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## Consumer group sues Marsh, Aon, Willis over contingent pay

# More suits filed over broker commissions

By SALLY ROBERTS

**SAN DIEGO**—A San Francisco-based insurance consumer rights group is suing the world's three largest brokerages, alleging they defrauded California customers by not adequately disclosing the contingent commissions they receive from insurers.

The trio of lawsuits—filed by United Policyholders against Marsh & McLennan Cos. Inc., Aon Corp. and Willis Group Holdings Ltd.—opens yet another chapter on the controversial industry practice.

Late last month, a Chicago judge granted class certification to a similar lawsuit brought by policyholders against Aon (*BI*, Aug. 2). New York Attorney General Eliot Spitzer, California Insurance Commissioner John Garamendi and Connecticut Attorney General Richard Blumenthal also have launched separate investigations into contingent commission arrangements.

Each of the latest lawsuits alleges that the brokerages engaged in a "systematic scheme and common course of unfair and fraudulent business conduct" by claiming to provide unbiased brokerage ser-

See **SUITS/page 7**

# Whirlpool crafts innovative plan to fund benefits

## Proposal involves captive, VEBA

By JERRY GEISEL

**WASHINGTON**—One of the nation's best-known major appliance manufacturers is asking the Labor Department for permission to fund retiree health care benefits in an unusual arrangement utilizing its captive insurance company, a tax-free trust and commercial life insurance.

The plan proposed by Benton Harbor, Mich.-based Whirlpool Corp. involves the interplay of a Whirlpool-established and -funded voluntary employee beneficiary association, the Vermont branch of Whirlpool's Bermuda captive, a fronting insurer and a group universal life insurance policy.

As an added twist, the Whirlpool captive would purchase commercial paper sold by Whirlpool as part of the funding arrangement.

Under the plan, submitted to the Labor Department in late July, Whirlpool would contribute at least $100 million to a VEBA to fund part of the health care obligations of retired union employees. Whirlpool estimates the unfunded accumulated benefit obligation of this group at $164 million.

Then the VEBA would purchase a group universal life policy from The Prudential Life Insurance Co. of America to insure retiree health care plan participants. The group life policy would be 100% reinsured by the Vermont branch of Bermuda-domiciled Whirlpool Insurance Co. Ltd., which Whirlpool established in 2002 and currently utilizes for workers compensation and property risks.

When a retiree health care plan participant dies, the life insurance proceeds from the Prudential-written policy would go

See **WHIRLPOOL/page 18**

# Benefit managers seeking greater info on workings of PBMs

By JOANNE WOJCIK

The increased scrutiny of the prescription benefit management industry is giving benefit managers a clearer glimpse into PBMs' inner workings, empowering them to demand greater transparency.

Despite a recent public relations blitz touting the value of the services the PBM industry provides, however, many PBMs are still reluctant to share all of the information sought on their sources of revenue, benefit managers and other industry observers say.

Instead, some PBMs have been altering their pricing structures in a way that is undermining benefit managers' efforts to discern whether their organizations are get-

See **PBMs/page 16**

## International

### JAPAN MAY ALTER MARKET CLIMATE

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## Late News


PHOTO: NOAA

### Charley claims could hit $15 billion, RMS says

Catastrophe modeling specialist Risk Management Solutions Inc. late last week was predicting that Hurricane Charley could cause as much as $15 billion in insured property damage. The storm was upgraded to a Category 4 hurricane on Friday afternoon shortly before it made landfall on Florida's Gulf coast. Gov. Jeb Bush declared a state of emergency for all of Florida Thursday, and millions of state residents were asked to evacuate certain regions.

### Premera appeals conversion rejection

Premera Blue Cross has appealed Washington state Insurance Commissioner Mike Kreidler's rejection of its application to convert to a for-profit company. Premera said Mr. Kreidler acted outside his statutory jurisdiction and applied state insurance laws erroneously in rejecting the conversion application. "Undisputed evidence of the benefits of Premera's proposal...has been ignored or distorted," the company said in its petition. In particular, the Blues plan disputed the assertion that it might increase rates in areas where it has a large market share if it were allowed to convert. Mr. Kreidler said his decision was "based solidly on Washington law."

### Judge issues stay of Near North litigation

A federal district court judge in Chicago placed a stay on all pending litigation against Near North Insurance Brokerage Inc., granting a motion filed by the trustee appointed to oversee the firm's assets after Near North and its owner, Michael Segal, were convicted on numerous charges. Shortly before the judge's ruling, the Chicago Transit Authority sued Near North, alleging the firm fraudulently misrepresented the amount of premiums and "secretly

See **LATE NEWS/page 19**

NEWSPAPER

# Tax credit for health coverage sees growth in participation

By JERRY GEISEL

**WASHINGTON**—Although it remains small, a federal program that subsidizes the cost of health insurance premiums for some workers and retirees is rapidly growing, with much more utilization considered likely if certain changes are made.

In addition, lessons learned from the operation of the program could be invaluable if lawmakers decide to expand it to cover a greater number of the uninsured.

"There are some critical learning issues here," said Stan Dorn, a senior policy analyst at the Economic & Social Research Institute, a nonprofit, nonpartisan research organization in Washington. Mr. Dorn has extensively studied the program, known as the health coverage tax credit.

Under the 2002 legislation that created the HCTC, the government set up and funded a new program that provides a 65% tax credit that eligible individuals can apply toward the premiums they pay for qualified health care coverage.

The credit is available to individuals who have lost their jobs due to "foreign competition" and to those age 55 through 64 who are receiving benefits from the Pension Benefit Guaranty Corp. due to a takeover of their underfunded pension plan. Those in the latter group make up about 60% of those eligible for the HCTC.

The credit can be used to offset the cost of a variety of health insurance plans, including COBRA continuation coverage; insurance from state high-risk pools; and plans offered by commercial insurers that meet certain standards, such as not using exclusions for pre-existing medical conditions for those who maintained coverage before they lost their jobs or before their pension plan folded. Currently, nearly 60% of beneficiaries use the credit to help pay for COBRA coverage from their former employers, according to statistics compiled by the Internal Revenue Service.

Unlike other types of federal tax credits, the HCTC is available regardless of whether an individual owes federal taxes.

In addition, the HCTC can be applied immediately to offset 65% of the individual's health insurance premium.

Under the "advance refundability" system implemented by the IRS, the beneficiary pays 35% of his or her premium to the government, which then remits—typically through electronic transfer—the full premium to the health plan or plan administrator. This feature significantly reduces the upfront cash

See TAX CREDIT/page 19

### Despite high cost of cover, law change rejected

# Government report denies U.K. auditors a cap on liability

By SARAH VEYSEY

**LONDON**—Auditors' hopes that the U.K. government might allow them to cap their liabilities have been dealt a blow by a report from the Office of Fair Trading, but they say they will continue to lobby for liability reform.

The U.K. Department of Trade and Industry asked the OFT to look at the case for such a cap and assess whether it would increase competition among auditors. Currently, while many audit firms have become limited liability partnerships, claims may be pursued on a joint and several basis.

In July, Trade and Industry Secretary Patricia Hewitt said that company law would only be amended to allow a liability cap if the OFT concluded that such a change would increase competition in the audit market.

The OFT's report, published early this month, said a cap likely would be "competitively neutral overall." And the report did not find compelling evidence to support claims that a cap would reduce barriers to entry and growth facing smaller audit firms, maintain competition between larger audit firms or reduce the risk of collapse of one of the so-called Big Four firms—Deloitte Touche Tohmatsu, Ernst & Young L.L.P., KPMG L.L.P. and PricewaterhouseCoopers L.L.P.

Both large and small audit firms in the United Kingdom have been seeking a change in the law to limit their liability.

London-based KPMG said in a statement that it believed "it is clear to all observers that a cap would reduce the risk of the collapse of another firm and the associated risks to capital markets."

London-based Deloitte said it hoped that, with the question of anticompetitiveness resolved, the DTI would consider liability reform.

The high cost of insurance and the difficulty some auditors have had in purchasing coverage are among the reasons auditors would like to see their liability position changed. In its report, the OFT noted that professional indemnity insurance is available for auditors. But companies and brokers say that such coverage is expensive and restricted.

"There is no insurance for the Big

See AUDITORS/page 16

# Group benchmarks programs to manage absences, disability

ROBERTO CENICEROS

An employer group is working to make it easier for companies to measure the success—and to demonstrate the benefits—of their absence and disability management programs.

The Council on Employee Health & Productivity, part of Washington-based employer coalition the National Business Group on Health, this month rolled out a program designed to allow employers to benchmark their programs against those in use at other companies.

The initiative, known as EMPAQ—which stands for "employer measures of productivity, absence and quality"—establishes standardized metrics and data-gathering protocols designed to help employers measure the cost and effectiveness of their programs addressing medical leave, transitional return-to-work, incidental absence and other absence and disability concerns.

Because the metrics are standardized, participating companies will be able to accurately benchmark their disability programs against those at other employers, including companies determined to be "best in class," according to EMPAQ.

EMPAQ also hopes the metrics will help companies measure employee satisfaction with employer programs, as well as helping purchasers evaluate the quality of services provided by disability vendors, said a spokesman for the initiative.

The ability to measure the

See METRICS/page 17

## Inside Business Insurance

### Mold claims growing in commercial lines

An increasing number of commercial insurance lines are seeing lawsuits related to the proliferation of mold. Page 4

### Mental health claims rising in Canada

Canadian employers are experiencing more disability claims from mental illness. Page 4

### Intervention key in fighting drug abuse

Employers with workers addicted to drugs have several resources available to help address the problem. Page 6

### Health care tax credit holds promise

The tax credit may help reduce the uninsured and contain spending, one of this week's editorials says. Page 8

### Fatal Paraguayan blaze leads to insured loss

Spanish insurer Mapfre is facing claims following a deadly fire that killed hundreds at a market in Asuncion, Paraguay. Page 13

## Online

- The **Datebook** calendar lists upcoming industry seminars and meetings and allows you to add info about your own event.
- Searchable **directories** provide access to all the listings of industry vendors found in *BI*'s Market Sourcebook.
- New **Opinion Poll** for readers: With litigation over contingent commissions growing, will brokers still receive such payments two years from now?

## Departments



REPORTING ON CORPORATE RISK AND EMPLOYEE BENEFIT MANAGEMENT NEWS

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STANDARD MAIL ENCLOSED IN EDITION 03

# Kemper's acting chief executive steps down

## Management changes not expected to threaten solvent runoff arrangement

By MEG FLETCHER

**LONG GROVE, Ill.**—In an unexpected move, Kemper Insurance Cos. and its runoff chief have parted company, but the insurer and regulators say the move should not hamper the solvent runoff of the financially troubled insurer.

Some observers, though, hope the change could bring an end to some of the controversial runoff tactics employed by Kemper.

The change in leadership occurred last week, when Kemper and Kenning Financial Advisors L.L.C. terminated their runoff contract for Kemper without naming a successor runoff manager. In addition, Michael Coutu, chief executive officer of Portsmouth, N.H.-based Kenning, resigned as acting president, chief executive officer and chief financial officer of Long Grove, Ill.-based Kemper.

Mr. Coutu and his firm had managed the solvent runoff of Kemper since November 2003.

But Kemper said last week that the management services contract had been "mutually terminated."

Members of Kemper's board of directors and Mr. Coutu "all agreed that the time was right for a transition," a Kemper spokeswoman said. The company is currently interviewing potential candidates to replace Mr. Coutu and hopes to have a new CEO in place "in the coming weeks," according a Kemper statement.

"I think it is good news," an industry source said. Illinois regulators are "sending a signal that not everything that was being done was with its blessing."

Deirdre K. Manna, acting director of the Illinois Insurance Division, emphasized, though, that it was Mr. Coutu's decision to resign. The regulator will have some say over who replaces him, she noted. Specifically "potential candidates are subject to the division's review and veto," because Kemper is in supervisory runoff, Ms. Manna said.

Until a new leader is found, Kemper "will stay the course and

See KEMPER/page 7

PHOTO: NY TIMES

A Hilton Hawaiian Village hotel tower in Hawaii was forced to close for more than a year following an infestation of mold.

# Mold liability woes creeping up on commercial lines

By RUPAL PAREKH

While mold is turning out to be a shorter-lived liability nightmare than had been initially feared for personal lines insurers, commercial lines companies continue to face considerable exposure to mold-related lawsuits, experts say.

As first-party mold claims have waned since insurers have restricted and eliminated mold coverage in homeowners policies in recent years, the filing of lawsuits increasingly threatens a range of business lines, including commercial property, commercial liability and products liability, they say.

It was the landmark case of *Ballard et al. vs. Fire Insurance Exchange* that in 2001 rattled the industry with a $32 million verdict—later reduced to $4 million by an appellate court—awarded against Fire Insurance Exchange, a member of the Los Angeles-based Farmers Insurance Group, to cover mold-related damages to Melinda Ballard's 22-room Dripping Springs, Texas, home.

Traditionally, insurers have covered mold damage for personal lines only when it was caused by a covered peril—for example, if mold contamination resulted from a burst water pipe.

"Mold was never something the industry should have paid for," a spokeswoman for the New York-based Insurance Information Institute said. "But there's a learning curve, like with anything."

Data indicate that the insurance industry has learned from past experience. Back in 2002, water losses accounted for one-half of all homeowners' claims, according to the III. Two years later, though, those claims have dropped significantly, now representing one-third.

"The cases haven't been eliminated, but there most certainly have been less first-party claims due to the implementation of absolute mold exclusions," said Bill Stewart, an attorney in the insurance coverage department

See MOLD/page 15

# California's high court rejects bad-faith award against insurer

By DOUGLAS McLEOD

**SAN FRANCISCO**—In a decision that could limit insurers' exposure to bad-faith claims, the California Supreme Court has ruled that a policyholder cannot pursue a bad-faith suit against its insurer for alleged overbilling of retroactive premiums.

The state's highest court last week affirmed an appellate court decision that overturned a multimillion-dollar jury award to the owners of a trucking company against their California Automobile Assigned Risk Plan insurer.

Trucking company owners Fred and Mildred Jones leveled bad-faith charges against Cal-Eagle Insurance Co. after the insurer—which initially collected $20,000 in premiums for the Jones' liability coverage—billed them an additional $51,294 after an audit. A Fresno County Superior Court jury, finding Cal-Eagle liable for bad faith and fraud, awarded the policyholders $2.0 million in compensatory damages and $11.4 million in punitive damages. The trial court reduced the punitive award to $4.4 million.

A panel of the state Court of Appeals later threw out the jury verdict, though, and the seven-member Supreme Court unanimously affirmed the appellate action.

Bad-faith suits are allowable for alleged insurer mishandling of claims, but not for premium overbilling that is unrelated to claims manipulation, the court found.

The Supreme Court also found that the trial judge should have stayed the litigation and referred the premium dispute to the California Insurance Department, which has "primary jurisdiction" over such matters. The panel directed the trial court to halt the litigation pending administrative proceedings before the insurance department.

The ruling will limit insurers' exposure to bad-faith charges in workers compensation and other disputes arising from large retroactive premium bills, predicted Paul Glad, a partner in the San Francisco office of Sonnenschein, Nath & Rosenthal. His firm represented the California assigned risk plan as an amicus curiae on behalf of Cal-Eagle.

Policyholders have frequently "rattled the saber" of bad-faith claims in disputing retroactive premium charges, he noted.

*Jonathan Neil & Associates Inc. vs. Freddie Jones et al.; Supreme Court of California, No. S107855.*

# Mental illness costly in Canada, but few employers seek fixes

By GLORIA GONZALEZ

Canadian employers recognize that mental illnesses are leading to substantial increases in benefit costs, but most neither have dealt with mental health issues in the workplace nor plan to do so in the near future, according to a recent study.

Mental health issues have caused an increase in short-term disability claims for 75% of surveyed employers and an increase in the use of employee assistance programs for 68% of surveyed employers, according to a survey by Mercer Human Resource Consulting conducted on behalf of the Toronto-based Canadian Mental Health Assn. Survey respondents were 134 Ontario-based public- and private-sector organizations, 44% of which have more than 500 employers. The survey covered the period February 2003 to February 2004.

Of those surveyed employers, 68% reported increased employee absence and 61% reported decreased productivity related to mental health conditions, the study said.

Disability claims or leave due to mental illness represent anywhere from 4% to 12% of payroll costs in Canada, according to benefit studies. The annual cost of mental health conditions was estimated at $14.4 billion in 1998, an increase of 71% from the 1993 figure, by Health Canada. Some mental health professionals believe those costs are now closer to $30 billion when rising health care costs and the full inclusion of lost productivity costs are factored in.

Despite these cost increases, most Canadian employers have not addressed mental health issues in the workplace, according to the survey. For example, only 24% of employers in the Mercer survey said they would increase resources dedicated to disability management, while just 16% said they would identify and reduce stress factors in the workplace.

Conversely, 57% of employers said they had no plans to increase resources for disability management in the next 12 months, and 45% said they did not plan to identify and reduce stress factors in the workplace.

"There's a lot employers can do, but, unfortunately, there is a big gap between what employers can do and what they are doing," said Samira Kaderali, consultant with Towers Perrin in Toronto.

Employers are not taking action partly because they don't know what actions to take or how to approach their employees, said Mary Ann Baynton, director of CMHA's Mental Health Works program. "Managers are so afraid of doing or saying the wrong thing that they often do nothing at all," Ms. Baynton said.

According to the survey, 7% of

See CANADA/page 18

# Intervention key in battle against drug abuse

By MEG SHREVE

"I was driven by success," Bob Poznanovich said of his corporate rise.

By the time he was 30, Mr. Poznanovich was vp of sales at a Fortune 500 electronics company and was handling millions of dollars in sales and overseeing hundreds of employees. Up to that point, he had never used drugs, he said. But surrounded by new pressures, he began to use cocaine.

It wasn't until he had "almost lost everything" that he sought treatment for what had become a serious addiction.

Now, seven years later, he is president and chief executive officer of St. Paul, Minn.-based Addiction Intervention Resources, which handles interventions both in the home and workplace.

Mr. Poznanovich's story is not an unusual one, observers note.

According to the Hazelden Foundation, a nonprofit addiction recovery center in Center City, Minn., nearly 60% of adults know someone who has come to work under the influence of drugs or alcohol.

Furthermore, a study of 200 U.S. companies Hazelden conducted last year revealed that 89% of human resource professionals thought that treatment was an effective way to handle an employee's addiction. However, 54% of respondents said they lacked experience in identifying addiction, 36% had little experience in directing employees to treatment, and 25% believed that it was easier to terminate an employee than to assist him or her in finding treatment.

The survey prompted Hazelden to launch a campaign, "Making Recovery America's Business," aimed at educating employers about the toll that addiction takes on the workplace.

Chemical dependency entails many costs for employers, including those stemming from absenteeism, workers compensation, decreased productivity and increased medical insurance claims. For example, Hazelden estimates that chemical dependency costs U.S. employers $81 billion in lost productivity each year.

While many companies maintain drug-free-workplace policies and provide employee assistance programs and insurance benefits to help employees deal with addiction, the problem lies in getting employees to seek that help, observers say.

Cheryl Lowe, manager of human relations at Hazelden, said the key to addressing chemical dependency among employees is creating a culture in which workers feel safe seeking help. Employees are a "long-term investment," and companies should weigh the costs associated with replacing employees vs. helping workers overcome an addiction.

To help create such a culture, Ms. Lowe suggested that companies consider increasing benefits to pay for treatment and training supervisors and managers about the employee assistance programs and benefits available to workers. She added that once an employee has undergone treatment, the company should work to gradually bring him or her back into the workforce, through follow-up.

Employees "need to know, culturally, that they can see other people, access benefits, get treatment and return to work," Ms. Lowe said.

In Mr. Poznanovich's case, his co-workers and supervisors did not know how to help him seek treatment, he said. After he had left his employer, he found out that there had been numerous meetings about him among concerned co-workers, supervisors and customers. But he was never approached.

Mr. Poznanovich said no one in the workplace knew how to handle his addiction. If someone had urged him to seek help, he said, it would have been "a different story."

Companies, he said, should be "willing to take a risk to step forward."

## Taking action

One way to step forward is by conducting interventions.

Typically, some aspect of an employee's job performance will trigger concerns in a boss or supervisor, Mr. Poznanovich said. The company's human resources department will then get involved and decide how to respond, including by turning to a company such as Addiction Intervention Resources to conduct an intervention.

Such interventions begin with an assessment of the appropriate course of action, determining who will be involved, what treatment will be offered and how the meeting should be conducted, Mr. Poznanovich said. From there, the employee attends a meeting with the counselor, direct supervisor and human resources representative and is offered a chance either to seek treatment or resign. If the employee chooses the treatment route, Addiction Intervention Resources follows up with counseling for four to six months to ease the individual's transition back to work.

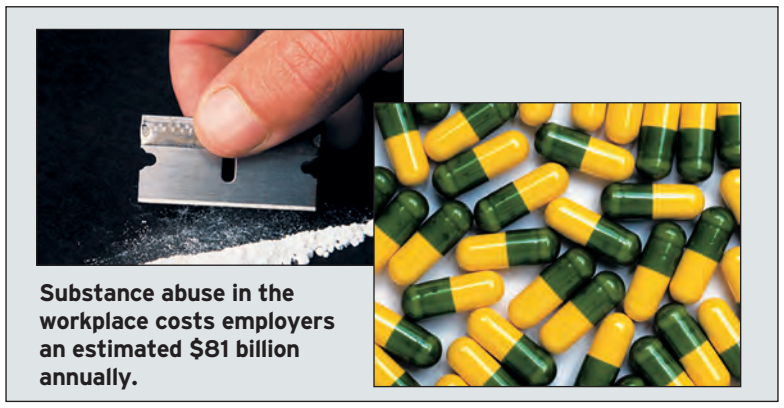
Companies may be "petrified to step in," Mr. Poznanovich said. But "a job is a powerful influence on a person."

Companies also rely on EAPs. These programs provide a range of services to help employees deal with a variety of personal problems, including chemical dependency.

But as Linda Bergthold, senior consultant in Los Angeles with Watson Wyatt Worldwide, notes, addiction remains "a taboo in the workplace to bring up." As a result, communicating what benefits an EAP can offer is key to helping employees, she said.

Ann Clark Associates, a San Diego-based EAP, tries to publicize its services by lunchtime seminars, fliers, newsletters, meetings with managers and an interactive Web site. President and CEO Ann Clark said her company is "very proactive" in helping employees to understand their benefits."

Employee assistance programs can also face limitations when employees have concerns about confidentiality, said Marie Apke, senior vp at Bensinger, DuPont & Associates, an EAP in Chicago. EAPs are, "in fact, very confidential," she added.



Substance abuse in the workplace costs employers an estimated $81 billion annually.

Bensinger, DuPont & Associates tries to increase accessibility—and allay fears about confidentiality—by allowing workers to contact the EAP online.

Providing direct access to counselors also is important, said Ken Larsen, president of AffinityCare Inc. in Wayzata, Minn. Seemingly trivial things like being put on hold can make an employee decide to hang up. "It can take very little for an employee to decide not to talk," he said.

Another company, Resources for Living Ltd. in Austin, Texas, tries to enhance accessibility by offering a "telephone-based treatment program" called New Start. Through the program, an employee seeks treatment over the telephone through scheduled counseling sessions, referrals to support groups and follow-up sessions. This approach allows the client to seek treatment while still working, a spokesman said.

One company attempts to spot problems—and assist with treatment—through employee drug testing.

ChevronTexaco Corp. in San Ramon, Calif., which has 50,000 employees worldwide, has an internal EAP staff that handles 1,200 to 1,500 cases each year. Of those, about 60 to 90 cases involve substance abuse, according to John Dillon Riley, ChevronTexaco's manager of employee assistance, work, life, health and productivity services. Most of those cases—about 80%—come from drug testing, to the extent allowed under various state laws, he noted.

As part of ChevronTexaco's drug-free policy, random drug testing is used to identify problems, especially in "safety-sensitive jobs," Mr. Riley said.

To encourage treatment, ChevronTexaco offers "very generous" benefits for substance and mental health issues, he said. Benefits are set at $25,000 for a lifetime; the first $5,000 is fully covered, while the rest is 80% covered.

After receiving treatment, workers sign a return-to-work agreement stating they will remain drug free for the next three years; those in safety-sensitive jobs pledge not to use drugs for their entire career at ChevronTexaco.

After the individual returns to work, he or she is expected to remain in touch with the EAP and submit to further drug tests, especially after vacations and weekends, Mr. Riley said. Mr. Riley said the company "approaches testing as a deterrent" and that it has seen a recovery rate of about 80% over the last 10 years.

Substance abuse, he said, poses risks not only to the individual's health but also to co-workers, the employer and, in ChevronTexaco's case, the environment.

"Everyone's got this problem, and you either address it or you don't," he said.

# Two ex-Benfield execs barred from soliciting former clients

By DOUGLAS McLEOD

**MINNEAPOLIS**—A federal judge has issued a temporary restraining order against two former Benfield Inc. officers accused by the broker of luring away clients after they quit to join rival intermediary John B. Collins Associates Inc.

U.S. District Judge Michael J. Davis granted Benfield's request last Tuesday for a restraining order against former Minneapolis-based Senior Vp David Moline and former Vp Mark Hagen.

On July 29, Mr. Moline submitted his resignation and those of Mr. Hagen and two other members of a six-member account service team that Mr. Moline headed. The team managed 15 Benfield clients generating about $3 million a year in brokerage revenues, court filings state.

The four Benfield officials immediately joined Collins' Minneapolis office, and Benfield charges in a lawsuit that Messrs. Moline and Hagen have violated their employment contracts by luring away several clients and recruiting other Benfield employees.

One client, Atlanta-based insurance holding company Atlantic American Corp., moved the business of two underwriting units to Collins within days of Mr. Moline's departure "to keep the relationship we have" with him, an Atlantic American official informed Benfield in correspondence filed in court.

In an affidavit, Benfield Executive Vp David Cameron charged that Mr. Moline alerted at least one client that he would be leaving Benfield and that Mr. Moline has tried to contact another client and a broker still working at Benfield.

The actions breached restrictive covenants and confidentiality provisions in the two men's employment contracts, according to Benfield's suit, which also charges them with breach of fiduciary duties.

The two other Benfield employees who resigned with Messrs. Moline and Hagen—former Assistant Vp Janna Hepper and Beth Briner—did not have employment contracts and are not named as defendants.

In their own affidavits, Mr. Moline and Mr. Hagen deny soliciting Benfield accounts or trying to convince co-workers to quit. Both say that they, Ms. Hepper and Ms. Briner decided independently to resign and join Collins.

Ms. Hepper also charges in an affidavit that Benfield officials have made disparaging comments to clients about the four former employees, including that they have "no integrity."

While noting that Minnesota law generally frowns on noncompete agreements, Judge Davis found that Benfield provided enough evidence of alleged breaches to justify a restraining order. Basing his order on the terms of the employment contracts, the judge ruled that Mr. Moline may service former Benfield accounts but may not solicit the business, and that Mr. Hagen may not solicit or service former clients.

The judge also said that the one-year period of the restrictive convenants in the contracts may be too long and that a reasonable period would be between three and six months.

The two sides met Wednesday for a settlement conference but came to no agreement. No further settlement talks are scheduled.

**Paul Winston**

*Editor Paul Winston's weekly column will return in the August 30 issue*

# Kemper: Acting CEO quits

Continued from page 4

continue to execute the initiatives contained in our runoff plan; we don't expect a change in CEOs to have an impact on our ability to do this," the company said.

"We hope (Mr. Coutu's) decision to resign won't negatively impact Kemper's day-to-day operations. We don't think that it will, because staff responsible for daily operations is still intact," Ms. Manna said.

In addition, Kemper pointed out that the management team below the CEO level "remains largely unchanged." Two of four members of Kenning's team are expected to retain their posts at Kemper indefinitely to assist in the runoff, according to a Kemper spokeswoman. They are: Doug Andrews, the chief operating officer to whom managers will report, and Benjamin Schwartz, transactional counsel.

**'We hope (Michael Coutu's) decision to resign won't negatively impact Kemper's day-to-day operations. We don't think that it will, because staff responsible for daily operations is still intact.'**

*Deirdre K. Manna*
*Illinois Insurance Division*

The resignation of Mr. Coutu comes after a period when brokers and policyholders have expressed concerns about tactics being employed by the insurer to add to its assets.

In recent weeks, some policyholders and brokers have voiced their disenchantment with some aspects of the runoff.

In particular, the Council of Insurance Agents & Brokers wrote to Ms. Manna to complain about certain issues related to the runoff, including Kemper billing policyholders to recoup dividend payments that the mutual insurer made in prior years, as well as recalculating loss adjustment expenses on cases up to 28 years old (*BI*, July 5).

While Ms. Manna declined to comment on the specific allegations in the Washington-based CIAB's letter, she did say that she was not sure that the descriptions of Kemper's runoff activities were entirely accurate.

Since the CIAB sent its letter in late June, several affected brokers have praised the willingness of Illinois insurance regulators to meet and discuss issues, said Ken A. Crerar president of the CIAB. Illinois regulators have pledged to maintain such communication.

Some current and former Kemper policyholders have said they would prefer that Illinois regulators take over the company and place it into liquidation (*BI*, Aug. 2). But supporters of the runoff, including Kemper executives, insurance regulators and some industry sources, say the runoff is in the best interests of policyholders because it reduces frictional costs such as attorneys' fees and costs.

"The whole scheme, however, was that the company would eventually go into liquidation," said Barbara Cox, assistant general counsel and assistant secretary of the Indianapolis-based National Conference of Insurance Guaranty Funds.

Ms. Manna declined to comment on that issue.

# Suits: Contingent commissions

Continued from page 1

vices while also collecting commissions from insurers based on the profitability, growth and volume of insurance placed with individual companies.

"Such payments destroy any objectivity that defendants have in advising their customers and constitutes a breach of their fiduciary duties," the complaints state.

The suits against Marsh and Willis were filed in San Diego County Superior Court, and the suit against Aon was filed in Los Angeles County Superior Court.

Each complaint seeks monetary relief and an injunction requiring the brokerages to adequately disclose to their customers the nature of the contingent commission agreements, among other things.

A spokeswoman for Marsh declined to comment on pending litigation, and a spokesman for Aon said the broker had not yet seen the complaint.

In a statement, Willis said: "Contrary to the assertions in the complaint, Willis discloses contingency agreements to its clients through its agreements, proposals, invoices and Web site. We stand by the services we provide our clients and are confident the complaint lacks merit. We intend to defend ourselves against these allegations vigorously."

A Willis spokesman also noted that, contrary to the complaint, which states that a "significant portion" of the brokerage's $665.0 million first-quarter revenues were derived from California business, less than 3% of Willis' total global revenues emanate from California. "Obviously, a small percentage of that is contingent commissions. So it's a small percent of 3%," he said.

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## Editorial

# Health cover tax credit promising

IS THE GLASS half full or half empty?

That is a reasonable question when evaluating a federal program that gives a generous tax credit to partially offset the cost of health insurance premiums for those who have lost their jobs due to foreign competition or for older individuals whose pension plans have failed.

The credit, known as the health care tax credit, can be used to pay 65% of the premium of any qualified health plan. Such plans include COBRA, plans sold by commercial insurers that are approved by state regulators and meet certain criteria, and those offered through state high-risk pools.

A key appeal of the HCTC is the way it is delivered. Since the credit's "advance refundability" feature kicked in a year ago, a beneficiary pays only 35% of the premium up front to the government, which then remits the full premium to the health plan chosen by the beneficiary. That feature is especially important to beneficiaries who have lost their jobs, as they may lack the cash to pay the full premium up front.

To be sure, enrollment in the program remains relatively small. At the end of June, only about 16,000 people—out of roughly 250,000 eligible—were enrolled in the advance refundable tax credit part of the program or were in the process of enrolling.

To some, that level of participation may seem disappointing. However, the enrollment rate is on par with the early years of other health care entitlement programs. Simply put, it takes time to get the word out.

And word has begun to spread, with HCTC enrollment steadily climbing over the last year. Consider that enrollment was only 6,300 in August 2003.

Additionally, we're encouraged that the interaction between health plans and the government has gone smoothly.

That said, there is room for improvement. Experts say some aspects of the program are too paper-intensive and that greater automation is needed.

Also worrisome is that even with a 65% discount, the premium may be too much for lower-income individuals to pay. Perhaps a higher level of subsidy is needed for those individuals.

And one gap in coverage clearly needs to be closed. Under current law, a beneficiary loses the tax credit when he or she becomes eligible for Medicare at age 65. If that person has a younger spouse, the spouse could not use the credit, without which his or her health insurance coverage could again become unaffordable.

But overall, we like what we have seen: a new insurance program has been created—with a minimal amount of bureaucracy—on a foundation of health care coverage plans, such as COBRA, that already exist.

The tax credit approach holds, we think, great potential for future expansion to cover more of the uninsured.

Such an expansion would ensure less cost-shifting for uncompensated care, in which providers and hospitals build such costs into what they charge group health plan members.

In addition, an expansion of the tax-credit program could reduce overall health care spending, as those with insurance are more likely to have health care conditions treated promptly, rather than waiting until the condition worsens and treatment becomes more expensive.

# Kemper changes offer new options

THE RECENT MANAGEMENT changes at Kemper Insurance Cos. should be taken as an opportunity for all sides to adopt a more positive approach to resolving the liabilities of the insurer as it pursues a solvent runoff.

As we have reported over the past several weeks, Kemper's runoff managers have won little goodwill through controversial efforts to maximize the insurer's assets. Those efforts, according to the risk managers and brokers who have had to deal with them, include attempts to recoup past policyholder dividends and to bill for services provided years ago.

While such efforts may be legal, they are hardly conducive to the kind of give and take that is necessary to a solvent runoff arrangement.

Policyholders who bought coverage from a well-known, adequately rated and well-established company would understandably bristle at some of the runoff managers' tactics when, at the same time, they are being asked to accept cents on the dollar for their legitimate claims.

Of course, policyholders also must accept the reality of the situation and understand that, to a certain extent, Kemper must seek to preserve its assets and take a firm, but ideally equitable, stance in its negotiations with all policyholders.

We hope that regulators, future runoff managers and Kemper's policyholders will take this opportunity to establish a professional and realistic approach to the runoff that will at least partially satisfy all parties, as well as avoiding a lengthy liquidation that would likely lead to more frustration.

## Schillerstrom


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# Terrorism threat demands proper planning

## Designating a response team, ensuring access to policies are among key preparations

By Donald V. Jernberg

No one wants to dwell on the potential for a significant terrorist attack on the United States in the near future, but officials are telling us that an attack is almost inevitable. There is reason to believe that the attempted attack may be tied to the elections this fall and will be aimed at maximizing damage to the American economy.

The ultimate amount of damages that companies may sustain from business interruption resulting from a terrorist attack will develop over time. For planning and decision-making purposes, however, senior management will need to promptly have a projected range of probable damages and some reasonable estimate of the likelihood and amount of any insurance recoverables.

In the aftermath of a significant terrorist event, many issues will need to be addressed. Just mobilizing the team, developing the plan and assembling necessary data for estimating likely damage ranges and insurance recoverables could take weeks. However, senior management may need the estimate in a matter of days to make important decisions.

Take some simple and inexpensive steps now to be far better prepared to provide the necessary assessments.

**1. Designate a team.** As a matter of sound contingency planning, create the team now. For many companies, the corporate risk manager—who should understand both the business interruption risk and insurance issues—would be a sound choice for assembling and directing the team. Second, the team should include one or more persons from the finance department who can identify and estimate likely economic damages from different scenarios. Depending on the nature of the company's business, the area of sales and production should be included.

Finally, the team should include a lawyer who has extensive experience in insurance coverage matters. The factual setting actually presented may well pose unique coverage issues. Simply having "a lawyer" on the team will not be enough. The stakes may be high, the issues unique and the pressures intense. An attorney with a depth of coverage experience and an understanding of insurance will be a valuable asset.

The situation likely will not be one where the company will be well served by an associate at a large law firm who is starting to learn about insurance. The designated lawyer should be an individual attorney, and that attorney should commit firmly to serve only a handful of companies on their insurance issues in the immediate aftermath of a terrorist event.

**2. Secure access to all of your insurance policies.** In order to assess potential insurance coverage, the policies will need to be readily accessible. As a matter of caution, a company should not assume that its offices would be immediately accessible in the aftermath of a terrorist attack. Power outages, contamination, threats of future attacks or general security concerns could all cause the corporate offices to be cordoned off.

Having a second copy of insurance policies in the hands of the brokers is not a solution. The offices of the brokers may be inaccessible. Also, brokers may have hundreds of clients vying simultaneously for immediate attention, perhaps while dealing with its own operational disruptions.

Placing copies of the policies at the offices of a major law firm may also not be a good choice. If the firm is located in a major metropolitan area, it may have significant business continuity and access issues of its own.

A solid strategy would be to make two complete sets of insurance policies and have one copy retained by the designated coverage lawyer and the other by the risk manager. Both individuals should maintain the policies at readily accessible locations outside of their offices and central business districts. Keeping copies of the policies at their homes may be a simple, effective solution to assure access under almost any scenario.

**3. Do preliminary planning and tasking.** Because the nature of any terrorist event and its impact on the business of a particular company is quite speculative, attempting to create a detailed contingency plan would probably be difficult and not cost-effective. However, some basic planning can be done. For example, a contact list, with home, cellular and other telephone numbers can be created. General areas where the company might be vulnerable to losses from business interruption can be identified and shared. In addition, key issues that might determine the availability of insurance coverage can be identified.

Businesses need to make reasonable preparations for a potential future terrorist attack. One fairly simple and straightforward step is to put in place a plan and structure for beginning to assess immediately the potential business interruption loss and insurance recoverables.

The prediction is that the United States and its economy are at increased risk of a near-term attack. Therefore, this is not an issue for study or future consideration—it needs to be handled now. Fortunately, the steps are simple and are not costly.

However, failing to take these basic steps may be costly and further complicate management's difficult task of assessing and effectively handling a post-attack situation.

*Donald V. Jernberg is principal of Jernberg Law Group in Chicago.*

# Seizure-related bite not a violent crime under comp

## Legal briefs

A police officer who was bitten by an HIV-positive man experiencing a seizure was not a "victim of a crime of violence" under the Colorado Workers Compensation Act, according to the Colorado Court of Appeals.

Michael Bralish, a police officer for the city of Thornton, Colo., responded to a scene where a man was experiencing a seizure. When Mr. Bralish arrived, the man was agitated, combative and yelling obscenities. Firefighters requested Mr. Bralish's assistance in restraining the man.

As Mr. Bralish attempted to handcuff the man, he bit Mr. Bralish's finger. Upon discovering that the man had hepatitis B and was HIV-positive, Mr. Bralish experienced a severe emotional and psychological reaction and was diagnosed with a permanent mental impairment. He filed for workers compensation benefits.

Mr. Bralish was subject to a statutory 12-week limitation on mental impairments unless he qualified for an exception to the limitation as a "victim of a crime of violence." An administrative law judge determined that Mr. Bralish was subject to the 12-week limitation, and that decision was appealed.

The appellate court said that the man who bit Mr. Bralish had not acted with any conscious objective or intent. Thus, the court said that Mr. Bralish could not demonstrate that the man violated any public law or would be liable for punishment for his action. The court also pointed to evidence that the man's seizure prevented him from controlling his actions. Therefore, the court was satisfied that Mr. Bralish's injuries were not the result of a crime of violence and that his entitlement to benefits for mental impairment was subject to the 12-week limitation.

*Bralish vs. Industrial Claim Appeals Office,* June 5, 2003, rehearing denied July 24, 2003, certiorari denied Jan. 12, 2004 (*BI*/01/Au.-$10)

### Medical exam-related injury compensable for comp purposes

A workers compensation claimant's injury from attending a medical arbiter examination arose out of and in the course of employment and, thus, was compensable, according to the Court of Appeals of Oregon.

Rodney McAlery injured his knee in 1994 and received workers compensation. He had corrective surgery and was declared medically stationary, receiving 18% scheduled permanent disability. He then requested reconsideration on the grounds that the award did not adequately compensate him. Mr. McAlery was then required to attend a medical arbiter examination, with failure to attend resulting in suspension of benefits. At the exam, the examiner performed tests on Mr. McAlery, including hyperextending his leg, causing a lateral meniscus tear. Nevertheless, the examiner recommended a reduction in his benefits. Mr. McAlery appealed, seeking reinstatement of the original level of disability and compensation for the examiner-inflicted injury. Although his original level of disability was reinstated, he was denied compensation for the additional injury. Mr. McAlery appealed the decision.

The appellate court concluded that the injury sustained by Mr. McAlery in the exam arose out of and in the course of his employment. The court emphasized that the predicate for the examination where the injury occurred was a work-related injury that entitled Mr. McAlery to receive compensation. The court noted that had he not complied with the request for the exam, his benefits would have been suspended. In addition, the court said participating in the examination was not an act performed by Mr. McAlery for personal reasons unconnected to his employment. Thus, the court said that his claim was compensable.

*McAlery vs. SAIF,* Court of Appeals of Oregon, Nov. 26, 2003 (*BI*/01/Jy.-$10)

### Policy's exclusion not limited to current employees

Because of the wording of an exclusion, a business owner's insurance policy for personal injury did not provide coverage for a defamation suit brought by a former employee of the policyholder, according to the Court of Appeals of Oregon.

Clinical Research Institute of Southern Oregon purchased a "Kemper Premier Businessowners Special Policy" from Kemper Insurance Cos. in May 2000. The insurance policy included coverage for commercial liability, which covered damages because of "personal injury."

In July 2000, Lori Hagler, a former employee, sued the institute, claiming damages for interference with economic opportunity based on its conduct after Ms. Hagler's termination in January 2001. She based her claim on a letter sent by the institute to her prospective employer, which she alleged contained false and defamatory information. The institute tendered the defense of this suit to Kemper, which declined to defend. The institute then filed suit, seeking a declaration from the court that Kemper had a duty to defend it in Ms. Hagler's suit. The trial court ruled for the insurer.

The appellate court said that an exclusion in the policy for injury from "employment-related" practices was not limited to conduct directed at current employees; rather, it included a former employee's claim for defamation based on the letter sent by the insured to a prospective employer. The court emphasized that the term "employment-related" was not limited to practices, policies, acts, or omissions that are directed at current employees. The trial court decision was affirmed.

*Clinical Research Institute vs. Kemper Insurance Cos.,* Court of Appeals of Oregon, Jan. 28, 2004 (*BI*/04/Jy.-$10)

*These abstracts were prepared by Mayo H. Stiegler. Copies of these decisions are available, at $10 each, by sending a check payable to Mayo H. Stiegler, to Business Insurance, 360 N. Michigan Ave., Chicago, Ill. 60601-3806. Please provide the listed number for each opinion ordered.*

# Comings & Goings-Buyers

**Suzanne Molinari** has been appointed vp of human resources for Keenan & Associates, a Torrance, Calif.-based insurance brokerage.

Ms. Molinari is responsible for the entire human resources department, which includes employee benefits and compensation, recruiting and retention, leadership development, performance management and organizational management. She reports to Dave De Wenter, Keenan & Associates' chief operating officer.

Ms. Molinari replaces Pamela Rhoden, who left the company to pursue other opportunities.

Prior to joining Keenan, she most recently served as director of human resources at San Francisco-based Blue Shield of California.

Ms. Molinari earned a bachelor of science degree in human services with an emphasis in management from Lesley University in Cambridge, Mass. She also earned a master of business administration degree from Pepperdine University's Graziadio School of Business & Management in Los Angeles.

* * *

**Michael Cardenas** and **Christine M. Kocot** have been named to the risk management department at Ascension Health, a St. Louis-based nonprofit health system.

Both report to James K. Beckmann, senior vp and chief risk officer.

Mr. Cardenas has been appointed senior director and litigation counsel, while Ms. Kocot has been named director and litigation counsel. Both are responsible for managing all professional, employment practices, directors and officers and general liability claims, as well as litigation for Ascension Health and its affiliated organizations.

Previously, Mr. Cardenas served as general counsel and corporate compliance officer for St. Anthony's Medical Center in St. Louis. He earned a bachelor of arts degree in history as well as a master's degree in health administration and a juris doctor degree from Saint Louis University.

Ms. Kocot previously served as a partner for Armstrong Teasdale L.L.P., a law firm based in St. Louis. She has a bachelor of science degree in business marketing from Eastern Illinois University in Charleston and a J.D. from SLU.

* * *

**Paige Riveron** has joined Knight Ridder Digital, an online news service provider based in San Jose, Calif., as vp of human resources.

Ms. Riveron's responsibilities include employee benefits, compensation, staffing, performance management and organizational development.

She replaces Elizabeth Drewry, who recently retired.

Before joining the company, Ms. Riveron she served as director of human resources of Knight Ridder's Shared Services, a Miami-based financial services support provider for Knight Ridder companies.

Ms. Riveron earned a bachelor of arts degree in business administration from the University of Miami in Coral Gables, Fla., and a J.D. from the University of Miami School of Law.

*We'd like to report on staff changes in your organization's risk management, safety and benefits departments. Contact Carrie A. Brittain, Business Insurance, 360 N. Michigan Ave., Chicago, Ill. 60601; phone: 312-649-5313; fax: 312-649-7801; e-mail: cbrittain@businessinsurance.com.*

# Commentary

## *Ensuring a hit for reality TV*

Reality TV programming may eventually go the way of "The Gong Show," but right now it's looking like an inexhaustible genre.

The lineup has expanded from a mere handful of shows a few years ago to a coaxial cableload today. The Fox network is planning a whole new reality channel (distinct from Fox News, which only appears to do reality programming) to broadcast all reality shows, all the time. It would be the third such channel available to reality-starved viewers.

The shows have unlimited potential because they have a wide world of human drama to exploit: from mescal worm-eating to wife-swapping; from the trials of attractive people stranded in the Amazon, Australia and Palau to the trials of different attractive people stranded in the Marquesas, Thailand, and the Pearl Islands. Plus Donald Trump.

**Douglas McLeod**

With the major networks and scads of cable channels scrambling for new concepts, there is probably no corner of American life that will go unplumbed by one show or another. We'll all have our 15 minutes of reality.

That's why I'm glad that The Insurance Channel (check your local listings) is developing its own slate of reality shows for the 2005 season.

Leading the schedule, network executives say, will be "Survivor: Hartford," in which five insurance company CEOs battle each other to produce the best quarterly results while chained by the ankle to a casualty actuary.

Contestants face a series of challenges, including trying to control their actuaries during stock analyst conference calls announcing huge drawdowns of unneeded asbestos reserves. The CEOs' mettle will be tested again as they order their underwriters to grab market share in anesthesiologist malpractice and California workers comp programs. The final hurdle will be a three-legged race through downtown Hartford to a fundraiser for Rep. Nancy L. Johnson, R-Conn.

CEOs face disqualification for assaulting an actuary, and rumors are rampant that one contestant brandishing a Callaway driver will be forced out near the end of the contest.

Next up on the schedule is "South by Southeast," in which eight small business owners bankrupted by a bogus offshore health insurer race to find the Dominion of Melchizedek, the fictional nation where the insurer is supposedly based.

Is Melchizedek, as some documents suggest, on an island off the coast of Colombia that until now has been known mainly as a nesting ground of the masked booby? Or is it, as many believe, located on the rapidly melting Larson B ice shelf in Antarctica?

The show will follow contestants on an exciting sprint through Patagonia to the Strait of Magellan and beyond. If the Dominion is found—and producers won't reveal the surprise finish—the winner will receive $3 billion in Melchizedek government bonds and cash to cover unpaid medical bills.

Also in the lineup is "The Gold Watch," in which five retirees from the same company move with their spouses to an idyllic golfing community near Kiawah Island, S.C.

Viewers will get a close and sometimes uncomfortable look at the lives of these retirees as they shift from worrying about golf to worrying about the accounting scandal that has engulfed their former employer, obliterating the value of company stock in their 401(k)s.

As the couples struggle to scale back, their former employer sues to terminate their health benefits. And, in a final test of strength, contestants learn that the company is dumping its underfunded pension plan on the PBGC.

Audience members will vote on which couple holds up best under the onslaught. The winners will receive a certificate of appreciation from the chairman of the SEC.

Insiders at The Insurance Channel are holding out high hopes for their final entry, "Heir Apparent." In this show, a dozen senior executives of American International Group Inc. will compete to avoid being the last to leave AIG to head a rival insurer. The show will follow contestants as they strain to keep combined ratios under 100%, expand volume, deflect the legendary tirades of AIG Chairman Maurice R. Greenberg and have lunch with executive recruiters. The last AIG official remaining will be promoted to vice chairman.

Producers are already planning a second installment of "Heir Apparent," in which contestants will be members of the Greenberg family.

Network executives expect big things from their reality lineup, but they're developing a couple of replacement shows. These include "Extreme Makeover: Property/Casualty Edition," focusing on a cadre of Kemper Insurance Cos. runoff specialists; and "Crop Insurers in the City."

I can hardly wait.

*Senior Editor Douglas McLeod can be reached at dmcleod@businessinsurance.com.*

# Comings & Goings-Industry

**Mr. Bartlett**

**Mr. McDonnell**

**Mr. Jaramillo**

### Agents/brokers

**Steve Bartlett** has been appointed managing director of the Horsham, England-based wholesale division of Heath Lambert Insurance Services. Previously, Mr. Bartlett was marketing director at Heath Lambert.

New York-based Willis Group Holdings Ltd. has named **John McDonnell** executive vp and director of Willis' Japan Services Business in North America. Previously, Mr. McDonnell was a managing director at Marsh & McLennan Cos. Inc.

### Insurers

**Jonathan Jaramillo** has been named senior vp in New York Life Insurance Co.'s agency department. Previously, Mr. Jaramillo was senior vp of the Northeast region.

**Rob Fishman** has been named president of U.S. insurance for Quanta U.S. Holdings Inc., a unit of Bermuda-based Quanta Capital Holdings. Previously, Mr. Fishman, who will be based in New York, was executive vp and chief underwriting officer of Zurich North America.

Chattanooga, Tenn.-based UnumProvident Corp. has named **Roger Edgren** executive vp of field sales. Previously, Mr. Edgren was a senior vp with Palmer & Cay Inc.

### Reinsurance

**Susan L. Cross** has been named chief actuarial officer-nonlife reinsurance for Hamilton, Bermuda-based XL Capital Ltd.'s reinsurance operations. Ms. Cross will continue in her post as chief actuary for XL Re Ltd.

XL Re Europe has named **Bertrand Romagné** senior vp and head of the property treaty department. Mr. Romagné previously was vp of the reinsurer in Le Mans, France.

Minneapolis-based reinsurance intermediary John B. Collins Associates Inc. has named **David Moline** as senior vp. Previously, Mr. Moline was a senior vp at Benfield Group.

### Managed care

Philadelphia-based CIGNA Corp. has named **Dr. W. Allen Schaffer** to the new post of senior vp and chief clinical officer of its public affairs unit. He joined CIGNA in 1993 as national medical director.

### Other providers

The Tillinghast unit of New York-based Towers Perrin has named **Peter Gentile** national director of business development in its property/casualty insurance practice. Previously, Mr. Gentile was president and chief executive officer of Gerling Global Financial Products Inc.

*Business Insurance would like to report on senior-level changes at commercial insurance companies and service providers.*

*Please send news of recently promoted, hired or appointed senior-level executives to: Joe Walker, Business Insurance, 360 N. Michigan Ave., Chicago, Ill. 60601-3806; jwalker@businessinsurance.com.*

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### Trade talks to include U.S. insurers' concerns about state-run company

# Japan mulling changes to Kampo

By MICHAEL BRADFORD

**TOKYO**—Japan's huge government-run insurer may soon lose some of the competitive advantages that private insurers have long wanted eliminated.

While the Tokyo-based Postal Life Insurance Service, which enjoys government financial backing and tax advantages, has mainly been seen as a threat to life insurers, it also has worried property/casualty companies. Both domestic and foreign nonlife insurers have expressed concerns that Postal Life, nicknamed Kampo, could expand into their markets, creating an unbalanced playing field that would make it hard for private insurers to compete.

"There is that concern," said David Snyder, vp at the American Insurance Assn. in Washington. Insurers, he said, are worried that Kampo could expand into personal property/casualty lines and, eventually, into commercial lines. "When you have an entity like this, it has an insatiable appetite," Mr. Snyder said.

Kampo wrote 14.317 trillion yen ($129.68 billion) in premiums in 2002, the most recent year for which information is available.

Kampo gave insurers a start a few years ago when it began selling its first nonlife insurance product, in the form of coverage for moped owners (*BI*, Aug. 14, 2000). Since then, the insurer has expanded no further into nonlife business.

Insurers' concerns could soon be allayed, though.

The Diet, Japan's parliament, is expected to consider legislation next year that would reshape the country's postal system and could privatize the insurer so that it would be subject to the same regulation as other insurers.

See KAMPO/next page


PHOTO: REUTERS LIVE

**Claims and liability issues surrounding the deadly blaze at the Ycua Bolanos shopping center near Asuncion, Portugal, remain unclear as authorities investigate the center's safety practices.**

# Mapfre writes cover for Paraguayan mall gutted in deadly fire

**ASUNCION, Paraguay**—The owner of the Paraguayan shopping center where about 400 people died in a fire earlier this month has property and liability coverage written by a local unit of Corporación Mapfre S.A. in Madrid, Spain.

However, liability and claims issues remain unclear as officials investigate the shopping center's safety practices.

The fire, whose cause is not yet known, occurred Aug. 1 in a three-story Ycua Bolanos center near Asuncion, Paraguay.

A Mapfre spokesman in Madrid confirmed that the owner of the shopping center is covered for property damage and civil liability under a policy issued by Mapfre Paraguay Compañía de Seguros S.A. in Asuncion.

He said the insurer does not have a loss figure, but said that the civil liability limit bought by the owner was $80,000 regardless of the number of victims. The Mapfre spokesman also declined to estimate the property loss but confirmed that the building was destroyed.

The policy was reinsured by Corporación Mapfre Compañía Internacional de Reaseguros S.A. in Madrid, which ceded some of the risk to "the usual big companies in the reinsurance market," the spokesman said.

He stressed, though, that it remains unclear whether the shopping center's owner, Juan Pio Paiva, followed safety regulations, noting that issue could have an impact on whether the insurer must pay certain claims.

Mr. Paiva was charged with involuntary manslaughter Aug. 3 after security guards at the center claimed they were ordered to lock exit doors during the fire to prevent looting. The Mapfre spokesman noted that this is only part of the investigation into the shopping center's safety practices.

Mapfre plans to release more information on the claim when it issues quarterly results in October but does not expect any loss to have a significant impact on the company, the spokesman noted.

*—By Peta Miller*

# Directors of trust for asbestos claims get liability shield

By ELIZABETH FRY

**SYDNEY, Australia**—Directors of the fund created to pay the asbestos-related liabilities of James Hardie Industries N.V. should be temporarily protected from any personal liability to allow the fund to continue to pay claims, the New South Wales Court of Appeal ruled earlier this month.

The directors of the Medical Research & Compensation Foundation, which independent actuaries have deemed to be massively underfunded, sought the court protection because they could not obtain directors and officers liability insurance.

In its ruling, the court determined that claimants on the fund would be better served if the directors continued to serve and administer payments from the fund, than if they resigned and the fund was placed in provisional liquidation.

The foundation was established with $293 million Australian ($154 million) in February 2001 by James Hardie Industries Ltd., a major Australian building supplier then based in Sydney that had significant asbestos exposure until the 1970s. Accusations by unions and asbestos victims groups that the company avoided its responsibilities by shortchanging the foundation, relocating to Amsterdam, Netherlands, and restructuring as James Hardie Industries N.V. prompted the formation of a commission of inquiry in February to look into the trust's shortfall, currently projected at $2.0 billion Australian ($1.44 billion). The commission is due to report its findings next month.

The four directors—MRCF Chairman Sir Llew Edwards, Managing Director Dennis Cooper and Directors Ian Hutchinson and Peter Jollie—sought court protection against being held personally liable for payments to asbestos victims in the event that the fund exhausts its resources.

At the hearing, Chief Justice James Spigelman ruled that, under Australia's Corporations Act 2001, the court could offer retrospective protection from liability for the directors and ordered that they be shielded from liability through the time of the Aug. 6 order. The judge also ruled, though, that the directors could apply for retrospective protection again in December 2004.

In addition, Justice Spigelman ruled that, under the law, the court should encourage the preservation

James Hardie

of companies and avoid their costly winding up.

"The court is obliged to adjourn an application for a winding-up order and not to appoint a provisional liquidator in the case of a company under administration if it is satisfied that it is in the interest of the creditors to remain under administration," he said.

Justice Spigelman acknowledged that the decision not to liquidate the fund raised the possibility that present creditors would receive a benefit at the expense of future creditors. "The extent to which future creditors would be disadvantaged would be small on a per-capita basis. On evidence before the court, the expenditure of the trust is running at about $5 million per month, and the amount that will be paid out will be $30 million…and this has to be contrasted with the estimates of the total present and future liabilities of the foundation, of which the overwhelming majority concern future liabilities."

In addition, a lengthy liquidation would likely lead to delays in payments, and that would likely mean "that a number of people who would otherwise receive awards and die with the knowledge that their families are provided for would die without that certainty," Judge Spigelman ruled.

# World Updates

## AXA posts gains in first half

AXA S.A. recorded net income of 1.44 billion euros ($1.75 billion) for the first half of 2004, up from 200 million euros ($230.0 million) for the year-earlier period, when its profits were held down by a 1.1 billion euro ($1.27 billion) charge related to investment losses, as well as by currency exchange fluctuations. AXA's revenues for the half rose 2.4% to 37.30 billion euros ($45.33 billion).

## Alternative risk finance expected to grow

Half of European risk managers expect to increase their use of alternative risk financing over the next five years, according to a survey. ACE European Group surveyed the risk managers of 502 companies in Belgium, France, Germany, Italy, the Netherlands, and Spain. In other findings, 60% of the risk managers reported seeing a trend toward greater spending on risk management rather than on insurance premiums. In addition, nearly half of the risk managers said that their local insurance market does not adequately meet their coverage needs.

## RSA investment charge leads to net loss

A £189 million ($347.9 million) charge for short-term investment fluctuations led Royal & SunAlliance Insurance Group P.L.C. to post a net loss of £65 million ($119.7 million) for the first six months of 2004. London-based RSA recorded net income of £103 million ($168.9 million) for the comparable period of 2003. Net property/casualty premiums fell 31% to £2.49 billion ($4.58 billion) in this year's first half, while net life premiums declined 27% to £553 million ($1.02 billion).

## Briefly noted

A.M. Best Co. has upgraded its rating of **Lloyd's of London** to A from A-. Best said the upgrade reflects Lloyd's improving capitalization and strong operating performance, among other factors....Meanwhile, Lloyd's said it is opening an **office in Los Angeles** to develop West Coast business in the United States. The office will be headed by Tony Joseph, currently a senior vp at Guy Carpenter & Co. Inc....**Hannover Reinsurance Co.** posted a profit of 211.5 million euros ($257.3 million) for the first half of 2004, up 30.2% over the year-earlier period. Gross written premiums, though, fell 19.8% in the first half of 2004, to 4.80 billion euros ($5.84 billion), due in part to a strategy to reduce its premium volume.

# Kampo: Japanese government may privatize insurer

**Continued from previous page**

In talks scheduled for Aug. 20 in Tokyo between representatives of the U.S. and Japanese governments, the American delegation will press the case for the privatization of Kampo. The delegation will be led by the U.S. Office of the Trade Representative, while Japan's Financial Services Authority and other agencies will be on hand.

Insurers will be closely watching the talks, which are held yearly as required by agreements reached in the mid-1990s.

Kampo, which was set up in the early 1900s as a way to serve remote populations by selling insurance from post offices, has grown into a behemoth of a competitor with several unfair advantages, said Brad Smith, managing director of international relations at the American Council of Life Insurers in Washington.

"It is in direct competition with private insurers but doesn't pay taxes," he said. "It doesn't pay into a guaranty fund. It is backed not by a guaranty fund but by the good faith of the government. And they market that," Mr. Smith said, by promoting government backing as far superior to that of private companies.

In addition, "our producers have to be licensed," he said of the association's private company members operating in Japan, while any postal employee can sell Kampo products.

Although the trade discussions will encompass several topics, the privatization of Kampo is "the marquee issue," said an official with the U.S. Office of the Trade Representative. He said the U.S. agency will express its views on the importance of creating a level playing field among insurers writing coverage in Japan.

**Kampo 'is in direct competition with private insurers but doesn't pay taxes....It doesn't pay into a guaranty fund. It is backed not by a guaranty fund but by the good faith of the government. And they market that.'**

*Brad Smith*
*American Council of Life Insurers*

Another issue expected to be discussed is the oversight of largely unregulated insurance cooperatives called "kyosai," which write both personal lines and commercial coverages. Such cooperatives are formed for workers who engage in similar work, for residents of particular regions or for groups with other similar characteristics. The membership pays into a pool of funds that is used to provide disaster, death or accident benefits.

Many of the cooperatives are not subject to regulatory supervision and do not participate in any guaranty arrangements.

Some large kyosai, such as those that are formed as agricultural cooperatives or for groups of businesses, are subject to government regulation. They are, however, exempt from Japan's insurance law.

Mr. Smith said some "creative minds have set up unregulated insurance companies" by banding together groups with tenuous connections. The kyosai sometimes choose names that are confusingly similar to those of reputable insurers, he added.

They write "all kinds of coverage—property/casualty and life—and should be subject to some (insurance) regulation," Mr. Smith said.

The AIA's Mr. Snyder pointed out that some U.S. regulatory issues will also be discussed during the talks.

"The discussions are a two-way street," he said, noting that the two sides are expected to talk about the lack of uniformity in state insurance regulation and issues around rate regulation in the United States.

# Mold: Liabilities creeping up on commercial lines

Continued from page 4

at Cozen O'Connor Subrogation Consultants Inc. in West Conshohocken, Pa.

Mold endorsements limiting property coverage to $10,000 have been approved in 42 states and the District of Columbia, according to the Jersey City, N.J.-based Insurance Services Office.

When in court, insurers are more successfully arguing that lucid policy language precludes coverage for mold, lawyers say. In the June 2003 case of *Fiess vs. State Farm Lloyds*, for instance, a Houston federal court deemed State Farm's mold exclusion "clear and unambiguous" and dismissed the plaintiffs' claims for statutory and common law bad faith.

In addition, "personal-injury mold claims aren't the jackpot bonanza people once thought they were," according to Barry J. MacNaughton, a business and commercial litigation attorney and partner at the Beverly Hills, Calif.-based law firm of Ervin, Cohen & Jessup L.L.P.

A closely watched case last month involving claims of serious bodily injury from mold exposure saw an Orange County, Calif., jury deliberate for less than 30 minutes before determining not only that the homeowners had lost the suit but that they would have to pay the general contractor's court fees.

Industry experts generally agree that the homeowners mold crisis peaked in 2002. But they note that the mold problem afterward began to creep into the commercial arena, where it now appears to be proliferating.

According to Mr. Stewart, though the insurance industry has reduced first-party claims, "third-party liability claims are not going away and are slowly trending upward."

Commercial and public property insurers of schools, churches, apartment and municipal buildings can anticipate mounting mold claims, Mr. Stewart said.

Mold litigation in commercial lines increasingly arises out of construction defect claims that implicate a number of parties, from the builder to the landscaper to the building materials manufacturer, lawyers say. Class-action mold suits are also gaining ground, and cases are also no longer confined to mold hotspots such as Arizona, Florida and Texas but are scattered across the nation, they say.

A $400 million mold lawsuit is pending in New York State Supreme Court, after the management board and unit owner in a luxury Park Avenue building in December 2002 sued the building's architects, engineers and developer, alleging that mold had caused property damage and health problems.

In April 2003, Hilton Hotels Corp. brought a suit against 18 companies and individuals over alleged construction defects to the $95 million Kalia Tower in Waikiki's Hilton Hawaiian Village complex. The 25-story building was forced to close for over a year due to an infestation of mold.

Despite such large commercial mold cases, Alex Robertson—a Calabasas, Calif.-based attorney who specializes in toxic mold litigation and routinely lectures around the country on commercial mold issues—said he has witnessed a "shocking amount of lack of sophistication on the part of large property owners" in dealing with mold.

"Today's plaintiff could be tomorrow's defendant," Mr. Robertson said. Large property owners must protect themselves against claims from employees, vendors and guests on their properties, he said, but many are only now "starting to sit up and realize that they need some serious risk management."

Fortunately for buyers of commercial policies, more insurers are offering mold coverage, brokers say.

"A couple of years ago, carriers were hit really hard—the loss history was so great because of mold and other factors," said Gary Rodrigues, senior vp and managing director for the environmental practice of Willis Group Holdings Ltd. in Boston. But "carriers are now stepping back in, very carefully," Mr. Rodrigues said.

Concurrently, insurance buyers are becoming savvier when it comes to their mold-related exposures, insurers say.

Marcel Ricciardelli, senior vp in the environmental unit of XL Insurance Inc., said he is "currently getting a lot of requests" to purchase mold insurance as an extension of coverage. "Among our commercial real estate client base, coverage for mold is in excess of about 60%," he said.

Changes in the mold marketplace have even altered business for contractors offering mold remediation services, who say they are witnessing a shift from single-family home cleanup operations to large residential buildings and businesses.

Bay Shore, N.Y.-based TradeWinds Environmental Restoration Inc., with a staff of 200 and pre-approved contracts with almost 30 insurance companies, has in recent years been handling an increasing number of commercial jobs that at times have cost as much as $8 million, according to Michael O'Reilly, Trade-Winds' CEO.

Nonetheless, earlier predictions that mold would surpass asbestos in volume of cases and size of awards—such as that made by the American Bar Assn. Journal in late 2001—are no longer seeing support.

Scientific studies have not yet conclusively linked mold to serious life-threatening problems. A National Academy of Sciences analysis released this May stated that while mold can cause respiratory problems in individuals with allergies or compromised immune systems, it found no evidence that mold causes cancer, brain damage or chronic fatigue.

"The bottom line is that asbestos does cause very serious health problems, which science proves, but most molds, at the current level of science, are not known to be damaging to health," said Sean F. Mooney, senior vp and chief economist for Guy Carpenter & Co. Inc.

"Mold is not a litigation that has existed a long time, and already the claims are lessening," said Patrick Perrone, a partner at the Newark, N.J., law firm of McCarter & English L.L.P. "It started out very hot, but it's getting colder and colder all the time."

# PBMs: Greater transparency demanded

Continued from page 1

ting a good deal, observers say.

As a result, many frustrated benefit managers are using more frequent audits to obtain information on sources of PBM income derived from their prescription drug plan utilization, which they plan to use as ammunition in subsequent renewals.

But a few persistent benefit managers, and some of the smaller PBMs untainted by lawsuits or investigations, are capitalizing on the situation.

Because of all the bad press, "employers are getting more interested in looking under the hood of their PBMs," said Sean Brandle, a vp with The Segal Co. in New York. "People are reading about the scrutiny. They really do want to have a feeling that they're getting what they're supposed to be getting."

The PBM industry has been on the defensive since government statistics revealed at the beginning of this decade that prescription drug costs are among the greatest contributors to the rising cost of health care. At first, pharmaceutical manufacturers were blamed, but the focus has shifted toward PBMs, some of which had been closely tied to the pharmaceutical industry.

But the attacks did not subside even after drugmaker Merck & Co. Inc. spun off Medco Health Solutions Inc. in August 2003. Probes into PBM industry practices as part of numerous civil suits and investigations by 20 state attorneys general revealed that, even without an ownership relationship, PBMs were still benefiting from their drugmaker links by accepting rebates for certain brand-name drugs that were given preferential treatment on plan formularies.

The PBM industry has repeatedly denied that rebates have any influence over their choice of formulary drugs, most recently promoting a Harvard Business School study that found generic substitution rates among PBMs are similar to those of retail pharmacies.

After settling a lawsuit brought by attorneys general in 20 states for $29 million earlier this year, Medco, the nation's largest PBM, launched a national rebranding campaign aimed at educating the public about how PBMs work.

"We had done a lot of research that indicated that not only did many companies not know who their PBM was, but what a PBM did," explained Jack A. Smith, senior vp and chief marketing officer for Medco in Franklin Lakes, N.J.

But as Medco works to define its brand, the nation's second- and third-largest PBMs, Nashville-based Caremark Rx Inc. and St. Louis, Mo.-based Express Scripts Inc., are embroiled in litigation, leaving them vulnerable to attack. Neither of those PBMs agreed to comment for this article.

In defense of the PBM industry as a whole, the Washington-based Pharmaceutical Care Management Assn. has issued press release after press release touting numerous pro-PBM studies, including one they hired PricewaterhouseCoopers L.L.P. to perform that showed PBMs will save employers $1.3 trillion over the next decade.

"Our feeling is the more employers and our other clients know about the value PBMs add, the more they will like PBMs and the better position we're in," said Mark Merritt, PCMA president.

In March, the PCMA sued the state of Maine and succeeded in overturning a 2003 law that would have made PBMs fiduciaries, and it is lobbying hard against a pending set of bills in Michigan that would require uniform pricing among mail order, chain and community pharmacies, asserting that the bills would eliminate price competition and cost employers $124 million annually.

## A call for transparency

The PBM industry also is responding to the demand for greater transparency by developing new products or business models, according to the Pharmacy Benefit Management Institute.

Among the most common changes are: eliminating so-called "spread pricing" in which the PBM negotiates lower rates with retail pharmacies but does not pass on these lower rates to employers; identification and sharing of all drug-specific rebates; and elimination of certain revenue sources that may be considered a conflict of interest, such as rebates or other incentives provided by pharmaceutical manufacturers to promote certain drugs.

But transparency has its price: Because it may result in the elimination of certain revenue sources, PBMs are charging higher administrative fees. In fact, the PCMI has estimated that full transparency would result in a 7% increase in the overall cost of prescription drugs for employers.

"They're taking the rebates away," said one benefit manager for a large Midwest manufacturer who asked to not be identified. Instead, the PBM with which she is currently negotiating is offering to provide bigger discounts on preferred brand-name drugs and reduce administrative fees, she said.

But by changing the way it bills for its services, "they're trying to tell me that I'll do better, but I doubt it, and there's no way I can figure it out," she said.

"A lot of PBMs are still struggling with the transparency-of-pricing issue," said Steve Ashley, vp-consulting services at Ultralink in Costa Mesa, Calif. "When they open their books, a lot of employers will be shocked to see what they've been paying for."

But even though PBMs continue to be coy, members of the Pacific Business Group on Health are taking whatever information they can get and using it as best they can, according to Emma Hoo, director of value purchasing for the San Francisco-based employer coalition.

"I think it's been understood in the past that there were these components to be negotiated, but now with the transparency proposals that are on the table, there's a better understanding of how the components play off of each other and where there are opportunities," she said. "It's not just the discount off average wholesale price, but what's on the MAC (maximum allowable cost) list, what's the generic discount, what's the value of rebates—all the different pricing components."

In their current negotiations with PBMs, some benefit managers "might elect to leave the contract structure the same (and) increase their audit rights to assess" utilization patterns for their specific plans, Ms. Hoo said. Then they can use the information culled from the audits to obtain a better deal next year, she said.

But some insistent benefit managers are making inroads. Louisiana, for example, included in its request for proposal for a three-year contract to provide pharmacy benefits to state employees, language that would make the PBM a fiduciary—the same language included in the Maine statute that was overturned.

"We were really pushing for transparency in our program. We wanted all the revenue to flow to our program. Our intention was the PBM would be compensated for claims adjudication services and providing a network. We wanted rebates, administrative sharing agreements, anything else undefined out there to flow to us. In an effort to promote that, we took the fiduciary component of the Maine law concerning PBMs and put that in our RFP. We made them agree to be our fiduciary," explained Kip Wall, chief executive officer of the state's Office of Group Benefits in Baton Rouge, La.

"We certainly act as a fiduciary on behalf of the state of Louisiana, and we're prepared to do that for other states as well," said David Blair, chief executive officer of Catalyst Rx, the Rockville, Md.-based PBM that won the state's business. "It's pretty simple for us to do that because we've always had the philosophy that we work for the employer group, that that's our client, and every decision that we make needs to be based on their best interests."

Catalyst Rx is just one of the smaller PBMs that has been benefiting from the negative publicity involving the industry's three largest players.

"The smaller PBMs are getting more attention because of the large PBMs' troubles," acknowledged Roxann Kerr, vp at benefits broker CBIZ Benefits & Insurance Services Inc. in Kansas City, Mo. And, because of their size, it's easier for smaller PBMs to be more open and flexible in their dealings with employers, she added.

NEBCO, a Warwick, R.I.-based broker and third-party administrator, also is seizing opportunity and launching its own PBM, IdealScripts, which will provide full disclosure and sharing of rebates, according to Sam Fleet, company president.

"Part of the due diligence process of creating this program was to look at our own PBMs and take a look at other PBMs. As I started peeling back the onion, it just became apparent that the industry itself, for lack of a better word, is corrupt," he said.

"It is unbelievable the amount of money that the PBMs were making off of my clients. So we decided to start our own," he said.

# Auditors: U.K. liability cap dealt setback

Continued from page 3

Four. Period. Full stop. End of story," said Peter Wyman, a partner at PwC in London.

"We do not believe that adequate liability insurance is there or is going to be there," said Eric Anstee, chief executive of the London-based Institute of Chartered Accountants in England & Wales.

The "Big Four" firms are treated as a separate and distinct risk class from midtier and smaller firms, said Geoff Morris, deputy chairman of Aon Professional Risks in London. This is because the size of the risks they face is large, as they tend to audit big companies, experts explained.

The four largest firms tend to self-insure their primary liability exposure within their captives, Mr. Morris said, and seek reinsurance for catastrophic claims.

Large auditing firms have looked at other forms of risk financing, such as finite deals or buying capital market products, noted Andrew Wallin, of the global markets team at Willis Group Holdings Ltd. in London. But because the largest audit firms know that they likely will pay out large numbers of claims every year, captives have so far proved to be the best solution, he said.

**'There is no insurance for the Big Four. Period. Full stop. End of story.'**

*Peter Wyman*
*PricewaterhouseCoopers L.L.P.*

The large firms often take very hefty retentions, he noted, explaining that a "Big Four" firm would likely retain about £10 million ($18.4 million) itself, then self-insure into a captive up to a limit of about £70 million ($128.9 million), and then seek commercial market coverage above that limit.

A cap on liabilities, Mr. Morris said, would improve the risk profile of large accounting firms and could make insurance easier to obtain.

And while midtier and smaller firms are able to buy commercial insurance, sources said, that coverage is expensive and can be restricted.

The insurance market is very difficult, especially for auditors' professional indemnity," said John Wosner, chairman of London-based PKF U.K., a midtier firm.

Many midsize firms take fairly high retentions—sometimes of about £1 million to £2 million ($1.8 million to $3.7 million), Mr. Wallin said, and some have captive insurance vehicles within which they self-insure a portion of their risk.

If one of the "Big Four" firms suffered a catastrophic loss, the effect on the insurance market would hit smaller firms too, Mr. Wosner said.

One tactic that some midsize firms use to encourage better management of risks is to make regional business units bear the brunt of any losses attributable to them, he said.

Representatives of audit firms said they would continue to lobby for a cap or some level of proportional liability.

A cap could either be a multiple of fees, or a flat cap set at, say, £75 million ($138.1 million), noted PwC's Mr. Wyman.

But auditors would also like to see proportional liability rather than joint and several liability.

Mr. Anstee said the ICAEW would like auditors to be allowed to introduce proportional liability into contract negotiations.

This, said Andrew Hubbard, an insurance partner at midsize firm Mazar in London, would be more relevant to smaller firms whose claims may not reach the level of any liability cap but that would like to see their liability limited.

And Mr. Wosner said that this is something the profession would prefer, but is not something that the DTI is currently considering.

A spokesman for the DTI said the department had received the OFT's report and would now consider its findings. He said the DTI could not comment further at this stage.

*The OFT report is available at www.oft.gov.uk.*

## ADVERTISER INDEX

**Issue of August 16**

# Productivity tool improves employer's labor relations

**DENVER**—One company involved in an EMPAQ pilot project has already enjoyed a benefit of its participation—improved relations with organized labor.

Denver-based Qwest Communications International Inc. in 2003 took part in a pilot version of EMPAQ, which stands for "employer measures of productivity, absence and quality." The initiative aims to help employers benchmark the success of their disability and absence management programs, through the use of standardized, comparable metrics.

One of EMPAQ's metrics—a measure of employee satisfaction with absence and disability management efforts—helped Qwest assure the Communication Workers of America that the company is working to make its programs more beneficial to employees, said Maria Henderson, who formerly was Qwest's director of disability and workplace intervention.

Qwest had heard unfavorable stories from the union about its disability programs, Ms. Henderson explained. But, she said, she had no way of determining whether the dissatisfaction described in the union's anecdotal accounts was limited or widespread.

By applying EMPAQ's metric for employee satisfaction, Qwest found the company had room for improvement. The results, derived from an EMPAQ-based survey of employees, showed displeasure with the company's return-to-work process and with a disability claims adjudication center operated by a third-party administrator, Ms. Henderson noted.

Qwest then shared that information with the union and made some changes, even allowing the union to help select new disability program vendors. In addition, the company promised to continue testing for satisfaction and sharing outcomes data with the union, said Ms. Henderson, who is now vp of workforce productivity for Health & Disability Management Solutions Inc. in Denver.

Qwest has a health and wellness advisory committee made up of union representatives and company leaders. That group, which meets every six weeks, will be able to examine EMPAQ-related data to address problems, she said.

Sharing such disability program outcomes data with unions can help improve labor relations and can even lead to smoother contract negotiations, said Robert E. McGarrah Jr., coordinator for workers compensation for the AFL-CIO in Washington.

Like employers, unions need to know whether member complaints represent a few isolated incidents or widespread problems that need to be addressed, Mr. McGarrah said.

Unions also need to show their members that improvements are being made, and EMPAQ-type data can help them do that, he said.

Other employers are also interested in how EMPAQ data might help with labor relations, an EMPAQ spokesman said.

"The employer satisfaction piece has got a lot of traction within the employer community for that reason," he said.

*—By Roberto Ceniceros*

## Metrics: Aiding efforts

**Continued from page 3**

success of disability and absence management programs is critical, employers say, as rising benefits expenses and a tough economy have prompted management to ask whether investments in the programs are truly paying off.

But that evidence, employers say, has been tough to present.

Unlike health benefit managers, who can turn to the National Committee for Quality Assurance's Health Plan Employer Data and Information Set to evaluate health plans, disability managers lack standardized measurements for gauging their programs' effectiveness, said Maria Henderson, vp of workforce productivity for Health & Disability Management Solutions Inc. in Denver.

Because of that lack of standardized measurements, one employer might, for example, measure disability duration by counting missed work days, while another might count calendar days, Ms. Henderson said. Or, one employer might begin counting from the first day of missed work, while another may begin counting when benefit payments begin.

EMPAQ seeks to change that.

"It's unprecedented," Ms. Henderson said of the EMPAQ program. "Nothing this organized has happened in the disability and health and productivity arena. Health care and safety have always been much more organized than we have been."

Ms. Henderson recently left Denver-based Qwest Communications International Inc., where she worked as director of disability and workplace intervention.

Qwest is among the employers

**See METRICS/next page**

# Metrics: Project aids disability plan benchmarking

Continued from previous page

that have participated in pilot programs to test the EMPAQ metrics. Other participants include Memphis, Tenn.-based FedEx Corp., Fairfield, Conn.-based General Electric Co., Minneapolis-based General Mills Inc., and St. Paul, Minn.-based 3M Co., the EMPAQ spokesman said.

EMPAQ earlier this month opened the program to other participants, launching a Web site where employers can learn about the project and sign up for online training and certification in the collection and use of EMPAQ metrics and protocols. Once employers receive certification, which is designed to ensure comparability of programs, they can begin collecting data and submitting the information to EMPAQ.

The San Francisco-based Integrated Disability Institute is collecting and analyzing participating employers' EMPAQ data, while the San Diego-based Disability Management Employer Coalition is responsible for certifying program participants.

So far, 84 employers and 19 disability program vendors—including major consultants and disability insurers—are participating in the EMPAQ initiative.

EMPAQ's cost metrics seek to measure benefit cost per employee, average benefit cost per claim, and benefit cost as a percentage of payroll. Metrics for productivity outcomes include lost days per 100 employees, average claim duration, return-to-work effectiveness and employee satisfaction.

To measure the administrative effectiveness of vendors, EMPAQ metrics include timeliness of claim payment and timely decision of claim acceptance.

While EMPAQ aims to allow employers to compare their programs' effectiveness with those at other companies, a similar benchmark comparison of vendor performance will not be available, the EMPAQ spokesman said. However, employers can use their own data to internally evaluate their vendors' performance, he noted.

The benchmarking capability provided by EMPAQ represents a "quantum leap" for the disability industry, said Marybeth Stevens, leader for workplace absence and disability delivery programs at GE in Schenectady, N.Y.

GE, which implemented an integrated disability program about 10 years ago, has relied on its own internal measurements to track the program's performance and to make improvements, Ms. Stevens said.

But, before joining EMPAQ, GE was not able to compare its results against those at its peers to make sure its program is performing as well as possible, she said.

Many of GE's health and disability vendors already participate in the EMPAQ program, Ms. Stevens said. But she expects other employers will require their vendors to participate in the project. Some request-for-proposal forms already ask disability and absence management vendors about such participation, Ms. Stevens added.

GE's participation in the EMPAQ initiative, she said, will help her answer a question that is frequently posed by the company's top management: "How are we doing compared to our competitors?"

# Whirlpool: Innovative proposal

Continued from page 1

to the VEBA. Whirlpool would pay its retirees' medical claims and then seek reimbursement from the VEBA.

Additionally, the Vermont branch of the Whirlpool captive would invest a majority of the group universal life insurance policy reserves in Whirlpool commercial paper.

As part of the arrangement, Whirlpool would sweeten health care benefits for union retirees, including substantially boosting the lifetime limits on covered expenses and imposing an annual cap on out-of-pocket expenses.

"We believe that this structure would provide a cost-effective way for us to fund retiree liabilities while providing significant benefit enhancements and security to retirees," a Whirlpool spokesman said. The company declined further comment.

Outside experts speculate that tax considerations may be a factor driving the complex arrangement.

Under a 12-year-old Internal Revenue Service ruling, employee benefit risks in a captive are considered to be unrelated business.

By putting employee benefit business in a captive, an employer could increase the likelihood of being able to take a tax deduction for property/casualty premiums paid to its captive. Courts have ruled that as long as roughly 25% to 30% of a captive's business is unrelated, the parent can deduct premiums paid to the captive.

"This could be a way of getting more third-party business" into the captive, said Nancy Gerrie, a partner with McDermott, Will & Emery in Chicago.

"There could be tax advantages generated by funding life insurance benefits through the captive," concurred Henry Saveth, an attorney with Mercer Human Resource Consulting in New York.

In fact, in its Labor Department application, Whirlpool said it is considering expanding its captive "by adding additional lines of coverage, including employee benefits as potential third-party risk."

Speculation about captive premiums' tax-deductibility aside, Whirlpool's proposed arrangement has definite tax advantages.

Whirlpool's contribution to the VEBA would be tax-deductible, while VEBA assets would earn tax-free interest. Additionally, the VEBA would not be taxed on the death benefit proceeds generated from the life insurance policy it holds, and Whirlpool would not be taxed on reimbursement from the VEBA for the retiree medical claims it pays.

Whirlpool, which has about 68,000 employees worldwide, including 23,000 in the United States, and reported $12.2 billion in revenues last year, has asked the Labor Department for expedited consideration of its proposal.

To qualify for rapid consideration, under which the department must make its initial decision within 45 days of receiving an application for a so-called prohibited transaction exemption, an organization has to cite two substantially similar exemptions the department has approved in the last five years.

In its application, Whirlpool cites three captive benefits funding exemptions approved by the Labor Department, which it says are substantially similar to what it is proposing.

Those earlier exemptions involved:

- Columbia Energy Group of Herndon, Va., to use the Vermont branch of its Bermuda captive to reinsure long-term disability policies written by Employers Insurance Co. of Wausau.
- Archer Daniels Midland Co., the Decatur, Ill.-based agribusiness giant, to reinsure group life insurance benefits written by Minnesota Life Insurance Co. through its Vermont captive
- International Paper Co. of Stamford, Conn., to use its Vermont captive to reinsure life insurance policies written by Metropolitan Life Insurance Co.

All those applications were approved following a 1999 Labor Department liberalization of a 20-year-old rule—called a class exemption—that had severely limited the use of captives to fund employee benefit risks.

In that 1979 ruling, the Labor Department said that for a captive to be used to fund benefits, it must be licensed in at least one domestic state and write no more than 50% of its business for risks related to the parent. Additionally, arrangements involving reinsurance are considered on a case-by-case basis.

The so-called 50% test effectively prevented nearly all captives from being used to fund benefits, as few employers have wanted their insurance subsidiaries to take on so much unrelated business.

But in 1999, the department, while not abandoning the 50% test, said it would consider alternative arrangements, provided the alternatives were in the best interests of plan participants.

Among other things, the department said it would want to see that primary or fronting insurers used by the captive were highly rated and that the transaction would benefit participants.

Employers responded to that new flexibility. Aside from the applications and subsequent approvals of the captive benefits funding arrangements of Columbia Energy, ADM and International Paper, the Labor Department earlier this year approved the application of Swedish paper, packaging and consumer products producer Svenska Cellulosa Aktiebolaget. SCA asked to use a recently formed U.S. Virgin Islands branch of its Ireland-based captive, SCA Re, to reinsure the long-term disability, life insurance and accidental death/dismemberment policies written by Aetna Life Insurance Co. for SCA's U.S. employees.

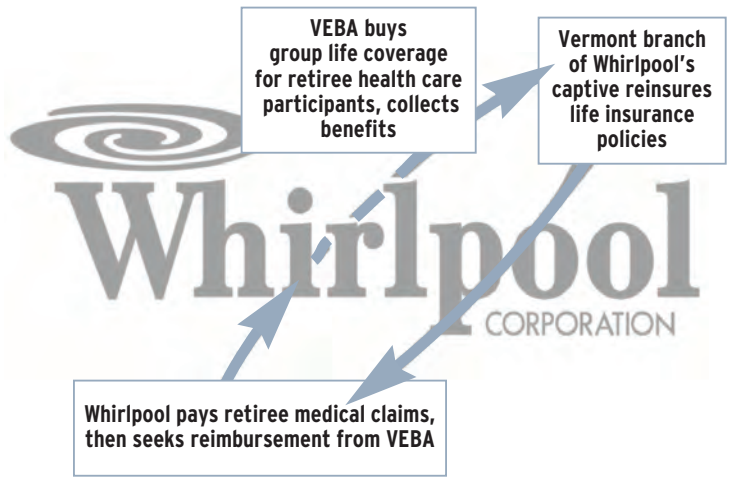
In addition, the Labor Department this week is expected to give final approval to a proposal by Fort Worth, Texas-based Alcon Laboratories Inc., a subsidiary of Swiss eye care pharmaceutical company Alcon Inc., to use an Alcon Laboratories Vermont-domiciled captive to reinsure LTD and life insurance policies written by Aetna for Alcon's U.S. employees.

While Whirlpool's application is similar in certain ways to those of the other five employers—such as the enhancement of benefits and the use of an independent fiduciary—it is different in another. In the other five applications, the captive reinsures the fronting insurer, which, in turn, provides the benefits to plan participants.

In the Whirlpool arrangement, the captive and the fronting insurer would not be directly involved in the delivery of health care benefits to retirees. Instead, the captive and the fronting insurer would play a role in the generation of revenue that ultimately will help fund retiree health liabilities.

**GIVING BENEFIT FUNDING A WHIRL**

Whirlpool wants to use a VEBA, a captive and a fronting arrangement to help fund retiree health care benefits




# Canada: Mental health claims

Continued from page 4

the employers have trained managers to identify and address mental health issues, while 28% said they plan to do so in the next 12 months. However, 65% of employers said they have no plans to train their managers to deal with mental health issues, according to the survey.

There is also a lack of senior management support for focusing on mental health issues in many organizations, Ms. Kaderali said. Human resource departments are receiving pressure from upper management to cut costs, but they are not addressing the root cause of why the costs are rising, she said.

Companies need to address the corporate culture that contributes to mental health conditions, including employees' concerns over their career paths and increased demands and responsibilities, she said. "If you treat the symptoms without treating the cause, then the symptoms are going to continue to occur," Ms. Kaderali said.

In the past few years, employers have started to acknowledge that the work environment has an impact on the mental health of their employees and their ability to cope with these conditions, said Rochelle Morandini, organizational health practice leader for Hewitt Associates Inc. in Vancouver. "I think employers recognize they have to deal with it, but they don't have an idea of how to tackle it," she said.

Some employers are relying on their employee assistance programs to address mental health conditions, but EAPs were not designed to handle the serious mental health conditions they are now being used to address because their counselors do not have the necessary expertise, Ms. Morandini said.

EAP programs alone are insufficient because they do not change the workplace environment, agreed Ms. Baynton of CMHA.

# Late News

**Continued from page 1**

collected" almost $372,000 in commissions on an owner-controlled insurance program the CTA purchased in 2001. According to the suit, Near North charged the CTA a flat fee for its services and agreed not to collect commissions. However, Near North did collect commissions through a subsidiary, DMI Brokerage L.L.C., the suit charges.

## Caremark reveals more investigations

Caremark Rx Inc. says that 23 states and the District of Columbia are now investigating its operations and its compliance with consumer protection laws. The pharmacy benefit manager reported in July that it was under investigation by 19 states after receiving civil investigative demands from the office of the attorney general of the state of Washington and 18 other states. All were seeking information relating to the business practices of Caremark Rx, Caremark and AdvancePCS, which Caremark acquired in March.

## Beecher Carlson acquires captive manager RiskCap

Beecher Carlson has acquired Denver-based captive manager and risk management consultant RiskCap Inc. Terms of the transaction were not disclosed. For now, RiskCap will essentially function as a subsidiary of Beecher Carlson, with its 36 employees continuing to operate under existing management, including Michael Murphy, RiskCap's president, said Gregory K. Myers, Beecher Carlson's managing director. With RiskCap, Beecher Carlson has 88 captives under management in nine domiciles.

## Tennessee OKs exclusions on punitive award cover

Insurance companies in Tennessee no longer are required to cover punitive damages, due to a recent reversal of a 16-year-old law. The decision reverses a September 1988 directive by the Nashville-based Tennessee Department of Commerce that prohibited punitive damage exclusions in property/casualty policies, except for pollution liability and uninsured motorist coverage. Under the rule reversal authorized by Commissioner Paula A. Flowers last month, Tennessee property/casualty insurers may limit coverage to compensatory damages.

## Nuclear claims unlikely in power plant accident

An Aug. 9 accident at a Japanese nuclear plant that killed four people likely won't trigger nuclear liability coverage, according to the plant's insurer. According to the plant's owner, no radioactive material was released in the accident. Following a pipe burst, the plant's turbine building filled with super-heated steam, killing four and injuring seven. Nuclear liability coverage for the plant is written in the London market and led at Lloyd's of London by syndicate 1176, managed by Chaucer Syndicates Ltd. The policy covers damage caused by nuclear radiation, as well as the nuclear and nonnuclear assets of the plant, he said.

PHOTO: AFP

**A Japanese nuclear power plant accident is not expected to trigger liability coverage.**

## Bankruptcy lets employer escape benefit guarantee

A federal bankruptcy judge ruled that Horizon Natural Resources Co. is no longer obligated to honor union contracts that guaranteed health benefits to more than 3,000 active and former employees. The coal company in November 2002 voluntarily filed for Chapter 11 protection; as part of its reorganization, Horizon sought relief from its benefit expenses. Horizon's union employees had argued that the company should be required to protect workers' medical and retiree benefits.

## Briefly noted

Standard & Poor's Corp. has lowered its financial strength rating of **Oil Casualty Insurance Ltd.** to A- from A, with a stable outlook. S&P cited the energy industry mutual's exposure to more frequent claims from its growing membership base, as well as higher severity losses from increased average policy limits. Bermuda-based OCIL writes excess-of-loss general liability and directors and officers liability coverage....The **Workers Compensation Board of Nova Scotia** will raise employer premiums for workers comp coverage by 3.0% in 2005. The average employer premium in Nova Scotia, which is already the second highest among Canadian provinces, will increase to $2.65 per $100 of payroll. Several factors contributed to the premium increase, including a Supreme Court of Canada ruling that struck down limitations on workers compensation benefits for chronic-pain claims.

## Check out BusinessInsurance.com

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# Tax credit: Participation still growing

**Continued from page 3**

layout by beneficiaries, a key feature for individuals who have lost their jobs and whose incomes have been reduced significantly.

Employers have a direct interest in the outcome of the HCTC program and its potential as a model for future federal initiatives to boost access to health insurance. By increasing the number of people with health insurance, hospitals and other medical providers should experience a reduction in the amount of uncompensated care. That, in turn, should benefit employers, because providers will shift less uncompensated-care costs onto patients covered under group plans.

To date, enrollment in the HCTC program remains small relative to the roughly 250,000 beneficiaries eligible. But participation is growing as more states add qualified plans and as public knowledge of the program increases.

For example, in August 2003—the month the advance refundability system took effect for the HCTC—about 6,300 people either were enrolled to receive the credit or were in the process of enrolling. By January, enrollment and registration had increased to nearly 12,000. And at the end of June—the most recent month for which figures are available—nearly 16,000 people were enrolled or had registered to enroll.

Government officials, noting that enrollment has more than doubled in a year, say they are encouraged by the results.

"We think this (enrollment) is a real positive" at this point in the program, said a senior U.S. Treasury Department official.

**'The payment process has worked wonderfully.'**

*Sandra Troia*
*Highmark Inc.*

Also encouraging is the smooth operation of certain aspects of the program, notably the government's payment of premiums to health plans or plan administrators, observers say.

"The payment process has worked wonderfully," said Sandra Troia, director of consumer programs in Pittsburgh for Highmark Inc., a Blue Cross & Blue Shield plan. Highmark has about 700 HCTC beneficiaries, including dependents.

"Everything has gone smoothly in transactions" and the enrollment process, said Tim Cook, manager of government affairs in the Lansing office of Blue Cross Blue Shield of Michigan, which also has about 700 HCTC enrollees.

Others applaud the basic design of the program, which largely builds on coverage already available, COBRA coverage or health plans broadened to include HCTC beneficiaries.

"This is probably the most efficient way that benefits can be delivered. It is far more efficient than creating an additional government organization to deliver the benefits," said Andy Anderson, consultant with Hewitt Associates Inc. in Lincolnshire, Ill.

Still, some observers suggest certain changes are needed to boost enrollment further. For example, Tom Duzak, director of pension and benefits at the United Steel Workers union in Pittsburgh, said that the interplay of the HCTC and Medicare needs to be modified.

Currently, the primary beneficiary loses the tax credit when he or she becomes eligible for Medicare at age 65. If the primary beneficiary has a younger spouse, that spouse could not continue to take advantage of the credit, even though he or she is not yet eligible for Medicare.

"That is a real gap that needs to be corrected," Mr. Duzak said.

Mr. Duzak also noted that the amount of premium a beneficiary pays—or whether a qualified plan, other than COBRA, is even available—depends on where an individual lives.

For example, premiums charged by the Maryland Health Insurance Plan, that state's high-risk plan, cover only 60% of the plan's claim costs, with the rest coming from state funding. In such cases, enrollees are receiving a considerable discount on premiums, compared with those enrolled in some other qualified plans where premiums are intended to cover the full cost of claims.

And there are other premium variations. Some state-qualified plans charge community rates, while others will base rates on factors such as age and health care status.

Indeed, Mr. Dorn, the analyst at the Economic & Social Research Institute, found in an analysis that beneficiaries' 35% premium share averaged $974 per year in the lowest-price quartile of state-qualified plans to $3,904 per year in the highest quartile.

The result, Mr. Duzak says, is that even with the 65% tax credit, the premium cost may be unaffordable for eligible beneficiaries, suggesting that, at a minimum, Congress should examine the issue.

Others say that the size of the tax credit should be linked to the income of beneficiaries, as a way to make coverage more affordable. Mr. Dorn, for example, suggests boosting the size of the health care tax credit for the lowest income beneficiaries.

## Online Poll

[ 8/9 - 8/13 ]

**Has your company instituted any new security measures as a result of the heightened terror alert for New York, Washington and Newark, N.J.?**

| | |
|---|---|
| Yes | 11% |
| No | 82% |
| Do not know | 7% |

## *BI* Stock Index

[ 8/9 - 8/13 ]

**Up-to-the-minute data for all 87 companies that comprise the *BI* Stock Index can be found at *www.businessinsurance.com***

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

| | | |
|---|---|---|
| ***BI* Stock Index** | 2142.35 | ▲ 0.05 |
| **Dow Jones** | 9825.35 | ▲ 0.10 |
| **S&P 500** | 1064.80 | ▲ 0.08 |

### Largest gains

| | |
|---|---|
| Aetna Inc. | 8.25% |
| Unico American Corp. | 7.60% |
| ProAssurance | 6.46% |
| CIGNA Corp. | 6.20% |
| United HealthGroup | 5.79% |

### Largest losses

| | |
|---|---|
| Gainsco Inc. | -16.67% |
| American Safety Insurance | -15.95% |
| ESG Re Ltd. | -13.04% |
| SCOR | -7.97% |
| PMA Capital Corp. | -5.83% |

### Weekly change by market segment

| | |
|---|---|
| Brokers | 0.08% |
| Insurers/Reinsurers | -2.34% |
| Managed Care Organizations | 3.38% |

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