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BEST PRACTICES

Best Agencies
Defy Market

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THE LEADER IN PROPERTY & CASUALTY NEWS

TOP STORIES OF THE WEEK

White House Signals Support On TRIA Extension

The Senate Banking Committee approved legislation extending the Terrorism Risk Insurance Act for seven years, drawing approval from the Bush administration. ▶ Page 6

Munich Re To Acquire Midland

The world's second largest reinsurer, Munich Re, took a first step in its recently announced mission to grow in the U.S. property-casualty market when it announced its intention to acquire specialty insurer Midland Insurance Company for \$1.3 billion. ▶ Page 7

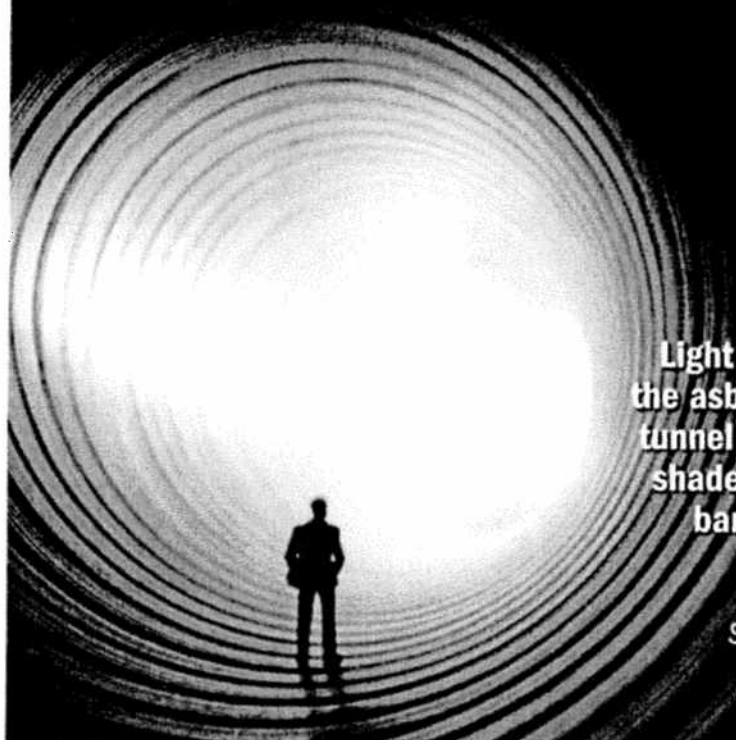
IRS Proposal Blindsides Captives

A state regulator and a captive trade group are protesting a proposed IRS rule that would reverse a long-standing tax benefit for captive insurance operations. ▶ Page 8

Allstate Subpoenaed In Florida Rate Battle

Florida authorities added Allstate to the list of insurers subpoenaed for information and testimony about homeowners rates in an ongoing probe examining possible collusion by insurance groups. ▶ Page 33

Asbestos Defendants See New Light



Light at the end of the asbestos litigation tunnel is being partly shaded by new trial bar strategies

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CYBER-TAXMAN COMETH

Internet Tax Freedom Act Expiring

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DIFFERENT WORKS

E&S Execs Highlight Distinctions

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Is Benzene The New Legal Battlefield?

BY ROBERT L. MCDONNELL
AND ROBERT E. GILMARTIN

THERE IS NO ARGUMENT that asbestos has been a monetary gold mine for the plaintiffs' bar across the United States, particularly in certain geographic areas, for the past 20-plus years. The first asbestos lawsuit was filed in Beaumont, Texas, in 1966, and to date judgments have been delivered exceeding \$70 billion.

However, this particular gold mine may finally be tapping out. The number of plaintiffs is falling off, and the number of new cases being filed nationwide is starting to dwindle. The count of possible defendants has been substantially reduced by bankruptcy caused by asbestos litigation.

Now the plaintiffs' bar is looking for a "new" litigation hot-button issue. At one time it was thought that silica would be that new issue, but recent court rulings—particularly in Texas—indicating that asbestos and silica are basically the same have been major setbacks for the plaintiffs' bar.

Today, U.S. corporate risk managers and their insurers see benzene, and possibly welding rod litigation related to magnesium, as supplanting asbestos as the next legal battlefield.

- ▶ Benzene is a clear colorless liquid derived during the processing of crude oil.
- ▶ The federal government has classified benzene as a carcinogen. Human exposure occurs through dermal contact and inhalation.
- ▶ Benzene can be found in virtually every petroleum product. It is also a component

in the propellant of most aerosol sprays.

▶ Exposure can occur from tobacco smoke, ambient air, strawberries, charcoal grilling, automobile exhaust, glues and furniture wax. Recently, some people have argued there are dangerous benzene levels in soft drinks, although the Food and Drug Administration denies it.

▶ Plaintiffs are alleging occupational exposure from employment in the oil, shipping, auto repair, shoe manufacturing, painting and other industries.

Although the federal government has classified benzene as a carcinogen, which cancers it actually causes is seriously in debate by the medical community.

In the late 1990s, the Texas Supreme Court upheld a \$6 million punitive damages award against Mobil Oil. The decedent was a worker at a Mobil refinery who claimed that his acute myelogenous leukemia (AML) was caused by Mobil's failure to warn of the risk of his exposure to benzene at its refinery.

A mechanic in Mississippi was awarded \$2 million by a jury that believed benzene in an automotive product caused the plaintiff's non-Hodgkin's lymphoma. The presiding judge ultimately granted the defendant's motion for judgment notwithstanding the verdict due to the failure of the plaintiff's expert's evidence to prove causal connection between the benzene exposure and the Lymphoma.

In California, the estate of a woman who died from leukemia allegedly caused by the release of benzene at an Amoco gasoline refinery resulted in a \$13 million verdict. Additionally, a California Superior Court awarded a part-time aircraft painter \$2.2 million for leukemia allegedly caused by exposure to benzene.

Class action lawsuits have been filed in Massachusetts and Florida against a family-owned soft drink manufacturer alleging that benzene in soft drinks caused AML

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FAVORABLE RULING STANDS

No Asbestos Decision Review Texas Supreme Court Says

BY DANIEL HAYS

THE TEXAS SUPREME COURT has rejected a request to revisit its finding that asbestos injury plaintiffs must prove substantial harmful exposure to an asbestos product to successfully sue a manufacturer.

Notice that the petition for a rehearing in the case of *Borg-Warner vs. Flores* was denied was posted on the court's Web site earlier this month.

The case at issue was brought in 2001 by brake mechanic Arturo Flores, who claimed that he had developed work-related asbestosis from asbestos in brake pads.

Mr. Flores sued contending his exposure came from brake pads manufactured by Borg-Warner between 1972 and 1975 that he used five to seven times per week. Borg-Warner is now known as Burns International

Services Corp.

The high court in a June 8 decision tossed out a jury verdict finding the manufacturer had acted with negligence and malice and was strictly liable for Mr. Flores' illness.

"While science has confirmed the threat posed by asbestos, we have not had the occasion to decide whether a person's exposure to 'some' respirable fibers is sufficient to show that a product containing asbestos was a substantial factor in causing asbestosis," the court said,

adding that "we conclude that it is not."

Effectively, the court said, Mr. Flores was not able to provide evidence that any asbestos exposure he suffered while working on Borg-Warner brake pads played a substantial role in his illness.

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▶ **Robert L. McDonnell**, CPCU, is assistant vice president at McLarens Young International, a global loss-adjusting firm.



▶ **Robert E. Gilmartin** is a partner at Clausen Miller Law Firm, an insurance litigation law firm.



NO ASBESTOS

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"This record," Chief Justice Wallace Jefferson wrote of the evidence presented at trial, "reveals nothing about how much asbestos Flores might have inhaled."

Mr. Flores, he said, performed roughly fifteen to twenty brake jobs per week for over thirty years, and had certainly been exposed to "some asbestos" on a regular basis during that time period.

"Nevertheless, absent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis," he said. "Nor did Flores introduce evidence regarding what percentage of that indeterminate amount may have originated in Borg-Warner products."

In seeking the rehearing, Mr. Flores' attorneys contended the court erred by holding there was no evidence to support the verdict that Borg-Warner conduct was a substantial factor in causing Mr. Flores' asbestosis. Mr. Flores, they noted, testified he used and was exposed to visible dust from Borg-Warner brake pads on a "frequent" and "regular" basis over four years. The plaintiff's testimony was enough to allow the verdict, the plaintiff's motion argued.

His court papers also contended that the court's opinion if allowed to stand would mean plaintiffs in asbestos cases would have to present expert testimony, which it was argued would be an expensive and time-consuming exercise that other courts had found to be unnecessary. ■

NEW CEO

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casualty arena today."

On the casualty brokerage side, he noted he will concentrate on bringing in additional underwriting talent and leadership. "You will not see rapid growth in the casualty brokerage arena near term," he continued. But "when the market starts hardening a little, we'll start to grow."

The agenda is different at Penn-America. Instead of building internally, Mr. Frakes said the first order of business for him and Mr. McDowell is reestablishing historically strong ties with agency partners.

"The biggest challenge I've had in the last five months is to make sure the agents

NEW LEGAL BATTLEFIELD

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and other ailments.

Juries have rendered verdicts in favor of injured plaintiffs in benzene cases filed in California, Mississippi, New Jersey, Pennsylvania, Texas and Florida. Benzene actions are currently filed in Illinois, West Virginia, Florida and Massachusetts. Many more state filings are anticipated.

A Web-based Google search of benzene and verdicts results in hundreds of hits. Numerous Web page advertisements for plaintiffs' law firms soliciting clients based on exposure to benzene can be found. There are already dozens of plaintiffs' law firms professing expertise in benzene litigation. These firms are becoming benzene "gurus," with each firm developing national reputations and countywide practices.

One of the most striking highlights of any benzene lawsuit is its extreme cost, particularly in terms of expert witnesses. Oftentimes the cost of litigating a benzene case is much higher than the potential loss payment. This is particularly true for a defendant who is not a target defendant.

Although benzene litigation could be classified as standard toxic tort litigation based upon common and longstanding legal causes of action, it does present its own unique and complex issues requiring

understand where United America is and what the changes mean for them in the long term," he said, noting that since the merger, frequent management changes have been unsettling for agency partners.

At the same time, he noted, the market is softening, "and agents have opportunities to take on new relationships or expand existing ones."

"Through Mr. McDowell, we are back working on relationships," he said, confirming that Penn-America has binding authority contracts with more than 100 general agents today.

Prior to the merger, United National had been doing some small binding authority business similar to that of Penn-America, he reported, adding

special handling. For example, benzene litigation involves its own specialized knowledge regarding applicable standards of care and causation. Complex medical and statistical analyses are needed. Epidemiological studies may or may not prove an association between benzene and the specific cancer alleged by the plaintiff.

In addition, crucial toxicological and industrial hygiene analyses must be performed to determine whether the dosage to which the plaintiff was exposed rises to the level for specific causation of the plaintiff's injury from the product.

Medical analysis of the plaintiff's condition may prove the plaintiff had a different disease than the disease alleged in the lawsuit.

Statistical analysis of confidence levels may indicate the cancer could have been caused by chance rather

er than by benzene.

Bringing benzene claims to an economical conclusion is not a simple process. Third-party administrators, commercial casualty adjusters and insurers will need to coordinate with their litigation attorneys to form successful strategies to defend against these claims. This includes working with medical doctors and health care resources as well as experts including epidemiologists, toxicologists and industrial hygienists who must be well-grounded in the specific issues of benzene. ■

WORTH NOTING!

Daniel Bodell, a partner for the law firm Gordon & Rees, recently told actuaries at the Casualty Loss Reserve Seminar that an estimated 238,000 people in the United States may have been occupationally exposed to benzene.

that when the merger deal was complete, United National's general agency relationships were brought together with approximately 66 existing Penn-America relationships.

"You had more business but more agents in place as well, [and] in some places, perhaps, overrepresentation," he said. "Actually, when you put the companies together, we were still underrepresented in some markets also," he said.

Going forward, the company will continue to refine its agency base to ensure strong franchise value, Mr. Frakes said, agreeing that there might be some partnership reorganization as a result. ■