

# Business Insurance

\$5

September 19, 2011

www.businessinsurance.com

**PBGC CHIEF REVEALS PLAN TO SCALE BACK PENALTIES ON EMPLOYERS / PAGE 3**



**RISK MANAGEMENT FAULTED IN REPORT ON BP SPILL / PAGE 4**

**TRANSATLANTIC WEIGHS OPTIONS AFTER MERGER CALLED OFF / PAGE 4**

## In Brief

**RMS estimates Irene losses at \$2B-\$4.5B**

Catastrophe modeler Risk Management Solutions Inc. estimates U.S. insured losses from Hurricane Irene range between \$2 billion and \$4.5 billion. The figures exclude inland flood losses from heavy rainfall and all National Flood Insurance Program losses from surge and rain. Irene dropped extensive rainfall along the East Coast and caused severe flooding in the Northeast.

**19% of comp costs due to medications**

Prescription drugs account for an estimated 19% of workers compensation medical costs in 2009, according to an annual report released by NCCI Holdings Inc. That amount, however, is only "slightly higher" than its 2010 estimate.

See **IN BRIEF** page 25



## SPOTLIGHT

**PHARMACY BENEFIT MANAGERS**  
Many don't adhere to drug regimens; carve-out savings; PBM ranking. **PAGE 9**

## CASE STUDY

Beware of retaliation charges; employees gain protections. **PAGE 16**

### WORKERS COMPENSATION

## Impact of drugs a comp myth?

*Often-quoted data on impaired workers disputed by experts*

By **ROBERTO CENICEROS**

There are service providers, bloggers, anti-drug organizations and even state agencies that claim alcohol or drugs are involved in up to half of workers compensation cases, but experts say the data appears to be bogus.

Insurers, workers comp research organizations and federal workplace safety agencies say that neither they nor any group or agency they know of collects data on the number of comp claims where the use of drugs or alcohol is a factor.

Yet certain vendors, blogs, anti-drug groups and state agencies claim on their websites that drugs or alcohol are involved in 38% to

50% of all workers comp claims.

They typically attribute the data to research that can't be verified.

Rita Nowak, vp of commercial lines and workers comp for the Property Casualty Insurers Assn. of America in Des Plaines, Ill., said she does not know of any industry statistics on workers comp claims stemming from drug or alcohol use. She also said she does not believe state regulatory agencies request that insurers or employers report such information.

Claiming that 38% to 50% of comp claims stem from alcohol or drugs does not make sense and is insulting to workers, Ms. Nowak said.

"I don't think that is even within the realm of realistic data points," Ms. Nowak said. "It basically implies that half the U.S. workforce is predominantly high at work."

Yet the National Drug-Free



**38% TO 50%**

Certain vendors, blogs, anti-drug groups and state agencies claim that drugs or alcohol are involved in 38% to 50% of all workers comp claims.

Workplace Alliance, a division of Drug Free America Foundation Inc. in St. Petersburg, Fla., cites the 38% to 50% statistic on its website. In one location, the NDWA attributes that finding to NCCI Holdings Inc., a Boca Raton, Fla.-based workers comp research and rating organization.

But a spokesman for NCCI said the organization examined more than 20 years of its research and found no such statistics. NCCI

now plans to ask organizations to remove such attributions to its research, the spokesman said.

In another place on its website, NDWA attributes the 38% to 50% statistic to a 1992 "Working Partners, National Conference Proceedings Report," sponsored by several federal agencies including the U.S. Labor Department. But an online copy of the proceedings

See **DRUGS** page 24

### REINSURANCE

## Property cat reinsurance rates heading higher

By **SARAH VEYSEY** and **MARK A. HOFMANN**

**MONTE CARLO, Monaco**—Property catastrophe reinsurance rates, which already increased at April, June and July renewals for some catastrophe-exposed programs, are expected to increase again at Jan. 1, 2012, renewals.

While rate increases have been and likely will continue to be seen for accounts that suffered losses in

the series of natural catastrophes this year, loss-free business may see rates remain stable or rise only slightly, experts say.

The impact of recent revisions to catastrophe models, particularly Risk Management Solutions Inc.'s updated U.S. hurricane model, also may be felt by accounts renewing at the start of 2012, with the increased loss exposure for cedents resulting in increased rates for some property



**Reinsurance executives met last week at the annual Rendez-Vous de Septembre in Monte Carlo, Monaco, to start renewal discussions.**

Montpelier Re Holdings Ltd.

Instead, midyear renewals resulted in price increases of 10% for catastrophe-exposed property business, he said.

At the June and July renewals, U.S. windstorm-exposed business saw rates increase an average of 7% to 12%, said James H. Veghte, CEO of reinsurance at Hamilton, Bermuda-based XL Group P.L.C.

The market is in an "interesting time with the capital being eroded by the events we had this year," said Stephen Young, executive vp of Pembroke, Bermuda-based Endurance Specialty Insurance Ltd.

"We will see some price increases" at the Jan. 1, 2012, renewal

See **PROPERTY** page 21

crain

Entire contents copyright © 2011 by Crain Communications Inc. All rights reserved.

### INDEX

Advertiser Index	23
Business Resources	22
Commentary	8
End Page	26
Mid-Market Executive	6
Products & Services	20
Professional MarketPlace	21
Up Close	20

cat business, sources said during the Rendez-Vous de Septembre gathering of the reinsurance industry.

"You look back at the beginning of the year, and we were looking at a long soft market," said Bill Pollett, chief corporate development and strategy officer for Hamilton, Bermuda-based

# Business Insurance

Online features & highlights  
[www.businessinsurance.com](http://www.businessinsurance.com)



virtual  
 conference

**ONLINE WORKERS COMP CONFERENCE:** Join *Business Insurance* for a free online Workers Comp Cost Control Strategies Conference on Sept. 22. Panelists will explore overprescribing of pain drugs and other topics. Register online at [www.BusinessInsurance.com/compcosts](http://www.BusinessInsurance.com/compcosts).

## MOST POPULAR STORIES Week of September 12, 2011

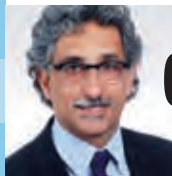
1. *BI* announces Best Places to Work in Insurance winners
2. EEOC sues Walgreen for diabetic worker firing
3. Guy Carpenter makes management changes
4. IRS proposes safe harbor for health care plan affordability test
5. Hartford disaster losses up, Travelers' rates rise
6. Suit against Liberty Mutual alleging extortion by exec settled
7. U.S. judge rejects health care insurance mandate
8. Standard commercial insurance prices rising: Towers Watson
9. Estimated 19% of workers comp costs due to prescription drugs
10. XL introduces construction subcontractor default cover

**GET ONLINE NEWS EACH DAY**  
 Subscribe to *BI's* daily newsletter



video

**BUSINESS INSURANCE IN FOCUS:** Our weekly video offers insights into the biggest risk management and benefits stories, and interactive information about our in-depth coverage, upcoming events and other features.



**COMP TIME**

**READ:** Comp Time, the award-winning workers compensation blog by Senior Editor Roberto Cenicerros.



**LOG ON, WEIGH IN**

**COMMENT:** Registered *BusinessInsurance.com* users can discuss the news, share tips and more.

**COMINGS & GOINGS**

**SEE WHO'S WHERE:** Search industry executive changes alphabetically by name or company, or by date.

Business Insurance (ISSN 0007-6864) Vol. 45, No. 36, is published weekly, except for combined issues the first and second week of July, the fourth and fifth week of August and no issue the last week of December, by Crain Communications Inc., 360 N. Michigan Ave., Chicago, Ill. 60601-3806. Periodicals postage is paid at Chicago and at additional mailing offices. POSTMASTER: Email address change to [customerservice@businessinsurance.com](mailto:customerservice@businessinsurance.com) or mail to Business Insurance Circulation Department, 1155 Gratiot Ave. Detroit, Mich. 48207-2912, \$5 a copy and \$125 a year in the U.S. \$130 in Canada and Mexico (includes GST). All other countries, \$230 a year (includes expedited air delivery). Canadian Post International Publications Mail Product (Canadian Distribution) Sales Agreement No. 40012850, GST No. 136760444, Canadian return address: 4960-2 Walker Road, Windsor, ON N9A6J3. Printed in U.S.A. Copyright © 2011 by Crain Communications Inc.

Aon Risk Solutions

# Intuition or *facts?*

Click by click. Request by request.

**With more than one million requests**, you can practically hear the Aon Global Risk Insight Platform® become more and more robust as Aon Risk Solutions brokers request quotes from markets and update it each step of the way.

Thank you for supporting Aon's efforts to build our industry's most relevant resource and the world's leading repository of insurance placement information. Whether your organization operates in Cincinnati or Singapore, Aon GRIP™ provides empirical facts and analytics to give you a competitive edge and support the best placement decision possible.

Let our innovation help define your legacy. Learn more about the distinctive value Aon delivers by visiting [aon.com](http://aon.com)



## PENSION BENEFITS

# Plan sponsors get regulatory relief

*PBGC eases rules on late payment fees, penalties for errors*

By JERRY GEISEL

**WASHINGTON**—Pension plan premium relief announced last week is only the first step in reducing regulatory burdens on defined benefit plan sponsors, a top federal official says.

That relief, sought by employer groups and announced by Pension Benefit Guaranty Corp. Director Josh Gotbaum, applies in two situations.

First, penalties no longer will be assessed for late premium payments, so long as the premiums are paid within seven days of the due date, Mr. Gotbaum said.

In addition, penalties will be waived in situations where employers with underfunded plans and subject to an additional premium make inadvertent errors, such as checking the wrong box on a form, that result in them paying less than they actually owe.

"We are trying to reduce the burden we impose on companies. What we are doing...is an example of that," Mr. Gotbaum said.

Employer groups welcomed the move.

"We have a very positive reaction," said Jan Jacobson, senior counsel-retirement policy with the American Benefits Council in Washington.

"Certainly, this will be very helpful," added Mark Ugoretz,



**'We need to pay attention to what our customers need and want. We need to reduce burdens' employers incur in offering pension plans to their employees.**

Josh Gotbaum,  
Pension Benefit Guaranty Corp.

president of the ERISA Industry Committee in Washington.

And the relief announced last week may be just the beginning.

"We need to pay attention to what our customers need and want. We need to reduce burdens" employers incur in offering pension plans to their employees, Mr.

Gotbaum said.

In particular, he cited the need to revamp the PBGC's premium structure so the PBGC would have the authority to set premiums based on the risk posed by employers and their pension plans to the PBGC. While details have yet to be finalized, the basic concept is that the premium an employer would pay would be based in part on its credit rating.

Under the current structure, employers pay a base annual premium, which in 2011 is \$35 per plan participant. In addition, a variable rate premium of \$9 per \$1,000 of underfunding is imposed on employers with underfunded plans.

"Lots of companies have said, entirely accurately, 'We are financially strong. We are not going bankrupt and you are charging us the same as companies that are weak,'" Mr. Gotbaum said.

While not directly in his realm, he also said remaining regulatory uncertainties surrounding cash balance plans need to be resolved.

"There ought to be a market for cash balance plans," he said, noting that the plans can be designed to be no more expensive than defined contribution plans, such as 401(k) plans, but still shield employees from investment risk, unlike defined contribution plans.

Mr. Gotbaum's comments came at a time when the PBGC premium base is shrinking as more employers freeze their defined benefit plans, with few companies setting up new plans.

As its premium base is shrink-

ing, the PBGC faces a more than \$20 billion deficit—the difference between its assets and its guarantees—to pay benefits to participants in underfunded plans taken over by the agency after sponsors went out of business or could no longer afford to continue the plans.

"It is music to our ears" that he wants to reduce regulatory burdens, the American Benefits Council's Ms. Jacobson said.

On the other hand, there is skepticism about a move, which Congress would have to approve, to a risk-based premium.

"Many plan sponsors are not publicly held. Assessing their creditworthiness could be a daunting task," said Alan Glickman, a senior retirement consultant in the Dallas office of Towers Watson & Co.

Others say the best way to encourage employers to remain in the defined benefit plan system is to ease funding rules to give employers more time to fund benefit commitments. Under a 2006 law, employers have seven years to amortize liabilities.

The ERISA Industry Committee's Mr. Ugoretz said that amortization period needs to be stretched out as employers face significant increases in required contributions to their plans due to low interest rates that have boosted the value of liabilities and the equities market slump that has reduced the value of plan assets.

"Employers are looking at extraordinary funding obligations," he said.

## RISK MANAGEMENT



Ms. Chakos Mr. Lynch

## Learn ways to improve your continuity plan

Though recent catastrophes such as Hurricane Katrina and the earthquake in Japan were considered statistically improbable, the severity of their impact highlights the need for integrated enterprise risk management plans that consider the unimaginable, experts say.

In a *Business Insurance* webinar titled "Catastrophe Management: Taking Care of Business When Disaster Strikes"—now available on demand at *BusinessInsurance.com*—independent urban resiliency policy adviser Arrietta Chakos said a common failure of risk management in recent years is a lack of preparation for business disruption. Ms. Chakos urged risk managers to consider an enterprise risk management framework that promotes long-term resiliency by linking today's disaster preparation and risk mitigation with tomorrow's response and recovery efforts.

"In Chile, New Zealand and Japan, no matter how much planning went into effect, the scale of those disasters was really beyond what people had foreseen," said Ms. Chakos. "That's part of the work that enterprise risk management will help to reduce over time," she said, and offered guidance on the integration of business resiliency into ERM.

Among other ERM strategies discussed, Gary S. Lynch, managing director at Marsh Risk Consulting, said the first step in preparing for a disaster is mapping the supply chain to identify single points of failure, such as single-sourced parts. Because all failure points are not created equal, Mr. Lynch suggests narrowing down top suppliers by value rather than spend.

"Organizations are quickly migrating away from traditional, broad-based programs for their organization that they simply cannot execute on and are focusing in on the business priorities that align with the business value," said Mr. Lynch.

*Business Insurance* Associate Editor Mike Tsikoudakis moderated the webinar. The free, 60-minute webcast can be viewed on demand at [www.businessinsurance.com/webinars](http://www.businessinsurance.com/webinars).

—By Mallory Gillikin

## CYBER RISKS

## Quick action on data losses not always the right move

*Early client notifications can cause problems*

By JUDY GREENWALD

Companies experiencing data breaches face difficult decisions as to when to let their clients know about the problem.

While 46 state regulations set deadlines as to the latest point at which clients must be informed, still remaining is the issue of how soon they should be told. An initial estimate of affected records that is too low can result in subsequent notices to additional clients that can hurt firms' reputations. But a too-high estimate can unnecessarily worry clients whose information had not been



compromised. Notifications also can generate significant expenses.

There are steps companies can take to help minimize the problem, though, including establishing an incident response plan that lets them spring quickly into action whenever a problem emerges (see story, page 23).

Meanwhile, many observers say a federal data breach notification law would simplify the entire notification process and be welcome, assuming such a law pre-empts state laws (see story, page 22).

"Companies are now struggling" with the question of whether, when and how to

notify, said Joe DePaul, New York-based senior vp for Arthur J. Gallagher Risk Management Services Inc.

"It's a subject of a lot of conversations within the industry," said John Doernberg, vp at William Gallagher Associates Insurance Brokers Inc. in Boston. There is a tension between the desire to quickly notify people about a breach so they can take action, as well as to abide by regulations, "and the need to conduct a sufficient and adequate forensics investigation to really determine what data was compromised, so you know who really needs to be notified," he said.

See **BREACHES** page 22



## CATASTROPHES

# Risk management faulted in probe of BP disaster

*Federal report says no risk assessment done before blowout*

By **RODD ZOLKOS**  
and **MICHAEL BRADFORD**

Risk management failures were a core factor leading to last year's offshore oil well disaster in the Gulf of Mexico, a federal report released last week concluded.

The joint report by the U.S. Coast Guard and Bureau of Ocean Energy Management, Regulation and Enforcement into the Macondo well blowout that led to the Deepwater Horizon disaster put

most of the blame on BP P.L.C., but also found fault with driller Transocean Ltd. and cement specialist Halliburton Co.

"The blowout at the Macondo well on April 20, 2010, was the result of a series of decisions that increased risk and a number of actions that failed to fully consider or mitigate those risks," the report said.

The investigative panel "found no evidence that BP performed a formal risk assessment of critical operational decisions made in the days leading up to the blowout. BP's failure to fully assess the risks associated with a number of operational decisions leading up to the blowout was a contributing cause

of the Macondo blowout."

The report also said cost- or time-saving decisions made by BP "without considering contingencies and mitigation" contributed to the disaster, as was the energy company's "failure to ensure all risks associated with operations on the Deepwater Horizon were as low as reasonably practicable."

The explosion and fire at the offshore rig killed 11, injured numerous others and led to nearly 5 million barrels of oil pouring into the Gulf of Mexico before the well was capped on July 15, 2010.

Jim Guild, senior vp-global property/casualty with Willis Group Holdings P.L.C. in Hous-



AP PHOTO

**Last year's explosion and fire on the Deepwater Horizon oil rig, which killed 11 and dumped millions of gallons of oil into the Gulf, was caused by a series of risk management failures, an investigation concluded last week.**

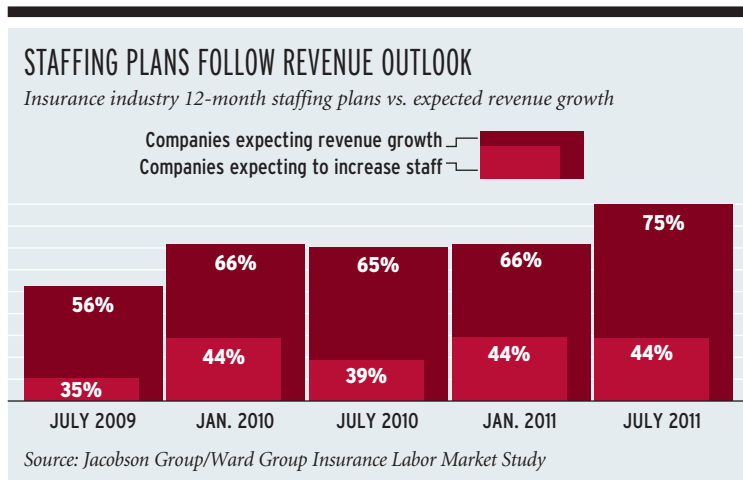
ton, said the "risk management" discussed in the report actually is focused very specifically on procedures meant to ensure the safety of such drilling ventures.

"The risk management that is in

that report is not traditional insurance risk management," Mr. Guild said. "It is true risk management of the work being done and recogniz-

See **BP** page 25

## PROPERTY/CASUALTY INSURERS



## Nearly half of insurers plan to increase staff

By **RODD ZOLKOS**

U.S. insurers' revenue outlook for the next year has improved considerably over six months ago, according to a recent survey, but for now their hiring plans appear fairly constant.

The latest Insurance Labor Market Study by Chicago-based Jacobson Group and Cincinnati-based Ward Group showed that 75% of companies surveyed expect revenue growth in the next year, 19% expect revenue to be flat and 6% expect revenue to decrease.

Meanwhile, 44% of those surveyed anticipate staff increases in the next 12 months, 43% expect to maintain staff levels and 13% expect staff reductions.

"We actually saw a significant increase in the anticipation of growth in revenue compared to what was anticipated six months ago," said Greg Jacobson, CEO of the Jacobson Group. In the last

Insurance Labor Market Study conducted in January, only 66% of those surveyed anticipated revenue growth during the 12 months ahead.

The percentage of companies anticipating staff increases, however, held steady from six months ago at 44%.

Mr. Jacobson attributed that steady level of expected hiring to efficiencies adopted by the companies surveyed and the likelihood that the revenue increases companies expect are coming from areas of the business that won't require additional staff to realize.

Another factor, said Jeff Rieder, president of Ward Group, is that some companies chose not to reduce staff during the economic downturn due to expectations that revenue would grow eventually, and now their anticipated revenue growth is catching up to

See **SURVEY** page 24

## MERGERS &amp; ACQUISITIONS

## Transatlantic, Allied World scrap deal

*Competing offers from Validus, Berkshire deemed too low*

By **SONJA RYST**

**NEW YORK**—The merger of reinsurer Transatlantic Holdings Inc. with Allied World Assurance Co. was derailed last week as shareholders were urged to vote against the deal, but it remains unclear whether Transatlantic will remain independent or be swallowed up by a competitor.

Unsolicited bids for the New York-based reinsurer from Validus Holdings Ltd. and Berkshire Hathaway Inc.'s National Indemnity Co. may still be an option, but Transatlantic appeared to indicate that it thought those offers too low.

In addition to weighing the offers, though, Transatlantic faces more pressure from Validus after the Bermuda-based reinsurer filed papers to replace the Transatlantic board last week.

The merger with Allied World was aborted last Friday, three months after it was announced, after several investor advisory firms recommended that Transatlantic shareholders vote against the deal, citing the competing bids.

Transatlantic then canceled a Sept. 20 shareholder meeting about the proposal and announced the merger agreement was terminated.

Allied World indicated that it does not plan to adjust the original merger terms. "Although disappointed we were unable to complete the proposed merger with Transatlantic, Allied World's core business strategy remains intact," CEO Scott Carmilani said in a statement Friday.

But the Zug, Switzerland-based insurer and reinsurer gets a \$35.0 million termination fee, including \$13.3 million in expense reimbursement, and another \$66.7 million if Transatlantic does another deal within a year.

See **TRANSATLANTIC** page 25

**\$115M**

What Allied World could recover in termination, reimbursement and other fees.

## HEALTH CARE BENEFITS

## Employment-based health cover declines

By **JERRY GEISEL**

**WASHINGTON**—The percentage of the U.S. population covered by employer-based health care plans and the number of people covered by those plans fell in 2010, continuing a decadelong trend, the U.S. Census Bureau said in report last week.

The percentage of people covered through employer-sponsored health care plans fell to a record low 55.3% in 2010. That's a drop from 56.1% in 2009 and continues a trend of annual decreases that began in 2001.

Correspondingly, the number of people enrolled in employment-based plans dropped to 169.3 million in 2010, down from 170.8 million in 2009.

Employment-based coverage peaked in 2000, when 181.9 million people were covered by employer-sponsored plans, according to the Census Bureau.

Still, last year's drop in employment-based coverage is much more modest compared with 2009, when employers laid off millions of employees during the peak of the Great Recession and others went out of business. The

number of people covered by employer-sponsored plans fell by more than 7 million in 2009 compared with 2008, the biggest one-year decline in employment-based coverage since the Census Bureau began to compile such statistics in 1987.

The 2009 decline in employment-based coverage might have been even greater had it not been for a program Congress passed in February 2009 that subsidized COBRA health insurance premiums for terminated employees.

See **CENSUS** page 24



# PROTECTION AT EVERY STAGE.

When a large contractor was beginning a reconstruction project for coastal infrastructure in the south, the firm was challenged with a variety of issues—a complex project, difficult worker and public liability exposures, and formidable insurance coverage requirements.

They called on **Arch Insurance Group's Construction Division**. Arch Construction partnered with the contractor to develop a project-specific safety program, review training procedures for crews and subcontractors related to the site crane use demands, and develop the specific coverage endorsements to meet contract requirements. Arch worked to help prevent issues and ensure project success BEFORE work began.

But if our clients do have an incident, Arch Construction responds with cutting-edge emergency technical and claim investigation support—all to help mitigate the loss. We're positioned to respond quickly and flexibly where larger insurers sometimes can't. It's how Arch Construction built its reputation. We take on the most complex exposures. Using a collaborative approach with clients, we effectively deploy our underwriting expertise and leading edge service—so we can be there for our clients—in good and bad times.

It's an approach that demonstrates proven expertise. **ArchExpertise<sup>sm</sup>**

A.M. Best: "A"      Standard & Poor's: "A+"

 **Arch**  
Insurance Group<sup>®</sup>  
Powering Specialty Risk Solutions

SPECIALTY PROPERTY/CASUALTY, FINANCIAL & PROFESSIONAL LIABILITY SOLUTIONS, AS WELL AS OTHER UNIQUE PRODUCTS.

[www.archinsurance.com](http://www.archinsurance.com)

Insurance coverage is underwritten by one or more member companies of Arch Insurance Group in North America, which consists of (1) Arch Insurance Company (a Missouri corporation, NAIC # 11150) with admitted assets of \$2.0 billion, total liabilities of \$1.4 billion and surplus to policyholders of \$616.7 million, (2) Arch Specialty Insurance Company (a Nebraska corporation, NAIC #21199) with admitted assets of \$426.6 million, total liabilities of \$109.8 million and surplus to policyholders of \$316.7 million and (3) Arch Excess & Surplus Insurance Company (a Nebraska corporation, NAIC # 10946) with admitted assets of \$33.0 million, total liabilities of \$5.2 million and surplus to policyholders of \$27.8 million. All figures are as shown in each entity's respective Quarterly Statement ended March 31, 2011. Executive offices are located at One Liberty Plaza, New York, NY 10006. Not all insurance coverages or products are available in all jurisdictions. Coverage is subject to actual policy language. This information is intended for use by licensed insurance producers.

# Mid-Market EXECUTIVE

Helping C-level executives at midsize firms overcome critical risk and benefits challenges

## Midsized firms targeted in D&O suits

*Number of securities suits expected to continue rising*

By JOANNE WOJCIK

**CHICAGO**—Although lawsuits charging directors and officers of large, publicly traded companies with malfeasance may capture the headlines, experts say middle-market and small firms also are becoming frequent targets of such litigation.

Whether they are publicly traded, privately held or a nonprofit, midsize and smaller firms also risk lawsuits filed by employees, competitors, vendors and regulators, they say.

Some 160 securities lawsuits have been filed against publicly traded companies in the first half of this year, more than any first-half of the year since 2002, said Ann Gron, vp at NERA Economic Consulting in Chicago. If second-half

filings follow the pattern of prior years, “you can expect more in the second half than in the first,” she said during a session on trends in claims against directors and officers during the Crittenden Middle Market Insurance Accounts Conference held Sept. 11-13 in Chicago.

But it’s not just publicly traded middle-market companies that are at risk, said Debbie Schaffel, managing director of the financial services group at Aon Risk Solutions in Chicago, a unit of brokerage Aon Corp. “A lot of middle-market companies, especially closely held private companies, forget they have exposures beyond shareholders,” she said during a conference session highlighting the chief insurance concerns for midsize companies.

“All it takes is one family member to get upset with other family members, and all of a sudden you have infighting issues. There’s more exposure out there than you might think,” Ms. Schaffel said.

Family claims are especially difficult to resolve because they involve intense emotional ties, said De’Andre Salter, CEO of Professional Risk Solutions L.L.C. in Warren, N.J., who spoke during a session on emerging specialty coverage for middle-market companies.

Recent publicity over the massive class action lawsuit against Bentonville, Ark.-based Wal-Mart Stores Inc. charging violations of the Fair Labor Standards Act is triggering similar wage-and-hour litigation against small and midsize companies nationwide, said Alton Moore, San Francisco-based assistant vp of specialty casualty underwriting at Liberty International Underwriters, a unit of Liberty Mutual Group Inc. The fact that this suit was denied class action status because the court felt that the class was too large does not preclude other employees from filing wage-and-hour suits, he said.

“FLSA claims have gone through the



## Package policies can dilute coverage for executives

By JOANNE WOJCIK

**CHICAGO**—Increasing awareness of the potential for discrimination and harassment litigation has persuaded more privately held, middle-market companies to purchase employment practices liability insurance.

But they still are largely unprotected when it comes to directors and officers and fiduciary liability exposures, experts said during the Crittenden Middle Market Insurance Accounts Conference.

When middle-market companies buy specialty insurance that combines EPL, D&O and fiduciary liability, they usually are subject to a single limit, which could leave these companies shortchanged if they have one large claim in any of these areas, coverage experts said during the Chicago conference.

Unlike large, publicly traded companies that routinely buy separate EPL, D&O and fiduciary liability policies, “in the mid-market a lot of companies go without these specialty coverages,” said Joseph Monteleone, a partner at Tressler L.L.P. in New York. When they do buy such coverage, it generally is a package policy that covers all three exposures under a combined single limit, he said.

“We’re seeing a lot more middle-market companies blend limits between D&O and EPL coverage,” said Keith Lavigne, senior vp, professional risk, at ACE USA in New York.

The problem is, “such broad coverage could be stressed,” Mr. Lavigne said. “The assets of a director may be at risk if the limits are eroded by paying for the defense of a single EPL claim.”

Patrick Moran, special counsel at Gordon & Rees L.L.P. in Chicago, said defense costs in employment-related litigation oftentimes “can go through the roof. The amount (of defense costs) that we’re seeing is terrifying for the middle-market company.”

For example, under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex or national origin, plaintiffs need win only a partial verdict to recoup their attorney fees, said Matthew Pullman, a claims attorney at Monitor Liability Managers L.L.C. in Rolling Meadows, Ill.

“A person may only be entitled to \$50,000 in damages, but the plaintiff’s litigation costs may be \$400,000, and then there’s defense costs on top of that,” he said.

“EPL has always been a big, sexy coverage, but a lot of middle-market clients forget they have D&O exposures as well,” said Debbie Schaffel, managing director in the financial services group of Aon Risk Solutions in Chicago. “A lot tend to buy the cheapest option, and that’s not always the best option. They need to make sure they have sufficient limits, and that they do not have limits that are shared between EPL & D&O.”

### 150 attend inaugural middle-market conference

**CHICAGO**—The inaugural Crittenden Middle Market Insurance Accounts Conference attracted approximately 150 insurance industry professionals to Chicago.

The Sept. 11-13 gathering focused on top professional and specialty liability concerns facing middle-market businesses and nonprofit entities.

Next year’s conference by Crittenden Conferences Inc., also slated for Chicago, will be held in September.

For more information about next year’s event, contact Shayna Stinson, Crittenden’s conference and marketing director, at [shayna@CrittendenConferences.com](mailto:shayna@CrittendenConferences.com).

—By Joanne Wojcik

roof in California,” Mr. Moore said. “The bottom line is, we are in a bad economic environment. Regulators are looking for

places to find recoveries and this is one of the ways they are doing that. They are going after employers.”

Keith Lavigne, senior vp, professional risk, at ACE USA in New York, said he has seen situations where midsize companies had to defend themselves after complaints by their competitors triggered Justice Department investigations into their business practices.

Oftentimes, middle-market companies involved in mergers or acquisitions become embroiled in litigation filed by shareholders concerned that they may be paying too much or getting too little out of the deal, said Mike Early, assistant general counsel at Chicago Underwriting Group Inc. in Chicago.

It’s an almost automatic reaction, he said. After a company announces an M&A, a plaintiffs law firm issues a news release stating it is investigating the transaction. While terms of the deal don’t change in most cases, what Mr. Early called “nuisance suits” generate legal fees and an insurance claim for businesses that have purchased appropriate coverage, usually directors and officers liability insurance.

About one-third of such cases are being filed in federal court, but the rest are in state courts and oftentimes in multiple jurisdictions, he said.

“I’ve got one case where the company being acquired is being sued in state court and federal court for selling out for too little; while in another jurisdiction, the acquiring company is being sued for paying too much,” Mr. Early said.

“There’s obviously a correlation between the economy and these lawsuits,” said Anjali Das, a partner at Wilson Elser Moskowitz Edelman & Dicker L.L.P. in Chicago. “Lots of companies are very flush with cash, looking to acquire companies. This may be good for investors, but the plaintiffs bar wants their cut, too.”

As more middle-market companies conduct business overseas, they also are being charged with violations of the Foreign Corrupt Practices Act, said Jerome Tomas, a partner at Baker & McKenzie L.L.P. in Chicago. Those especially vulnerable are companies doing business in emerging markets such as India and China, he said.

While it may seem to be standard business practice in many of those countries to pay civil servants “gratuities” to expedite the processing of permits, for example, such payments may be barred under FCPA, he said.

“The anti-bribery provisions state you can’t make a payment, promise or offer of anything of value to a foreign government official to obtain business,” Mr. Tomas said. “That also includes payments made through third parties, whether it’s your consultant, distributor or wholesaler. Who is a government official? The U.S. government says it can be employees of state-owned industries...therefore making a payment to them runs afoul of FCPA just as much as making a bribe payment to a minister of China,” he said.

“Some middle-market companies don’t understand they have all of these exposures to deal with when they’re running their business,” Mr. Moore concluded. While the allegations are often without merit, “defense costs can drive some of these companies into the ground, and they will go bankrupt trying to defend themselves,” he said.

**“94 million barrels of tankage capacity.  
8,417 miles of pipeline.  
90 terminal and storage facilities globally.  
3 refineries.  
1 Zurich energy insurance policy.”**

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

## Zurich HelpPoint

**Delivering the energy expertise you need to help meet your emerging insurance needs.**

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



*Because change happenz.*

# Opinions

## EDITORIAL

### PBGC deploys common sense

**W**HILE MODEST, the Pension Benefit Guaranty Corp.'s decision not to impose penalties when employers are a few days late paying required premiums and waive, in certain situations, penalties for employers making inadvertent errors that affect how much they pay the PBGC in premiums is a very welcome move.

More than merely being a correct policy decision, granting the relief that employer groups sought is a sign that the agency is listening and responding to its customers—employers who help fund the agency's insurance programs that guarantee participants' benefits in plans it has taken over.

It also shows that federal officials finally are starting to take a closer look at what they can do to reduce regulatory burdens on defined benefit plan sponsors and encourage employers to continue to offer the plans.

PBGC Director Joshua Gotbaum, who announced the relief at a briefing last week, said regulators need to listen to employers and reduce regulatory burdens where appropriate.

We haven't heard words like that in a long time coming from a pension regulator and we hope other regulators and federal lawmakers take note of his comments.

The defined benefit plan system, as Mr. Gotbaum noted, is a voluntary one. If regulators and lawmakers impose too many burdens on plan sponsors and are not responsive to sponsor needs, that gives employers yet another reason to fold their plans. The plan to waive penalties for inadvertent errors, such as accidentally choosing the wrong box on a form, makes sense.

Regrettably, there are numerous examples of wrong-headed moves by regulators. Perhaps, the best example involves cash balance plans, which once were the fastest-growing type of defined benefit plan.

Instead of issuing guidance on design issues, the Treasury Department sat on its hands. In that vacuum, the trial bar filed a wave of lawsuits alleging that the basic design discriminated against older employees. Ultimately, employers prevailed in the courts, but only after spending tens of millions of dollars in legal fees. Just as bad, the continuing uncertainty undoubtedly discouraged other employers from adopting the plans.

We hope that all federal pension regulators pay attention to what Mr. Gotbaum said and see what steps they can take to encourage employers to offer defined benefit plans.

## LETTERS

### Allow RRGs to expand offerings

**TO THE EDITOR:** Your articles on risk retention groups were very good and extremely timely. As you know, the critics can distort the figures and say that they have a larger percentage of failure, which is very explainable when you look deeper into why and how those that failed were

See **LETTERS** page 23

## SCHILLERSTROM



## COMMENTARY

### Health care dialogue needed

**H**ealth care reform law critic Grace-Marie Turner calls it “Obama’s strategy of silence.”

That is how Ms. Turner, a longstanding and outspoken foe of the Patient Protection and Affordable Care Act, describes a new approach she says the president and his administration are taking in an article published in the September issue of *The American Spectator* magazine.

Ms. Turner, who is president of the Galen Institute Inc., an Alexandria, Va.-based free-market health care policy organization, says “after two years of nonstop focus” on health care, President Obama has stopped talking about the law.

Since last year’s congressional elections, Ms. Turner says, President Obama has not given a single speech about the major changes contained in the health care reform law.

The reason for this turnaround from the prior “nonstop” focus, is simple, Ms. Turner writes. President Obama’s advisers, she says, believe public anger over the health care reform law contributed to Republicans’ success in capturing so many congressional seats in the November elections.

In light of those results, the “White House’s strategy has the president talking as little as possible” about the health care reform law, Ms. Turner says.

However, it seems like a big stretch to directly correlate Republican victories in the Novem-

ber elections to widespread anger over the health care reform law. To me, Republican success had far more to do with public disappointment with the weak economic recovery, coupled with a long history in which, for whatever reason, the party out of power picks up many seats in nonpresidential election years, than anger over the health care reform law.

Still, if President Obama has stopped talking about the health care reform law, so have many congressional Republicans.

That’s a shame, because the law needs to be discussed and improved. As time has passed, more and more glitches and problems are becoming apparent. Some can be addressed by regulation. Last week, the Internal Revenue Service announced it is moving to fix one provision for which employers would have had to find out what their employees’ family incomes were to prove their plans are affordable. Given the privacy issue—just to name one—this would be a mission impossible for employers. Instead, a real-world approach is being proposed in which affordability would be tested by comparing employees’ premiums contributions with their wages, something employers know.

Still, many needed changes to the law can only come as a result of legislative action, and a strategy of silence by either party is hardly the way to enact those changes.

Contact: [jgeisel@businessinsurance.com](mailto:jgeisel@businessinsurance.com)



**JERRY GEISEL**  
EDITOR-AT-LARGE

Pharmacy  
Benefit  
Management

# DOSE of REALITY

**'There are all sorts of qualitative reasons for noncompliance that can't be captured in a standard data set.'**

Brenda Motheral,  
Pharmacy Benefit  
Management Institute

*Many patients don't adhere to prescription regimens*

By **ROSEANNE WHITE GEISEL**

**M**edication adherence programs are effective only if they target the individual reasons patients fail to take their prescription drugs and doctors' influence is tapped when necessary.

The challenge is that there are several reasons why patients do not adhere to their drug regimens.

Brenda Motheral, executive director of the Pharmacy Benefit Management Institute in Plano, Texas, said research has shown there are "about 20 different major reasons," that patients don't take their medications, from fears of side effects to believing the medication is not a necessity or simply forgetting.

"There are all sorts of qualitative reasons for noncompliance that can't be captured in a standard data set," she said.

While cost is one factor, it is not the biggest contributor to nonadherence among insured patients, Ms. Motheral said.

Studying predictive models that have been built to determine who will or will not follow their physicians' prescriptions, the factors that cause patients not to take their prescription drugs vary greatly. Still, Ms. Motheral said, compliance rates have remained consistent during the past 20 years. Adherence rates are difficult to define precisely because nonelectronic pre-

See **COMPLIANCE** page 12

**COST SAVINGS  
FOUND IN PHARMACY  
CARVE-OUT**

**PAGE 14**

**LARGEST PHARMACY  
BENEFIT MANAGERS  
RANKED**

**PAGE 10**

# DATA snapshot

## PHARMACY BENEFIT MANAGERS

VISIT the *Business Insurance* Research Center to access full searchable directories and directories in PDF and Excel formats. [WWW.BUSINESSINSURANCE.COM/DIRECTORIES](http://WWW.BUSINESSINSURANCE.COM/DIRECTORIES)

### PRESCRIPTIONS FILLED BY PBMs

Ranked by number of prescriptions filled in 2011.

COMPANY	PRESCRIPTIONS FILLED
Express Scripts Inc.	753,900,000
Medco Health Solutions Inc.	740,100,000
CVS Caremark Corp.	530,958,000
Prescription Solutions Inc.	346,278,000
HealthTrans	108,000,000
Catalyst Rx	80,835,554
Restat L.L.C.	51,258,753
Envision Pharmaceutical Services	31,500,000
informedRx Inc.	22,023,914
PerformRx L.L.C.	20,000,000

### PBM DISTRIBUTION

Percentages of prescriptions filled for all companies listed.



RETAIL NETWORK

91.6%

MAIL ORDER

8.4%

## LARGEST PHARMACY BENEFIT MANAGERS

Ranked by 2010 revenues from unbundled PBM services.

RANK	Company/address	Phone/website	Unbundled PBM revenues	2010 total staff	2010 total clients	Principal officer
1	Medco Health Solutions Inc. 100 Parsons Pond Drive, Franklin Lakes, N.J. 07417	201-269-3400 <a href="http://www.medcohealth.com">www.medcohealth.com</a>	\$66,000,000,000	20,000	N/A	David B. Snow Jr., chairman/CEO
2	CVS Caremark Corp. 1 CVS Drive, Woonsocket, R.I. 02895	401-770-3317 <a href="http://www.caremark.com">www.caremark.com</a>	\$47,780,000,000	N/A	2,200	Per Lofberg, president
3	Express Scripts Inc. 1 Express Way, St. Louis, Mo. 63121	800-332-5455 <a href="http://www.express-scripts.com">www.express-scripts.com</a>	\$44,973,200,000	13,170	N/A	George Paz, chairman/president/CEO
4	Prescription Solutions Inc. 2300 Main St., Irvine, Calif. 92614	877-309-5345 <a href="http://www.prescriptionsolutions.com">www.prescriptionsolutions.com</a>	\$13,100,000,000	4,103	654	Jacqueline Kosecoff, senior vp/ chief administrative officer
5	Catalyst Rx 800 King Farm Blvd., Rockville, Md. 20850	301-548-2900 <a href="http://www.catalystrx.com">www.catalystrx.com</a>	\$3,764,092,000	1,149	N/A	David T. Blair, CEO
6	informedRx Inc. 2441 Warrenville Road, Suite 610, Lisle, Ill. 60532-3642	800-282-3232 <a href="http://www.sxc.com">www.sxc.com</a>	\$1,841,600,251	1,055	230	Mark Thierer, chairman/president/CEO
7	Envision Pharmaceutical Services 2181 E. Aurora Road, Twinsburg, Ohio 44087	330-405-8089 <a href="http://envisionrx.com">envisionrx.com</a>	\$1,200,000,000	600	450	Kevin Nagle, CEO
8	National Pharmaceutical Services 13660 California St., Suite 300, Omaha, Neb. 68154	402-964-9030 <a href="http://www.pti-nps.com">www.pti-nps.com</a>	\$1,100,000,000	135	3,600	Douglas M. Pick, president/CEO
9	Restat L.L.C. 11900 W. Lake Park Drive, Milwaukee, Wis. 53224	800-926-5858 <a href="http://www.restat.com">www.restat.com</a>	\$1,087,367,180 <sup>1</sup>	N/A	6,500	Mark Helvick, president
10	Pharmacy Data Management Inc. 1170 E. Western Reserve Road, Poland, Ohio 44514	800-800-7364 <a href="http://www.pdmi.com">www.pdmi.com</a>	\$917,555,199	53	219	Doug Wittenauer, CEO

<sup>1</sup> BI estimate. N/A=Not available

### PRESCRIPTIONS FILLED WITH GENERIC EQUIVALENTS BY THE LARGEST PHARMACY BENEFIT MANAGERS

COMPANY	% FROM GENERICS
MEDCO HEALTH SOLUTIONS INC.	71.0%
CVS CAREMARK CORP.	71.5%
EXPRESS SCRIPTS INC.	71.6%
PRESCRIPTIONS SOLUTIONS INC.	71.9%
CATALYST Rx	71.0%
INFORMEDRx INC.	76.0%
ENVISION PHARMACEUTICAL SERVICES	69.0%
NATIONAL PHARMACEUTICAL SERVICES	79.5%
RESTAT L.L.C.	97.2%
PHARMACY DATA MANAGEMENT INC.	76.7%

Source: BI Survey. Researched by Karen Tucker



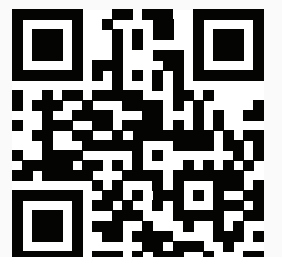
**Smarter** is helping the 3% of your employees who are driving 50% of your medical costs.



**Aetna is making a difference with individuals and companies.** Aetna Care Management identifies members in need and motivates them to take charge of their health.

- 26% fewer inpatient admissions for diabetes, coronary artery disease and strokes.<sup>1</sup>
- Proven increase in routine check-ups.<sup>2</sup>
- Proven decrease in non-urgent emergency room visits.<sup>3</sup>
- Proven to save employees and companies money.
- One-on-one attention.

See the proof and the savings at [smarteris.aetna.com/caremanagement](http://smarteris.aetna.com/caremanagement), or just scan the code.



<sup>1</sup> Aetna Health Analytics, DM Matched Cohort Study, November 2008. <sup>2</sup> Aetna HealthFund® Seventh Annual Study Results, released December 2010. <sup>3</sup> Sixth annual Aetna HealthFund Study, 2010. Based on the actual health profile and activities of your population, your actual results will differ.  
© 2011 Aetna Inc. Plans offered by **Aetna Life Insurance Company** and its affiliates. Health benefits and insurance plans contain exclusions and limitations.  
2011105

# Compliance: Targeted adherence key

CONTINUED FROM PAGE 9

scriptions that never are filled cannot be counted, said Dr. Mark Friedlander, chief medical officer of Aetna Behavioral Health in Hartford, Conn. Aetna last month convened a summit of experts from pharmacy benefit managers, other health-related organizations and the University of Connecticut's School of Medicine to "find out what we are missing" in solving the compliance problem, Dr. Friedlander said.

Dr. Friedlander said an estimated 15% of prescriptions written are never filled. Among patients

with ongoing conditions, 50% stop taking prescribed drugs in the first six months, he said. The persistence rate for antidepressants is even lower, with 60% of patients stopping the drug after six months.

What is surprising about research on medication compliance is that poor health literacy accounts for only 20% of non-compliance. The rest involves patients making a conscious decision not to take the drugs, Dr. Friedlander said.

A factor that hasn't been sufficiently considered is physicians' communication with their

patients about medications, he said.

For example, patients are much more likely to stick with medication if they hear about the risks, Dr. Friedlander said. Among doctors who allowed themselves to be videotaped meeting with patients, 42% said they discussed the risks with their patients. In reality, only 3% did, he said.

"There are value systems in the equation that physicians don't realize," Dr. Friedlander said.

Trying to increase medication compliance so employees stay healthy and avoid costlier medical care is one of the toughest chal-

lenges for employers, said Marianne Fazin, executive director of the Dallas-Fort Worth Business Group on Health. Worksite education programs on the importance of adherence may help, she said. Compliance programs need to address the emotional issues involved, she said.

## Irrational behavior

Innovative PBM approaches are necessary because "the way people behave isn't that rational," said Sharon Frazee, vp research for St. Louis-based PBM Express Scripts Inc. For that reason, educational efforts or financial incentives such as waiving or reducing copays "will only get you so far" in nudging people to comply.

"Poor adherence is more common in younger, healthier people," Ms. Frazee said. "Adherence improves with age, with income and the number of medications." Research shows compliance also increases when the gender of the doctor is the same as the patient, she said.

Heather Sundar, Express Scripts director of clinical services, said, "You have to tailor the intervention to whatever the person's non-compliant habit is."

For example, pilot programs at Express Scripts have shown that the wording of letters to patients and having a physician sign a letter increase compliance. Express Scripts' most effective letter, which used the behavioral science approach of asking people to make a deliberate choice to take the medication, increased compliance 26% compared with a control group, Ms. Sundar said.

If a person's compliance issues are procrastinating in picking up prescriptions from a pharmacy, then a mail-order drug plan may solve the problem.

"It's important for us to make sure we can identify the right patients for the right intervention," Ms. Sundar said. The PBM plan must be designed around those reasons. "We aren't going to be able to intervene just once," she said. Patients may shift from compliance to non-compliance, and specific services need to be provided whenever necessary.

Express Scripts also is in the process of combining its predictive models that forecast adherence to targeted interventions.

Aetna's Dr. Friedlander agreed that "any efforts are going to need to be multichanneled and tailored to the audience." Mail order, automatic and synchronized refills, simpler drug regimens, and copay reductions each will help certain patients. Aetna plans increased use of technology in interventions, such as texting, and easy-to-understand medication explanations.

Ms. Fazin recommends exploring strategies that have immediate consequences or immediate rewards.

That approach is one of the components of value-based insurance design.

Dr. A. Mark Fendrick, director of the University of Michigan Center for Value-Based Insurance Design in Ann Arbor, said, "PBM design must be aligned with the goals of the compliance program" and must be integrated with disease management.

It's all about awareness of "clinical nuances," Dr. Fendrick said. "Not all services provide the same value." The point of VBID is to "make it easy for patients to receive the services that are the major focus of programs."

The most recent VBID research is to "lead with the carrots," such as giving patients financial rewards for improved health from following a drug regimen, Dr. Fendrick said. After the patients have adhered for a time, then those rewards can be removed or patients can be penalized for not staying healthy.

PRUDENTIAL GROUP INSURANCE

## CHALLENGE US TO HELP YOU OUTSMART, NOT OUTSPEND, ON VOLUNTARY BENEFITS.

Escalating costs have many employers cutting back on workplace benefits. Today, Prudential offers smart, cost-effective solutions that can help you meet your benefits challenges. And help employees meet their needs for protection.

A robust portfolio of voluntary benefits—Life, Disability, Long-Term Care and Dental\*—backed by the strength of a recognized brand can help businesses attract and retain the top talent they need to stay competitive, while minimizing costs and administrative burdens.

With 95 years of group insurance experience, Prudential knows the key to a successful and financially strong voluntary benefits plan is high participation. Innovative enrollment solutions that educate employees on the value of benefits will maximize plan participation—and result in a win-win for both employee and employer.

- Life-stage and educational communications targeted to employee needs
- Multi-year and off-cycle enrollment periods
- Online tools and toll-free customer service
- Consultative, administrative and marketing support from experts

Contact Bob Patience, Vice President, Voluntary Benefits, Prudential Group Insurance at 973-548-6233.

Download our "Fifth Annual Study of Employee Benefits: Today & Beyond" at [www.prudential.com/group](http://www.prudential.com/group)



**Prudential**  
Bring Your Challenges™

We'll help you get through  
**CUSTOMS.**

**Multinational  
means knowing  
local markets,  
worldwide.**

With clients spanning the globe and a local presence virtually everywhere the world does business, Chartis delivers a unique combination of local expertise and global perspective. Whether you're exploring new markets or expanding your presence in familiar ones, we can help you move forward with confidence. Learn more at [www.chartisinsurance.com/multinational](http://www.chartisinsurance.com/multinational)

**CHARTIS**   
Your world, insured

Mask in handicraft market  
**Mexico** – Where Chartis insurers have done business since 1948

All products are written by insurance company subsidiaries or affiliates of Chartis Inc. Coverage may not be available in all jurisdictions and is subject to actual policy language. For additional information, please visit our website at [www.chartisinsurance.com](http://www.chartisinsurance.com).



Pharmacy benefit data is a barometer of the health of the lives an employer covers. 'One office visit can yield a multitude of prescriptions. The health plan data is not the early warning system you need.'

Stephanie Ward, Corporate Synergies Group L.L.C.

# Self-insuring Rx plans can help cut costs

*Carve out plans seen as initial step for midsize firms*

By ROSEANNE WHITE GEISEL

Carving out the pharmacy benefit from the medical portion of a health plan provides valuable

cost-control data for midsize employers, regardless of whether they are interested in self-insuring, consultants say.

For employers that want to become self-insured, a stand-alone pharmacy benefit plan is the smartest preparatory step, consultants say.

"Midsize fully insured employers get minimal data from their insurer," said Stephanie Ward, vp-account manager for Corporate Synergies Group L.L.C. in Mount Laurel, N.J.

But if an employer contracts with a pharmacy benefit manager, a wealth of data is provided. "It gives you a window into what's going on," Ms. Ward said.

Another advantage is that "prescription drug claims are more real time. They are available more quickly to plan sponsors," said Lisa Zeitel, senior vp and national pharmacy practice leader for Aon Hewitt Inc. in Lincolnshire, Ill.

"You're getting data you've never seen before," said Ken Olson, president of Horton Benefit Solutions in Orland Park, Ill.

Jill Watson, a consultant with Gallagher Benefit Services in Houston, agrees. If the pharmacy benefit is part of the medical benefit, "there's no transparency for the employer. You are at the whim of the insurer."

"The advantage of being self-funded comes from the advantage of the data and what you can do with it," Ms. Watson said.

Pharmacy benefit data is a barometer of the health of the lives an employer covers. "One office visit can yield a multitude of prescriptions," said Ms. Ward. "The health plan data is not the early warning system you need."

Employers with 200 to 2,000 covered lives "can look at trends in the group," such as number of prescriptions per patient, Mr. Olson said.

"With that data, there's a big uptick in the ability to write customized wellness plans," Mr. Olson said. "Create a baseline and look at the trends and how they change when you create a different wellness plan." For example, if many plan members are on cholesterol- or blood pressure-lowering drugs, wellness efforts can focus on those conditions.

"You never want to design a wellness program that doesn't solve a problem," Ms. Ward said.

With pharmacy data that PBMs offer, "you can identify the cost drivers and identify the actions to take," said Aon Hewitt's Ms. Zeitel. For example, she said, the data show whether utilization, price or the drug mix is escalating costs. Share that data with your insurer, and look for PBM or health plan clinical programs to help lower costs, Ms. Zeitel said.



## Ahead of the Curve. Competitive Edge.

Since 2007, our Insurance Coverage Practice has helped our clients recover more than \$5 billion, including coverage for property damage and business interruption claims. Our attorneys do more than practice insurance law—they shape and influence it. It's why we have been recognized as a leading policyholder firm by publications such as *Chambers USA*, *U.S. News*, and *Business Insurance*.

To learn more about insurance recovery for recent U.S. disaster-related losses, please visit [dicksteinshapiro.com/icbi](http://dicksteinshapiro.com/icbi).

## DICKSTEINSHAPIRO<sup>LLP</sup>

LOS ANGELES | NEW YORK | ORANGE COUNTY | SILICON VALLEY | STAMFORD | WASHINGTON, DC

Prior results do not guarantee a similar outcome.  
© 2011 Dickstein Shapiro LLP. All Rights Reserved.

1825 Eye Street NW, Washington, DC 20006  
(202) 420-2200 | [dicksteinshapiro.com](http://dicksteinshapiro.com)

See **DATA** next page

CONTINUED FROM PREVIOUS PAGE

Other helpful pharmacy benefit information to glean includes how well specialty biologic drugs are managed, said Larry Boress, president and CEO of the Midwest Business Group on Health in Chicago. That category of drugs, for diseases such as multiple sclerosis or hepatitis, can cost \$1,600 to \$5,000 each time a prescription is filled, he said.

"It's also valuable to know where people are filling prescriptions," Mr. Boress said. Reducing the size of the pharmacy network also may reduce costs.

While employers can reap advantages by carving out the pharmacy benefit, some insurers are making it more difficult to do so.

While there are many advantages to a PBM carve-out, employers must weigh whether there are any disadvantages to separating the pharmacy program from the medical insurer's disease management program. In Mr. Olson's opinion, the downside is minimal. Employers can ask their PBMs whether they can connect with the medical insurer's disease management program. Additionally, Mr. Olson said, employers must make sure the medical insurer is willing to discount their premium by the percentage that

**'The advantage of being self-funded comes from the advantage of the data and what you can do with it.'**

Jill Watson,  
Gallagher Benefit Services

reflected pharmacy costs, so that it is financially feasible to carve out the PBM.

Ralph Catillo, an account executive with Gallagher Benefit Services Inc. in Mount Laurel, N.J., said midsize employers that want to carve out their pharmacy benefit must identify insurers that will allow that.

"The savings used to be great," as much as 10% to 12% if the drug plan was carved out, Mr. Catillo said. "Now the gap has been closed." In fact, some insurers are imposing a fee for carving out the pharmacy benefit, he said.

Before signing a contract, find out who the PBM's vendors are, what the PBM does with rebates, its reporting capabilities, and wellness and outreach programs it offers, Mr. Catillo said. PBM reports will show which drugs have equivalent generics, which are available through mail order and which are coming off patent.

Plan on taking "a long-term look" at your financial results, Mr. Catillo advised. "The savings might not be great in the first year, but you have to be willing to do it to get control of benefits."

One Gallagher client initially carved out the PBM piece. After two years of analyzing PBM data

and implementing changes, the client was comfortable self-insuring the medical plan as well, Mr. Catillo said. Now wellness programs are provided through an insurer. Nurses are brought on-site twice monthly to allow employees to check their cholesterol and blood sugar or seek advice, which can keep employees healthier while contributing to the cost savings realized from self-insuring.

Mr. Catillo said he's also seen plan design changes, such as mandatory generics; up-front deductibles; and step therapy, where a patient starts on a generic or lowest-cost drug and only moves to a more expensive medication if the original is ineffective, result in cost decreases of

10% to 12%.

"It's great information to (encourage) consumer-driven behavior," Gallagher's Ms. Watson said.

The point for employers that want to self-insure their entire health benefit program is to give themselves one to three years to use this data to implement wellness initiatives, financial incentives and other design changes that will get the population as healthy as possible and to instill positive habits, such as medication compliance.

Employers should attempt to move to self-funding health insurance "at a time when the first year is going to be a good year," said Horton's Mr. Olson.



**You're hired.**

**Business Insurance CAREER CENTER**

The ultimate career resource in the insurance industry.

<http://careers.BusinessInsurance.com>

# Targeted Advertising Opportunities 2011



● Corporate C- Suite		
Feature	Issue	Close Date
Case Study: D&O Best Practices	Oct 17	Oct 5
Professional Liability	Oct 31	Oct 19
Case Study: Product Liability Best Practices	Nov 7	Oct 26
Special Report: Construction Risks	Nov 14	Nov 2
Industry Financials: Nine Month Results	Nov 21	Nov 9
▲ Brokers		
Feature	Issue	Close Date
Middle-Market Risks	Oct 3	Sept 21
Excess & Surplus Lines Report	Oct 10	Sept 28
Special Report: Construction Risks	Nov 14	Nov 2
Industry Financials: Nine Month Results	Nov 21	Nov 9
Buyers Choice Awards	Nov 28	Nov 16
Women To Watch	Dec 5	Nov 22
Year-in-Review: Best & Worst of 2011	Dec 12	Nov 30
Case Study: E&O Best Practices		
Market SourceBook 2012	Dec 19/26	Dec 7

◆ Insurers/Reinsurers		
Feature	Issue	Close Date
Excess & Surplus Lines Report	Oct 10	Sept 28
Reinsurance: Trends & Issues	Oct 24	Oct 12
Special Report: Construction Risks	Nov 14	Nov 2
Industry Financials: Nine Month Results	Nov 21	Nov 9
Buyers Choice Awards	Nov 28	Nov 16
Feature	Issue	Close Date
Women To Watch	Dec 5	Nov 22
Year-in-Review: Best & Worst of 2011	Dec 12	Nov 30
Case Study: E&O Best Practices		
Market SourceBook 2012	Dec 19/26	Dec 7
■ Middle Market		
Feature	Issue	Close Date
Middle-Market Risks	Oct 3	Sept 21
Professional Liability	Oct 31	Oct 19
Special Report: Construction Risks	Nov 14	Nov 2
Industry Financials: Nine Month Results	Nov 21	Nov 9

**Business Insurance** [www.BusinessInsurance.com](http://www.BusinessInsurance.com)

Mid-Atlantic/International 212-210-0136  
 Midwest/West/Hawaii 303-898-4043  
 Northeast/Canada/UK/Bermuda 617-292-4856  
 Southeast/Classifieds 212-210-0129  
 Email: [sstilwill@businessinsurance.com](mailto:ssstilwill@businessinsurance.com)

CONTINUED FROM PREVIOUS PAGE

Other helpful pharmacy benefit information to glean includes how well specialty biologic drugs are managed, said Larry Boress, president and CEO of the Midwest Business Group on Health in Chicago. That category of drugs, for diseases such as multiple sclerosis or hepatitis, can cost \$1,600 to \$5,000 each time a prescription is filled, he said.

"It's also valuable to know where people are filling prescriptions," Mr. Boress said. Reducing the size of the pharmacy network also may reduce costs.

While employers can reap advantages by carving out the pharmacy benefit, some insurers are making it more difficult to do so.

While there are many advantages to a PBM carve-out, employers must weigh whether there are any disadvantages to separating the pharmacy program from the medical insurer's disease management program. In Mr. Olson's opinion, the downside is minimal. Employers can ask their PBMs whether they can connect with the medical insurer's disease management program. Additionally, Mr. Olson said, employers must make sure the medical insurer is willing to discount their premium by the percentage that

**'The advantage of being self-funded comes from the advantage of the data and what you can do with it.'**

Jill Watson,  
Gallagher Benefit Services

reflected pharmacy costs, so that it is financially feasible to carve out the PBM.

Ralph Catillo, an account executive with Gallagher Benefit Services Inc. in Mount Laurel, N.J., said midsize employers that want to carve out their pharmacy benefit must identify insurers that will allow that.

"The savings used to be great," as much as 10% to 12% if the drug plan was carved out, Mr. Catillo said. "Now the gap has been closed." In fact, some insurers are imposing a fee for carving out the pharmacy benefit, he said.

Before signing a contract, find out who the PBM's vendors are, what the PBM does with rebates, its reporting capabilities, and wellness and outreach programs it offers, Mr. Catillo said. PBM reports will show which drugs have equivalent generics, which are available through mail order and which are coming off patent.

Plan on taking "a long-term look" at your financial results, Mr. Catillo advised. "The savings might not be great in the first year, but you have to be willing to do it to get control of benefits."

One Gallagher client initially carved out the PBM piece. After two years of analyzing PBM data

and implementing changes, the client was comfortable self-insuring the medical plan as well, Mr. Catillo said. Now wellness programs are provided through an insurer. Nurses are brought on-site twice monthly to allow employees to check their cholesterol and blood sugar or seek advice, which can keep employees healthier while contributing to the cost savings realized from self-insuring.

Mr. Catillo said he's also seen plan design changes, such as mandatory generics; up-front deductibles; and step therapy, where a patient starts on a generic or lowest-cost drug and only moves to a more expensive medication if the original is ineffective, result in cost decreases of

10% to 12%.

"It's great information to (encourage) consumer-driven behavior," Gallagher's Ms. Watson said.

The point for employers that want to self-insure their entire health benefit program is to give themselves one to three years to use this data to implement wellness initiatives, financial incentives and other design changes that will get the population as healthy as possible and to instill positive habits, such as medication compliance.

Employers should attempt to move to self-funding health insurance "at a time when the first year is going to be a good year," said Horton's Mr. Olson.

**You're hired.**

**Business Insurance CAREER CENTER**

The ultimate career resource in the insurance industry.

<http://careers.BusinessInsurance.com>



**Your satisfaction is our true reward.**

When it comes to the health of your business, you understand it depends on not just fulfilling customer needs, but exceeding them. At HAP, we share this philosophy and it's why we're so driven to enhance the lives of our members and the communities we serve. To us, it's all about your business and giving your employees more than just access to what they need.

For the fourth consecutive year, HAP has been ranked "Highest in Member Satisfaction among Commercial Health Plans in Michigan," according to the J.D. Power and Associates 2011 U.S. Member Health Insurance Plan Study<sup>SM</sup>.

And for this, we'd simply like to say, "thank you."

*Improving health. Enhancing lives.*

[hap.org](http://hap.org)

Health Alliance Plan of Michigan received the highest numerical score among commercial health plans in Michigan in the proprietary J.D. Power and Associates 2008-2011 U.S. Member Health Insurance Plan Studies<sup>SM</sup>. 2011 Study based on 34,000 total member responses, measuring four plans in Michigan (excludes Medicare and Medicaid). Proprietary study results are based on experiences and perceptions of members surveyed in December 2010 - January 2011. Your experiences may vary. Visit [jdpower.com](http://jdpower.com).

CONTINUED FROM PREVIOUS PAGE

Other helpful pharmacy benefit information to glean includes how well specialty biologic drugs are managed, said Larry Boress, president and CEO of the Midwest Business Group on Health in Chicago. That category of drugs, for diseases such as multiple sclerosis or hepatitis, can cost \$1,600 to \$5,000 each time a prescription is filled, he said.

"It's also valuable to know where people are filling prescriptions," Mr. Boress said. Reducing the size of the pharmacy network also may reduce costs.

While employers can reap advantages by carving out the pharmacy benefit, some insurers are making it more difficult to do so.

While there are many advantages to a PBM carve-out, employers must weigh whether there are any disadvantages to separating the pharmacy program from the medical insurer's disease management program. In Mr. Olson's opinion, the downside is minimal. Employers can ask their PBMs whether they can connect with the medical insurer's disease management program. Additionally, Mr. Olson said, employers must make sure the medical insurer is willing to discount their premium by the percentage that

**'The advantage of being self-funded comes from the advantage of the data and what you can do with it.'**

Jill Watson,  
Gallagher Benefit Services

reflected pharmacy costs, so that it is financially feasible to carve out the PBM.

Ralph Catillo, an account executive with Gallagher Benefit Services Inc. in Mount Laurel, N.J., said midsize employers that want to carve out their pharmacy benefit must identify insurers that will allow that.

"The savings used to be great," as much as 10% to 12% if the drug plan was carved out, Mr. Catillo said. "Now the gap has been closed." In fact, some insurers are imposing a fee for carving out the pharmacy benefit, he said.

Before signing a contract, find out who the PBM's vendors are, what the PBM does with rebates, its reporting capabilities, and wellness and outreach programs it offers, Mr. Catillo said. PBM reports will show which drugs have equivalent generics, which are available through mail order and which are coming off patent.

Plan on taking "a long-term look" at your financial results, Mr. Catillo advised. "The savings might not be great in the first year, but you have to be willing to do it to get control of benefits."

One Gallagher client initially carved out the PBM piece. After two years of analyzing PBM data

and implementing changes, the client was comfortable self-insuring the medical plan as well, Mr. Catillo said. Now wellness programs are provided through an insurer. Nurses are brought on-site twice monthly to allow employees to check their cholesterol and blood sugar or seek advice, which can keep employees healthier while contributing to the cost savings realized from self-insuring.

Mr. Catillo said he's also seen plan design changes, such as mandatory generics; up-front deductibles; and step therapy, where a patient starts on a generic or lowest-cost drug and only moves to a more expensive medication if the original is ineffective, result in cost decreases of

10% to 12%.

"It's great information to (encourage) consumer-driven behavior," Gallagher's Ms. Watson said.

The point for employers that want to self-insure their entire health benefit program is to give themselves one to three years to use this data to implement wellness initiatives, financial incentives and other design changes that will get the population as healthy as possible and to instill positive habits, such as medication compliance.

Employers should attempt to move to self-funding health insurance "at a time when the first year is going to be a good year," said Horton's Mr. Olson.



**You're hired.**

**Business Insurance CAREER CENTER**

The ultimate career resource in the insurance industry.

<http://careers.BusinessInsurance.com>



**LUBA**   
**Workers' Comp**  
*Genuine Dependability™*

**YOU'RE NOT ALONE.**

Thanks to LUBA Workers' Comp. With our online quoting, competitive rates, aggressive claims management, and an AM Best rating of A- Excellent, we can help you navigate around the potential obstacles you face whenever they occur, wherever you are. It's our way of taking service to a whole new level. Visit [lubawc.com](http://lubawc.com).

**LUBA | Loo-buh | – Does the sound of good service ring a bell?**

# CASE STUDY

## EMPLOYMENT PRACTICES LIABILITY [BEST PRACTICES]



### Today's bias claim may trigger tomorrow's retaliation charge

By **JUDY GREENWALD**

**R**etaliation charges, which are the most common type of employment claim against companies, create thorny issues for employers that must be carefully managed.

Such charges often are more difficult to defend than the underlying discrimination claim with which they often are coupled in lawsuits, legal experts say. Major reasons include that retaliation is easier to prove in court and juries often seem more willing to believe managers are capable of

retaliation than they are of discrimination.

This means it is particularly crucial management takes steps to head off potential retaliation claims once they are aware discrimination charges have been made (see story, page 18). One important step is to ensure there is some distance between the time a complaint is made and any action taken that could be considered retaliatory.

Meanwhile, recent U.S. Supreme Court cases have made it easier for plaintiffs to prove retaliation in court (see story,

Continued on next page

**INSIDE:** Proceed with caution [PAGE 18] More protection for employees [PAGE 19]

## CASE STUDY

CONTINUED FROM PREVIOUS PAGE

page 19).

According to the U.S. Equal Employment Opportunity Commission, there were 36,258 retaliation charges filed in fiscal year 2010, which accounted for 36.3% of the total charges filed with the agency, exceeding any other type of charge. This was a 7.9% increase over the 33,613 filed in fiscal year 2009.

Diana L. Hoover, a partner with law firm Hoover Kernell L.L.P. in Houston, said retaliation charges often reflect the employee's perceptions, rather than the employer's intent. For instance, if a worker asks for a different shift after he has filed a discrimination claim, he may incorrectly interpret rejection of the request as retaliation.

"I don't think a lot of supervisors think through the possibility that whatever action they're taking with regard to that employee would have any connection to the charge of discrimination from the employee's perspective," she said.

Misinterpreted actions can include a demotion or pay cut introduced for nonretaliatory reasons, or even something seemingly inconsequential, such as wishing another employee a happy birthday but neglecting to do the same for the complaining worker, said Ms. Hoover.

Meanwhile, the employee, who may be anxious after making the discrimination charge, assumes he is being discriminated against, when the employer may not yet even be aware a discrimination charge has been made, Ms. Hoover said.

Christopher W. Olmsted, a shareholder at Barker, Olmsted & Barnier P.L.C. in San Diego, said there may be legitimate reasons for assigning someone to a different job task within the job description, "and so it's easy for an employer to overlook how that may be made to appear to look like retaliation in the hands of a plaintiff's lawyer who's specifically hunting for evidence to show payback" after a complaint.

Mr. Olmsted said he also wonders whether, because retaliation often is brought in tandem with another charge, "there may be something to the idea" that when a company is charged with discrimination, "it's common for plaintiff lawyers to throw in" the retaliation charge as well, Mr. Olmsted said. "It's a different way to address the alleged wrong that the employees believe happened to them."

Observers say when workers perceive they are about to be fired, perhaps in a reduction in force, they often file a discrimination charge as a pre-emptive measure. They then file the retaliation charge after the layoff.

The employer is then put in the position of having to prove its action "had nothing to do with the decision" to include the worker in the reduction in force, said Ms. Hoover. "It puts the employer

in a defensive posture from the very beginning," she said.

Another problem, she said, is "it's hard sometimes for a large company to convince a jury that the supervisor really didn't know" about the discrimination charge. A lot of people assume the supervisors must have known, she said.

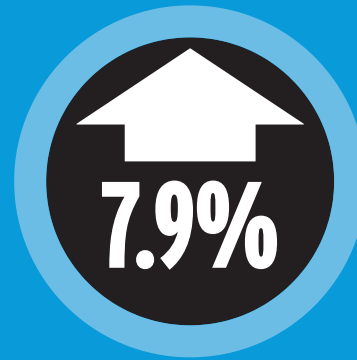
### Charges survive dismissal

One irony of retaliation claims is that the original, underlying discrimination claim often is dismissed, but the retaliation charge survives. "If you think about it, it's

the frivolous charge that would kind of make the supervisor more inclined to retaliate," said Michael W. Fox, a shareholder with law firm Ogletree, Deakins, Nash, Smoak & Stewart P.C. in Austin, Texas.

"Juries really believe when people stand up and speak out, the employers don't like that and they strike back; and so I think that's why plaintiffs lawyers like (retaliation charges) so much, because they just jibe with human

See **RETALIATION** next page



According to the U.S. Equal Employment Opportunity Commission, there were 36,258 retaliation charges filed in fiscal year 2010, a 7.9% increase over the 33,613 filed in fiscal year 2009.

## There's a lot more to Swiss Re than reinsurance. Isn't it time you found out how much more?

Don't let the name mislead you; there's a lot more to Swiss Re than reinsurance. Commercial insurance, industrial insurance, large corporate risks and specialty insurance. Insurance for aviation and space as well as environmental and commodity markets. Financial tools like insurance-linked securities and catastrophe bonds. Yet every service we offer and every challenge we face for our clients receives the same commitment and the same hands-on expertise. As in everything we do at Swiss Re, risk is our raw material; what we create for you is opportunity.

Visit [www.swissre.com/rimscanada](http://www.swissre.com/rimscanada) to learn more and to schedule a meeting with one of our experts at the 2011 RIMS Canada Conference in Ottawa.

Corporate Solutions

Swiss Re



©2011 Swiss Re

Proud supporter of the  RIMSCANADA Conference

Visit us at booth #415.

## CASE STUDY

## Retaliation: Bias claims may trigger more charges

CONTINUED FROM PREVIOUS PAGE

nature," Mr. Fox said.

Kristan Peters-Hamlin, managing partner with Peters Hamlin L.L.C. in Stamford, Conn., said: "Jurors tend to be more cynical about discrimination claims than retaliation claims because they believe that it's human nature to retaliate when somebody's brought a claim against them," even though they are often reluctant to find somebody is racist or sexist "because that's a very serious finding to make about somebody."

"Many jurors may not agree with, or be convinced, that someone was discriminated against... but some of that may have to do with the personal beliefs of jurors, who bring their own life experience to bear, who just find it hard to believe that people discriminate," said plaintiff attorney Frederick M. Gittes, principal at the Gittes Law Group L.L.C. in Columbus, Ohio.

"On the other hand, those same jurors will often have had experiences where people were treated badly just for reporting or complaining about things," Mr. Gittes said.

Retaliation also is easier to prove than discrimination. Under Title

VII of the Civil Rights Act of 1964, "the employee doesn't have to prove that discrimination took place in order to establish a claim of retaliation," said Richard D. Tuschman, a partner with law firm Duane Morris L.L.P. in Miami.

"As long as the employee's complaint of discrimination has met the definition of protected

don't believe there was actually any discrimination, but we do believe that the plaintiff made a good faith complaint of discrimination and was retaliated against for making that complaint," Mr. Tuschman said.

In addition, "there's just an explosion of new statutes that have permitted—and even encouraged—people to come forward and complain about retaliations," said Philip M. Berkowitz, a shareholder at Littler Mendelson P.C. in New York.

Mr. Berkowitz said these

**'Jurors tend to be more cynical about discrimination claims than retaliation claims because they believe that it's human nature to retaliate when somebody's brought a claim against them.'**

Kristan Peters-Hamlin, Peters Hamlin L.L.C.

activity, then the discrimination complaint can be the basis for a retaliation claim," said Mr. Tuschman. The employee "need not prove discrimination actually occurred" but just that "the employee had an objectively reasonable good faith belief that there was discrimination," he said.

As a result, it is not "necessarily inconsistent for a jury to say, 'We

include the Dodd-Frank Wall Street Reform and Consumer Protection Act, which offers financial awards to those who can prove they have been retaliated against when there's wrongdoing; the Foreign Corrupt Practices Act and the False Claims Act, "which also encourages employers to come forward and make complaints about wrongdoing" with the potential of a financial reward.



## Proceed with caution after discrimination complaint

Employers often can head off retaliation claims by training managers to proceed cautiously in employment decisions involving employees who have filed discrimination complaints, observers say.

If practical, they advise leaving at least several months between the time a discrimination claim is made and taking any negative employment action.

Training is important, say experts. Employers "should just pound it into the heads of every manager" that retaliation is forbidden, said plaintiff attorney Frederick M. Gittes, principal at The Gittes Law Group L.L.C. in Columbus, Ohio. "You just don't do it."

Good record-keeping also is important, said Mr. Gittes. Reports, if possible, should be progressive in indicating a problem employee. "It's always suspicious" when you go from reporting a positive job performance to suddenly suspending or firing the employee, he said.

Many observers also recommend that managers be told when an employee has filed a discrimination charge so they can make a point of avoiding any appearance of retaliation.

Diana L. Hoover, a partner with law firm Hoover Kernell L.L.P. in Houston, said she recommends, once the manager is informed, that any subsequent job action by the manager after a discrimination charge, including shift or job changes, have a supervisor's approval.

Human resources and legal departments "must be kept in the loop" on all decisions "and make sure it's being handled neutrally," said Martha J. Zackin, of counsel at Boston-based Mintz, Levin, Cohn, Ferris, Glovsky & Popeo P.C.

For instance, when it is learned someone has made a complaint, "the employer treats the employee with kid gloves, and the person doesn't perform...and that doesn't work for anybody, either," with other employees becoming upset about the worker not pulling his or her weight, Ms. Zackin said.

Richard D. Tuschman, a partner with law firm Duane Morris L.L.P. in Miami, said that when an employer is considering terminating an employee, it often is safer "to pull the trigger now rather than to wait." That is because the employee may learn his or her employment is in jeopardy, file a discrimination suit and, once the firing takes place, claim retaliation.

"The timing of the termination on the heels of the discrimination complaint is going to look, on its face, suspicious. The employer is going to have to explain that its decision was not retaliatory," Mr. Tuschman said.

Employers should avoid following a discrimination charge too closely with anything that could be perceived as retaliation, observers say. Kristan Peters-Hamlin, managing partner with law firm Peters Hamlin L.L.C. in Stamford, Conn., said. On average, courts seem to hold that six to nine months "is an adequate time period to rebut a presumption of retaliation."

However, "you can't let the tail wag the dog," and fear of a retaliation claim should not interfere with an employer's ability to run its business, so long as the decision to discipline or terminate "is made in good faith and for a lawful reason," said Philip M. Berkowitz, a shareholder in law firm Littler Mendelson P.C. in New York.

—By Judy Greenwald



It's not easy to earn a FORC shield. It takes years of experience in insurance regulatory law. Recommendations from many insurance industry leaders. A rigorous vetting by insurance industry experts. If you are looking for the high standards and expertise of a FORC lawyer, just go to **FORC.org** and search our member directory.



## CASE STUDY

# Court rulings protect employees from retaliation

## Four key decisions by Supreme Court favor workers

By JUDY GREENWALD

Three recent U.S. Supreme Court decisions based on Title VII of the Civil Rights Act of 1964, along with a fourth ruling based on the Fair Labor Standards Act, are viewed by experts as expanding the scope of employees' retaliation protections under the law.

### Redefining retaliation

The first of the Title VII cases was the court's decision in *Burlington Northern & Santa Fe Railway Co. vs. Sheila White*. Ms. White, a forklift operator and the only woman working in the maintenance department at the BNSF yard in Memphis, Tenn., had complained to company officials of alleged harassment by her supervisor. She later was reassigned to a different, more arduous, track laborer position and then temporarily suspended without pay due to insubordination.

In its unanimous 2006 ruling, the Supreme Court upheld a lower court's ruling that said reassigning Ms. White to a different job and temporarily suspending her pay were retaliation for her sexual harassment complaint.

The court's ruling set a national standard by redefining retaliation as employer actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." It also ruled that retaliatory actions are not limited to those that affect only the terms and conditions of employment.

### Extended protection

The Supreme Court's 2009 decision in *Vicky S. Crawford vs. Metropolitan Government of Nashville and Davidson County, Tenn.* involved a 30-year employee, Ms. Crawford.

When asked, as part of an internal investigation, whether she had witnessed inappropriate behavior by the Metro school district employee relations director, Gene Hughes, Ms. Crawford described several instances of sexual discrimination that were directed at her.

Metro took no action against Mr. Hughes, but later fired Ms. Crawford and accused her of embezzlement. It also fired two other employees who had reported being sexually harassed by Mr. Hughes.

In its ruling, the court held that Title VII protection extends beyond employees who file com-

plaints about discrimination to those who cooperate in an employer's investigation.

### Link to complainant

The Supreme Court's decision this year in *Eric L. Thompson vs. North American Stainless L.P.* involved a metallurgical engineer, Mr. Thompson, and his then-

fiancée and later wife, Miriam Regalado, both of whom worked for Gwent, Ky.-based North American Stainless.

Ms. Regalado filed a sex discrimination claim against the company with the EEOC, which notified North American Stainless of the charge in February 2003.

Mr. Thompson was terminated three weeks later.

The court held in its ruling that an employee linked to a co-worker who has alleged discrimination should also be protected from workplace retaliation.

### Anti-retaliation suit

In *Kevin Kasten vs. Saint-Gobain Performance Plastics Corp.*, Mr. Kasten had brought an anti-retalia-

tion lawsuit against his former Valley Forge, Pa.-based employer, stating he was terminated in retaliation for repeatedly complaining about the location of the firm's time clock.

The Supreme Court held in its March decision that oral complaints to management can be used to invoke the FLSA's anti-retaliation provisions.

UNDERSTANDING HOW FM GLOBAL IS DIFFERENT IS AKIN TO SEEING THE



If you remember just one thing about FM Global, here it is: FM Global believes that most loss is preventable. That's why we link underwriting to loss prevention engineering. A proactive approach that helps us identify, minimize and assume risk before disaster strikes—and only FM Global does it.

With over 1,500 engineers around the world and a \$100 million research campus, FM Global takes the time to learn about risk. So, our clients experience smaller and less frequent losses, ensuring business continuity. Maybe that confidence is why our client list includes one third of the top Fortune 1000. Underwriting through loss prevention engineering. Now, that's insurance evolved.

Insurance Evolved **FM Global**

## Products & Services

### Summit Health launches online immunization portal

**SOUTHFIELD, Mich.**—Summit Health Inc., a provider of on-site wellness programs for employers, has launched an online portal as part of its immunization services.

The VacciNation portal provides users the ability to learn about effective vaccines and can answer questions to determine their health status, Southfield, Mich.-based Summit Health said in a statement.

The portal also provides users the ability to determine which vaccines to take and which can be safely administered together, and to schedule vaccinations, according to the statement.

The portal is designed for companies of all sizes and includes various vaccinations including influenza, tetanus, pneumonia and hepatitis.

For more information, contact Tracey Brady, director of immunization services at Summit Health, at 248-416-1608 or [tbrady@summithealth.com](mailto:tbrady@summithealth.com).

### Markel offers E&O cover for small businesses

**RICHMOND, Va.**—Markel Corp. has created an admitted errors and omissions insurance program targeted toward small businesses.

The admitted miscellaneous professional liability program aims to address exposures faced by small businesses, the Richmond, Va.-based specialty insurer said in a statement.

Targeted classes include consulting services, medical support services and insurance-related services.

The program is available through a claims-made policy form with available limits up to \$3 million. Deductibles can be offset to zero in select situations and minimum premiums can be \$750 for a \$1 million limit, Markel said.

For more information, contact Inga Goddijn, managing director of miscellaneous E&O for Markel, at 847-572-6162 or [goddijn@markelcorp.com](mailto:goddijn@markelcorp.com).

### Chartis offers upgrade to fiduciary coverage

**NEW YORK**—Chartis Inc. announced two enhancements to its fiduciary liability insurance program for organized labor.

The Fiduciary Liability Insurance Edge endorsement, which attaches to Chartis' fiduciary liability policy for organized labor, covers trustees of multiemployer plans, the New York-based insurance unit of American International Group Inc. said in a statement.

The new endorsement addresses a "potential catch-22" by covering trustees alleged to be plan fiduciaries but who later are proven to be acting only in a business capacity, according to the statement.

The Multiemployer Plan Panel, the second enhancement, is a pre-approved panel of attorneys with expertise in defending litigation

against multiemployer plan trustees and is a supplement to the executive liability unit's existing panel of attorneys.

Chartis said both enhancements were developed by the insurer's executive liability unit.

For more information, contact Rhonda Prussack, executive vp and product manager of fiduciary liability insurance at Chartis, at 212-458-1424 or [rhonda.prussack@chartisinsurance.com](mailto:rhonda.prussack@chartisinsurance.com).

### Origami Risk, Advisen partner on risk platform

**NEW YORK**—Risk management information system provider Origami Risk L.L.C. has partnered with Advisen Ltd. to give risk managers and other insurance buyers the ability to benchmark insurance programs.

The system will allow users to benchmark limits, premiums and retentions relative to company and industry peers, New York-based Origami Risk said in a statement.

Through the partnership, Origami Risk will integrate New York-based business information and market data provider Advisen's database of 1.6 million insurance programs collected from more than 375,000 entities.

Advisen Advantage will provide Origami Risk RMIS users peer-group options mirroring Advisen's set of company demographics, allowing real-time communication between the two systems, Origami Risk said.

For more information, contact Aaron Shapiro, executive vp for Origami Risk, at 914-509-6622 or [ashapiro@origamirisk.com](mailto:ashapiro@origamirisk.com).

## UP Comings & Goings CLOSE



### LEIGH ANNE FOSTER

**NEW JOB TITLE:** Lawrenceville, Ga.-based chief nurse officer/senior vp with Ability Services Network Inc./MedAllocators Inc.

**PREVIOUS POSITION:** Burlington, Mass.-based director of clinical training and medical case management services with Coventry Workers' Compensation Services Inc.

**LOOKING FORWARD TO:** I am extremely excited to work with a dynamic and growing company. ASN/MedAllocators has a progressive, leading-edge vision for growth and demonstrated measurable results for our customers. The staff is professionally competent, caring and personable. This, combined with their willingness to incorporate new tools, guarantees growth and continued customer satisfaction.

**CHALLENGES FACING INDUSTRY:** There is a nursing shortage with little opportunity for professional growth within the case management industry....As the new chief nurse officer, it is

my responsibility to ensure job satisfaction among our professional staff by offering a career path for professional growth, competitive salaries, rich continuing educational opportunities and specialized certifications....In addition to the nursing shortage, bilingual nurses are in high demand. There are many locations where there is a strong need for multilingual professionals.

**INDUSTRY OUTLOOK:** Heightened awareness of safety in the workplace has resulted in a decrease in reported work injuries recently. Injuries that are currently being reported are more complex and severe. There has also been an increase in catastrophic-type injuries. It is important to maintain specialized expertise in managing more complex cases.

**ADVICE:** Always remain customer-focused by listening and responding to their needs.

**HOBBIES:** Fitness, healthy eating, exercise, travel, skiing, theater, golf and trying new things.

**MOST PASSIONATE ABOUT:** Fair and equitable treatment for all.

## IN PRINT AND ONLINE BUSINESS INSURANCE

IS THE LEADING NEWS AND INFORMATION SOURCE FOR EXECUTIVES CONCERNED ABOUT RISK AND ITS IMPACT ON THEIR BUSINESS

DON'T MISS OUT SUBSCRIBE TODAY!

### One year of our print edition includes:

- Special Report issues
- Annual Broker Profile issue (\$100 value)
- Market sourcebook issue (\$50 value)

### One year of the Digital edition:

- Prompt Monday morning delivery
- Exact replica of the print edition
- Easily accessible

### Subscriptions also includes:

- Discounts on whitepapers
- Unrestricted access to all the special features on our website

Go to [www.businessinsurance.com](http://www.businessinsurance.com) for your special subscription offer!



**Business Insurance**  
[www.BusinessInsurance.com](http://www.BusinessInsurance.com)

## Comings & Goings

# ONLINE

**VISIT** [www.businessinsurance.com/ComingsandGoings](http://www.businessinsurance.com/ComingsandGoings) for a full list of this week's personnel moves and promotions. Check our Web site daily for additional postings and sign up for the weekly email.

### TO SUBMIT ITEMS

*Business Insurance* would like to report on senior-level changes at commercial insurance companies and service providers. Please send news and photos of recently promoted, hired or appointed senior-level executives to:

Mallory Gillikin  
*Business Insurance*  
360 N. Michigan Ave.  
Chicago, Ill. 60601-3806  
[mgillikin@businessinsurance.com](mailto:mgillikin@businessinsurance.com)

### POSTING THIS WEEK

#### BROKERS:

- Aon Risk Solutions
- Willis North America
- CRC Insurance Services Inc.

#### INSURERS:

- XL Insurance
- Chaucer Holdings P.L.C.
- Lincoln Financial Distributors

#### REINSURANCE:

- Endurance Specialty Holdings Ltd.

#### OTHER PROVIDERS:

- Dewey & LeBoeuf L.L.P.
- Gallagher Bassett Services Inc.

#### ASSOCIATIONS:

- Comité Européen des Assurances

# Property: Cat reinsurance rates higher

CONTINUED FROM PAGE 1

period, Mr. Young said. He said prices probably will increase in the single-digit range, perhaps slightly more in the United States, and that the new RMS model will be a “significant driver” of reinsurance pricing during the next renewal cycle.

In Europe, reinsurers are still trying to judge client reaction to the new RMS Europe windstorm model, he said. He expects European prices to rise, although not to the degree they probably will in the United States.

Accounts that experienced losses likely will see higher rates early next year, said Patrick Hartigan, team leader of reinsurance at Beazley Group P.L.C. in London. A combination of the losses experienced this year and model revisions likely will mean there are some rate increases for catastrophe-exposed cedents early next year. Those increases are likely to be in the single-digit range, he said.

North America has seen a large number of attritional property losses, and the impact of the RMS hurricane model on pricing likely will be more marked on Jan. 1, 2012, than it was on June 1 and July 1, when insurers had not fully digested its implications, noted John D. Daum, executive director of Lockton Re L.P. in New York.

But outside of U.S. coastal areas, markets are still competitive, he said.

“The market likely will remain flat at Jan. 1,” Mr. Daum said.

The property/catastrophe reinsurance sector began the year with about \$20 billion in excess capital, said David Flandro, London-based global head of business intelligence at Guy Carpenter & Co. L.L.C. “We think that there have been about \$75 billion of insured losses, many of which were reinsured,” he said. This would mean that the reinsurance sector lost about 5% of its capital as a result of those losses, he explained.

Business that renewed on June 1 saw average rate rises of 5% to 10% for property catastrophe coverage, while business that renewed July 1 saw rates that ranged from flat to 10% higher, he said.

But Jan. 1, 2012, is not likely to see a “thumping hard market,” in the absence of any further catastrophes, Mr. Flandro said.

If there are no large catastrophes during the second half of this year, then “we could experience some drift” of prices downward, he said.

“We would certainly expect property catastrophe rates to go up at the year-end,” said Stephen Catlin, CEO of Catlin Group Ltd. And another major catastrophe by year-end likely would lead to significant rate increases, he said.

“We talk to our clients and we say that the increased frequency and severity of natural catastrophes has to be compensated in terms of pricing,” said Victor Peignet, CEO of the property/casualty operations of Paris-based reinsurer SCOR S.E.

Heavy first-half catastrophe losses mean that reinsurers need

to increase rates for catastrophe-exposed business, said Ulrich Wallin, CEO of Hannover Re Group. At the beginning of the year, reinsurers were trying to keep rates stable, but the Japanese earthquake started a move to increase rates on catastrophe-exposed business, he said.

Increases vary from “modest to quite significant” in loss-laden areas, he said.

At the July renewals, catastrophe-exposed U.S. property business saw rate hikes of about 10% to 15% on average, and similar or higher increases are expected at January renewals, said Michael Pickel, a

member of the executive board of Hannover Re in Hanover, Germany.

Programs with losses in New Zealand saw “rather dramatic rate increases”—with prices doubling or tripling in some cases—for midyear renewals. In Japan and Australia, loss-affected business saw average rate hikes of 50%, Mr. Wallin said.

Dominic Simpson, a vp and senior credit officer with Moody’s Investors Service Inc. in London, told a news conference during the Monte Carlo, Monaco, gathering of the reinsurance industry that catastrophe property prices for some areas—such as Japan and New



**MORE COVERAGE** of the 2011 Rendez-Vous de Septembre will be featured in the next issue of *Business Insurance*.

Zealand, which suffered large earthquake losses—rose 100% in some cases during the recent renewals.

“Prices will go up,” he said. Property catastrophe rates in

Australia and New Zealand, which were hit respectively by floods and earthquakes, increased “tremendously,” said Bryon Ehrhart, chairman of Chicago-based brokerage Aon Corp.’s Aon Benfield Analytics and Aon Benfield Investment Banking Group.

Further rate increases are likely for property catastrophe business in Japan, Australia and New Zealand early next year, said Dennis Sugrue, a director at Standard & Poor’s Corp. in London.

But sufficient capacity in the reinsurance market means that the losses in Australia, Japan and New Zealand likely won’t result in Jan. 1, 2012, rate hikes for companies that do not have cat exposures in those regions, Mr. Ehrhart said.

## Professional MarketPlace To place your ad, contact Monique Murray 212.210.0129 • E-mail: mmurray@BusinessInsurance.com

Business Insurance, Classified Department, 711 Third Ave., New York, NY 10017-4036 • Call for details on blind box and internet advertising

### LEGAL NOTICE

#### IN THE MATTER OF THE LIQUIDATION OF ASPEN U.S. INSURANCE COMPANY

New York Supreme Court, Index No.: 401644/11

Notice is Hereby Given:

I. James J. Wrynn, Superintendent of Insurance of the State of New York, has been appointed by an order of the Supreme Court of the State of New York, New York County, filed on August 24, 2011 (“Liquidation Order”), as the liquidator (“Liquidator”) of Aspen U.S. Insurance Company (“Aspen”) and, as such, has been: (i) vested with all powers and authority expressed or implied under New York Insurance Law (“Insurance Law”) Article 74, in addition to the powers and authority set forth in the Liquidation Order; (ii) authorized and directed to immediately take possession of Aspen’s property, liquidate the Aspen’s business and affairs, and dissolve Aspen’s corporate charter in accordance with Insurance Law Article 74, (iii) vested with title to Aspen’s respective property, contracts, rights of action; (iv) authorized and directed to take possession of Aspen’s books, files, records and other property, wherever located, as of the date of entry of the Liquidation Order; and (v) authorized and directed, without further notice of this Court, to destroy or otherwise dispose of any and all of Aspen’s books, files, records and other property in the Liquidator’s possession when he deems them to be no longer required in connection with the dissolution of Aspen.

II. In accordance with Insurance Law Section 7432(b), all claims against Aspen must be presented to the Liquidator by December 26, 2011. Claims presented after December 26, 2011, will not share in the distribution of assets until all allowed claims that were filed on or before December 26, 2011 have been paid in full with interest. All claimants who appear on Aspen’s books and records as of the date of entry of the Liquidation Order are deemed to have duly filed proofs of claim prior to December 26, 2011.

III. The officers, directors, shareholders, members, depositories, trustees, policyholders, agents, servants, employees, attorneys, managers and affiliates of Aspen and all other persons other than the Liquidator and his agents are permanently enjoined and restrained from: (i) wasting or permitting to be done any act or thing that might waste Aspen’s property; (ii) transacting Aspen’s business or disposing of Aspen’s property, except as authorized by the Liquidator; (iii) interfering with the Liquidator in the possession, control or management of Aspen’s property or in the discharge of his duties; and (iv) disclosing any information that is proprietary to Aspen or not in the public domain, except as authorized by the Liquidator.

IV. All persons are enjoined and restrained from commencing or prosecuting any actions or proceedings against Aspen, the Liquidator or the New York Liquidation Bureau, their present or former employees, attorneys or agents with respect to any claims against Aspen.

V. All persons are enjoined and restrained from obtaining preferences, judgments, attachments or other liens, or making any levy against Aspen’s assets or any part thereof.

VI. The Liquidator is authorized, permitted and allowed to sell, assign or transfer any and stocks, bonds or securities, and any real or other property of Aspen at market price or better, or if there is no market price, at the best price obtainable at private sale at such times and upon such terms and conditions as, in his discretion, he deems is in the best interest of the creditors of Aspen, and he is further authorized to take such steps and to make and execute such agreements and other papers as may be necessary to effect and carry out such sales, transfers and assignments.

VII. In accordance with Insurance Law Section 7405, all in-force contracts, leases, tax sharing agreements, employment contracts, and obligations of Aspen, however described, shall terminate and all liability thereunder shall cease and be fixed as of the date of entry of this Order unless expressly ratified in writing by the Liquidator.

VIII. Aspen, its officers, directors, shareholders, members, depositories, policyholders, trustees, agents, servants, employees, attorneys, managers and affiliates, and all firms, corporations, associations, and other persons or entities having any property and/or information, including, but not limited to, business records, insurance policies, claims files (electronic or paper), software programs, bank records and/or any tangible or intangible items of value, belonging or relating to Aspen, shall preserve such property and/or information and immediately, upon the Liquidator’s request and direction, assign, transfer, turn over and deliver such property and/or information to the Liquidator or his designees.

IX. Any person or entity providing claims processing services, data processing services, electronic records retention services or other information technology services to Aspen shall maintain and preserve all information in its possession relating in any way to Aspen, wherever located, including but not limited to all documents, data, electronic files and records, computer equipment (i.e., servers and printers), software programs and software licenses owned by Aspen, and are directed, upon the Liquidator’s request, to promptly submit all such information to the Liquidator or his designees.

X. Any bank, savings and loan association, other financial institution or any other entity or person, which has on deposit or in its possession, custody or control of any of Aspen’s funds, accounts or assets shall immediately, upon the Liquidator’s request and direction: (i) turn over custody and control of such funds, accounts or assets to the Liquidator; (ii) transfer title of such funds, accounts or assets to the Liquidator; (iii) change the name of such accounts to the name of the Liquidator; (iv) transfer funds from such bank, savings and loan association or other financial institution; or (v) take any other action necessary for the proper conduct of the liquidation proceeding.

XI. Any distribution of assets shall be in accordance with the priorities set forth in Insurance Law Article 74.

XII. The corporate charter of Aspen is relinquished, forfeited, surrendered and annulled, and Aspen is dissolved.

XIII. All communications relating to Aspen and to the liquidation thereof should be addressed to: New York Liquidation Bureau, 110 William Street, New York, New York 10038, (212) 341-6218.

JAMES J. WRYNN  
Superintendent of Insurance of the State of New York as Liquidator  
of Aspen U.S. Insurance Company

### LEGAL NOTICE

#### UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF NEW YORK

In re ) Chapter 15  
Petition of David McGuigan, as foreign representative of Tokio Marine Europe Insurance Limited ) Case No.  
Debtor in a Foreign Proceeding. ) 11-13420 (MG)

#### NOTICE OF ORDER GRANTING RECOGNITION OF A FOREIGN PROCEEDING, PERMANENT INJUNCTION AND RELATED RELIEF

NOTICE IS HEREBY GIVEN THAT, in connection with the petition filed on July 18, 2011 David McGuigan (the “Petitioner”), in his capacity as the duly appointed foreign representative, as defined in section 101(24) of title 11 of the United States Code (the “Bankruptcy Code”), of Tokio Marine Europe Insurance Limited (the “Scheme Company” or “Debtor”), which is subject to an adjustment of debt proceeding (the “English Proceeding”) and bound by that certain Scheme of Arrangement pursuant to Part 26 of the Companies Act 2006 (the “Scheme”) sanctioned by the High Court of Justice of England and Wales (the “English Court”) on April 15, 2011 for the Scheme Company, the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) has issued an Order Granting Recognition of Foreign Proceeding, Permanent Injunction and Related Relief (the “Order”).

1. Ordering that the relief granted in each of the following paragraphs shall affect Scheme Creditors solely with respect to the Scheme and/or Scheme Claims; provided, however, that in no way shall the relief granted herein be construed so as to narrow or limit the terms of the Scheme;

2. Ordering that the Petitioner is recognized as a “foreign representative” pursuant to 11 U.S.C. § 101(24);

3. Ordering that the English Proceeding is recognized as a “foreign main proceeding” pursuant to 11 U.S.C. § 1502;

4. Ordering that all relief equivalent to that afforded to a debtor in a foreign main proceeding pursuant to 11 U.S.C. § 1520 is granted;

5. Ordering that the Scheme (including any amendments or modifications to the Scheme on or before the date of the Order) and the Sanction Order shall be given full force and effect and be binding on and enforceable against all Scheme Creditors, including without limitation, against a Scheme Creditor in its capacity as a debtor of the Scheme Company, in the United States and its territories;

6. Ordering that that all Scheme Creditors and any parties acting on behalf of or deriving title from any Scheme Creditor are hereby permanently enjoined and restrained from: (a) taking or continuing any step, or doing or continuing any act by way of Proceedings (as defined in the Scheme) or otherwise, in any jurisdiction whatsoever: (i) against or in respect of the Scheme Company or the Property (as defined in the Scheme) of the Scheme Company, for the purpose of obtaining payment, or establishing the existence or quantum, of any Scheme Claims; or (ii) save as permitted by clause (b) below, against or in respect of any of the Released Parties (as defined in the Scheme) either individually or collectively in connection with their duties and obligations under the Scheme; (b) commencing or continuing any legal or equitable action or proceedings challenging the validity of any act done or omitted to be done by the Released Parties in connection with the Scheme, including in the United States and its territories, and/or (where appropriate) the meetings of Scheme Creditors held on March 8, 2011 and April 7, 2011, and the Released Parties shall not be liable for any loss suffered by any Scheme Creditor or third party, unless such loss is attributable to their fraud or dishonesty; accordingly, no Scheme Creditor shall bring or institute any Proceedings, claims or complaints against the Released Parties to the extent prohibited by the Scheme; (c) enforcing any judicial, quasi-judicial, administrative or regulatory judgment, assessment or order or arbitration award and commencing or continuing any act or any other legal or equitable action or proceedings (including, without limitation, arbitration, mediation or any judicial, quasi-judicial, administrative or regulatory action, proceedings or process whatsoever) to create, perfect or enforce any lien or other security interest, set off, attachment, garnishment, or other claim against the Scheme Company in connection with the Scheme or any of its property in the United States, and its territories, or any proceeds thereof, including, without limitation, rights under reinsurance or retrocession contracts; (d) invoking, enforcing or relying on the benefit of any statute, rule or requirement of federal, state or local law or regulation requiring the Scheme Company to establish or post security in the form of a bond, letter of credit or otherwise as a condition of prosecuting or defending any proceeding (including, without limitation, arbitration, mediation or any judicial, quasi-judicial, administrative or regulatory action, proceeding or process whatsoever), and such statute, rule or requirement will be rendered null and void for Proceedings, except in compliance with the Scheme; provided, however, that nothing in the Order shall in any respect affect any Security in existence at the Effective Date or the replacements for such Security; (e) withdrawing from, setting-off against, or otherwise applying property which is the subject of any trust or escrow agreement or similar agreement in which the Scheme Company has an interest in excess of amounts expressly authorized by the terms of the trust, escrow, or similar agreement; (f) drawing down any letter of credit established by, on behalf of or at the request of, the Scheme Company, in excess of amounts expressly authorized by the terms of the contract or other agreement pursuant to which such letter of credit has been established;

7. Ordering that a Net Ascertained Claim or Net Debt determined under the Scheme shall be final and binding on the Scheme Company and any person or entity that is a Scheme Creditor;

8. Ordering that all Scheme Creditors of the Scheme Company are permanently enjoined from taking any action in contravention of or inconsistent with the Scheme; and

9. Ordering that except as otherwise provided herein or in the Scheme, in the absence of a bona fide dispute raised and conducted in accordance with the Scheme, all persons and entities in possession, custody, or control of property of the Scheme Company in the United States and its territories, or the proceeds thereof, are required to turnover and account for such property or proceeds thereof to the Scheme Company;

10. Ordering that nothing in the Order prevents the continuance or commencement of proceedings against any person, entity, or other insurer other than the Released Parties; provided, however, that if any third party shall reach a settlement with, or obtain a judgment against, any person or entity other than the Released Parties, such settlement or judgment shall not be binding on or enforceable against the Released Parties or their property, or any proceeds thereof;

11. Ordering that the security provisions of Rule 65(c) of the Federal Rules of Civil Procedure, pursuant to Bankruptcy Rule 7065, shall be, and the same hereby are, waived with respect to the injunctive relief provided in the Order;

12. Ordering that no action taken by the Released Parties, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of the Scheme, the Order, this Chapter 15 Case, any further order for additional relief in this Chapter 15 Case, or any adversary proceedings in connection therewith will be deemed to constitute a waiver of the immunity afforded pursuant to section 306 or section 1510 of the Bankruptcy Code, the law of the United States or otherwise;

13. Ordering that all Scheme Creditors that are beneficiaries of letters of credit established by, on behalf of or at the request of the Scheme Company or parties to any trust, escrow or similar arrangement in which the Scheme Company has an interest, are required to: (a) provide notice to the Petitioner’s United States counsel of any drawdown on any letter of credit established by, on behalf of or at the request of, the Scheme Company, or any withdrawal from, set-off against, or other application of property that is the subject of any trust or escrow agreement or similar arrangement in which the Scheme Company has an interest, together with information sufficient to permit the Scheme Manager to assess the propriety of such drawdown, withdrawal, set-off or other application, including, without limitation, the date and amount of such drawdown, withdrawal, set-off or other application and a copy of any contract, related trust or other agreement pursuant to which any such drawdown, withdrawal, set-off or other application was made, and provide such notice and other information contemporaneously therewith; provided, however, no drawing against any letter of credit or withdrawal from any escrow, trust or similar arrangement shall be made in connection with any commutation unless the amount of such drawing has been agreed in writing with the Scheme Company and the Scheme Manager; and (b) turnover and account to the Scheme Manager for any funds resulting from the drawdown of any letter of credit or the application of funds subject to any trust, escrow or similar arrangement, withdrawal, set-off or other application in excess of amounts expressly authorized by the terms of the contract, any related trust or other agreement pursuant to which such letter of credit, trust, escrow or similar arrangement has been established;

14. Ordering that the Scheme Company and the Scheme Manager be authorized to transfer to the foreign proceedings for distribution pursuant to the Scheme any monies or assets of the Scheme Company which the Scheme Company or the Scheme Manager have or may hereafter recover in connection with the Scheme;

15. Ordering that all persons that have a claim of any nature or source against the Scheme Company in connection with the Scheme and who are parties to any proceedings (including, without limitation, arbitration or any judicial, quasi-judicial, administrative action, proceeding or process whatsoever) in which the Scheme Company is or was named as a party, or as a result of which a liability of the Scheme Company may be established in connection with the Scheme, is required to place the Petitioner’s United States counsel (Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, Attn: Lee S. Attanasio, Esq., and Alex R. Rovira, Esq.) on the master service list of any such action or other legal proceeding, and to take such other steps as may be necessary to ensure that such counsel receives: (a) copies of any and all documents served by the parties to such action or other legal proceeding or issued by the court, arbitrator, administrator, regulator or similar official having jurisdiction over such action or legal proceeding; and (b) any and all correspondence, or other documents circulated to parties named in the master service list;

16. Ordering that the English Court has exclusive jurisdiction to hear and determine any suit, action, claim or proceeding and to settle any dispute which may arise out of the construction or interpretation of the Scheme, or out of any action taken or omitted to be taken by any of the Released Parties in connection with the Scheme; provided, however, that in relation to the determination of Scheme Claims, nothing in the Order affects the validity of provisions determining governing law and jurisdiction, whether contained in any contract between the Scheme Company and any of its Scheme Creditors or otherwise; and

17. Ordering that the Court shall retain jurisdiction with respect to the enforcement, amendment, or modification of the Order or requests for any additional relief in this Chapter 15 Case and all adversary proceedings in connection therewith properly commenced and within the jurisdiction of the Court.

18. Ordering that service as set forth in the Order will be good and sufficient notice of the Order for all purposes.

Copies of the Order, the Scheme and the Petition are available at the Scheme Website, www.TMEIScheme.com, or upon written request to the undersigned counsel.

For further inquiries, please contact, TMEI Scheme Manager, Pro Insurance Solutions Limited (PRO\_TMEI@pro-ld.co.uk), attn. Philip Toft, at Bruton Court, Bruton Way, Gloucester GL1 1DA United Kingdom or +44(0)1452 782699 (tel) or +44(0)1452 523437 (fax).

Sidley Austin LLP, Attorneys for the Petitioner, as foreign representative of the Scheme Company, 787 Seventh Avenue, New York, NY 10019, (212) 839-5300, Attn: Lee S. Attanasio, Esq. and Alex R. Rovira, Esq.

**You're hired.**

**Business Insurance CAREER CENTER**

The ultimate career resource in the insurance industry.

<http://careers.BusinessInsurance.com>

**Need to publish a Legal Notice, Announcement or RFP?**

**Contact Monique at 212-210-0129.**

# Breaches: Take time to respond

CONTINUED FROM PAGE 3

Working with law enforcement also can be among the factors that “are in the mix in figuring out what’s the right time to go public with this,” said Mr. Doernberg.

Telling clients too early is a potential problem, say experts. Alan E. Brill, senior managing director for the computer forensics and secure information services practice of Secaucus, N.J.-based Kroll Inc., said, “We see very often companies don’t take advantage of the time that’s available in all the laws to actually investigate and determine what happened.

“There’s often a rush to notify without really understanding what happened,” in which case “you’re running a significant risk of either notifying the wrong people, too many or not enough, or in fact responding to an event that may never have happened, because there’s a difference between thinking something happened and knowing something happened.”

In one case, he said, a company believed a laptop that had consumer data on 500,000 individuals was stolen, and that it was required to report it. But an investigation revealed the data had not been downloaded before the laptop’s theft. In another case, a firm initially thought 360,000 credit

card records were compromised, when in fact malware had obtained only a small portion of that total.

Lori S. Nugent, a partner with law firm Wilson Elser Moskowitz Edelman & Dicker L.L.P. in Chicago, said, “It is important to provide notification quickly and reasonably. That doesn’t mean that the notice has to be provided the second someone knows that a situation has happened,” she said. “Sometimes, providing notice before there’s a clear understanding from a forensics level of what happened actually results in noti-

precipitously,” Mr. Doernberg said. “Studies have shown an almost universal relationship between the speed with which a company notifies the affected individuals and the cost of notification,” because often “forensic investigation reveals that much less information was actually affected by the breach,” he said.

Observers note that according to a study by Traverse City, Mich.-based Ponemon Institute L.L.C., the total cost of a data breach is \$214 per compromised record, although that includes expenses such as credit card monitoring,



fication being provided to people that aren’t exposed, which unnecessarily causes upset.”

Experts say another problem that arises when notification is too hasty is when firms are forced to send out subsequent notices as it discovers additional data breach victims. That can be like “death by a thousand cuts,” said Mr. Brill. “You really start to look like you don’t know what’s going on.”

Another factor is cost. “People tend to over-notify when they act

forensic investigations, legal costs and revenue loss costs.

Richard J. Bortnick, a member of Cozen O’Connor P.C. in West Conshohocken, Pa., said if there is a statutory requirement to make a notification, most insurers will cover it under their policies, although not if the notification is voluntary.

There also is the danger of providing the information too late. Particularly onerous, say observers, are states including Connecticut and Massachusetts that have five-day reporting requirements. California has a five-day reporting requirement on health care-related breaches. It is “pretty hard to get your hands around” the issue during that period of time, said John F. Mullen Sr., an attorney with Nelson Levine de Luca & Horst L.L.C. in Blue Bell, Pa.

Ms. Nugent said, “A lot of the regulators have the view that all breaches are the same, that there should be a time period within which certainly anybody should be able to provide notification, but the reality is that every breach is different, and some are much more complicated than others. And so what may sound reasonable from a regulatory or legislative standpoint may not work very well in the real world.”

“It’s the proverbial, ‘It depends,’” said Laurie Schwarz, senior vp for Lockton Cos. L.L.C.’s global technology and privacy practice in San Francisco. Factors including the size of the company, its industry and the type of event that occurred can affect the process, she said.

Meanwhile, Eric Goldman, director of the High Tech Law Institute at Santa Clara University in Santa Clara, Calif., questioned the value of data breach notifications altogether.

There is “rarely anything viable consumers can do in response to the notification,” he said. “It just increases their angst without improving their lives.”

# Federal data proposals could simplify process

By JUDY GREENWALD

A uniform federal law governing notification of data breaches would be welcome, but it should preempt related state laws if it is going to be helpful to employers, observers say.

With the exception of Alabama, Kentucky, New Mexico and South Dakota, every state as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands has enacted legislation requiring notification of security breaches involving personal information, according to the Denver-based National Conference of State Legislatures.

On Aug. 31, for instance, California Gov. Jerry Brown signed into law amendments to the state’s security breach notification statute that establish new content requirements for breach notification letters to California residents and mandate notification to the state attorney general when a breach affects more than 500 state residents.

Observers say there are no immediate prospects for a federal law, although several bills on the issue have been introduced. They include the Personal Data Protection and Breach Accountability Act of 2011, which was introduced by Sen. Richard Blumenthal, D-Conn., this month. The bill is intended to protect consumers from threats to their sensitive, personally identifiable information online and to safeguard data security. It has been referred to the Senate Judiciary Committee.

In July, the House Energy and Commerce Committee’s trade subcommittee approved the Secure and Fortify Electronic Data Act, which was introduced by Rep. Mary Bono Mack, R-Calif., but it has been in committee since.

Observers say both bills include state law pre-emption provisions.

Right now, whenever firms have a breach, they are in the “unenviable position of having to navigate through many state laws,” said Aaron P. Simpson, a partner with law firm Hunton & Williams L.L.P. in New York. A federal law would be “helpful for companies trying to do the right thing.”

Alex Ricardo, New York-

based director of breach response services at Beazley Group P.L.C., said a federal law would “streamline the process for interpreting various laws” and make it easier for the covered entities as well as “hopefully make it less expensive.”

Pre-emption, though, is important. The privacy requirements of the federal Gramm-Leach-Bliley Act of 1999, which addresses consumer financial issues, and the Health Insurance Portability and Accountability Act of 1996 “set the floor with respect to privacy in terms of what’s required” by companies but do not preempt state law, said Laurie Schwarz, senior vp for Lockton Cos. L.L.C.’s global technology and privacy practice in San Francisco. And without pre-emption, “you’re still going to have to deal with the patchwork” of state laws.

“It depends on what the federal statute would look like,” said John F. Mullen Sr., an attorney with Nelson, Levine, de Luca & Horst L.L.C. in Blue Bell, Pa., of a federal law. The concern is that states take the position, “You preempted this part of our law, but not that part,” he said.

Alan E. Brill, senior managing director for the computer forensics and secure information services practice of Secaucus, N.J.-based Kroll Inc., said, “It is very difficult now to have different thresholds of what constitutes a breach, and different requirements for notifications. It certainly makes the entire process more complex.”

But at the same time, if certain states require more immediate notification, “What are you going to do, not notify the other people?” asked Mr. Brill. As a result, “I think we see very often there’s more uniformity in notification regardless of the laws.”

Lori S. Nugent, a partner with law firm Wilson Elser Moskowitz Edelman & Dicker L.L.P. in Chicago, said she is not sure a federal statute is inevitable. “There has been variation in the effectiveness of regulators addressing” the issue on the federal and state levels, and “I’m not sure when, or whether, the federal government will want to jump into this particular thicket,” she said.

## Business Resources

### EDUCATION

### ONLINE Master’s Degree in Risk Management and Insurance

- Take your knowledge and skills to the next level
- Earn our Top 10-ranked degree in under two years

Apply now at [onlineRMI.cob.fsu.edu](http://onlineRMI.cob.fsu.edu)



THE FLORIDA STATE UNIVERSITY  
COLLEGE OF BUSINESS

## YOUR TARGET AUDIENCE IS HERE...



Where is your ad?

Call (212) 210-0129 to reserve your space.

**Business Insurance** [www.BusinessInsurance.com](http://www.BusinessInsurance.com)

# Plan ahead to tackle data breaches

*Response strategy should be in place before problems arise*

By **JUDY GREENWALD**

Establishing a data breach response plan before a problem occurs will help firms navigate the delicate issue of when they should inform those affected by a breach.

Businesses "should have an incident response/breach response plan in place where all the players are clearly defined, and where they could act quickly and efficiently to contain the harm...and to gather all the facts quickly and offer appropriate remediation services, whether it's credit monitoring or identify theft," said Jon A. Neiditz, a partner with law firm Nelson Mullins Riley & Scarborough L.L.P. in Atlanta.

"It's very helpful for companies to have an incident response plan, because the timing requirements of doing this as soon as reasonably practical are pretty tight," said Aaron P. Simpson, a partner with Hunton & Williams L.L.P. in New York. Getting the right people "who can remediate appropriately and in a timely manner is very important," he said.

"The faster a company can act in response to a breach, the better it will be able to assess what needs to be done" and the more responsive it will be "to the needs of law enforcement, the desire of its customers to be able to protect themselves and the other factors that are involved in any data breach," according to John Doernberg, a vp at William Gallagher Associates Insurance Brokers Inc. in Boston.

Mr. Neiditz said it is important to "contain the potential harm" as quickly as possible and form a "coherent and reliable narrative" in notifying those affected.

However, "if you are only part of the way through gathering the facts and you notify, you can get yourself in a lot of trouble," Mr. Neiditz said.

Alex Ricardo, New York-based director of breach response services at Beazley P.L.C., said firms might need to do a forensic inves-

tigation depending on the nature of the data breach.

With certain breaches in particular—such as a lost laptop, lost portable device or malware—the ability to do a forensic investigation "is certainly valuable" to confirm not only that a data breach occurred but also to define those affected, which could reduce the risk of notifying too many or too few people, he said.

Scott N. Godes, of counsel at law firm Dickstein Shapiro L.L.P. in Washington, said the first thing to do when there is a data breach is "look at your insurance policies,

and figure out whom you can notify and from whom you can request coverage right away." To the extent an insurer agrees to cover the breach, "they can start providing you with resources right away," he said.

Mr. Godes also suggested that policyholders "seek coverage under any possible policy that can provide coverage."

However, he also had a warning. "We've learned there's no guarantee...because no matter how you act, there's always the risk of class actions and other claims from plaintiffs," Mr. Godes said.

## LETTERS

CONTINUED FROM PAGE 8

capitalized. There is no doubt that the industry has come a long way since 1986. In many instances, there are self-imposed disciplines that lead to a more soundly capitalized and professionally operated company.

We are seeing a growing interest in the alternative sector, with clients not only looking to take steps with the possibility of a hardening market but also a more comprehensive analysis of their exposures, which they are

comfortable assuming.

I have been a strong proponent of expanding the lines of business that would make RRGs even more efficient. If you set some stringent capital, conservative ratios and reporting requirements, I believe you could even go so far as to consider workers compensation.

Thanks again for several excellent articles.

**Peter H. Foley**  
Executive vp  
Breckenridge IS Inc.  
Aurora, Ohio

**Business Insurance's**  
**2011 WOMEN TO WATCH**  
**LEADERSHIP WORKSHOP AND AWARDS LUNCHEON**

Don't just save the date - save the full day!  
We've expanded our 6th annual Award luncheon  
To include a full day of sessions with targeted  
content for our past, present honorees and guests.

**DECEMBER 6TH | NYC | HILTON**  
Workshop Registration and Sessions 8am  
Award Luncheon 11:30am

[BusinessInsurance.com/WomenToWatch](http://BusinessInsurance.com/WomenToWatch)

For information about attending or available partnership opportunities, please contact Becky Briggs, Events Manager at [RBriggs@BusinessInsurance.com](mailto:RBriggs@BusinessInsurance.com) or 212-210-0132.

Presented by: **Business Insurance**  
In Partnership with: **TRAVELERS**

ADVERTISER	
INDEX	
Issue of September 19	
ADVERTISER	PAGE #
Aetna Inc. ....	11
Allstate Insurance Co. ....	27
Aon Corporation ....	2
Arch Insurance ....	5
Business Insurance ....	15, 20, 23, 25
Catlin ....	28
Chartis ....	13
Dickstein Shapiro LLP ....	14
Federation of Regulatory Counsel ..	18
FM Global ....	19
Health Alliance Plan ....	15A
LUBA Workers' Comp ....	15B
Prudential ....	12
Swiss Re ....	17
Zurich North America ....	7

## Survey: Staffing

CONTINUED FROM PAGE 4

those staff levels.

Of companies planning to increase staff, the primary reason given for the additions is an increase in business volume, cited by 53% of those surveyed, up from 36% who cited increased business volume as their reason for adding staff in the January survey, "which is tremendous growth in just a six-month period," Mr. Rieder said.

Property/casualty companies surveyed indicated they're more likely to increase staff in the year ahead than their life/health counterparts, with 45% of property/casualty companies surveyed expecting to add staff—up from 38% a year ago—and 42% of life/health companies indicating they plan to add staff in the next 12 months—down from 50% a year ago.

While information technology remained the function in which most of the anticipated hiring was likely to occur, "It was nice to see the underwriting, marketing and claims functions are also expected to increase," Mr. Rieder said.

The survey showed that actuarial, executive and technology positions remain the most difficult for U.S. insurance companies to fill, and also showed that demand for commercial property/casualty underwriting staff is growing and those positions are becoming harder to fill.

The largest companies are the most likely to add staff in the next year, according to the survey, a fact Mr. Rieder attributed to those companies looking to rebuild from staff reductions during the economic downturn. "The large-stock companies were pretty aggressive at reducing staff a couple of years ago," he said.

Mr. Jacobson noted that in the current survey, participants were asked about their actual staffing growth during the past 12 months. In the Jacobson/Ward July 2010 survey, industry respondents indicated an anticipated staff growth rate of 1.4%. "The actual growth rate was about 1.3%, so it was very, very close to what was anticipated," Mr. Jacobson said.

The current survey projects growth in U.S. insurance company staffing of just over 1% in the next 12 months.

The latest study surveyed 113 companies, with an average of 1,528 employees. Of the companies surveyed, 59 were regional businesses and 54 national or multinational. It was the fifth such survey conducted by Jacobson Group and Ward Group.

The survey results can be found at [www.wardinc.com](http://www.wardinc.com).

## Drugs: Comp impact a myth

CONTINUED FROM PAGE 1

report shows that while conference speakers addressed drug and alcohol issues and solutions for small businesses, it does not show that any speaker raised the 38% to 50% statistic.

In addition, neither the Labor Department's Occupational Safety and Health Administration nor its Bureau of Labor Statistics track such data, representatives for both agencies said.

The NDWA could not be reached for comment.

The statistic pops up again on the website of the Tennessee Department of Labor and Workforce Development, which says that "38% to 50% of all workers compensation claims are related to substance abuse in the workplace."

"That seems kind of high to me," a spokesman for the Tennessee agency said when asked about the numbers. But he cited the source of the information as the "Working Partners, National Conference Proceedings Report."

Likewise, attorney Bill Judge states on the Work Comp Roundup blog that NCCI estimates that 38% to 50% of workers comp claims involve a drug or alcohol issue, which the NCCI denied was the case.

But Mr. Judge said the real percentage may be even greater. Mr. Judge is a research attorney for Park-Dickens Group L.L.C. in Chicago, which helps employers comply with regulations for drug testing so they can argue an intoxication defense against workers comp claims.

"I can understand where people might say, 'Wait a second,' but a lot of the insurance companies that we talk to on a regular basis believe that (38% to 50%) number is probably low," Mr. Judge said.

However, several of the nation's largest workers comp insurers say they do not collect such data, in part because it's up to employers to report to them whether a claimant was under the influence at the time of an accident and not all employers test for intoxication.

But a spokeswoman for the California State Compensation Insurance Fund estimated that just less than 1% of its claimants are intoxicated at the time of their injury.

Numerous studies have linked the potential for intoxication impairment to contribute to occupational injuries, said Eric Goplerud, senior vp of the NORC Department of Substance Abuse, Mental Health and Criminal Justice Studies at the University



of Chicago.

But Mr. Goplerud said he is not familiar with any study substantiating that 50% of workers comp claims are related to drugs or alcohol.

Any such statistics would be "very shaky and not defensible from data," in part because of state laws exempting workers comp benefits for persons injured while under the influence of alcohol or drugs, he said.

The laws undoubtedly suppress accurate reporting as some doctors treating injured workers are not likely to ask about alcohol or drugs out of concern the workers comp system won't pay for their patients' injury expenses, he added.

Some observers say inflating the influence of intoxicants is dangerous because it can lead to blaming workers for accidents rather than implementing procedures that address real safety problems.

"If you hang on to that (38% to 50%) number, you are basically going to start blaming the people for getting hurt as opposed to saying maybe there is a systemic (safety) problem we need to fix," said Thomas Cecich, a member of the board of directors for the Des Plaines, Ill.-based American Society of Safety Engineers.

Many states that allow denial of workers comp benefits when drugs or alcohol cause an accident require the intoxicants to be the sole cause of the accident, Ms. Nowak said. But it is probably frequent that other factors contribute to accidents, such as failing to use proper safety guards on machinery.

Therefore, it is difficult to pin down how often intoxication contributes to injuries, Ms. Nowak said. But compared with 20 years ago, there are more drug- and alcohol-free workplaces because of education programs sponsored by insurers and state and federal agencies, Ms. Nowak added.

A 2009 Rand Corp. Center for Health and Safety in the Workplace study titled "The Effects of Substance Use on Workplace Injuries" reviewed existing literature examining the topic.

The Rand researchers found that the association between substance use and occupational injuries is greater in certain industries such as manufacturing and construction. But overall, the Rand researchers concluded that the proportion of occupational injuries caused by substance use is "relatively small."

"Instead, there is mounting evidence that harmful substance use is one of a constellation of behaviors exhibited by certain individuals who may avoid work-related safety precautions and take greater work-related risks," Rand's report states. "Thus, we suspect that it is more likely that risk-taking dispositions...and other omitted factors can explain most empirical associations between substance use and injuries at work."

## Census: Work-based health cover falls

CONTINUED FROM PAGE 4

Under that program, the government paid 65% of the COBRA premium for up to 15 months for employees laid off through May 31, 2010.

While employment-based coverage continued to decline, government-provided health care programs grew, though only modestly.

For example, the percentage of the population covered by Medicaid—the federal-state program for the poor—rose to 15.9% in 2010, up from 15.7% the previous year; the number of people enrolled in Medicaid increased to 48.6 million, up from 47.8 million.

While these figures are records, the one-year changes are not significantly different statistically, the Census Bureau said.

The percentage and number of people enrolled in Medicare also

set records last year. In 2010, 44.3 million people were enrolled in Medicare, up from 43.4 million in 2009; the percentage of the population covered by Medicare increased to 14.5%, up from 14.3%.

Overall, the number of uninsured in 2010 rose to 49.9 million, up from 49 million in 2009. The percentage without coverage climbed to 16.3%, which was not a statistically significant change from the 2009 uninsured rate of 16.1%, the Census Bureau said.

The number of people with health coverage increased to 256.2 million in 2010, up from 255.3 million, which the Census Bureau said also was not a statistically significant change.

At 5%, Massachusetts had the lowest uninsured rate—averaged over 2009 and 2010—of any state, according to the Census Bureau.

That is the result of a 2006 law that created a program in which

the state subsidizes health insurance premiums of the low-income uninsured, and imposes penalties on employers not offering coverage. The law also imposes assessments on individuals without health insurance coverage—except those who can prove that affordable coverage was not available and those who obtain special waivers.

After Massachusetts, Hawaii, at 7.5% had the second-lowest uninsured rate, followed by Minnesota at 8.9% and Wisconsin at 9.2%.

On the other hand, Texas had the highest uninsured rate of any state at 25%, followed by Florida at 21.3% and Nevada at 21%.

The 2010 federal health care reform law is supposed to make deep inroads in the number of uninsured, but the extension of federal premium subsidies to the lower-income uninsured to make coverage more affordable does not take effect until 2014.

# Business Insurance

**Publisher/General Manager,  
Strategic Business Media:**  
Mark Stach (Chicago)

**Associate Publisher/  
Online General Manager/Event Director:**  
Paul D. Winston (Chicago)

**Editor:** Gavin Souter (Chicago)

**Editor-at-Large:** Jerry Geisel (Washington)

**Managing Editor:** Matt Scroggins (Chicago)

**Assistant Managing Editors:**  
Charmain Benton (Chicago);  
John D. Thomas (Chicago)

**Art Editor:** William Murphy (Chicago)

**Senior Editors:** Michael Bradford (Dallas);  
Roberto Cenicerros (Boise);  
Judy Greenwald (San Jose);  
Mark A. Hofmann (Washington);  
Sarah Veysey (London);  
Joanne Wojcik (Denver);  
Rodd Zolkos (Chicago)

**Associate Editors:** Matt Dunning (New York);  
Sonja Ryst (New York);  
Mike Tsikoudakis (Chicago)

**Copy Desk Chief:** Katherine Downing (Chicago)

**Copy Editor:** Ann Reus (Chicago)

**Editorial Assistant:** Mallory Gillikin (Chicago)

**Research Director:** Kevin P. Edison (Chicago)

**Research Editor:** Karen Brown Tucker (Chicago)

**Editorial Cartoonist:** Roger Schillerstrom (Chicago)

**Advertising Sales Director:**  
Susan Stillwill (Chicago)

**Regional Sales Managers:**

Ron Kolgraf (Boston); Robert B. Murray  
(New York); Mary Pemberton (Denver)

**Southeast & Classified Advertising Manager:**

Monique Murray (New York)

**Production Manager:** J. Thomas Janka (Chicago)

**Assistant to the Publisher:**

Justine Karl (Chicago)

**Marketing Manager:**  
Kathy L. Barnes (Chicago)

**Audience Marketing Director:**  
Michelle O'Malley (Chicago)

**Events Manager:**  
Rebecca Briggs (New York)

**Digital Product Manager:**  
Christina Kneitz (Chicago)

**EDITORIAL:** Boise: 208-286-1425;  
Chicago: 312-649-5200; Dallas: 972-691-7960;  
Denver: 303-278-7444; London: 44-207-457-1400;  
New York: 212-210-0100; San Jose: 408-774-1500;  
Washington: 202-662-7200

**ADVERTISING:** Boston: 617-292-4856;  
Chicago: 312-649-5224; Denver: 303-898-4043;  
New York: 212-210-0136

**SUBSCRIPTIONS & SINGLE COPY SALES:**  
1-877-812-1587 (U.S. & Canada)  
1-313-446-0450 (All other locations)

Business Insurance is published by  
Crain Communications Inc.

**Chairman:** Keith E. Crain

**President:** Rance Crain

**Secretary:** Merrilee Crain

**Treasurer:** Mary Kay Crain

**Executive Vice President/Operations:**  
William A. Morrow

**Senior Vice President:** Gloria Scoby

**Vice President/Group Publisher:**  
Christopher Crain

**Group Vice President/Technology,  
Circulation, Manufacturing:**  
Robert C. Adams

**Vice President/Production & Manufacturing:**  
Dave Kamis

**Chief Information Officer:** Paul Dalpiaz  
G.D. Crain Jr. Founder (1885-1973)

**Mrs. G.D. Crain Jr.** Chairman (1911-1996)

**S.R. Bernstein**

Chairman-executive committee (1907-1993)

## News In Brief

CONTINUED FROM PAGE 1

the workers comp rating and research organization said in the report, "Workers Compensation Prescription Drug Study: 2011 Update."

### Commercial insurance prices on the rise

Commercial insurance prices increased nearly 1.5% during the second quarter compared with the same period last year, which Towers Watson & Co. said is the first time prices rose for all standard commercial product lines since the fourth quarter of 2003.

### Dow Corning asks to fund more benefits via captive

Dow Corning Corp. has asked the Labor Department for approval to expand employee benefit risks funded through its Washington-based captive insurer. Dow Corning wants to use its captive, Devonshire Underwriters Ltd., to fund basic life insurance benefits. Minnesota Life Insurance Co. would reinsure the risk with Devonshire.

### Most Mass. employers provide coverage

Nearly all Massachusetts employers that are required by law to either offer health care coverage meeting certain standards or pay a penalty chose to provide coverage in 2010. Under a "play-or-pay" provision in the 2006 law intended to move Massachusetts close to universal coverage, employers with at least 11 employees must make a "fair and reasonable" contribution toward health care coverage. In 2010, 95.4% of employers subject to the fair-share requirement provided the required coverage.

### Bill Pieroni named COO of Marsh Inc.

Bill Pieroni has been named to the new position of chief operating officer of Marsh Inc., Marsh announced. In his new position, Mr. Pieroni will be responsible for the brokerage's global operations, and "will focus on the Marsh platform in order to maximize performance

and to deliver superior, differentiated value to our clients," Marsh said. Mr. Pieroni, whose appointment is effective today, will be based in New York and report to Peter Zaffino, president and CEO of Marsh Inc.

### Federal judge rejects health insurance mandate

A federal judge in Pennsylvania said the insurance-buying mandate in the 2010 health care reform law is unconstitutional. U.S. District Judge Christopher Conner said the Commerce Clause of the U.S. Constitution did not give Congress power to require nearly all U.S. residents to buy health insurance, whether they want it or not.

### IRS seeks comment on affordability guidelines

The Internal Revenue Service last week asked for public comment on a proposal in which employers could use employees' wages to determine if its health care plans are affordable and exempt from a health care reform law penalty set to go into effect in 2014. Under the proposal, coverage would be considered affordable so long as the required employee premium contribution for individual coverage in an employer's lowest cost plan available to the employee did not exceed 9.5% of the employee's W-2 wages.

### Lloyd's of London writes direct insurance in China

Lloyd's of London has begun writing direct insurance in China through its subsidiary Lloyd's Insurance Co. (China) Ltd., the insurer said. Lloyd's China was licensed to write reinsurance in 2007 and granted a license to write direct business last year. It will provide specialty coverage through four managing agents that will underwrite directors and officers, marine cargo and sports contingency insurance.

### More risk management time: Board members

Risk management is the top area on which public company board members would like to spend more time, according to a study by BDO USA L.L.P. According to the survey, 55% of board members surveyed cited risk management as the area on which they'd like to spend more time, followed by succession planning at 54% and studying industry competitors at 50%.

## Transatlantic: Deal with Allied World called off

CONTINUED FROM PAGE 4

Transatlantic's executive vp and chief operating officer, Michael Sapnar, is appointed president, effective immediately, and CEO effective Jan. 1, 2012, the company announced last week. He succeeds Robert Orlich, who retires as CEO in January but remains on the board. Meanwhile, Transatlantic announced plans to buy back more stock.

What will ultimately happen to Transatlantic is unclear.

"As of now, Transatlantic is effectively a stand-alone. It doesn't have a deal with anyone, although it's possible they'll discuss offers with different parties," said Tracy Dolin-Benguigui, an associate director at Standard & Poor's Corp. in New York.

Transatlantic remains willing to engage in discussions with any seriously interested party, according to a statement it issued Friday. But National Indemnity's \$52-per-share bid represents only 77% of Transatlantic's stated June 30 book value, the company said. National Indemnity has said that it will not increase its offer, and no talks are scheduled between the two companies, Transatlantic said.

Meanwhile Transatlantic said Validus' offer continues to be

"inadequate," for reasons ranging from insufficient valuation to "cultural incompatibility."

In July, Validus offered 1.5564 of its shares and \$8.00 per share in cash, and also said it would add \$500 million to Transatlantic's reserves. But the Bermuda reinsurer based its bid on public information, and Allied World's agreement with Transatlantic prevented Validus from doing due diligence, experts say.

"We welcome the opportunity to enter into discussions without any restrictive preconditions and engage in mutual due diligence," a Validus spokesman said Friday.

"Obviously, once they get the insider's look (into Transatlantic) and scrub the numbers, it could be that the reserves are fine," said Michael G. Paisan, a New York-based analyst for financial services firm Stifel Nicolaus & Co. Inc. Depending on what the Bermuda reinsurer discovers, it could offer to allocate less money for the reserves and pay more to Transatlantic shareholders, Mr. Paisan said.

Transatlantic said it's planning a \$600 million share buyback program, adding \$455 million to its existing one. The company plans to do half before the end of 2011 and the rest in 2012.

Davis Selected Advisers L.P.

## BP: Investigation cites risk management failures

CONTINUED FROM PAGE 4

ing the hazards and making sure you're safe before taking the next step in the procedure."

The risk management in question in the Deepwater Horizon disaster involved understanding the hazards drill crews faced, as well as the checks and balances meant to prevent such accidents. Asked Mr. Guild, "With all of the protections that should have been available, why did they still have the problem?"

The report cited "technical steps they should have taken" and "warning signs" that should have been heeded, said Chris Moss, senior risk management

consultant at Charles Taylor Risk Consulting in Dallas.

"The Deepwater Horizon event has huge implications for risk management in general," Mr. Moss said. "At its broadest, there are so many examples of just simple things that could have been done. This is like so many man-made disasters that is the result of a series of things that have gone wrong."

While saying he hasn't yet read the report in its entirety, Mr. Moss said that from some of the findings he is aware of, "there were striking similarities to the Piper Alpha incident in the North Sea many years ago." The Piper Alpha platform was

said it "applauds Transatlantic's efforts to create value for shareholders with an intelligent capital management plan while at the same time remaining open to other strategic alternatives," according to Transatlantic's statement Friday. The Tucson, Ariz.-based investment management firm, which owns a nearly 24% stake in Transatlantic, had objected in June to Transatlantic's deal with Allied World.

Meanwhile Transatlantic continues with initiatives such as completing a licensing process that would provide the reinsurer with access to U.S. primary insurance business. Transatlantic might have benefited from joining its pure reinsurance operation with Allied World's predominantly insurance business, analysts say.

"It sounds like (Transatlantic is) continuing to do what they've been doing," said James Eck, vp-senior credit officer at Moody's Investors Service Inc. in New York.

Berkshire did not respond to a request for an interview.

Earlier last week, Validus said it was filing papers with the U.S. Securities and Exchange Commission in an effort to replace Transatlantic's board with three independent directors.

Validus had proposed the same three people replace members on IPC Holdings Ltd.'s board, after the property/catastrophe reinsurer launched a successful unsolicited bid for the reinsurer in 2009.

destroyed by fire in 1988 after an explosion, killing 168.

Brian T. Petty, executive vp of government affairs at the Washington-based International Assn. of Drilling Contractors, late last week said that the report's findings still were being studied by the industry, and it was unclear what new risk management lessons might be part of the findings.

Like a report released this year by a presidential commission studying the disaster, this latest report suggests various regulatory and industry reforms aimed at preventing such incidents in the future.

The industry generally moves quicker than government regulators in responding to problems, Mr. Petty said, noting that "the industry has been in response mode since the Macondo blowout."



## Need to improve your safety record?

Check out your options with the *Business Insurance* Directory of Safety Consultants. Find a safety consultant that meets your needs from our comprehensive listing of companies.

Purchase a *Business Insurance* Research Subscription for **\$399** and get unlimited access to this and all the other *Business Insurance* directories all year long.

**Business Insurance. Research Center** @ [www.businessinsurance.com/research](http://www.businessinsurance.com/research)

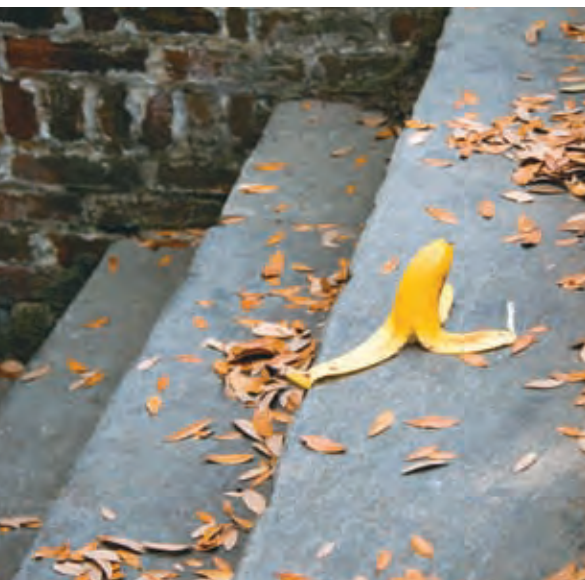
Contributing: Roberto Cenicerros,  
Matt Dunning, Judy Greenwald,  
Mike Tsikoudakis

## Stairway leads to injury dispute

A family is being sued on grounds that their cluttered inside staircase caused a Gettysburg, Pa., police officer to fall down the steps and injure himself.

The suit was initiated by the Gettysburg Police Department's insurance company, which paid out \$11,896.29 for medical treatment and lost wages to the injured officer, The Evening Sun reported.

Sgt. Kevin Wilson was injured last year when he responded to a call about a domestic dispute at the



residence of Ronald Carstetter. Mr. Carstetter's daughter, April, was arguing with her step-mother and called police, according to the newspaper.

According to the suit, which was brought in August by Branchville, N.J.-based Selective Insurance Co. of America and the Borough of Gettysburg, Sgt. Wilson tripped over bags that obstructed the stairway.

However, Mr. Carstetter's daughter maintained that the stairway was not cluttered and that the officer lost his balance and fell.

She also questioned the need for the suit since the borough provides workers compensation insurance for police officers, which is budgeted at \$72,000 this year, the newspaper reported.

The suit asks that the family be required to pay for medical costs and lost wages, along with additional fees that total less than \$50,000.

# End Page



AP PHOTO

Madonna, at the Venice Film Festival Sept. 1, lost a bid to dismiss a noise and damage suit brought by a former New York neighbor.

## Madonna sued for expressing herself

A former neighbor of pop icon Madonna will have her day in court now that a judge has ruled that her lawsuit against the Material Girl can go to trial.

Karen George, a resident since 1995 at the Harperly Hall co-op at 41 Central Park West, sued Madonna in 2009 over excessive noise and damage to her apartment resulting from her then-upstairs neighbor's dance training sessions.

The sessions lasted up to three hours nearly every day, subjecting Ms. George and other neighbors to "blaring music, stomping and shaking walls," according to the suit.

Last month, Manhattan Supreme Court Justice Louis York denied Madonna's attempt to have the case against her thrown out, concluding that Ms. George had a right to shelter from the outside world "to think, interact and relax in peace." That is "one of the most basic functions of a residence," the judge ruled.

If noise caused by the singer's activities prevented Ms. George from using her apartment, "then the warranty of habitability has been breached," Judge York wrote in his decision allowing a trial to proceed.

Also named in the suit are the building's board of directors and its management company, Midboro Management Inc.

Ms. George alleges that she informed the building's co-op board repeatedly of the problem, but never was able to force it or the building's management company to enforce building rules and city noise ordinances.

Madonna left the apartment earlier this year for a \$32 million Upper East Side mansion.

## Unlikely target faces ADA suit

A manufacturer of wheelchairs, ramps and other such equipment is being sued by the Equal Employment Opportunity Commission for disability discrimination for refusing to accommodate an employee's request for a leave of absence because of a knee injury, and then firing him.

On its website, New Braunfels, Texas-based The Scooter Store describes itself as "America's leading supplier of power mobility solutions, including power wheelchairs, scooters, lifts,

ramps and accessories."

James Sherman, a mobility manager in the company's Farmingdale, N.Y., store, asked for a temporary leave of absence to seek treatment for his disability, psoriatic arthritis, after he sustained the knee injury, according to the

EEOC. "This reasonable accommodation would have enabled Sherman to perform the essential functions of his job," says the federal lawsuit filed Aug. 31 in New York.

The company refused his request and fired him in April 2009, "purportedly for job abandonment, although he had presented medical documentation," according to the EEOC.

The EEOC, which filed suit under the Americans with Disabilities Act, is seeking monetary relief, punitive damages and a permanent injunction from engaging in discriminatory practices, among other things.

Mark B. Leita, The Scooter Store's vp of external affairs and government relations, said in a statement, "The Scooter Store operates in full compliance with all state and federal laws including those that protect the rights of the disabled. However, the company will not comment further on this litigation."



## Whistle-blower in hairy situation

A former president for Nad's hair removal products is suing for more than \$500,000, claiming the brand's distributor fired him for blowing the whistle on its defective body strips.

Huntington Beach, Calif., resident Robert Spetner sued in Orange County Superior Court claiming violation of California's whistle-blower statute, breach of contract, wrongful termination and unpaid wages.

He was president of U.S.

operations for Australia-based Sue Ismiel & Daughters Enterprises Pty. Ltd. But he alleges he was fired after the company instructed him to conceal that it bought more than 300,000 boxes of defective Nad's body hair removal strips from its manufacturer and shipped them to U.S. retail stores.

While SI&D was disregarding Mr. Spetner's urging to alert its retail customers about the problematic product, it also sought and received credits from its manufacturer for the

defective merchandise, he alleges.

Mr. Spetner said he was fired after reporting the defect to state and federal agencies.

But an attorney for SI&D said the defect did not cause any physical danger and most of the product was quarantined before reaching store shelves, the Orange County Register reported.

The attorney also said that complaints were handled individually, adding that Mr. Spetner was not fired for being a whistle-blower, but for poor sales performance, insubordination and double-dipping on vacation pay.

This doesn't appear to be a problem that can be removed as easily as unwanted body hair.



# Benefits

## *What's Missing From Your Benefits Program?*

Allstate Benefits. We have the most comprehensive benefits portfolio in the business. Including the **#1 critical illness product in America**. It's no wonder we're one of the fastest-growing benefits providers in the country. Call an Allstate Benefits Representative today and let the Good Hands go to work for you.



**Allstate**<sup>®</sup>

B E N E F I T S

*You're in Good Hands.*<sup>®</sup>

1-866-895-8676  
or [allstateatwork.com](http://allstateatwork.com)

Life • Disability • Critical Illness • Accident • Medical Gap

Lisa Reynolds treats her  
300 pound pigs like babies.



**Lisa Reynolds**

// Broker //

// Competitive Pig Hobbyist //

**This comes as no surprise to her clients.**

As an expert in animal husbandry, broker Lisa Reynolds knows how to nurture life. She takes the same care with her clients by securing them the best coverage she can find. That's why she chooses Catlin.

With unparalleled expertise, agility and, in Lisa's words, a "bend over backwards" approach to service, Catlin earns the trust of brokers every day.

To learn more, visit [CatlinUS.com](https://www.CatlinUS.com).

**CATLIN**

Underwriting Ambition