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Late News

Marchitello leaves Aon for Integro

Gary Marchitello, former head of Aon's global property practice, is the latest high-profile brokerage executive to join startup Integro Ltd. Mr. Marchitello, a 25-year veteran of the industry, was tapped to head Integro's property insurance practice in New York. He is the latest in a string of hires Integro has made since it was formed by three former Marsh Inc. executives this year.

Ryan sets plan to sell 5 million Aon shares

Aon Executive Chairman Patrick G. Ryan plans to sell nearly one-fifth of his shares in the brokerage over the next year. Mr. Ryan said in a statement that the sale will be the first time in his 42 years at the company that he has sold any Aon stock. "Having just celebrated by 68th birthday, however, the time has come for me to address certain personal estate, charitable and other financial matters," he said. Aon's stock closed at $29.18 a share on Friday.

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Inside

PHOTO: ZUMA PRESS

Allegations that the painkiller Vioxx can cause heart problems led to a $253 million verdict against Merck & Co. Inc. The award could exhaust the drugmaker's insurance.

Vioxx ruling won't add to liability cover woes

By MICHAEL BRADFORD and RUPAL PAREKH

WHITEHOUSE STATION, N.J.—Pharmaceutical companies, long avoided by many insurers and charged high premiums by those who do remain in the market, should not expect the recent verdict against Merck & Co. Inc. to have a big impact on their liability costs.

The $253 million jury verdict in a Texas state court on Aug. 19 is the latest bad news for a group of policyholders that have long been among the toughest to insure, insurance industry sources say. While the verdict is not expected to cause a spike in product liability coverage costs or shrink availability, it certainly won't

See **MERCK**/page 18

Reinsurance ruling favors cedent

Court approves insurer's loss allocation

By DAVE LENCKUS

NEW YORK—A primary insurer has significant latitude in choosing how it will allocate losses among its reinsurance policies and is not required to craft the allocation around its original coverage position, a federal appeals court has ruled.

Any reasonable reinsurance allocation is permissible under the so-called "follow the fortunes" clauses in reinsurance policies as long as it meets certain criteria, a 2nd U.S. Circuit Court of Appeals panel ruled on Aug. 18. The allocation must have been made in good faith, it must be rational, and it cannot violate reinsurance policy terms, the panel ruled 3-0.

The appellate panel not only overturned a lower court's summary judgment in favor of the reinsurer in the case, New York-based Gerling Global Reinsurance Corp. of America, but also ordered the lower court to enter a summary judgment in favor of Hartford, Conn.-based ceding insurer Travelers Casualty & Surety Co. of America.

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States strive to curb comp for drug users

Intoxicated workers paid lower benefits when hurt

By ROBERTO CENICEROS

North Carolina legislators last week adopted a measure making it harder for workers compensation claimants to collect benefits for accidents occurring while they are under the influence of illegal drugs or alcohol.

Arizona employer groups, meanwhile, say they likely will push for a constitutional amendment to reverse a state Supreme Court ruling handed down earlier this month. The court found unconstitutional a law allowing the restriction of workers comp benefits for employees injured while drunk or on drugs.

Excluding Arizona, laws in 42 states now grant employers or their insurers permission to deny or restrict workers comp benefits to those injured while intoxicated or under the influence, according to data compiled by Ensuring Solutions to Alcohol Problems, a George Washington University Medical Center-based research center in Washington. Courts have typically upheld such laws, Ensuring Solutions found.

Impairment risk

Workers under the influence of drugs or alcohol are **3.6 times more likely to be in a workplace accident** and **5 times more likely to file a workers comp claim** than workers who are not impaired, according to the National Institute on Drug Abuse.

Some states, such as North Carolina and Missouri, have recently moved to strengthen their existing laws. Missouri, for example, earlier this year allowed insurers to increase the percentage of workers compensation benefits they can withhold to 50% from 15% when injuries occur in violation of employers' alcohol or drug policies.

Denying workers comp coverage to workers that are intoxicated or under the influence helps ensure a safe workplace not just for those who are intoxicated but for other employees who could become victims of accidents caused by inebriated individuals, employers and insurers say.

By restricting workers comp benefits, employers provide a disincentive against employees showing up at work under the influence, said Michelle Bolton, state director in Phoenix for the National Federation of Independent Business.

"Society has a responsibility to look beyond the person

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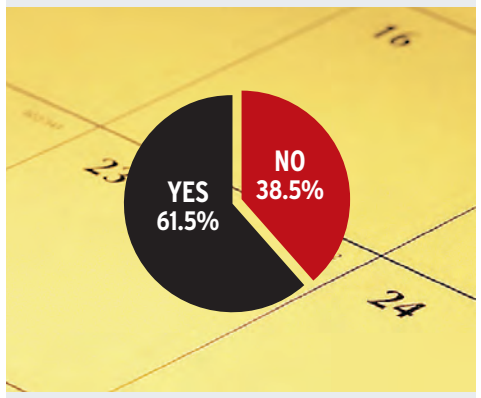
Do you intend to modify your health care flexible spending account program to offer enrollees a grace period?



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REPORTING ON CORPORATE RISK AND EMPLOYEE BENEFIT MANAGEMENT NEWS

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Insurer first-half profits up 44.5%

But a sharp drop in rates is unlikely

By JUDY GREENWALD

Good weather, few catastrophes and the legacy of hard market rates all combined to create a strong 2005 first half for commercial property/casualty insurers, say observers.

While insurers' robust profits will likely lead to continued softening in rates, policyholders should not expect a sharp drop-off in rates, as most observers believe the discipline insurers have exercised so far indicates that the industry will come in for a soft landing.

In the first six months of 2005, the 14 major property/casualty insurers surveyed by *Business Insurance* posted a 44.5% increase in net income, to $14.78 billion, compared with the same period last year.

Among other results:

- The insurers reported a 92% average combined ratio, vs. 96.2% for the comparable period a year ago.
- Net premiums written increased 5.6%, to $67.57 billion.
- Policyholder surplus for the 13 companies that reported this data increased 15.5%, to $73.8 billion.

"It was really a stellar earnings performance from an underwriting perspective," said John Iten, a director at Standard & Poor's Corp. in New York.

Complete P/C insurer results on page 16

"Despite the talk about price competition and rates falling, the margins, at least so far, are holding up extremely well," he said. "It looks like it's going to be another banner year for the industry, unless something really bad happens in the fourth quarter, although we're not expecting that."

"Results continue to be outstanding," with earnings better than analysts' expectations, said Peter C. Streit, an analyst with Williams Capital Group in New York. "Underwriting margins continue to benefit from the favorable reserve developments and low levels of cat losses and low-level weather related losses," said Mr. Streit.

Loss cost trends also have helped, say observers. "There's been a slight improvement in claims trends in the sense that frequency levels have been very positive, on the low side for commercial lines," which has helped the industry's loss ratios, said John L. Ward, a Cincinnati-based independent insurance analyst.

"Everybody keeps predicting loss cost trends will revert back to historical norms, and so far the loss costs continue to surprise on the downside," which has been a pleasant surprise for insurers, Mr. Iten said.

The impact of previous years' rate hikes also has helped, despite the current softening trend, say observers.

"We've had the buffeting effect of the rate

See RESULTS/page 16

PHOTO: EPA PHOTOS

A Kingston, Jamaica, resident prepares for Hurricane Dennis. Jamaica has developed a risk management plan to mitigate future damage from hurricanes and earthquakes.

Jamaica official seeking risk management culture

Plans calls for strengthening codes

By MICHAEL BRADFORD

KINGSTON, Jamaica—Hurricane-prone Jamaica is hoping a new risk management plan will mitigate damage from the storms and make buildings safer when earthquakes rattle the island.

The plan, developed by a government committee, is being promoted by Jamaica's Office of Disaster Preparedness and Emergency Management, the agency that also would implement it. The plan calls for building code revisions, dedication of public finances to the risk reduction effort, risk mapping and other loss-control practices.

Lawmakers will have to approve the plan, which could take several weeks, according to Barbara Carby, director-general of the ODPEM.

An important part of the plan involves strengthening the island's building code and codifying it, according to Ms. Carby and others in Jamaica. The code "should be updated based on recent events," she said, referring to disasters such as Hurricane Ivan, which lashed the island last year and caused around $35.9 billion Jamaican ($574 million) in damages.

The risk management plan calls for

See JAMAICA/page 17

Swiss Re names new CEO amid other changes

By BARBARA COCKBURN

ZURICH, Switzerland—Swiss Reinsurance Co. will have its third chief executive in less than five years when former banker Jacques Aigrain takes the helm on Jan. 1, 2006.

Mr. Aigrain, who was appointed deputy chief executive officer of the Zurich, Switzerland-based reinsurer in 2004, will take over the top job from John Coomber, who will retire in December.

The appointment may signal an increased emphasis in securitization products at the world's second-largest reinsurer, given Mr. Aigrain's background in finance, one analyst said.

Mr. Aigrain

Swiss Re announced the appointment last week when it reported lower profits for the first half of 2005.

Mr. Aigrain joined Swiss Re in 2001 as head of the financial services business group, which handles the reinsurer's securitization efforts, among other things. He joined Swiss Re from JPMorgan Chase & Co., where he held positions in the investment banking, capital markets, and mergers and acquisitions divisions.

Mr. Aigrain likely will use his experience from the banking industry to help increase Swiss Re's involvement in the market for securitized reinsurance products, said Tim Dawson, an insurance analyst at stock broker Helvea in London.

Mr. Aigrain's personal vision of the industry appears to embrace the use of alternative capital risk, and Swiss Re has recognized the increased use of securitized reinsurance products, Mr. Dawson said. "I think he's the right person to lead to company."

The appointment of Mr. Aigrain as CEO comes three years after Mr. Coomber was named head of Swiss Re. Mr. Coomber, an actuary, joined Swiss Re in 1973.

In addition to the CEO change, Andreas Beerli, currently head of Swiss Re's U.S. property/casualty division has been named to the newly created role of chief operating officer. Mr. Beerli's successor in the United States will be named later, Swiss Re said.

In addition to the appointments, Swiss Re reported a profit of 1.35 billion Swiss francs ($1.05 billion) for the first half of 2005, down 6% compared to 2004.

Nova Scotia ruling reopens debate on gradual-stress claims

Province's new policy applies only to government workers

By GLORIA GONZALEZ

A new policy in the province of Nova Scotia for the filing of workers compensation claims for federal employees suffering from gradual-onset stress is rekindling the debate over the possible expansion of coverage for stress conditions for all Canadian employees.

While Nova Scotia's new policy is not expected to have a direct impact on the coverage of stress claims for workers not employed by the federal government, it is part of an overall atmosphere of change that some observers believe will lead to the future broadening of eligibility for stress claims.

The Workers' Compensation Board of Nova Scotia, which administers comp claims for federal employees who work in the province, recently developed a new policy for stress claims filed by federal employees. The new policy allows a federal employee to file a claim for stress resulting from a traumatic event or work-related stressors acting over time, also known as gradual-onset stress. In contrast, stress claims for all other employees are restricted to stress caused by an acute reaction to a traumatic event.

The WCB of Nova Scotia developed the policy to comply with a recent judicial interpretation of the Government Employees Compensation Act, a 1985 federal law that covers compensation for federal government employees. The GECA provisions are broader than those featured in Nova Scotia's own Workers Compensation Act and have been determined to include gradual-onset stress. In other words, the GECA provides for the possibility of entitlement for gradual-onset stress where the provincial legislation does not, according to the board.

Many other provinces have similar legislation that restricts a stress claim to an acute reaction to a traumatic event. For example, Ontario provides coverage for "traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment," according to the operational policy of the Workplace Safety and Insurance Board of Ontario.

Events leading to stress

Examples of events that could lead to a stress claim include the witnessing of a fatality or a horrific accident, being the object of physical violence or death threats, or being the object of harassment that includes physical violence or being placed in a life-threatening situation. A worker in Ontario is not entitled, though, to benefits for traumatic mental stress that stems from employment decisions or actions such as termination, demotion, transfer, discipline, changes in working hours or changes in productivity expectations.

Officially, the WCB's new policy will not have implications for private employers because it covers only federal employees based in Nova Scotia. The policy, though, is part of an overall trend of events that has expanded the scope of workers compensation coverage for stress conditions, observers say.

For example, the Workplace Safety and Insurance Appeals Tribunal in Ontario—the final appeal body in the workers compensation system in the province—has been gradually expanding the areas of entitlement for stress claims. In an April 2005 decision, the tribunal overruled a denial of benefits for an employee who suffered stress due to hostile treatment by a co-worker. While the situation did not fit the traditional parameters for stress claims featured in the board's policy, the tribunal found that the treatment was an unjustified attack

See CANADA/page 15

Los Angeles MTA settles 1996 bad-faith lawsuit with Argonaut Insurance

By JOANNE WOJCIK

LOS ANGELES—The Los Angeles Metropolitan Transportation Authority has agreed to pay more than $45 million to Argonaut Insurance Co. to settle a 1996 bad-faith lawsuit seeking coverage for damage claims stemming from subway construction nearly 10 years ago.

The settlement includes the first $4 million the MTA received from its excess carriers to pay the claims, plus 50% of any net proceeds it received thereafter, according to a spokesman for Argonaut, a subsidiary of San Antonio-based Argonaut Group Inc.

Argonaut was the primary insurer on the MTA subway construction project between 1986 and 1996, providing $2.5 million in occurrence-based commercial general liability coverage above a $500,000 self-insured retention. It dropped the MTA after the agency was hit with millions of dollars in claims filed by Hollywood business owners who said their properties were damaged by subway construction.

Argonaut, which paid more than $120 million in liability claims related to the subway project, had been carrying a $46.5 million receivable on its financial statements representing deductible amounts that the MTA had not paid, as well as claims-handling expenses and defense costs, the insurer spokesman said.

The MTA decided to settle the coverage litigation, which commenced in 1996, because, among other reasons, the case "had been lingering for a very long time and Argonaut was seeking to recover considerably more than the amount of the settlement," said David Casselman of Wasserman, Comden, Casselman & Pearson L.L.P. in Los Angeles, trial counsel for the MTA.

"Based on our own assessments of what was involved and what we believe we would owe in deductibles, this was a reasonable compromise," he said.

The settlement mandates that the MTA must pay Argonaut the full amount by Sept. 14. It does not assign fault or blame.

While the settlement resolves litigation with Argonaut, MTA's coverage disputes with excess carriers remain unsettled, according to Mr. Casselman.

The MTA has $98 million in excess CGL coverage from numerous carriers, including Lloyd's of London and London market underwriters.

Errors & omissions

- Due to a production and editing error, the Aug. 1 ranking of the largest independent safety consultants omitted Applegate Associates Inc., which ranks as the 10th-largest consultant, with $2 million in safety consulting revenues. Strategic Safety Associates is the ninth-largest consultant. A corrected ranking appears on page 10 of this issue.
- Due to a production error, the name of JLT Risk Solutions Ltd. appeared incorrectly in a story in the Aug. 8 issue.
- An item on so-called "death taxes" in the Aug. 22 Between the Lines column incorrectly stated the expected federal estate tax exemption for 2011. Under current law, the estate tax exemption will increase until 2010, when it will be repealed and then reinstated at $1 million in 2011, unless Congress revises the tax laws.

PHOTO: ZUMA PRESS

New California regulations require employers to take steps to ensure that workers exposed to heat work in a safe environment.

California takes steps to keep workers cool

Rules target heat-related illness

By MARA LAZDINS

Employers in California face new workplace safety rules designed to protect employees from heat-related illness.

Cal/OSHA introduced the emergency regulations chiefly in response to the intense heat wave that has struck California and other parts of the United States this summer, a spokeswoman for the department said. The department is investigating several cases in which high temperatures have been blamed for illnesses and deaths among workers in the state this year.

The rules were recently approved by the Office of Administrative Law and took effect Aug. 22. The regulations will remain in force until Dec. 21, during which time Cal/OSHA will work to implement permanent rules.

The regulations focus on steps employers must take to ensure their employees who are exposed to heat work in a safe and controlled environment and that workers are provided with enough water, shade and rest so that they do not develop heat-related illnesses.

Among the requirements in the regulations are that employers must:

- Provide sufficient drinking water. Each employee must have access to at least one quart of drinking water per hour for the duration of his or her shift, and employees should be encouraged to drink water frequently.
- Provide access to shade for employees suffering from a heat illness or "believing a preventative recovery period is needed." Shaded areas

See HEAT/page 15

MBIA receives 'Wells' notice

SEC investigating finite reinsurance for bond guarantee

By SARAH VEYSEY

ARMONK, N.Y.—Bond insurer MBIA Inc. has received a "Wells" notice from the U.S. Securities and Exchange Commission about retroactive reinsurance MBIA purchased to cover losses it incurred by guaranteeing bonds issued by Allegheny Health, Education and Research Foundation.

In a statement, MBIA said the notice indicated that the staff of the SEC is considering recommending to the regulator that it bring a civil injunctive action against MBIA for alleged violations of federal securities laws.

The alleged violations relate to excess-of-loss and quota-share agreements MBIA entered into with three counterparties to retroactively reinsure losses from guaranteeing bond issues by AHERF—a nonprofit organization that went bankrupt in 1998 with several outstanding bond issues—among other things.

MBIA said in a statement that it was involved in discussions with SEC staff about possible resolution of the charges.

And the Armonk, N.Y.-based company also said it was involved in preliminary discussions with the staff of the New York Attorney General's Office and the New York State Insurance Department about the possible resolution of civil charges that the attorney general's office might bring in connection with the AHERF reinsurance transactions.

Bankruptcy judge approves enlarged asbestos settlement

By RUPAL PAREKH

PITTSBURGH—Swiss engineering company ABB Ltd. is moving forward with its settlement of asbestos liability claims after a revised $1.4 billion arrangement was approved earlier this month by a bankruptcy court in Pittsburgh.

Judge Judith K. Fitzgerald of the U.S. Bankruptcy Court for the Western District of Pennsylvania approved the new plan—which includes an additional payment of $232 million—allowing it to put the plan to a vote by claimants. If claimants agree to the reworked plan, it will return to the court for a confirmation hearing on Sept. 28.

Earlier this year, ABB agreed to pay another $232 million into a $1.20 billion trust fund set up to settle asbestos claims against two of its units—ABB Combustion Engineering Inc. and ABB Lummus Global Inc. Its original deal was rejected following a decision by a panel of 3rd U.S. Circuit Court of Appeals judges in Philadelphia to overturn a lower court's approval of the plan over concerns about its fairness to claimants.

In a statement, ABB said it "welcomes the positive outcome" to the week's hearing, which "marks another step towards resolving the asbestos issue."

David M. Bernick, an attorney representing ABB with the law firm of Kirkland & Ellis L.L.P. in Chicago, said "ABB certainly does expect that the plan will be approved."

BI searching for top companies

Business Insurance readers have a little more time to weigh in on which companies they think are the best in the industry. The deadline for the inaugural Readers Choice Awards has been extended to Sept. 7.

If you subscribe to *BI*, we want to know your opinion on who's tops in terms of service, value, quality and innovation. *BI* readers will choose the top companies in 11 categories relating to risk management and employee benefits. The winners will be announced and profiled in the Oct. 10 issue.

The categories are for best overall:

- Commercial lines retail insurance brokerage
- Commercial property/casualty insurer
- Property/casualty reinsurer
- Employee assistance program provider
- Employee benefit consulting firm
- Insurance wholesaler
- Managed health care organization
- Reinsurance intermediary
- Risk management consulting firm
- Surplus lines insurance company
- Third-party claims administrator

Voting is completely confidential, but must be completed by the end of **Wednesday, Sept. 7**. To complete a ballot, please visit *www.BusinessInsurance.com/ReaderAwards*.

Voting is open to *BI* subscribers, who can fill out an interactive online ballot if they are registered users of the Web site. Subscribers who are not registered or do not wish to register may submit a paper ballot, which can be downloaded at the site, but must include their subscription number. All ballots will remain confidential.

Visit *www.BusinessInsurance.com/ReaderAwards* today to cast your vote.

PAUL WINSTON

Editorial Director

AIG and Paris Hilton stop traffic in survey

What do you get when you blend American International Group Inc., insurance research and Paris Hilton? Whatever it is, the combination is freaking me out.

AIG Auto Insurance last week released a survey on consumer behaviors when stuck in traffic. The press release that turned up on my computer screen trumpeted: "Move Over Paris Hilton! Sixty-Six Percent of Men Prefer Their Significant Others in the Passenger Seat While Stuck in Traffic."

My first thought was—why? Not why would two-thirds of men lie so shamelessly, but why would AIG be releasing such a goofy survey? Let's be honest: AIG is not a company that comes to mind when one thinks of press releases with Weekly World News-caliber headlines. Or irreverent, comic marketing strategies. Or Freakonomics-style research. Or Paris Hilton.

Is this what we can expect now that Hank Greenberg—someone few would suspect of having a joyful sense of humor—is gone? Could it be that the company was full of closet stand-up comedians who only now can express their inner zaniness?

Or has the past year been so torturous and stressful for AIG employees—with the management shakeup, accusations by New York Attorney General Eliot Spitzer and the Securities and Exchange Commission, financial restatement and a plunging stock price—that the prevailing mood is one of might as well laugh because things can't get any worse?

Or is it merely a shrewd, competitive ploy for AIG's auto insurance unit to try to steal some thunder from GEICO, which boasts of a lizard that does the robot dance on its Web site and TV commercials, and Progressive, which pioneered such serious research as the underwear-buying habits of drivers?

I don't know the reason for the silliness at the insurer, but I'm sure policyholders and the marketplace will welcome it. Heck, I can even envision a day when AIG could freely joke with its policyholders about the perception of the company as somewhat stingy in parting with claims dollars.

Customer: "I have a claim under our liability policy for this $450 million court award that I would like you to pay."

AIG: "Ha! Ha! Ha! Ha!"

Regarding the AIG survey, researchers polled more than 1,000 adult Americans on driving-related behaviors. The research was conducted in anticipation of the upcoming Labor Day weekend, when many of us will indeed be stuck in traffic, casting murderous glances at those bold enough to drive past in the breakdown lane or on the shoulder of the road.

The survey asked people who they would most want with them if they were stuck in a long traffic jam. Among men, 66% voted for their significant other or spouse, 28% said their best friend, 4% said a celebrity, and 3% said their kids. Among women, 49% said significant other/spouse, 42% said best friend, 6% said their kids, and 4% said a celebrity.

Those opting for a celebrity riding shotgun were asked to name who they would want in the car, and the top picks were Paris Hilton, Pamela Anderson and George Clooney. Frankly, I think 4% is a bit low. I'm not sure if that's because their spouses were alongside them when they answered the question or whether the setting is a turn-off. Some folks must feel more at ease in front of family and friends when weeping in frustration, beating the steering wheel, swearing at strangers and making rude gestures.

AIG also asked for respondents' perceptions of "the real reason men are reluctant to ask for directions." Putting aside the prejudicial nature of this question for the moment, 40% of men said that guys would rather figure it out on their own (that's right, we love a mental challenge), 30% said men are too stubborn to admit they don't know (pride goeth before the map), 15% said guys are embarrassed to admit they don't know (maybe we don't know *exactly*, but we have a very good inkling), 9% said it takes too long to stop and ask (like sharks, we know it's always better to keep moving), and 5% said why ask for directions—men never get lost (tell it like it is, brother).

Of course, female respondents had a very different take on this question…oh look: I'm out of room.

I look forward to more funny press releases from AIG in the future.

Note: The full results of AIG Auto's Labor Day survey can be viewed online at www.aigauto.com.

Editorial Director Paul Winston's commentary appears fortnightly. He can be reached at pwinston@businessinsurance.com.

Editorial

Policyholders benefit in reinsurance ruling

POLICYHOLDERS SHOULD broadly welcome a federal appeals court decision compelling a reinsurer to pay its allocated share of a settlement over asbestos liabilities that was negotiated between an insurer and its policyholder. On balance, though, the complex case is a clear example of why some disputes are perhaps best settled through arbitration.

One of the key components of reinsurance contracts, and therefore of insurance coverage itself, is the "follow the fortunes" requirement that binds reinsurers to the same fate as the insurers they cover. So, if an insurer agrees to pay a claim, the reinsurer should pay the insurer for its share of the claim, too.

As far as policyholders are concerned, the stipulation goes some way to ensuring that the insurance coverage they buy is backed by reinsurance that will respond to valid claims.

Of course, reinsurers at times may not agree with the resultant allocation of the claims between insurers and reinsurers. Such was the case in a dispute between Travelers Casualty & Surety Co. and its reinsurer, Gerling Global Reinsurance Corp. As we report on page 1, a settlement between Travelers and its policyholder had the effect of capping the insurer's liability for asbestos claims at an amount somewhere between what the policyholder sought and what the insurer said it was liable for—in other words, a fairly typical resolution of a disputed insurance claim.

Applying the "follow the fortunes" principle, the insurer sought to maximize its reinsurance recovery based on an allocation methodology it deemed appropriate, even though certain technical aspects of the underlying insurance recovery were not clarified under the settlement.

Such an approach, critics argue, allows insurers to fashion an outcome that will mean that they will secure the highest amount of reinsurance coverage.

But as the court opinion points out, "a cedent choosing among several reasonable allocation possibilities is surely not required to choose the allocation that minimizes its reinsurance recovery to avoid a finding of bad faith."

In overturning a lower court decision, we believe the appellate court went some way to ensuring that reinsurers adhere to the coverage they sign up for and, in doing so, bolstered the security of policyholders' insurance arrangements.

There are aspects to the decision, however, that might make reinsurers review their coverage and pricing and that may not be welcomed by insurers or their policyholders. Perhaps a better solution would have been for all of the knowledgeable parties to have arbitrated a settlement that reflected the unique details of the dispute and with which everyone could have agreed.

Schillerstrom

Write Us

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

Please send your letters to:
Letters to the Editor, Business Insurance, 360 N. Michigan Ave., Chicago, Ill. 60601-3806; fax: 312-280-3174; e-mail: rcoccia@businessinsurance.com.

Sobering thoughts on denying comp benefits

IT SEEMS A SIMPLE QUESTION: should workers who are injured on the job while under the influence of alcohol or drugs be denied workers compensation benefits? The answer, however, isn't the same in all states. As we report on page 1, about 41 states have laws permitting denial of workers comp benefits in cases involving drugs or alcohol, but there is still some debate on that elsewhere.

In an era of "blame and claim," where personal injury lawsuits are commonplace, this debate doesn't come as a surprise. A mentality of "I've been injured, so someone must be responsible and pay me" has taken hold, at great cost to businesses, governments and society. But we think those who advocate entitlement even for workers who act irresponsibly are missing the point of the workers compensation system.

Most states require employers to provide such benefits to compensate workers for injuries and illnesses that arise from the workplace. The exclusive-remedy doctrine in workers comp law offers mutual advantages to both employer and employee: an injured worker receives medical treatment and income in exchange for not pursuing damages against his or her employer.

The workers comp system does not invite or excuse negligence on the part of employers. States and the federal government have health and safety agencies and inspection programs designed to help make workplaces safer. Indeed, an employer that flouts safety laws can and should be held liable. So why should workers be allowed to act recklessly and still collect workers comp benefits? Workers comp is a two-way street. We think the implied contract between employer and employee under workers comp requires that both parties uphold their ends of the bargain.

We won't argue that addictions to drugs or alcohol are not serious problems. But we also would point out that many employers offer workers help through employee assistance programs. Workers who choose not to seek help and instead put themselves and their co-workers at risk should bear the consequences.

Business Insurance

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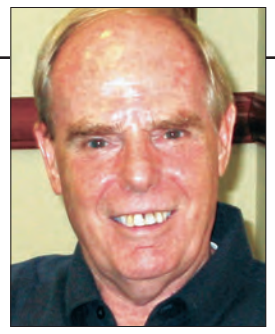
Perspectives



Keep employment disputes out of court

Alternative dispute resolution systems can save time, reduce tension

By Whayne Hougland

"They might die before they hit the floor."

That is how one lawyer described what would happen if human resources and risk management professionals could hear courthouse conversations among plaintiff lawyers. Unless your company is bankrupt, sooner or later you likely will be in the crosshairs of a plaintiff's attorney looking for an easy mark. And then, if the action turns out to be a class action, you can multiply that risk by a factor of hundreds or even thousands, as Wal-Mart and others have learned.

Applying our traditional adversarial legal system to workplace disputes, however, is rarely the best means of dispute resolution. The adversarial system is expensive, disruptive, and protracted. More significantly, by its very nature, it tends to drive the parties further apart, weakening their relationship, often irreparably. The process completely ignores the real underlying problem. As a result, by the very nature of the adversarial process, the minor disagreements and the stress inherent in the employment relationship escalate into a full-scale war, typically resulting in the termination of the employment relationship, years of litigation and tens of thousands of dollars in legal expenses. Only the lawyers profit.

Recently, numerous external factors, such as access to jury trials, have combined to result in a marked increase in both the frequency and intensity of litigation between employers and employees. When these factors are combined with the systemic escalation of disputes resulting from our adversarial legal system, the contemporary employer is charged with an impossible task: to successfully manage its human resources in an increasingly competitive environment, while attempting to keep legal claims from arising and, when they do, responding to them effectively with minimal cost and disruption.

Alternative dispute resolution is a means to resolve disputes other than through the traditional court and administrative forums. ADR encompasses a broad spectrum of activities ranging from a simple open door policy to mediation and binding arbitration of statutory claims.

A carefully structured ADR policy typically uses different types of ADR at different stages of a dispute. For example, an ADR policy may have the following progressive steps: an employee may first be required to informally discuss a concern with a supervisor, then file a written grievance with higher management, submit the dispute to mediation and, if necessary, then proceed to binding arbitration.

When ADR is effective and resolves the dispute, it is far less costly and time-consuming than court litigation.

More importantly, a carefully instituted and well-planned ADR mechanism becomes an effective risk management/loss control tool. Because mediation forces the parties to compromise and to concentrate on the other side's perspective as well as their own, and to structure a mutually agreeable resolution to the dispute, it is usually far more effective in employment settings than litigation, since litigation imposes a third party's findings as to the relative claims of the dispute.

ADR offers employers a far less expensive, less risky, more efficient and potentially more effective means of dispute resolution than does litigation.

As often as not, litigation results in an appeal or the initiation of a scheme to secure revenge. The parties to a mediated settlement, by contrast, have invested time and effort into reaching a mutually accepted resolution to the dispute. By the very nature of the process, both parties are committed to its success.

ADR components

A well-crafted ADR program should cover all claims of an employee except workers compensation and unemployment compensation.

The ADR program must be balanced. An employer cannot be able to shift the balance in its favor by use of an ADR procedure that is unfair to employees and does not preserve all legal rights and remedies of employees. Courts would have little trouble invalidating any program that limits the statutory remedy of employees.

In addition, courts will not validate an ADR program that: artificially limits the statute of limitations; allows an employer to unilaterally change the arbitration rules; or allows the employer to choose the arbitrator.

There are significant risk management advantages to an ADR program. These include reduction in legal costs compared to conventional litigation both in terms of legal fees and expenses, and in the reduction of the time management is involved in protracted litigation. Arbitration proceedings are private, which means that sensitive business does not have their dirty laundry aired in public.

Another significant advantage is the certainty that management and employees have in the process. Everyone understands what the rules are and manages their expectations accordingly. This result can improve employee relations and reduce turnover.

When an arbitration ruling is made, the award will be binding, allowing the parties to achieve finality.

One of the most important aspects of a carefully crafted ADR program is the prospect of eliminating class or collective actions. Exposure to frivolous lawsuits also will be significantly curtailed. Implementation of an ADR program requires some careful planning but when executed properly, can be a relatively painless process.

ADR is the employee practices risk management mechanism of the future. For workplace disputes, it is far superior to conventional litigation. It offers employers a far less expensive, less risky, more efficient and potentially more effective means of dispute resolution than does litigation. It can improve organizational health by identifying and addressing the root cause of employment disputes and structuring creative resolutions.

Whayne Hougland is founder of EDR Systems, a Louisville, Ky.-based company that designs and implements employment dispute resolution systems.

Driver who fell asleep didn't commit misconduct

Falling asleep at the wheel of her vehicle did not constitute willful misconduct in a workers compensation claim, according to the Supreme Court of South Dakota.

Vanessa Mudlin lived in Rapid City, S.D., and was employed by Hill's Materials Co. as a flagger, laborer and materials spreader. Ms. Mudlin was assigned to a crew that was working on a road construction project near Faith, S.D., about 125 miles from Rapid City. She showed up at Hill's headquarters at 5:30 a.m. on June 7, 1999, in Rapid City to find her work crew had already departed. Ms. Mudlin set off for Faith in her personal vehicle. During the trip, she was involved in a one-vehicle accident. She admitted she fell asleep at the wheel and her car left the road. She filed for workers comp benefits. The Department of Labor awarded her benefits, and the trial court affirmed the award.

On appeal, the employer argued that Ms. Mudlin's claim was barred by willful misconduct because she was speeding, not wearing her seatbelt and was under the influence of prescription medication when she fell asleep at the wheel. The court said that it considered the conduct individually and collectively and did not agree that it constituted willful misconduct under the workers compensation laws. The trial court decision was affirmed.

Mudlin vs. Hills Materials Co., Supreme Court of South Dakota, May 25, 2005 (BI/01/O.-$10)

Legal Briefs

Worker theft not covered under dishonesty policy

A Massachusetts appellate court ruled that an employee dishonesty insurance policy did not cover an employee's thefts by writing and cashing checks from a business entity separate from the named insured.

Atlas Metals Products Co. Inc. was covered under a blanket employee dishonesty protection policy issued by Lumbermens Mutual Casualty Co. Atlas submitted a claim to the insurer involving thefts by a former Atlas employee, Elizabeth Kunst, who was employed as a secretary and bookkeeper at Atlas. The claim concerned Ms. Kunst's misappropriation of about $65,000 from R & R Realty Trust. Although Ms. Kunst was not an employee of R & R, she had access to the R & R checking account by virtue of an arrangement between Atlas and R & R, in which Atlas provided administrative services for the processing and payment of R & R's bills. In the course of writing checks to pay the R & R bills, Ms. Kunst fraudulently wrote checks payable to herself from the R & R banking account and, thereby, misappropriated the money. The insurer denied Atlas' claim. Atlas sued but lost in the trial court.

The appellate court said that it was of the opinion that the separate R & R checking account maintained by a bank and holding funds for R & R was not the property of Atlas. According to the court, there was nothing in the trial record to show that the checking account in the name of an uninsured separate company fell within the covered property of Atlas under the employee dishonesty policy. The court also pointed out that the policy here excluded coverage for indirect losses and third-party claims, and extending coverage would, in effect, transform this policy into a general liability policy. The trial court decision was affirmed.

Atlas Metals Products Co. vs. Lumbermens Mutual. Casualty Co., Appeals Court of Massachusetts, June 14, 2005 (BI/03/O.-$10)

Subrogation agreement stipulation improper

The 10th U.S. Circuit Court of Appeals ruled that an Employee Retirement Income Security Act fund acted arbitrarily and capriciously in requiring a beneficiary to execute a subrogation agreement to obtain his vested medical benefits.

In August 2002, Paul Gorman and his wife were injured in a motorcycle accident, leaving him unable to work. Mr. Gorman was a beneficiary of the Carpenters' & Millwrights' Health Benefit Trust Fund, an ERISA-qualified welfare plan. The Gormans filed medical claims with the Fund for their medical expenses, which totaled over $120,000. Although the Fund eventually allowed their claims, it required both to sign a subrogation assignment contract as a precondition to payment of benefits. The SAC added several provisions that were not included in the 1999 summary plan description. These additions included requiring Mr. Gorman to file a legal action against the third party at his own expense within one year and diligently pursue the action. Although Mr. Gorman signed the SAC to obtain payment of his medical bills, he challenged the Fund's right to require him to sue at his own expense. The trial court ruled for Mr. Gorman and rescinded the subrogation contract. The Fund appealed.

The appellate court said that the SAC here attempted to broaden the Fund's rights by imposing a new requirement on Mr. Gorman as a condition for receiving benefits. The court noted that despite requiring the unwilling Mr. Gorman to file an action, the SAC provided that the Fund would not pay any portion of the litigation costs and fees. Because that requirement was not contained in the 1999 SPD, the court said it was arbitrary and capricious to impose the new condition as a prerequisite to paying Mr. Gorman his benefits under the 1999 SPD. Furthermore, the court found that the trial court's recision of the subrogation contract was pure equitable relief within the court's authority under ERISA. The trial court decision was affirmed.

Gorman vs. Carpenters' & Millwrights' Health, 10th U.S. Circuit Court of Appeals, June 8, 2005 (BI/04/O.-$10).

BI Ranks

Largest independent safety consultants

Ranked by 2004 revenues from safety consulting services*

Rank	Company/Address	Phone/Fax/Web site	Unbundled safety consulting revenues	Staff	Total unbundled clients	Corporate/ individual clients	Principal officer
1	Clayton Group Services Inc. 45525 Grand River Ave., Suite 200, P.O. Box 8008, Novi, Mich. 48376-8008	248-344-8577 Fax: 248-344-0229 *www.claytongrp.com*	$23,000,000	445	1,475	730	Philip J. Kaszar, president/CEO
2	Safety Resources 239 New Road, Building C, Parsippany, N.J. 07054	973-575-0900 Fax: 973-575-0901 *www.safetyresc.com*	$21,347,000	223	86	86	Jack Leonard, president
3	Broadspire NATLSCO Risk & Safety Services 4 Corporate Drive, Suite 100, Lake Zurich, Ill. 60047	847-719-5376 Fax: 847-719-5271 *www.choosebroadspire.com*	$14,100,000	93	350	320	Dennis Replogle, president/CEO
4	Risk Consultants Inc. 6611 Watson St., Union City, Ga. 30291	770-964-1226 Fax: 770-969-7301 *www.riskcon.com*	$8,878,000	96	452	452	R. Michael Malone, president/CEO
5	F.A. Richard & Associates Inc. dba FARA 1625 W. Causeway Approach, Mandeville, La. 70471	800-259-8388 Fax: 985-624-8489 *www.fara.com*	$6,200,000	120	72	34	M. Todd Richard, president/CEO
6	North American Risk Management Inc. 100 First Ave. S., St. Petersburg, Fla. 33701	888-486-7466 Fax: 727-287-1666 *www.narm.biz*	$4,990,000	86	172	78	Bud Schade, president
7	Regional Reporting Inc. 40 Fulton St., New York, N.Y. 10038	212-964-5973 Fax: 212-608-5074 *www.regionalreporting.com*	$2,250,000	218	236	72	Martin Myers, CEO
8	Bickmore Risk Services 1831 K St., Sacramento, Calif. 95814	800-541-4591 Fax: 916-244-1199 *www.brsrisk.com*	$2,230,000	101	19	19	John Chiquica, CEO
9	Strategic Safety Associates P.O. Box 80161, Portland, Ore. 97280-1161	503-977-2094 Fax: 503-977-3175 *www.masteringsafety.com,* *www.movesmart.com*	$2,150,000	13	59	59	Robert Pater, managing director
10	Applegate Associates Inc. 2310 Route 34 N., Suite 2C Manasquan, N.J. 08736	732-292-9956 Fax: 732-292-9957 *www.applegateassociates.com*	$2,000,563	19	110	110	Grace C. Applegate, president/CEO

BI defines "independent" as not owned by brokers or insurers. * Reflects safety consulting revenues provided on a direct, unbundled basis to corporate/institutional clients. Source: *BI* survey

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COMMENTARY

Senior Editor Douglas McLeod

A short recap of all the news that fits

It's the end of August, nearly the end of summer, and you, like me, have probably been out of the office for stretches over the past couple of months.

I try to keep up with the news while I'm out, but it isn't always easy. There are fishing lines to untangle, kayaks to overturn, unfamiliar roads to get lost on and fast-paced bad novels to read passages of between demands to ride bikes, go miniature golfing or get ice cream.

Assuming that you, too, may have missed a week or two of crucial work-related news, I thought I'd offer a quick recap of some of the summer's important stories:

- Food companies are replacing those annoying stickers on fruit and vegetables with laser tattoos, The New York Times reports. The tattoos, burned into the foods' skin, give identifying numbers, countries of origin and other valuable tracking information without leaving the stickers all over your kitchen or attached to your sleeves.

Now, this may depart from the original purpose, but life and health insurers would be missing a great opportunity if they didn't look into laser tattoo advertising. People who eat a lot of fruit and vegetables have to be a great demographic group for insurers; imagine if, every time they bit into a pear, they saw the message: "Feeling good? It won't last. Call MetLife."

- Meanwhile, the Terrorism Risk Insurance Act seems unlikely to be extended in its current form beyond its Dec. 31 expiration. That's because the Bush administration is committed to letting the magic of the free market produce private capacity for the risk. The free market, it turns out, would rather have the government's help, but that's too bad for the free market. The free market's bill for your terrorism coverage will be in the mail next year.
- Employers are increasingly worried about workers who cheat on drug tests using a variety of products readily available on the Internet. One of these products, we reported this month, is a "lifelike prosthetic device that delivers clean urine" to circumvent a urinalysis. Baltimore Orioles first baseman Rafael Palmeiro, who was suspended after testing positive for steroids recently, really could have used this device; unfortunately, it would have breached the terms of his promotional deal for Viagra. Maybe the answer is to require employees to appear under oath before a congressional committee and…oh, wait, that doesn't work either.
- The state of West Virginia has decided to switch back to a defined benefit pension plan for state employees after concluding that it would actually cost less than the defined contribution plan it created in 1991. While West Virginia seems to be swimming against the tide on this issue, the fact is that most public and private employers have known for years that defined benefit plans are indeed cheaper as long as they don't have to be funded.

United Airlines, for instance, succeeded in dumping several billion dollars in unfunded liabilities on the U.S. Pension Benefit Guaranty Corp., triggering legislation this summer to boost PBGC premiums and tighten funding requirements. Not included in the Senate or House versions of the bill, though, is a sensible provision that would increase the retirement age of United senior managers to 95 and force them either to take a 50% cut in their own pension benefits or assume the unfunded liabilities of the Illinois state employees retirement fund.

- President Bush's Supreme Court nominee, Judge John G. Roberts Jr., was lauded by business and tort reform advocates for his likely sympathy to corporations on legal reform issues. Judge Roberts represented corporate clients in years of private practice before being named to the federal appeals court for the District of Columbia. Bush administration officials surprisingly failed to point out that his representation of businesses does not reflect his personal views on their positions.
- In the Senate's struggle to produce asbestos reform legislation, absolutely nothing happened.
- Insurers already rattled by federal and state inquiries into finite risk transactions are terrified that regulators will next look at property/casualty reserving practices, particularly at the industry's chronic pattern of underreserving. Insurer senior managements have already devised plans to plead ignorance.

I'm guessing that you now feel you haven't missed anything while you were away. I hope this has helped, and welcome back from the high-stress summer months.

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

PRODUCTS & SERVICES

Chubb expands coverage for in-house attorneys

WARREN, N.J.—The Chubb Corp. has expanded its Employed Lawyers Professional Liability Insurance program to cover new exposures in-house attorneys now face.

The ELP program now includes a full house endorsement, expanding coverage to include approved pro bono work and the in-house counsel's legal staff and independent contractor attorneys while performing legal services for the company; a Securities and Exchange Commission and Sarbanes-Oxley endorsement, amending coverage for wrongful acts, including any violation of the Sarbanes-Oxley Act of 2002; moonlighting endorsement, covering attorneys who perform company-approved legal services, such as estate administration and residential real estate closings; and choice of counsel, allowing the insured in-house counsel to choose legal counsel if a claim is filed.

For more information, visit Warren, N.J.-based Chubb's Web site at *www.chubb.com*.

Citizens, Hanover expand business owners policy

WORCESTER, Mass.—The Citizens Insurance Co. and Hanover Insurance Co., units of Worcester, Mass.-based Allmerica Financial Corp., are offering an enhanced business owners policy.

The Avenues Business Owners Policy replaces the companies' Dimension 2000+ product. The eligibility guidelines for Avenues BOP have been expanded and are now available to companies with sales and total property values of $15 million per location and square footage up to 50,000 per location. The enhancements also include additional classes for general liability and incidental exposures.

The policy is currently available in Indiana, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Virginia and Wisconsin. In September, it will be available in Connecticut, Florida, Georgia, Illinois, Louisiana, Maine, Michigan, Missouri, New York, Oklahoma, South Carolina and Texas.

To obtain more information, visit the companies' Web site at *www.allmerica.com*.

Fireman's Fund adds crisis management cover

NOVATO, Calif.—Fireman's Fund Insurance Co. has introduced crisis management coverage.

The covered costs include: crisis event communication costs, which pays for professional public relations counsel to help manage internal and external communications; crisis event business income and extra expense, which covers loss of income and extra expenses resulting from a crisis event; and post-event expense, which covers medical expenses, funeral expenses and counseling expenses. The product covers events such as workplace violence, child abduction, sexual assault, premises contamination and food contamination, among others.

The limit options are $10,000, $25,000, $50,000 or $100,000 each for the three coverages offered. The coverage is available to companies that purchase business income coverage and extra expense coverage, which are optional offerings of Fireman's Fund's commercial business property policy.

More information can be obtained by visiting the Novato, Calif.-based Fireman's Fund Web site at *www.firemansfund.com*.

Rockwood creates division offering MGA products

WILMINGTON, Del.—Rockwood Programs Inc. has established a managing general agent division, which offers a portfolio of products and services for MGAs and program administrators.

The MGA division's main offering is errors and omissions coverage, which includes risk management services as part of the coverage package. Other coverage offerings include employment practices liability insurance and E&O coverage for MGAs' producer networks. The division offers a menu of services, including marketing services and agency loans and valuation, among others.

Limits of up to $5 million are available for each of the coverages.

More information can be obtained by contacting the Wilmington, Del.-based Rockwood Programs at 800-558-8808 or by visiting Rockwood online at *www.rockwoodinsurance.com*.

Travel Underwriters offers travel medical plan

RICHMOND, British Columbia—Travel Underwriters, a travel insurance provider, is offering a travel medical insurance plan designed to work in conjunction with Canadian employee group health programs.

The TravelSure travel insurance plan covers medical expenses in excess of what standard health plans cover in emergency situations. The plan coverage includes hospital and physician fees, diagnostic services and emergency air transportation.

More information can be obtained by visiting online at *www.travelunderwriters.com*.

We'd like to report on new risk management and employee benefit products and services offered by your company. Send information about your new offerings to: Carrie A. Peinado, Business Insurance, 360 N. Michigan Ave., Chicago, Ill. 60601-3806; telephone: 312-649-5313; fax: 312-649-7801; e-mail: cpeinado@businessinsurance.com.

U.K. to set risk, continuity standards

Benchmarks will aid efforts to develop risk management practices

By SARAH VEYSEY

LONDON—Formal benchmarks for risk management and business continuity management could be in place in the United Kingdom within two years following a decision by the British Standards Institution to establish standards to cover the issues.

The standards will enable risk managers to develop risk management and business continuity practices for their individual organizations that can be compared with industry benchmarks, observers say.

Although a voluntary standard for risk management already exists in the United Kingdom, a standard endorsed by the BSI, which formulates a wide range of business standards, would recognize the maturity of the risk management discipline in the U.K., they say.

Julia Graham, of DLA Piper Rudnick Gray Cary U.K., will lead efforts to create a risk management standard.

Last week, London-based BSI announced the formation of two committees to formulate the standards.

The risk management committee is chaired by Julia Graham, chief risk officer of London-based law firm DLA Piper Rudnick Gray Cary U.K. L.L.P.

The committee comprises representatives from the Assn. of British Insurers, the Assn. of Insurance and Risk Managers, the Assn. of Local Authority Risk Managers, the Confederation of British Industry, the Health and Safety Executive, and the Institute of Risk Management—all based in London—among others. It held its first meeting Friday.

Nicki Dennis, head of risk market development at the BSI, said that in addition to formulating a U.K. standard, the risk management committee would contribute to the Geneva-based International Organization for Standardization's discussions on development of an international standard for risk management.

The committee will use a voluntary standard formulated jointly by AIRMIC, ALARM and the IRM and published in October 2002 as a "source document," Ms. Dennis said.

That voluntary risk management standard, which has been endorsed by the Federation of European Risk Management Assns., calls upon risk managers to develop a risk-aware culture within their organizations, to develop a risk-response process, and to provide their board and stakeholders with regular risk reports, among

See STANDARDS/page 14

GIO execs failed duty of care requirements: Australian court

By SARAH VEYSEY

SYDNEY, Australia—Three former executives of GIO Insurance Ltd. breached duty of care and diligence requirements over profit forecasts and a finite reinsurance deal during a 1998 takeover bid for the Sydney, Australia-based insurer, the Supreme Court of New South Wales has ruled.

The charges, which were brought by the Australian Securities and Investments Commission, alleged that the former executives' actions led to GIO's board rejecting a $5.35 Australian ($2.91)-per-share takeover bid by AMP Ltd. The rival insurer succeeded in buying GIO for just $2.75 Australian ($1.70) a share in 1999, when GIO's stock plummeted after it reported a $743 million Australian ($404.5 million) loss for 1998.

The ASIC alleged that Geoffrey Vines, former chief financial officer of GIO Insurance, Francis Robertson, former executive director of GIO Insurance and an executive officer of GIO Australia, and Timothy Fox, who succeeded Mr. Robertson as executive director of GIO Insurance in November 1998, made incorrect profit forecasts and failed to inform GIO's management and a due diligence committee, among others, about potential reinsurance losses during the time of AMP's bid for the company.

The judge also found that Mr. Vines failed to inform management of his doubts about a financial reinsurance contract GIO bought in November 1998 from American Re Corp.'s Sydney-based subsidiary that was intended to retrospectively cover the reinsurance losses.

Mr. Vines, the judge said, later became aware that the contract would not greatly minimize GIO Re's catastrophe losses, but he failed to inform management of his concerns.

And Mr. Fox acted dishonestly in relation to the transaction, the judge said, in particular in writing a side letter to American Re attempting to take back a major share of the defined event risk covered by the policy.

The court has not yet ruled on the penalties to be imposed on the three executives.

PHOTO: AFP

A man carries the black box of a TANS Peru jet that crashed last week while attempting an emergency landing in bad weather near the city of Pucallpa in the Amazon region of Peru.

Coverage for Peru crash led in London market

Fifth crash in a month unlikely to affect rates

LIMA, Peru—XL London Market Ltd.'s syndicate 1209 leads the hull and liability coverage for the Transportes Aéreos Nacionales de Selva Boeing 737-200 jet that crashed during an emergency landing in Peru on Tuesday, market sources said.

The TANS Peru jet, carrying 92 passengers and eight crew, was en route from Lima to the Peruvian city of Pucallpa. At least 40 of those aboard were killed when, due to bad weather, the pilot attempted an emergency landing near the destination airport.

Sources said the aircraft, which was built in 1981, was valued at $3.5 million. The jet's coverage was placed by Aon Ltd., the London-based unit of Aon Corp., sources said.

The crash is the fifth involving a commercial airline this month.

Earlier this month, aviation market sources said the four prior losses would not likely reverse the trend of falling aviation rates. And brokers last week said the addition of the loss from the Aug. 23 crash was unlikely to have a major effect on rates when airlines renew their coverage later this year.

Although the crash is the fifth aviation disaster in a short space of time, it is unlikely to change the trend of rate reductions, said Nigel Weyman, head of the direct aviation division at Jardine Lloyd Thompson Group P.L.C. in London.

—By Barbara Cockburn and Sarah Veysey

Updates

Marine claims panel to examine practices

London market organizations have established a committee to discuss market concerns and promote best practices for marine insurance and reinsurance claims. The Joint Marine Claims Committee, set up by the International Underwriting Assn., which represents London company market insurers, and the Lloyd's Market Assn., which represents underwriters at Lloyd's of London, is made up of marine claims adjusters from member companies of both associations.

E.U. product recalls rise after directive

Product recalls of consumer goods have risen in the first six months of 2005 compared with the second half of 2004, according to an analysis by PricewaterhouseCoopers L.L.P. in London. During the first six months of 2005, there were 351 recalls reported to the European Commission, according to PwC, a 64% increase over the number of recalls reported between July and December 2004. Under the European Union's General Product Safety Directive, which came into force last year, companies within the European Union are subject to more-stringent product recall reporting requirements.

U.K. pension trustees ready for new rules

More than half of the trustees of U.K. occupational pension plans say they are ready for requirements that will be introduced by the U.K. Pensions Act when it comes into force next April, according to a study. Mercer Human Resource Consulting in London surveyed 130 occupational pension plans and found that 56% had already taken steps to address the new requirements trustees will face when the act becomes law. Respondents to the survey operate both defined benefit and defined contribution plans.

SCOR gets OK to open office in Mumbai

French reinsurer SCOR S.A. has received regulatory authority to open a representative office in Mumbai, India. Santhana Gopalan, who was previously deputy general manager at Arig Reinsurance Co., will be manager of the SCOR office. Paris-based SCOR said in a statement that the move was part of its plan to expand in the rapidly growing nonlife reinsurance markets in the Indian subcontinent and Asia Pacific regions.

Standards: BSI to develop benchmarks for risk management

Continued from page 13

other things.

The committee also will consider other standards that have been developed in Australia and New Zealand, Ms. Dennis said.

It normally takes between 18 months and two years to develop a BSI standard, she said.

Over the past 10 years or so, risk management has matured as a professional discipline, noted Ms. Graham, and it has become clear that a high-level benchmark would be useful to help companies judge their performance.

The standard developed by the committee likely will provide definitions for risk management, set out a good-practice approach for systems and processes, and offer guidance on how to put such processes into practice, Ms. Graham said.

Many companies in the United Kingdom would welcome a BSI standard for risk management as a benchmark, according to Steve Fowler, executive director of the IRM in London.

The business continuity committee, headed by Chris Green, vice-chair of the Caversham, England-based Business Continuity Institute, will examine businesses' responses to a "publicly available specification"—seen as the first step to a standard—on business continuity.

The committee will consult with interested parties about their response to PAS 56, which was introduced in late 2003 and provides guidelines on best practices in business continuity management, with a view to developing a BSI standard for business continuity, Ms. Dennis said.

The BSI business continuity committee members include AIRMIC, ALARM, the BCI, the CBI and the Institute of Internal Audit.

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LEGAL NOTICE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Petition of Catherine Geraldine Regan, as Foreign Representative of **Sphere Drake Insurance Limited**, formerly Odyssey Re (London) Limited, Subject of a Foreign Proceeding.	In a Proceeding Under Section 304 of the Bankruptcy Code Case No. 05-14610 (RDD)

NOTICE OF ENTRY OF ORDER GIVING FULL FORCE AND EFFECT TO U.K. SCHEME OF ARRANGEMENT AND GRANTING RELATED INJUNCTIVE RELIEF AND CLOSING CASE

PLEASE TAKE NOTICE THAT on August 24, 2005, the Honorable Robert D. Drain, United States Bankruptcy Judge for the United States Bankruptcy Court for the Southern District of New York entered an Order giving full force and effect to the U.K. Scheme of Arrangement under Section 304(b) of the Bankruptcy Code and granting related injunctive relief in the above-captioned case. Parties in interest may obtain a copy of such Order and the referenced U.K. Scheme of Arrangement by making written request to the undersigned attorneys for the Petitioners.

Dated: New York, New York • August 24, 2005

LOVELLS • Attorneys for Petitioners
By: /s/ Karen Ostad
Karen Ostad (KO 5596), Dina Gielchinsky (DG 6054), 900 Third Avenue, 16th Floor, New York, New York 10022, (212) 909-0600

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LEGAL NOTICE

IN THE HIGH COURT OF JUSTICE (ENGLAND AND WALES)
No. 2873 of 2005
CHANCERY DIVISION
COMPANIES COURT
IN THE MATTER OF LION CITY RUN-OFF PRIVATE LIMITED
and
IN THE MATTER OF THE COMPANIES ACT 1985 (ENGLAND AND WALES)
IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE
No. OS542 of 2005
IN THE MATTER OF LION CITY RUN OFF PRIVATE LIMITED
and
IN THE MATTER OF THE COMPANIES ACT, CHAPTER 50 OF SINGAPORE

Proposed Scheme of Arrangement ("Scheme") for Lion City Run-Off Private Limited ("the Company")

In the above matter the Company sought leave of the courts to convene a Creditors' Meeting for the purpose of considering and if thought fit approving the proposed Scheme between the Company and the Scheme Creditors. The courts directed that such a meeting be held on 1 September 2005.

The Directors of the Company have decided to postpone the Creditors' Meeting originally scheduled for 1 September 2005 in order to evaluate any potential implications for the Company and the Scheme arising from the recent Judgment concerning The British Aviation Insurance Company Limited. The Directors believe that the Scheme is still the most appropriate way of finalising the Company's business affairs and the main advantages and possible disadvantages of the Scheme as set out in the Explanatory Statement remain valid.

The Creditors' Meeting will be re-scheduled and confirmation of the exact date, time and venue will be provided to you as soon as possible along with details of any changes to the Scheme which may be necessary following the postponement of the Creditors' Meeting. The deadline for the completion of Voting Forms and Forms of Proxy will be extended to two days before the re-scheduled date of the Creditors' Meeting or they can be handed in to the chairman of the Creditors' Meeting at that meeting.

Creditors should note that any Voting Forms that have been sent to the Company will remain valid unless otherwise instructed by Omni Whittington Asia Pacific Pte Ltd ("Omni Whittington"), the proposed Scheme Managers and current run-off managers for the Company.

If you consider you may be a policyholder and would like to be sent the scheme documentation or require further information, please email Andrew Campbell at lioncityrun-off@omniwhittington.com.

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PHOTO: REUTERS

New California regulations mandate that employers provide workers access to shade and plenty of water.

Heat: California takes steps to keep workers cool

Continued from page 4

must either be open to the air or provided with ventilation or cooling.

● Train supervisors and employees in the risk factors for heat illness and the symptoms of the condition; the employers procedures for addressing such risk factors; procedures for contacting emergency medical services; and, if necessary, transporting employees affected by heat to a location where they can receive medical attention.

"While there are plenty of wonderful businesses that do provide these things to their workers, there are those that do not," the Cal/OSHA spokeswoman said. "Having a plan in place, a strategy to get anyone who may be affected to have medical attention, providing shade if someone is feeling ill, and providing certain quantities of water are huge parts to prevent heat exhaustion."

According to a spokesman for the federal Occupational Safety and Health Administration, OSHA does not have any specific standards for heat-related illness prevention. The federal agency does, however, have a general duty clause, which covers all aspects of workplace safety and health that are not addressed by a specific standard, the spokesman said.

"The general duty clause basically says employers need to keep their employees in a safe and healthy workplace and keep them out of danger," he said.

> "The best course of action is training and education to involve supervisors and employees."
>
> **Carlos Rojas**
> **Remedy Temps Inc.**

Carlos Rojas, field safety manager for Aliso Viejo, Calif.-based Remedy Temps Inc., said he hopes the regulations will improve education about the danger of heat-related illness.

"The best course of action is training and education to involve supervisors and employees," Mr. Rojas said.

"Heat illness is simple to prevent," the Cal/OSHA spokeswoman said. "If those that suffered would have had enough water or shade early enough, there wouldn't have been a problem."

More information on the regulations is available at *www.dir.ca.gov/dosh/heatillnessinfo.html*.

Illinois limits med mal damages

By MEG FLETCHER

ALTON, Ill.—Illinois Gov. Rod Blagojevich has signed into law a medical malpractice reform bill that establishes new caps on noneconomic damage awards and permits the state to deny rate increases.

S.B. 475, which the governor signed at a hospital in Alton, caps noneconomic damages for all plaintiffs in any civil action to $1 million from a hospital—including its personnel and affiliates—and $500,000 from a physician or health care professional.

The law, which takes effect immediately, also requires the Department of Financial and Professional Regulation to collect and make available medical malpractice insurers' actuarial data used in determining pricing. If an insurer requests an increase of more than 6%, the law mandates that a public hearing be held to determine whether the increase is justified, and it gives the secretary of financial and professional regulation the authority to adjust the increase if such a change is deemed appropriate.

Subjecting premium hikes to greater public scrutiny should increase competition and help stabilize rates, Gov. Blagojevich said in a statement.

In addition, the measure requires med mal lawsuits to be certified by a physician and raises the standards for expert witnesses.

The law also gives state officials increased authority to more aggressively discipline physicians. In addition, the bill requires that the department create a Web site containing profiles of each licensed physician, including his or her history of disciplinary actions and malpractice judgments.

"With so much at stake, we cannot think that just because we passed this bill, our work is done," Gov. Blagojevich said in the statement. "We have to aggressively regulate insurers so that we can increase competition and reduce prices, and we have to make sure that patients have the information they need about their doctors."

Canada: Ruling opens debate on stress

Continued from page 4

by the co-worker that constituted a "sudden and unexpected traumatic event."

In a March 2004 decision, the tribunal ruled that an employee who was subjected to ongoing harassment by a manager was entitled to benefits, even though the harassment did not include being placed in a life-threatening or potentially life-threatening situation. The tribunal said the policy wording suggested that there might be other types of harassment that would satisfy the requirements for determining whether the stress claim was justified.

"If it's involved with the workplace, the board has a hard time rejecting it," said Michael McAlear, a senior consultant for Heath Benefits Consulting Inc. in Ottawa.

Widening of the policy

Meanwhile, the Supreme Court of Canada's October 2003 decision in *Nova Scotia (Workers Compensation Board) vs. Martin* declared that limitations on claims for chronic pain were illegal (*BI*, May 24, 2004). In this decision, which observers said had implications for the coverage of stress claims, the Supreme Court challenged the constitutionality of attempts to limit or deny benefits for injuries or conditions arising from the workplace.

Given these recent tribunal and court decisions, the Nova Scotia rules represent a "de facto widening of the policy," said Sheikh Azaad, president of Toronto-based Atworkcanada Inc., which provides solutions for managing workplace disability and absenteeism. It is only a matter of time, probably within the next 12 months, before Nova Scotia's policy will be expanded to nonfederal government employees, Mr. Azaad predicted.

A spokeswoman for the WCB of Nova Scotia said there has been discussion of expanding eligibility for gradual-onset stress claims, but she declined to comment further.

Employers have several objections to any expansion of eligibility for stress claims, namely the difficulty in quantifying the nature of the condition and effectively linking the condition to a workplace issue. For employers, the key problem is how to determine whether and how much of the stress is related to the job or to other factors, such as the employee's personal life.

"The workplace needs to be the significant contributor to any disability," said Sherri Helmka, executive director of the Kitchener, Ontario-based Employers' Advocacy Council, which represents more than 600 employers in the province.

For gradual-onset stress, "it's practically impossible to determine the causality," said Ian Howcroft, vp-Ontario division of the Ottawa-based Canadian Manufacturers & Exporters, a trade association that represents more than 2,000 employers in Canada.

"It does make it very hard to make the connection between work and the condition or the disease," said Terry Bogyo, director of corporate planning and development for the Richmond, British Columbia-based WCB of British Columbia.

If the eligibility for stress claims is expanded, employers worry, it could lead to employees filing claims for a number of stress conditions arising out of the course of everyday employment.

"It can't be normal, day-to-day labor relations issues," Ms. Helmka said. "That's not a road we want to go down."

In order to combat this concern, gradual-onset stress likely will be covered initially within a certain limited framework, requiring evidence that the employee has suffered stress due to working in extraordinary or abnormal conditions, Mr. Azaad said. The boards will create policy language designed to limit gradual-onset stress claims, as Nova Scotia did in its policy, he noted.

Nova Scotia's policy says the work-related events causing the stress must be "unusual and excessive" in comparison to the work-related stress experienced by an average employee in the same or similar occupations.

"It has to be more than just the norm," Mr. Azaad said. "Otherwise, they're opening a floodgate that they can't control."

Employee advocates have argued that Nova Scotia's policy treats federal employees differently than other employees, a discrepancy the WCB of Nova Scotia attributed to the need to comply with the GECA.

Labor unions take the position that all work stress should be covered, and employers make the argument that other types of stress beyond traumatic stress "may be work-related, but it's not affordable," Mr. Bogyo said. "There's always been a tension around that issue," he said. "Where do you draw that line?" he asked.

Affordability of coverage

The affordability of workers comp coverage remains a key issue for employers. Canadian workers comp coverage is provided largely by provincial workers comp boards and financed by employer-paid premiums. Many of the provincial workers comp systems have substantial unfunded liabilities, with Ontario's $7 billion deficit forcing the board to raise employer premiums by 3% in 2006.

Employers say the workers comp system in Canada simply cannot broaden the eligibility for stress claims without creating an undue financial hardship.

"We can't afford to be paying for everybody to be off of work because they're experiencing stress," Ms. Helmka said. If employees can file stress claims based on all types of work situations, she asked, "how are we going to afford a system like that?"

Property/casualty insurers' 2005 first-half results

Ranked by net income. All amounts are in thousands of dollars.	CORPORATE			PROPERTY/CASUALTY OPERATIONS					
	Net income	Percent increase 2005-2004 (decrease)	Consolidated revenues 2005	Combined ratio 2005[1]	Combined ratio 2004[1]	Net premiums written 2005	Percent increase 2005-2004 (decrease)	Policyholder surplus 2005	Percent increase 2005-2004 (decrease)
American International Group	$7,676,000	47.4%	$53,973,000	92.7%	94.1%	$21,433,000	5.9%	N/A	N/A
The St. Paul Travelers Cos. Inc.	1,281,000	310.6	12,142,000	89.1	110.6	9,996,000	15.5	$16,137,000	15.6%
Hartford Financial Services Group Inc.	1,268,000	26.7	12,048,000	87.8	90.6	5,301,000[2]	7.1	6,700,000	13.6
Chubb Corp.	965,100	34.6	6,900,100	88.9	92.7	6,168,700	3.7	8,600,000	22.9
ACE Ltd.	904,000	3.8	6,406,000	89.5	87.8	6,275,000	3.2	10,499,000	13.9
Liberty Mutual Insurance Co.	896,000	29.7	10,261,000	101.3[2]	103.9[2]	6,923,000[2]	1.5	9,867,000	26.0
CNA Financial Corp.	466,000	175.7	4,934,000	99.4[2]	96.8[2]	3,494,000[2]	(4.2)	7,374,000	11.1
SAFECO Corp.	399,300	(17.4)	3,171,200	88.8	87.6	2,945,300	4.7	3,699,300	14.0
Cincinnati Financial Corp.	302,153	0.2	1,856,091	88.2	89.5	1,587,508	4.2	4,180,351	(0.3)
Old Republic International	286,634	27.2	1,825,206	91.7	91.0	896,681[2]	7.6	2,119,398	12.6
American Financial Group	144,500	11.9	1,926,600	91.0	94.1	1,209,500	7.1	2,355,500	21.1
Ohio Casualty Corp.	79,800	53.7	838,600	95.5	101.5	743,400	(1.0)	929,100	3.3
RLI Corp.	63,702	80.4	284,365	77.4[2]	91.1[2]	246,882[2]	(5.6)	676,675	8.5
Argonaut Group Inc.	49,700	37.3	371,800	95.2	97.3	349,500	13.1	658,000	18.4
Cumulative	$14,781,889	44.5%	$116,937,962	92.0%	96.2%	$67,569,471	5.6%	$73,795,324	15.5%

1. Includes dividends. 2. Statutory. N/A Company did not provide data.
Source: *BI* survey

Results: Rates soften as insurers post strong first-half results

Continued from page 3

increases that had gone on over the last several years, and even as they trend off, you have the earnings coming through," said Jeffrey Berg, a senior analyst with rating agency Moody's Investors Service in New York.

"I think, for the most part, you had more companies having upside earnings surprises than earnings misses," which is "largely coming from what's going on with pricing over the last several years," said Brian Meredith, senior property/casualty insurance analyst with Banc of America Securities in New York. Also helping was an increase in short-term interest rates, which boosted investment yields, said Mr. Meredith.

Furthermore, "I think reserves have been generally developing favorably, with a couple of exceptions," said Cliff Gallant, an analyst with Keefe, Bruyette & Woods in New York.

But there is evidence of pricing pressure as rates soften. "What we saw in the first half was continued increasing pressure on pricing that resulted in a slowdown in top-line growth," said Mark Lane, a principal and research analyst with William Blair & Co. in Chicago.

The outlook is generally positive, though, say observers.

For the second half of the year, "a lot still depends on the catastrophe experience," said James B. Auden, senior director at Chicago-based Fitch Ratings. "Last year, you had huge catastrophe losses. It was a very unusual year.

"This year, there's been a number of storms, but the losses haven't really been too high," said Mr. Auden. As a result, "If you have kind of a normalized cat loss year, 2005 will probably end up being a strong year, maybe stronger than '04."

As for next year, "I think 2006 is shaping up to be a pretty good year," said Mr. Iten. "We don't think it will be as strong a year from an underwriting perspective, but we still think it will be a good year, just because you're going to have a lot of momentum going into 2006 as long as the price decreases stay fairly moderate, which they have so far, apparently."

> "Companies are looking for new areas of growth, and getting more competitive on price, so it's the beginning of the soft market."
>
> **Cliff Gallant**
> **Keefe, Bruyette & Woods**

But rates will continue to fall, say observers.

"I would expect companies to continue to report some very low combined ratios, and continuing to see the balance sheets get stronger, but the competitive environment will continue to get more difficult," Mr. Gallant said. "I think, increasingly, companies are looking for new areas of growth, and getting more competitive on price, so it's the beginning of the soft market."

"Pricing continues to fall across pretty much all lines of business, and I'm expecting that the favorable returns on equity will decline steadily over the next couple of years," said J. Paul Newsome, vp and senior equity analyst with A.G. Edwards & Sons Inc. in St. Louis.

"Going forward, we would expect premium volume to continue to come under pressure, driven by lower rates, especially considering that the experience to this point has been strong for the insurance companies," said Mr. Streit of Williams Capital.

However, Mr. Lane said competition has been relatively rational, "But it's a little bit premature to say the market is stabilized."

Observers generally expect the downside of the cycle to be gentle, though.

So far, "we're seeing the competition remaining largely rational," said Mr. Streit. If business does become underpriced, insurers "are walking away from it to some extent," while they are also beginning to purchase shares to return capital to their shareholders.

"As long as those types of trends continue, we would not expect to see a dramatic fall off in both premium and underwriting margins," said Mr. Streit.

Mr. Iten said the way insurers are behaving "suggests that discipline is being maintained in the market….There's no reason to anticipate there's going to be a sharp dropoff. It seems more like a shallow scenario, a soft landing."

Ruling: Reinsurer must pay claim: Court

Continued from page 1

Insurance and reinsurance experts, who disagree over the court's reasoning, say they expect the ruling to be influential in various court jurisdictions but less so among arbiters, who resolve the vast majority of reinsurance disputes.

"I think they got it dead wrong," asserted reinsurance attorney David Spector, noting that other courts and arbiters have not previously reached a consensus on the allocation issue.

"It's an example of a court creating law out of thin air, in my point of view," said Mr. Spector, a partner with Schiff Hardin L.L.P. in Chicago.

Mr. Spector questioned why a reinsurer would agree to give an insurer broad discretion in crafting its allocation. That would create a conflict of interest between the insurer, which typically would seek to maximize its recovery, and the reinsurer, Mr. Spector said.

There would be no conflict of interest if the allocation were based strictly on the terms of a settlement, Mr. Spector said.

But insurer attorney John H. Mathias Jr., a partner at Jenner & Block L.L.P. in Chicago, said the 2nd Circuit panel's decision "hung together."

"I think it's well-reasoned. It's well-written," he said.

Insurer and reinsurer attorney Joseph G. Finnerty III said the opinion "seems to be a rational analysis."

The court correctly decided that it should not inquire whether an insurer crafted its loss allocation to maximize its reinsurance recovery as long as the reasoning behind the allocation was rational, said Mr. Finnerty, a partner and head of litigation at DLA Piper Rudnick Gray Cary U.S. L.L.P. in New York.

Ruling otherwise would have led to the next "Ice Age" of litigation between reinsurers and their cedents, he said.

The decision also "frees the hands" of primary insurers in their coverage negotiations with policyholders, Mr. Finnerty said. Insurers now can focus on negotiating the best claim settlement without eyeing how the process would impact its reinsurance recovery.

The impact of the ruling is unclear, though, because most reinsurance disputes are arbitrated, and arbiters are not bound by court precedent.

"I don't think that it will necessarily be determinative in similar situations in most or all situations," said arbiter Ronald A. Jacks of Annapolis, Md.

Mr. Jacks said he expects that the ruling will be cited in future disputes. "But I don't think that most arbiters will necessarily feel they're bound by it."

Coverage dispute

The litigation stems from an underlying coverage dispute between Travelers and policyholder Owens-Corning Fiberglas Corp. of Toledo, Ohio, over thousands of asbestos liability claims.

Travelers covered Owens-Corning from 1952 through 1979 under various primary and excess liability insurance policies that provided separate limits for products- and nonproducts-related losses.

Each primary products policy had a $1 million per occurrence and aggregate limit, while each primary nonproducts policy provided $1 million of per-occurrence limits with no aggregate. Each of several layers of excess coverage provided $25 million of limits.

The total per-occurrence limit for the products as well as for the nonproducts coverage in each policy year was $273.5 million, according to court papers.

Beginning in the 1970s, Owens-Corning categorized its asbestos losses as a single products-related occurrence. The occurrence was the production and distribution of its insulation product that contained asbestos.

But by the early 1990s, losses had exhausted Owens-Corning's products coverage. The company then sought additional coverage by asserting that its nonproducts policies should respond to claims arising from its contracting operations and that either each claim or each set of claims tied to a particular operation represented a separate occurrence.

> "It's an example of a court creating law out of thin air, in my point of view."
>
> **David Spector**
> **Schiff Hardin L.L.P.**

Travelers denied the claim. It argued, among other things, that all of Owens-Corning's claims arose from a single occurrence and that Travelers already had paid out a full-limits loss.

Under a 1993 settlement, Travelers agreed to pay $273.5 million more in coverage—or about the amount of a full-limits loss attributable to another single occurrence. But the settlement pointedly did not resolve the dispute over the occurrence issue.

Travelers allocated most of its settlement amount as a single additional occurrence of nonproducts claims. That led to $4.4 million of claims against the facultative reinsurance policies Travelers purchased from Gerling from 1975 to 1977 to cover the insurer's excess position.

But Gerling asserted that Travelers had abandoned that position in its settlement. Gerling argued that Travelers should have made the allocation on a multiple-occurrence basis—the position that the reinsurer said Travelers implicitly accepted in its settlement.

Because of the absence of an aggregate limit on the primary nonproducts coverage, the primary insurance would have covered much more of the loss under that methodology. As a result, the reinsurance claim would have been much smaller.

In a September 2003 summary judgment in favor of Gerling, a district court ruled that the follow-the-fortunes clause was inapplicable in the Travelers loss. The district court ruled that the clause was designed to protect a ceding company by ensuring that its reinsurance recovery would not be jeopardized when a settlement forces the insurer to relinquish its original coverage position. The court agreed that Gerling did not challenge the terms of Travelers' settlement but instead tried to enforce them.

Previous ruling

In reversing the district court, the appellate panel relied on a follow-the-fortunes ruling it issued in a separate Owens-Corning dispute with another reinsurer about six months after the district court ruled in Gerling's favor.

In that earlier case, reinsurer North River Insurance Co. had written excess coverage above the Travelers' layers and, after settling with Owens-Corning, had allocated its losses as Travelers had.

North River's reinsurer, ACE American Reinsurance Co., objected to the allocation because it differed from a presettlement analysis the insurer conducted on various loss scenarios it could face. The analysis showed how such losses could impact North River's reinsurance recovery.

A 2nd Circuit panel in that case rejected ACE's argument. It ruled that the follow-the-fortunes doctrine extends to an insurer's postsettlement allocation decisions—regardless of any inconsistencies between the insurer's pre- and postsettlement positions—as long as the allocation was made in good faith, was reasonable and complied with policy terms.

The court also noted in the North River case that the main rationale for the doctrine was to foster maximum coverage and settlements and to prevent courts from undermining the cedent-reinsurer relationship.

In the Travelers case, the 2nd Circuit panel reiterated its application rule.

The panel further noted that Gerling's position was "even weaker" than ACE's, because Traveler's allocation reflected its settlement and Gerling did not show an inconsistency in Travelers' position.

"Given that Travelers and OCF expressly declined to resolve the occurrence issue, there is no cause for us to do so now," the panel wrote. "Indeed, were we to undertake such an analysis, we would be engaging in precisely the kind of 'intrusive factual inquiry' that the follow-the-fortunes doctrine is meant to avoid," the panel said, quoting its North River decision.

Gerling's and Travelers' attorneys could not be reached.

Travelers Casualty & Surety Co. of America vs. Gerling Global Reinsurance Corp. of America, 2nd U.S. Circuit Court of Appeals, Aug. 18; No. 03-9220.

PHOTO: EPA PHOTOS

Residents of Kingston, Jamaica, survey damage after Hurricane Emily hit the island earlier this year. Jamaican authorities are proposing a risk management plan to help the nation deal with natural disasters.

Jamaica: Risk management plan covers catastrophe risks

Continued from page 3

strengthening the building code so that structures are built to withstand hurricane windspeeds and the effects of earthquakes, Ms. Carby said. Quakes are occasionally felt in Jamaica, she said.

Other sources agreed that building codes need to be comprehensive and mandatory.

"We need to establish, very firmly, building codes that are strictly adhered to," said Jason Goldsmith, commercial lines underwriting manager with Globe Insurance Co. of Jamaica Ltd. in Kingston.

There are certain types of construction materials, particular kinds of roofing, for example, "that shouldn't be used in Jamaica," said Mr. Goldsmith. "We need to make sure that houses being constructed are constructed according to the code."

> "I don't think 50% of the businesses look at their overall risk management."
>
> **Barbara Carby**
> **Office of Disaster Preparedness and Emergency Management**

Paul Edwards, head of risk mitigation and environmental protection at Cable & Wireless Jamaica Ltd. in Kingston, said that while "standards are there, they could be improved." He added that companies such as Cable & Wireless often build to standards exceeding those in place in Jamaica, but there appear to be "some challenges with persons abiding by" Jamaica's current standards.

Cable & Wireless learned a valuable lesson from Hurricane Gilbert 17 years ago, when its communications network was damaged. "We put a lot underground," he said of the communication infrastructure, and while service was interrupted in some areas during Hurricane Ivan, business interruption losses were kept down because much of the network was safely buried.

Jamaica needs more extensive risk mapping, Ms. Carby said, because much of the country has not been mapped. "It has been ongoing for some time," she said of the mapping, but funds need to be allocated annually so that the entire country eventually is mapped.

If the risk management plan helps lower the cost of natural disasters, insurance prices will fall, according to Mr. Goldsmith. "If we don't have the sort of losses we've had, it will lower prices eventually," he said. "It would lead to lower insurance costs over time."

Knock-on effects

As efforts to mitigate losses from natural disasters continue, risk management as a whole in Jamaica could use the added attention, sources said.

"The risk management community is not at the level it should be," said Mr. Goldsmith. "There is room for a significant amount of improvement."

"Entities and companies have to buy into the risk management mindset," Mr. Goldsmith said, and that hasn't happened in Jamaica. "At one time there was a push for more companies to have a risk manager," he recalled. "Eventually it just went; there were other, more pressing things," and softening insurance prices dimmed the focus on risk management, he said.

Ms. Carby agreed that "there is room for improvement among our commercial operations. We have been trying to encourage businesses to do the planning" to control losses through disaster recovery efforts and insuring their assets.

The ODPEM holds workshops to help businesses develop risk mitigation techniques, she added.

But while "awareness has been increasing," Ms. Carby said, "I don't think 50% of the businesses look at their overall risk management."

Abuse: States look to limit comp to workers under influence

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impaired," agreed Sam Sorich, president of the Assn. of California Insurance Cos., a Sacramento, Calif.-based affiliate of the Property Casualty Insurers Assn. of America. "By prohibiting recovery of benefits, we think these laws encourage a safe workplace."

Yet there is no evidence that restricting workers compensation coverage for someone under the influence of alcohol or drugs discourages them from showing up at work in that condition, said Eric Goplerud, director of Ensuring Solutions.

Mr. Goplerud agrees that drugs and alcohol abuse are costly to employers. But he advocates diagnosing drug and alcohol problems, and providing counseling and treatment as an effective way to reduce accidents and costs over denying benefits.

He has found that doctors tend to underreport drugs or alcohol as the cause of an accident because insurers may decline to pay the bills in such cases.

A worker who imbibes or abuses drugs will not think far enough ahead to reason that he or she may not receive workers comp benefits if involved in an accident, Mr. Goplerud elaborated.

The threat of denying medical benefits to individuals with drug or alcohol problems is not likely to induce them to improve their mental health, agreed Pete Cerchiara, president of the SouthWest Health Alliance, a Scottsdale, Ariz.-based employer health group and an affiliate of the National Business Coalition on Health.

Furthermore, to recoup their expense for treating uncompensated injured workers, medical providers are likely to cost shift onto social programs and employees being treated under employer health plans. That, too, would drive up employers' costs, Mr. Cerchiara said.

Employer anti-drug and -alcohol policies, though, can reduce drug and alcohol use if they are clearly stated and rely on practices such as pre-employment screening and random testing, Mr. Goplerud said.

Following the Arizona Supreme Court's Aug. 10 ruling in *David C. Grammatico vs. The Industrial Commission*, more Arizona employers might consider random drug testing, said Marc Shockley, insurance and risk administrator for the Central Arizona Project, a canal and water delivery company in Phoenix.

His employer already administers pre-employment screening, and employees can be tested when supervisors witness suspicious activity, Mr. Shockley said. CAP also administers random tests, but only to drivers.

Under the random tests, employees have tested positive in a couple of instances that surprised him, Mr. Shockley said. So, he concluded, employees can slip past employer policies that rely solely on pre-employment screening or test only when there is suspicious activity.

With the Arizona Supreme Court ruling, therefore, there is a greater impetus for employers to consider random testing that could prevent employees from slipping past other detection methods, said Mr. Shockley, who is considering expanding his company's random testing.

The Arizona ruling resolved conflicting state appellate court decisions involving workers who tested positive for alcohol and illegal drug use shortly after they were injured.

Arizona's workers comp law, which is embedded in the state's constitution, created a no-fault system. The court found that the law under review created a fault and violated the constitution by requiring proof that alcohol or illegal drugs did not contribute to the accidents.

Although employers and insurers argued in amicus briefs that workplace safety was at risk, Arizona's high court did not rule on the social merits of denying coverage for impaired workers.

To restore the ability to deny benefits, Arizona employer groups are likely to form a coalition and ask state lawmakers to place a constitutional amendment on the November 2006 ballot, said a spokesman for the Arizona Chamber of Commerce & Industry in Phoenix.

Employers believe they can garner the support from a majority of lawmakers necessary to place the issue on the ballot. That strategy would save them the costs and effort that would be required if they were to collect voter signatures, another route to placing the issue on the ballot.

In North Carolina, meanwhile, proponents say they expect Gov. Mike Easley to sign a workers comp reform packaged adopted last week by legislators. Among other measures, House Bill 99, sponsored by Pryor Gibson, D-Anson County, would strengthen an existing law allowing the denial of benefits when intoxication or being under the influence of a controlled substance causes an employee's death or injury.

Under H.B. 99, if a claimant were to test positive following an accident, the burden would shift to the claimant to prove that he or she was not intoxicated, according to an analysis by the American Insurance Assn. If a claimant were to test positive, the individual could rebut the presumption that he or she was intoxicated by showing evidence that his or her faculties were not impaired.

That bill is not as strong as one favored by employers and the American Insurance Assn., which would have allowed the denial of benefits based on positive tests without the opportunity for rebuttals. A spokeswoman for the American Insurance Assn. noted, though, that, H.B. 99 would at least place the burden on claimants to rebut failed tests.

Jobs with alcohol problems

Rates of alcohol problems by industry, among workers 18 to 49 years old.

Industry occupation	Workers with serious alcohol problems
Construction	18.9%
Agriculture	16.9%
Handlers, helpers and laborers	16.8%
Transportation and material moving	13.8%
Service	13.4%

Sources: CDC, Substance Abuse & Mental Health Services Administration, U.S. *Statistical Abstracts.*

Merck: Verdict unlikely to have influence on pharmaceutical market

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help an already tight market, either, sources point out.

"The market has largely pulled away from this sector already," said Tom Coughlin, executive vp and chief operating officer of Willis Risk Solutions in New York, a unit of Willis Group Holdings Ltd. "This event, if anything, is just a furtherance of an already much-diminished market, from a capacity perspective," Mr. Coughlin said of the verdict against Merck.

Merck, based in Whitehouse Station, N.J., said immediately after the award that it would appeal, claiming it acted responsibly in marketing and monitoring the drug.

The award to the widow of a man who died of heart arrhythmia after taking the painkiller Vioxx amounted to $24 million for mental anguish and loss of companionship and $229 million in punitive damages. The punitive damages likely will be reduced under a Texas law that caps such awards.

For Merck and other drug companies, there is not a large market to tap for the liability insurance that could protect them from such payouts. And the impact of awards like the one against Merck long ago began influencing what is offered by insurers who remain in the market, sources note.

"Drug litigation in prior years has already affected the availability and cost of product liability coverage in the global marketplace to a large extent," said a spokesman for Allianz Global Risks in Munich, Germany. "As a consequence, the drug industry already carries large portions of their exposures on their balance sheets. We expect this to increase further," especially among large pharmaceutical companies, he said.

Allianz writes liability coverage for pharmaceutical risks but does not provide the coverage for Merck, the spokesman confirmed.

Only a handful of insurers write pharmaceutical liability coverage for large companies oriented toward research and development, according to Mr. Coughlin, with the bulk of capacity coming from Europe and Bermuda.

One of the major concerns insurers have about underwriting large drug companies' product liability insurance is the "sheer size of the typical patient population," said Lee Farrow, New York-based vp for ACE Medical Risk, a unit of ACE USA. "Any company that has a product that ends up in 20 million medicine cabinets across the country is going to be difficult to underwrite," he said.

Additionally, Mr. Farrow pointed out, plaintiffs attorneys are drawn to cases involving large pharmaceutical companies. "If there's something wrong with the product, there's a good chance you'll have a class action," he said.

"ACE does not write products liability coverage for large pharmaceutical companies" because of such concerns, said Mr. Farrow. ACE writes select pharmaceutical risks, mostly in the biotech field.

Mr. Coughlin said insurers that continue to provide liability coverage to pharmaceutical companies are "pretty committed to this market." Nevertheless, he said, "anytime that there is a major claim in this sector, the underwriters that have been committed to this sector need to evaluate how they are going to insure this, and how they are going to structure their programs, and continue to refine their list of excluded products."

A source close to American International Group Inc. in New York said the Merck verdict would not affect the coverage that insurer offers. A spokeswoman for Warren, N.J.-based Chubb Corp., which writes coverage for pharmaceutical risks, said last week that it was too soon to know what the eventual market fallout might be from the Merck verdict. Neither insurer would comment on whether they insured Merck.

Merck has some coverage

Merck, meanwhile, faces nearly 5,000 lawsuits spawned by Vioxx in state and federal courts, with additional suits filed in other countries, including Australia, Brazil, Canada, Israel and Turkey. Though it had previously vowed to vigorously defend each suit in court, lawyers for Merck late last week said the drugmaker was open to the possibility of settling a small number of cases involving patients who ingested the drug for 18 months or more.

Merck has already acknowledged it probably has inadequate insurance to cover defense costs and claims in Vioxx-related cases.

In a 10-Q filing with the U.S. Securities and Exchange Commission earlier this month, Merck said it has $630 million in product liability coverage to pay Vioxx-related claims after deductibles and coinsurance. The company said it also has at least $190 million in directors and officers liability insurance that will respond to potential Vioxx-related securities liabilities, and at least $275 million in fiduciary and other insurance that would respond to Vioxx claims related to the Employee Retirement Income Security Act.

In the filing, Merck said it is "reasonably possible" that the company's coverage with respect to Vioxx lawsuits "will not be adequate to cover its defense costs and any losses."

A source close to Lloyd's of London said Merck sought directors and officers liability coverage from that market last year, but underwriters declined to write the coverage. "Lloyd's writes a small number of Merck policies, but they are confined to property coverage and not pharmaceutical coverage," the source said. "It's thought that Bermuda and the U.S. are carrying most of their exposure in terms of D&O, product recall and pharmaceutical liability."

Leonard Fodera, a plaintiffs attorney with Monheit, Silverman & Fodera P.C. in Philadelphia, which is handling around 200 Vioxx cases, said he is aware of at least $100 million in excess coverage written for the drugmaker, but he could not identify the insurer. He called the coverage amount "a drop in the bucket" compared to potential liabilities faced by Merck.

Muddying the coverage waters for Merck are disputes with its insurers. The company would not comment on its insurance coverage or the disagreements with insurers, but said in a March SEC filing that its "upper-level excess insurers" are seeking, through arbitration, to cancel their policies with respect to Vioxx lawsuits.

"As most of those insurers also issued lower-level excess policies to Merck, it is likely that such insurers will also dispute their obligation to provide coverage under other policies," Merck said in the filing.

Mr. Fodera said the disputes are over what insurers say were failures by Merck to disclose "pertinent information" about Vioxx to the U.S. Food and Drug Administration. "There is a disclaimer on coverage for not being up front" with regulators, he said.

ADVERTISER INDEX

Issue of August 29

Ruling protects worker witness

By JUDY GREENWALD

NEW YORK—An employee who agrees to testify on behalf of a co-worker in a discrimination lawsuit is protected against employer retaliation even if she does not actually testify, a federal appellate court ruled last week.

The decision by the 2nd U.S. Circuit Court of Appeals in *Donna S. Jute v. Hamilton Sundstrand Corp.*, says that the day after she was named as a witness by a co-worker, Ms. Jute was removed from a special team at the Windsor Locks, Conn.-based aircraft systems and services supplier, even though a supervisor had earlier described her work as a "tremendous asset."

Subsequently, she was denied a promised promotion and told she was no longer needed to teach an evening aerobics class that would have supplemented her income.

After additional alleged retaliatory actions that occurred over a two-year period, Ms. Jute was fired as part of a postmerger reorganization. She charged also she was subsequently "blackballed" from obtaining a job at an affiliated company.

The opinion notes that Title VII of the Civil Rights Act of 1964 forbids retaliation against an employee who has participated in an investigation, proceeding or hearing. Ms. Jute never testified because the case was settled, and Hamilton argued that Ms. Jute's involvement in the co-worker's suit was "too attenuated" to qualify her as a participant, said the opinion.

But in a unanimous decision, the three-judge panel disagreed.

"Accepting Hamilton's argument would mean, for example, that an employer could freely retaliate against a Title VII whistleblower, as long as it did so before the employee actually testified," sad the opinion.

"Placing a voluntary witness into this kind of legal limbo would impede remedial mechanisms by denying interested parties 'access to the unchilled testimony of witnesses,' " said the court, quoting another decision.

The case was remanded for trial.

Insurer must pay attorney fees

By ROBERTO CENICEROS

EL PASO, Texas—A workers compensation claimant is entitled to attorney fees when an insurer sues to contest an award and later drops their lawsuit, a Texas appeals court ruled.

In *Pacific Employers Insurance Co. vs. Severiano Torres*, the insurer argued that the claimant did not qualify as a "prevailing party" under Texas law because it had dropped its suit against him and, therefore, Mr. Torres was not entitled to attorney fees.

The insurer in July 2003 had sued Mr. Torres seeking judicial review of an award from a Texas Workers Compensation Commission appeals panel. After 19 months of litigation, and three weeks before trial, the insurer filed a "nonsuit" to dismiss its claim against Mr. Torres, court records show.

Mr. Torres then sought attorney fees. A trial court in February granted him $15,175 plus interest for attorney fees and additional amounts for any appeals by Pacific Employers.

Last week, Texas' 8th District Court of Appeals affirmed the trial court's ruling by finding that Mr. Torres fits the definition of a prevailing party.

"We recognize the inequity…of allowing an insurance carrier the option of filing a lawsuit and challenging an award, requiring an employee to retain an attorney to defend against the challenge, and then nonsuit the claim with no risk of consequences to the insurance carrier," Chief Justice Richard Barajas wrote in his opinion.

BI Stock Index [8/22 - 8/26]

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**	2595.87	-1.07
Dow Jones	10559.20	-1.53
S&P 500	1219.71	-1.20

Largest gains

Allmerica Financial Corp.	6.81%
Markel Corp.	4.33%
Willis Group Holdings Ltd.	3.22%
PXRE Corp.	2.75%
Hub International	2.54%

Largest losses

AXA-UAP Group	-5.07%
Unico American Corp.	-4.86%
Gainsco Inc.	-4.23%
Unitrin	-3.64%
United Fire & Casualty Co.	-3.19%

Weekly change by market segment

Brokers	0.41%
Insurers/Reinsurers	-0.60%
Managed Care Organizations	-0.35%

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

Late News

Continued from page 1

Asbestos fund could fall short

A proposed $140 billion trust fund designed to replace the current litigation-based system for compensating victims of asbestos-related disease may not be sufficient to pay all claims over the next 50 years, according to an analysis by the Congressional Budget Office. The fund as outlined in the Fairness in Asbestos Injury Resolution Act, which was passed by the Senate Judiciary Committee in May, could face claims of between $120 million and $150 billion, not including administration and financing costs, the CBO found.

Katrina losses could reach $2 billion

Preliminary loss estimates for Hurricane Katrina, which battered Florida last week, will likely range between $600 million and $2.0 billion, according to initial estimates. Modeling firm AIR Worldwide Corp. estimated that insurer losses from the initial landfall of Katrina should not exceed $600 million. However, Risk Management Solutions, another modeling firm, estimated insured losses of between $1 billion and $2 billion for Katrina's first landfall.

Trucking safety rules draw criticism

Insurers and public-safety advocates are calling unsafe new rules that they say allow commercial truck drivers to spend too much time behind the wheel. The Federal Motor Carrier Safety Administration late last week issued new hours-of-service rules to replace those that had been vacated by a U.S. Circuit Court of Appeals just over a year ago. Insurers are particularly unhappy about one rule that allows truckers to drive a maximum of 11 hours after 10 consecutive hours off duty. Rules in place since the court struck down last year's proposed requirements capped at 10 the maximum number of hours behind the wheel.

Schinnerer names president

Victor O. Schinnerer & Co. Inc. has named John F. Shettle as president of the Chevy Chase, Md.-based underwriting manager. He replaces Vince Santorelli, who retired Dec. 31. Most recently, Mr. Shettle served as chief executive officer of Tred Avon Capital Advisors Inc., which provides advisory services to companies and private equity firms focusing on the insurance sector, Schinnerer said in its statement.

ABPA buys union TPA business

El Monte, Calif.-based American Benefit Plan Administrators Inc., an affiliate of HealthPlan Holdings of Tampa, Fla., has acquired the Taft-Hartley trust fund assets of Associated Administrators Inc., a Portland, Ore.-based third-party administrator. The acquisition will facilitate ABPA's expansion into the Pacific Northwest, according to Dan Maier, chief operating officer. ABPA provides TPA services exclusively to multiemployer trusts organized under the federal Taft-Hartley laws on behalf of unionized workforces.

Allmerica selling life, annuity business

Allmerica Financial Corp. said it is selling its runoff variable life insurance and variable annuity business to Goldman Sachs Group Inc., which will enable Allmerica to focus on its property/casualty business. Cash proceeds from the sale and from a $40 million dividend from its remaining life business are expected to total $385 million, including $70 million that will be deferred and paid over a three-year period, the insurer said.

HIP buys CDHP provider

HIP Health Plan of New York has acquired PerfectHealth Insurance Co., a provider of high-deductible health insurance policies in the New York market. The purchase of Staten Island, New York-based PerfectHealth, which has 1,500 members, recognizes the growing interest in consumer-driven health care options, HIP said in a statement. HIP, a regional health plan with more than 1.4 million members, recently launched its first consumer-driven health plan. The PerfectHealth acquisition will expand the scope of HIP's CDHP product line, the company said. The purchase price was not disclosed.

At *BusinessInsurance.com*

New Online Poll: How much of an injured employee's workers comp benefits should an employer be allowed to withhold if an employee was under the influence of drugs or alcohol at the time of the injury?

Items in the Late News column originally appeared in BI's Daily News feature on *www.businessinsurance.com.* Visit the BI Web site to sign up to receive BI's Daily News by e-mail.