taking part in community events. Those who receive the required level of points are eligible for a "premium holiday" in which they are not required to make their regular biweekly health plan premium contribution.

"We actually reward that 'wellness warrior'—not just for dropping 30 pounds, but for making other life changes that make them a more happy, satisfied employee because we know that when our employees are happy, it reflects on their work and extends to our customers," Mr. Stout said.

Once a midsize employer becomes self-insured, they have the greatest "opportunity to benefit from health risk management," said Marcia Benshoof, president of IMA Benefits in Denver.

> 'The best employers are doing this because it's what the best employers do.'
>
> Robin Bouvier, Aon Hewitt Inc.

Regardless of whether they are fully insured or self-insured, midmarket employers' smaller size can make it easier for them to implement a wellness strategy, said Aron Minken, a director of PricewaterhouseCoopers L.L.P. in New York.

"Just by virtue of their size alone, (midmarket employers) are a bit more nimble," he said. "They think about things in a much more practical way. Usually there's a much more apparent sense that the (chief financial officer) is involved and the employee benefits is among the single largest line items in the expense, so it gets their attention."

Midsize employers also can take quicker advantage of the results of wellness programs, Ms. Benshoof said. "There are some instant results if you do (health risk assessments). You'll find some ticking time bombs and perhaps save some lives," she said.

Not all successful midmarket wellness programs require investing as much resources as might be required at a large, multistate employer, said Lisa Raasch, president of Empower Change, a consulting business in Muskogee, Okla., who serves on the Greater Muskogee Area Chamber of Commerce's newly formed Wellness Task Force.

"The fact is, it doesn't have to cost a lot of money to change the culture into one that appreciates health and wellness," she said.

Robin Bouvier, vp at Aon Hewitt Inc. in Boston, suggested that midmarket employers start by recruiting a wellness committee and then providing a forum for them to share their passion with others.

"These people become cheerleaders for the organization and encourage their peers to take a more active role in their health through exercise, making healthy food choices," she said.

"The best employers are doing this because it's what the best employers do. They do it to attract and retain the best people who are willing to work really hard," said Chris Dickinson, chief revenue officer at Limeade Inc., a Bellevue, Wash.-based wellness provider.

"It's about investing in people as opposed to managing health risks, viewing people as bundles of potential rather than as units of health risk. That's what it takes to have a vibrant, dynamic culture," he said.

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Default: P/C insurers well placed to weather debt ceiling crisis

CONTINUED FROM PAGE 3

would sustain losses that are modest and "manageable relative to capital" even "in the unexpected event of a U.S. default."

"I don't think there's going to be a great impact on property/casualty insurers," said Andrew Colannino, a vp at A.M. Best Co. Inc. in Oldwick, N.J. "I think there will be some cases in which their capitalization falls somewhat because of the potential increase in interest rates, so the value of bonds may go down. There may be some companies where there would be liquidity concern," he said.

Best said among companies with large exposures to such bonds, if the values were to decline and the company needed to realize the loss due to liquidity needs, their ratings could be affected. "The main concern in those cases is that the impact of that change on adjusted surplus causes capitalization to fall too low, and the company would be unable to meet liquidity needs in its operations or inflation-led impacts of loss costs," Best said in a briefing paper issued last week.

Also last week, Moody's Investors Service said four Aaa-rated U.S.-domiciled insurers could be affected by U.S. sovereign debt issues, but none had been placed under review because Moody's "regards them as resilient to a one-notch downgrade of the sovereign rating."

"While we think insurance company ratings are affected by the sovereign credit profile, we think that an insurance company could sit one to two notches above the sovereign rating," said Bruce Ballentine, an analyst with Moody's in New York. He noted that only one of the insurers mentioned, United Services Automobile Assn., is a property/casualty insurer.

Matt Stroud, head of strategy and portfolio construction for North America in Towers Watson & Co.'s investment business in New York, said failing to raise the U.S. debt ceiling would be a "big deal for everybody."

"At some point shortly after Aug. 2, without new borrowing, servicing of U.S. denominated debt would be disrupted," Mr. Stroud said. "With that, the global risk-free asset, which is U.S. Treasury securities, would no longer be risk-free. Just about every financial asset in the world prices off the U.S. Treasury."

"Just about nobody believes this will actually happen," Mr. Stroud added.

If there were to be an actual default, that would constitute a shock, he said. "Institutional investors of all stripes would be caught up." For property/casualty insurers, it would hit their fixed-income investment portfolios and then potentially soften their premium income on renewal as well, he said.

> **'I think there will be some cases in which their capitalization falls somewhat because of the potential increase in interest rates, so the value of bonds may go down.'**
>
> Andrew Colannino, A.M. Best Co. Inc.

The III's Mr. Hartwig said property/casualty insurers are in no danger of seeing any actual capital loss in the value of their Treasury holdings.

"Under the worst-case scenarios where the debt limit is not raised, there's not a default," he said. "We wind up with some rating agencies making some kind of negative assessment of sovereign U.S. debt. Under that worst-case scenario, we wind up with interest rates rising marginally."

If Congress fails to raise the debt ceiling, the disruption would be felt by people who weren't being paid, such as government employees and contractors, rather than bondholders, he said.

"If it was actually believed we had a situation along the lines of Greece, the stock market would be down 50% to 60% and interest rates would be at the highest they've been in decades rather than the lowest they've been in decades," said Mr. Hartwig. "We're going to wind up with current bondholders being paid both interest and dividends."

ADVERTISER INDEX

Issue of July 25

ADVERTISER	PAGE #
Aon Corporation	2
Business Insurance	10, 15, 19, 21, 23
Florida State University	16
Liberty Mutual	5
Marsh, Inc.	9
National Alliance for Insurance Education & Research	13
National Ethics Association	16
Sentry Insurance	7
Zurich North America	24

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AP PHOTO

Former Rams runningback Eric Dickerson (29) attempts a play against Bears defenders Mike Richardson (27) and Mike Singletary on Jan. 12, 1986, at Soldier Field in Chicago. Mr. Richardson is included in a suit filed by former NFL players against the league and its helmet maker and affiliates and parent.

NFL: Players sue over brain injuries

CONTINUED FROM PAGE 3

on pending litigation."

The suit does not seek a specific damage amount. Instead, an attorney for the players said the plaintiffs will look to establish the extent of injury of each player and seek an award commensurate with the extent of the injury.

"What we characteristically do in these courts is damages awarded according to proof," said Thomas V. Girardi of the Girardi Keese law firm in Los Angeles who is representing the players. "This is just a more conservative way of doing things."

He added that the suit is intended as much to raise awareness of concussions in the NFL and effect changes that will reduce brain injuries as it is about getting appropriate compensation for the injured players. "One of the purposes of the case is to see if we can stop other guys getting hurt," Mr. Girardi said.

Mr. Girardi noted that the effects of the brain injuries to some of the players can be "subtle," and that the symptoms develop over time. Asked to liken the NFL concussion case to other injury cases, he cited two particular cases he tried.

One was *Sandy B. Arnold et al. vs. Ashland Chemical Co.*, a toxic tort case that's known as the "Erin Brockovich case." In that case, "You had the chromium (in the drinking water) that the people were subjected to for two decades," he said. "Cancer doesn't pop up just after you drink the chromium."

The other was the coordinated action, *In Re Vioxx Coordinated Cases,* against Merck & Co. Inc. involving the medication Vioxx. "You don't have a heart attack after you pop the first Vioxx pill," Mr. Girardi said.

The suit against the NFL contends that various player safety rules the league has adopted over the years, such as penalties for grabbing a player's face mask or using a helmet as a weapon to strike an opponent, provide "irrefutable evidence" of the NFL's "duty to protect the health and safety of its players."

But the suit alleges, among other things, that the NFL "failed to regulate and monitor practices, games, equipment and medical care so as to minimize the long-term risks associated with concussive brain injuries suffered by the NFL players." It also alleges the NFL failed to require that adequate concussive brain histories be taken of NFL players, ensure accurate diagnosis and recording of players' concussions and warn of the harm associated with repeated concussions.

Sports risk management consultant Herb Appenzeller of Appenzeller & Associates Inc. in Summerfield, N.C., said he thinks the players' chances of winning their suit is hurt by the awareness of those coming into the NFL that they're engaging in an inherently risky profession.

"I'm not real sure that they'd win a lawsuit like this because when they became NFL players, they knew that they were taking a lot of risk," he said.

Mr. Appenzeller added that he was "surprised" by the suit, given what he sees as a growing awareness of the long-term effects of concussions and steps he thinks the NFL has begun taking to address them.

"We have had a lot of concussions and the recent research has proved that maybe some of the rules we had are outdated," Mr. Appenzeller said. "I think the new research is getting people conscious not just in football but in soccer, women's sports, anything where there's contact."

He said he thinks the NFL has been taking steps to address the brain injury issue with moves such as penalties for blows to the head. "Everybody's talking about concussions and what they can do to prevent them," Mr. Appenzeller said.

Measure proposes catastrophe commission

By MARK A. HOFMANN

WASHINGTON—A discussion draft Senate bill aimed at extending and reforming the National Flood Insurance Program calls for establishing a new commission, the National Commission on Natural Catastrophe Risk Management and Insurance.

According to the draft of the Flood Insurance Reform and Modernization Act of 2011, the Senate bill in many ways would follow a reform measure that the House passed earlier this month. For example, the draft bill would extend the NFIP through Sept. 30, 2016.

But the Senate bill also would establish the National Commission on Natural Catastrophe Risk Management and Insurance to examine the risks posed to the United States by natural catastrophes, the means to mitigate those risks, and ways to pay losses caused by natural catastrophes.

According to a copy of the draft, the commission would do so by, among other things, assessing "the condition of the property and casualty insurance and reinsurance markets prior to and in the aftermath of Hurricanes Katrina, Rita, and Wilma in 2005, and the (four) major hurricanes that struck the United States in 2004."

The commission also would look at the appropriate role, if any, for the federal government in stabilizing property/casualty insurance and reinsurance markets and the role of the federal, state and local government in providing incentives for "feasible risk mitigation efforts.

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News In Brief

CONTINUED FROM PAGE 1

alleging that it is not obligated to cover the media and electronics company for lawsuits and investigations related to hacking of its PlayStation Network. Zurich American and Zurich Insurance Co. Ltd. filed the lawsuit against Sony Corp. of America, stating they are not obligated to "defend and potentially indemnify" Sony from class action lawsuits, miscellaneous claims and possible investigations by state attorneys general related to April hacking attacks on its network because Sony's primary commercial general liability policy and its excess policy with Zurich do not qualify for such coverage.

Brown & Brown settles suit against ex-execs

Brown & Brown Inc. has settled its lawsuit against several former high-ranking employees whom the company accused of using confidential trade secrets to start a competing brokerage. In March, Brown & Brown's former chief operating officer and chief acquisitions officer announced formation of insurance brokerage Assured Agencies L.L.C., just a few months after leaving the company. Several other top-level Brown & Brown executives soon joined Assured Agencies, prompting the broker to file suit. In a settlement, Assured Agencies agreed not to solicit any Brown & Brown clients or employees for 18 months, and not to communicate with any insurance agency or brokerage listed on two rosters of potential Brown & Brown acquisition targets. Assured also agreed to return all confidential material its former employees might have kept after leaving the company, as well paying Brown & Brown an undisclosed amount.

Broker noncompete clause invalid: Court

Timothy W. Turner, president and CEO of R-T Specialty L.L.C., is not obliged to honor a noncompete clause in his contract with former employer CRC Insurance Services Inc., a court has ruled. Mr. Turner served as president of CRC before leaving to join Ryan Specialty Group Inc., the parent company of R-T Specialty, in February 2010. More than 120 CRC employees eventually followed him to join Ryan Specialty, sparking lawsuits by both sides over the employees' employment contracts. The Superior Court of California in Los Angeles said in its July 13 ruling that Mr. Turner's contract with CRC contained a clause that prohibited him from working for any competitor for two years or soliciting CRC clients over the same period. The court ruled, however, that Mr. Turner is under no duty to abide by the employment agreement with CRC because it is invalid under the California Business and Professions Code.

RRGs win auto liability coverage ruling

A Vermont-domiciled risk retention group has won summary judgment in its case against Nevada regulators who sought to bar the RRG from writing first-dollar automobile liability coverage in the state. In a hearing, U.S. District Court Judge James C. Mahan ruled in favor of the Alliance of Nonprofits for Insurance, Risk Retention Group.

NCCI seeks loss-cost reduction for Illinois

NCCI Holdings Inc. has filed for an 8.8% loss-cost decrease for Illinois employers, citing the impact of workers compensation reforms that recently were signed into law. Among other estimates, the arm of the National Council on Compensation Insurance said in a filing with the Illinois Department of Insurance that it expects changes to Illinois' medical fee schedule will account for 7.4% of the 8.8% decrease. The fee schedule changes go into effect Sept. 1.

Noted

Ryan Specialty Group L.L.C. has launched a managing general underwriter to specialize in renewable energy risks. The MGU, called PER se, will write property/casualty coverage for facilities producing wind, solar, bio, hydro and other sources of renewable energy....**Aon Corp.** has acquired Westfield Financial Corp. and its Ward Financial Group subsidiary from Ohio Farmers Insurance Co. Terms of the transaction were not disclosed.

Distributor files suit against drywall firm

Seeks damages for loss of business, harmed reputation

By JEFF CASALE

NEW ORLEANS—A Florida drywall distributor and its subsidiaries have filed a lawsuit alleging a Chinese drywall manufacturer made false claims about the safety of its product.

Banner Supply Co., a distributor of tainted Chinese drywall that was used to build thousands of homes, is seeking more than $100 million in damages from German-based Knauf Gips A.G. and any of its related entities for making false claims about its drywall.

Miami-based Banner filed the cross-complaint in U.S. District Court of Eastern District of Louisiana on July 15, approximately one month after the company engaged in a preliminary settlement with a proposed class of homeowners whose residences were damaged by Chinese drywall.

In that settlement, Banner and several of its subsidiaries agreed to pay approximately $55 million to affected homeowners in Florida.

Attorneys for a group of Florida plaintiffs involved in the litigation, however, have said that they are advising clients to opt out of the proposed class action settlement and pursue damages individually.

According to Banner's complaint against Knauf, the parent company of China-based Knauf Plasterboard Tianjin Co. Ltd., where the tainted wallboard originated, the company lied about the defective drywall manufactured in China and shipped to the United States.

"Knauf then compounded its fraud by trying to evade responsibility, shifting blame entirely to small Florida businesses, such as Banner, that relied on Knauf to tell the truth," Banner said in the suit.

According to the June settlement, Banner found out that Knauf "made material misrepresentations to Banner about the fitness and safety of its drywall in order to induce Banner to sign (a) confidential settlement agreement" between the two companies.

Banner then accused Knauf of "knowingly" concealing information from Banner about the state of its drywall and that the company "knew that the impurities (in its drywall) would cause and were causing serious and widespread property damage."

$100M

Banner Supply Co. is seeking more than $100 million in damages from Knauf Gips A.G. and any of its related entities for making false claims.

In separate litigation, a jury in Miami decided in June 2010 that Banner was liable for damages to a couple's home and awarded them $2.4 million.

Banner received about 100 million square feet of Chinese-manufactured drywall, primarily from Knauf, according to its complaint.

"This cross-claim seeks compensation for Banner's loss of business and reputation and will place liability for the defective drywall where it belongs, with Knauf, the manufacturer," Michael Peterson, of Miami-based law firm Peterson & Espino P.A. and Banner's counsel, said in a statement. "Knauf shouldn't be permitted to profit by concealing defects from citizens of Florida while businesses like Banner are left to clean up the mess."

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Contributing: Jeff Casale, Judy Greenwald, Mike Tsikoudakis, Rodd Zolkos

Airline sued after faux pas by attendant

"Je vais prendre un 7UP, s'il vous plait."

An Air Canada flight attendant's apparent inability to understand that request for the beverage is among factors costing Air Canada $12,000.

Michel Thibodeau and his wife each sued Air Canada for $25,000, plus $500,000 in punitive damages, for that and other alleged failures to provide services in French as required by Canada's Official Languages Act.

Mr. Thibodeau received a Sprite in response to his 7UP request, according to the decision this month by the Ottawa-based Federal Court in *Michel Thibodeau and Lynda Thibodeau vs. Air Canada*. He alleged the couple's "linguistic rights" were violated by Air Canada employees' "malicious, oppressive and reprehensible" conduct, according to the decision.

Air Canada denied its employees demonstrated an arrogant attitude, and an official said enough bilingual flight attendants are on fights with a significant demand for services in French.

"Even though Air Canada is making efforts to comply with its linguistic duties, problems persist," Justice Marie-Josee Bedard wrote in the decision awarding the plaintiffs the $12,000 plus legal costs.

The decision calls for Air Canada to "make every reasonable effort" to comply with the law and introduce within six months a "proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties."

Mr. Thibodeau has been to court before, winning nearly $5,400 and an apology from Air Ontario for a 2000 flight in which he ordered a 7UP in French and was refused service.

AP PHOTO

Chicago Cubs pitcher Carlos Zambrano breaks a bat over his knee. A family feud over the right to tickets to the Cubs was resolved last month.

Family plays ball on Cubs seats

While the Chicago Cubs are busy dropping further behind the leaders in the National League standings, a suburban Chicago man has dropped his lawsuit against his son over Cubs tickets and money lost in an insurance business.

The reason for the change of heart? According to reports, the allegations made in the suit "turned out not to be true."

Gerald Adelman of Northbrook, Ill., reached an agreement with his son, Stuart, last month and dropped the $2.5 million suit he'd brought last year in Cook County Court, with both parties retracting allegations about the other.

The agreement reportedly includes a plan to allow sharing of the four Cubs season tickets Gerald Adelman acquired in 1993, as well as an accountant's affidavit indicating no knowledge of money owed Gerald Adelman's company by his son.

Accounts of the case indicate that for several years Stuart Adelman had handled the annual purchase of the tickets, using money provided by his father. In his suit, Gerald Adelman indicated he lost access to the tickets when his son left the family insurance business, Gerald S. Adelman & Associates Ltd., in 2007, and that his son had diverted commissions from the business.

But with the two sides agreeing to play ball, father and son both can enjoy time at Wrigley Field. Gerald can spend time with his grandsons and all is well, except of course, for the Cubs' soon-to-be 103-year World Series drought.

Wizardly font spells trouble for theme park

The tale of the stolen typeface could be another installment in the popular "Harry Potter" series, but it probably won't be nearly the best-seller or the box-office smash accomplished by the actual Potter franchise.

NBCUniversal Media L.L.C.'s Wizarding World of Harry Potter at the Universal Orlando theme park in Florida is being sued by muggle font creative P22 Type Foundry, which alleges that the typeface Cezanne Pro is being used on Harry Potter merchandise without the company's consent.

The final installment of the Harry Potter movies, "Harry Potter and the Deathly Hallows: Part 2," hit theaters this month, shattering box office records.

Buffalo, N.Y.-based P22 is seeking $1.5 million in damages in the suit it filed this month in New York federal court. According to reports, the allegedly stolen Cezanne Pro's license costs $69.95.

Reports also state that P22 Type Foundry has sued the media and theme park company previously for fonts used by cable television station CNBC.

WRITER SEEKS ROYALTIES FROM QUEEN OF SOUL

A songwriting partner of Aretha Franklin is asking the soul music legend for a little r-e-s-p-e-c-t.

In a lawsuit filed in mid-July in Detroit federal court, Norman D. West and his publishing company allege that Ms. Franklin's publisher, Springtime Publishing Inc., never signed a royalty agreement for "Put It Back Together Again."

The song was released May 3 on "A Woman Falling Out of Love," Ms. Franklin's latest album.

The complaint also accuses Springtime Publishing of copyright infringement over a song, "Watch My Back," released in 1998.

Mr. West reportedly has worked on songs with Ms. Franklin for more than 20 years.

"These are two parties that have a longstanding working collaboration," Mr. West's attorney, Jeffrey Thennisch, told The Detroit News. "Mr. West has told me that he owes much of his career to Aretha Franklin and that he views her as both a mentor and a guiding force in his career."

Once he learned of the situation, Mr. West said in the suit that he tried repeatedly to resolve it. "Springtime, however, has refused to comply with plaintiffs' foregoing requests and has left plaintiffs no choice but to bring this lawsuit."

Mr. West is seeking damages and an order that Springtime Publishing signs the royalty agreement, with which the two artists may be able to put it back together again.

Norman D. West and his publishing company allege that Aretha Franklin's publisher, Springtime Publishing Inc., never signed a royalty agreement for "Put It Back Together Again."

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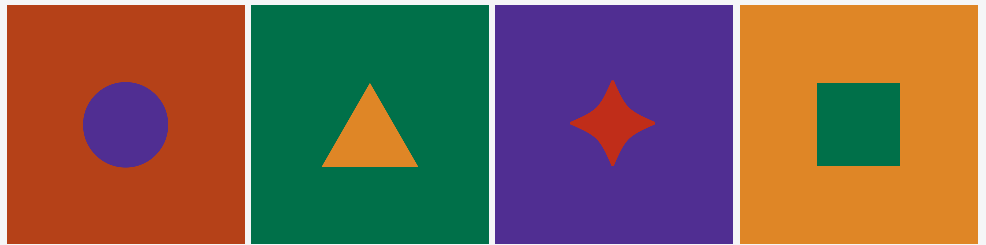

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A COMPREHENSIVE LOOK AT ALTERNATIVE RISK TRANSFER

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3 refineries.
1 Zurich energy insurance policy."**

**Ron Walton, Executive Director, Risk Management
NuStar Energy L.P.**

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NuStar Energy, one of the largest oil and gas pipeline and storage companies, needed a single, scalable insurance solution to meet its current and future growth needs. Zurich tailored a solution that streamlined claims reporting, reduced coverage gaps, and combined worldwide energy and marine – all under one policy. It's an example of how Zurich HelpPoint delivers the help businesses need when it matters most. Watch the video to learn more. **www.zurichna.com/stories8**

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