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SPECIAL REPORT

CAPTIVE INSURANCE

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Intellectual property assets rise as businesses evolve, but insurance seldom tapped

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BUSINESS INSURANCE®

PRESIDENT
Steve Acunto
(Greenwich)
sa@businessinsurance.com

PUBLISHER
Keith Kenner
(Chicago)
kkenner@businessinsurance.com

EDITOR
Gavin Souter
(Chicago)
gsouter@businessinsurance.com

DEPUTY EDITOR
Claire Wilkinson
(New York)
cwilkinson@businessinsurance.com

ASSISTANT EDITOR
Louise Esola
(New Orleans)
lesola@businessinsurance.com

SENIOR REPORTER
Judy Greenwald
(San Jose)
jgreenwald@businessinsurance.com

REPORTER
Angela Childers
(Chicago)
achilders@businessinsurance.com

REPORTER
Matthew Lerner
(New York)
mlerner@businessinsurance.com

COPY CHIEF
John Obrecht
(Chicago)
jobrecht@businessinsurance.com

COPY EDITOR
Brian Gaynor
(Portland)
bgaynor@businessinsurance.com

ART DIRECTOR
Jeremy Werling
(Cincinnati)
jwerling@businessinsurance.com

DIRECTOR OF RESEARCH, PLANNING AND INSIGHTS
Andy Toh
(Chicago)
atoh@businessinsurance.com

MAJOR ACCOUNTS DIRECTOR - NORTHEASTERN U.S. & INTERNATIONAL
Ron Kolgraf
(Boston)
rkolgraf@businessinsurance.com

SENIOR VICE PRESIDENT, BUSINESS DEVELOPMENT
Stephen Acunto
(Princeton)
stephen@businessinsurance.com

HEAD OF SALES, EVENTS
Susan Stilwill
(Nashville)
sstilwill@businessinsurance.com

VICE PRESIDENT OF MARKETING
Brian McGann
(Buffalo)
bmcgann@businessinsurance.com

DIGITAL AD OPERATIONS MANAGER
Jordan Kilty
(Raleigh)
jkilty@businessinsurance.com

DIGITAL MARKETING MANAGER
Jen Jonasson
(Chicago)
jjonasson@businessinsurance.com

DIRECTOR OF MARKETING & EVENTS
Katie Kett
(Portland)
kkett@businessinsurance.com

MARKETING & EVENTS MANAGER
Brittany Collins
(Lafayette)
bcollins@businessinsurance.com

MARKETING & EVENTS SPECIALIST
Beth Wojdyla
(Chicago)
bwojdyla@businessinsurance.com

REPRINT SALES MANAGER
Marie LaFerrara
(New York)
mlaferrara@businessinsurance.com

SUBSCRIPTIONS & SINGLE COPY SALES
membership@businessinsurance.com
954-449-0736

COVER STORY

Despite companies' increasing efforts to value and monetize their intellectual property, interest in IP insurance continues to lag. Experts expect that to change, though, over the next year or two. A particular area of interest is mergers and acquisitions coverage. **PAGE 18**

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As insurance rates increase and capacity shrinks in some lines, risk managers are using existing captives more or considering forming facilities to retain more risk and directly access reinsurance, captives experts say. **PAGE 22**

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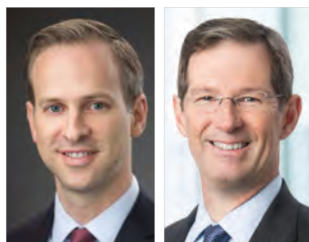

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Stephen Viña of Marsh LLC and Steve Bunnell of O'Melveny & Myers LLP warn of the threats posed by sophisticated 'deepfakes.' **PAGE 31**

VIEW FROM THE TOP

TODD JONES

Todd Jones joined Australian insurer QBE Insurance Ltd. as CEO of its North American operations in New York in October 2019 after working for Aon and Willis Towers Watson. Mr. Jones, who spent almost 30 years as a broker, addresses the distinct challenges of moving into underwriting. He also discusses his goals for QBE North America and the need to move cautiously as some insurers cut back on capacity and exit certain lines of business. **PAGE 16**

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Insurers restrict opioids exposures

BY CLAIRE WILKINSON
cwilkinson@businessinsurance.com

Pharmaceutical companies are facing a broadening range of exclusions in their products and professional liability insurance policies as litigation related to the opioid crisis continues to unfold, experts say.

The expanded coverage restrictions come as insurance professionals look to see how various courts determine to what extent insurance coverage can be drawn on as a source of funding for pharmaceutical manufacturers, distributors and pharmacies facing opioid-related claims.

The products liability market for life sciences companies has changed in the past year and is "continually changing," said Walker Taylor IV, Wilmington, North Carolina-based senior managing director of life sciences for Arthur J. Gallagher & Co. "Oftentimes it changes as a result of class action litigation or an increase or trends in types of claims."

"In the last year, there's obviously been a lot of interest in the press and a lot of tragedy around the opioid crisis. We are seeing exclusions or limitations on capacity and, at a minimum, underwriters are being more careful on a variety of risks," Mr. Taylor said.

Exclusions range from "absolute exclusions against the opioid class of products" to broader exclusions against narcotics that "we think are ill-founded," said Doug Carey, Norwalk, Connecticut-based U.S. life science practice leader for Marsh LLC.

"With major insurers we have most activity with, we have a fairly appropriate narrow exclusion in the areas that we think are of insurers' concern," Mr. Carey said.

Opioid exclusions are "fairly well-established," he said, adding: "We have a firm position about what insurers' posture is going to be and what we think clients' coverage posture should be."

While most insurers "at first blush are attempting to exclude opioids … we've been very successful in being able to negotiate with the marketplace various levels of carvebacks specific to individual clients' exposures," said Aaron Simpson, director of the life science practice at Aon PLC, based in Philadelphia.

"The market will often start with a full exclusion but is agreeable with adequate information and discussion of controls to carving back a level of coverage specific to each client's exposure," he said.

In the past 18 months, products manufacturers and pharmaceutical companies are seeing exclusions that "we've never seen before," said Michael Muglia, Farmington Hills, Michigan-based national underwriting director for Burns & Wilcox Ltd.

Some insurers are issuing endorsements that state the exclusion applies to "future labels determined to be any substance described as opioids or controlled substance," he said.

In doing so, insurers are saying "anything in the future that looks or feels like an opioid or controlled substance, we still don't want anything to do with it," Mr. Muglia said.

"Insurers are trying to control their exposure," he said. Class action exclusions and specific carve-outs for opioids where insurers will cover any product manufactured except for opioids are other changes seen in products and professional liability policies, he said.

While manufacturers and distributors of opioids had coverage in place when the opioid-related claims were filed and reported, today there is no coverage, said Lainie Dorneker, Chicago-based president of IronHealth, a Liberty Mutual Insurance Group unit.

Most life science insurance policies also have a designated ingredients exclusions list for "ingredients that have had problems in the past, like ephedra and hormone replacement therapy. Any time there becomes a major issue in the industry and it's a huge aggregation issue, most companies will put it on their designated exclusions list," she said.

"Depending on the risk, you may be able to get it removed, but it's more customary than not that those designated ingredients are excluded," she said.

Some insurers have introduced absolute opioid exclusions that also have a governmental acts exclusion on policies, Ms. Dorneker said.

"The question is where insurers are putting those exclusions on additional classes of insureds and then what clawbacks they'll give," she said.

For example, in the area of manufacturing defect, it is possible to get coverage, experts say.

"There's a little bit of coverage," said Sandie Mullen, Kansas City, Missouri-based North American broking leader, life science and pharmaceuticals, for Willis Towers Watson PLC.

"If you were a distributor where you don't make the product nor put your name on it, there's a little bit broader coverage there because you shouldn't be responsible," she said.

Meanwhile, pricing is going up in general in the products liability market, though life sciences companies are not seeing the increases that other sectors of the casualty market have, industry experts say.

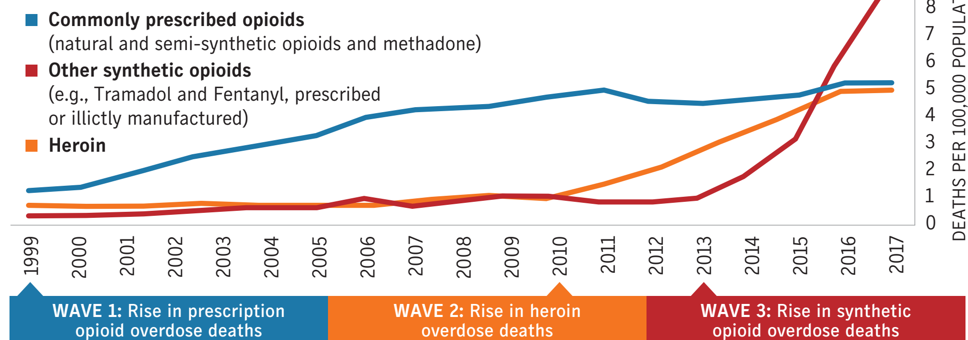
Capacity for the products liability market remains robust, which has limited the impact on the sector as a whole, they said.

"There is some modest rate pressure, but it's not dramatic or severe," Mr. Carey said. "It's been a fairly reasonable and steady market compared to the volatility you're seeing in markets generally in the excess liability, property, and directors and officers sectors," he said.

Marsh LLC clients across the brand, generic sector and clinical trials areas are seeing ranges from moderate 5% to 10% decreases to moderate increases of 5% to 10%, Mr. Carey said.

In the past five to 10 years, the rate environment has been decreasing to flat, Ms. Dorneker said. "This is the first year we're seeing any rate increases at all."

THREE WAVES OF THE RISE IN OPIOID OVERDOSE DEATHS



Source: Centers for Disease Control and Prevention

D&O COVER HIT HARD BY LITIGATION

Pharmaceutical companies are experiencing a "volatile" directors and officers liability insurance market due to increased litigation, experts say.

Opioid exposures play a role, but are not the driving factor, they say.

"It's common knowledge that life sciences companies get hit with securities class action lawsuits and other lawsuits more frequently than the universe of public companies as a whole," said Kevin LaCroix, executive vice president of RT ProExec, a division of R-T Specialty LLC, in Beachwood, Ohio.

In the past 18 to 24 months, pricing and underwriting for D&O coverage for this sector has been affected, he said.

"Just about every company that touched opioids in some way, whether it was a manufacturer, distributor, marketing has experienced a variety of different kinds of litigation, and most of them have experienced D&O litigation," Mr. LaCroix said.

Double-digit rate increases are not uncommon, depending on the individual risk, experts say.

"However, companies that have a track record of getting approvals and are managed well may not be experiencing the volatility of companies that have a higher risk," said Aaron Simpson, director of the life science practice at Aon PLC, based in Philadelphia.

Recent litigation is laying a "road map" for plaintiffs' attorneys and for future litigation, said Michael Muglia, Farmington Hills, Michigan-based national underwriting director for Burns & Wilcox Ltd.

"Right now, it's opioid and controlled substances; it could be heart medicine tomorrow, or any other type of drug. … We're seeing awards in the hundreds of millions of dollars and large punitive damage awards," he said.

Claire Wilkinson

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Jury remains out on social inflation as rates rise after years of decreases

BY MATTHEW LERNER AND JUDY GREENWALD

Social inflation, the term used to describe rising jury awards and settlements, is one of the principal drivers behind recent increases in insurance prices, according to insurers.

After a prolonged period of rate decreases prior to last year, underwriters are imposing rate hikes and cutting back limits in response to escalating claims costs, they say.

Some observers, however, say social inflation is a convenient phrase used to justify higher premiums and that there is little evidence to support insurers' claims.

The term has been used for decades to describe rising liability awards but has been heard more frequently over the past several months. In third-quarter earnings calls last year executives at several large insurers cited social inflation as the cause of increased loss costs, and the term was heard frequently at industry meetings throughout the fall and winter.

At the same time, insurers imposed double-digit rate hikes on numerous accounts and severely cut excess liability limits in several lines, according to various pricing surveys (see related story).

"It's always been the challenge of casualty underwriters to be able to target what the expected trends will be, but now it's harder than ever," said Mike Hudzik, head of casualty underwriting for U.S. and Canada and managing director for casualty underwriting at Swiss Reinsurance Ltd. in Armonk, New York.

"Insurers price risks on historical loss development trends based on what they've seen happen in the past," said Michael Knoerzer, a partner at law firm Clyde & Co. in New York. "If societal trends change — how people feel about litigation or claims or dollars — then those historical trends may not be useful anymore for pricing and underwriting purposes."

> "Insurers price risks on historical loss development trends based on what they've seen happen in the past. If societal trends change — how people feel about litigation claims or dollars — then those historical trends may not be useful anymore for pricing and underwriting purposes."
>
> Michael Knoerzer, Clyde & Co.

Typically, the industry assumes claims costs increase by between 4% and 7% annually, said Donnacha Smyth, president of excess casualty, North America, at Axa XL, a unit of Axa SA He said that "social inflation has greatly accelerated that claims trend" to around 10%.

According to a jury award analysis by Thomson Reuters, in 2010 the average jury award for all liabilities was $575,064; in 2017 it had increased to $1,847,438 (see chart).

While it's difficult to compare recent and older liability payments, because cases are fact specific and many cases are settled without the settlement amounts being disclosed, several recent cases include some significant awards.

In December 2019 a state court jury in Bakersfield, California, awarded Tomasa Cuevas and her son, Alex, who suffered severe brain injuries when their car was hit by a tractor trailer, $70.6 million, according to court papers in *Tomasa Cuevas, et al. v. RAI Transport, et al.* A motion has been filed by the defendant for a new trial in the case.

In July 2019, a judge in California reduced a $2 billion jury verdict against German pharmaceutical manufacturer Bayer AG to $86.7 million in a case in which the company's glyphosate weed killer was alleged to have caused cancer. Reuters reported that the company has appealed or plans to appeal all verdicts against it in glyphosate cases.

New Jersey-based consumer products giant Johnson & Johnson in 2018 was hit with a $4.7 billion jury verdict in a suit alleging its talc product was linked to cancer. The company has appealed that decision.

"One of the big differences we see in this market is that the allocation of negligence is very arbitrary sometimes," said David Perez, chief underwriting officer, North America, for global risk solutions, Liberty Mutual Insurance Co.'s global commercial and specialty lines insurance business in Boston.

"Bodily injury cases have been an area where we've seen a significant increase in the ultimate cost," said Mr. Hudzik of Swiss Re, and not necessarily due to medical costs but rather to "anti-corporate sentiment" and "the feeling somebody has to pay."

It's no longer unusual to see billion-dollar punitive damage awards and compensatory awards "in the mid-eight figures," said Mr. Knoerzer of Clyde & Co.

Tough to prove

Some observers say, however, there is little evidence to support insurers' argument that awards and settlements are rising significantly.

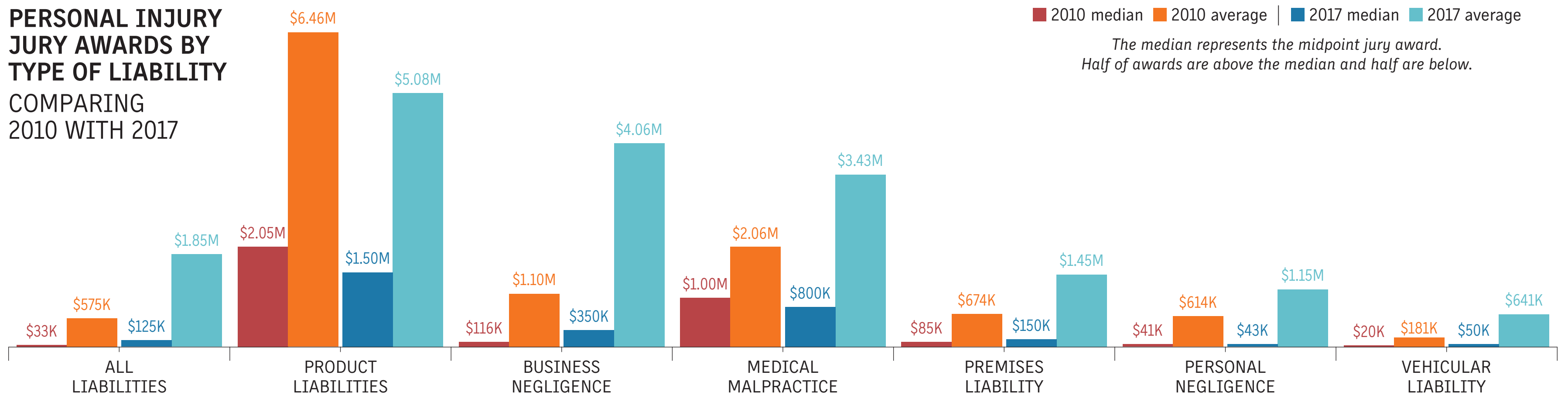
A report on the property/casualty insurance sector issued by Standard & Poor's Corp. in January states that while social inflation "is the new-again buzzword in the P/C sector," there is "limited evidence of liberalization of the tort system expanding the size of the litigation economy."

"If social inflation is leading to a rise in exaggerated damages, then perhaps a more appropriate way to characterize tort reform is tort lethargy," says the report.

Tracy Dolin, New York-based senior director and sector lead, North American insurance ratings at S&P global ratings and one of the authors of the report, said of social inflation, "This is not new. It's the cost of doing business."

S&P is trying to gather data on the issue, she said.

The "very limited" data available is "skewed towards the large nuclear award sizes, and that only impacts a subset of insurers, not to mention a number of those defendants may even self-insure,"



Source: Thomson Reuters

Ms. Dolin said.

"It's all been anecdotal at this point," she said. "We think part of it is an excuse where there has been pricing complacency for a number of years. There has to be a catalyst to raise pricing, and it's not replenishment of capital."

Joanne Doroshow, executive director of consumer rights group the Center for Justice and Democracy at New York Law School, said that while there have always been large outlier jury awards, which are generally later pared down by the courts, there is no overall increase in awards.

"Social inflation is basically a meaningless term," she said. "This is entirely about (the industry) trying to trigger a hard market, and it's just a lot of public relations rhetoric that is not supported by the industry's own data, or by any litigation data that we've seen."

After experiencing average rate decreases for 13 or 14 years, insurers are trying to raise premiums, Ms. Doroshow said.

"They have apparently now decided now's the time to start price gouging businesses again on their rates, and they've made up an excuse," she said.

In earnings calls discussing 2019 fourth-quarter results, some insurer executives appeared to play down the effect of social inflation on current pricing trends.

According to a call transcript, Arch Capital CEO Marc Grandisson said, "While there are some lines of business where the rise in loss costs can be tied to social inflation, in our review, a large component of the stress on the P&C industry's performance is due to prolonged soft market conditions and optimistic loss picks over the last three to four policy years."

Everest Re Group Ltd.'s reinsurance CEO, John Doucette, said: "There's been a lot of talk about social inflation and increased loss trends in casualty. We believe this is a reversion to the long-term mean as opposed to something new. And this reversion to the mean in trend and loss development is something that we have been underwriting for, pricing for and embedding in our trend factors for several years, prior to this being in the headlines now," according to a transcript of Everest Re's earnings call.

Other experts agreed that increased awards have been evident for several years.

"We've been watching this trend. It hasn't just arrived in 2019," said Mr. Smyth of Axa XL. "We've been watching an accelerated claims inflation over the last three to four years."

"We've been talking about it for several years," Mr. Perez said. "Liberty Mutual recognized this awhile ago," he said, noting ongoing, multiyear efforts to return commercial auto liability business to profitability.

"We've been trying to fix that line of business for years, with compounded rate hikes for five or six years and it's still not profitable," Mr. Perez said. "General liability exists in the same tort system; it just has a longer tail and takes a longer time to materialize in value."

> "While there are some lines of business where the rise in loss costs can be tied to social inflation, in our review, a large component of the stress on the P&C industry's performance is due to prolonged soft market conditions and optimistic loss picks over the last three to four policy years."
>
> Marc Grandisson, Arch Capital

Rate hikes intensify as insurers curb excess liability limits

Increased discussions and concerns over social inflation have been accompanied by a rise in insurance pricing in several commercial coverage lines and a reduction in available capacity, particularly for excess liability insurance.

According to industry pricing surveys, rate hikes that began in a few lines two to three years ago expanded into several other areas last year.

Commercial auto liability rates led the increases with average hikes hitting the upper single-digit percentage range in 2017, according to data from the Council of Insurance Agents & Brokers. By the third quarter of last year, commercial property and umbrella liability rates were also increasing in the high single-digit range.

And overall rates accelerated in the fourth quarter of 2019 with average U.S. commercial insurance rates increasing by double digits, according to data from Marsh LLC (see chart).

Some of the biggest increases were in excess casualty and directors and officers liability insurance rates, according to Marsh. The only major line of coverage that was still seeing decreases was workers compensation.

In addition to increasing prices, insurers are reducing available capacity or limits for some lines.

"The industry is responding finally, from a supply and demand perspective, by increasing prices, and we see the supply of capacity reducing in some of the more sensitive areas where typically large capacities are offered," said Mike Hudzik, head of casualty underwriting for U.S. and Canada, and managing director for casualty underwriting at Swiss Reinsurance Ltd. in Armonk, New York.

Most notably, excess liability limits have been reduced and towers of coverage have shrunk, he said.

"We're seeing an adjustment in market pricing because we're seeing this adjustment in the jury perspective," said David Perez, chief underwriting officer, North America, for global risk solutions, Liberty Mutual Insurance Co.'s global commercial and specialty lines insurance business in Boston.

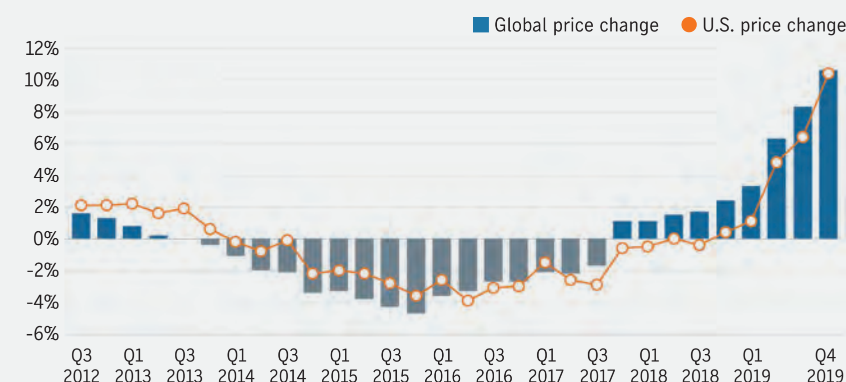
The most affected layer is lead umbrella, where there has also been a reduction in capacity, he said.

"We're not only seeing more and more big losses hit the umbrella, but also more losses which used to be contained in the primary (layer) are trending up into that umbrella. There's not enough pricing to contain both of these. That's why the capacity is retracting."

"The primary layers are probably not impacted to the same degree by social inflation. They just see a frequency of loss," said Donnacha Smyth, president of excess casualty, North America, Axa XL, a unit of Axa SA.

Matthew Lerner

U.S. INSURANCE COMPOSITE RENEWAL RATE



Source: Marsh LLC

OSHA gets tough on repeat offenders

BY LOUISE ESOLA
lesola@businessinsurance.com

Companies with a history of violating federal safety standards face tougher scrutiny after the U.S. Occupational Safety and Health Administration promised to crack down on repeat offenders.

While the move comes as the number of companies with multiple safety violations continues to rise, a recent court ruling expanded OSHA's ability to target corporate offenders.

Employers with a history safety problems are effectively on notice from OSHA to improve their safety protocols, experts say.

OSHA signaled its tougher stance in December when it reported that 2019 showed "a significant increase in the number of inspections" and promised to continue enforcement.

"As part of their general overall emphasis on safety … we are seeing more violations" among companies not complying with the same standards or multiple standards, which includes repeat citations, said Neil Brunetz, of counsel in the Atlanta-based office of Drew Eckl & Farnham LLP, which represents employers.

"Sometimes that can expand to different facilities and different locations; we are going to see more and more as they continue to up enforcement, as they did last year and will continue in the future," said Mr. Brunetz.

In December 2019, OSHA announced a $27,000 fine against San Leandro, California-based Bigge Crane and Rigging Co., the company found liable for a crane that collapsed in a storm in Dallas in June 2019. The company had a history of federal and state citations going back to 1999, with one stemming from a fatal collapse of a crane in Arkansas in 2013. The company, which did not return calls for comment, was also cited in 2014, alleging in part that it failed to follow manufacturer procedures for constructing a crane, as is alleged in the 2019 citation.

"In cases like this crane disaster, (problems are) only identified after workers have been killed, and that's tragic," said David Michaels, an epidemiologist and professor at George Washington University and former assistant secretary of Labor for OSHA.

"Part of the problem is that OSHA fines remain very low, and more importantly, the likelihood of actually catching a violator is very low… OSHA has enough inspectors to inspect every workplace around once every 165 years, and that doesn't count workplaces that are not stationary," like temporary construction sites, he added.

Kim Worl, a Folsom, California-based principal industrial hygienist with Network Environmental Systems Inc., a consulting and training firm, said he expects OSHA to continue to crack down.

"(OSHA) is trying to identify companies that have historically not been serious about OSHA violations," he said, listing a number of top violations that line up with OSHA's own list of most-frequent violations: failing to use fall protection, lack of safety training, and failing to control hazardous chemicals and the related respiratory protections.

Companies with noted "repeat" violations are on the rise, according to Eric Conn, founding partner of Conn Maciel Carey LLP in Washington.

A repeat violation is when OSHA has previously cited the employer for a "substantially similar condition," and the Occupational Safety and Health Review Commission has affirmed the previous citation, according to OSHA.

In 2004, 2.4% of OSHA violations were repeat and — steadily rising since — 5.5% were considered repeats in 2017, according to OSHA data compiled by Conn Maciel Carey.

A review of OSHA announcements during peak construction months of May and June 2019 show that of the 25 companies cited or fined for violations of safety standards, eight were described as repeat violations. And changes underway could put more companies in the repeat category, according to Mr. Conn.

A major decision from the 2nd U.S. Circuit Court of Appeals in New York in 2018 eliminated time restrictions in determining when a violation can be considered repeat. Prior to the Obama administration, OSHA could look back three years, but it later was changed to five years.

The federal appeals court ruled OSHA was not restricted by time, according to documents in *Triumph Construction Corp. v. Secretary of Labor*. "OSHA has an unlimited resource for repeats," said Mr. Conn.

Other changes include OSHA's elimination of a requirement that companies can only be cited for violations at the same location, he said.

"They used to look at individual workplaces as unique," said Mr. Conn. "OSHA blew down that barrier."

The issue of predecessor companies has also widened the net with OSHA now considering an acquired company's history of safety violations as part of the sale, meaning companies can be cited for repeat violations from incidents they were not connected to at the time.

"All of this together, which was done with deliberate intention to cite repeat violations, has resulted in more than double the amount of repeat violations," said Mr. Conn. "On the other side, there are really bad companies out there … but some just get swept up because they are a large employer."

Management needs to pay attention and put resources and support toward safety to avoid becoming "good and close personal friends with OSHA," said Greg Gerganoff, owner of Denver-based Rocky Mountain Consulting Inc., which provides safety consulting services primarily for the oil and mining industries.

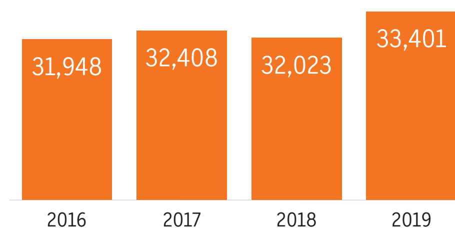
A safe work culture starts at the top and is most effective when leadership listens to its workers on the ground, Mr. Gerganoff said.

Mr. Poague agrees, noting that although it's never fun to ask employees whether what the company is doing to promote safety is right, "that continuous feedback loop" is what's effective.

There's compelling evidence that well-managed companies place an importance on safety and are more productive and profitable, said Mr. Michaels. When companies don't remedy hazards, they're "endangering their most valuable resource — their workers."

Angela Childers contributed to this report.

OVERALL OSHA INSPECTIONS INCREASE



Source: Occupational Safety and Health Administration

OSHA VIOLATOR PROGRAM TURNS 10

The U.S. Occupational Safety and Health Administration's Severe Violator Enforcement Program has been in place since 2010, with the goal of penalizing employers who demonstrate what the agency calls "indifference to the health and safety of their employees" through willful, repeated or failure-to-abate violations.

As of 2019, 677 companies are on the severe violator list, according to an OSHA log.

Two years into the program, the agency reported that the focus led to "a significant increase in follow-up inspections and enhanced settlements." However, the program has faced criticism that it unfairly targets smaller employers — OSHA data reveals that 75% of the employers on the list have fewer than 100 employees.

"The severe violator program — you really don't want to be there," said Greg Gerganoff, owner of Denver-based Rocky Mountain Consulting Inc., which provides safety consulting services primarily for the oil and mining industries.

But companies continue to violate OSHA rules and gamble they won't be caught, he said.

"It's almost like being the matador in the bull ring — let's see if we can dodge the horn today," Mr. Gerganoff said.

The "vast majority" of employers in the severe violator program "are, in fact, severe violators who have endangered the health and safety of employees," said David Michaels, who was assistant secretary of Labor for OSHA when the program started gaining traction in 2012.

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mark.cook@willistowerswatson.com / +44 20 7170 2184

Captive Consulting – Jim Swanke:
jim.swanke@willistowerswatson.com / +1 952 250 3170

Captive Management – Jason Palmer:
jason.palmer@willistowerswatson.com / +1 802 264 9555

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Doctor shortages to hit workers comp sector

BY ANGELA CHILDERS
achilders@businessinsurance.com

With physician shortages affecting health care and the doctor deficit expected to jump, experts say the shortage may be felt more acutely in workers comp, given fee schedule restrictions and additional paperwork.

"Physicians are going to go where it's the easiest to practice and make a living, and generally that's not going to be in the workers comp system," said San Francisco-based Dr. Robert Goldberg, chief medical officer and senior vice president for Healthesystems LLC. With the aging of the general workforce, too few individuals becoming physicians and a growing population, "it's a great formula to make things worse," he said.

The U.S. is expected to see a shortage of up to 122,000 physicians by 2032, according to the Association of American Medical Colleges. The National Center for Health Workforce Analysis predicts that 39 states will experience a shortage of primary care physicians within the next five years.

The extent of shortages may be affected by geographic region, doctor distribution per population and state fee schedules, experts say.

In a study of workers compensation fee schedules in 45 states released in 2019, the Cambridge, Massachusetts-based Workers Compensation Research Institute found that the states' reimbursement rates "varied substantially," noting that where fee schedule rates for physical medicine were close to or below the Medicare rate that "such a level might potentially jeopardize access to quality primary and physical medicine care for injured workers."

"I think one thing you can say for sure is that low fee schedules in and of themselves are going to produce a shortage of treating doctors unless you absolutely have an overabundance of physicians in a specific area," said Dr. Goldberg.

US DOCTOR SHORTAGE PREDICTIONS

- The U.S. could be short as many as **122,000 physicians** by 2032, including up to 12,000 medical specialists, up to 23,000 surgical specialists, and up to nearly 40,000 specialists such as pathologists, neurologists, radiologists and psychiatrists.
- Within the next decade, a third of all active doctors will be older than 65, and more than **40%** of the current physician workforce may retire in the next 10 years.
- Approximately **15,400 new nurse practitioners** and **physician assistants** will be needed each year between 2016 and 2026 to fill new positions and those being vacated.

Source: Association of American Medical Colleges and the National Center for Health Workforce Analysis

In certain specialties, "we're going to see fewer and fewer providers participate if they can get similar reimbursement rates and a lot less hassle through the commercial market," said Tampa, Florida-based George Furlong, senior vice president of program outcomes and analytics for Sedgwick Claims Management Services Inc.

When doctors leave the workers comp system, they often cite too much paperwork, delays in treatment and lack of autonomy in the comp system as reasons, said Dr. Dinesh Govindarao, chief medical officer for Pleasanton, California-based State Compensation Insurance Fund.

There's an increasing challenge to find workers comp providers in specialties such as cardiology, oncology and psychiatry to treat firefighters, police officers and other first responders covered by occupational disease and post-traumatic stress disorder presumption laws, said Mr. Furlong.

"Finding doctors in those places is not something that we've had to do in any kind of large scale, but it's becoming more and more of a need," he said, referring to the steady increase in states passing PTSD legislation. "The psychiatry networks … a lot of times fee schedules don't address their treatments."

While Dr. Goldberg does not see a physician shortage having much effect on minor injuries — where a delay in care is unlikely to affect outcomes or return to work — or catastrophic injuries, which will require immediate treatment, he does see "intermediate injuries," such as a low back injury with radiating leg pain and numbness, as being impacted by a shortage of doctors.

"We know delayed care leads to longer treatment periods, disability periods and higher incidents of chronic injury," said Dr. Goldberg. "If there's a true physician shortage … for workers comp patients it will lead to slower recoveries and longer temporary disability and potentially increased total indemnity costs."

While physician shortage is something every line of business has had to deal with, some states have more shortages in workers comp than others, says Chicago-based Kate Farley-Agee, vice president of network product development for Coventry Workers' Comp Services.

In 2019, New York Gov. Andrew Cuomo passed a law to allow nurse practitioners, physician assistants and several other mid-level health professionals to apply to become authorized workers comp medical providers, which a spokesperson for the New York State Workers Compensation Board said "is expected to bring thousands of new providers into the NYS workers' compensation system, greatly expanding the treatment options available to injured workers."

Texas passed a law in September to allow some mid-level providers to treat injured workers.

Telemedicine is also being used to combat shortages, particularly in rural areas. The State Fund's telehealth options have helped improve access to care, especially in northern California, said Dr. Govindarao.

While telemedicine remains fairly new in workers compensation with little data, Coventry reports high satisfaction so far with its use, said Ms. Farley-Agee.

STATES SEE FEE SCHEDULE INCREASES AS MEANS TO ATTRACT, RETAIN DOCS

States are making plans to help retain and attract doctors to the workers compensation system.

The New York Workers Compensation Board recently increased fee schedule reimbursement amounts and transitioned to a universal medical billing form to reduce administrative burdens and encourage medical providers to participate in workers comp, said a spokeswoman for the board.

California, Nebraska, Ohio, Oklahoma and South Carolina are expected to make fee schedule adjustments this year, and legislation in New Jersey would establish a new medical fee schedule that takes into account geography and provides the option to raise reimbursement if a "maximum fee causes a significant limitation on access to quality health care in either a specific field of health care services or a specific geographic limitation on access to health care."

In 2003, Texas reduced its fee schedule reimbursements in some categories, to the consternation of providers, many of whom threatened to leave the system, said Amy Lee, special adviser and director of research for the Texas Division of Workers Compensation in Austin, Texas.

The fee schedule was changed again five years later with increased rates for primary care and modifications to apply inflation factors, she said. Today, the state reimburses at about 173% of Medicare for in-office non-network medical services, and 210% of Medicare for facility-performed surgical procedures.

While physician deficits exist in rural areas in the state, other changes the state has made, such as standardizing billing and coding and helping doctors understand the treatment guidelines, has helped, she said.

According to Texas data, the state has seen a net increase in physicians treating injured employees from about 17,700 in 2005 to about 18,400 in 2017.

In November, the Auditor of the State of California reported that the California Department of Industrial Relations did not have enough qualified medical examiners to handle caseloads that could lead to delays in injured workers' access to benefits and increase costs to employers. The agency has since announced that it will implement a plan to attract doctors.

Angela Childers

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Nick Frost
President
Davies Captive Management
+1 441 247 8301
nicholas.frost@questgroup.bm

Jeff Kenneson
President
Davies Captive Management
+1 802 371 2202
jeff.kenneson@davies-group.com

NEWS ANALYSIS

Empty shopping malls full of risks

BY JUDY GREENWALD
jgreenwald@businessinsurance.com

FLICKR/NICHOLAS ECKHART

The growing number of abandoned shopping malls create potential liability problems for their owners and operators, including fire, environmental hazards, and vandalism and other crimes, experts say.

Driven at least in part by the increasing popularity of online shopping, more shopping malls are closing, with Credit Suisse predicting in a 2017 report that 20-25% of malls would close over the following five years.

The trend reflects the woes of many retailers that once dominated the malls. Macy's, for instance, which is a frequent shopping mall anchor, said last month it plans to close another 125 department stores in "lower tier" malls, among many other reports of closings by retailers including Sears Holdings Corp., J.C. Penney Corp., Charlotte Russe Inc. and Payless ShoeSource Inc.

While some of the malls will eventually be repurposed for uses as varied as churches, community colleges, dialysis centers, health care facilities and film studios, others will remain vacant for at least some period, which creates liability risks, experts say.

That can lead to increased insurance costs for their owners, although much will depend on the strength of their overall portfolio of risks, experts say.

Mixed-use malls, those that may include a theater, restaurants, apartments and retailers "have really taken over" while the traditional indoor mall "has been struggling for quite some time," said Phillip B. Burke, executive vice president at AmWINS Brokerage of Georgia in Atlanta.

"Abandoned buildings quickly deteriorate if they're not cared for," said Steven D. Sallen, president and CEO of Madden Hauser Roth & Heller P.C. in Southfield, Michigan, who is co-chair of his firm's real estate practice group.

"Regardless of the fact they're vacant, the property owners have a responsibility to maintain the premises, just as they would if they were fully occupied," although they may have a "scaled-down version of what they typically do," said David Colburn, real estate industry lead for commercial accounts at the Travelers Insurance Co. They are not going to be absolved of a sidewalk slip and fall "just because it's vacant property," he said.

"From a liability and property exposure perspective, abandoned malls are a big concern," said Barbara Frare, Chicago-based senior vice president, real estate & hospitality leader, western region, for Sompo International Holdings Ltd. "We're very cautious about insuring those types of accounts."

Large retail shopping centers "have been going through some struggles," and "it's a world of haves and haves not," she said, with some large regional malls, which often have tenants that feature luxury brands, continuing to be highly successful, while others are not performing well. Often, the latter "tend to have anchor stores that are no longer in business, or are limiting their number of stores," she said.

"Those properties, when they reduce their tenancy, or become completely vacant, are difficult properties to provide insurance for, and that is why we approach the large regional shopping centers with caution," Ms. Frare said.

> "Regardless of the fact they're vacant, the property owners have a responsibility to maintain the premises, just as they would if they were fully occupied."
>
> David Colburn, Travelers Insurance Co.

"From a casualty perspective, when a property is vacant, it creates all kinds of concerns with security and with access to the property. It often becomes a target for vandalism for all those features that made it attractive in the first place" such as its water fountains, indoor gardens and playgrounds, she said.

Even if someone is illegally trespassing and gets seriously hurt, such as by falling from a high-level walkway to concrete flooring, "they're still likely to pursue an action against the building owner for failing to safeguard" the facility, she said.

There is also concern for the employees of the property owner or management firm that is working to maintain the property, who can be hurt when a building's features are dilapidated or broken, Ms. Frare said.

There may also be asbestos in building materials, while dry cleaners may leave behind chemical waste, "and then you have historical contamination," said Marcel Ricciardelli, Philadelphia-based senior vice president of the casualty-environmental and engineering division at Allied World (U.S.) Inc.

"Some of these malls in the '90s were built on top of brownfields," and the mall owners were obligated to maintain them, he said. There is also the possibility of an abandoned mall serving as an illegal dumping ground.

"Whenever you have a building without people, there are lots of perils that can cause an underwriter concern," said Scott Wolf, Dallas-based executive vice president at AmWINS Brokerage of Texas Inc. "The biggest one is going to be protection." Underwriters "are going to need more information than they would historically," he said.

Ms. Frare said that if a prospective policyholder owns 50 malls, "and one of them happens to be a large regional mall that is vacant, maybe that's something we can handle within the context of this larger portfolio." And if the policyholder plans to repurpose the property "we want to be aware of that as well," she said.

Conversely, she said, a firm that operates only large regional malls and has a high vacancy rate is "probably not a good

STORE CLOSINGS

Many U.S. retailers that may have been prominent presences in malls have been closing their stores

STORE CLOSURES IN 2019*
9,302

STORE CLOSURES IN 2018
5,844

% INCREASE IN CLOSINGS
59.2%

*As of Dec. 13, 2019
Source: Coresight Research

account for us" and is "not where we're most comfortable." These are subject to an individual risk-by-risk evaluation process, she said.

Vacant mall owners may face higher rates, higher deductibles or reduced coverage, said Michael Heid, Newport Beach, California-based executive vice president, real estate at Alliant Insurance Services Inc.

"I don't think this is really moving the market per se, but it could be impactful to an individual account," he said.

"From a liability and property exposure perspective, abandoned malls are a big concern. We're very cautious about insuring those types of accounts."

Barbara Frare,
Sompo International Holdings Ltd.

Ideally, insurers and policyholders "need to be on the same page," said policyholder attorney Marshall Gilinsky, a shareholder with Anderson Kill P.C. in Boston.

"I've seen it happen where the property goes vacant kind of midstream, where you have a policy that's in fact for a year or more, and the tenants are gone," and when a loss is submitted, the insurance company is "surprised to learn there was nobody there," which creates a potential coverage dispute, Mr. Gilinsky said.

There is "more flexibility around terms and conditions" on the nonadmitted side, which might include some protective safeguard requirements, said Eric Blecker, Hartford, Connecticut-based president of Northfield, a unit of Travelers Cos. Inc.

If a mall is insured on a standalone basis, "most of the admitted markets will have stricter prohibitions than the (excess and surplus lines) markets, which have the ability to write higher hazard risk. They will step in, but the coverage isn't as robust, generally speaking, and it's just there to make sure it's still meeting the named peril requirements," said Alexandra Glickman, senior managing director, global practice leader-real estate & hospitality at Arthur J. Gallagher & Co. in Studio City, California.

"We work closely with carriers and underwriters and inspectors, and try to find out well before if there are concerns," said Greg Maloney, Atlanta-based president and CEO, retail services for Jones Lang LaSalle Inc., a Chicago-based real estate services firm that operates shopping malls, which has not experienced a vacant mall.

COVERAGE, SAFETY NEEDS CHANGE

Property owners that close malls should check their insurance policies immediately, said John H. Fontham, a partner with King & Spalding LLP in Washington, D.C.

That is because the properties could be designated as vacant within 30 days of the change "and that could trigger exclusions to current policies," he said. Operators should then ask about vacant property coverage, he said.

The No. 1 thing to do is to secure the premises, making sure that no one who is not authorized to be there is there, said Barbara Frare, Chicago-based senior vice president, real estate & hospitality leader, western region, for Sompo International Holdings Ltd. "If there aren't people inside, then nobody's going to be falling down," she said.

From a property perspective, Ms. Frare said, "they need to maintain whatever safeguards they have in place," including making sure sprinklers are fully functional; that there is exterior security "that is regularly canvassing the property to make sure all the security is intact"; and that alarm systems are maintained — all of which is expensive for an owner that is not generating revenue from the facility.

If there is a prospect for future use, "the building needs to be preserved and guarded against further damage," Ms. Frare said.

Management needs to continue upkeep of such properties "that stops them from further deterioration and becoming unsafe, or basically collapsed or truly damaged," as well as maintain fire alarms and fire-suppression procedures, said Marcel Ricciardelli, Philadelphia-based senior vice president of the casualty-environmental and engineering division at Allied World Assurance Co. (U.S.) Inc.

Judy Greenwald

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PROFILE: COLOMBIA

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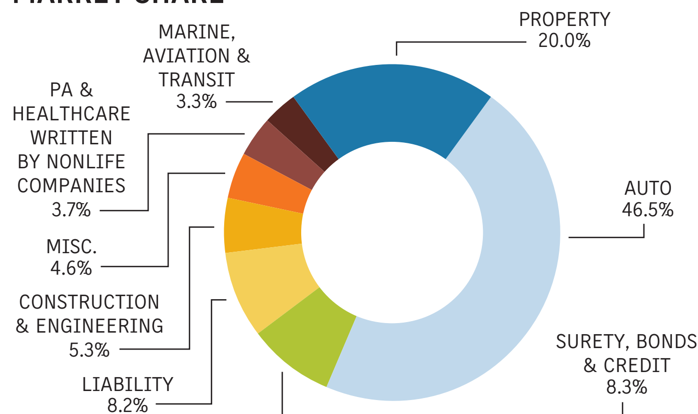
GLOBAL P/C MARKET RANKING

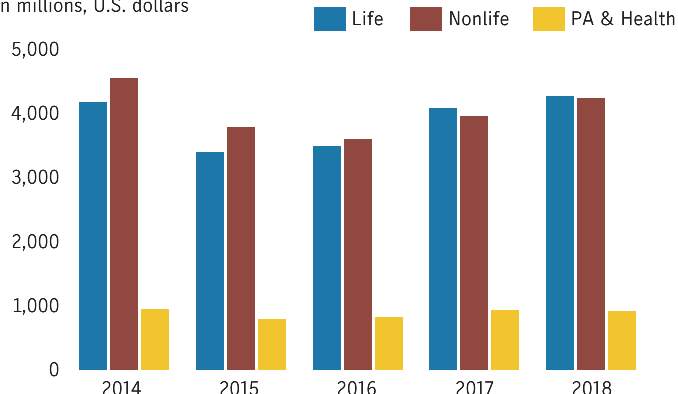
In 2018, Colombia's total market premium income was $8.65 billion. Auto liability, with growth of 6.6%, remained the leading property/casualty class, accounting for 48.3% of premiums. Premium changes implemented in 2017 had an effect, with combined operating ratios for voluntary auto business coming in below 100% in 2017 and 2018 for the first time in at least a decade. Despite pressure from reinsurers since 2017 and a change in the method of calculating earthquake exposures to cover a 1,500-year event, primary property rates did not begin to rise until 2018 or even 2019, when signs of hardening began to show. Directors and officers liability insurance is an area of judicial uncertainty, with the government having overridden claims-made clauses to force payment of insured limits applicable to more than one policy period. Reinsurers generally continue to support the Colombian market.

MARKET SHARE



MARKET GROWTH

In millions, U.S. dollars



Source: Axco Global Statistics/Industry Associations and Regulatory Bodies

AREA

440,800

square miles

POPULATION

49.1

million

MARKET CONCENTRATION

48.6%

market share of top five insurers

2019 GDP CHANGE (PROJECTED)

2.6%

MARKET DEVELOPMENTS

Updated February 2020

- The paralysis of the huge Hidroituango power plant project was confirmed as one of the largest insurance claims worldwide after Mapfre formally acknowledged in September 2019 that cover applied to the 2018 events. The amount of loss reportedly exceeded the insurance limit, which was mainly fronted outside the local market. While the extent of the claims payable across the complicated structure of the program was yet to be determined, in late 2019 it was thought likely to range from $1.4 billion to more than $2 billion.
- In November 2019, Mutua Madrilena announced the acquisition of a 45% shareholding in Seguros del Estado, ranked second in the nonlife market in 2018 and leader in the compulsory auto personal accident class. The deal, which is subject to regulatory approval but is expected to be completed in the first few months of 2020, also envisaged a potential increase within five years to a majority shareholding for the Spanish group.
- An SFC External Circular 25 of Oct. 3, 2019, that authorized decennial insurance — a variety of construction defect insurance — as a new line of business also relieved insurers established for more than one year of the need to submit new products in most nonlife classes for prior approval by the regulator.
- The significant amount of merger and acquisition activity in recent years continued into 2019, with some sources still considering further consolidation of the market or at least more new foreign entrants into existing companies possible.

COMPULSORY INSURANCE

More than 30 classes are compulsory, including:

- Personal accident for victims of motor accidents.
- Liability covering public transportation by land, water, cable cars or rail.
- Liability of port concessionaires.
- Liability relating to aircraft, including drones.
- Liability for damage to the environment for those requiring an environmental license.

NONADMITTED

Unauthorized insurers cannot carry on insurance activity in Colombia, although there is nothing in the law to indicate that insurance must be purchased from locally authorized insurers with some exceptions. This is generally interpreted to mean that insurers can issue policies from abroad with exceptions if approached by a buyer but not by an intermediary.

INTERMEDIARIES

Intermediaries are not permitted to place business with nonadmitted insurers, with the exception of property and liability insurance for international marine, international commercial aviation and space risks. These risks may also be offered within Colombia by nonauthorized foreign brokers. Although the law does not establish any process for obtaining approval, in isolated cases brokers can get approval to place risks with nonadmitted insurers after providing evidence of the risk being declined by the local market.

MARKET PRACTICE

Since 2013, cross-border business is allowed in certain classes, subject to local registration of the insurers involved, and policyholders are also free to purchase many covers directly abroad should they wish. However, policyholders usually still prefer to have a local policy in place, even for risks mainly ceded or wholly fronted abroad.

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NRA charged over gun insurance sales

■ New York regulators charged the National Rifle Association with violation of the state's insurance laws by allegedly acting as an unlicensed insurance broker in marketing and endorsing its insurance programs for gun owners.

The charges filed by New York's Department of Financial Services followed the regulator's $7 million settlement in May 2018 with Lockton Cos. LLC, which administered programs that provided liability insurance to members of the Fairfax, Virginia-based gun rights advocacy group.

According to the notice of hearing and statement of charges, the NRA has worked with Lockton since 2000 to endorse and market gunowners' liability coverage, including the Carry Guard program launched in 2016.

"In return for its participation in these programs, the NRA receives substantial compensation, including in the form of 'royalties' that are based upon a percentage of the insurance premiums paid by its members," the charge statement said.

The payments to the NRA varied between 13.67% and 21.92%, and the organization received more than $1.8 million from Lockton for New York sales between 2000 and 2019, the statement said.

"The NRA's participation in endorsing and marketing the insurance programs, along with its receipt of compensation from those activities, means that the NRA has been acting as an insurance producer, thus requiring it to be licensed and regulated by the department. Despite this, the NRA is not now, and has never been, licensed by the department in any capacity with respect to insurance," the statement said.

The coverage offered, which includes defense costs incurred after the "purposeful use of the firearm," is barred under a provision in New York law stating that, with some exceptions, insurance cannot cover intentional acts or criminal defense costs, according to the statement.

In addition, many of the programs were placed in the excess market in violation of New York's excess lines insurance rules, the charges say.

Lockton and the NRA created the Carry Guard program in 2016 and sold about 680 policies in New York between April 1, 2017, and Nov. 17, 2017, before the program was discontinued in the state, the statement said. The policies were underwritten by an excess and surplus lines unit of Chubb Ltd. Chubb settled charges filed by New York regulators for $1.3 million in 2018.

AIG unit loses ruling on Zillow coverage

■ A federal appeals court overturned a ruling in favor of an American International Group Inc. unit in a coverage dispute with a real estate firm over its professional liability insurance policy.

The U.S. District Court in Seattle had ruled that AIG unit National Union Fire Insurance Co. of Pittsburgh was not obligated to provide coverage to Seattle-based Zillow Inc. in a copyright infringement suit filed against it by Rosemont, Illinois-based VHT Inc., which provides technology and services for marketing real estate online, according to the ruling by the 9th U.S. Circuit Court of Appeals in San Francisco in *National Union Fire Insurance Co. of Pittsburgh, PA v. Zillow Inc.*

The district court had based its ruling on a demand letter VHT Inc. had sent to Zillow before the policy period, holding that the letter, and the litigation, comprised "a single claim that was first made" before the policy period and was therefore not covered by the policy, according to the ruling.

A unanimous three-judge appeals court panel disagreed.

Court rules against livestock worker

■ A Wisconsin appeals court ruled that a livestock worker who was gored by a bull and fell into depression because of his injuries can't sue his employer's workers compensation insurer for negligence over a denial of antidepressants, which he said led him to attempt suicide.

Following his 2012 injury, the man was prescribed antidepressants to treat depression caused by the incident. In May 2015, he attempted to refill his prescription, which was "initially rejected" by the Continental Indemnity Co., which eventually agreed to cover the cost after a phone call from the pharmacist. In June, while trying to refill his prescription, the same denial occurred. Yet this time when pressed, Continental did not approve payment for the drug, according to documents filed in the Court of Appeals of Wisconsin, District III in Wausau.

The man said he "could not afford to purchase the medication on his own" and one month later he shot himself in the head. Surviving his suicide attempt, in 2017 he filed a lawsuit claiming the insurance company had been negligent, documents state.

A circuit court subsequently denied summary judgment to the insurer Continental, which had argued that the man's injury and mental injury fell within the parameters of workers compensation.

The appeals court reversed, stating that the issue should have stayed with the state's workers compensation system, which has procedures for handling benefits denials.

School worker wins disability retirement

■ The Supreme Court of Hawaii unanimously ruled a school cafeteria worker diagnosed with various work-related injuries is entitled to service-connected disability retirement benefits.

In *Quel v. Board of Trustees, Employees Retirement System*, the Supreme Court vacated an appellate court's decision to deny the worker benefits on the basis that the risks she faced were not different than those in most other occupations.

Debbie Quel had been an elementary school cafeteria helper for nearly two decades, and her daily duties included lifting heavy trap doors, scooping rice for 250 trays, pinching dough, peeling potatoes, cutting vegetables, opening numerous cans with a manual can opener, cooking vats of rice in the oven, carrying heavy boxes of foods and serving meals.

She said the school did not have equipment common to other school cafeterias — such as rice cookers, electric can openers and machines for cutting bread and vegetables — which increased the repetitive labor she was required to perform.

The court held that the cumulative, repetitive work performed by Ms. Quel, "especially without the proper equipment, which led to the serious injuries … requiring multiple surgeries to her shoulders, wrists, fingers, and thumb, and resulting in her permanent incapacity for duty, is not a risk common to employment in general."

DOCKET

DEPUTY IN SHOOTOUT GRANTED PTSD COMP

A sheriff's deputy who had a gun aimed at him, and who in turn with his partner was able to kill the gunman, is eligible for workers compensation for his post-traumatic stress disorder, an appeals court in Arizona ruled. The decision overturned an earlier decision by the Industrial Commission of Arizona that denied the Gila County Sheriff's Office deputy workers comp benefits after deeming his experience in the June 2017 shooting within the parameters of his expected job duties. The appeals court said the earlier ruling erroneously focused on the nature of the event, rather than the nature of the stress.

EMPLOYED AMPUTEE OWED BENEFITS

A man who lost both his feet after being electrocuted at work is entitled to permanent disability benefits despite finding a higher-paying full-time job. In *Wasatch Electric Dynalectric Co. v. Labor Commission*, a three-judge panel of the Utah Court of Appeals unanimously held that the worker's former employer must continue to pay benefits even though he has gainful employment. The court noted that Utah law has an exception for workers who have lost limbs or eyes in a workplace accident and considers such workers permanently disabled and entitled to permanent total disability benefits even if they are able to return to work.

CLEVELAND'S COMP CLAIM REJECTED

The city of Cleveland will have to pursue its claim that it was overcharged $4.5 million by the Ohio Bureau of Workers Compensation through the Ohio Court of Claims after the state's high court ordered the dismissal of its case. The state Supreme Court of Ohio in a 6-1 decision vacated an award of unpaid premiums to Cleveland and remanded the case to the Cuyahoga County Court of Common Pleas with an order of dismissal.

VIEW FROM THE TOP

Todd Jones joined Australian insurer QBE Insurance Ltd. as CEO of its North American operations in New York in October 2019. A longtime brokerage executive, he began his insurance career at Johnson & Higgins, then spent 10 years at Aon PLC prior to joining what is now Willis Towers Watson PLC in 2003. After specializing in management liability, his responsibilities broadened as his career progressed at Willis Towers Watson, rising to global head of corporate risk and broking in 2016. Recently, Mr. Jones spoke with *Business Insurance* Editor Gavin Souter about moving from broking to underwriting, his goals for QBE North America and changes in the property/casualty insurance market. Edited excerpts follow.

Todd Jones

QBE NORTH AMERICA

Q What's the difference between working at a broker and underwriter?

A Many things. I spent almost 30 years as an insurance broker, and I do think with that perspective of serving clients directly and managing teams that serve clients, you develop a point of view on the carrier community. I have always been intrigued with the capital providing side of the business, both the concept of how to manufacture product along with pricing and customer service strategies. So, I've had a fascination with what it would take to lead a world class insurance company.

There are clearly some distinct differences. One is that when you make a mistake it can stay with you for quite some time. I come from a world where if you are not making mistakes you are not trying hard enough. In the brokerage world mistakes live for a period of time and then they go away — that might be a quarter, or it might be a year — but there would be a life span to it. On the carrier side, what you quickly discover is that mistakes can linger and linger for years. As a result, that really puts a premium on quality decision-making, and speed and agility to course correct when things don't go as you intended.

Q What has been the strategy at QBE?

A The organization in North America has gone through a significant amount of change in a relatively short period of time. There were a series of inorganic activities over many years that led to the creation of QBE; then there were some divestitures and rightsizing, so there was a lot of growth and pulling back. Starting with Pat Regan's arrival (as CEO of the parent company) in early 2018, the company did a tremendous amount of work in really zeroing in on strategy and on how to run a more disciplined organization — know the areas where we want to compete and feel as though we have a right to compete when in those different businesses and geographies. So, there's been a great deal of work bringing clarity around that strategy and a real level of focus. I'm coming into this very much midstream not only in North America but globally, and it's been terrific to see the progress.

Q What is the vision going forward in North America?

A We operate essentially in three businesses. We operate a crop business, which is very high performing, and we continue to see opportunities to take market share and expand client relationships in that business. Our second business is alternative markets, which is our programs business, and we are very happy with the programs that are currently operating and see lots of opportunities to grow those programs, onboard new programs and have product extensions in our existing program relationships.

The third business is specialty and commercial, and that is really a collection of a number of different businesses that includes accident and health, aviation, transaction liability, professional liability, trade credit, surety and other property/casualty. All those businesses have lots of opportunity for scalable growth.

Q Are there any areas you want to get in to?

A I get that question a lot. One of the things that really attracted me to QBE is that I think they had a sound strategy and they knew the businesses and geographies where they wanted to compete. Where I felt I could really help is in the execution of that strategy, so it's probably less about where we are not today and more about leveraging where we are. After getting a level of scale and performance in these businesses, I would absolutely see a point in time when QBE in North America would look to expand out or expand in different areas where we think there's an interesting market and QBE can have some relevance as a competitor.

Q What difference does it make being owned by an Australian parent?

A One thing is that being Australian listed, we do not issue quarterly results, we issue half-year results, and in some respects that can be really helpful in terms of your level of patience and how we think about investing and taking different risks or different bets as a business.

Q What about trends in the wider market, from your perspective?

A I think you'd describe it as in transition and trying to find a better rhythm both from an underwriting and pricing perspective. Clients are obviously undergoing a lot of change as the market evolves and how they manage through that within their own organization can be really challenging and so how we contribute to taking some of the anxiety out of that process is really important. But the good news is that insurance continues to play such a critical role in the global economy.

Q There seems to be a fair amount of disruption in the market, do you see opportunities in that disruption?

A When folks are cutting back on capacity or exiting certain lines of business there is a void that's naturally created and an opportunity for somebody to step into that void. But you have to ask yourself, "Why are people exiting certain classes, and why are they cutting capacity?" My guess is that if it were a profit-making enterprise or a sustainable business, we wouldn't see these dynamics. The real challenge isn't jumping in where you see a void, it's where you see a void understanding what the right void is to jump into and what is the disciplined way of participating in that dislocation, or not. One thing I've learned in my tenure in this industry is that change presents opportunity and this business, as it continues to evolve and change, can present lots of opportunities, but the trick is making sure you take the right opportunities and the right bets.

In the broker's world mistakes live for a period of time and then they go away — that might be a quarter, or it might be a year — but there would be a life span to it. On the carrier side, what you quickly discover is that mistakes can linger and linger for years.

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COVER STORY

HOW TO PROTECT THE INTANGIBLES

Intellectual property assets grow in value, but appetite for insurance coverage lags

MATTHEW LERNER
mlerner@businessinsurance.com

Despite increased inquiries and a few sales, and the growing interest in the valuation and monetization of corporate intangible assets, the market for intellectual property insurance has yet to reach expected growth levels, market participants say.

Most experts, however, anticipate more uptake in coverage in the next year or two, and investment in the sector continues.

"We're seeing a little more inquiry, but we're not seeing the uptick in binding like we thought," said Manny Cho, executive vice president, executive lines for Risk Placement Services Inc., the Rolling Meadows, Illinois-based managing general agent/underwriting manager.

"For the small and medium-sized enterprises and middle-market firms, we're just not seeing the increase in buying," he said.

> "We're reading the tea leaves and think through the course of 2020 and into 2021 we are expecting an uplift in new business."
>
> Matthew Hogg, Liberty Specialty Markets

Over the past few years, several insurers, brokers and others have increased their intellectual property insurance staff and offerings as intangible assets – such as patents, trademarks, copyrights and know-how – make up an increasing proportion of companies' overall assets. According to one widely quoted estimate, intangible assets make up more than 80% of the assets of companies in the S&P 500.

"I really wouldn't say submissions have gone particularly up or that there has been a strong appetite by business to pursue intellectual property coverage," said Matthew Hogg, intellectual property specialist for Liberty Specialty Markets, a London-based unit of Liberty Mutual Insurance Co. However, "the market continues to help clients think about new ways to insure intellectual property-related exposures," he said.

Liberty Mutual recently brought on an additional intellectual property underwriter in London and still expects growth, Mr. Hogg said.

"We're reading the tea leaves and think through the course of 2020 and into 2021 we are expecting an uplift in new business," he said, adding that "the training and development of the broking community is improving all the time."

"That education part is absolutely critical, both on the broker side and the client side," said Paul King, Dallas-based senior vice president and national technical director for the executive and professional risk solutions practice at USI Insurance Services Inc. of Valhalla, New York.

Four policies have been bound and two more are expected in the first quarter of this year under a proprietary policy created by Marsh USA Inc. and Ambridge Partners LLC last year, said Jason Sandler, vice president in Marsh USA's FINPRO

See **INTANGIBLES** page 21

ROLE OF INTELLECTUAL PROPERTY IN M&A DEALS EVOLVES

A growth area for the intellectual property insurance market is the purchase of coverage in connection with mergers and acquisitions, experts say.

"I do think there's an investment side spurring a lot more activity in this space," said Manny Cho, executive vice president, executive lines for Risk Placement Services Inc.

Intellectual property insurance is increasingly being sought and folded into representations and warranties coverage, an area designed to cover alleged false claims or incorrect information provided during M&A deals.

Jason Sandler, vice president in Marsh USA's FINPRO practice in New York, said that when Marsh and Ambridge launched their IP Protect product in March 2019, "we thought it would make sense both as a deal facilitation product and also outside the context of a merger and acquisition and transaction environment."

Stand-alone intellectual property coverage can be added to existing representations and warranties coverage in a transaction to ensure intellectual property issues are covered.

The M&A portion of the intellectual property insurance market is a "material piece" of the business, according to Paul King, senior vice president and national technical director for executive and professional risk solutions practice at USI Insurance Services Inc.

"It's certainly a material part of the market and will increase as more and more companies look to monetize their intellectual property and look to do deals," Mr. King said.

He added that with more private equity funding becoming available, "there are going to be more deals done, and reps and warranties will help get those deals done."

Matthew Lerner

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SUSAN STILWILL
HEAD OF SALES - EVENTS
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sstilwill@businessinsurance.com

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MAJOR ACCOUNTS DIRECTOR, EASTERN US & INT. | Ron Kolgraf | 508-243-2690 | rkolgraf@businessinsurance.com
HEAD OF SALES – EVENTS | Susan Stilwill | 312-833-4099 | sstilwill@businessinsurance.com

INTANGIBLES

Continued from page 19

practice in New York. Some two dozen more submissions have been quoted across a range of industries, including financial institutions, consumer products and software production, he said.

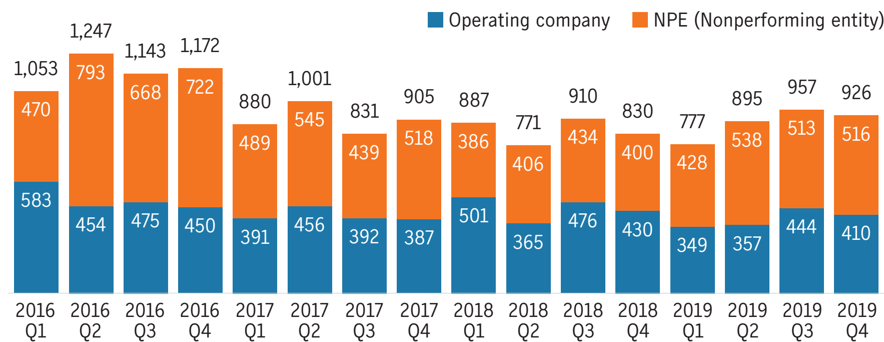
Interest is roughly split between companies seeking coverage during mergers and acquisition and non-M&A clients, Mr. Sandler said. (see story page 21).

specialty lines insurance policies. Businesses that buy or are considering intellectual property coverage are seeking clarity of coverage through stand-alone policies, she said.

"Companies and policyholders are demanding more separate coverage for intellectual property so as to not have any potential for confusion and also to preserve limits they might have in other policies," Ms. Hawkinson said.

Intellectual property insurance sales may also be hampered by a somewhat arduous submission process, according to Mr. Cho.

DEFENDANTS ADDED TO LITIGATION CAMPAIGNS — BY QUARTER



Source: RPX Corp.

The majority of intellectual property coverage is defensive in nature, designed to cover the costs of defending against allegations of infringement.

USI's Mr. King said that while there is increased interest in the coverage, prospective buyers may be slow to purchase due to the complexity of intellectual property and related coverages.

"It's a wide-ranging threat that can be addressed in many ways," he said. In addition to stand-alone products, such as those from Ambridge and Liberty Mutual, coverage for intellectual property exposures can be triggered in cyber policies and professional liability coverages.

"It is a multichannel, multifaceted and class-of-business neutral type of exposure that can hit multiple different policy types and trigger different coverages," he said.

> "Patent and trade secret coverage typically fall outside media liability and existing policies."
>
> Manny Cho, Risk Placement Services Inc.

Some intellectual property exposures are not covered in traditional policies, Mr. Cho said. Patent and trade secret coverages typically fall outside media liability and other existing policies, he said.

"Historically, a lot of insurance policies would not provide coverage for patent infringement or trade secret misappropriation," said Julie Hawkinson, a partner in Los Angeles with Atheria Law P.C., which represents insurers with respect to

"The process is lengthy," he said, with attorneys used by underwriters in the process to help calculate the chances of being sued.

RPX Insurance Services LLC in San Francisco, a wholly owned subsidiary of RPX Corp., has shortened the process for buying intellectual property coverage to defend against suits from non-performing entities. NPEs, as they are known, are financial entities that buy patent portfolios for the purpose of launching infringement lawsuits against companies that allegedly use the patented technology as opposed to employing the patents, Mr. Cho explained.

RPX can provide an online quote in a few minutes for intellectual property cover against NPEs, also known as "patent trolls," Mr. Cho said, adding that broader cover will likely involve a longer process.

RPX Insurance Services began underwriting and issuing policies on behalf of Great American E&S Insurance Co. in April 2018 under a limited binding authority agreement. RPX says 2019 NPE district court filings increased 22.7% over 2018, while operating company litigation fell by 12%.

Risk managers should become more involved in intellectual property stewardship for their organizations, said Mr. Hogg of Liberty Special Markets.

"All too easily (risk managers) have left it to the legal team, but the legal team are not looking at the entire risk environment of an organization or the total cost of risk," Mr. Hogg said, adding that lawyers play more of a "guardian role with respect to intellectual property exposures."

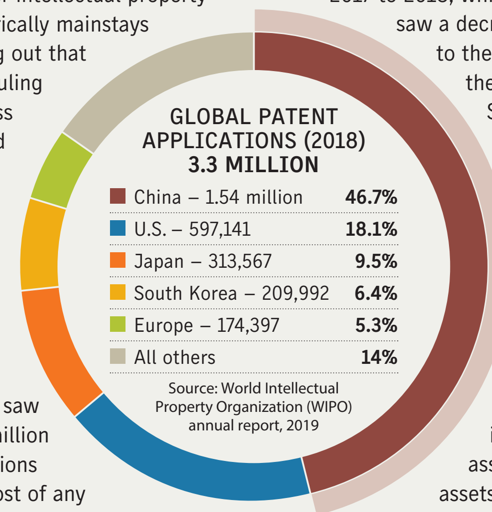
"Why do we continue to say, 'Everything is under control, our law firm is on it?'" he asked.

INNOVATIVE ASSETS ON THE RISE

The creation of intellectual property assets worldwide continues to grow, as does interest in the valuation and monetization of those assets.

There were 3.3 million patent applications filed in 2018, up 5.2% compared with 2017 and marking a ninth straight yearly increase, according to the most recent World Intellectual Property Indicators report from the Geneva-based World Intellectual Property Organization.

A trend affecting intellectual property coverage is that "industries where patents or other intellectual property were not historically mainstays are now finding out that technology is ruling the world across the board," said Jason Sandler, vice president in Marsh USA's FINPRO practice in New York.



China's intellectual property office saw a record 1.54 million patent applications in 2018, the most of any nation and almost half of the global total, the report said, "similar in magnitude to the combined total of the offices ranked two through 11."

The United States was second, with 597,141 patents, followed by Japan (313,567), South Korea (209,992) and the European Patent Office (174,397).

Efforts to more fully realize the value of patents have increased over the past five years, as "some entities are trying to evaluate their assets under their patent portfolios and monetize them," said Manny Cho, executive vice president, executive lines for Risk Placement Services Inc.

The intellectual property budget for just over 40% of responding corporate intellectual property heads rose from 2017 to 2018, while just under 5% saw a decrease, according to the Report of the Economic Survey from the American Intellectual Property Law Association.

"We definitely have seen a slight uptick in people considering intangible assets over fixed assets as potential loan securitization," said Matthew Hogg, intellectual property specialist for Liberty Specialty Markets, a London-based unit of Liberty Mutual Insurance Co.

Matthew Lerner

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IN THE SUPREME COURT OF BERMUDA — **2007: No. 324**
COMMERCIAL COURT
COMPANIES (WINDING-UP)

IN THE MATTER OF
LIGHTHOUSE INSURANCE COMPANY LIMITED – IN LIQUIDATION
AND IN THE MATTER OF THE COMPANIES ACT 1981
AND IN THE MATTER OF THE INSURANCE ACT 1978

NOTICE TO CONTRIBUTORIES AND CREDITORS OF FIRST MEETINGS
(Under the Order for winding-up the above named Company dated the 15th February, 2008)

NOTICE IS HEREBY GIVEN that the first meeting of the Contributories of **Lighthouse Insurance Company Limited** (the "Company") will be held on the **23rd March, 2020 at 10:30 a.m. (Atlantic Time)** and the meeting of Creditors will follow at **11:30 a.m. (Atlantic Time)** or soon thereafter at the Office of the Official Receiver on the 4th Floor, Government Administration Building, 30 Parliament Street, Hamilton HM 12, Bermuda.

Proof of Debt forms and Proxy forms to be used at the meetings have been mailed to all known Contributories/Creditors. If you believe that you are a contributory or creditor of this Company and have not received Proof of Debt and Proxy forms, please contact Ms. Emily Lo by email at eplo@gov.bm or by phone at (441) 297-7578 for the relevant forms. All forms must be lodged with the Official Receiver's Office of Bermuda by **12 noon (Atlantic Time) on the 18th March, 2020**.

Dated this 1st day of March, 2020

Kenneth Joaquin
Official Receiver and Provisional Liquidator of Lighthouse Insurance Company Limited

SPECIAL REPORT

CAPTIVE INSURANCE

Rate hikes put captives on course for growth

INSIDE

EMPLOYEE BENEFITS

More employers expand list of benefits exposures covered in captives. **PAGE 24**

REINSURANCE

Capacity tightens as consolidation cuts number of big reinsurers looking to cover captives. **PAGE 26**

RANKINGS & DATA

Business Insurance's 2020 rankings of the top captive managers. **PAGE 28**

BY GAVIN SOUTER AND CLAIRE WILKINSON

The hardening commercial insurance market is driving more interest in captives as policyholders review their options, captive experts say.

With insurance rates increasing and capacity shrinking in some lines, risk managers are using existing captives more or considering forming facilities to retain more risk and directly access reinsurance, they say.

As a result, captive managers and regulators expect an uptick in captive formations in 2020, despite a fall in worldwide captive numbers last year.

The number of captives licensed fell 3.5% to 6,359 in 2019, according to *Business Insurance*'s latest ranking (see chart page 28). Seven of the 10 largest captive domiciles reported a reduction in captive licenses compared with 2018.

For several years previously, captive experts said falling commercial prices led to fewer captive formations, and while prices in some lines of commercial coverage started turning in 2018 and more lines have seen increases since last spring, captive formations often lag price hikes by several months.

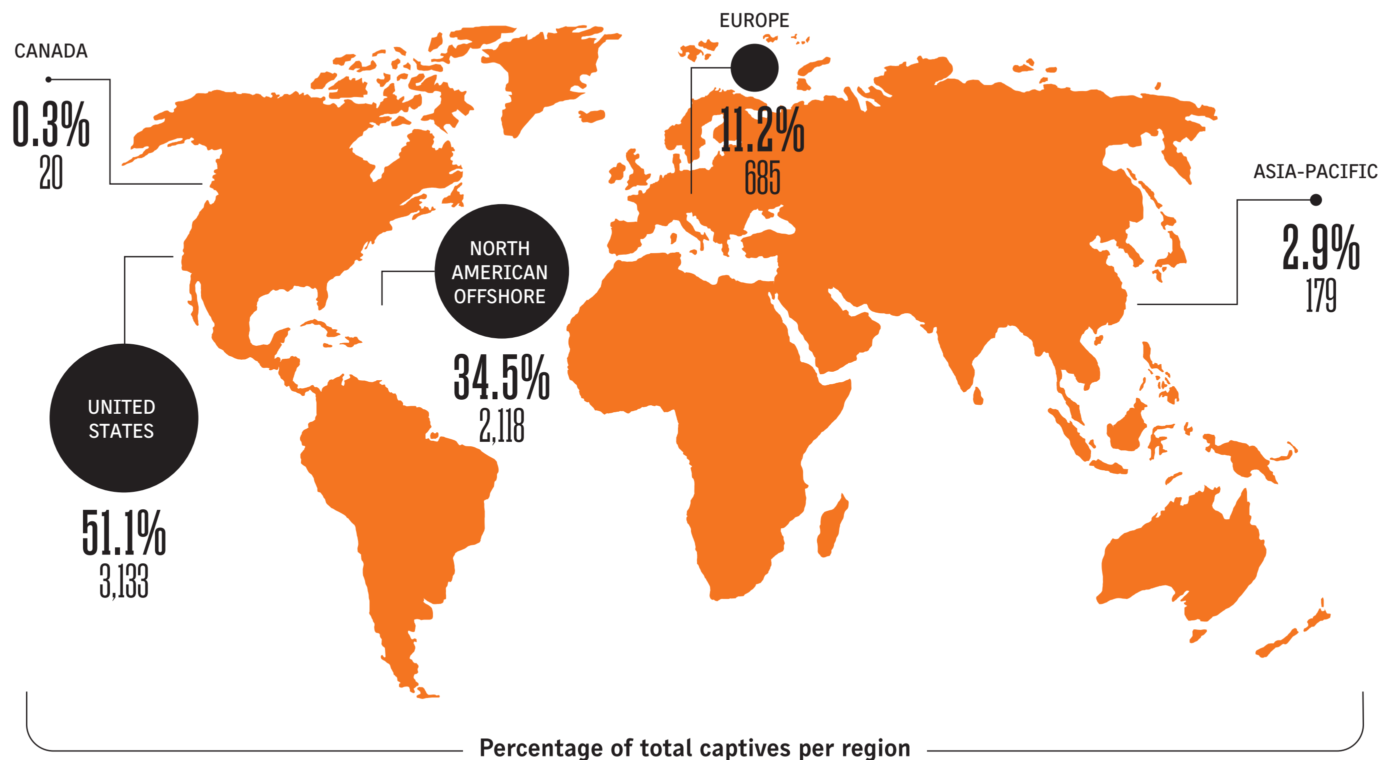
Court victories by the IRS against a handful of captive owners electing to be

ONSHORE/ OFFSHORE

BY THE NUMBERS

There were 6,135 captives in 2019, not including microcaptives, series captives, or individual cells or cell members in protected cell companies.

Source: *BI* survey



taxed under Section 831(b) of the tax code and legislative changes also discouraged formation of microcaptives, they say.

"We've seen a lot of activity in the past 12 months for all the classic reasons," said Nick Dove, chairman of Davies Captive Management in Bermuda, a unit of Davies Group Ltd.

Commercial policyholders facing price increases are turning to captives to increase deductibles and self-insured retentions, gain direct access to reinsurance capacity and take more control of their risks, he said.

"Captive utilization has definitely been affected by the hardening insurance market," said Nancy L. Gray, regional managing director, Americas, at Aon PLC in Burlington, Vermont.

Many policyholders want to take higher deductibles or self-insured retentions in response to the changing market, particularly on property exposures, she said.

While there is an increased interest in forming captives, existing captive owners who benefited from the prolonged soft insurance market are comfortable taking more risk in their captives, Ms. Gray said.

> "Sometimes we're being brought in at the right time, sometimes we're being called because they're in the middle of or close to a renewal."
>
> Michael Serricchio, Marsh Captive Solutions

"In the last year, we've been busier responding to inquiries by companies of all sizes in all industries," said Michael Serricchio, a managing director with Marsh Captive Solutions, a unit of Marsh LLC in Norwalk, Connecticut.

Companies from private smaller entities to large multinationals are all "basically banging their head against the wall, saying, 'Gosh, if I've got a captive I need to expand it and you need to show me how to expand it in a strategic way,'" he said.

The most common lines of coverage in captives in the past year are property, products liability and recall, and D&O, he said.

"Sometimes we're being brought in at the right time, sometimes we're being called because they're in the middle of or close to a renewal, and they need some alternative solution," Mr. Serricchio said.

"Clients are sometimes skipping the feasibility analysis because they know they need a captive set up in two to three months," he said.

Feasibility studies generally take two to three months to complete, but policyholders looking for a quicker option can establish a cell captive within an existing structure, said Ms. Gray of Aon.

Jeff Ellington, Charlotte, North Carolina-based vice president, business development at Atlas Insurance Management,

See **CAPTIVES** on page 25

WASHINGTON STATE TAX CHALLENGE CREATES CONCERNS FOR CAPTIVE OWNERS

While more than 20 U.S. states host captive insurance companies, it's the actions of regulators in a state that is not a captive domicile that have sparked interest and concern for captive experts over the past year.

Efforts by Washington state to make captive owners pay the state's 2% premium tax have led to fines, settlements, legal challenges and proposed changes to the state's law.

The issue of premium tax arose about three years ago, after the topic came up in a routine review of commercial policyholders, said Mike Kreidler, Washington's insurance commissioner.

The first captive owner challenged over nonpayment of the tax was Redmond, Washington-based Microsoft Inc. In August 2018, the company's Arizona-based captive, Cypress Insurance Co., paid $573,905 in unpaid taxes and $302,915 in penalties and interest to settle with the insurance department.

In March 2019, NW Re Ltd., the Arizona captive of Issaquah, Washington-based Costco Wholesale Corp., paid $3.6 million in unpaid taxes and fines.

In December 2019, Mr. Kreidler ordered a captive owned by Seattle-based Starbucks Corp. to pay $23.9 million in unpaid taxes and fines and a captive owned by Seattle-based Alaska Airlines Group to pay more than $2.5 million and ordered both captives to stop insuring risks in Washington.

Hearings over the unpaid taxes and fines are scheduled for later this year.

In its demand for a hearing on the premium tax issue filed last November, Starbucks argued among other things that captives are a form of self-insurance and don't fall under the insurance commissioner's jurisdiction and its captive is based in Vermont where it already pays premium taxes.

Alaska Airlines also questioned the scope of the Washington commissioner's jurisdiction in its hearing demand.

Washington is not opposed to the use of captives, Mr. Kreidler said.

"I think it's great that they want to use captives. … My only obligation is to make sure that they are doing so with a legal framework to permit them to do it and that they are paying their premium tax," he said.

Washington offered reduced fines to captives that self-report unpaid taxes by June 30. So far, 16 companies have self-reported.

The insurance department is also seeking more information on risks covered by captives and some financial information, Mr. Kreidler said.

Bills are pending in the Washington State Legislature that would require captive owners to disclose some information on policy wordings and premiums and to pay premium taxes.

The prospect of paying premium taxes on companies in Washington is a concern for the industry, said Jason Palmer, a director at Willis Towers Watson Management (Vermont) Ltd.

"We've had prospects come to us that are headquartered in Washington who don't want to form a captive until that situation is resolved," he said.

Gavin Souter

SPECIAL REPORT

More employers cover health care in captives

BY JERRY GEISEL

A growing number of employers are expanding the employee benefits risks they fund through captive insurers.

Captives have traditionally been used, with required approval from the U.S. Department of Labor, to fund benefits covered by the federal Employee Retirement Income Security Act of 1974, including life insurance and long-term disability. Benefits consultants say the use of captives is now expanding to cover non-ERISA benefits, especially medical stop-loss.

Medical stop-loss policies are typically purchased from commercial insurers by employers that self-fund their health care plans. The stop-loss plan will, for example, cover a health care claim that exceeds a certain amount. In another approach, known as aggregate stop-loss, a health insurance policy would cover claims after their combined amount exceeds a set level.

But, amid escalating premiums charged by commercial insurers, a growing number of employers are turning to their captives to provide stop-loss coverages for health care claims, experts say.

Funding stop-loss coverage through captives has "been accelerating like wildfire," said Karin Landry, a Boston-based managing partner with Spring Consulting Group, a unit of Alera Group. By funding stop-loss coverages through captives, employers can "recapture profits that otherwise would be going to insurers," Ms. Landry said.

Other experts agree with that assessment.

Captives have become, especially for mid-sized companies, "a real stop-loss solution," said David Hayden, senior vice president with Captive Resources LLC in Itasca, Illinois.

"It has become very expensive, especially for smaller companies, to purchase stop-loss coverage, so they are utilizing their captives to take a layer of the risk. It can be a real cost-saver," said Nancy Gray, a regional managing director with Aon PLC in Burlington, Vermont.

Employers are also considering funding more benefits than stop-loss coverage.

Looking at all employee benefits, a Marsh LLC survey found that 31% of employers with captives are likely to consider adding benefit coverages.

Captive benefit funding "is on the corporate radar," said Lorraine Stack, a managing director with Marsh Captive Solutions in Dublin, Ireland.

"Almost every risk manager I have spoken with has given some thought to funding employee benefits through their captives," said George O'Donnell, a captive and risk management consultant in Greenwich, Connecticut.

> "It has become very expensive, especially for smaller companies, to purchase stop-loss coverage, so they are utilizing their captives to take a layer of the risk."
>
> Nancy Gray, Aon

At the same time, employers are expanding coverages offered by their captives far beyond traditional employee benefits. For example, some are looking to use their captives to reinsure group auto and home insurance coverages, said Rich Fuerstenberg, a senior partner with Mercer LLC in New York.

Yet another approach is using captives to provide cash lump-sums for employees who are hospitalized. Captive manager Strategic Risk Solutions Inc. last year set up such a group captive in Arizona.

"Let's say you are only making $15 an hour and you break your arm. A $25,000 cash payment can be very meaningful to you," said Strategic Risk Solutions President and CEO Brady Young in Atlanta.

FAST-TRACK APPROVAL REMAINS ON HOLD AS LABOR DEPARTMENT REVIEWS RULES

Employers long used a federal regulatory procedure that enabled them to get quick U.S. Department of Labor review of their plans to fund employee benefits through their captive insurance companies, but the procedure has been in limbo for well over a year.

The procedure, known as ExPro, required the Labor Department to act within 45 days of an employer's request for an arrangement, like the funding of certain employee benefits through captives, that normally would be barred by the federal Employee Retirement Income Security Act. However, in September 2018, the Labor Department froze, without saying why, the use of ExPro for employers seeking to fund employee benefits through their captives.

The speed of the ExPro process was in sharp contrast to captive benefit funding approval applications that did not qualify for the program. Non-ExPro applications at a minimum take several months for Labor Department review and sometimes more than a year.

Employers seeking ExPro for funding benefits through their captives had to meet a Labor Department requirement that they cite two substantially similar individual exemptions approved by the Labor Department in the previous 10 years or one individual exemption and one approved through ExPro within the previous five years.

Several dozen employers, including Archer Daniels Midland Co., Dow Corning Corp., Google Inc. and Hyatt Hotels Corp., used ExPro to gain Labor Department approval of their captive benefit applications.

Outside experts speculate that the Labor Department put the freeze into effect to give federal regulators time to develop new requirements for the program.

Breaking its silence last August, the Labor Department began circulating among captive managers and attorneys its thoughts on requirements employers would have to meet to fund employee benefits through their captives. It said in its document, Captive Reinsurance Exemption Applications — New Requirements, that employers would have to use an independent fiduciary to certify in writing that the captive funding structure would "primarily benefit" plan participants by establishing "real and substantial" additional benefits.

By contrast, under the suspended rules, employers seeking ExPro approval were required only to show that employees would benefit from the captive benefit funding arrangement. The rules did not specify that the benefit improvement had to be substantial.

While the Labor Department has yet to finalize the rules it had been circulating, captive benefit experts say employers are free to use them.

Indeed, the Labor Department is using the guidelines to review applications for individual exemptions, said Kirk Watkins, practice leader-captive insurance programs, with the Trion Group in King of Prussia, Pennsylvania.

The Labor Department "now will consider captive benefit funding applications," said Bruce Wright, a partner with the law firm Eversheds Sutherland (US) LLP in New York.

Experts are confident that the Labor Department, with new rules in place and after it approves two applications that follow those rules, will reinstate the use of ExPro.

"I am optimistic that ExPro will be reinstated," said Brian Tiemann, a partner with McDermott, Will & Emery LLP in Chicago.

Jerry Geisel

CAPTIVES

Continued from page 23

said there is "increased interest" in captives as people look for ways to "have more control over what they're spending for insurance."

The hardening market is playing a role, he said. "Without the market hardening there probably would not be as many people thinking it's something they need to do. When there's more pain, there's obviously more motivation to look at all available options," Mr. Ellington said.

Vermont, the largest U.S. domicile, saw a slight increase in captives last year, but commercial market changes are triggering more interest in alternative risk transfer, said David Provost, deputy commissioner for captive insurance with the Vermont Department of Financial Regulation in Montpelier.

In 2020, a further five captives had been licensed in the state as of early February and there are a lot of companies in the pipeline, he said.

"I've heard for a year now a lot of noise about a very difficult property market. The market seems to be hardening. I expect we will see some growth in captive numbers this year," Mr. Provost said.

For example, he cited a recent call from a papermill in upstate New York that had received notice its insurer was no longer writing papermills, and was asking, "Is there a captive option for me?"

Property "has always been in captives. It's very often used for gaining access to reinsurance for large property risks. We see a lot of big properties, either single buildings or large corporations with a $1 billion captive program with 40 reinsurers on the back side," Mr. Provost said.

The top five lines of business written by Vermont captives are workers comp, general liability, auto liability, professional liability and property.

Medical stop loss business is increasing, and there are a growing number of tenant landlord programs that provide tenant liability coverage "where landlords make it easy for their tenants to buy insurance," he said.

Utah is also seeing an increased interest in tenant liability programs, said Travis Wegkamp, the domicile's captive director.

In addition, captive owners are increasingly putting cyber risks in captives. "Cyber is still popular with people figuring out new and interesting ways to protect themselves in that regard," he said.

While Utah has historically attracted a significant number of 831(b) captives — although it has seen a drop in those formations over the past year — it is seeing more larger captives form in the state, he said.

Utah is also seeing interest from captive owners looking to offer shipping coverage on goods sold online, he said.

"We've struggled to do that if the person providing that coverage is a third party and not the merchant itself. But with our proposed legislation to allow captives to reinsure third-party risks through traditional insurers, there's potentially a way for them to do that," Mr. Wegkamp said.

The legislation is expected to be passed in the current legislative session and go into effect in the spring, he said.

Utah is also seeing interest in cannabis-related captives, Mr. Wegkamp said. While it's unclear how senior state officials would view captives covering cannabis risks, given the discrepancies between state and federal law on the legality of cannabis, he said he'd welcome a cannabis captive application to review with Utah officials.

Cannabis could be a significant area of growth for captives, said Mr. Ellington of Atlas.

"An easing or changing of the laws and regulations of cannabis, if that goes forward, the floodgates could open," he said.

Cryptocurrency-related risks are another area of potential growth, Mr. Ellington said. Earlier this year, Gemini Trust Co. LLC, a cryptocurrency exchange founded by former Olympic rowing brothers Cameron and Tyler Winklevoss, set up a captive insurance company providing up to $200 million in coverage for its custody business.

There is a continued focus on "exotic risks" such as catastrophe bonds, wildfire risks, cyber and digital, said Mr. Serricchio of Marsh.

Examples include a single-parent captive taking a large retention for liability associated with wildfires or using a captive as a conduit to buy a catastrophe bond in Bermuda, he said.

The recent coronavirus outbreak has prompted discussions of how captives might be used to cover business interruption or workers compensation risks related to pandemics, said Jason Palmer, director at Willis Towers Watson Management (Vermont) Ltd. in Burlington, Vermont.

"A captive can be used as a funding vehicle for the risk," he said. "It can impact a number of lines of business."

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SPECIAL REPORT

COUNTING CAPTIVES

Ranked by number of captive licenses at year-end 2019

Rank	Domicile	2019	2018
1	Bermuda	715	730[1]
2	Cayman Islands	618	674
3	Vermont	585	580
4	Utah	435	441[1]
5	Delaware	366	421
6	Barbados	294	276
7	North Carolina	235	246[1]
8	Hawaii	231	231
9	Guernsey	199	209[1]
10	Luxembourg	195	198
11	South Carolina	179	171
12	Nevada	174	182[1]
13	Nevis	147	155
14	Tennessee	140	169
15	Anguilla	129	165
16	Arizona	128	124
17	Montana	123	128[1]
18	District of Columbia	104	105
19	Isle of Man	102	103
20	Singapore	73	72
21	Dublin	69	78
21	Turks & Caicos Islands	69	66
23	Kentucky	64	64
24	British Virgin Islands	59	73
25	Missouri	52	54
25	Georgia	52	49[1]
27	Labuan	50	46[1]
28	New York	49[3]	55[3]
29	Alabama	48	44
30	Texas	45	42
31	Sweden	39	42
32	St. Lucia	34	35
33	Switzerland	27[3]	26[1,3]
34	Federated States of Micronesia	25	26[1]
35	Michigan	24	23
36	New Jersey	21	23
37	British Columbia	20	21
38	Bahamas	18	18
38	Puerto Rico	18	14
40	Connecticut	17	15
41	South Dakota	16	15
42	Oklahoma	11	11[1]
42	Gibraltar	11	10
44	Denmark	10	10
44	Malta	10[2]	10
46	New Zealand	9[3]	9[3]
46	Arkansas	9	6
48	Liechtenstein	8	8
49	Curacao	7	8[1]
49	Colorado	7[2]	7
51	Ohio	6	8
51	Germany	6	6
51	Norway	6[2]	6
51	Vanuatu	6	6
55	Australia	5[2]	7[2]
55	Panama	5[3]	5[3]
55	U.S. Virgin Islands	5	5
58	Illinois	4	5
58	Hong Kong	4	4
58	Nebraska	4	4
61	Guam	3	4
61	Jersey	3	3
61	Maine	3	3
64	Dubai	2[2]	2[2]
64	Mauritius	2	2
66	Kansas	1	1
	TOTAL	6,135	6,359

[1] Restated. [2] *BI* estimate. [3] From website.
Source: *BI* survey

Reinsurance capacity tightening

BY CLAIRE WILKINSON
cwilkinson@businessinsurance.com

The reinsurance market for captives is hardening with some significant reinsurers and smaller underwriters cutting back capacity.

While captives with limited reinsurance claims can still easily find coverage, loss-hit accounts can be hard to place, experts say.

Despite more than $600 billion in global reinsurance capital, consolidation in the market has reduced the number of bigger players covering captives, said Michael Woodroffe, president, Kirkway International Ltd., a Bermuda-based reinsurance broker.

Some $1.04 billion of Lloyd's capacity has left the overall market due to syndicate mergers and runoffs, Mr. Woodroffe said.

In addition, MS Amlin PLC, a major reinsurer of captives, reduced its capacity by $325 million and exited nine lines of business in 2019.

"We're in a very interesting market. There's some real dislocation going on," Mr. Woodroffe said.

"The market isn't so spread around, there aren't so many mid-sized reinsurers out there. If you get declined by 10 people, you start to have a problem. In the old days, there were always another 10," he said.

Mr. Woodroffe was speaking during a session of the World Captive Forum, sponsored by Business Insurance and held in Miami in late January.

Commercial auto, trucking and railroad risks are some of the most challenging classes of business and captives can provide solutions, he said.

"If your business is highly risk managed, predictable and profitable, there are people who will write it, but rates aren't going down, that's for sure. You should have ample capacity, if you've done everything you were supposed to do," he said.

"If you're a startup or distressed, or you've had big hits, it can be extremely difficult. If you're in one of those tricky areas, your options are cut down," he said.

The New York construction market has been challenging for the last five to six years, pre-dating the hardening market, "because it's such a litigious state, there are so few underwriters who will write New York contractors risk," said Guilden Gilbert, CEO, CG Captive Managers Ltd., based in the Bahamas.

He cited the experience of a New York-based contractor client. "We set up a captive for them … It's been two years now and we're still trying to get reinsurance for them. Reinsurance is hard to come by," he said.

The tightening capacity is affecting property and liability risks, said David Provost, deputy commissioner for captive insurance with the Vermont Department of Financial Regulation in Montpelier.

"If you're a startup or distressed, or you've had big hits, it can be extremely difficult. If you're in one of those tricky areas, your options are cut down."

Michael Woodroffe,
Kirkway International

"We had one of our hospital liability risk retention groups talk to us last year. Half their reinsurers had pulled out of the market, and others wanted to be further away from the first dollar. That results in them having a smaller pool of reinsurers and having to retain more of the risk themselves," he said.

Meanwhile, the tightening in the hospital liability market is driving more use of captives for primary risks, said Philip Reischman, executive vice president at Alliant Insurance Services Inc. in Houston, during another session at the World Captive Forum.

The commercial medical malpractice market is operating at an aggregate underwriting loss as the costs of jury verdicts and settlements increase sharply, he said.

With losses mounting, some insurers are reducing capacity, "making it harder to put together malpractice programs," Mr. Reischman said.

Captive owners can use them to respond to changing market conditions, said Eric Gardzina, vice president, corporate insurance and risk management at Envision Healthcare Holdings Inc., a Nashville, Tennessee-based health care company.

"As a captive owner, this is the perfect time to have a captive, in a lot of ways," he said.

Captive owners should consider funding retentions within their captive at a higher level, in response to the rising verdicts and settlements, said Laura Ratcliffe, director, risk and insurance services at BayCare Health System, a Clearwater, Florida-based hospital system.

Previously, BayCare's captive had not fully funded its retentions because most claims fell well below the retentions, she said.

"Now, our working layer is higher and is closer to each and every retention, so this year we are fully funding that layer," Ms. Ratcliffe said.

Gavin Souter contributed to this report.

Gig economy firms eye alternative market

BY GAVIN SOUTER
gsouter@businessinsurance.com

Gig economy risks are a natural fit for the alternative risk transfer market, a panel of experts said.

The flexibility that captives and other vehicles can offer on policy wordings and the claims data collected by captives can be used to develop coverage tailored to the specific risks of gig economy companies, such as ride-share companies and their affiliates, they said.

"The captive industry is well positioned to capitalize on this evolving economy," said Peter Foley, corporate and business development manager at Arsenal Insurance Management, a captive manager in Montgomery, Alabama.

He was speaking at the World Captive Forum in Miami, sponsored by Business Insurance in late January.

Alternative risk transfer vehicles can be structured to ensure that insurance coverage corresponds with the emerging risks arising from companies that use nontraditional business models, he said.

"We can bridge the gap between traditional insurance versus new economies," Mr. Foley said. "Traditional contract coverages aren't going to cover the exposures."

Mr. Foley said an insurance program he worked on for HyreCar Inc., a Los Angeles-based company launched in 2015 that allows car owners to rent vehicles to ride-share drivers, made use of a risk retention group and a captive.

When HyreCar was formed, coverage for the program was underwritten under a traditional hire car policy, but there were gaps in the coverage, he said.

To provide customized coverage, HyreCar used a risk retention group, which provided for more flexibility in coverage wordings, Mr. Foley said.

At the same time, the company's technical staff worked with outside insurance experts to design a database to collect underwriting information, he said. And it used the technology platform to build in usage-based insurance to adjust the premium.

Since 2016, the underwriting results have been profitable. The program was eventually moved to a traditional insurer, using the manuscript policy, and the RRG participates as a reinsurer, Mr. Foley said.

In 2019, HyreCar saw increased physical damage losses, in part due to high loss adjusting expenses and fraudulent claims, he said. RRGs can only cover liability risks so the company established a captive to cover the physical damage exposures and take better control of the risks, Mr. Foley said.

Gig economy companies are often more open to using alternative risk transfer mechanisms than companies in the traditional economy, said Robert Arowood, president of Appalachian Underwriters Inc., an Oak Ridge, Tennessee-based managing general agent. In addition, insurtech companies, which compete with traditional insurers, often are more willing to offer customized insurance, such as usage-based coverage, and many insurtech use captives, he said.

"Most of the insurtech guys have capital-light structures, so maybe they started as an MGA with a captive behind them, so they did not have to put up much capital," Mr. Arowood said.

Later, they may capitalize the captives as traditional insurers, but unlike a traditional insurer they don't necessarily look for rating from A.M. Best & Co. as they look to "stretch" their dollars, he said.

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Congratulations to Kevin H. Kelley, recipient of the 2020 Business Insurance Lifetime Achievement Award.

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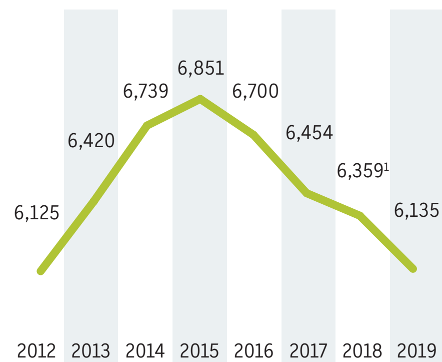
RANKINGS OF CAPTIVE DOMICILES & CAPTIVE MANAGERS

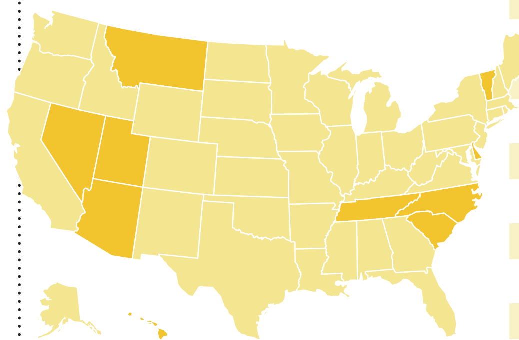
TOTAL CAPTIVES WORLDWIDE



[1] Restated
Source: *BI* survey

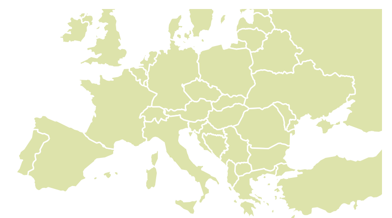
TOP U.S. CAPTIVE DOMICILES

Ranked by number of captive licenses at year-end 2019



Rank	Domicile	2019	2018
1	Vermont	585	580
2	Utah	435	441[1]
3	Delaware	366	421
4	North Carolina	235	246[1]
5	Hawaii	231	231
6	South Carolina	179	171
7	Nevada	174	182[1]
8	Tennessee	140	169
9	Arizona	128	124
10	Montana	123	128[1]

[1] Restated.
Source: *BI* survey



TOP EUROPEAN CAPTIVE DOMICILES

Ranked by number of captive licenses at year-end 2019

Rank	Domicile	2019	2018
1	Guernsey	199	209[1]
2	Luxembourg	195	198
3	Isle of Man	102	103
4	Dublin	69	78
5	Sweden	39	42

[1] Restated.
Source: *BI* survey

TOP 10 CAPTIVE MANAGERS

Ranked by the number of captives managed worldwide in 2019

Rank	Company	2019 total captives[1]	CAPTIVE TYPES: Captives	CAPTIVE TYPES: 831(b) microcaptives	CAPTIVE TYPES: Protected/ segregated cell companies [Individual cells]	2019 captive premium volume[2]	Domiciles	Total staff	Officers
1	Marsh Captive Solutions	1,380	1,296	28	56 [198]	$53,808,723,522	49	445	Ellen Charnley, president; Julie Boucher, islands practice leader; Chris Varin, U.S. practice leader; Will Thomas-Ferrand, international practice leader
2	Aon Captive & Insurance Management	926	876	15	35 [305]	$38,160,000,000	43	550	John English, CEO
3	Artex Risk Solutions Inc.	729	401	266	62 [524]	N/A	32	512	Peter Mullen, CEO; Jennifer Gallagher, president- North America; Nick Heys, CEO-international
4	Willis Towers Watson PLC, Global Captive Practice	337[3]	287	16	34 [63]	$6,620,600,000	30	211	Peter Carter, CEO; Sumit Mehra, chief operating officer
4	Strategic Risk Solutions Inc.	337	273	—	64 [292]	$6,525,000,000	28	118	Brady Young, president/ CEO; Michael O'Malley, senior vice president/managing director; Andrew Berry, chief operating officer
6	Davies Captive Management[4]	141	131	1	9 [190]	N/A	17	27	Nicholas Dove, chairman; Nicholas Frost, president; Jeff Kenneson, president-Quest USA
7	USA Risk Group	100	80	8	12 [32]	$750,000,000	10	25	Paul Macey, president; Rob Leadbetter, vice president; Charmain Aggarwal, vice president
8	Innovative Captive Strategies[5]	89	68	—	21 [77]	$191,000,000	9	25	Tom Stewart, president; Peter MacKay, executive vice president
9	Beecher Carlson Insurance Services LLC	83	63	10	10 [33]	$4,771,069,000	16	29	Pete Kranz, executive managing director/captive practice leader; Matthew Takamine, executive managing director/ captive operations leader
9	Atlas Insurance Management	83	33	41	9 [80]	$345,803,032	14	25	Martin Eveleigh, chairman; Elaine Tapp, executive vice president; Tania Davies, vice president

[1]Includes all licensed insurance entities managed at year-end 2019. [2]Premium volume includes total gross volume of captives managed by the company or on its behalf. [3]Prior years restated. [4]Formerly Quest Management Services Ltd. [5]Acquired Global Captive Management Ltd. in Sept. 2019
N/A = Not available
Source: *BI* survey

TOP NORTH AMERICAN OFFSHORE CAPTIVE DOMICILES

Ranked by number of captive licenses at year-end 2019

Rank	Domicile	2019	2018
1	Bermuda	715	730[1]
2	Cayman Islands	618	674
3	Barbados	294	276
4	Nevis	147	155
5	Anguilla	129	165

[1] Restated.
Source: *BI* survey

TOP ASIA-PACIFIC CAPTIVE DOMICILES

Ranked by number of captive licenses at year-end 2019

Rank	Domicile	2019	2018
1	Singapore	73	72
2	Labuan	50	46[1]
3	Federated States of Micronesia	25	26[1]
4	New Zealand	9[2]	9[2]
5	Vanuatu	6	6

[1] Restated. [2] From website.
Source: *BI* survey

MARKET PULSE

Chubb expands availability of catastrophe alert tool

■ Chubb Ltd. has made its Incident Alert tool available for excess casualty clients, the insurer said in a statement.

Previously used by Chubb environmental and cyber customers, Incident Alert may now be accessed by excess casualty clients to assist during a catastrophic event by helping identify qualified response contractors, manage cleanup efforts and mitigate potential liabilities, Chubb said.

Incident Alert allows incident reporting via smartphone, tablet or computer, and clients are assigned an incident response manager once an incident is reported, the statement said.

In addition to 24-hour reporting, Incident Alert provides geo-location technology to help align and deploy local resources; a customized email notification chain through which the customer, broker and Chubb adjuster can communicate in real-time; assistance with federal, state and local regulatory reporting; and real-time incident documentation reporting.

Beazley adds endorsement to Virtual Care cover

■ Beazley PLC said it is adding an endorsement to its Virtual Care insurance policy to offer more protection for technology-enabled health care and lifestyle management service providers.

With the addition of the new Surge endorsement, Beazley said it can provide first-party cover for direct financial loss resulting from e-crime, including fraudulent instruction funds transfer and telephone fraud; business interruption or dependent business interruption loss from security breach or system failure; data recovery loss; cyber extortion loss; and crypto jacking, including the unauthorized access or use of computer systems to mine for digital currency.

Beazley's Virtual Care coverage includes medical malpractice and a range of other third-party coverages, the insurer said.

The policy offers up to $25 million in limits, according to a spokeswoman.

CFC offers package policy for events organizers

■ CFC Underwriting Inc. launched a package policy for events organizers that includes cancellation coverage, general liability and commercial property insurance.

The London-based managing general agent said in a statement that the policy will pay for costs associated with event cancellation, curtailment, postponement or relocation for reasons outside the organizer's control, including nonappearance of a participant.

The property component includes coverage for contents lost or damaged in transit and additional expenses, such as temporary repairs, the statement said.

Maximum limits available for U.S. risks are $7.5 million for cancellation, $5 million for general liability, and $5 million for property.

Bold Penguin adds commercial auto to platform

■ Bold Penguin Inc. has added commercial auto insurance to its online commercial insurance platform, the Columbus, Ohio-based company announced.

Platform users will be able to see auto insurance quoted alongside other types of coverage, such as general liability and workers comp, through a single application, the company said in a statement.

Commercial auto represents 12% of the $100 billion small commercial market comprising 30.2 million small businesses in the U.S., the statement said.

Commercial auto coverage "was in high demand from our existing broker partners," Ilya Bodner, founder and CEO of Bold Penguin, said in the statement, adding the company "will be expanding commercial auto options and continuing our expansion into E&S."

Sompo unveils E&O cover for life sciences firms

■ Sompo International Holdings Ltd. said its global risk solutions unit has introduced Sompo Life Science Plus errors and omissions liability protection for the life sciences industry.

The Pembroke, Bermuda-based insurer offers the coverage for life science products such as those used in human clinical trials, products loaned or rented to others, representations and warranties made with respect to a named insured's product, limited coverage for bodily injury and property damage occurring on premises with respect to contract research and contract manufacturing services, and E&O for financial loss, including failure to provide directions or instructions, Sompo said.

It also offers property coverages for the specific needs of life science companies such as research animals, bio and radioactive contamination and R&D research and development business income, the statement said.

Limits are available up to $10 million, based on risk, product liability and clinical trial liability, according to a product sheet.

Property capacity is available up to $500 million for all other perils and $25 million for catastrophes.

MGA, insurer launch online freight cover

■ Loadsure Ltd. and ArgoGlobal launched an online coverage for the U.S. spot freight market following Lloyd's of London's granting coverholder approval for managing general agent Loadsure, the MGA and insurer said in a statement.

London's Loadsure is also collaborating with Avalon Risk Management as retail broker in the U.S., according to a spokeswoman's email.

Argo has been involved in supporting the business through the Lloyd's coverholder approval process and providing capacity, the statement said.

Loadsure offers coverage for shippers, brokers and insurers that is integrated with freight and logistic industry electronic platforms and marketplaces, the statement said.

ProSight to offer captive insurance services

■ ProSight Specialty Insurance Group Inc. launched a captive insurance offering along with the formation of an agency specializing in captives led by the Morristown, New Jersey-based insurer's founder.

ProSight, which was formed in 2009 and offers various specialty coverages, will provide risk management and risk mitigation services to captive owners, according to a ProSight statement. The insurer will provide fronting services and reinsurance to captives.

In addition, ProSight's founder and former CEO Joe Beneducci has stepped down from his executive chairman role to form Altruis Group, an independent agency, the insurer said.

DEALS & MOVES

AssuredPartners buys agribusiness agency

Acquisitive brokerage AssuredPartners Inc. has bought LMC Insurance & Risk Management Inc., an agricultural risk specialty agency, in West Des Moines, Iowa.

Terms of the deal were not disclosed.

In a statement, Lake Mary, Florida-based AssuredPartners said the 290 LMC employees, who operate out of 11 offices, would remain under the leadership of Greg LaMair, the agency's president and CEO.

LMC is the 58th largest broker of U.S. business with about $57 million in annual brokerage revenue

Marsh unit acquires entertainment broker

Marsh & McLennan Agency LLC, the middle-market agency subsidiary of Marsh, has acquired Los Angeles-based Momentous Insurance Brokerage Inc., MMA said in a statement.

Terms of the acquisition were not disclosed.

Momentous specializes in insurance for the entertainment industry and wealthy private clients, the statement said.

Diane Brinson, president and CEO of Momentous, will continue to lead operations.

Aon adds Canadian cybersecurity firm

Aon PLC said it has acquired Canada-based cybersecurity firm Cytelligence Inc., adding incident response and digital forensics services to its cyber portfolio.

Terms of the deal were not disclosed.

Founded in June 2016, Cytelligence has offices in Toronto, Ottawa, New York, San Francisco and Miami, and has expertise in cyber incident response, ransomware mitigation and cyber security training for employees, Aon said in a statement.

Risk Strategies buys aviation specialist

Risk Strategies Inc. has acquired Transport Risk Management Inc., Risk Strategies said in a statement.

Terms of the deal were not disclosed.

Based in Conifer, Colorado, Transport Risk specializes in coverage for the aviation, aerospace and aircraft operations and activities.

The acquisition of Transport Risk includes wholesale capabilities with the firm's managing general agent authority for its specialty drone program, the statement said.

OPINIONS

COMMENTARY

Captives offer buyers options

Few consumers welcome higher prices, and commercial insurance buyers are no different.

As insurers push through rate increases in more and more lines of coverage and hold back capacity on excess layers, risk managers in many industries are having to find more money to pay premiums or come up with ways to make their corporate dollars stretch further.

After more than a decade of falling or stagnant pricing, it hardly comes as a surprise that rates are starting to climb, even though there has not been a catastrophic loss of sufficient size to make a significant dent in insurance industry capital levels.

Gavin Souter
EDITOR

Property losses are rising in coastal regions and, as we report on Page 6, insurers are blaming higher jury verdicts and settlements for increased liability losses and the ensuing so-called social inflation is cited as a principal reason for rate hikes. Some observers are skeptical of the reasoning of insurers, but there's no escaping the reality of higher premium costs.

Risk managers aren't, however, completely bound by the limitations of the conventional market. As we report in our annual special report on captive insurance, the alternative market, which saw demand slacken in the soft market, remains open for business and eager to provide solutions to commercial policyholders.

More companies are funding rising deductibles or self-insured retentions through captives and directly accessing additional capacity in the reinsurance market, though some of that capacity is shrinking, too. And companies in some riskier industries are turning to captives to fund coverages where their conventional insurers are dropping them completely.

But it's not just companies in established industry sectors that are taking advantage of the alternative market; gig economy companies are using captives to shape coverages that suit their new and emerging business models. Captive managers and regulators also appear keen to help find solutions for companies in the cannabis industry, which are often hard pressed to find willing insurers as they grapple with conflicts in state and federal law.

The captive sector itself, though, has its own challenges.

Over the past couple of years, the IRS has scored some significant court victories over owners of 831(b) captives, which has reduced demand in what was once a thriving microcaptive market. While most large corporations should not be affected by the rulings, few commercial sectors welcome the gaze of federal tax authorities.

State tax authorities, too, are examining captives. Washington state — home to some of the best-known U.S. brands — is demanding premium tax payments, even though it's not a captive domicile itself. Such a move could have significant implications if it is followed by other states.

While captives have their limitations, they offer commercial policyholders a proven alternative to rising insurance costs, and any moves to curb them should be considered in a wide context.

DISTRIBUTION OF CORONAVIRUS CASES

Countries, territories or areas with reported confirmed cases of COVID-19 as of Feb. 23, 2020

SITUATION IN NUMBERS

GLOBAL
- 78,811 confirmed cases

CHINA
- 77,042 confirmed cases
- 2,445 deaths

OUTSIDE OF CHINA
- 1,769 confirmed cases
- 28 countries
- 17 deaths

Source: World Health Organization

COLUMN

Virus risk hard to transfer

BY CLAIRE WILKINSON
cwilkinson@businessinsurance.com

As the March issue of *Business Insurance* goes to press, the coronavirus outbreak continues to spread to new countries, with growing numbers sick from the virus and a global death toll that is also rising. While the majority of the cases are in China, where the virus originated, countries including South Korea, Japan, Italy, Singapore, Iran, the United Kingdom and the United States have reported confirmed cases, and varying internal responses are in place from quarantines to travel restrictions and lockdowns.

The broadening economic impact of the virus has affected airlines, cruise lines, manufacturing plants, retailers, hospitality chains, event organizers and transportation companies, among others.

U.S. businesses including Procter & Gamble Co., Apple Inc., Coca-Cola Co. and Starbucks Corp. have all warned of profit declines due to the fallout from the virus. For example, recent comments from Jon Moeller, vice chairman, chief operating officer and chief financial officer of Procter & Gamble, at a Feb. 20 conference in New York highlighted the extent of the supply chain risk and exposures that multinational companies face.

"We access 387 suppliers in China that ship to us globally more than 9,000 different materials, impacting approximately 17,600 different finished product items. Each of these suppliers faces their own challenges in resuming operations. The operating challenges change with the hour, and of course the path of the virus is unknown, making it very difficult to provide precise estimates of impact," Mr. Moeller said.

Procter & Gamble's results for the January to March quarter in China and for the total company "will be materially impacted on both the top and bottom line by these dynamics," he said.

Apple also warned in February that its worldwide iPhone supply will be "temporarily constrained" as its manufacturing partner sites in China are ramping up "more slowly" than anticipated. "These iPhone supply shortages will temporarily affect revenues worldwide," the company said.

As we continue to cover the story, the word from insurance brokers and others is that most supply chain-related losses for U.S. companies will likely not be covered by business interruption or contingent business interruption policies, because in general both require physical damage for coverage to be triggered.

However, there are nuances in coverage, so for example civil authority provisions in insurance policies may provide coverage for a business interruption loss if a government entity denies access to a covered property.

Coverage under contingent business interruption policies may also be in play, though that would depend on individual policy language, according to industry experts. Policyholders should be checking their policies and providing notice to insurers if they think they have a valid claim, they said.

Perhaps one of the most obvious early takeaways for risk managers and their companies is the importance of having a backup plan and the ability to be nimble during an event. Given all the variables and unknowns surrounding this virus, that is easier said than done, but in the case of companies with a concentration of manufacturing plants and/or suppliers in one part of the world, there's clearly a problem.

Business practices and supply chains are not going to change overnight and global production systems have so many advantages that this is clearly a risk that needs to be mitigated and where possible transferred rather than avoided.

Digital deception: Is your business ready for ´deepfakes´?

Stephen Viña is senior vice president in the U.S. cyber practice of Marsh LLC in Washington. He can be reached at 202-263-7919 or stephen.vina@marsh.com.

Steve Bunnell is partner and co-chair of the data security and privacy practice at O'Melveny & Myers LLP in Washington. He can be reached at 202-383-5399 or sbunnell@omm.com.

ABC Shoe Corp. has just completed the most successful quarter in its history. The CEO holds a press conference to announce the good news. Several hours later, an altered video of the CEO at the press conference goes viral on social media, showing the CEO slurring his words and appearing inebriated. ABC Shoe Corp. has become a victim of a "deepfake."

This story may seem far-fetched, but similar circumstances have already played out in real life, impacting mostly politicians and celebrities. But businesses are starting to see deepfakes targeting them, too. What once took significant skill and time to create can be done cheaply, quickly and convincingly, posing a major threat to the public and private sectors.

A "deepfake" is a sophisticated digital forgery of an image, sound or video. The forgery may be so good that a human is unlikely to detect the manipulation. The goal is to mislead, making it appear a person has said or done something when that is not the case. Supported by advances in artificial intelligence, deepfakes have proliferated across the internet as the technology becomes less expensive and more accessible.

Risks for businesses

Businesses have always taken great strides to protect the "CIA" triad of information security — confidentiality, integrity and availability. Data confidentiality has frequently been threatened by massive data breaches involving businesses, while attacks on the availability of data have become a new normal with the proliferation of ransomware attacks.

Attacks on data integrity, however, appear to be a more recent phenomenon, and businesses may not be prepared to respond to this sleeping giant, which could have devastating effects.

Nation states, competing businesses, disgruntled employees, criminals and anonymous saboteurs may use deepfake technology to disrupt business operations or facilitate fraud. Indeed, news reports surfaced in August 2019 that — for the first time — deepfake audio technology was used to mimic the voice of a CEO to facilitate the fraudulent transfer of funds. This type of misuse introduces a potentially dangerous trend.

Deepfakes can also have a severe effect on a company's reputation. A deepfake posted on social media could easily go viral and spread worldwide within minutes. Companies would have to spend valuable resources identifying, removing and rebutting such fake content; legal fees and crisis management expenses would

likely also stack up. If the deepfake was embedded in internal materials, companies would need to investigate the network intrusion and remediate corrupted systems and data. Though a company might ultimately prove it was a victim of a deepfake, the damage to its reputation will have been done, potentially resulting in lost revenue.

Current legal regime

As with many advances in technology, deepfakes are outpacing the law. While no law directly addresses deepfakes, several criminal and civil laws may be applicable.

Criminal statutes governing fraud, extortion and cyberstalking, for example, may broadly serve as remedies and deterrents to combat deepfakes. Federal securities law may also apply to a deepfake used to defraud anyone in connection with registered securities. Impersonating a government official through a deepfake could also result in criminal penalties.

Civil remedies provide more flexibility for businesses in holding deepfake perpetrators accountable. Unlike criminal remedies, if a business can prove a general harm, such as defamation, copyright infringement, or a violation of the right of publicity, the business can sue the perpetrator.

Knowing exactly whom to bring actions against and being able to bring perpetrators under the jurisdiction of U.S. laws — particularly if they live abroad — may be difficult. If a deepfake is spread over the internet, the victim business will likely only be able to sue the perpetrator of the deepfake. Content platforms, even when hosting fake content, are typically immune from civil liability under U.S. law.

Protecting data integrity

Risk managers can take action now to build enterprise resilience and address the potential onslaught of new data integrity threats. Public relations and crisis communication planning — along with identifying proper legal remedies — can be critical to responding to a deepfake and mitigating reputational harm. Cyber risk assessments and strong cyber hygiene can also help thwart attacks that target data on company networks, while robust backup procedures can help restore or verify corrupted information.

For those businesses that fall victim to a deepfake, cyber insurance policies may provide relief for some financial loss.

A data integrity attack on a company network, like other cyberattacks, could result in a security incident that would need to be investigated and remediated. Cyber insurance policies often offer broad cyber-event management coverage for the cost of crisis communications and computer forensic specialists responding to an incident. If data has been corrupted, cyber insurance policies may cover the cost to replace, restore or recreate the data. A cyber policy may also respond to a ransom demand tied to the potential release of a deepfake on a corporate network.

Public relations and crisis communication planning — along with identifying proper legal remedies — can be critical to responding to a deepfake.

Cyber policies are also expanding to include coverage for attacks on a company's reputation from adverse publicity after a cyber incident or privacy breach. For example, a cyber policy can cover lost revenue and the costs to hire public relations consultants after a reputational attack. While wordings vary and often are tied to a network intrusion, these coverages continue to evolve and could be helpful to a company that sustains reputational harm from a damaging deepfake.

Crime policies — and, to a lesser extent, cyber policies — could also help companies that have fallen victim to deepfakes recover funds that were transferred to third parties under false pretenses.

Deepfakes are a new type of threat for businesses, and insurers are still assessing potential risks. Whether a cyber policy responds to a deepfake ultimately depends upon the circumstances of the incident and the terms and conditions of the policy. Risk managers should carefully review their policies and work with their insurance advisers and legal counsel to assess potential exposures and coverages for this evolving threat.

PEOPLE

"Today, insurance and risk management executives can use new technology-based solutions to leverage data and drive automation to gain efficiencies and improve outcomes for their enterprises."

UP CLOSE

David Duden

NEW JOB TITLE: Chicago-based strategic relationships executive, core solutions, Origami Risk LLC

PREVIOUS POSITION: Hartford, Connecticut-based managing director, Deloitte Consulting LLP

OUTLOOK FOR THE INDUSTRY: I foresee the continued acceleration of the movement to the digital world by property/casualty insurers, facilitating a wider array of specialized services and tailored solutions based on individual customer needs.

GOALS FOR YOUR NEW POSITION: To continue to enhance the customer experience for the growing number of Origami Risk's insurance and large self-insured clients, as well as to expand our suite of offerings for this customer base with innovative solutions.

CHALLENGES FACING THE INDUSTRY: Along with the various legacy insurance administration systems still in the marketplace, there are legacy processes that need to be revisited. Today, insurance and risk management executives can use new technology-based solutions to leverage data and drive automation to gain efficiencies and improve outcomes for their enterprises.

FIRST EXPERIENCE: As a college senior, I conducted a risk assessment for a large wholesaler, looking at the distribution centers and searching for areas where risk was high and remediation available.

ADVICE FOR A NEWCOMER: Get out of your safe zone; learn something new every day and look at all areas to expand your knowledge.

DREAM JOB: As I look back, my first job was a tennis instructor. The interaction with students, young and old, was simply the best people experience.

LOOKING FORWARD TO: Being part of Origami's rapid pace of innovation, collaborative culture, high energy level and focus on customers, as well as being in a position to mentor others as they grow in their careers in risk management and insurance solutions.

COLLEGE MAJOR: Economics with a focus on risk management, minors in mathematics, political science and philosophy

FAVORITE MEAL: I like any red meat that is Pittsburgh charred, with a nice red wine to match.

BOOK: "The Road Less Traveled"

HOBBIES: Marathon running, classical guitar, golf and tennis.

TV SHOW: "The Big Bang Theory"

ON A SATURDAY AFTERNOON: If not golfing, I would be in a college football stadium with friends and family.

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ON THE MOVE

Axa SA named **Scott Gunter**, previously a senior vice president at rival Chubb Ltd., as chief executive of commercial insurance unit Axa XL. He replaces Greg Hendrick, who is leaving the company.

Acadia Insurance Co. named Westbrook, Maine-based **John Elias** senior vice president, chief underwriting officer. Previously, Mr. Elias was insurance commissioner for the state of New Hampshire.

Alliant Insurance Services Inc. named Dallas-based **Carleen Patterson** to the newly created position of first vice president, practice leader, within the company's public entity group. Previously, Ms. Patterson was a managing director, national practice leader, public sector with Aon PLC.

Bermuda-based insurer and reinsurer Argo Group International Holdings Ltd. appointed **Kevin J. Rehnberg** permanent CEO. Mr. Rehnberg has served as Argo's interim CEO since November 2019, when Mark Watson, the insurer's former CEO, stepped down.

Gallagher Bassett Services Inc. promoted **Mike Hessling** to CEO, North America, a newly created position. Mr. Hessling had been North American chief client officer and led the Rolling Meadows, Illinois-based TPA's sales and account management teams. In 2017, Mr. Hessling was named a Break Out Award winner by *Business Insurance*.

Thomas Warsop was named CEO for workers compensation service provider One Call Co. Prior to joining Jacksonville, Florida-based One Call, Mr. Warsop served as chairman and CEO of York Risk Services Group Inc.

A Titanic idea: insurance museum

The insurance industry is not just one of numbers, it's one of stories and policies, such as that for the ill-fated RMS Titanic passenger liner.

That's the thought behind a new endeavor to create a museum later this year in London dedicated to the industry, the Financial Times reported.

"We need to tell [people] how widespread the insurance business is," a retired executive with Lloyd's of London told the newspaper. "It's not just singing waiters and car insurance and household insurance, which is what they see on the television adverts."

Several large insurers and brokers are backing the venture. "The idea of insurance and risk management goes back thousands of years to Mesopotamia and China, and London has been one of the (centers) of the industry since policies were first discussed at Edward Lloyd's coffeehouse in the 1680s," the Financial Times writes.

Emoji-related suits triple in Florida

Recent statistics gathered by the Fox News affiliate in Jacksonville, Florida, found that the number of reported legal cases in the Sunshine State involving emojis or emoticons increased from 33 in 2017 to 53 in 2018 and 99 in 2019.

And courts are struggling to handle the nuances of emojis as evidence, according to a legal expert who spoke to Jax Action News. The expert said that "courts have not interpreted yet what that means. It's a new system of communication."

One case involves a face-kissing emoji in a sexual harassment suit against the city of Tampa, according to the news report.

In response to the rise in such lawsuits, the Florida Bar Association has published a best practices guide for attorneys that advises against using emojis, saying, "Leave them off unless you know the recipient extremely well."

TELEVISION HOST FUMING OVER INSURANCE INCREASE

It's likely "Good Morning Britain" host Piers Morgan wasn't thinking about his health insurance when he posted an Instagram photograph of himself smoking a cigar during a boozy lunch.

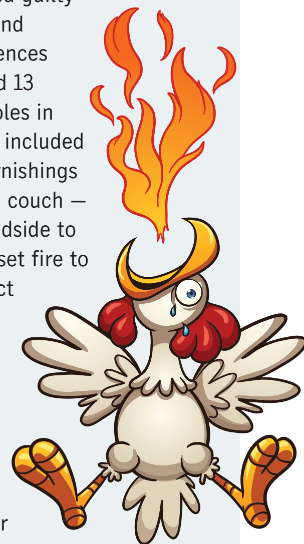
But his health insurer was thinking, he's a smoker and there's proof, and apparently raised his annual premium, the Sun newspaper reported.

An outraged Mr. Morgan reportedly snuffed out his policy with the unnamed insurer and told the Sun: "I've never smoked cigarettes and only have four to five cigars a year."

"But they still wanted to slap a massive hike on my premiums for being a 'smoker,' so I sought cover elsewhere," he said.

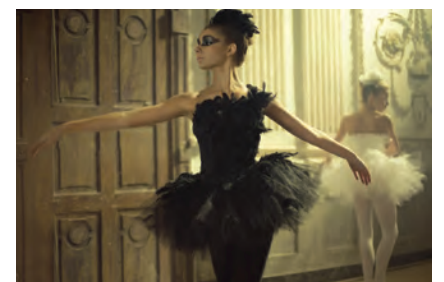
Finger lickin´ not-so-good fraud

Three people in Stockton, California, were sentenced in February for insurance fraud and arson for cooking up an elaborate scheme to collect insurance money on fires they intentionally set by leaving chicken to fry on a stove. Twice.



The trio pleaded guilty to their crimes and were given sentences between one and 13 years for their roles in the scheme that included adding home furnishings — washer, dryer, couch — found by the roadside to the homes they set fire to in order to collect more insurance money, ABC 10 in Stockton reported.

The investigation was launched when an adjustor started seeing similarities in the claims filed by the fraudsters. The three were also linked to insurance claims that involved water damage to property in warehouses that were damaged in fires.



This job is just tu-tu demanding

Stamina, strength and precision? One could say a basketball player, an emergency room doctor, a roofer or construction worker, even, might have the most physically demanding job.

Nope. Add flexibility, coordination and poise to that list and you get: dancer.

That's what researchers at InsuranceProviders.com found when analyzing occupation data, Dance magazine reported.

In determining the 20 most physically demanding professions, dancers leaped to the top of the list, upstaging other roles: athletes, steelworkers, roofers, firefighters and construction laborers.

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