

**AIG POSTS QUARTERLY LOSS, REPORTS BIG PROCEEDS FROM AIA, ALICO DEALS / PAGE 3**

**DEAL WITH INTRACORP GIVES GENEX BOOST IN COMP, DISABILITY / PAGE 3**

**REINSURANCE RENEWALS REFLECT SOFT MARKET, PRICING DISCIPLINE / PAGE 4**

## In Brief

### AXA cat bond covers windstorms

AXA Global P&C has sponsored a €275 million (\$382.8 million) catastrophe bond to cover European windstorm risks. The bond gives AXA three years of coverage of European windstorm losses on an occurrence basis. It uses triggers by specific country and line of business provided by European catastrophe data provider PERILS A.G. The bond gives AXA Global P&C, a unit of AXA S.A., coverage of European windstorm losses in Belgium, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Switzerland and the United Kingdom.

### Swiss Re to repay Berkshire capital

Swiss Reinsurance Co. will repay 3 billion Swiss franc (\$3.05

See **IN BRIEF** page 37

## FEDERAL LEGISLATION & REGULATION

# GOP wins reshape Congress

## Federal charter, nat cat changes likely off agenda

By **MARK A. HOFMANN**

**WASHINGTON**—The risk management and insurance landscape will feel some tremors from the political earthquake that occurred in last week's midterm elections, say observers.

For example, observers say the new Congress will likely shut off efforts to move quickly on major financial services reforms, such as an optional federal charter for insurers and producers. And don't expect major initiatives in natural catastrophe policy, but tort reform may get a boost, they say.

The new Republican House majority means there will be changes on the House Financial Services Committee, which has jurisdiction over insurance matters. Rep. Spencer Bachus, R-Ala., is in line to become chairman of the panel. But Rep. Ed Royce, R-Calif.—a longtime OFC advocate—has said that he intends to challenge Rep. Bachus for the chairmanship.

Rep. Scott Garrett, R-N.J., is in line to succeed Rep. Paul

See **RISK** page 34



Republican Rep. John Boehner of Ohio is expected to become Speaker of the House in 2011.

AP PHOTO

## ELECTION 2010

**INITIATIVES:** Wash. nixes workers comp privatization / **PAGE 34**

**MANDATE:** Some states reject key health reform provision / **PAGE 35**

**COMMISSIONERS:** Several states elect top regulators / **PAGE 35**

## Future murky for health care reform law

By **JERRY GEISEL**

**WASHINGTON**—The uncertainty that surrounded the health care reform effort prior to its passage this year has returned.

After the midterm elections that gave Republicans a large majority in the House of Representatives, congressional GOP leaders pledged to work to repeal—or at least alter—the health care reform law next year.

While observers say the effort to scrap the law will fail, what actions legislators will take to amend the reform law aren't clear.

"We are entering a period of uncertainty," said Paul Dennett, senior vp with the American Benefits Council in Washington.

There is little doubt that a repeal bill will be introduced early next year—almost a year after the passage of the reform measure—when the new congressional session begins.

House Minority Leader John Boehner, R-Ohio, who is certain to become Speaker of the House next year when the new Congress is

See **HEALTH** page 35

## DIRECTORS & OFFICERS LIABILITY

# FDIC starts legal assault on execs of failed banks

By **ROBERTO CENICEROS**

**CHICAGO**—The Federal Deposit Insurance Corp.'s lawsuit against

the former directors and officers of a failed Illinois community bank marks the first in an expected series of such suits—and another

source of claims for that segment of the financial institutions D&O market.

"I don't think there is any question that this is the first in a large wave of claims we are going to be seeing by the FDIC against directors and officers of failed banks," said Dan Bailey, a D&O insurance expert and partner at law firm Bailey Cavaliere L.L.C. in Columbus, Ohio.

Observers had expected the FDIC to commence litigation to recover funds from the directors and officers of shuttered banks, similar to a litigation wave that

accompanied the savings and loan crisis of the 1980s and 1990s.

"If that experience is any guide, we are definitely going to see more lawsuits," said William A. Boeck, a Kansas City, Mo.-based senior vp and insurance and claims counsel at Lockton Financial Services, a unit of Lockton Cos. L.L.C.

But last week's lawsuit against 11 former executives at Heritage Community Bank comes at a time when few D&O liability insurance markets are available for smaller,

See **FDIC** page 36



## SPOTLIGHT

### EMPLOYMENT LIABILITY RISK MANAGEMENT

Broader employment practices cover offered; wage-and-hour suits a major risk; retaliation claims up; more age bias suits; **BI** ranks insurance recovery law firms. **PAGE 13**

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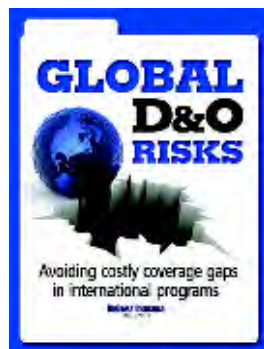
# Business Insurance

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### VIDEO: GREEN COVERAGE OPTIONS

In this Risk of Going Green video, *Business Insurance* looks at the new green coverage endorsements for business. Click through the Multimedia tab.



An expanded online version of a new white paper shows how risk managers can ensure directors and officers are covered overseas. [www.BusinessInsurance.com/whitepapers](http://www.BusinessInsurance.com/whitepapers).

### ONLINE DIRECTORY

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### CONSTRUCTION DEFECT WEBCAST

"Blueprint for Construction Defects: Managing the Risks and Coverage," with experts Brian Casey and Michael Szot, is scheduled for 2 p.m. EST Nov. 10. [www.BusinessInsurance.com/webcasts](http://www.BusinessInsurance.com/webcasts).



### MOST POPULAR STORIES

Week of November 1, 2010

1. Marsh, Aon settle suit, charges against broker dropped
2. *Business Insurance* names 2010 Readers Choice Awards winners
3. Mixed results in state votes on health insurance mandate
4. Election changes lawmakers overseeing insurance issues
5. U.S. Republicans to attack health care law funding
6. Obama open to 'tweaks' to health care reform law
7. More hurricane activity possible in Atlantic: Modeler
8. Zurich profit drops 22% on U.S. lawsuit settlement
9. Business looks to Republicans to block health care rules, taxes
10. Waldorf bitten by another bedbug lawsuit

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### COMP TIME

The award-winning blog by *BI* Senior Editor Roberto Cenicerros



For the second consecutive year, Comp Time has been named one of LexisNexis' Top 25 blogs for workers compensation issues. To read Mr. Cenicerros' unique perspective on today's comp scene, go to the Blogs tab and click on Comp Time.



## Questions & Answers

Listen to the full version of a Q&A with Judie Tsanopoulos, director of workers comp at St. Joseph Health System, online. Click through the Multimedia tab.

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## P/C INSURERS

# AIG reports big proceeds from AIA, ALICO deals

*But insurer reports loss of \$2.4 billion in third quarter*

By JUDY GREENWALD

**NEW YORK**—The \$2.4 billion third-quarter loss that American International Group Inc. reported last week is largely attributable to nonoperating issues, while its property/casualty operations are not doing all that badly, analysts say.

Meanwhile, AIG raised more than enough money to pay the approximately \$20 billion in interest and principal owed to the Federal Reserve Bank of New York on its credit facility, the insurer said last week. Separately, the U.S. Treasury Department said it is on track to earn a profit from its rescue of AIG.

The \$2.4 billion loss compares with \$455 million in net income for the comparable quarter in 2009. Among other factors, AIG said the loss reflected \$4.5 billion

in restructuring charges, a \$1.3 billion deferred tax asset valuation allowance charge, a previously disclosed \$1.9 billion loss on the pending sale of American General Finance Inc., and the previously disclosed \$1.3 billion goodwill impairment charge in connection with the pending sale of AIG Star Life Insurance Co. Ltd. and AIG Edison Life Insurance Co.

For the nine-month period, AIG reported a \$3.27 billion loss vs. a \$2.08 billion loss for the same period a year ago.

Meanwhile its property/casualty unit, Chartis Inc., reported third-quarter operating income of \$1.07 billion before net realized capital gains, a 49.1% increase from a year earlier. AIG said results were driven primarily by an improvement in underwriting income.

Third-quarter results also reflected the consolidation of Fuji Fire & Marine Insurance Co. after AIG's acquisition of a controlling stake in the publicly traded

See **AIG** page 36



EPA/LANDOV

AIA Group Ltd. Executive Chairman and Chief Executive Mark Tucker looks on during the company's listing ceremony at the Hong Kong Stock Exchange on Oct. 29.

## HEALTH CARE REFORM

## Employers seek to borrow from Medicare reform

*Group exploring improvements to payment system*

By JOANNE WOJCIK

Seven large employers have launched an initiative that will assist the private sector in implementing many of the same types of health care payment reforms that have been prescribed for Medicare under the Patient Protection and Affordable Care Act.

The initiative, Catalyst for Payment Reform, is being led by many of the same heavy hitters who have been working for nearly a decade to transform the nation's health care delivery and payment systems.

They include Suzanne Delbanco, co-founder and former CEO of the Washington-based Leapfrog Group, which developed standardized health care performance measures and provider reporting programs, and Dr. Robert Galvin, former chief medical officer at Fairfield, Conn.-based General Electric Co., who helped found Bridges to Excellence, a national pay-for-performance program that rewards providers for improvements in the quality of



Suzanne Delbanco is co-founder and former CEO of the Washington-based Leapfrog Group.

care they deliver.

CPR's employer members are Boeing Co., Delta Air Lines Inc., Equity Healthcare L.L.C., GE, the Commonwealth of Massachusetts Group Insurance Commission, Intel Corp. and Wal-Mart Stores Inc.

Though the employer group has been having discussions informally since 2009, a decision was made after the March 23 passage of federal health care reform to organize formally to ensure that private employers will reap the same rewards as Medicare in the health care payment reform arena, said David Lansky, president and CEO of the Pacific Business Group on Health, a member of CPR's leadership team.

"There was a concern among

See **HEALTH CARE** page 37

## LIABILITY &amp; LITIGATION

## Marsh, Aon settle noncompete dispute

*Suit centered on evidence contained in discarded laptop*

By SARAH VEYSEY

**LONDON**—A settlement has been reached in the case of a former Marsh Ltd. energy market broker who admitted throwing his laptop into a pond to destroy evidence that he had started working for a rival brokerage during a noncompete

time period in his contract.

Units of Marsh & McLennan Cos. Inc. and Aon Corp. recently settled the case of *Marsh Services Ltd. & Marsh Ltd. and Euan David Nicolson, Alister Gavin Laird and Aon Ltd.*

As part of the settlement—terms of which were not disclosed—contempt of court proceedings against Mr. Nicolson have been withdrawn, Aon and Marsh said in a statement.

Marsh had contended that Mr. Nicolson, who left Marsh Ltd. in London in 2009 to join Aon Ltd.

in London, broke the terms of a six-month period during which he was barred from working for a Marsh competitor, made false statements and breached court orders.

Marsh accused Mr. Nicolson, formerly a managing director in the brokerage's construction team, of helping Aon to bid for the business of Milan-based Saipem S.p.A., an account previously brokered by Marsh, during the six-month period.

See **LAPTOP** page 37

## WORKERS COMPENSATION

## GENEX to expand with Intracorp deal

By ROBERTO CENICEROS

**WAYNE, Pa.**—GENEX Holdings Inc.'s agreement to purchase Intracorp's workers compensation business will not affect pricing for services, but employers could face integration adjustments, consultants said.

Wayne, Pa.-based GENEX announced last week that it agreed to purchase the workers comp and disability management business of rival Philadelphia-based Intracorp.

The deal is expected to close within weeks and GENEX CEO Peter Madeja will lead the com-

bined business.

The two companies provide services such as utilization management, case management, medical bill review, preferred provider organization networks and specialty networks for employers, insurers and third-party administrators.

Intracorp is the nation's largest case manager, based on 2009 case management revenues of \$306 million, according to *Business Insurance's* 2010 ranking. GENEX ranked third with \$175 million in case manage-

**83%**

Percentage of cases managed by GENEX that involve workers compensation claims.

**25%**

Percentage of cases managed by Intracorp that involve workers compensation claims.

See **GENEX** page 33

## LIABILITY &amp; LITIGATION

# Employment, labor remain key lawsuit concerns

By **RODD ZOLKOS**

Labor and employment cases consistently rank among the top three most frequent types of litigation against employers, but a recent survey showed a downturn in companies that expect an increase in litigation against them in the next year.

The Fulbright "Litigation Trends Survey Report" prepared by law firm Fulbright & Jaworski L.L.P. shows only 26% of companies surveyed expect to face an increased number of legal disputes in the next year, down from 40% in last year's survey and 31% in the 2008 version.

Among those surveyed, 6%

**'Employment litigation is just seen as a normal part of the scope of doing business these days.'**

Cynthia M. Benedict,  
Fulbright & Jaworski L.L.P.

anticipate a decrease in legal disputes against them in the next year, down from 7% in 2009, while 68% expect the number of legal actions against their companies to remain at the same level in the coming year, up from 53% last year.

The survey showed the highest number of lawsuits pending in the United States involved contract cases, reported by 53% of survey respondents; labor and employment, 49%; and personal injury, 27%. In the 2009 survey, contract cases and labor and employment stood at 45%, with personal injury at 27%.

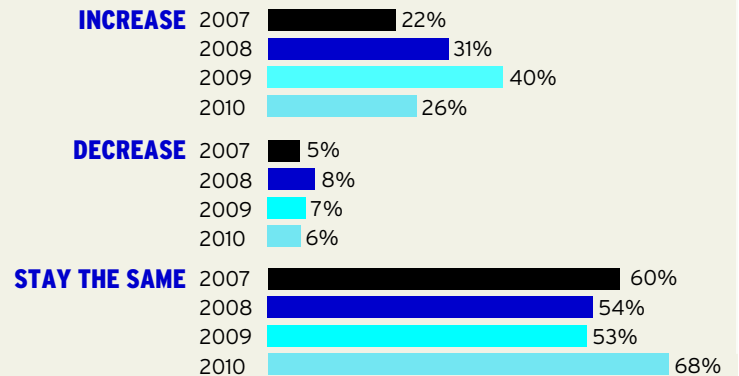
During a webinar last week discussing the survey's results, Cynthia M. Benedict, a Fulbright & Jaworski partner in San Antonio, noted that labor and employment litigation consistently top legal disputes facing companies.

"Employment litigation is just

See **SURVEY** page 9

## LITIGATION EXPECTATIONS

After three years of increases, this year there was a decline in the proportion of corporations that expect to be involved in more legal disputes.



Source: Fulbright & Jaworski L.L.P.

## REINSURANCE

## Reinsurance rates to stay soft at renewals

By **JUDY GREENWALD**

**COLORADO SPRINGS, Colo.**—U.S. reinsurers face ongoing rate softening for January renewals, particularly in property catastrophe lines.

Meanwhile, prospects for an overall turn in the market likely are at least a year away, reinsurance officials said during the Property Casualty Insurers Assn. of America's annual meeting (see story, page 26). They noted, however, that reinsurers continue to maintain underwriting discipline despite the softening market, and the renewal season is expected to be a smooth one (see story).

Other trends include a push by insurers for multiyear contracts, to which reinsurers are reacting cautiously (see story, page 28). To a degree, this reflects insurers' and reinsurers' emphasis in developing long-term relationships. Meanwhile, the trend toward increased retentions is ongoing (see story, page 27).

Joseph M. Fedor, executive vp and director at Pearl River, N.Y.-based U.S. Re Corp., said the reinsurance market is "going to remain competitive," with a high likelihood that rates "will be flat to down, even for accounts that experience losses."

"From the reinsurer's perspective, it will



MICHAEL MARCOTTE

The Property Casualty Insurers Assn. of America met at the Broadmoor in Colorado Springs, Colo., where participants discussed when the soft reinsurance market would turn.

probably be a relatively poor renewal season," Mr. Fedor said during the Oct. 24-27 PCIA conference in Colorado Springs, Colo.

Hugo Crawley, chairman of London-based BMS Group Ltd., said the outlook is "relatively bleak in terms of an industry that is creeping towards losing money," with low to zero investment returns, cash flows that are drying up and debate about whether market participants are taking

down reserves.

"All in all, it's adding up to a more difficult soft market, and I don't see the light at the end of the tunnel in terms of predicting whether the market is going to change in a short space of time," Mr. Crawley said. "Personally, I don't see it."

Pina Albo, president of the reinsurance

See **PCI** page 24

## Reinsurers maintain price discipline in buyers' market

By **JUDY GREENWALD**

**COLORADO SPRINGS, Colo.**—Reinsurers continue to maintain underwriting discipline despite ongoing soft rates, reinsurance officials said during discussions at the Property Casualty Insurers Assn. of America's annual meeting.

Pina Albo, president of the reinsurance division at Princeton, N.J.-based Munich Reinsurance America Inc., said while Munich Re "expects pressure on rates, we don't expect there to be a free fall, primari-

ly due to the fact that all reinsurers are still exercising a good degree of discipline in this market."

Munich Re has been in the business for a long time, "so we've seen these market cycles, and we know the key to longevity in this business basically comes down to managing the cycle," which includes underwriting and pricing discipline, Ms. Albo said during the Oct. 24-27 meeting in Colorado Springs, Colo.

This includes no cash flow underwriting, she said.

"We are not a top-line company," Ms. Albo said. Performance at Munich Re America is based on return on risk-adjusted capital," said President and CEO Anthony J. Kuczinski.

Joseph M. Fedor, executive vp and director of Pearl River, N.Y.-based U.S. Re Corp., said, "I don't see a lot of innovation. I don't see a lot of new products on the table. So from a reinsurer perspective, new business is not going to be easy to get.

See **DISCIPLINE** page 25

## INTERNATIONAL

## Foreign practices of Swiss insurers under scrutiny

*Regulator checks on cross-border business*

By **MICHAEL BRADFORD**

**BERN, Switzerland**—Swiss insurers say they are well-positioned to comply with a call by the Swiss Financial Market Supervisory Authority that financial institutions have procedures that ensure cross-border risks are properly managed and that the companies do not violate foreign laws.

FINMA, the Bern-based financial regulator, late last month issued a position paper calling for all institutions under its supervision, which include insurers and reinsurers, to develop such procedures or demonstrate that existing frameworks are sufficient to prevent the companies from running afoul of supervisory laws in each of the foreign countries where they operate.

FINMA's requirement is not a regulation. The agency says, though, that as part of its ongoing supervision, it will consider how banks and insurers are managing cross-border risks.

FINMA said in a statement that "legal and reputational risks involved in cross-border financial services have risen noticeably in recent years." The agency said "it is essential for supervised institutions to conduct a thorough assessment of their cross-border financial services operations, examining the legal framework and associated risks."

A FINMA spokesman said the seriousness of such risks was highlighted by problems encountered

See **SWISS** page 6

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## BI blog wins honor from LexisNexis

*Business Insurance* Senior Editor Roberto Cenicerros' blog, Comp Time, has been honored by LexisNexis as one of its Top 25 Blogs for Workers Compensation and Workplace Issues for 2010.

This is the second consecutive year that the blog has been honored by LexisNexis.

According to LexisNexis, Comp

Time "offers invaluable news summaries and learned analysis about risk management, business insurance and workers compensation.... Those who are pressed for time should turn first to Comp Time to get a broad overview of current developments in the field."

Access the Comp Time blog at [www.businessinsurance.com/CompTime](http://www.businessinsurance.com/CompTime).



Mr. Cenicerros

## Swiss: Insurer practices under scrutiny

CONTINUED FROM PAGE 4

by UBS A.G. when the Swiss bank ran into difficulties with U.S. authorities over issues of client tax evasion.

"We saw what happened to UBS," he said, "and how legal risk became a risk for the entire entity."

"In its capacity as supervisor, FINMA expects institutions to take due account of foreign supervisory legislation in particular, and to define a service model appropriate for each target market," the regulator's statement said.

The Swiss Insurance Assn. in Zurich said most insurers already have such risk management procedures in place.

"Swiss insurance companies typically manage risks by sound monitoring and assessing of all possible risks with a focus on legal,

regulatory and tax aspects," the association said in an e-mailed statement. "Monitoring and risk assessments are conducted by specialists: lawyers, tax experts, actuaries. It goes without saying that the same quality of risk management is performed in the foreign branches of Swiss insurance companies, in consideration of local statutory and regulatory obligations and guidelines."

Insurers more often are involved in foreign business through local branches than in cross-border business, the association said. "FINMA's requirement to develop service models specifically compliant to each target market is inherent to the existing foreign business activities of the Swiss insurance companies," the group noted.

Financial institutions that do

not have proper frameworks in place to deal with the risks could face penalties such as fines, or in extreme cases, license revocation, the FINMA spokesman said.

"We see it as an issue of risk management," he said. "Cross-border business can develop massive legal risks, which can be dangerous for the whole entity."

"They have to fulfill our expectations," the spokesman said. "If not, we are going to enforce this."

Zurich Financial Services Ltd. said it welcomes FINMA's stance.

Operating in more than 170 countries, "Zurich is very much aware of the importance of being compliant with local rules and regulations," the Zurich-based insurer said in a statement. "We have strong controls in place for our international/cross-border business."

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## Commentary

# Time change creates another hour of risk

As the time to "fall back" and reset the clocks drew near last week, I discovered that the switch between daylight saving time and standard time might not be the casual event I'd always thought.

I used to think that the biggest risk associated with changing back and forth to daylight saving time was the possibility of a missed Sunday brunch appointment. Recently, though, I learned there might be other risks.

In fact, I learned that there's been a lot of research done looking at the possible relationship between the transition into and out of daylight saving time and increased accident risk.

And here I thought that clock change early Sunday morning was going to be pure benefit, giving me an extra hour's sleep and some extra time to hang around at home before heading to the airport for a scheduled flight that afternoon.

I guess it makes sense that there's been a suggestion by some researchers that an increase in traffic, workplace and household accidents comes after the spring transition into daylight saving time. The hour's sleep lost springing ahead might not seem like much, but we've all had times when that extra hour was a pretty big deal.

Several studies have shown an increase in the number of traffic accidents on the Monday after daylight saving time takes effect. Another study conducted by two Michigan State University researchers and reported last year in the *Journal of Applied Psychology* showed an increase in the number of injuries among mine workers on the Monday after the transition to daylight saving time.

The injuries that occurred also were more severe, according to the study, conducted by organizational behavioral psychologists Christopher M. Barnes and David T. Wagner.

In their research, the two Michigan State researchers found no correlation between the fall time change and mine accidents.

The data surrounding the fall transition appears to be more complicated, with several studies finding no correlation between the time change and increased accidents.

One noteworthy exception, however, comes from the



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National Highway Traffic Safety Administration. That study, conducted between 1987 and 1997, showed a dramatic increase in the number of fatal auto-pedestrian accidents in the two-hour period after local sunset in the weeks after the switch back to standard time, a result possibly largely attributable to the earlier onset of darkness.

Others who've studied the

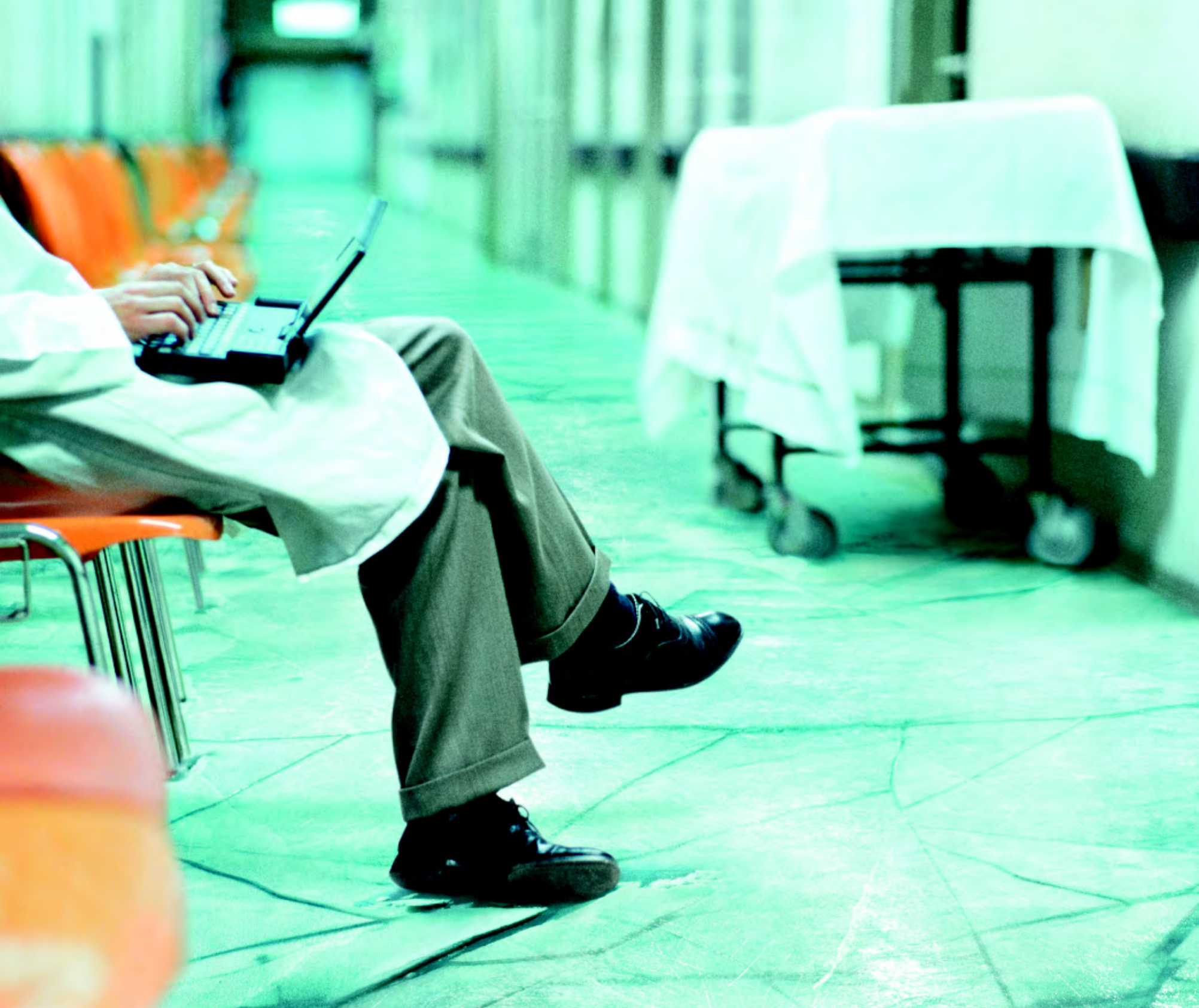
**I used to think that the biggest risk associated with changing back and forth to daylight saving time was the possibility of a missed Sunday brunch appointment.**

issue say there are reasons other than light conditions for increased accident risks after the fall transition back to standard time, despite the extra hour of sleep that turning back our clocks offers.

It turns out, according to some, that even a slight disruption of sleep patterns can have a real physiological impact—an impact that might take up to a week to overcome. It has to do with those darn circadian rhythms our bodies are so connected to, the same body rhythms responsible for jet lag when we travel across time zones.

While adapting to the spring time change and the loss of an hour's sleep might be more difficult than the one in the fall, it still can take several days to adjust to the transition back to standard time, some sleep experts say.

So, if you're feeling a little sluggish and out of sorts this week, there's your explanation. Just be careful.



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Straight Answers

# Business Insurance OPINIONS

## Bipartisan approach needed on health care

WE HOPE CONGRESSIONAL Republicans respond positively to President Obama's offer to work together to improve the health care reform law.

One day after the GOP decisively regained control of the House of Representatives and gained ground in the Senate, the president told Republicans he would consider their ideas to improve the sweeping reform legislation that Congress passed this year.

For now, GOP leaders aren't biting. Soon-to-be Speaker of the House John Boehner, R-Ohio, said he would work to repeal the measure during the next congressional session.

But Democrats still hold a majority in the Senate. If a health care law repeal passed, President Obama surely would veto it. Given the makeup of the Senate, a veto would be sustained. We think a far wiser course of action is for leaders of both parties to try to find areas of agreement.

*Neither party has a monopoly on good or bad ideas.*

There is no question that portions of the law are politically popular among Republicans and Democrats. We've heard, for example, no complaints about the provisions that extend coverage to employees' adult children up to age 26, ban pre-existing medical condition exclusions, and eliminate lifetime and annual dollar limits on essential benefits.

Highly controversial, though, are provisions that mandate that employers—except smaller ones—offer coverage or pay an assessment and that individuals enroll in a plan or be hit with penalties. Compromises on those provisions seem elusive.

That doesn't mean leaders of both parties shouldn't sit down and talk, something that didn't happen at all when the reform bill was moving through Congress.

As we have said before, neither party has a monopoly on good or bad ideas. The best ideas from both parties surely would improve the law and we think that is what the public wants.

## More patience required on federal charter effort

NO SECTOR of the economy will go unaffected by the results of last week's elections.

But for the property/casualty insurance industry, changes wrought by the new Congress may be less than dramatic, and that's not a bad thing at all.

The current Congress—which is about to reconvene in a lame-duck session—passed the most comprehensive financial services regulatory reform bill in decades. The measure won't be fully implemented for years. The new Congress can use the power of the purse to help assure the law is implemented in a sound manner. That would include ensuring that property/casualty insurers aren't on the hook for bailing out other types of financial institutions solely because of their asset size.

The enactment and continuing implementation of sweeping financial regulatory reform also means lawmakers probably won't have much appetite for further major reforms, at least not in the short term. That probably means serious consideration of optional federal charters for insurers and producers will have to wait.

That probability, while disappointing, is understandable. But supporters of the OFC long have realized that achieving such a dramatic change in insurance regulation is a very long-term process. Given all the other changes that have occurred, we can wait awhile longer to reach this goal.



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#### THIS WEEK'S RESULTS

Should Marsh have to pay bonuses to fired execs whose convictions were overturned?



Former Marsh Inc. executives William M. Gilman and Edward J. McNenney Jr.

YES

26%

NO

73%

#### NEXT WEEK'S QUESTION

Should major changes be made to the health care reform law?

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Perspectives and expert analysis online at  
[www.businessinsurance.com/section/perspectives](http://www.businessinsurance.com/section/perspectives)



## Need for K&R coverage on rise

Kidnap and ransom insurers and their clients are becoming more concerned about kidnappings in Mexico and other countries. Jeremy Lang, vp and manager of U.S. kidnap and ransom insurance for Hiscox USA, says new threats like virtual kidnapping are emerging and demand for K&R coverage is on the rise. Mr. Lang says companies that do business around the world should assess their need for K&R coverage and offers tips on how to do so.

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## Survey: Top employer lawsuit risks

CONTINUED FROM PAGE 4

seen as a normal part of the scope of doing business these days," Ms. Benedict said.

Respondents indicated that the sorts of labor and employment cases that are on the rise include wage-and-hour cases, age discrimination, sex discrimination, race discrimination, disability discrimination and Employee Retirement Income Security Act litigation.

During the next 12 months, the sorts of employment litigation that respondents said they expect to increase the most include discrimination cases, cited by 39%; wage and hour cases, 35%; ERISA cases, 5%; and labor union-related litigation, cited by 17%.

Ms. Benedict said she expects employers to face an increase in age discrimination litigation as the economy rebounds and hiring increases. "Are they going to be going back and hiring the workers who got laid off, or are they going to be hiring a younger workforce?" she asked.

As for the types of class actions businesses report facing most frequently, Marcy Greer, a partner with Fulbright & Jaworski in Austin, Texas, said the survey showed that "labor and employment and consumer (lawsuits) tend to lead the pack." The reason is those sorts of cases have an easier time gaining certification from courts than other actions, she said. But "securities class actions continue to be very prominent."

The annual survey also showed respondents often look for alternative fee arrangements with the law firms they employ, with 52% of survey respondents in the United States and 50% in the United Kingdom saying they do so.

Of those seeking such alternatives, 78% said they are doing so to reduce costs while 18% said they were seeking greater predictability in their legal expenses.

"We're certainly seeing much more willingness to move to alternative fee arrangements," said John O'Tuel, senior counsel at GlaxoSmithKline Inc. in Research Triangle Park, N.C., who participated in last week's webinar.

In this year's survey, one in six U.S. respondents indicated that alternative fee arrangements account for more than 50% of their legal costs. Nearly half of the largest companies said they plan to increase their use of alternative fees, though smaller companies indicated they are less likely to do so.

"I think if there is going to be a change, it's going to be alternative fees or alternative billing arrangements," Mr. O'Tuel said. "Right now, it's a buyer's market."

This year's Fulbright & Jaworski "Litigation Trends Survey Report" drew 403 respondents—275 in the United States and 128 in the United Kingdom. The report is at [www.fulbright.com](http://www.fulbright.com).

# Conditions favor hurricane formation: Modeler

By JEFF CASALE

**NEWARK, Calif.**—This year's hurricane season has been fairly quiet so far, but conditions in the Atlantic Ocean remain ripe for further activity, catastrophe modeler Risk Management Solutions Inc. said last week.

Ocean temperatures still are above average, RMS said in a statement, adding that tropical cyclone formation in November typically occurs in the Caribbean Sea, where Tropical Storm Tomas was located.

Tomas was the fifth hurricane

to form during October and the 12th hurricane of the season. It later weakened to a tropical storm.

No hurricanes have made landfall in the United States so far this year.

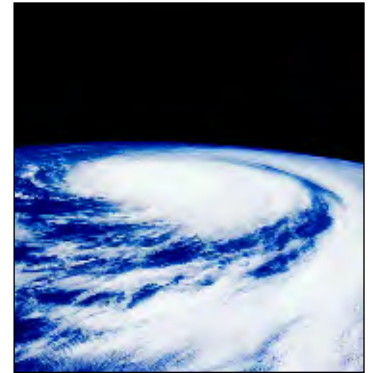
Since 1950, some 20 hurricanes have formed this late in the season, but only four have reached major hurricane status, Newark, Calif.-based RMS said. All of those hurricanes were located in the Caribbean Sea and affected mainly that region.

Outside the Caribbean Sea, sea surface temperatures are cooler and fall below the threshold of

26.5 degrees Celsius (79.7 degrees Fahrenheit) needed to support tropical cyclone activity, RMS said.

"Sea surface temperatures are a major factor in tropical cyclone formation, but are not the only ingredient," Neena Saith, senior catastrophe response manager at RMS, said in the statement.

"The levels of wind shear, which can suppress formation and are expected to reduce over the next few days across the Caribbean, will play a key role in hurricane activity over the coming weeks."



Since 1950, some 20 hurricanes have formed this late in the season, but only four have reached major hurricane status.

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## Products & Services

### Liberty Mutual covers equipment breakdown

**BOSTON**—Liberty Mutual Group Inc. has introduced monoline equipment breakdown coverage that can be purchased separately from commercial insurance.

PowerPro Select aims to give agents and brokers the flexibility to offer companies a stand-alone equipment breakdown policy

rather than all-risk coverage that includes equipment breakdowns, the Boston-based insurer said in a statement.

The policy covers equipment exposures from physical damage, loss of income and spoilage. It also includes utility interruptions affecting boilers, refrigeration and air conditioning, mechanical and electrical equipment, and computer and telecommunication systems.

The stand-alone policy as well as the all-risk coverage also provide technical services, such as in-house engineering and claims services.

For more information on PowerPro Select, which will be available Jan. 1, contact Liberty Mutual's equipment breakdown team at [lmeb@libertymutual.com](mailto:lmeb@libertymutual.com).

### Security firm offers audio sensor service

**VANCOUVER, British Columbia**—Sonitrol Verified Security offers insurance companies and brokers security services to help reduce claims and possibly get premium credits for insurance buyers.

The offering from the Vancouver, British Columbia-based security firm provides technology—remotely monitored audio sensors that “hear” abnormal sounds and video technology that activates when it senses changes in heat or motion—that protects facilities from break-ins, theft and fire, said Sonitrol, a franchisee of Stanley Convergent Security Solutions Inc., in a statement.

Conventional alarms have a high false alarm rate “and because of that, police departments across North America are implementing a thing called ‘verified-only dispatch,’ where they no longer respond to conventional alarms,” said Joe Wilson, president and CEO of Sonitrol Western Canada.

“Verified” criminal acts captured and recorded on audio and video by the security company result in a quicker police response that has helped apprehend 170,000 people in the act of breaking into sites since 1977, Mr. Wilson said.

The company works with insurance companies and brokers to better protect their clients’ sites to reduce insurance claims.

Insurance company clients that

have installed verified security systems have seen a dramatic decrease of crime taking place, and some have had their security costs reduced by half, the company said in the statement.

For more information, contact Mr. Wilson at 604-542-5330 or [joe@sonitrolbc.com](mailto:joe@sonitrolbc.com) or visit [www.sonitrol-canada.com](http://www.sonitrol-canada.com).

### Travelers covers trucking safety data

**HARTFORD, Conn.**—Travelers Cos. Inc. has introduced coverage for equipment used to capture data that helps improve safety compliance for the trucking industry.

The CSA Technology and Communication Equipment coverage aims to address the Federal Motor Carrier Safety Administration’s Comprehensive Safety Analysis 2010, an initiative to improve large-truck and bus safety and reduce commercial vehicle crashes, injuries and fatalities, the Hartford, Conn.-based insurer said in a statement.

“CSA 2010 and the new measures under (the National Safety Council’s) Behavior Analysis Safety Improvement Categories look at the end result of safety management practices,” Joe Tracy, president of Travelers’ inland marine unit, said in the statement.

In addition to the coverage, Travelers will provide transportation safety management practices that may lessen accidents and compliance violations and potentially improve CSA 2010 scores, Mr. Tracy said.

For more information, contact Sam Rizzitelli, national transportation director for Travelers’ inland marine unit, at 860-277-9999.

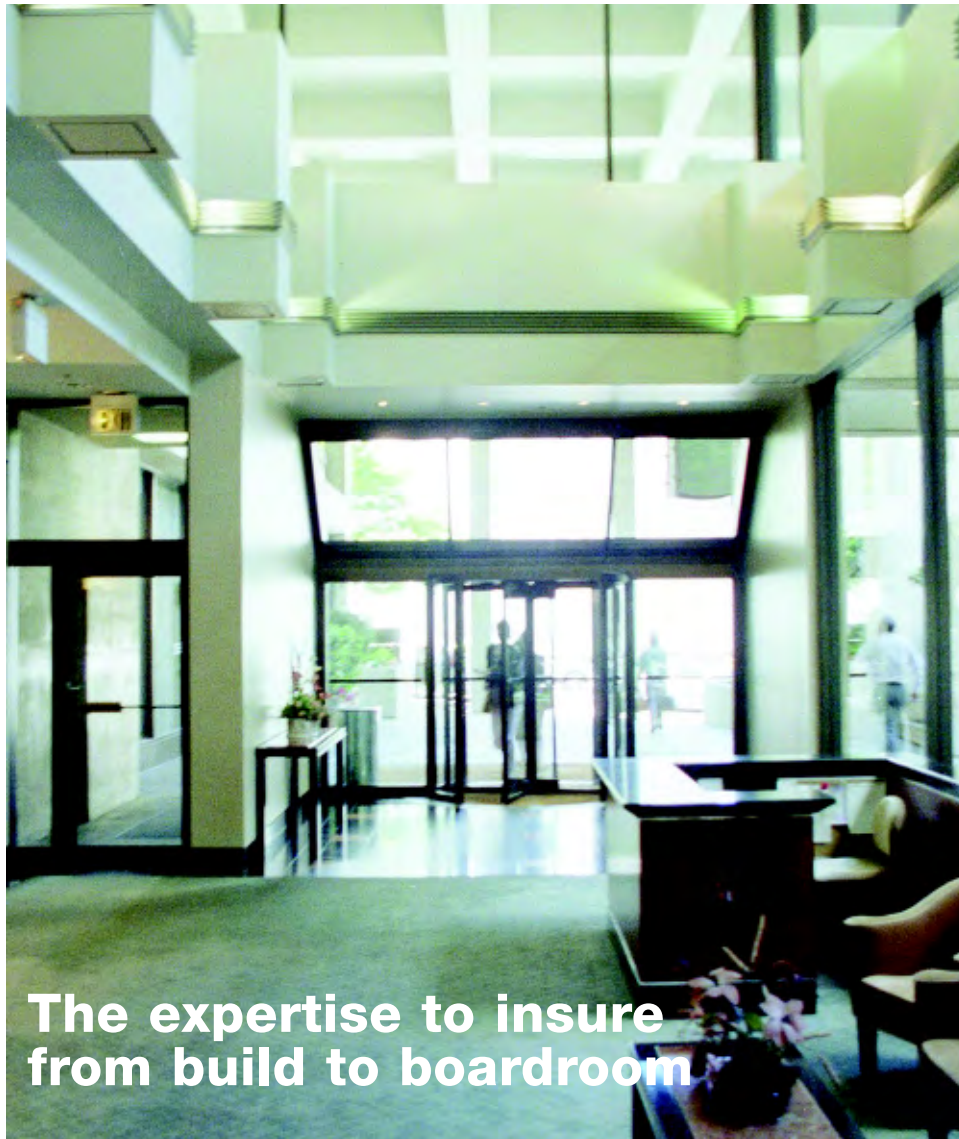
### IronHealth E&O policy targets health care

**HAMILTON, Bermuda**—IronHealth is offering a specialty policy for U.S. health care organizations to manage the risks of government audits and investigations.

Government Billing Errors & Omissions coverage is designed as a policy option for health care organizations to protect against costly, time-consuming and in-depth government audits and investigations of Medicare and Medicaid billings, the specialty health care unit of Hamilton, Bermuda-based Ironshore Inc. said in a statement.

The policy provides reimbursement for all costs, including investigations, audits, defense expenses and settlements, a spokesperson for the company said in an e-mail. The coverage excludes antitrust and fraudulent claims.

For more information, contact Josh Stein, chief underwriting officer for IronHealth, at 860-408-7804 or [josh.stein@ironshore.com](mailto:josh.stein@ironshore.com).



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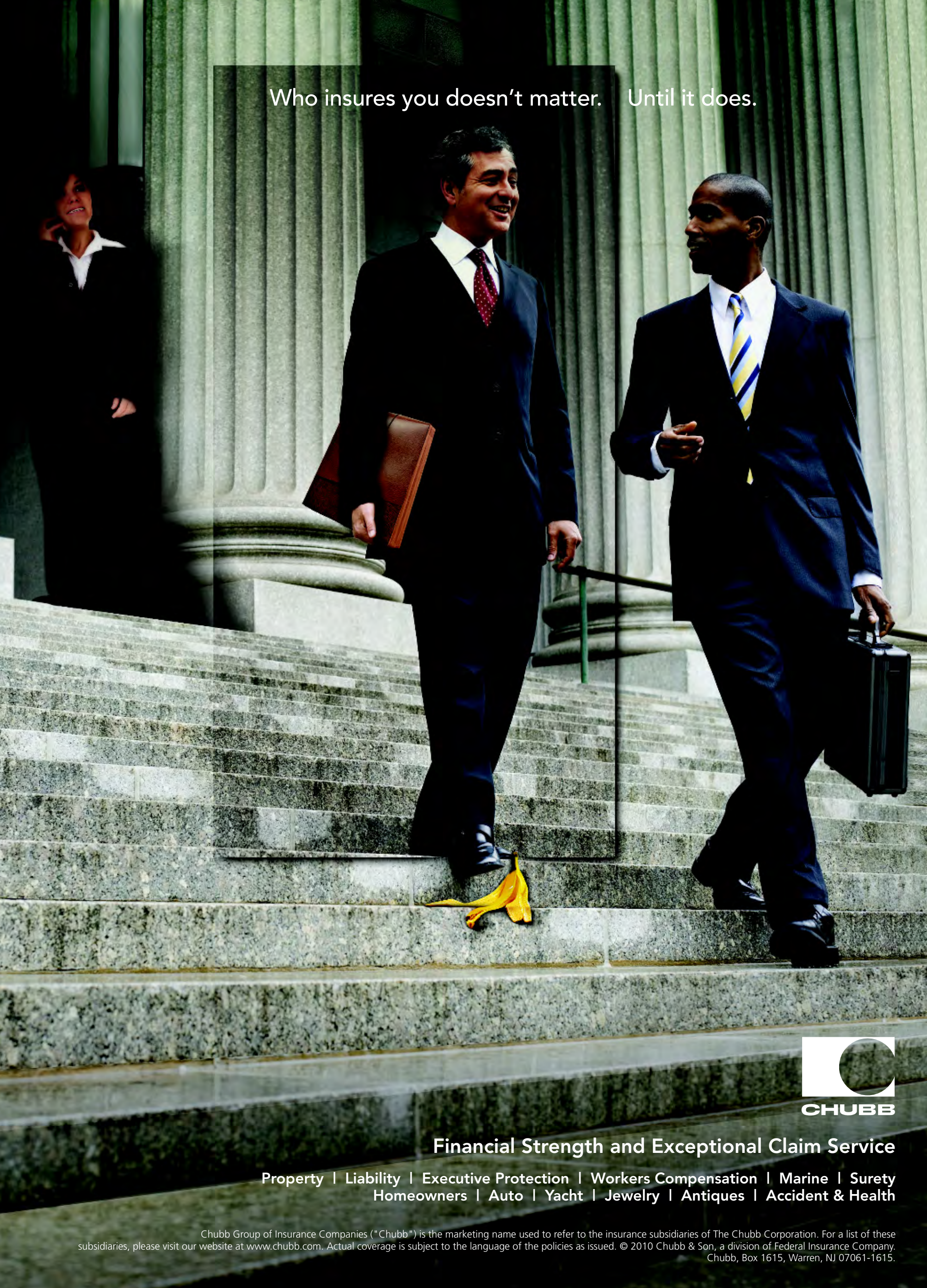
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**'We expect that for the rest of 2010, rates will remain soft and we don't see anything to change that in the first quarter of 2011.'**

Adeola Adele, Marsh Inc.

# soft MARKET power



## Policyholders offered broader cover as employment practices rates fall

By ROSEANNE WHITE GEISEL

Employers should use the soft employment practices liability insurance market to pursue enhancements in coverage and resources, experts say.

Most brokers and insurers foresee flat to modest rate declines in 2011, prompting brokers to seek more flexibility in policy provisions. Brokers and insurers also advise risk managers to use loss control tools offered with many EPL policies to be ready when the market does harden.

Tom Hams, Chicago-based managing director and national EPLI practice leader for Aon Risk Solutions' Financial Services Group, said by collaborating with human resources and the legal department, risk managers can "dig into the infrastructure" of their company so they know their people and their loss history thoroughly enough to present themselves as an excellent risk.

Brokers also are campaigning for advances in coverage of wage-and-hour claims under the EPL form, but insurers have limited their underwriting of such claims (see story, page 17).

While there hasn't been a breakthrough on wage-and-hour claims, more insurers are covering emerging liabilities generated

by social networks and other technology.

"The evolving impact of social media in the workplace is a hot topic," whether it's an employee post or an employer basing a hiring decision on online information about the candidate, said Melissa Mattioli, vp and EPLI product manager for Liberty International Underwriters in New York. Another is workplace bullying, she added.

For overall EPLI coverage, plenty of capacity is available in the United States, Bermuda and London. Estimates range from \$350 million to as high as \$800 million, if capacity for small businesses is included.

Jim Gray, executive vp and chief professional liability underwriting officer for Alterra Bermuda Ltd. in Hamilton, Bermuda said the largest individual EPLI placement that is exclusively Bermuda capacity is \$500 million.

The available capacity keeps the market competitive.

"We expect that for the rest of 2010, rates will remain soft and we don't see anything to change that in the first quarter of 2011," said Adeola Adele, New York-based senior vp and national EPL practice leader for Marsh Inc. "At this time, it's hard to look beyond the first quarter. Frequency of claims has gone through the roof, but

we're not seeing the severity of claims," she said.

Aon's Mr. Hams agreed claims severity has not been an issue and said the market "will likely soften another 5%."

Brad Villers, senior vp and director of financial services at Lockton Cos. Houston, a unit of Lockton Cos. L.L.C., said EPLI rates could range from flat to declines of up to 9%. "If a client doesn't have significant layoffs or adverse claims, they likely would get a mid- to upper-single-digit reduction," he said.

"Rates still are soft and continue to decline," said LIU's Ms. Mattioli. "In 2011, we'll still see rates continue to soften."

Employers are not required by law to have EPL insurance, which Ms. Mattioli said policyholders may see as a reason to push for premium reductions.

However, Joni Mason, senior vp, EPL product manager for Chartis Inc. in New York, said regardless of whether employers are required to purchase EPL coverage, "If you have an employee, you're at risk, whether you're publicly held or privately held," she said.

"Right now, there's a lot of capacity and newcomers" joining the market, she said.

See **MARKET** page 16

Employment  
Liability Risk  
Management

SPOTLIGHT

**BI RANKING: LARGEST  
INSURANCE RECOVERY  
LAW FIRMS**

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**WAGE-AND-HOUR  
SUITS POSE MAJOR  
EMPLOYER RISKS**

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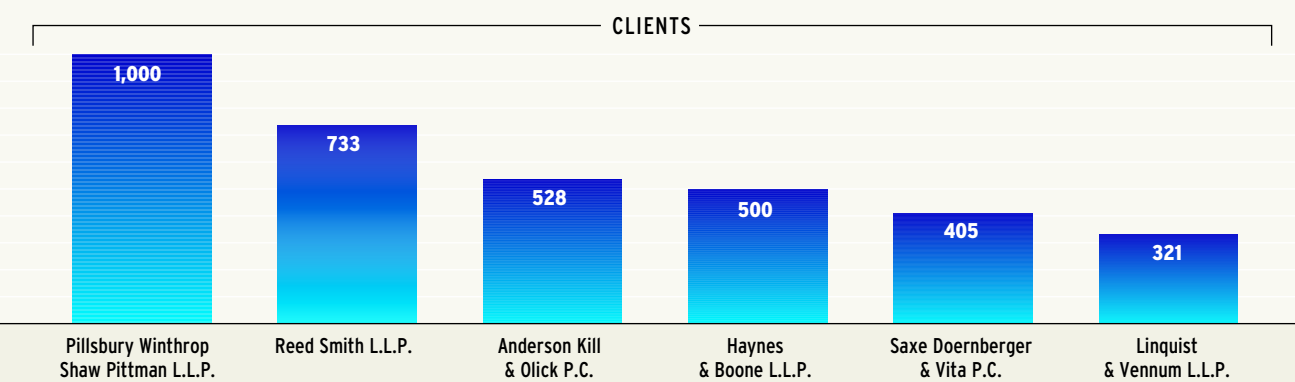
**RETALIATION CLAIMS  
INCREASE AMID  
ECONOMIC STRUGGLES**

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**MORE BIAS SUITS  
AS WORKFORCE AGES,  
LAYOFFS CONTINUE**

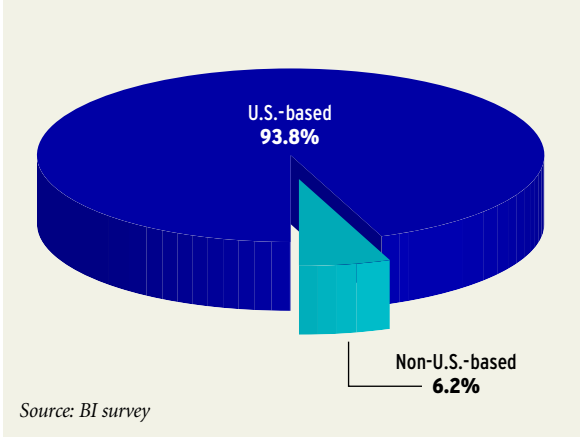
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LARGEST INSURANCE RECOVERY LAW FIRMS BY NUMBER OF CLIENTS



Source: BI survey

INSURANCE RECOVERY LAW FIRM CLIENTS



Source: BI survey

# Largest insurance recovery law firms

Ranked by number of attorneys in recovery practice

Rank	Firm/address	Phone/website	Attorneys	Managing partners	Total clients	Officers
1	<b>Covington &amp; Burling L.L.P.</b> 1201 Pennsylvania Ave., N.W., Washington, D.C. 20004-2401	202-662-6000 <a href="http://www.cov.com">www.cov.com</a>	110	2	190	Mitchell Dolin, chair-policyholder insurance coverage practice
2	<b>K&amp;L Gates L.L.P.</b> 210 Sixth Ave., Pittsburgh, Pa. 15222-2613	412-355-6500 <a href="http://www.klgates.com">www.klgates.com</a>	80	1	212	John M. Sylvester, partner/insurance coverage practice group coordinator
3	<b>Anderson Kill &amp; Olick P.C.</b> 1251 Ave. of the Americas, New York, N.Y. 10020	212-278-1000 <a href="http://www.andersonkill.com">www.andersonkill.com</a>	69	7	528	Robert M. Horkovich, William G. Passannante, co-chairs-insurance recovery group
4	<b>Reed Smith L.L.P.</b> Reed Smith Centre, 225 Fifth Ave., Pittsburgh, Pa. 15222	412-288-3131 <a href="http://www.reedsmith.com">www.reedsmith.com</a>	68	1	733	Douglas E. Cameron, partner
5	<b>Dickstein Shapiro L.L.P.</b> 1825 Eye St. N.W., Washington, D.C. 20006-5403	202-420-2200 <a href="http://www.dicksteinshapiro.com">www.dicksteinshapiro.com</a>	64	1	181	Kirk Pasich, partner/practice leader- insurance coverage
6	<b>Howrey L.L.P.</b> 1299 Pennsylvania Ave. N.W., Washington, D.C. 20004	202-783-0800 <a href="http://www.howrey.com">www.howrey.com</a>	55	1	206	David W. Steuber, chair-insurance recovery practice group
7	<b>Jones Day</b> 222 E. 41st St., New York, N.Y. 10017	212-326-3939 <a href="http://www.jonesday.com">www.jonesday.com</a>	52	15	122	Steven Sigalow, Marty Myers, co-chairs-global insurance recovery practice
8	<b>Morgan, Lewis &amp; Bockius L.L.P.</b> 1701 Market St., Philadelphia, Pa. 19103-2921	215-963-5000 <a href="http://www.morganlewis.com">www.morganlewis.com</a>	50	2	150	Paul A. Zevnik, Michel Yves Horton, partners
9	<b>Orrick, Herrington &amp; Sutcliffe L.L.P.</b> 405 Howard St., San Francisco, Calif. 94105	415-773-5700 <a href="http://www.orrick.com">www.orrick.com</a>	49	19	60	Mark Plumer, partner
10	<b>Barnes &amp; Thornburg L.L.P.</b> 1 N. Wacker Drive, Suite 4400, Chicago, Ill. 60606-2833	312-357-1313 <a href="http://www.btlaw.com">www.btlaw.com</a>	44	3	102	Andrew J. Detherage, Charles P. Edwards, Alan J. Martin, co-chairs-policyholder insurance recovery and coverage group

Source: BI survey  
Researched by Kevin Edison

Visit [www.businessinsurance.com/directories](http://www.businessinsurance.com/directories) for more information and to access the full searchable Directory of Insurance Recovery Law Firms. Business Insurance now offers the option to purchase the entire online directory as an Excel file or as a PDF.



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## Market: Policyholders offered broader EPL coverage

CONTINUED FROM PAGE 13

"Rates don't reflect our increased exposure" as defense costs and settlements have increased.

Darryl McCallin, vp sales and operations at Rockwood Programs Inc., a Wilmington, Del., managing general agent for Houston Casualty Co., said, "We're flat on renewal. In some cases, a little lower than that."

In the Bermuda market, where the biggest U.S. companies needing the highest limits place their risks, things are much the same. "We are not planning on any type of across-the-board increases,"

said Alterra's Mr. Gray. "In general, our market is supporting modest decreases for good-performing accounts."

Rather than pressing for rate reductions, brokers are asking insurers for flexibility in other areas.

"Everyone is trying in the soft market to make forms tailored to the client," said Ann Longmore, D&O/fiduciary product leader at Willis Group Holdings P.L.C. in New York. "It's the difference between buying an expensive suit off the rack or having the store's tailor custom-make one."

In addition, Willis has sought more loss-control resources, such

as seminars specific to a client's needs or claims information specific to a client's industry or locations.

"If all we do today is beat on carriers (to lower premiums,) the more severe their response" will be when the market hardens, Ms. Longmore said.

Willis also is helping global companies build centralized reporting systems to track overseas EPL claims. Overseas employees figure into premiums at a lower rate than U.S. employees because the United States is more litigious, "but you still have to look at whether you are paying for coverage that will never be triggered," she said.

Aon's Mr. Hams said he is seeing "more flexibility around the friction points." For example, insurers "may soften the reporting periods or give more authority to the insured to hire a defense attorney or to settle" a lawsuit.

Another example of insurer flexibility is Chartis' revised notice provision. Ms. Mason said the insurer is "rewarding policyholder loyalty with a claims-savings provision." This preserves coverage for civil claims stemming from an Equal Employment Opportunity Commission or Uniformed Services Employment and Re-employment Rights Act charge

that went unreported in a prior policy period.

Similarly, Travelers Co.s Inc.'s new EPL policy "has eased insured's duties to report," said Cara Lovering, New York-based EPL portfolio manager. Under the policy, the insured must report a claim as soon as is practical after an executive officer—as opposed to any employee—becomes aware of it.

Travelers also offers a 10% retention reduction if the insured agrees to the insurer's first recommended settlement offer in 30 days.

LIU does not "box in a class of business," Ms. Mattioli said. Instead, it looks at each policyholder's risk management and human resources functions and structure, and then decides enhancements case by case.

Beyond coverage flexibility, insurers emphasized services and resources that come with their insurance.

Ms. Lovering said Travelers provides complementary online risk management tools, training, a 24-hour hot line and articles on emerging EPL issues. Additionally, claims representatives use local attorneys experienced in employment law and state laws affecting the policyholder.

Chartis' offerings include loss prevention services, sample handbooks and HR forms, seminars, information on emerging risks and legislation, and a specialized EPL claims unit, Ms. Mason said.

Rockwood offers policy and procedure help online and monthly updates on regulations, Mr. McCallin said.

A sound insurance policy still is required, and Marsh's Ms. Adele said it should contain "a very broad definition of an employment practices violation, including all types of discrimination under federal, state and local laws; employment-related torts; coverage for loss that includes back pay, front pay (lost pay for the period from judgment to reinstatement or instead of reinstatement) and compensatory damages; (a provision for) most-favored jurisdiction (for punitive damages); clarification of defense and settlement obligations (procedures); and the ability to choose their own counsel, if desired."

Additionally, she said definition of a claim should include EEOC charges and demand letters, clearly stated notice obligations and favorable post-policy claim reporting.

Rick Betterley, president of Betterley Risk Consultants Inc. in Sterling, Mass., said he would "ask the insureds to pay a little more, take a higher retention and get a better legal defense."

Amid the soft market, "insurers are doing the only thing they can do, which is trying to squeeze on the expenses of providing EPL." That, in turn, is "too much of a squeeze on the lawyers," a trend that may lead to policyholders getting less-qualified attorneys, he said.

Still, brokers are seeking additional changes, such as Marsh's push to clarify classification of independent contractors and indemnification.

"I suspect it will be a market in transition," said Travelers' Ms. Lovering. "People entering, exiting and changing their offers."



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# Insurers wary of wage-and-hour liability exposures

By ROSEANNE WHITE GEISEL

Wage-and-hour lawsuits brought under the Fair Labor Standards Act pose some of the greatest employment liability risks for employers because they involve employee classification and regulatory compliance, experts say.

Brokers are trying to press insurers to cover wage-and-hour claims, but insurers so far have taken only small steps, such as covering defense costs.

"Everyone is still trying to crack the code on wage-and-hour," said Tom Hams, Chicago-based managing director and national EPLI practice leader for Aon Risk Solutions' Financial Services Group.

"Insurers have been reticent to provide any cover for it," said Brad Villers, senior vp and director of financial services at Lockton Cos. Houston, a unit of Lockton Cos. L.L.C. "The problem with wage-and-hour is that it's in large part an issue of fortuitous events. Underwriters don't want this to be a backstop for misclassification of employment. Those are very severe claims, and (they are) growing so rapidly." Mr. Villers said.

In congressional testimony before the Senate Committee on Health, Education, Labor and Pensions in June, Department of Labor Deputy Secretary Seth Harris said there was a nearly 50% increase in back wages owed to employees "in cases where misclassification was the primary reason why the employer failed to pay the minimum wage or proper overtime" in fiscal 2009 compared with the previous year. The Labor and Treasury Departments plan to step up enforcement of employee misclassification regulations, according to Mr. Harris' testimony.

Lockton Cos. International Ltd. in London has been able to negotiate a sublimit for defense costs for wage-and-hour claims, Mr. Villers said.

"It's fairly easy to make a mistake and not be in regulatory compliance," said Darryl McCallin, vp sales and operations at Rockwood Programs Inc. in Wilmington, Del.

Rockwood offers a \$100,000 sublimit that can be used for indemnity and defense of wage-and-hour claims and may tweak the policy to slightly restrict coverage. Mr. McCallin said he thinks this policy is well-suited for employers with 100 to 500 employees.

Meghan Bell, Rockwood's EPL underwriter, said there is no additional application or premium for that sublimit. Most insurers won't write coverage for wage-and-hour claims and certain classes of employees, she said.

Jim Gray, executive vp and chief professional liability underwriting officer for Alterra Bermuda Ltd. in Hamilton, said, "The biggest request we receive is information about the market

appetite for coverage for wage-and-hour claims."

"It's a work in progress," Mr. Gray said. "A couple of things inhibit the effectiveness of the insurance industry's response." One is: Employee classification standards are evolving. Second, "the loss history continues to expand in the litigation environment. It's not easily predictable," he said.

Rick Betterley, president of Betterley Risk Consultants Inc. in Sterling, Mass., holds a different view. He said wage-and-hour cov-

erage can be underwritten for small- to medium-size employers. "It is certainly as insurable as the third-party liability extensions," he said.

Part of the problem, Mr. Betterley said, is that such claims can result from tension between employers and unions and become "politicized."

"Sometimes you hear that wage-and-hour is not insurable because it's under the control of the employer," Mr. Betterley said. "That doesn't mean the employer doesn't need protection."

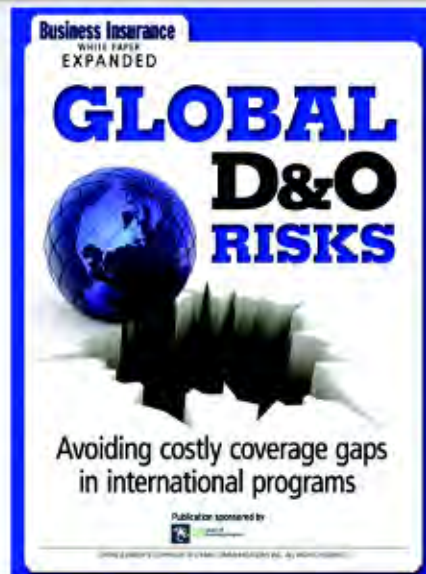


**'Everyone is still trying to crack the code on wage-and-hour.'**

Tom Hams,  
Aon Risk Solutions

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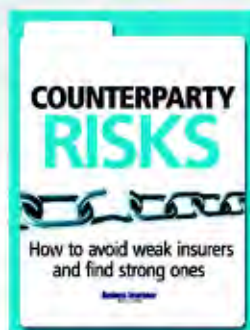
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# Workplace retaliation claims rise as economy stumbles

## Plaintiffs bar sees opportunities outside discrimination suits

By **RUSS BANHAM**

The struggling economy is getting part of the blame for more retaliation claims being filed with the Equal Employment Opportunity Commission, employment practices liability attorneys and insurance brokers say.

In fiscal 1998, 18,198 retaliation

claims were filed with the EEOC. Last year, the number had increased to 33,613 (see chart, page 20).

While traditional retaliation claims emanating from adverse actions such as being fired, demoted or not promoted for blowing the whistle on a co-worker or filing a workers compensation claim still dominate, high unemployment caused by the recession has resulted in laid-off workers arguing their job termination was caused by employer retaliation.

"You can draw correlations

between the recession and layoffs and the rise in the number of retaliation claims," said Adeola Adele, senior vp and U.S. employment practices liability product leader at New York-based broker Marsh Inc. "Employees whose jobs are terminated and cannot find new employment might think, 'Well, you only fired me because two years ago I complained about discrimination, or last month I complained about sexual harassment by a supervisor.'"

Kenneth Ross, executive vp at

broker Willis Executive Risks in New York, a unit of Willis Group Holdings P.L.C., agreed. "Many people who have lost their jobs and are going through some relatively difficult economic times may be looking for an unlawful basis for which their termination arose," he said.

Another factor pushing up retaliation claims is a zealous plaintiffs bar, said Aaron Maduff, a partner at employment practices law firm Maduff & Maduff L.L.C. in Chicago. "We're seeing employment lawyers popping out

of the woodwork on the plaintiff side because they lost their jobs at the big defense firms," he said. "Claims that we would routinely turn down we now see being filed by attorneys we've never heard of."

"Plaintiff attorneys have caught on to these cases," said Gary Batke, chair of the labor employment group at Columbus, Ohio-based law firm Bailey Cavalieri L.L.C. "They realize that while it may be difficult to prove the client was the victim of discrimination, it's a lot easier to show that he or she was the victim of retaliation."

Mr. Batke pointed to a recent case—*Frank Kevin Fischer vs. United Parcel Service Inc.*—that the 6th U.S. Circuit Court of Appeals affirmed in July. "The plaintiff, an African-American, first filed suit against his employer, UPS, in 2000 alleging racial discrimination, harassment and retaliation," Mr. Batke said. "UPS obtained a jury verdict in its favor in late 2001. The plaintiff continued working



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'You can draw correlations between the recession and layoffs and the rise in the number of retaliation claims.'

Adeola Adele, Marsh Inc.

for UPS until he was discharged in 2003. He then sued under the retaliation provision of Title VII of the Civil Rights Act of 1964, alleging that the discharge was the result of the prior lawsuit."

The jury awarded the plaintiff \$150,000 in back pay, \$650,000 in compensatory damages and \$1.3 million in punitive damages, later reduced to \$300,000. "It's an example of a retaliation claim being easier to prove than the underlying discrimination claim," Mr. Batke said.

U.S. Supreme Court decisions also have widened employer liability for a retaliation lawsuit by loosening the standards of harm to win such claims. In *Sheila White vs. Burlington Northern & Santa Fe Railway Co.*, the court ruled in 2006 that an "adverse action" is any action by an employer that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Ms. Adele said the ruling indicates, in part, "that if the court finds that the initial complaint of discrimination is unwarranted or without merit doesn't mean the court or a jury can't find that the retaliation occurred."

She added that another Supreme Court ruling, *Vicky S. Crawford vs. Metropolitan Government of Nashville and Davidson*

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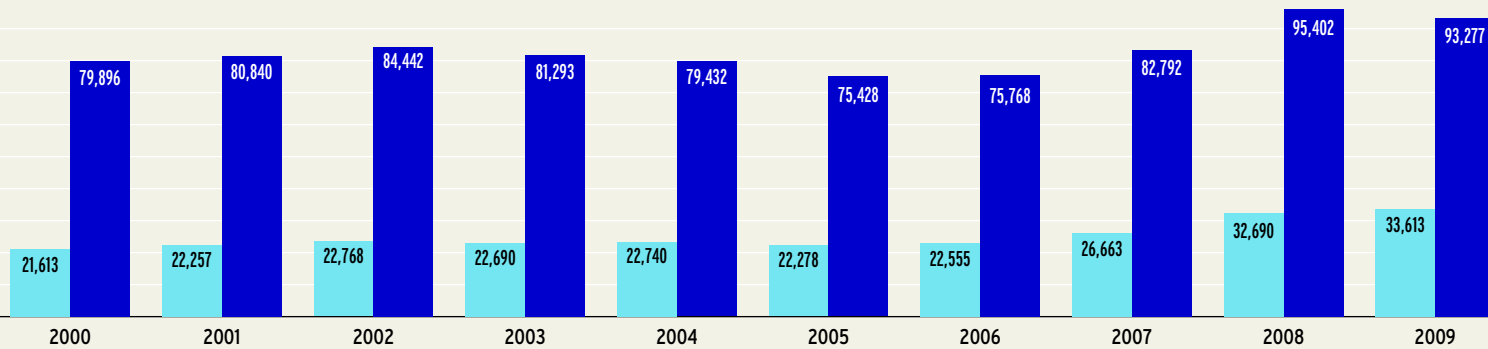


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**RETALIATION CASES**

The number of claims alleging employer retaliation increased from 27% of all claims filed with the Equal Employment Opportunity Commission in fiscal 2000 to 36% of all claims filed in fiscal 2009.



Source: EEOC

# Retaliation: Claims rise amid layoffs

CONTINUED FROM PAGE 18

County, Tenn., essentially held in 2009 that any employee who provides evidence as part of an internal investigation of another employee's claim also is protected under the anti-retaliation provisions of Title VII. "If the person's employment is subsequently terminated or other adverse employment action is taken against such individual, he or she could argue that the only reason for the adverse employment action is because he or she participated in the investigation," she said.

A factor also encouraging the rise in retaliation claims is an average award of \$770,000 per successful claim, said Willis' Mr. Ross.

"The outcomes are typically severe, with many statutes allowing plaintiffs to collect punitive damages and double damages as a way to discourage other employers from doing the same thing," said Mr. Batke. "Since these tend to be high-profile cases, there are also the reputational repercussions to consider to the employer's business."

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## Ways to avoid suits alleging retaliation

There are ways to reduce the possibility of incurring a retaliation claim.

Willis Executive Risks, a New York-based unit of Willis Group Holdings P.L.C., provides the following advice:

- Amend anti-discrimination and harassment policies to include a nonretaliation policy that encourages employees to complain about unlawful conduct without fear of reprisal, or establish a stand-alone policy.

- Train managers and supervisors about retaliation—what constitutes it and how they should respond when a complaint under Title VII is brought to their attention—and document training to show the steps taken to prevent unlawful retaliation.

- When an employee makes a claim of discrimination, harassment or other unlawful conduct, managers, supervisors and, where appropriate, co-workers should be counseled regarding their nonretaliation obligations. Then, document this counseling.

—By Russ Banham



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# Age bias claims rise in recession

Some older workers seeking protection under federal law

By LOUISE ESOLA

Older workers who lost their jobs and blame age discrimination account for about one in four claims made with the Equal Employment Opportunity Commission, a number that rose in recent years as the economy tanked.

Some experts blame the Great Recession, which began in December 2007 and ended in June 2009, for the rise in age discrimi-

nation filings.

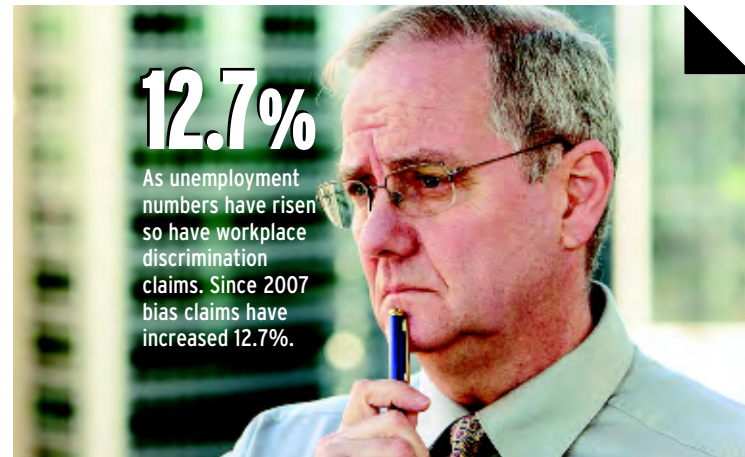
As businesses laid off workers during the tough economy, age discrimination claims filed with the EEOC increased 15.4% in fiscal 2007 from the previous year and jumped another 28.7% in fiscal 2008 to a record 24,582. However, such filings dipped 7.3% in 2009, declining to 22,778.

"The truth is the filings go up and down and it's difficult to pinpoint the reason," said Diana

Johnston, a Washington-based attorney with the EEOC. "We assume (the surge) is related to the economy."

Just as unemployment overall hit record highs, so have overall workforce discrimination claims—rising 12.7% since 2007, according to the EEOC.

Older workers have been among those turning to the agency for protection, under the federal Age Discrimination in Employment Act.



"The charges have been astronomically high," said Laurie McCann, Washington-based senior attorney with the AARP

Foundation. "Older workers tend to bear the brunt of downsizing....A lot of people will say, 'Well, it's the economy, stupid,' but we see this marked increase and we have to consider it," she said.

Some experts say it's a matter of demographics.

"We have an aging workforce," said Larry Racioppo, Stamford, Conn.-based leader of the executive liability practice with Towers Watson & Co. "Combined with the recession, you will see an uptick in age discrimination claims."

Workers first must file a complaint with the EEOC, which investigates the claim and decides whether to sue the employer. However, experts agree that age discrimination can be difficult to prove.

David Greenberg, a partner at Los Angeles-based law firm Greenberg & Rudman L.L.P., said he often steers clear of age discrimination cases, like many attorneys, because "they are too hard to prove."

"People are laid off for a lot of reasons and you have to be able to prove it was because of age," Mr. Greenberg said. "It's especially difficult if there's an over-reduction in force."

But that is changing slowly, experts said. In 2005, the U.S. Supreme Court in *Azel P. Smith et al. vs. City of Jackson, Miss., et al.* allowed "disparate impact" claims that do not require showing discriminatory intent under ADEA. Now, for example, employees can prove that age discrimination occurred by providing figures that suggest a disproportionate number of older workers were targeted in a layoff.

"If you can find a pattern, you can sue," said Rodney Mesriani, a principal partner with the Los Angeles-based Mesriani Law Group A.P.L.C. "What is unique about age discrimination is that you rarely see a smoking gun. You have to look for a pattern."

That is why Mr. Mesriani cautions employers reducing their workforces to avoid laying off only higher-paid workers, those who tend to be the oldest. Instead, "make it even. Lay off some young, some old and some in the middle," he said (see story, page 23).

The idea that older workers tend to be the highest paid is not the only reason they may be targeted in layoffs. "There seems to be a lot of stereotyping," said the



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Continued on next page

# Employers urged to implement strategies to avoid age bias suits

While experts have mixed views on whether employers can avoid age discrimination claims resulting from layoffs, all agree that a company's best defense is consulting with an attorney and trying to base layoffs on documented performance issues.

"The best thing (an employer) can do is base (a layoff) on performance. Basing it on salary is not good enough," said Laurie McCann, Washington-based senior attorney with the AARP Foundation. "That puts the company at risk for age discrimination" litigation because salary often correlates with age.

**'The best thing (an employer) can do is base (a layoff) on performance. Basing it on salary is not good enough.'**

Laurie McCann, AARP Foundation

Some experts say supplying documentation along with a pink slip can help avoid a lawsuit.

Tom Hams, Chicago-based managing director and national EPLI practice leader with Aon Risk Services, a unit of Aon Corp., said employers should provide documents to show that a mix of employees of all ages were laid off.

"There are rules around what kind of documentation they have to share," Mr. Hams said. "Providing statistics is one of them."

Employers "should know they have to do their homework" before layoffs, said Larry Racioppo, Stamford, Conn.-based leader of the executive liability practice with Towers Watson & Co. "The burden

of proof is on the employer to show that something else is the cause and not age. They should communicate these reasons upfront."

Rodney Mesriani, principal partner with the Los Angeles-based Mesriani Law Group A.P.L.C., said strict workplace rules on age discrimination—including banning age-related jokes and talking about a person's age—can help.

"If you have a workplace that, for example, makes fun of an older worker and then they get laid off, then you leave yourself open to an easy lawsuit," he said.

—By Louise Esola

Continued from previous page

AARP Foundation's Ms. McCann. "The perception is that they cost more," but companies that lay off their more experienced workers often pay the price when they hire less experienced workers who require costly training, she said.

Additionally, older workers sometimes are seen as more disposable because "they are leaving soon anyway" and "they can tap into their retirement savings a lot easier than a younger worker," Ms. McCann said. "Companies see this as a more humane way to go—laying off older workers vs. younger, but it can get them into trouble."

Because older workers often find it more difficult to re-enter the workforce after losing their job—an idea some say is an unspoken branch of age discrimination—experts argue that the surge in EEOC filings and lawsuits is one way employees seek compensation in hard times.

Tom Hams, Chicago-based managing director and national EPLI practice leader with Aon Risk Services, a unit of Aon Corp., said he believes older workers tend to take their time filing a claim with the EEOC after a layoff and often do so to seek more compensation during hard times.

"People thought they could find jobs and then they can get desperate, if you will, and move on (toward litigation)," Mr. Hams said, adding that juries tend to decide in favor of older workers.

Mr. Racioppo said older workers "are more aware of their rights" and that age discrimination claims may not be avoided.

Mr. Mesriani said the rise in age discrimination litigation actually could hurt workers 55 and older finding their next job.

"When you are older, it is so much more difficult to find a job; and as that loss of income escalates, so does the value of their claim," Mr. Mesriani said. "The lawsuits and claims have made it in fact harder for these workers to find jobs because employers are so afraid that if things don't work out and they have to fire that employee, (the company) could be accused of age discrimination," adding that older workers have a harder time finding work because of age discrimination.

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MICHAEL MARCOTTE

Reinsurance market executives traveled to Colorado Springs, Colo., to attend the 2010 Property Casualty Insurers Assn. of America meeting.

# PCI: Reinsurers see repeat season of soft renewals

CONTINUED FROM PAGE 4

division at Princeton, N.J.-based Munich Reinsurance America Inc., said, "This is a fairly challenging market environment and, from a reinsurance perspective, we're aware of that and we're approaching the renewals with that in mind."

Munich Re is looking at its overall portfolio, "determining what accounts don't look supportable anymore and having those conversations earlier to see what we

can do to make it more attractive and to ensure our support," Ms. Albo said.

"Right now, everybody's struggling to maintain profitability in a difficult environment," said James M. Hinchley, chief operating officer of Liberty Mutual Reinsurance, a unit of Boston-based Liberty Mutual Group Inc. "I think that's the single challenge facing everybody. It's a difficult market out there," he said. "How do you exercise underwriting discipline? Everybody's fighting tough these

days," he said. "Most reinsurers are holding onto business that is adequately profitable, so you have to question when opportunities do arise. You have to really do your homework and due diligence as to why" these new opportunities have risen. At times, he said, there is "winner's remorse" for taking on poor business they later regret. New business opportunities "present a challenge," said Mr. Hinchley.

Robert DeRose, vp, at Oldwick, N.J.-based A.M. Best Co. Inc., said "casualty across the board is pretty much soft, and property is becoming increasingly more competitive."

William H. Eyre Jr., Philadelphia-based managing director of Towers Watson & Co.'s reinsurance brokerage business, said, "Reinsurers are in general agreement about providing pricing relief for insurers on property business, subject to companies' exposure management and experience in 2010 and we do have to keep in mind that there were a number of storms in the U.S."

Observers estimated that property lines will drop 10% to 15% at renewals while casualty lines' rates will range from flat to 10% lower.

"Reinsurers are all sending messages that they're trying to hold the line, but we're pretty confident we're going to see a drop, I think more on the property side than certainly on the casualty side," said Mike Schnur, a Chicago-based a partner with TigerRisk Partners L.L.C.

There, however, have been limited reinsurance rate hikes.

Damien Magarelli, a director at New York-based rating agency Standard & Poor's Corp., said losses include earthquakes in Chile and New Zealand as well as the Deepwater Horizon oil rig in the Gulf of Mexico. "All of these areas could see rate increases of 30% or more," Mr. Magarelli said.

He also noted that the directors and officers liability and workers compensation reinsurance market is offering less capacity than previously. While the lines still are seeing rate declines, they are not as great as in the primary market. "So (reinsurers are) being a little more selective at this point in time," he said.

However, John Andre, A.M. Best Co. Inc. group vp of global reinsurance and alternative markets, said that while D&O and errors and omissions lines had hardened, "I think it's losing momentum because they haven't seen the loss emergence that everyone was anticipating."

For financial institutions, Stephen Mildenhall, Chicago-based CEO of Aon Benfield Analytics, said "there's been less claim emergence out of the financial crisis than maybe some people expected."

Meanwhile, Mr. Eyre said he expects "a fairly orderly renewal season, barring any disasters in the next two months, and there's certainly plenty of capacity for all lines of business."

The trend has been "to get into

Continued on next page

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## PCI: Reinsurers see repeat season of soft renewals

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"Most reinsurers are holding onto business that is adequately profitable, so you have to question when opportunities do arise. You have to really do your homework and due diligence as to why" these new opportunities have risen. At times, he said, there is "winner's remorse" for taking on poor business they later regret. New business opportunities "present a challenge," said Mr. Hinchley.

Robert DeRose, vp, at Oldwick, N.J.-based A.M. Best Co. Inc., said "casualty across the board is pretty much soft, and property is becoming increasingly more competitive."

William H. Eyre Jr., Philadelphia-based managing director of Towers Watson & Co.'s reinsurance brokerage business, said, "Reinsurers are in general agreement about providing pricing relief for insurers on property business, subject to companies' exposure management and experience in 2010 and we do have to keep in mind that there were a number of storms in the U.S."

Observers estimated that property lines will drop 10% to 15% at renewals while casualty lines' rates will range from flat to 10% lower.

"Reinsurers are all sending messages that they're trying to hold the line, but we're pretty confident we're going to see a drop, I think more on the property side than certainly on the casualty side," said Mike Schnur, a Chicago-based partner with TigerRisk Partners L.L.C.

There, however, have been limited reinsurance rate hikes.

Damien Magarelli, a director at New York-based rating agency Standard & Poor's Corp., said losses include earthquakes in Chile and New Zealand as well as the Deepwater Horizon oil rig in the Gulf of Mexico. "All of these areas could see rate increases of 30% or more," Mr. Magarelli said.

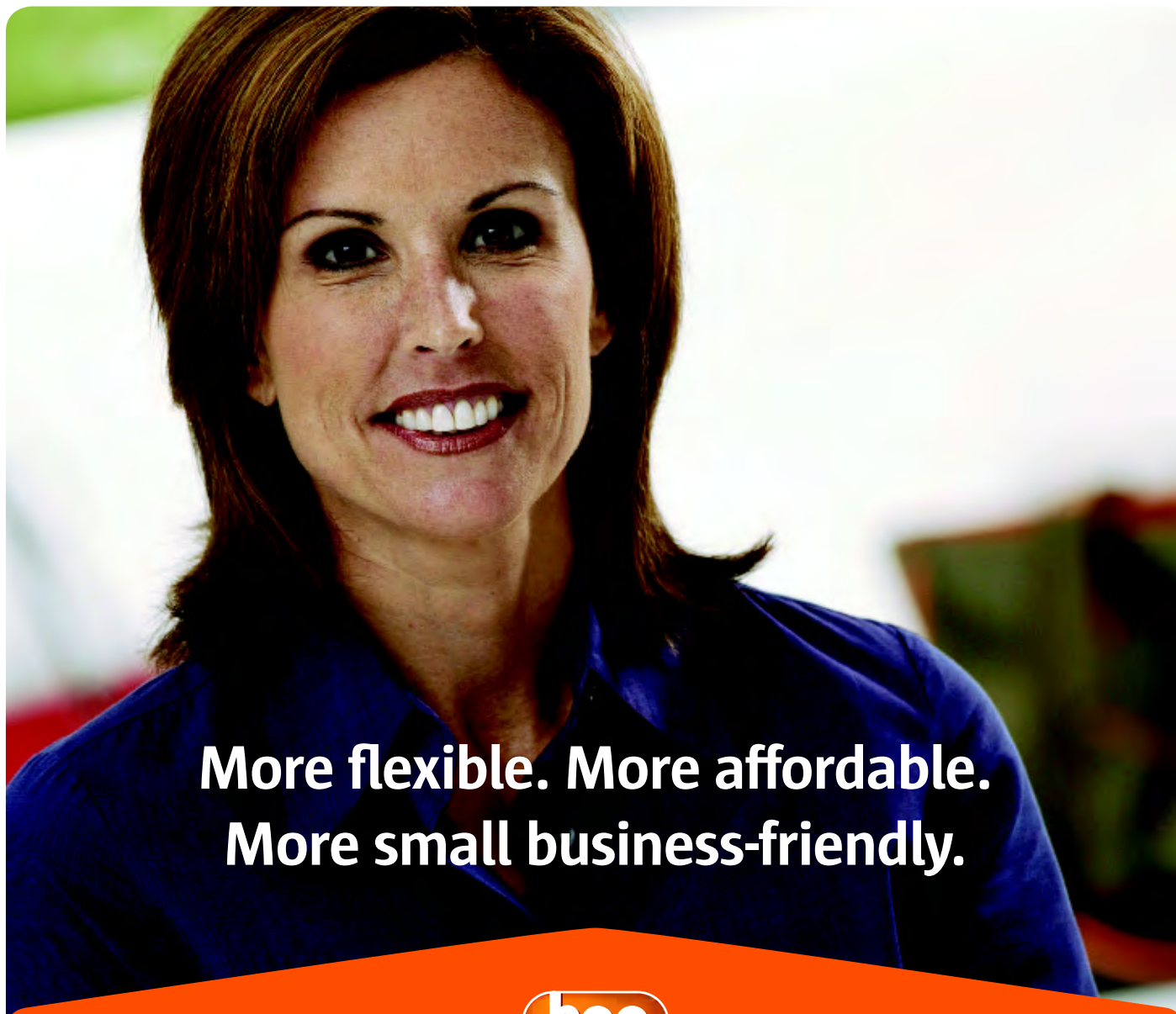
He also noted that the directors and officers liability and workers compensation reinsurance market is offering less capacity than previously. While the lines still are seeing rate declines, they are not as great as in the primary market. "So (reinsurers are) being a little more selective at this point in time," he said.

However, John Andre, A.M. Best Co. Inc. group vp of global reinsurance and alternative markets, said that while D&O and errors and omissions lines had hardened, "I think it's losing momentum because they haven't seen the loss emergence that everyone was anticipating."

For financial institutions, Stephen Mildenhall, Chicago-based CEO of Aon Benfield Analytics, said "there's been less claim emergence out of the financial crisis than maybe some people expected."

Meanwhile, Mr. Eyre said he expects "a fairly orderly renewal season, barring any disasters in the next two months, and there's certainly plenty of capacity for all lines of business."

The trend has been "to get into



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## Discipline: Market different than 1990s

CONTINUED FROM PAGE 4

"However, I do see some reinsurers looking for underwriting discipline, and therefore will either decrease lines or alternatively abandon accounts that they don't think are paying a reasonable level of return," Mr. Fedor said.

"Part of that is driven by the enterprise risk management analysis that many of these reinsurers are doing, that in effect looks at, 'What's my rate of return on equity'" and the amount of capital allocated to the lines of business?"

"Reinsurers tend to be more disciplined" than primary insurers, which do not use ERM "as much as the reinsurers are," Mr. Fedor said.

"The reinsurance market needs to show some discipline because there's sound technical reasons why prices should increase, with the investment climate providing historically low returns and the release of prior-year reserves being used to subsidize underwriting," said Patrick Hartigan, head of treaty team reinsurance for London-based Beazley P.L.C.

James H. Bradshaw, New York-based CEO of Willis Re Inc., said unlike the soft market of the late 1990s, "We think the reinsurance market has been very disciplined

**'Reinsurers tend to be more disciplined' than primary insurers, which do not use ERM 'as much as the reinsurers are.'**

Joseph M. Fedor, U.S. Re Corp.

in this soft market." He said that is a function of there being fewer reinsurers "and the fact that they've learned the lessons of the past; so while we see a continued softening, it's often warranted

based on experience."

Obviously, he added, if there are accounts with loss activity, "we'll see those adjustments being made, but for the most part, we expect the market to continue to soften," Mr. Bradshaw said.

But Mike Schnur, a Chicago-based partner with TigerRisk Partners L.L.C., said while reinsurers have been disciplined, he's been impressed by the "level of sophistication of primary companies." Really good primary insurers have introduced risk management techniques and now are "better able to measure what they need to do" to control their exposures, he said.



MICHAEL MARCOTTE

Reinsurance market experts gathered at the Property Casualty Insurers Assn. of America's conference to discuss year-end renewals.

Continued from previous page

the market earlier," said James H. Bradshaw, CEO of Willis Re Inc. in New York. "I think clients have been just getting better" at improving their access to data and brokers "are working harder to present that data in an organized and logical format, so I would think that trend should continue."

Another trend, said Mr. Magarelli, is a modest increase in asbestos and environmental charges by reinsurers. "We don't believe that's a fundamental shift in the risk of A&E, but you are seeing some companies taking some charges," usually in the range of \$200 million to \$400 million.

While this is "nothing as dramatic as the multibillion-dollar charges of the earlier part of the decade," a bit more volatility has returned to the A&E market, Mr. Magarelli said. "At this point in time it seems more sporadic, based on certain legal cases in court rulings, nothing that's broad to the market."

Meanwhile, some observers said an increased emphasis has been placed on reinsurers' credit quality.

"We don't see any immediate change in the marketplace, so clients are looking more for protection of earnings, looking at protection of their own franchises; and reinsurers are more interested in finding alternative solutions in the reinsurance market, so they're willing to provide broader products for the right clients," Mr. Crawley said.

Kelly R. Superczynski, senior managing director at Chicago-based Aon Benfield Analytics' rating agency advisory unit, said the issue of reinsurer credit quality "has definitely received a lot of focus lately."



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# What will it take to turn the soft reinsurance market?

By JUDY GREENWALD

**COLORADO SPRINGS, Colo.**—When the market will turn and what it will take to turn it, barring a significant catastrophe, were major questions at last month's Property Casualty Insurers Assn. of America's annual meeting, but no one professed to have definitive answers.

Gregory Schiffer, managing director of property and specialty for Armonk, N.Y.-based Swiss Reinsurance America Corp., said this year's hurricane season has

been "quite active" but "relatively benign," with the storms largely avoiding land in the United States.

Capital levels are high "and the economic recovery is relatively slow at this point, yet we have a low interest-rate environment, which equals low returns for insurers and reinsurance companies," Mr. Schiffer said.

In addition, "there's low reserve redundancies at this point, and yet we still see reserve releases, so that well seems to be running dry," he said in discussing the

issue at the conference in Colorado Springs, Colo.

"Overall, I would say the market lacks some sort of upper-level steering current to a firming market, so from Swiss Re's perspective, rates are not expected to increase significantly at the January renewals," Mr. Schiffer said.

Pina Albo, president of the reinsurance division at Princeton, N.J.-based Munich Reinsurance America Inc., said, "There's a lot of talk about what's going to turn it at the end of the day. What's going to make pricing move" is a

large catastrophe in excess of \$50 billion to \$60 billion, "so that it really affects people's capital position. That would be one thing."

A second factor, "which we are starting to see now," is "depletion of reserve cushions. What we're seeing now is pretty good calendar-year results," but results have benefited from prior-year reserve releases that are running out or will soon, she said. An uptick in the economy also could lead to improved pricing, she said.

Munich Reinsurance America President and CEO Anthony J.

Kuczinski said inflation, which is feared, would "help to drive rates at least on the casualty side, when people realize costs will be higher than expected."

"You can't make money on the investment side. The focus has to be on underwriting and we're in the middle of a soft market," said Robert DeRose, vp at Oldwick, N.J.-based A.M. Best Co. Inc.

The market should be turning now on casualty business, which is not making a profit, he said. "Casualty classes are living off the redundancies from the hard market, so theoretically the turn needs to happen. It needs to happen pretty soon because the redundancies can't go on forever," he said.

Damien Magarelli, a director at New York-based rating agency Standard & Poor's Corp., said a greater-than-expected change in frequency or severity "could be the catalyst for increased prices, unless there really is a triggering event."

If these changes do not occur and barring that triggering event, "at this point we don't think there's going to be a change" in

**'I think we are seeing a continued, gradual determination in rates in most lines. It's just really difficult to predict when things will start going from stable to upwards.'**

James M. Hinchley,  
Liberty Mutual Reinsurance

the cycle, "which means a general continued decline in rates and further pressure on margin compression," Mr. Magarelli said.

"You still have many companies" with combined ratios of 95% or lower on the primary side, and primary companies and reinsurers are "still reporting very strong earnings," he said. While weaker competitors are struggling because of the need to have underwriting profits increase, the rest of the market has strong capital and earnings and "isn't seeing the need to raise rates very aggressively," Mr. Magarelli said.

James M. Hinchley, chief operating officer of Boston-based Liberty Mutual Reinsurance, a unit of Liberty Mutual Group Inc., said, "It's hard for me to see a real turn in property cat rates without some event or some near misses.

"I think casualty may turn more on its own. I think people recognize that loss trends work against us, the investment climate is producing low yields, so you can't write at a high combined ratio and just make it on the backs of the investment portfolio the way

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the market is today, so it may be a more gradual turn," Mr. Hinchley said.

In addition, "as companies run out of prior-year reserve redundancies to release," it puts more pressure on current-year underwriting results, he said.

James H. Bradshaw, CEO of Willis Re Inc., a New York unit of Willis Group Holdings P.L.C., said, "People talk about capital and certainly the market is over-capitalized, but if you look at 2008—with the financial crisis and the impact on companies' portfolios and the drop in the assets and how much capital left the market—rates continued to soften," so capital is just one part of the overall equation that turns the market.

"I think, quite frankly, negative cash flow, calendar-year results deteriorating to the point where there's negative cash flow pain is what it's going to take for the market to turn. As long as we continue to have reserve releases and strong capital, it's just not going to happen," Mr. Bradshaw said.

Steve Mildenhall, Chicago-based CEO of Aon Benfield Analytics, a unit of Aon Corp., said a property catastrophe that has insured losses in the range of \$80 billion gross and \$40 billion net would be enough to get the industry up to a combined ratio between 110% and 115%, which historically is what the market has reached before hardening.

A casualty crisis that would lead to a market turn could include an inflation-driven event, such as changes in the legal system, a new theory for bringing a claim or a cyber virus, he said.

As to when the market will turn, Mr. Hinchley said, "Things are relatively stable right now. I don't think they're getting dramatically worse. I think we are seeing a continued, gradual determination in rates in most lines. It's just really difficult to predict when things will start going from stable to upwards."

"I do think we're getting closer to the bottom," said Mike Schnur, Chicago-based partner with TigerRisk Partners L.L.C., who said the market will not turn until casualty reserves really start running out or there is a significant event.

Absent a significant catastrophe, Mr. Bradshaw said he expects the market to turn "no sooner than 12 months and more likely 24 to 36 months."

Joseph M. Fedor, executive vp and director of Pearl River, N.Y.-based U.S. Re Corp., said, "It's going to take another two, three years, unless we have a major disaster." It is going to take that long "before the bleeding on the primary side will be significant enough that it will force rate increases," he said.

It also is possible there will not be an overall turn, some observers said.

It is possible the market "could get little bits and pieces of a turn," said John Andre, group vp of global reinsurance and alternative markets at Best.

# Primary insurers still increasing retention levels

## As premiums keep falling, efforts boost bottom line

By JUDY GREENWALD

**COLORADO SPRINGS, Colo.**—Primary insurers continue to increase their retention levels, reinsurance officials say.

John Andre, group vp of global reinsurance and alternative markets for Oldwick, N.J.-based A.M. Best Co. Inc., said primary insurers "are ceding less and less business and that's been a trend the past couple of years and we expect it will continue to do so."

He discussed the issue at Property Casualty

Insurers Assn. of America's annual meeting Oct. 24-27.

James H. Bradshaw, New York-based CEO of Willis Re Inc., said there is "a pattern of increasing retentions, as insurance companies try to retain earnings" and, if they are publicly traded, "trying to manage their earnings. Reinsurance quite often is the No. 2 expense behind salary and benefits," so it is "easiest to try to make up for falling premiums" by cutting reinsurance costs, he said.

Mike Schnur, a Chicago-based partner with TigerRisk Partners L.L.C., said, "Some clients are still raising retentions," but more so on casualty business. "Property seems to have kind of leveled off at this point. I still think

companies that are buying reinsurance in a soft market are looking to keep premiums, and one of the ways to do that is to buy less reinsurance."

James M. Hinchley, chief operating officer of Boston-based Liberty Mutual Reinsurance, a unit of Liberty Mutual Group Inc., said he's "not expecting a lot of change in retentions. There might be a slight bias towards primary companies keeping a little bit more of the risk, but overall I would say retentions are fairly stable."

However, Steven Mildenhall, CEO of Aon Benfield Analytics in Chicago, said as far as retentions are concerned, "the pendulum might have swung too far and might swing back."



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# Reinsurers adopt cautious stance on multiyear coverage contracts

*Add provisions to protect against effects of sharp market turn*

By JUDY GREENWALD

**COLORADO SPRINGS, Colo.**—Buyers are seeking multiyear contracts, but reinsurers are approaching the issue cautiously, observers say.

To protect themselves from being locked into low rates should the market harden, or left with poor business, reinsurers who agree to these requests are introducing “material differences” clauses that permit them to modify the contract.

Some observers, who discussed the topic during the Property Casualty Insurers Assn. of America’s annual meeting, said this is part of a general trend among reinsurers and cedents to develop long-term relationships during the soft market.

Robert DeRose, vp at Oldwick, N.J.-based A.M. Best Co. Inc., said the multiyear contracts are “structured in such a way that the reinsurer has the ability to get out, and also adjust terms on an annual basis, so it’s not the three-year contract of the soft market.”

The contract may have a multiple-year term, but “it’s got some flexibility built into it that allows some adjustment as the market changes,” Mr. DeRose said. Other-

wise, “terms and conditions have been holding up pretty well on the reinsurance side,” he said.

John Daum, New York-based executive director of Lockton Re, a unit of Kansas City, Mo.-based Lockton Cos. L.L.C., said the multiyear contract situation today is different than 1999, during the last soft market, when “the reinsurance market really got caught out, not only giving away the coverage, but also broadening the coverage, too.”

“We’ve actually placed several (multiyear contracts) but with the material change clauses,” Mr. Daum said. “I think reinsurers are getting more sophisticated in their crafting of this clause. I don’t think anyone expects a blank check for the next three years.”

Mike Schnur, Chicago-based partner at TigerRisk Partners L.L.C., said he is seeing some movement toward multiyear contracts on property business, but “it depends on the reinsurer.”

“Long-term, core clients, I think, are more likely to get a multiyear deal, and I would say reinsurers are certainly being very cautious” in agreeing to them, said Mr. Schnur.

“It’s a longer-term solution,” he said. “If you’re a big company

buying a lot of reinsurance,” securing a multiyear contract is “good risk management on the part of some companies.”

The advantage to the reinsurer is that it ensures “a longer-term relationship with a client, as opposed to seeing the program every single year and having to go through the bid-ask process. To the extent we have several years of soft market conditions, potentially that could be good for them as well,” Mr. Schnur said.

“It helps companies from a planning perspective,” said Stephen Mildenhall, Chicago-based CEO of Aon Benfield Analytics, a unit of Aon Corp.

Not every reinsurer, though, has agreed to such contracts.

Pina Albo, president of the reinsurance division at Princeton, N.J.-based Munich Reinsurance America Inc., said, “We’ve seen a couple of requests for multiyear contracts,” which is a “typical soft market play,” but Munich Re has not written any.

“Although reinsurers are sitting on a lot of capital, they are also conscious that investors expect certain returns,” Ms. Albo said.

Reinsurers and cedent insurers both want long-term relationships, observers said.



**Looking at the issue from the intermediary’s perspective, ‘often, we find that we’ve got trading relationships with clients over 10 years, which we find very advantageous.’**

Hugo Crawley, BMS Group Ltd.

“Reinsurers are trying to build stable, long-term relationships; and if it means entering into multiyear reinsurance agreements, I think most parties on both sides are willing to do that,” Mr. Daum said.

“Reinsurers are trying hard to work with their clients and be there for them throughout this next cycle, when it does turn, but I think they’re always trying to identify the clients they want to stick with and work with. I just see more of a greater sense of continu-

ity from both the buyers and sellers,” he said.

Mr. Schnur said reinsurers “really want to make sure they do whatever they can to ensure their relationships are strong, and to stay with their clients as much as possible. That seems to be more of an overriding theme.”

James M. Hinchley, chief operating officer of Boston-based Liberty Mutual Reinsurance, part of Liberty Mutual Group Inc., said while his firm is interested in long-term partnerships, “it’s hard for me to say whether that’s different than five or 10 years ago. I’m not sure if it’s a trend, but we definitely prefer to be involved with people who consistently buy reinsurance and who value long-term partnerships,” he said.

Looking at the issue from the intermediary’s perspective, “often, we find that we’ve got trading relationships with clients over 10 years, which we find very advantageous,” said Hugo Crawley, chairman of London-based BMS Group Ltd.

Meanwhile, James H. Bradshaw, New York-based CEO of Willis Re Inc., a unit of Willis Group Holdings P.L.C., said cedents have been combining lines of business of similar characteristics to achieve greater economies of scale and leverage their reinsurance business.

For instance, they are combining casualty business to have one excess-of-loss policy that covers all lines and has higher retentions, thus reducing the amount of premium ceded to reinsurers, where previously they might have had three or four pro rata policies, Mr. Bradshaw said.

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# Few reinsurers expected to fuel growth with M&As

*Low stock values, alternative options limit potential deals*

By JUDY GREENWALD

**COLORADO SPRINGS, Colo.**—Relatively few mergers and acquisitions are expected among reinsurers in the near future, industry experts say.

John Andre, group vp of global reinsurance and alternative markets at Oldwick, N.J.-based A.M. Best Co. Inc., said the one substantive deal in the past year was the May merger of Max Capital Group Ltd. and Harbor Point Ltd. under the new banner of Alterra Capital Holdings Ltd.

Low stock valuations “are what’s keeping (M&As) from happening” as well as cultural issues, said Mr. Andre in discussing the issue at the Property & Casualty Insurers Assn. of America’s annual meeting.

“Lots of times, reinsurers figure they might be able to gain market momentum themselves without having to merge,” so teams or blocks of business may move, but combining legal entities is “often

problematic,” he said.

However, Joseph M. Fedor, executive vp and director at Pearl River, N.Y.-based U.S. Re Corp., said he expected “some M&A activity,” with reinsurers “trying to get a better use of capital.”

While that will be the major driver, a “secondary driver might be the need for quality security, which means, as long as you have a bigger surplus, ostensibly you’re more secure,” Mr. Fedor said.

“I don’t see really big acquisi-



tions in the short run,” said Munich Reinsurance America President and CEO Anthony J. Kuczinski, who is based in Princeton, N.J. While there may be some smaller acquisitions, “to do a big acquisition in this market space, in the reinsurance space, you have to ask for what purpose?” Munich Re, for instance, already sees almost anything it wants to see (in insurance offerings) in the marketplace, he said.

“We think that pressure to grow the balance sheet could create some increased M&A activity, but



Experts gathered at the Property Casualty Insurers Assn. of America's annual meeting in Colorado Springs, Colo., discussed numerous issues including to prospect of more mergers and acquisitions.

we don't expect this to be overly dramatic to the industry.” said Damien Magarelli, a director at rating agency Standard & Poor's

Corp. in New York.

However, he said he would not be surprised if there were some M&As among “concentrated

niche companies” and firms with smaller balance sheets. “That would be the sweet spot, where M&A activity may actually have the greater impact,” said Mr. Magarelli.

Kelly R. Superczynski, senior managing director at Aon Benfield Analytics' rating agency advisory unit in Chicago, said there have been niche-type deals involving small- to medium-size players, such as Richmond, Va.-based Markel Corp.'s plans, announced in July, to acquire Omaha, Neb.-based Aspen Holdings Inc., which does business as First Comp, for \$135 million plus the value relating to certain outstanding stock options at closing. “It's hard to put your capital to work right now in order just to grow organically,” she said.

Rather than Bermuda, “I think we're going to see some merger activity probably on the U.K. side, and that may basically be London operations merging,” said U.S. Re's Mr. Fedor.

In October, Beazley P.L.C. offered to buy Hamilton, Bermuda-based Hardy Underwriting Bermuda Ltd. for £158.4 million (\$253.2 million). However, Hardy, which operates Lloyd's of London syndicate 382 and a managing general agency in Bermuda, rejected the offer as being too low.

Patrick Hartigan, Beazley's head of treaty team reinsurance, said, “We've gone public in order to be able to talk to shareholders and to encourage the Hardy board into some dialogue so we can look a little bit closer at their business. We do feel on that front that the businesses are compatible, they're complementary and they would provide Beazley with a more diversified portfolio in terms of class and geography.”

## Reinsurer domicile moves won't affect global market: Experts

By JUDY GREENWALD

**COLORADO SPRINGS, Colo.**—The recent move by several reinsurers to redomicile from Bermuda to Switzerland will not significantly affect the Bermuda market or the overall market in the near term, reinsurance officials say.

Companies that recently moved their domicile from Bermuda include Allied World Assurance Co. Holdings Ltd., Amlin P.L.C., Flagstone Holdings Ltd. and ACE Ltd. (BI, Oct. 11).

“It doesn't matter” where a company is domiciled, said William H. Eyre Jr., Philadelphia-based managing director of Towers Watson & Co.'s reinsurance brokerage business, who discussed the issue at the Property Casualty Insurers Assn. of America's annual meeting. “Our clients are concerned about the financial status of a reinsurer and the underwriting talent and the underwriting philosophy of that company,” he said. “It doesn't matter if a reinsurer is in Dublin or in Zurich or Bermuda or New York.”

Joseph M. Fedor, executive vp and director of Pearl River, N.Y.-based U.S.

### ON THE WEB



*Business Insurance* is offering electronic versions of its daily news from the Property Casualty Insurers Assn. of America's annual meeting in Colorado Springs, Colo., at [www.businessinsurance.com](http://www.businessinsurance.com). The coverage, which was published Oct. 25-27, includes BI's PCI Show Daily in a PDF format.

Re Corp., said, “I don't think it is going to have much of an impact on the market. This is really a corporate decision whether to assist in the diversification process or, alternatively, to shelter the company from U.S. taxation.”

“All these companies are keeping their Bermuda underwriting expertise available” and are not pulling it off the

island, said John Andre, group vp of global reinsurance and alternative markets for Oldwick, N.J.-based A.M. Best Co. Inc.

In the near term, the moves will not have much impact, said Kelly R. Superczynski, senior managing director at Aon Benfield Analytics' rating agency advisory unit in Chicago. “Obviously, companies are planning for potential changes in the tax relationship between the U.S. and Bermuda and being proactive in terms of redomesticating.”

At least operationally, there has not been much change “because they're keeping a lot of their operations in Bermuda,” said Ms. Superczynski.

The trend, though, toward redomesticating in Switzerland, Dublin and Luxembourg is expected to increase in coming years “until there's a decision one way or another on the Neal bill,” she said.

H.R. 3424, which was introduced by Rep. Richard E. Neal, D-Mass., seeks to limit tax deductions for reinsurers that cede large portions of their U.S. premiums to offshore affiliates.

Damien Magarelli, director at rating

agency Standard & Poor's Corp. in New York, said, “We don't believe that the move to Switzerland has an impact on our ratings” because “most companies are already global companies.”

However, he added, “there are questions” around Bermuda and Solvency II and whether the island's “place in the market will be sustainable or not.” It will be sustainable as long as it exists as a center of excellence and as a distribution center and market where business is transacted, he said.

“For lines of business like excess casualty coverages, property cat and for other short-tail lines of business, Bermuda still has a very strong place in the market and it will be sustainable,” he said. However, questions regarding its tax advantages would be “one of the reasons that companies are considering moving their holding companies to different locations.”

Meanwhile, the European Commission has named Bermuda, Switzerland and Japan as the first non-European Union countries to undergo equivalency reviews prior to the proposed implementation of Solvency II.

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**NOTICE IS HEREBY GIVEN** THAT ON OCTOBER 26, 2010, THE BANKRUPTCY COURT ENTERED AN ORDER (THE "ORDER") CONTINUING THE PRELIMINARY INJUNCTION ORDER PURSUANT TO 11 U.S.C. §304 ORIGINALLY ENTERED IN THIS CASE ON SEPTEMBER 9, 2009. THE ORDER SHALL REMAIN IN EFFECT PENDING A HEARING SCHEDULED FOR APRIL 20, 2011 AT 10:00 A.M. (THE "RETURN DATE") BEFORE THE HONORABLE SHELLEY C. CHAPMAN, UNITED STATES BANKRUPTCY JUDGE, IN THE UNITED STATES BANKRUPTCY COURT LOCATED AT ONE BOWLING GREEN, NEW YORK, NEW YORK. ALL PAPERS SUBMITTED FOR THE PURPOSE OF OPPOSING THE CONTINUATION OF THE ORDER AFTER THE RETURN DATE SHALL BE FILED WITH THE COURT, WITH A COPY TO THE CHAMBERS OF THE HONORABLE SHELLEY C. CHAPMAN AND SERVED ON COUNSEL FOR THE ADMINISTRATOR LISTED BELOW SO AS TO BE RECEIVED AT LEAST FOURTEEN (14) DAYS PRIOR TO THE RETURN DATE. ANY PERSON WISHING TO OBTAIN A COPY OF THE ORDER SHOULD CONTACT COUNSEL TO THE ADMINISTRATOR.

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SOUTHERN DISTRICT OF NEW YORK

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# UP Comings & Goings CLOSE



**JEFFREY M. HOMES**

**NEW JOB TITLE:** Baltimore-based senior vp of Aon Risk Solutions' global rail practice.

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**WHAT YOU WANTED TO BE WHEN YOU GREW UP:** A race car driver. Fast cars and fast living looked very appealing to a teenager.

**HOBBIES:** Puttering about the farm, mending fences, moving sheep and wrestling the llama.

**FAVORITE BOOK:** "Atlas Shrugged," by Ayn Rand. (It's a slow read, but what a premise.

**CAN'T-MISS TV SHOW:** "NCIS." (It has) great characters, action and technology. What's not to like?

## Comings & Goings

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# HHS rolls out new application for retiree health reimbursement

3,700 organizations already approved by federal program

By JERRY GEISEL

**WASHINGTON**—Organizations that haven't yet applied to participate in a government program that will provide partial reimbursement of claims incurred by enrollees in their early retiree health care plans will have to use a new application form starting this week, the Department of Health and Human Services announced last week.

Organizations whose applications are postmarked after Nov. 9 must use the new form, HHS said. Those that have not started to complete the prior Aug. 9 application form, and whose application is postmarked after

Nov. 9, also must use the Nov. 2 application.

However, organizations that started to complete the Aug. 9 application, which is no longer available online, may submit that version, provided that it is postmarked no later than Nov. 9, HHS said.

About 3,700 organizations, including private employers, public entities and union funds, have had their applications approved to participate in the Early Retiree Reinsurance Program.

Under ERRP, the government will reimburse organizations with early retiree health care plans for a portion of health care claims incurred by retirees who are at least age 55 but not eligible for Medicare, as well as by retirees' covered dependents, regardless of age.

After a participant in an early retiree plan incurs \$15,000 in

health care claims in a plan year, the government will reimburse plan sponsors for 80% of claims up to \$90,000.

The reimbursement applies to claims that are incurred June 1 or later.

As part of the health care reform law, Congress appropriated \$5 billion for the program, which was seen as a way to encourage employers to continue their early retiree health care plans until at least 2014, when subsidized coverage for the uninsured will be available through newly established state insurance exchanges.

However, researchers at the Employee Benefit Research Institute in Washington have projected that the money will run out sometime next year.

The new application form and instructions are available at [http://www.errp.gov/how\\_to\\_apply.shtml](http://www.errp.gov/how_to_apply.shtml).

## Electronic placements expanded

By SARAH VEYSEY

**LONDON**—The London Market Group said it plans to expand its electronic support of policy endorsements to more classes of insurance business.

The effort follows last month's launch of a pilot program of electronic endorsements in the marine market.

The London Market Group is made up of representatives from

the International Underwriting Assn., Lloyd's of London, the Lloyd's Market Assn. and the London & International Insurance Brokers Assn.

The move "sends a clear message that electronic processes, supporting business placement as well as other parts of the risk life cycle, are an essential part of the market's future," Rob Gillies, head of market processes at the LMA, said in a statement.

The London Market Group will roll out electronic support of endorsements in remaining marine classes and professional indemnity business by mid-summer 2011.

Electronic endorsement support of terrorism, U.S. property and treaty reinsurance will be implemented this fall and remaining classes of insurance business will be added next year, the group said in a statement.

## GENEX: Intracorp deal expands business

CONTINUED FROM PAGE 3

ment revenues.

Intracorp is a unit of CIGNA Corp., which will continue offering health management and wellness programs to employers and other buyers under the CareAllies brand.

GENEX is owned by Stone Point Capital L.L.C., a private equity firm in Greenwich, Conn.

Both companies derive about 80% of their business from workers comp and the rest from disability and auto liability business, a GENEX spokesman said.

One fewer case management and bill review provider will not affect the price customers pay for workers comp services because ample nationwide and regional competitors remain, said Joe Paduda, principal at Health Strategy Associates in Madison, Conn.

"The market is still oversaturat-

ed and oversupplied," Mr. Paduda said.

But GENEX and Intracorp are similar companies, which is why Mr. Paduda said he expects the deal to result in "more talent on the street" as services get consolidated and duplicate staff is reduced.

Provider changes can cause confusion for buyers, said Rebecca Shafer, president of Amaxx Risk Solutions Inc. in Hartford, Conn. There may be differences in risk management information systems and the contacts to whom employers are accustomed could change, she said.

But those differences may be minimal, said Mike Farrand, vp and area manager in Radnor, Pa., for the strategic outcomes practice at Willis Group Holdings P.L.C.

Many GENEX and Intracorp employees have worked at both companies during their careers, so buyers may reacquaint themselves

with familiar faces, Mr. Farrand said.

The deal, however, could encourage more provider consolidation as regional companies attempt to compete against the combined strengths of GENEX and Intracorp, Mr. Farrand said.

The GENEX spokesman said the company is focused on "minimizing (the integration of Intracorp) in every possible way" for customers. Most Intracorp employees, "with the exception of a limited few at the corporate level," will be retained so customer service levels and relationships will be maintained.

Until the integration is completed, services will be provided under the GENEX and Intracorp brands, the spokesman said.

Terms of the agreement were not disclosed, although CIGNA will receive GENEX stock and remain an ongoing GENEX minority shareholder.

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Business Insurance

# Mixed results for employers from ballot measures

By **ROBERTO CENICEROS**

Employers dodged a bullet last week when Golden State voters rejected legalizing marijuana, according to the California Chamber of Commerce.

But to the north, employers who backed an initiative that would have opened Washington state's monopoly workers compensation system to competition from private insurers were defeated at the polls.

More than 58% of voters rejected Initiative Measure 1082, according to the Washington Secretary of State's office. Washington is among four states with a monopoly workers comp system that organized labor and trial attorneys fought to maintain.

In New Jersey, voters also cast ballots on a matter affecting worker injury claims. More than 80% approved amending New Jersey's Constitution to prohibit lawmakers from balancing the state's budget by dipping into funds that pay for worker benefits, including unemployment benefits and the state's Second Injury Fund.

The Second Injury Fund provides payments to workers who are partially

disabled and then experience a subsequent work-related injury, according to New Jersey's Department of Labor and Workforce Development.

Second injury funds encourage companies to hire disabled workers by limiting employers' liability to payments applying only to a worker's latest injury.

Meanwhile, some employers in California said they were breathing easier after nearly 54% of voters defeated Proposition 19, which would have legalized marijuana possession and recreational use. The measure's potential impact on worker safety and workers compensation losses was a concern.

"We have had workers comp horror stories before and I can just imagine what this might have done," said Nancy Madson, owner of Seawright Custom Precast Inc., a Coachella, Calif.-based company that produces decorative concrete products for the building industry.

In addition to worker safety issues, the Sacramento-based California Chamber of Commerce, which led opposition to Proposition 19, said it feared the measure also would have

eroded employers' ability to eliminate marijuana use in the workplace.

The proposition specified that employers would retain existing rights to address consumption of marijuana that impairs an employee's job performance, according to an analysis by the nonpartisan Legislative Analyst's Office in Sacramento.

But under the proposition, employers who conduct pre-employment screening for drugs could not have been able to deny a job to applicants that tested positive for pot use, said Erika Frank, the Chamber's general counsel.

Proposition language concerning employers' ability to fire employees for marijuana use could have resulted in discrimination lawsuits, Ms. Frank added. Proposition 19 would have required employers to show employees were "actually impaired," for which there is no standard, she said.

The measure's defeat was "good news for California employers," Ms. Frank said. "There was more to it than just legalizing marijuana, particularly as it applies to the workplace."

In Washington state, a spokeswoman

for the Olympia-based Building Industry Assn. of Washington said employers can expect a double-digit increase in workers comp premiums.

The association led the bid to bring private workers comp insurers into the state and the spokeswoman alleged that the Washington State Department of Labor & Industries was holding off on authorizing such a rate increase until after the election.

A Labor & Industries spokeswoman said the state agency will announce a rate increase this week.

Opponents that helped defeat the privatization measure also alleged in their campaign statements that costs for small employers would rise because private insurers would be allowed to set their own rates.

The Building Industry Assn. spokeswoman could not say whether it would try again to eliminate Washington's monopoly system.

For now, however, "we are glad the debate is over," the Labor & Industries spokeswoman said. The state's system is not perfect and "perhaps some fundamental changes need to occur," the spokeswoman added.

## Risk: OFC, nat cat changes off agenda

CONTINUED FROM PAGE 1

Kanjorski, D-Pa., as chairman of the committee's Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises. Rep. Kanjorski, who advocated establishing a federal insurance office and was among the strongest backers of the federal terrorism insurance backstop, was one of several congressmen associated with insurance issues who suffered defeat in last Tuesday's voting.

Rep. Earl Pomeroy, D-N.D., former president of the National Assn. of Insurance Commissioners who pushed for pension funding relief as a member of Congress, also was defeated. In addition, Rep. Gene Taylor, D-Miss., a sharp critic of the insurance industry who advocated requiring the National Flood Insurance Program to offer windstorm as well as flood cover, lost his re-election bid.

Although Democrats retained their majority in the Senate, there will be a change at the top of the Senate Banking, Housing and Urban Affairs Committee as well. Sen. Christopher Dodd, D-Conn., chose not to seek re-election. Sen. Tim Johnson, D-S.D., is next in line to assume the chairmanship.

"We expect that Sen. Dodd will be succeeded as chairman of the Senate Banking Committee by Sen. Tim Johnson," Joel Wood, senior vp of the Washington-based Council of Insurance Agents & Brokers, said in an e-mail. "As author of the legislation to create

an optional federal charter for insurers, Sen. Johnson is viewed as very progressive on the insurance regulatory front, and unlikely to salute state insurance regulators."

The changes in Congress will have varying degrees of impact on risk management and insurance issues, according to Washington observers.

For example, supporters and opponents of the OFC say immediate congressional appetite for such a sweeping change in insurance regulation probably is lacking given the time and energy that went into passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Insurers, "having just come through the creation of Dodd-Frank, will in the short term be much more leery of the notion they can get quality free-market solutions out of Washington," said Jimi Grande, senior vp in the Washington office of the National Assn. of Mutual Insurance Cos., which opposes the OFC.

"If the election meant anything, it's certainly going to be a call for less Washington and more control at the state or local levels," said Mr. Grande.

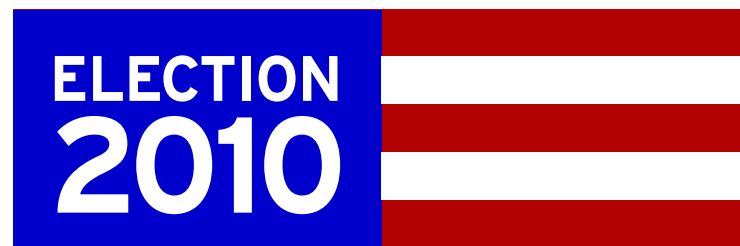
"I don't think Congress will have the appetite to take on another major regulatory overhaul in 2011," said Leigh Ann Pusey, president and CEO of the Washington-based American Insurance Assn., which supports the OFC.

But she said "there are real-world issues out there now," such

as Solvency II. She said the AIA is ready to work with regulators to assure that U.S. companies will be competitive in the domestic and international marketplaces, but "I don't know we'll have an isolated debate on OFC."

She said the AIA's immediate efforts will remain focused on implementation of the Dodd-Frank bill.

"Broadly speaking, the environment for business generally and



insurance specifically will improve as a result of this election," said Ben McKay, senior vp in the Property Casualty Insurers Assn. of America's Washington office. He said the election of pro-business lawmakers "alone means you're going to have more robust oversight of the Dodd-Frank law."

A bill introduced by Rep. Richard Neal, D-Mass., that would change the U.S. Internal Revenue Code to cap the deductibility of reinsurance premiums paid by insurers to their foreign affiliates could re-emerge in the new

Congress, Bradley Kading, president and executive director of the Assn. of Bermuda Insurers & Reinsurers, warned in a e-mail.

"Congress is still revenue-hungry, so action on an amendment incorporating Neal's draconian reinsurance amendment is still a risk to be managed," said Mr. Kading. "The Republican majority in the House will want to look at corporate tax policy generally. The Neal reinsurance tax would be an item they might consider, but the context will be tax policy rather than a revenue grab."

defeat could hamper efforts to have the federal government guarantee debt issued by eligible state catastrophe insurance programs that cover homeowners insurance, as called for in Rep. Klein's Homeowners' Defense Act. Mr. Grande said he hoped changes in Congress "permanently sunk" the idea of "shifting the burden to taxpayers" rather than working to solve some of the natural disaster issues.

"You're less likely to have big government programs like adding wind to flood or creating a federal backstop to (natural catastrophes)," said the PCI's Mr. McKay. He also noted the defeat of Rep. Taylor and of Florida Gov. Charlie Crist, another industry critic: "This election showed that trying to run a campaign by running down or attacking job-creating industry isn't a winning strategy."

Regarding natural catastrophe policy, the AIA's Ms. Pusey said, "I suspect to the extent Congress acts, it will be largely in response to something if they have to. I can't see much appetite for creating new programs that cost money."

She also said the new Congress would be wary of expanding liability in general, because it suppresses business growth.

Victor Schwartz, general counsel of the American Tort Reform Assn. in Washington, agreed that the new Congress would be less inclined to support efforts by the trial bar to expand liability. "One zone of possible tort reform advance is with respect to medical liability if there is a real overhaul of Obamacare," he said of the federal health care reform law.

He also noted that Rep. Klein's



Democrat Dave Jones (right) defeated Republican Mike Villines in last week's voting for California insurance commissioner.

AP PHOTO

## Newcomers join insurance commissioners

**SACRAMENTO, Calif.**—Democrat Dave Jones last week defeated Republican Mike Villines in the race for California insurance commissioner, in one of the few insurance regulator races this year.

Steve Poizner, the incumbent California commissioner, had sought the Republican nomination for governor but lost to Meg Whitman in the primaries.

Meanwhile, in Oklahoma, Republican challenger John Doak defeated incumbent Democratic Oklahoma Insurance Commissioner Kim Holland.

In Georgia, Republican Ralph Hudgens defeated Democratic opponent Mary Squires for the top state insurance regulatory post.

Kansas Insurance Commissioner Sandy Praeger, a Republican, faced no opposition in her re-election.

—By Mark A. Hofmann



Mr. Doak

AP PHOTO



Mr. Hudgens

AP PHOTO



Ms. Praeger

## Health: Murky future for reform law

CONTINUED FROM PAGE 1

seated has promised as much. "We have to do everything we can to try to repeal this bill," he said the day after the elections.

But a repeal bill—which observers say would pass the House easily due to the new political makeup—would face overwhelming odds of winning Senate passage. The GOP likely would lack the 60 votes needed to stop a Senate Democratic filibuster of a repeal bill, observers say.

The GOP would "have to stay united and pick off a dozen or so Democrats" in the Senate to stop a filibuster and that seems very unlikely, said Frank McArdle, a consultant with Aon Hewitt Inc. in Washington.

The odds also may not favor another approach that Republican leaders may take to derail the law. Senate Minority Leader Mitch McConnell, R-Ky., said last week that Republicans would work "on denying funds for implementation." He acknowledged that even if a repeal bill won Senate and House approval, it then would be vetoed by President Barack Obama.

It remains to be seen, though, how successful a funding denial would be. Rules already have been drafted on certain provisions due to take effect on Jan. 1, 2011, for most group plans, such as extending coverage to employees' adult children to age 26 and banning lifetime dollar limits on essential benefits.

In addition, some of the most controversial provisions, such as those that will require all but small employers to offer coverage or pay a \$2,000 per employee assessment and employees to enroll in a health plan or be hit with fines, aren't scheduled to take effect until 2014.

It is unknown whether Republi-

cans would work to stop funding of agencies charged with developing health reform rules and enforcing requirements.

In fact, in 1995, when then-Speaker of the House Newt Gingrich, R-Ga., succeeded in halting funding for numerous agencies, effectively shutting down the federal government, the move backfired politically, with Democrats scoring big wins during the next congressional elections.

"Holding up the federal budget and threatening the shutdown of the government is risky business," said Ed Fensholt, senior vp and director of compliance services

retained, costs could skyrocket. That is because many such individuals might purchase coverage only when they expected to incur big medical costs.

"When you pull out one thing, it all starts to fall apart," said Chantel Sheaks, a principal in the Washington office of Buck Consultants L.L.C.

"Unraveling the law in part is fraught with many practical difficulties," the ABC's Mr. Dennett said.

Still, Republicans and Democrats could reach agreement "on changes around the margins," said Geoff Manville, a prin-



Senate Minority Leader Mitch McConnell, R-Ky., (left) said Republicans would work to deny funds to implement the health care reform law championed by President Barack Obama. The GOP takes control of the U.S. House in January.



AP PHOTOS

with Lockton Benefit Group in Kansas City, Mo.

"The shutdown ended the Gingrich era. I don't think the public wants the government shut down over health care reform," said Helen Darling, president of the National Business Group on Health in Washington.

Working to repeal the most controversial provisions also presents risks. For example, if the individual mandate were scrapped while politically popular provisions such as providing premium subsidies for the lower- and middle-income uninsured were

retained, costs could skyrocket. That is because many such individuals might purchase coverage only when they expected to incur big medical costs.

For example, President Obama last week agreed to consider changes to a provision—staunchly opposed by the small-employer community—that requires employers to furnish 1099 reporting statements whenever they do more than \$600 in business with a corporate vendor. Republicans and some Democrats want the provision repealed.

In addition, there could be agreement in stretching out certain effective dates set in the reform law, Ms. Darling said.

## Two states vote to invalidate health care mandate

*But federal pre-emption means ballot initiatives have no impact on law*

By JERRY GEISEL

In a limited test of public opinion on a key provision in the U.S. health care reform law, voters in Arizona and Oklahoma last week approved ballot initiatives to invalidate a federal requirement that individuals be enrolled in a health care plan, while voters in Col-

orado defeated a similar initiative.

Under the federal health care reform law, effective in 2014, individuals must have health care coverage or be fined, while employers with at least 50 employees must offer qualified coverage or face a \$2,000-per-employee fine.

Arizona Proposition 106, approved by about 55% of voters, would amend the state constitution to bar requirements that would force state residents to participate in a health care plan.

Oklahoma Health Care Freedom Amendment State Question 756, approved by about two-thirds of vot-

ers, would consider any law requiring state residents or employers to participate in a health care plan to be unconstitutional.

Colorado Health Care Amendment 63, rejected by about 55% of voters, would have given state residents the "right of health care choice" and overturn any law that requires individuals to buy health insurance.

While an indicator of voter sentiment, the ballot initiatives would have had no practical effect because federal law pre-empts state law under the U.S. Constitution.

However, several courts have yet to rule on lawsuits filed by health care reform opponents that allege that Congress lacked the authority to impose health care coverage mandates.

Meanwhile, in Massachusetts, where a 2006 law has achieved near-universal coverage by requiring most individuals to have coverage and imposes fines on all but very small employers that do not offer coverage, incumbent Gov. Deval Patrick, a strong proponent of the law, easily won re-election last week. He defeated former health care executive Charles Baker.

## AIG: Big proceeds from AIA IPO, ALICO deal

CONTINUED FROM PAGE 3

Japanese insurance company, AIG said.

Net premiums written for the third quarter increased 6.5% to \$8.6 billion. Chartis' third-quarter combined ratio was 99.3% vs. 105.2% in the prior-year period.

For the nine months, Chartis posted \$2.91 billion in operating income, an 18.9% increase. Net premiums written increased 1.3% to \$24.03 billion. Its nine-month combined ratio was 101.2% vs. 100% for the same period a year ago.

Discussing the results, Clark Troy, Chapel Hill, N.C.-based senior analyst with research and consulting firm Aite Group L.L.C., said they were "not bad. The really high-impact items are obviously the impairment charges" and the deferred tax asset valuation allowance charge.

But drilling down into the operating results of the business units, "there's a dramatic improvement in the (third quarter) combined ratio in Chartis, which obviously speaks well," Mr. Troy said. "Chartis seems to be continuing to garner momentum" and building itself as an independent brand, he said.

However, Cathy Seifert, an equity analyst with Standard & Poor's Corp. in New York, said that while Chartis had top-line growth because of the Fuji Fire transaction, "if you look at underlying, organic written premiums, they were down 4%, which indicates to us, obviously, the market is still competitive, but AIG's results were a little softer than a lot of its peers."

She also said AIG reported adverse loss development, while several other property/casualty insurers "were actually sort of getting a little bit of a tail wind from favorable releases of prior-year reserves."

Meanwhile, AIG last week said it has raised \$36.71 billion to repay the U.S. government through the sale of its American Life Insurance Co. subsidiary and from the initial public offering for AIA Group Ltd. A total of \$27.71 billion of the proceeds were in cash.

The insurer said it expects to use cash proceeds from the two transactions to repay the credit facility extended to AIG by the Fed, and to make payments on other interests owned by the government under terms of the September agreement in principle as part of AIG's recapitalization plan.

"We promised the American taxpayers we would repay them and the initial public offering of AIA last week and the completion of the ALICO transaction move us closer to delivering on our promise," AIG President and CEO Robert H. Benmosche said in a statement.

Treasury said that after the restructuring it will own 92.1% of AIG, which equates to about 1.66 billion shares of the company's common stock. Based on AIG's Oct. 29 market closing price, these shares are worth about \$69.5 billion, which "significantly exceeds" the Treasury's \$47.5 billion cash investment in AIG, Treasury said.

AIG's stock, which closed at \$42.01 a share Oct. 29, closed at \$45.61 last Friday.

Mr. Troy said it is good to see



AP PHOTO

American International Group Inc. raised a total of \$36.71 billion from the recent IPO of AIA Group Ltd. and from the sale of American Life Insurance Co.

things go "according to script." However, he referred to last month's disclosure that Mr. Benmosche is suffering from an undisclosed form of cancer and undergoing aggressive chemother-

apy (BI, Nov. 1). "The next big question," he said, is: "What's going to happen with Benmosche, and what is the impact of the ongoing treatment going to be on his ability to come back?"

## Trade credit MGA opens in London

Equinox run by ex-Atradius exec

BY SARAH VEYSEY

**LONDON**—A London market-based trade credit insurance facility launched last Monday.

London-based managing general agency Equinox Global Ltd. is headed by CEO Mike Holley, formerly director of special products at rival trade credit insurer Atradius Credit Insurance N.V.

The agency offers \$75 million in policy limits with capacity supplied by Aspen Insurance U.K. Ltd., Beazley P.L.C.'s Lloyd's of London syndicates 2623 and 623, Liberty Mutual Insurance Europe Ltd. and Pembroke Managing Agency Ltd.'s Lloyd's syndicate 4000.

On each policy, Beazley will provide 31% of the capacity; Aspen, 30%; Pembroke, 23.25%; and Liberty Mutual, 15.75%.

Equinox began underwriting globally last Monday and said it plans to recruit staff and open offices in the United States, France, Germany and the Netherlands as soon as possible. It plans operations in Asia at a later date.

Equinox Global has received regulatory approval from the U.K. Financial Services Authority and from Lloyd's.

## FDIC: Suits target execs of failed banks

CONTINUED FROM PAGE 1

financially stressed community banks, market experts said.

"Legacy insurers" that have provided D&O coverage for community banks are "very worried" about the FDIC litigation and their aggregate exposure to smaller, financially distressed community banks, said David Payne, national practice leader for Aon Risk Solutions' special situations group, a unit of Aon Corp.

Those insurers are reluctant to provide D&O coverage for such risks, Mr. Payne said. "The end result is that we have clients that have displacement going on in terms of the carrier community, where we need new (insurers) to come in and provide programs at renewal," he said.

At the same time, directors and officers at small community banks have become more concerned about regulator lawsuits than shareholder litigation, sources said.

Consequently, new D&O insurers are needed to step in and pro-

vide coverage for such banks, Mr. Payne said.

The expected FDIC litigation, however, will not affect the broader range of financial institutions seeking D&O coverage, several sources agreed, including community banks that can demonstrate they are financially sound.

"If the institution is healthy, D&O coverage is available," Mr. Boeck said. "It is still more expensive than it was a couple of years ago, but coverage is available. If it's a bank that is in trouble, obviously it gets a lot tougher."

Banks with solid balance sheets that avoided subprime mortgage problems can get broad D&O coverage with attractive pricing, said Kevin LaCroix, a Beachwood, Ohio-based partner with executive liability intermediary OakBridge Insurance Services L.L.C.

"But for those financially troubled banks—actually for financially troubled companies in any sector—it can be very challenging right now," Mr. LaCroix said.

In last week's lawsuit, the FDIC,

**'Obviously, for the most recent bank closures, the FDIC hasn't even had an opportunity to assess whether or not there is a claim there.'**

Kevin LaCroix, OakBridge Insurance Services L.L.C.

as receiver for Heritage, is seeking \$20 million from the former bank's directors and officers. It alleges that the defendants mismanaged Heritage and its commercial real estate lending program over several years, leaving the bank "dangerously overexposed to the volatile CRE market."

The suit alleges claims of negligence, gross negligence and breach of fiduciary duty.

The Illinois Department of

Financial and Professional Regulation closed Glenwood, Ill.-based Heritage in February 2009 and the FDIC was named receiver.

In total, the FDIC recently has authorized legal action against 70 directors and officers of failed banks nationwide, including 11 from Heritage, an FDIC spokesman said.

That is an increase from the 50 directors and officers that the FDIC said it was authorized to sue in early October. The FDIC spokesman also said it is trying to recoup \$2 billion from directors and officers, up from \$1 billion announced in October.

It takes the FDIC up to 18 months from the time a financial institution fails to complete an examination, which is a prelude to authorizing a lawsuit, the spokesman said.

Observers therefore believe the authorization to sue 70 officers and directors stems just from banks that failed during the early days of the financial crisis, so more are on the way.

"I don't take much comfort in the fact that they have announced the 70 number, because that may or may not reflect the total num-

ber of claims they are going to be asserting once they get through all of the failed banks and investigate all of them," Mr. Bailey said.

Sources say more than 300 banks have failed since the beginning of 2008 and still more are expected to close, potentially providing targets for FDIC attempts to collect losses from directors and officers.

"The Friday before last, there were seven bank failures in just one afternoon, so that is going to go on for a while," Mr. LaCroix said last week. "Obviously, for the most recent bank closures, the FDIC hasn't even had an opportunity to assess whether or not there is a claim there."

Meanwhile, factors the FDIC assesses before commencing litigation include whether there is a potential to recover funds from a closed bank's D&O insurer, the FDIC spokesman said.

"If you are going to spend a large portion of money trying to sue individuals trying to recoup money, you want to make sure that you are going to get that amount back and then some," the FDIC spokesman said.

## News In Brief

CONTINUED FROM PAGE 1

billion) in capital invested in 2009 by Warren Buffett's Berkshire Hathaway Inc. The investment was in the form of convertible notes with a 12% interest rate and carried an option to convert to Swiss Re shares after three years. Stefan Lippe, Swiss Re's CEO, said in a statement that the reinsurer's improved capital position allowed it to "reach an agreement to repay Berkshire Hathaway, with no additional charge for bringing forward the repayment date." Swiss Re will post a charge to earnings of around \$1 billion related to the repayment.

### Lloyd's syndicate approved for SCOR

SCOR S.E. has received approval for a new Lloyd's of London syndicate. Syndicate 2015 will have initial capacity up to £75 million (\$1.2 billion). Final arrangements and approval are needed, SCOR said in a statement, but underwriting could begin as soon as Jan. 1, 2011. Whittington Capital Management Ltd. is the managing agent of syndicate 2015. The syndicate's portfolio is to focus on shorter-tail lines coming from markets outside the United States and excludes reinsurance treaty business, SCOR said. This will be the first time SCOR is the exclusive capital provider for a Lloyd's market syndicate.

### Validus Holdings names president

Joseph E. Consolino has been named president of Validus Holdings Ltd., the company said, replacing George P. Reeth, who recently announced his intention to step down. Mr. Consolino will take over his new role as of Nov. 15, Validus said in a statement, and will continue to serve as the Pembroke, Bermuda-based insurer and reinsurer's chief financial officer.

### Former Cooper Gay CEO to join Guy Carpenter

Jim Summers will join Guy Carpenter & Co. L.L.C. as global head of marine and energy specialty, effective in May 2011. Mr. Summers recently resigned as CEO

of Cooper Gay Swett & Crawford Group's Lloyd's of London broker Cooper Gay & Co. Ltd. Toby Esser, CEO of Cooper Gay Swett & Crawford, has assumed the role of executive chairman and CEO of Cooper Gay & Co. until a replacement is found, the broker said in a statement. Cooper Gay (Holdings) Ltd. and Swett & Crawford Group Inc. merged in July.

### Brit names group chief risk officer

Brit Insurance Holdings N.V. has appointed Baldeep Johal to the newly created position of group chief risk officer. Mr. Baldeep joined Brit in 2001 and most recently was group chief actuary. He will report to Dane Douetil, Brit's group CEO. Shane Kingston, an actuary in the Brit's global markets and reinsurance operations, will replace Mr. Baldeep as group chief actuary. Both appointments are subject to regulatory approval, according to the statement.

### Connecticut insurance commissioner resigns

Connecticut Insurance Commissioner Thomas Sullivan has resigned effective Nov. 12. Mr. Sullivan tendered his resignation to Republican Gov. M. Jodi Rell in a letter last week. Mr. Sullivan is joining PricewaterhouseCoopers L.L.P. as a principal in PwC's financial services regulatory practice. He begins Nov. 15 and will work out of PwC's Hartford, Conn., office. Gov. Rell appointed Mr. Sullivan commissioner in 2007. He previously held a number of executive positions with Hartford Financial Services Group Inc.

### VCIA to keep annual conference in Burlington

The Vermont Captive Insurance Assn. will continue to hold its annual conference in Burlington, Vt., because the VCIA board has decided against moving the 2012 conference to Stowe, Vt. The VCIA had explored moving the conference to the Stowe Mountain Lodge, believing that a change in venue could encourage more people to attend what already is the world's largest captive conference. Stowe is well-known for its scenic beauty. But VCIA President Richard Smith said the board decided that the timing was not right to move the conference. Holding the conference in Stowe would have increased the VCIA's costs by at least 20% at a time when the economy remains sluggish, he said.

## Health care: Group seeks to borrow from reform

CONTINUED FROM PAGE 3

the members that the reforms for the public system might not be the same for the private sector. We anticipated the need to align private and public payment strategies," he said.

For example, the Medicare Shared Savings Program included in PPACA will allow groups of providers who voluntarily meet certain statutory criteria, including quality measurements, to be recognized as "accountable care organizations" eligible to share in the cost savings they achieve for the Medicare program. Another provision would allow for Medicare to make bundled payments to providers who coordinate care of certain "episodes," such as joint replacement surgery, including everything from evaluation to physical therapy.

Many private-sector employers also are concerned that providers will try to make up for the cuts in Medicare spending required under PPACA by increasing fees for the private sector.

"Catalyst will provide a mechanism for payment reform efforts outside of Medicare...and to reduce the potential cost-shifting that can occur when Medicare cuts payments to providers," said Ms. Delbanco, who was named CPR's executive director late last month. "Private employers don't want to be the passive recipients of policy that has been made for Medicare. No one wants to be left in the dust."

Andrew Webber, president and CEO of the National Business Coalition on Health in Washington and a CPR leadership committee member, said, "The idea is to

get the public and the private sectors together to send the same signals to the provider community about the incentives in the system. This way Medicare isn't doing something completely different from what the private sector is doing."

CPR will provide employers with the tools and resources to assess the attributes of specific provider markets to determine which payment reforms would be most effective in those locations, Mr. Webber said.

**'With all of the greatest respect of the health care reform act, the cost containment pieces (for the private sector) are not as rigorous as we would like. What this group is doing is totally compatible with the goals of that legislation.'**

Dolores Mitchell,  
Group Insurance Commission in Massachusetts

For example, if Medicare allows for monthly care coordination fees to be paid to doctors who serve as medical homes in a certain community, CPR would provide the contracting tools for the private sector to institute similar incentives, he said. And if Medicare is making bundled, episode-based payments to providers in a given market, CPR will assist private employers in that market in making similar payment arrangements, Mr. Webber said.

CPR also will keep abreast of other payment reform initiatives

occurring around the country, such as Prometheus Payment Inc., a Washington-based nonprofit corporation that developed a model to pay providers based on what it costs to deliver only evidence-based care.

"I view us as a feeder to the CPR that will be incorporated into its tool kits on payment reform," said Dr. Francois de Brantes, executive director of the Newtown, Conn.-based Health Care Incentives Improvement Institute Inc., the umbrella organization for Bridges to Excellence and Prometheus.

Dolores Mitchell, executive director of the Group Insurance Commission in Massachusetts, which provides insurance coverage to some 185,000 state and local government employees, said she decided to join CPR to learn about payment reforms she can implement for her group.

"As a purchaser, I've been interested in the issue of payment reform for a long time," she said. "With all of the greatest respect of the health care reform act, the cost containment pieces (for the private sector) are not as rigorous as we would like. What this group is doing is totally compatible with the goals of that legislation."

Whether providers will be as receptive to the implementation of either public- or private-sector payment reforms is questionable, however.

Dr. Doug Henley, executive vp of the Washington-based American Academy of Family Physicians and a member of CPR's board, said the group has taken issue with some of the payment reforms included in PPACA.

"AAFP believes innovative payment policy ideas require scrutiny before they can be fully embraced by practicing family physicians," Dr. Ted Epperly, chairman of AAFP's board, said in a Sept. 27 letter to the Centers for Medicare & Medicaid Services.

## Laptop: Marsh, Aon settle lawsuit

CONTINUED FROM PAGE 3

Mr. Nicolson also was accused of breaching an October 2009 court order that he must not destroy, tamper with, cancel or part with any equipment or documents related to the case.

In a witness statement that was presented to the High Court in July, Mr. Nicolson admitted that he breached that order and did not tell the truth about when he disposed of a laptop computer that he used to keep in touch with five former Marsh colleagues who

also joined Aon, among other things.

Mr. Nicolson admitted to throwing the laptop into a pond near his home and to disposing of memory sticks that contained personal and Marsh-related data in a river.

## Business Insurance Webcasts & Webinars

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### ***Blueprint for Construction Defects: Managing the Risks and Coverage***

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Contributing: Jeff Casale, Mark A. Hofmann

## Asbestos scare blocks NBA game

Halloween had come and gone, but there was another scare for the New York Knicks—asbestos.

The Knicks were to square off against the Orlando Magic on Tuesday, but the game was postponed due to what workers thought may have been asbestos in Madison Square Garden.

It was just a false alarm, though, and the arena is asbestos-free, according to a statement by Madison Square Garden.

“After receiving assurance from the city and environmental experts regarding the safety of the



AP PHOTO

An worker at Madison Square Garden talks to fans about their tickets after an NBA game was postponed due to an asbestos scare.

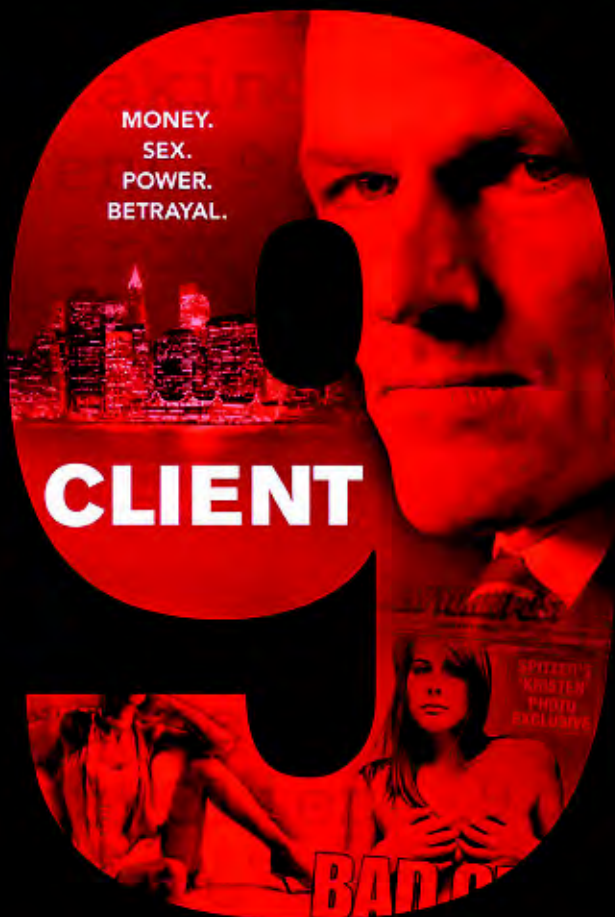
arena for our customers and employees, all events at Madison Square Garden, beginning with Friday night's Knicks game, will go on as scheduled,” Madison Square Garden officials said in last week's statement. “We have been working with the appropriate experts to confirm the arena is safe since debris fell during overnight work Monday.”

Tests by New York's Department of Environmental Protection and independent contractors concluded that no asbestos had been released into the arena.

The Knicks and the Magic were working with the National Basketball Assn. to schedule a makeup game.

# Business Insurance END PAGE

FROM ALEX GIBNEY – ACADEMY AWARD® WINNING DIRECTOR OF TAXI TO THE DARK SIDE & ENRON: THE SMARTEST GUYS IN THE ROOM



THE RISE AND FALL OF ELIOT SPITZER  
YOU DON'T KNOW THE REAL STORY

## Spitzer now on small, big screens

Former New York Gov. Eliot Spitzer is back in the limelight.

Mr. Spitzer who, as New York attorney general, rocked the property/casualty insurance world with his investigations into brokerage and underwriter conduct—particularly regarding contingent commissions—recently became half of the hosting team on a CNN talk show called “Parker Spitzer.”

The show, in which Mr. Spitzer appears with Washington Post columnist Kathleen Parker, hasn't exactly been a ratings powerhouse, but that didn't stop CNN from tapping Mr. Spitzer as an election night commentator last week.

Now Mr. Spitzer is about to hit the big screen in a documentary called “Client 9: The Rise and Fall of Eliot Spitzer,” which opened Friday. The title refers to how Mr. Spitzer was described in the

records of a high-priced call girl ring patronized by the then-New York governor.

The ensuing scandal led Mr. Spitzer to resign in 2008 and basically drop out of sight for a while.

One pre-release review said the documentary “deepens the saga of New York's former governor and attorney general into the paradoxical morality play it really was.” According to the review, which gave the film a B+ rating, the documentary “portrays him as a man brought down by his private peccadilloes—but also by his spiky fearlessness about making enemies.”

The documentary is rated R, which no doubt is fitting given the X-rated activities it chronicles. Box office receipts will tell whether the public continues to be interested in the suddenly ubiquitous Mr. Spitzer.

## WOMAN BURNED BY COURT DENIAL

A New York woman is the latest to allege that she suffered burns when she spilled a cup of hot liquid on herself, but a federal appeals court last week rejected giving her financial balm for her injuries.

The 2nd U.S. Circuit Court of Appeals upheld a lower court's dismissal of a \$3 million lawsuit brought by Rachel Moltner, 76, against Seattle-based coffee chain Starbucks Corp.

Ms. Moltner reportedly burned herself in February 2008 at a Starbucks in Manhattan's Upper East Side when she spilled tea on her leg



and foot while trying to remove the lid from a cup, causing burns on her leg that required a skin graft. During her stay at the hospital, she also reportedly suffered bed sores

and a herniated disc caused by a fall out of bed.

Ms. Moltner accused Starbucks of serving tea that was too hot in a double cup—one cup placed inside another, which she alleged had a defective design. She also reportedly said Starbucks should have warned her that the tea could spill.

The appeals court rejected her case, saying double-cupping is a “well-known” method used in the restaurant and coffee industry “as a way of preventing a cup of hot tea from burning one's hand.”

It's not the first time someone has alleged a restaurant served too-hot liquid. In 1994, a jury ordered McDonald's Corp. to pay \$2.96 million to a New Mexico woman who said she scalded herself with the restaurant's hot coffee. The two parties settled out of court.

## KIDS FACE SUIT FROM GROWNUP

A child riding a bicycle with training wheels might seem like an innocent thing, but a New York State Supreme Court judge is allowing a lawsuit against a 4-year-old girl to move forward.

According to reports, Justice Paul Wooten ruled that Juliet Breitman, then 4, and Jacob Kohn, then 5, and their mothers can be sued for negligence for injuries to 87-year-old Claire Menagh when they were racing their bicycles with training wheels on a Manhattan sidewalk and struck her.

Ms. Menagh was walking in front of a building on East 52nd Street in April 2009 when the children raced their bikes down the street, under the supervision of their mothers, Dana Breitman



and Rachel Kohn, according to reports. One of the children struck Ms. Menagh and, according to the complaint, caused severe injuries.

Ms. Menagh had a hip fracture that required surgery.

She died three months later of unrelated causes, according to reports.

The children and their mothers were sued by Ms. Menagh's estate, which alleged that the parties acted negligently. In response, lawyers argued that Juliet was not “engaged in adult activity” at the time of the accident and was too young to be held liable for negligence, according to reports.

Juliet's lawyer also argued that “courts have held that an infant under the age of 4 is conclusively presumed to be incapable of negligence,” according to reports. Justice Wooten ruled the attorney was correct about the age, but that the girl was just weeks away from her fifth birthday and could be sued for negligence.

The presence of Juliet's mother at the accident had no impact, according to reports. The Kohns were not seeking dismissal of the case, reports said.

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