Society of Insurance Receivers

Summer 1994 NEWSLETTER Vol. 3, No. 3

# First Joint Training Between Receivers and Guaranty Funds Is Set For November 13-14, 1994

The first joint training meeting for Insurance Receivers and Guaranty Funds is set for November 13-14, 1994, in San Antonio, Texas, immediately following the National Conference of Insurance Guaranty Funds (NCIGF) Annual Workshop. Sponsored by the Society of Insurance Receivers (SIR) and the NCIGF, the two-day meeting called "WORKING TOGETHER: Receivers and Guaranty Funds," includes separate tracks for managers and staff, as well as opportunities for group interaction among all attendees.

Joyce Wainscott, SIR Education Chair and Kristine Bean, co-chair explain, "With Receivers and Guaranty Funds working so closely across the country, effective training must focus on increased understanding of the issues and concerns for both parties. What better way to address those matters than by bringing both points of view into the room?

Holly Bakke, NCIGF Education Chair agrees. "Each year, both groups process thousands of claims effectively. The purpose of this first-time joint training for Receivers and Guaranty Funds is to focus on improving the insolvency process by identifying problem areas and examining possible solutions. Small group sessions are planned to facilitate exchange of ideas and concerns."

Two separate but simultaneous tracks will allow for two training levels — one for Guaranty Fund and Receiver managers and another for Claims staff. Each session will be led by teams of experienced Receiver and Guaranty Fund Managers and Claims Managers.

- **Track I:**

Receivers and Guaranty Fund Managers — will discuss Receivers and Funds operations, identify concerns and examine possible solutions.

- **Track II:**

Receiver and Guaranty Fund Staff — will use hypothetical claims to explore how Receivers and Guaranty Funds can improve claim processing through a discussion of detailed procedures and controversial issues.

- **Joint sessions:**

Joint events include a discussion of Global Settlements, a review of the new Uniform Data Standard (UDS), and a two-hour communications training course for all attendees. Breakfasts, lunches and a reception will allow for additional interaction among participants.

Dale Stephenson, president of the NCIGF, states, "By scheduling this event immediately following the NCIGF Annual Workshop, we help busy professionals access each other. This jointly sponsored program exemplifies NCIGF's continuing commitment to working with members of the insurance community to improve the insolvency system."

SIR President Mike Miron lists building understanding between Guaranty Funds and Receivers as one of the goals of the SIR. "By providing innovative training where two groups problem-solve for the industry, we are ensuring that we serve our members well. In only three years, our membership has grown to more than 350 members, domestic and international. We will continue growing by delivering leading-edge programs like this."

For registration, hotel reservations, or more information on "WORKING TOGETHER: Receivers and Guaranty Funds," contact Candy Miller at 317/464-8180.

## Inside this issue

# Insolvency Cooperation
## A Guaranty Fund Perspective

*By Dale Stephenson*

Every insurance company insolvency is important. Every insolvency has its own "public" to whom it is vital. Every insolvency must operate within the statutory basis established for insurance liquidations in the state of domicile. These are absolutes, however, there are many other factors which are not as definite.

Many insolvencies must also adhere to the statutory basis for an ancillary receivership. The guaranty fund statute for each state in which there are claims covered by the guaranty fund also applies. In fact, it is possible to have both the property and casualty guaranty statutes and the life and health guaranty statutes apply to different claims of the same insolvency.

Coordination and cooperation between all of the various entities is, therefore, essential. Essential not only to the effective and efficient liquidation of the estate, but to compliance with the letter of all of the applicable laws, rules and regulations. It is also essential that all of this be considered within the framework of public policy represented by these same laws, rules and regulations.

Coordination and cooperation do not, however always have the same appearance or priorities to all of the parties affected by an insolvency. For the individual claimant, payment is the primary concern, whether or not there is guaranty fund coverage. For the guaranty fund, discharge of their statutory liability with the least possible publicity is paramount. For the guaranty fund's members, minimizing the assessments for insolvencies can be an essential part of their own ongoing financial condition. To the various states, the impact of the cost of insolvencies may be reflected in increased insurance expense for their residents, direct impact upon state revenues, and not so direct impact upon the political realities of public service.

So the process, which has an obvious direct and abiding impact upon and control by the receiver, the receivership staff and the liquidation court, has many disparate participants with diverse interests and responsibilities. To maximize the process requires a balancing act, maybe akin to running on one rail of a railroad track, in front of an oncoming train. If you have ever tried to run a rail, you know that it isn't easy. However, if two people run together, one on each rail while holding hands, it is easier and you can run much faster. If receivers and guaranty funds "run the rails" together they both benefit.

The property and casualty guaranty funds must depend upon effective and timely transmittal of information and claim files from receivers to insure the continuity of payment of workers' compensation indemnity checks; prompt approval of medical procedures for workers' compensation claimants; prompt settlement of auto claims and property damage claims; communications to insureds and claimants to let them know that the guaranty fund exists and will be handling their claim; and timely and appropriate legal action for policy defense.

Receivers must depend upon effective and timely action by the property and casualty guaranty funds to acquire appropriate reserves; accumulate accurate payment information; provide for the initial notice and subsequent status reporting for reinsurers; and rely upon the provision of prompt and appropriate claim handling to insure a minimum of negative publicity.

Working together, we have created the Uniform Data Standard (UDS) for transmittal and reporting of claims information and we are now pursuing standards for financial reporting. Working with individual receivers, we have successfully developed procedures for handling the ongoing payment of workers' compensation indemnity payments in several insolvencies. There has been one insolvency in which a meeting of the "coordinating committee" (representative committee of involved guaranty funds) was held with receivership personnel prior to a liquidation order. Coordinating committees have also routinely worked with receivers to minimize the problems of routing and distribution of claims to the appropriate guaranty fund.

However, as the length of time needed to close insolvencies has increased and the federal government has pursued their position on their rights to "super priority" the flow of funds from receiverships to guaranty funds has slowed to a point that has caused guaranty funds some discomfort (at a minimum). "Early access" after 5 to 7 years (if at all) is now commonplace. This is true, while guaranty funds are facing concerns about our capacity (early access is a direct dollar for dollar deduction from the need for capacity) and at a time that the guaranty funds are finding some large commercial insureds willing to discuss "global settlements" of their claims (usually for substantial amounts).

It is also a time when guaranty funds and receivers are both faced with calls for replacement of the current system. Interstate compacts and/or federal programs might not work better, but you can certainly find supporters for trying either or both alternatives. Guaranty funds, like any other enterprise (including receiverships) are not always perfect. We can increase the communication with each other, resolve our differences and improve our processes.

We have a choice, find new and better ways to run the rails in front of the train or get run over by it. To do so, we must cooperate, coordinate and communicate at continuously higher levels of appreciation and understanding of each of our responsibilities and positions.

*Dale Stephenson is President of the National Conference of Insurance Guaranty Funds.*

# President's Column

**To: All Members**
**Re: Highlights of Recent Activities**

I am pleased to report that our Society is making considerable progress toward reaching its goal of providing a forum for the exchange of ideas and information on insurance receiverships.

Beginning with the prior issue of this quarterly Newsletter, there has been an expansion in number of pages and text content as well as an improvement in physical appearance. Your Board has heard nothing but compliments about these changes. Credit is due to both our Publications Chair, Deanna Delmar and our new Executive Director, Steve Acunto, for these improvements.

The initial report of the Achievement Committee which appears in this issue is further evidence of SIR's progress. I predict that this Committee's reports will become an important contribution to the receivership world. A flurry of publicity frequently accompanies the demise of an insurer whereas far lesser sounds are heard applauding the efforts of the receiver and his or her staff.

The introduction of guest speakers to the program for SIR's Saturday Roundtable has materially enhanced their value. Doug Hartz deserves credit for introducing this concept at our Denver Workshop this March. The June presentation by Sandra Spooner, the attorney responsible for assertion of the federal government's claims for superpriority, was outstanding both in scope and candor. Ms. Spooner provided an insight to an important issue that is not generally available elsewhere. Eligible SIR Members should take advantage of future Roundtables which are generally scheduled on the Saturday preceding the NAIC quarterly meetings. Specific details respecting the September Roundtable in Minneapolis appear elsewhere in this issue.

SIR's December Roundtable will be incorporated into our Annual Conference which is open to all members. This will be a full day program featuring audience participation presentations which your Board believes you will find particularly interesting. Be sure to arrange your New Orleans travel plans to allow you to spend Saturday at our Annual Conference. We are changing the format of the annual meeting, eliminating the dinner. The meeting will now immediate follow the conclusion of the annual conference. The next Newsletter will give further details.

The exchange of ideas and information on insurance receiverships includes the "who" of receiverships. SIR's first Membership Directory will be distributed to you this fall. Information forms were mailed to all members at the beginning of July. There will be no second mailing. If you haven't received your form please contact our Executive Director immediately.

The addition of a "Personals" column is designed to highlight activities of SIR members. New features in this Newsletter are the columns by NCIGF and NOLHGA, the spokespersons for the guaranty associations in the property/casualty and life insurance fields respectively. The contributions from these organizations for SIR's Newsletter is consistent with the key role of these organizations in the workings of the receivership world. We are pleased to contribute to joint efforts by receivers and guaranty associations in this Newsletter.

Another joint effort is the upcoming NCIGF/SIR Jointly Sponsored Training Program in San Antonio this November. An outstanding group of claim specialists will lead group analysis of some of the complex claim issues currently facing both receivers and guaranty associations. The fee is nominal especially compared to some charged at third party seminar organizations. In addition, the dates include a Sunday and Monday in order to minimize time out of the office. If you or your associates have any claim involvements, then you should follow up on this program, details of which appear in this issue.

Several other projects are in the pipeline for SIR. Details will be in future Newsletters as arrangements are finalized. I would like to remind members that SIR is an organization that is still in its infancy and priority as well as quality of implementation is a major concern. Suggestions by members with respect to any phase of the Society's activities are solicited. Letters to the Editor of this Newsletter are also welcomed.

One final reminder, our receptions on Monday afternoon at the NAIC Meetings have become a major success. Attendance has grown steadily. It's a good place to meet up with other persons interested in receiverships and these receptions are completely informal.

Looking forward to seeing you in Minneapolis.

**Mike Miron**
**President, S.I.R.**

# Meet Your Colleagues

## Constance B. Foster
### Principal Member

Connie Foster is the managing partner of the Harrisburg Office of the Philadelphia based law firm of Saul, Ewing, Remick & Saul. Prior to joining Saul, Ewing on March 1, 1992, Connie served as the Insurance Commissioner for the Commonwealth of Pennsylvania from January 1987 through February 28, 1992.

Among her other responsibilities as Insurance Commissioner, Ms. Foster served as Rehabilitator of Mutual Fire, Marine & Inland Insurance Company, the fourth largest insolvent property and casualty company in the United States. When Mutual Fire was put into rehabilitation on December 9, 1986, just six weeks prior to Ms. Foster becoming Insurance Commissioner, it had 28,000 policyholders located in all fifty states and several foreign jurisdictions and 14,000 known claims. It is now anticipated that policyholder claims will be 100% satisfied by year end 1994.

Since returning to private practice, Ms. Foster continues to focus on insolvency matters currently serving as regulatory counsel to Fidelity Mutual Life Insurance Company, In Rehabilitation.

Connie received her bachelor's degree in history from the University of California at Los Angeles and her law degree, magna cum laude, from the Rutgers Camden School of Law where she was a member of the Law Review.

In addition to practicing law, Connie is active in community affairs serving as 1993 Campaign Chair for the United Way of the Capital Region. Connie is married with two teenage sons and miscellaneous animals. Her one dream is to take a bridge cruise and spend at least a week doing nothing day and night but playing bridge with other bridge fanatics.

## David Vaughn
### Associate Member

David, a resident of Bristol, England, is married with 3 boys (twins aged 10 and one aged 6 years old) who all share his interest in playing and watching cricket and football.

David qualified as a Chartered Accountant in 1980 with Coopers & Lybrand and then left to work as a management accountant in industry, first with the mining group RTZ at its Bristol ISF process zinc smelter and then with Standard Chartered Group's Cardiff based finance house subsidiary.

In 1984, David rejoined Coopers & Lybrand, specializing in managing consultancy and then focusing on financial services. In 1987, David was requested to take responsibility for Coopers & Lybrand's then newly created run-off operation, Coopers & Lybrand Insurance Services, which he expanded from a two employee, one client operation, to the current forty employees and twenty clients.

Recently, David was joint managing director, with specific responsibilities for setting up the technical (claims and collection) aspects of KMS, the run-off vehicle of the KWELM insolvency.

David now has responsibility within Coopers & Lybrand's National Insurance Insolvency Practice for managing both the technical and operational aspects of insurance underwriters, broker and underwriting manager insolvencies. He is widely consulted by insurers and reinsurers with operational or run-off difficulties in the London Market and provides insurance litigation support to London Market lawyers.

David's portfolio of jobs is wide ranging and anyone dealing with the London Market has probably dealt with one of the following:

**Underwriters Insolvencies**

Halvanon - London Market branch on an Israeli company
Reinsurance Company of Mauritius - A Mauritian reinsurer
Grand Union - Hong Kong insurer/reinsurer
Continental Assurance Company of London - contingency insurer
Fremont (UK) - London Market Underwriter Reinsurers
ICS Re/RMCA Re - two Singapore reinsurers
ICS (UK) - a member of English & American

**Underwriting Pool Brokers**

Rowbothan Baxter Limited
Durham Hadley Cannon Limited
Hall Harford Jeffries Limited
IBI Limited

**Underwriting Managers**

David J. Burrows (Underwriting Managers) Limited
Ocean Reinsurance Corporation SA

## William D. Latza

### Sustaining Member

William D. Latza is a partner in the insurance and reinsurance industry practice group of the law firm Stroock & Stroock & Lavan, who act as counsel to the Society. The firm is a century-old general practice firm of approximately 350 lawyers headquartered in new York's financial district, where Mr. Latza is located, and having offices in Los Angeles, Miami, Washington, DC and Budapest, Hungary.

A native of Nebraska, Mr. Latza earned his B.S. with distinction in business administration and economics from the University of Nebraska — Lincoln in 1977 and his J.D. in 1981 from the Georgetown University Law Center. In addition, he was awarded a graduate fellowship to the London School of Economics and Political Science, where he studied the economics of industry in 1977-78.

Prior to becoming associated with Stroock in 1985, he was associated with an insurance specialty firm in New York City. He is engaged exclusively in the practice of insurance and reinsurance law for both United States and overseas clients, principally in the areas of corporate transactions, holding company and financial condition regulation, insurance-related acquisitions and financings, management of discontinued operations and reinsurance transactions. He is also substantially involved on behalf of insurers and reinsurers, mainly in the property/casualty industry, in contentious matters concerning policy coverage and validity and the resolution of reinsurance disputes.

Mr. Latza is the author of "Reinsurance", chapter 14 in the Matthew Bender & Co. treatise *Business Insurance Law and Practice Guide,* and is a frequent writer and speaker on insurance and reinsurance topics. Bill is a member of the American Bar Association, where he is a Vice Chair of the Public Regulation of Insurance Law Committee of the Tort and Insurance Practice section, the International Bar Association, the New York State Bar Association, the New York County Lawyers Association and The Association of the Bar of the City of New York, and he is an associate or sustaining member of the Society of Financial Examiners, the Insurance Regulatory Examiners and the Society of Insurance Receivers.

## Elizabeth A. Biaett

### Sustaining Member

Ms. Biaett graduated from Northern Arizona University (many years after Mr. Thomas Wrigley!) with a Bachelor of Science in Accountancy. Her 20 years of experience include eight years in public accounting with one of the "Big Six" firms, ten years in private industry and three years heading her own firm. Since April, 1991 Ms. Biaett has been part of the Conservator Team hired by the California Insurance Commissioner for Executive Life Insurance Company. In this capacity she was actively involved in the planning and actual take-over of the company, served as acting CFO, and has provided litigation support services, including expert witness testimony.

Ms. Biaett and her firm have also provided financial and accounting services for the Mission Insurance Companies liquidation since September, 1987, and are currently assisting the Georgia and Utah Departments of Insurance with receiverships. She is also supporting various litigation efforts for other clients. Her prior experience in industry was in various financial capacities with various troubled and bankrupt companies.

In addition to being a member of the Society of Insurance Receivers, Ms. Biaett is Editor of the "Takeover" chapter and previously served as Editor of the "Accounting" Chapter for the NAIC Receivers' Handbook. She has also served on the Life Supplement Committee for the "Takeover" and "Accounting" Chapters. Ms. Biaett has been a speaker at three of the four "Liquidator's Workshops" sponsored by the NAIC and a speaker at the June, 1993 ABA seminar on "Life Insurance Insolvencies".

Besides loving her work and her new husband, she is an avid skier and Laker fan even during these difficult times! They will be back! ■

# It's Time To Make Changes In Rules For Fidelity Bonds Held by Insurers

By Robert A. Deck, CPCU
Special Deputy Receiver
Missouri Receivership Office

*The insurance regulatory agency in each state should consider adopting regulations or lobby their legislature to pass laws requiring a specific form of fidelity bond for insurance companies.*

During the course of most financial examinations of insurance companies, a review is made of the fidelity bond and various other insurance coverages. The NAIC has guidelines as to the "adequate" minimum of fidelity bond coverage, based upon a decade old formula that incorporates five (5%) percent of assets and ten (10%) percent of the current year's income. The reader's attention is directed to page 76 of the NAIC Financial Examiner's Handbook.

This NAIC guideline for the amount of fidelity bond may be adequate for companies which are solvent and in normal operation. But these limits have been proven time and again, that they are inadequate if the company should later become insolvent.

As Deputy Receiver of four insolvent insurance companies, one of my duties is to marshal assets. This includes the recovery of those funds which were removed under questionable circumstances or improperly removed from the company by the Board of Directors or the officers prior to insolvency. The fidelity bond is often the main device to accomplish this recovery, since the individual directors and officers are in an otherwise "judgment proof" position.

I have not been able to make any recovery under the fidelity bond because:

1. The bonding company said the directors and officers were not "employees" of the company. Or, that such persons were employees of the holding company, and not the insurance company, named in the fidelity bond.

2. The alleged fraud was not discovered and a claim made within one year of its occurrence.

3. The fidelity bond expired or was canceled prior to the date when the alleged fraud occurred.

4. The bonding company denied the claim because, the board of directors had knowledge of the alleged dishonest activity and as a result of its actions, or inactions, ratified the same and permitted the wrongful activities to continue.

However, even if the fidelity bond claims were paid, for $25,000, $150,000 or more, it would not have covered the fidelity losses of $1.5 million in one company, $500,000 in another and $10 million in a third company, that I have been administering.

The total issue of the adequacy and purpose of the fidelity bonds, as recommended by the NAIC, needs to be re-addressed. This needs to be done in the light of the current levels of alleged fraud, dishonesty and other acts that cause wrongful removal of funds from potentially insolvent companies.

The two areas that need special review are:

1. the total dollar limits of fidelity bonds, and

2. the technical wording, exclusions and definitions of the bond coverages.

The insurance regulatory agency in each state should consider adopting regulations or lobby their legislature to pass laws requiring a specific form of fidelity bond for insurance companies. These bonds would:

A. Provide a minimum limit of $1 million and a $50 million maximum and declare that it is a Commercial Blanket Position Bond where the limit applies to each employee, director and officer position.

A single (low) policy limit for one or more positions combined is not appropriate, unless the amount is 3 or 4 times higher than a single individual limit which would address the possibilities of collusion, and hence greater losses.

B. Contain a provision that in the event of cancellation, at least a 60 day advance notice should be provided by certified mail, with a return receipt, to the state insurance regulatory agency.

C. Provide coverage for all persons affecting the company's operations; members of the board of directors, and all officers. This would also cover those holding company employees who work on the insurance company activities.

D. Expand the definition of loss notification to a two year period. Losses arising out of events during two years prior to the date of insolvency and reported within two years of the commencement of the insolvency date would be covered.

A two-year period is needed to give an insurance receivership staff time to discover the alleged fraud during the early administration of the receivership.

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*This article was first published in* The Regulator, *the official publication of the Insurance Regulatory Examiner Society and is reprinted here with permission.*

# NOLHGA To Launch New Quarterly Publication

***By Christopher Bonner, APR***
*Vice President & Director of Communications NOLHGA*

The National Organization of Life and Health Insurance Guaranty Associations will launch in September a new quarterly publication, the Life and Health Insurance Guaranty Journal, aimed at a broad audience of regulators, receivers, NOLHGA members, insurance companies and the news media.

The mission of the NOLHGA Journal will be to provoke a useful dialogue between the guaranty funds and the target audiences by providing a credible source of information about life and health insurance guaranty funds, the new Members' Participation Council insolvency process and pending cases.

"The NOLHGA Communications Committee encouraged staff to develop this quarterly to address the many issues that have emerged in the world of life and health insurance insolvencies," said NOLHGA President Jack H. Blaine. "It was obvious to us that there has been confusion and a great deal of interest in the process because change has come so quickly in the past few years."

The cover story for the inaugural edition of NOLHGA Journal will tackle one of the most thorny issues confronting guaranty funds. "Why So Long: Addressing Delays in the Insolvency Process," by NOLHGA counsel John F. Del Campo, critically examines the insolvency path from conservation to closing.

Another article, "How Guaranty Associations Handled the Big One," takes a look at the lessons from the Executive Life case.

Other highlights of the maiden issue include:

- A description of the Members' Participation Council and how it addresses the concerns of commissioners;
- Status reports on all active insolvencies;
- Update on all cases closed in 1994;
- Profiles of MPC executive committee members, task force chairs and NOLHGA senior staff;
- The Members' Participation Council calendar of meetings for 1994-95;
- Complete list of NOLHGA services and publications. ■

The NOLHGA Journal welcomes articles of interest to the life and health insurance insolvency community. Please send manuscripts to:

Christopher Bonner, Editor
NOLHGA Journal
13783 Park Center Road
Suite 329
Herndon, Virginia 22071
TEL 703/481-5206 FAX 703/481-5209

# Report of June Roundtable Held in Baltimore, Maryland

On Saturday, June 11, 1994, a Roundtable for Principal and Associate members was held in conjunction with the mid-year meeting of the NAIC.

Jim Gordon introduced the two guest speakers for the Roundtable, Sandra Spooner, Deputy Director of Commercial Litigation for the Civil Division of the Justice Department and Paul W. Grimm, a partner with the Baltimore law firm, Niles, Barton & Wilmer. Sandra and Paul were adversaries in the Federal Priority litigation known as Gordon v. U.S. and Paul assisted in the moot court preparation of Jim Rishel in his argument before the Supreme Court in the Fabe case.

Sandra spoke about the Fabe case and its implications in future matters. She advised that the Justice Department views these matters as revenue issues. She reported that Fabe has been remanded. One of the compelling issues on remand is whether the statute can be deemed to be severable since the Supreme Court held that only administrative expenses and policyholder claims should be paid prior to claims of the Federal government. Thus, the import of the Fabe decision would be to effectively rewrite the Ohio statute which might cause the entire statutory scheme to fall. Ms. Spooner reported that a settlement conference was scheduled this month.

During a spirited question and answer period, Ms. Spooner advised that the Justice Department will not attempt to undermine the Fabe decision as long as Receivership statutes treat federal government policyholder and third party claims on an equal priority as private policyholder and third party claimants. However, she did note that the Justice department still takes the position that it is not bound by the bar date set forth in an Order of Liquidation. Several receivers

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## June Roundtable

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mentioned that they had entered into release with the Justice Department regarding federal claims. Lastly, Ms. Spooner graciously suggested that if Receivers have questions, they could contact her directly.

Mr. Grimm gave an entertaining discussion of the Abstention doctrine. He discussed the history of the doctrine, the NOPSI case, a 1989 Supreme Court pronouncement which reaffirmed the Burford doctrine but under narrower and stricter guidelines and the divergent decisions since that time. Mr. Grimm advised that if a Receiver moves for a Federal court to abstain in a case in which he or she has been sued and the matter is one that goes to the core of the regulatory framework of liquidating an insurance company, the courts would be more likely than not to abstain and allow the Receivership Court to decide the issue.

After a short break, the meeting continued with a true roundtable discussion of current issues. These included the formation of ancillary receiverships for asset recovery purposes only, how to insist that ceding insurers continue to report to insolvent reinsurers, cooperation between receivers and federal prosecutors and how to collect special and general deposits from ancillary states. ■

## Fidelity Bonds

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E. Design a schedule with bond limits applying to each insurer (and other affiliates) in a holding company group of insurance companies.

F. Define losses as covered, even if they resulted from actions known to and approved by the Board of Director (subject to careful wording so as not to violate public policy).

G. Be mandatory for an insurer to purchase fidelity bond coverage, and with adequate minimum amounts, not merely suggested as a prudent business practice. Fidelity bonds are not nice to have, they are essential for the restoration of the policyholder's value in a failed company.

There should be a statute, with prescribed penalties, for failure to carry the coverage.

In summary, if the policyholders and claimants of insolvent insurance companies are to be truly protected by the insurance regulatory agency, it is important that these reforms in fidelity bond coverages be implemented. ■

# Society of Insurance Receivers Balance Sheet

## Treasurer's Report

| Assets | June 30, 1994 | June 30, 1993 |
|---|---|---|
| Current Assets | | |
| Wilmington Trust Checking Acct | $24,740.38 | $38,640.92 |
| Wilmington Trust CD | 25,000.00 | |
| Accounts Receivable | 290.00 | |
| Total Current Assets | 50,030.38 | 38,640.92 |
| Property, Plant and Equipment | 1,367.50 | |
| TOTAL ASSETS | $51,397.88 | $38,640.92 |
| **Liabilities and Equity** | | |
| Current Liabilities | $1,704.31 | |
| Accounts Payable | | |
| Members' Equity | | |
| Fund Balance | 34,904.34 | 13,650.02 |
| Net Income | 14,789.23 | 24,990.90 |
| Miscellaneous | | |
| Total Members' Equity | 49,693.57 | 38,640.92 |
| TOTAL LIABILITIES AND EQUITY | $51,397.88 | $38,640.92 |

# Contingent Claims: Has Their Time Finally Come?

*by*
***Stephen W. Schwab***
*Rudnick & Wolfe*
*Chicago, Illinois*



Receivers face enormous difficulties in ascertaining, estimating and valuing the liabilities of insolvent insurers. Part of the reason for such difficulties stems from the dramatic increases in the number, size and nature of insurance insolvencies in the last 20 years. Past insolvencies affected "small companies handling mostly automobile insurance and operating in one state or on a regional basis." U. S. General Accounting Office, *Insurer Failures: Property/Casualty Insurer Insolvencies and State Guarantee Funds* 3 (1987). More recent insolvencies, however, "have become more diverse, and now reflect more fully the whole range of operating companies...The [federal General Accounting Office] found that one-third of the insolvent companies it studied in the post-1976 period operated in 20 or more states." Congressional Research Service, *Insurance Company Solvency* 9 (1989).

Most American laws were not designed to remedy these problems. A substantial portion of the U.S. laws governing insurance insolvency were enacted in the 1930s to address the problems confronting receivers at that time. Those laws are now inadequate for dealing with the myriad complex issues arising in today's receiverships, and in particular, the administration of contingent claims. In this article, we summarize the existing statutory provisions governing the administration of contingent claims, outline the alternatives most receivers have for administering them and describe the recent changes to the Illinois Insurance Code, as well as the proposed revisions to the NAIC Model Act, both of which suggest that meaningful legislative reform is at hand.

## How are Valid Claims Identified?

Whether a claimant is entitled to a distribution of estate assets generally depends upon the nature of its claim. This, in turn, depends upon the relative stage of the claim's development, i.e., whether liability has been established, whether the amount has been determined, and whether payment is due. Each of these determinations is made with reference to the "fixing date." Section 22(B) of the National Association of Insurance Commissioners (the "NAIC") Insurers Rehabilitation and Liquidation Model Act (the "Model Act") provides for the fixing of rights and liabilities as follows:

Upon issuance of the order [of liquidation] or rehabilitation, the rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members and all other persons interested in its estate shall become fixed as of the date of entry of the order.

Insurers Rehabilitation and Liquidation Model Act § 22(B) (Nat'l Ass'n of Ins. Comm'rs 1993) (hereinafter "Model Act"). The insurance statutes of most states contain similar provisions. The significance of this "fixing date" is twofold: (i) it provides a date upon which coverage is terminated, enabling a policyholder to share in the ultimate distribution of assets with respect to claims for unearned premium and losses occurring on or before that date; and (ii) it establishes a date certain on which the insolvent company's liability is determined, resulting in the classification of claims as "contingent" or non-contingent.

## What is a Contingent Claim?

A contingent claim is one that is uncertain as to liability. As the New York Court of Appeals explained in 1936:

> [A contingent claim is] a claim which has not accrued and is dependent on the happening of some future event;...[it] depends for its effect on some future event, which may or may not happen.

In *re Lexington Sur. & Indem- Co.*, 5 N.E.2d 204 (N.Y. 1936).

In other words, a contingent claim is one as to which it remains uncertain whether the insolvent party ever will become liable to pay.

In the insurance insolvency context, a "contingent" claim should be defined with reference to the fixing date. Thus, whether a claim is contingent depends upon whether the insolvent insurer's liability had been established as of the fixing date. Only a claim which was uncertain as to ultimate liability on the fixing date is a true contingent claim. If, on the fixing date, the claim remained uncertain only as to amount, the claim is not contingent, but simply "unliquidated." Similarly, if on that date the claim was absolute as to liability and certain as to amount, but not yet due, it is "immature." Thus, contingency is a function of liability, liquidation is a function of valuation, and maturity is a function of time.

Unfortunately, the term "contingent" often has

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## Contingent Claims

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been used mistakenly to describe claims that are certain as to liability, but merely "unliquidated" or "immature." The distinctions between these terms, however, is a matter of substance, not form. In some jurisdictions, the contingency, liquidity and maturity of a claim determines whether it will be allowed in an estate and whether the claimant will share in distributions of the estate's assets.

### Statutes Governing the Filing and Proof of Contingent Claims

At least initially, how contingent claims should be administered in an insurance receivership is determined by the relevant state's insurance receivership statute. The Model Act currently provides for the filing and allowance of contingent claims as follows:

A. The claim of a third party which is contingent only on his first obtaining a judgment against the insured shall be considered and allowed as if there were no such contingency.

B. A claim may be allowed even if contingent, if it is filed in accordance with Section 39. it may be allowed and may participate in all distributions declared after it is filed to the extent that it does not prejudice the orderly administration of the liquidation. Model Act § 37. Not -all states follow the Model Act, however. In fact, as many as 12 states presently do not have any statutory recognition of contingent claims per se.

*More than twenty states' statutes explicitly provide for the filing and allowance of contingent claims.*

More than twenty states' statutes explicitly provide for the filing and allowance of contingent claims. For example, the Illinois Insurance Code provides that both insureds and those with claims against insureds may file contingent claims:

When a Liquidation, Rehabilitation or Conservation Order has been entered in a proceeding against an insurer under this Code, any insured under an insurance policy shall have the right to file a contingent claim [and] any person who has a cause of action against an insured of the insurer under an insurance policy issued by such insurer shall have the right to file a claim in the proceeding, regardless of the fact that the claim may be contingent...
215 ILCS 5/209(4)(a), (6) (1993). Nearly half of the United States and territories have enacted virtually this same statutory language, although most of them limit consideration of contingent claims to those arising under a liability insurance policy.

### Allowance of Contingent Claims

The mere filing of a contingent claim has never guaranteed that it will be paid. Some states require that a contingent claim become absolute, i.e., that its liability be established, before it may be paid. Other states require this only of some claimants and not others. Before it was amended recently, the Illinois Insurance Code (like the laws of most other states) provided that contingent claims of insureds would not be allowed "unless such claim is liquidated and the insured claimant presents evidence of payment of such claim to the Director on or before the last day fixed by the Court" for the liquidation of contingent claims, i.e., not more than three years after the date fixed for filing claims. 215 ILCS 5/209(3). Contingent claims of third parties, however, would be allowed:

(a) if it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured; and (b) if such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claims against such insurer arising out of this cause of action other than those already presented can be made; and (c) if the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation, rehabilitation or conservation. 215 ILCS 5/209(4) (repealed 1993). Nevertheless, there were limitations on the method by which a contingent claim could be "made" absolute:

No judgment against such an insured or an insurer taken after the date of the entry of the liquidation, rehabilitation or conservation order shall be considered in the proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured or an insurer taken by default, or by collusion prior to the entry of the liquidation order shall be considered as conclusive evidence in the proceeding either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

*Id.*

### A Hobson's Choice?

Against the backdrop of these rules, a receiver essentially has had three choices in deciding the overall scheme by which the estate would be administered and contingent claims would be valued. The receiver could:

(1) Recommend to the court a "bar" date before which all claims, both contingent and non-contingent, must be liquidated, thereby cutting off the insolvent's liability at an arbitrary date;

(2) Recommend to the court a run-off of the estate over time; or

(3) Recommend to the court a method by which the ultimate claims of creditors can be fairly determined and allowed against the estate.

The first approach has had the effect of penalizing creditors who placed long-tail business with the insolvent company or did business with it shortly before its demise, because only claims that have become absolute, liquidated claims as of the bar date will be paid; persons whose claims have not developed will not be paid. The second approach, in most instances, has kept estates open for many years, even decades. While all creditors are afforded equal opportunity for payment, the estate's assets may be depleted by ongoing administrative costs and expenses. The third approach well may be the most preferable, because all claims, whether contingent, absolute, unliquidated, immature, or liquidated and mature, can be paid. Liquidated claims may be allowed through the usual proof of claim procedures, while contingent claims may be estimated, valued and submitted for payment.

This method thus strikes a balance between the first two: It treats all creditors equally regardless of the type of business they transacted with the insolvent, allowing all creditors an opportunity to be paid; and it provides for a much earlier distribution of funds, which benefits the estate's creditors and facilitates a prompt return of funds to the marketplace.

## Recent Statutory Revisions and Proposals

Recognizing the inequity of denying policyholders fair value for their contingent claims, as well as the value of contingent claims in marshaling reinsurance recoverables and other assets, the NAIC and the State of Illinois have taken divergent approaches to the administration of contingent claims. As revealed below, the principal difference between the two approaches lies in the types of claims allowed.

The Model Act Issues Working Group of the NAIC's newly constituted Insolvency EX5 Subcommittee (combining the old Rehabilitators and Liquidators Task Force and the Guaranty Fund Task Force) has proposed a number of changes to the Model Act which are consistent with the third approach to contingent claims described above. If the proposed amendments are adopted, Section 41 of the Model Act would permit the filing of contingent, unliquidated and immature claims. Contingent claims that do not arise under liability insurance policies no longer will be prohibited. In addition, the much maligned "policyholder protection" claim under an occurrence policy now may be accepted as a contingent, unliquidated or immature claim (depending upon its relative stage of development) once a specific claim is made by or against the insurer. Contingent claimants also could share in the distribution of assets from the estate. Such claimants include: (i) the holder of a contingent claim against the insurer who presented proof of the insurer's liability; (ii) the holder of a contingent claim against an insured who established liability, that no further valid claims arising out of the same cause of action could be made (other than those already presented), and that the insurer's total liability to all claimants arising out of the same act would not be increased because of the receivership; (iii) the holder of an unliquidated claim whose amount was established by estimation; or (iv) the holder of an immature claim that was discounted to present value. These amendments represent a common sense approach to the problems that contingent claims present, while recognizing the real value of such claims to policyholders and receivers.

Illinois recently amended its receivership statute to delete the liability insurance policy limitation, and to provide for the allowance of "contingent claims" (an undefined term) if four criteria (the same four articulated in Section 41 of the Model Act) are satisfied. 215 ILCS 5/209(4)(a), (b). Moreover, the statute now permits the allowance, by estimation, of contingent or unliquidated general creditors' and ceding insurers' claims, which even "may include an estimate of incurred but not reported claims." Id. § 209(7). Broader than the proposed changes to Section 41, the Illinois statute now enables receivers to augment estate assets with retrocessional recoveries on contingent claims. No court has yet construed the Illinois statute, and the Illinois receiver is just beginning to employ these far-reaching provisions.

## Conclusion

When an insured purchases insurance protection or an insurer reinsures risks, it expects that there will be indemnification for then unknown losses. In most jurisdictions, an insurer's or reinsurer's insolvency has served to cut off a policyholder's right to file a claim against the estate for contingent, unliquidated or immature claims. The proposed amendments to Section 41 of the Model Act and the recent amendments to the Illinois Insurance Code evince both the need for, and the power of, reform. In the end, satisfaction of claims is what an insurance receivership is all about. Viewed in this light, issues relating to contingent claims are but attempts to define more equitably the nature of acceptable claims. Much work remains to be done, but the Model Act and Illinois amendments have taken great strides in the right direction. ■

*This method thus strikes a balance between the first two: It treats all creditors equally regardless of the type of business they transacted with the insolvent, allowing all creditors an opportunity to be paid; and it provides for a much earlier distribution of funds, which benefits the estate's creditors and facilitates a prompt return of funds to the marketplace.*

# Committee Reports

*Jim Dickinson,*
*Chair*

Reporters:
**Northeastern Zone,**
Allessandro Iuppa (ME),
William Taylor (PA);
**Midwestern Zone,**
Kathleen Neiweem (IL),
Robert Johnson (IA);
**Southeastern Zone,**
Robert Greer (WV),
James Guillot (LA);
**Western Zone,**
Mark Tharp (AZ),
Jo Ann Howard (TX);
**International,**
Philip Singer (England),
John Milligan-Whyte (Bermuda)

## Achievement Subcommittee Report

**This is the first article to appear in the quarterly SIR newsletter which will provide our membership with detailed up-to-date information as to the progress occurring in the receivership arena of insolvent insurers located in the United States and worldwide. That progress being reported upon includes, but is not limited to, (1) closing of receivership estates, (2) distributions by receivers to guaranty funds (associations), either as early access payments or subsequent payments to the guaranty funds, (3) distributions made by receivers directly to policyholder creditors, and (4) results of successful rehabilitation proceedings of distressed insurers.**

Mike Miron, President of SIR, recruited ten able correspondents at the Denver NAIC meeting this Spring, to assist in SIR's ongoing news gathering endeavors. Our U.S. correspondents have since obtained or are in the process of obtaining the assistance of a contract person in each state to report quarterly as to the events occurring in rehabilitations or liquidations taking place in their particular states. Philip Singer and John Milligan-Whyte are currently busy dividing and conquering the receivership world outside the United States and will have timely reports which will be included in later articles.

Our first report includes both information of receiverships for the year 1993 and the first quarter 1994. Seven states have responded in time for our initial article. It is expected that our second report will reflect information from many more states. We now have in place most of the state contact persons who are forwarding information as received to the US Zone reporters.

The following is a compilation of those reports which we hope you will find interesting:

### Receivers' Achievements by State

**Delaware** (Richard Cecil, State Contact Person)

| Estate Closed - 1994 | | Year Action Commenced | Insurance Category |
|---|---|---|---|
| | American Protective Excess Ins Co | 1985 | P&C |

**Pennsylvania** (William Taylor/Michael Petrelia, State Contact Person)

| Estates Closed - 1993/94 | | Year Action Commenced | Insurance Category |
|---|---|---|---|
| | Builders Indemnity Exchange* | 1991 | A&H |
| | Care Welfare Trust & Comp Assn* | 1991 | A&H |
| | Erin Benefit Assurance Co | 1988 | A&H |
| | Scranton Insurance Co | 1985 | P&C |
| | *unlicensed | | |

| | | Amount | Insurance Category |
|---|---|---|---|
| **Early Access Funds & Subsequent Amounts Paid to Guaranty Funds** | Columbia Life Insurance Co | $1,000,000 (1993) | L&H |
| | Life Assurance Company of PA | 5,000,000 (1993) | L&H |
| | Mutual Fire, Inland & Marine Ins Co | 8,445,548 (1993) | P&C |
| | | 1,670,112 (1st Qtr 94) | |
| | World Life & Health Insurance Co | 1,000,000 (1993) | L&H |

| | | Amount |
|---|---|---|
| **Disbursements Made Directly to Policy/Contract Creditors** | Builders Indemnity Exchange | $2,002,211 (1994) |
| | Erin Benefit Assurance Co | 236,472 (1st Qtr 94) |
| | Mutual Fire, Inland & Marine Ins Co | 18,376,948 (1993) |
| | | 2,458,892 (1st Qtr 94) |

**South Carolina** (Amy Zwart, State Contact Person)

Estate Closed - 1994

| | Year Action Commenced | Insurance Category |
|---|---|---|
| Grange Mutual Fire Ins Co of SC | 1989 | P&C |

**Tennessee** (Jeanne Bryant, State Contact Person)

Estates Closed - 1993/94

| | Year Action Commenced | Dividend Percentage | Insurance Category |
|---|---|---|---|
| Continental Bankers Life Ins Co of the South | 1986 | 27% | L&H |
| Cotton Belt Insurance Co, Inc. | 1982 | 74% | P&C |
| Federal Charter Surety Corp* | 1991 | -0- | Surety |
| First Choice Health Plan, Inc | 1988 | 89% | HMO |
| Mutual Insurance Co of Tennessee | 1977 | 8% | P&C |
| National Employees & Operators Assn | 1991 | 15% | MEWA |

*Unlicensed

**Payments to Other Receiverships Subject to Ancilliary Proceedings**

| | Amount |
|---|---|
| Champion Insurance Co (LA) | $23,000 |

**Utah** (Len Stillman, State Contact Person)

Estate Closed - 1994

| | Year Action Commenced | Insurance Category |
|---|---|---|
| Universal Indemnity Insurance Co. | 1989 | P&C |

**West Virginia** (John Collins, State Contact Person)

Estate Closed - 1994

| | Year Action Commenced | Insurance Category |
|---|---|---|
| Mountaineer Fire & Casualty Ins Co | 1987 | P&C |

Early Access Funds Paid to Guaranty Funds

| | Amount | Insurance Category |
|---|---|---|
| Quality Insurance Co | $3,045,194 (1993) | P&C |

## Other Information

**Mike Miron** (NJ) reports that in the Integrity Insurance Company estate, which he is managing, a Plan for an Initial Interim Distribution of Assets was filed on June 9, 1994 with the state court. Approximately $37.2 million will be made available for distribution to certain claimants and consists of: (1) $8.6 million to be paid to guaranty funds for administrative expenses, (2) $18.1 million to be paid to guaranty funds for allowed claims of policyholder creditors and (3) $10.5 million to be paid to non-guaranty fund policyholder creditors. Those payments on behalf of the policyholder creditors of Integrity as outlined under the Plan represent an eight (8) percent initial interim distribution for the estate's approved claims.

**Gale Simon** (NJ) also provided the following information as to two additional New Jersey receiverships:

(1) Mutual Benefit Life Insurance Company - Third Amended Plan of Rehabilitation was approved by the state court on January 28, 1994.

(2) New Jersey Life Insurance Company - Order of Liquidation signed on August 12, 1993 and Assumption Agreement of all in-force business by American General Life Insurance Company signed o September 1, 1993.

**Bill Taylor** (PA) reported the sale of Rockwood Casualty Insurance Company, a viable subsidiary of Rockwood Insurance Company (In Liquidation), to Trirock Acquisition Corporation and Physicians Insurance Company, was approved on April 26, 1994, Settlement is scheduled for June 20, 1994.

**Committee Reports**
continued from page 13

**Deanna Delmar,**
*Chair*

# Publications Committee Report

## SIR Newsletter

The first SIR newsletter in the new format was very well received. Extra copies of the current issue will be available on the SIR display in Minneapolis.

Representatives from NCIGF and NOLHGA have each agreed to write a column for our newsletter on a regular basis. We would also like to add a regular column of news about members such as job changes, promotions, awards, marriages, births, hospitalizations, etc. Please submit these items to Morty Mann at 59 John Street, New York, New York, 10038.

News items and articles must be received by Morty at least 60 days prior to publication date (February 1, May 1, August 1 and November 1) to be considered for inclusion in the next issue. The editorial board reserves the right to reject or edit any articles submitted.

Letters to the editor are encouraged and may be sent to Deanna Delmar, 2910 N. 44th Street, Suite 210, Phoenix, AZ 85018, (602) 912-8458.

To insure getting your copy of the newsletter timely, address changes should be sent to SIR c/o Chase Communications, P.O. Box 9001, Mt. Vernon, New York, 10552.

## Membership Directory

The first membership directory is expected to be available for distribution immediately following the Minneapolis NAIC meeting. This Directory will be updated on an annual basis. Membership directory forms were mailed out to all members July 5. Members whose forms were not returned by July 29th will be listed only with current address information. ■

# Report on SIR Nominations & Elections Committee/Bylaws Committee Activities

The Nominations & Elections Committee expects to complete its review of nominees by the September Minneapolis meeting and will, at that time, present a preliminary report to the Board. The Nominations & Elections Committee intends to nominate 1 person for each of the 4 position vacancies (Directors Rosen, Deck, Miron and Stewart). Announcements have been made at various meetings including the last SIR Roundtable advising those present that they should notify any one of the Nominations and Elections Committee members (Members Vaccarello, Hartz, Piccoli and Stewart) of their interest. Proxies will also be prepared and forwarded to members in time for their use at the annual meeting in the event a member is unable to attend.

**Bylaws Committee Activities**

During our March meeting and later at the June meeting of the SIR Board of Directors, the Board agreed in principle that the following proposed changes should be made to the bylaws. The Committee is presently in the process of preparing bylaws language which will in fact implement these proposed changes. It should be noted that some of these can only be made by the general membership. The changes proposed are:

- No persons shall serve more than two consecutive full terms as an officer or member of the Board of Directors.
- Eliminate the requirement that the chair of any committee must be a Board Member.
- No more than one person from any one firm and no more than two persons from any one jurisdiction (State agency) can serve as a Director and/or Officer.
- You must be a Receiver employed by an agency in order to be a Board Member or Officer. Board memberships and officerships are automatically terminated at the end of the calendar year during which a person is no longer employed by an agency.
- The past President shall not serve as a member of the Executive Committee and shall instead merely continue to serve out their term or the balance of their term as Director.
- Members will automatically be suspended in the event of any criminal indictment, and then be terminated in the event of a conviction.
- Rather than have a separate bylaw concerning how many "blue badges" or "foreign members" there should be on the Board of Directors, we should change the provisions with respect to the Nominating Committee and provide in the Nominating Committee bylaws for a certain apportionment of Board membership - where possible. In other words, so many blue badges and so many foreign members, etc.
- The Secretary need not be Chairman of the Membership Committee.
- The Treasurer need not be Chairman of the Finance Committee.

The Board will act on changes within the Board's jurisdiction and authority at the September meeting. The remainder will be on the agenda for the annual membership meeting. ■

# Early Access Distributions

*by*
***James A. Guillot, CFE***
*Guillot & Associates*
*Houma, La.*

## Purpose

The purpose of an early access distribution plan is to distribute funds from the receivership estate to the guaranty funds to reduce the assessment burdens on member companies, and through them to the policyholders. In large insolvencies, early access distributions can be useful where some guaranty funds' assessment capacities are insufficient to service all the claims in a given year. An early access distribution can provide an additional source of funds which can help avoid the necessity of deferring payment of some claims or providing only a pro-rata payment.

## Timing

The standard early access distribution provision requires that the receiver submit an early access distribution plan within 120 days of the liquidation date. If the receiver has insufficient assets to make any distribution, then a plan should be filed with the courts, which will fulfill the receivers' obligation and ensure a formal plan is in place to make the early access distribution when assets become available.

## Reserves

The standard early access distribution plan requires that the early access distribution plan at least include a provision for reserving amounts for the expenses of administration and the payment of claims at a *higher priority* than the guaranty funds' covered claim payments. The reserve for expenses should take into account all Class I priority claims anticipated to be incurred during the duration of the receivership proceeding.

The early access distribution statute does not require that the receiver reserve for non-guaranty fund claims of class 3 priority. Most early access distribution plans, however, contain a formula to reserve for the estimates of ultimate distributions on such claims. In situations where such claims are not paid until the estate is closed, they can be reserved out of non-liquid assets.

It can be difficult for the receiver of some estates to accurately determine at any given time the amount of policyholder claims not covered by the guaranty funds. An absolute determination of such amount is not necessary for the purposes of the plan, however, an estimate for calculation purposes is all that is needed. This estimate can be updated from time to time, and any overpayment to guaranty funds based on past estimates must be returned to the domiciliary receiver. This "pay back" requirement is included in a written agreement between the receiver and the guaranty funds.

## Liquid Assests

The receiver is not required to increase liquid assets for the purposes of the early access distribution plan by making forced or quick sales of non-liquid assets that result in obtaining less than market value. Liquid assets do not include real estate, book value of a subsidiary, assets pledged as security, special or general deposits held by other states, or any assets over which the receiver does not have complete control. On any calculation date, the total amount of liquid assets available should be determined after payment of administration expenses. Some states provide that the guaranty fund's expenses are at the same priority as the receiver's expenses of administration. The receiver should consider whether the guaranty fund's expenses should be paid at the same time as the receiver's expenses, as part of the early access distribution plan or at some other time.

## Early Agreements

Any payment to be made under the provisions of an early access distribution plan is conditioned upon the guaranty funds executing and returning to the receiver an early access distribution agreement. Such agreements typically require the guaranty funds to:

Submit to the exclusive jurisdiction of the receivership court, but only for the purpose of the early access distribution plan.

Return to the receiver any assets previously disbursed that are required to pay claims which are of an equal or higher priority (no bond shall be required of any such guaranty fund).

Report to the receiver on a periodic basis the amount paid by the guaranty fund on closed claims to date, the amount of expenses entitled to priority paid by the guaranty fund, the reserves established by the guaranty fund on open claims, the amounts collected by the guaranty fund as salvage or subrogation recoveries, the amounts collected by the guaranty fund from any state deposit and other information needed by the receiver.

*continued on page 16*

## Early Access Distributions

continued from page 15

Calculations and distributions by the receiver should be done at least semi-annually. Except in instances where the guaranty funds are reporting on a quarterly basis and sufficient assets are available to make distributions, the receiver may consider making quarterly calculations and distributions.

### Expenses

Early access distribution plans typically contemplate that the guaranty funds should receive prompt reimbursement of those guaranty fund expenses that are entitled to a class 1 priority. The calculation of liquid assets available should be made after payment of all incurred receiver and guaranty fund expenses that are entitled to a Class 1 priority.

Some receivers have questioned whether, under the laws of their states, certain categories of guaranty fund expenses are entitled to a Class 1 priority as are the receiver's expenses. Since the matter of priorities depends on the law of the particular state involved, it is not appropriate to try to resolve this issue here.

It is important to note that if there is a disagreement between the receiver and the guaranty fund as to priority for certain guaranty fund expenses, one option is to include those expenses in dispute as part of the guaranty fund claim payments for payment under the early access plan. This treatment would be solely for purposes of the early access distribution plan, and would be without prejudice to the receiver, the guaranty fund or any other creditor as to ultimate determination of priority. The priority of distribution ultimately to be accorded could then be decided later. The other option is to exclude guaranty fund expenses from early access and resolve their priority issue before the final dividend.

### Basis of Distribution

Most early access distribution statutes provide that distributions to guaranty funds will be based on claims paid and to be paid by the guaranty funds. This means that early access distribution payments are distributed on the basis of both paid claims and reserves. Some states, however, have based distributions solely on paid claims. In states that follow the reserve language, early access should be based on both paid claims and reserves. This permits a more equitable distribution of assets among the guaranty funds instead of' benefiting guaranty funds that make claim payments at an early stage of the receivership proceeding e.g., a state that has mostly workers compensation claims.

### Special Deposits

Early access distribution plans typically take into account state deposits by excluding such assets from the calculation of liquid assets available. Similarly, the plans typically take into account payment to guaranty funds from general or special state deposits by essentially treating such payments as prior early access distributions, and thereby reducing the early access distribution to those guaranty funds receiving state deposits. If after receiving early access distribution a guaranty fund receives payment from a special State deposit, the guaranty fund may be required to return all or part of the early access distribution. Some receivers reduce early access distribution to a guaranty fund by the amount of the deposit guaranty even where the deposit has not been paid to the guaranty fund, and the guaranty fund has no control over when and in what amounts, if any, such a deposit might be paid to the guaranty fund.

### Salvage and Subrogagtion

Some receivers take the position that salvage or subrogation recoveries collected by a guaranty fund on account of payments made by the guaranty fund are general assets of the estate. Receivers who take this position should add a provision to their early access distribution plan to subtract from the amount to be paid to a particular guaranty fund any amount collected by the guaranty fund as subrogation or salvage recoveries on account of amounts paid by the guaranty fund. The receiver, the guaranty funds and any other interested creditor can then reserve their rights on the issue of how to treat such salvage or subrogation recoveries, and the issue can be decided at a later time before final distribution from the estate.

### Steps To Prepare Early Access Distribution

1. Determine $ amount of early access distribution.
2. Obtain up to date billing data from each guaranty fund participating in the early access distribution.
3. Determine what guaranty fund expenses (if any) will be included in the early access distribution.
4. Obtain the ceiling amount of individual payments from each guaranty fund. Early access distribution may distribute funds to individuals who have submitted claims in excess of the guaranty fund ceiling for covered claims,
5. Obtain a detailed listing from each guaranty fund of claims it has paid to individuals.
6. The receiver should maintain a data base of its claims and should adjust these claims for amounts paid by the guaranty fund to an individual.

7. If an annuity holder has previously requested a 1035 exchange of his annuity from the insolvent insurer to another company, contact the transferee company to determine if it will accept the early access distribution amount for the annuity. In most cases the other company will not accept the reduced amount of funds and will return the money to the receiver. Consider contacting the annuitant to determine if he still wants to attempt a 1035 exchange. This situation is very prevalent where the annuitant is a resident of a non-guaranty fund state.

8. Update the receiver's data base to include the correct mailing address of each individual policyholder receiving an early access distribution, the correct social security number, data regarding a 1035 exchange and amounts held by the receiver in escrow (accident & health claims or amounts in dispute, unadjudicated claims, etc.)

9. Decide how to handle the payment of accident & health claims which have not been adjudicated at the time of the early access distribution. Consider placing in escrow the amount of the claim stated on the proof of claim form to be actually paid after the claim is adjudicated, but, place the amount of the claim in the aggregate amount of claims to be paid when calculating the amount of the early access distribution.

9. Determine the amount of liquid assets to be available for the early access distribution.

10. Consider using claim drafts for payments of early access distribution amounts to individuals. If a policyholder cannot be located, the draft will help to avoid the receiver from activating the state's escheat statute and from having to handle this issue. The payment is not made until the draft is approved by the receiver's bank.

11. Have policyholder data base ready to handle the required IRS 1099 forms for the end of the tax year. The 1099 forms must be sent to each individual and guaranty fund receiving a early access distribution.

12. Have staff ready to answer questions from policyholders after they receive their early access distribution checks. ■

**See you at NAIC**
**in Minneapolis/St. Paul**
**September 17-18th, 1994**

**Roundtable**
**set for Saturday**
**September 17th at 1:30 pm**

**Look for information**
**at the booth**

# INSOL International

The Society of Insurance Receivers was admitted to membership of INSOL International in 1993 and Philip Singer now represents the Society on the Council of INSOL.

INSOL International is a world-wide federation of over 20 national associations of accountants and lawyers who specialize in the bankruptcy and insolvency area. The Federation was formed in 1982, and is presently registered as a partnership in the Colony of Gibraltar. Its administrative offices are located in London, England.

The mission of INSOL is to take the leadership role in international insolvency issues and policies, and also to facilitate an exchange of information and ideas among member professionals and other constituencies affected by the insolvency process. To these ends, the Federation will encourage greater international co-operation and communication.

The goals and strategies are:

- To take the leadership role in the study and evaluation of insolvency subjects of international interest.
- To organize and hold congresses at regular intervals.
- To facilitate and co-ordinate the exchange of both technical and topical information.
- To involve member associations in the activities of the Federation.
- To ensure that the Federation is adequately financed to achieve its mission and goals.
- To expand membership of the Federation.
- To involve other constituencies affected by the insolvency process in the activities of the Federation.

In this latter regard INSOL has developed relationships with associate groups comprising bankers, regulators, judges and academics involved in international insolvency issues as well as with UNCITRAL (The United Nations Commission on International Trade Law) who were co-sponsors with INSOL of a two day colloquium in Vienna, Austria in April 1994.

The Federation sponsors a world congress for member professionals at four year intervals. The first world congress was held in 1982 at Cape Cod, USA followed by Monte Carlo in 1985, Vancouver, Canada in 1989 and Melbourne, Australia in 1993. Future congresses are planned for New Orleans, USA in 1997 and London, England in 2001.

In addition to the quadrennial congresses regional conferences will be held in 1995 in Hong Kong, Toronto, Canada and Florence, Italy.

The Society of Insurance Receivers provides for members of INSOL a special interest group for those involved with international insurance industry issues and the importance of international insurance insolvency is being reflected by a full day programme which will be organized in connection with INSOL 97. ■

# Board Member Takes Early Retirement

Deanna Delmar, SIR Board member since December 1993 and a charter member, announced she is taking early retirement from the State of Arizona, effective September 1, 1994, and has resigned as a SIR Board Member.

Deanna, Deputy Receiver for Arizona since January 1989, participated on many NAIC insolvency committees, serving most recently as Vice-Chair of the Receivers Handbook Committee.

# Mark Your Calendar

September 17, 1994

**Roundtable for principal members and invited guests**
1 to 5 p.m. Room to be announced.
Minnesota Hilton.

September 18, 1994

**SIR Board meeting**
1 to 4 p.m.
Minnesota Hilton
Room to be announced.

September 19, 1994

**SIR Cocktail reception**
Time and room to be announced.
Minnesota Hilton

November 13 & 14, 1994

**SIR/NCIGF Training Program**
San Antonio, Texas

December 2, 1994

**Lousiana Department of Fraud Seminar**
New Orleans

December 3, 1994

**SIR Annual Conference**
9 a.m. - 5 p.m. Oopen to all members
New Orleans
Annual meeting and the election of officers immediately following the Annual Conference.

February 6 & 7, 1995

**NAIC/SIR Annual Workshop**
Savannah, Ga.

***PLEASE PLAN AHEAD!*** There is an exciting program planned for the All-Day Annual Conference of The Society of Insurance Receivers to take place on December 3, 1994 in Louisiana. This conference is open to principal, associate, and sustaining members. There will be presentations with audience participation on the topics of Take-Over, Arbitration, How to Sell a Corporate Charter, and a special Fraud presentation, in addition to the normal roundtable topics. The next newsletter will provide additional details and a registration form.

**Society of Insurance Receivers**
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Mt. Vernon, NY 10553


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