The INSURANCE RECEIVER

Promoting high ethical standards in the administration of Insurance Receiverships.

Volume 5, Number 4 **Winter 1997**

16

*IAIR recognizes its first **Certified Insurance Receivers** and **Accredited Insurance Receivers** at the Annual Meeting during the NAIC this past December. Pictured are: (from left to right) Jack Traylor, CIR; Bob Deck, CIR; Jo Ann Howard, CIR; Dick Darling, CIR and Tom Wrigley, CIR. The other designees not shown are: Robert L. Howe, AIR; Nicholas J. Marfia, AIR; J. Burleigh Arnold, CIR; Robert M. C. Holmes, CIR; Jeanne Barnes Bryant, CIR; Michael Marchman, CIR; Lennard Stillman, CIR; Lawrence J. Warfield, CIR and Amy Jeanne Weaver, AIR.*

An application for the AIR and CIR designations is enclosed with this newsletter for your use.

President's Message

By Dick Darling
Chief Operating Officer, Illinois Department of Insurance

Heeee's Baacckk! As I write this I am facing the prospect of having to go outside my house and shovel six inches of partly cloudy, which has been piling up for the past few hours. However, as you read this we all should be preparing for spring and the new opportunities for growth and renewal that it brings.

It was good to see so many IAIR members at the San Antonio NAIC. At our annual meeting, we were pleased to award the first 12 IAIR accreditations. Information regarding the accreditation process will appear elsewhere in this newsletter. Our congratulations to the first 12 CIR/AIR members. The board hopes that all IAIR members will attempt to qualify for this designation, representative of your experience and professionalism in the insurance receivership arena. Our cocktail party in San Antonio was also a success and, once again, we wish to thank the National Organization of Life & Health Guaranty Associations for co-hosting this event. We are still accepting patron sponsors for the March and September NAIC meetings, and anyone interested in participating should contact Frank Bistrom, CAE - IAIR's Executive Director, at (913) 262-2749.

Many of us attended the 1997 NAIC/IAIR Insolvency Workshop at the Hyatt Regency Hill Country Resort in San Antonio, Texas. While we do not have the final numbers in, it appears this event was, again, a big success, drawing approximately 200 attendees. The IAIR Board wishes to thank all IAIR members who contributed so graciously their time and expertise to the various panels and sessions. The board also wishes to thank Michael Surguine, Insolvency Counsel-NAIC (IAIR Board Member), for assisting IAIR in the coordination of this event, as well as the NAIC staff. Until you get involved in a workshop/seminar of this nature, you never really have an appreciation for all the work that goes on behind the scenes in order to produce a successful event.

Speaking of events, I hope many of you have been able to register for the INSOL International Fifth World Congress to be held March 23-26, 1997 in New Orleans, Louisiana. IAIR Board member Philip Singer (Coopers & Lybrand U.K.) will host an insurance insolvency program that will address topical issues involving cross border insurance insolvencies. Insolvencies arising in the insurance industry invariably have an international dimension. This special one-day program will address the important issues, and explore the different insurance and insolvency regulations and practices.

While IAIR did not present its usual NAIC roundtable in San Antonio, in deference to the Interstate Compact drafting session, we will return to our basic format beginning with Orlando headed by Paula Keys, IAIR Education Chair. Anyone interested in participating in future IAIR roundtables should contact Paula at Chiltington (407) 895-0288, or at her temporary work location (312) 836-9690. Similarly, anyone with ideas or thoughts for the 1998 NAIC/IAIR Workshop should also contact Paula or Mike Surguine at the NAIC (816) 374-7209 (date and place have yet to be determined).

The annual meeting in San Antonio saw your board membership change somewhat. While Phil Singer, Doug Hartz and I were all re-elected to your board, Tom Wrigley (Nominations Chair) decided not to stand for re-election, in order to allow "new blood" into the board. Your board would like to thank Tom for his many years of valued assistance; his contributions will be missed. Tom indicated that he desires to continue to be very active on various committees, for which we are truly grateful.

Len Stillman (SDR Utah) was elected to your board for a new three-year term, commencing with the annual meeting in San Antonio. Len is an attorney in Utah, truly a renaissance man, and his viewpoint and experience is a welcome addition to your board.

(Continued on page 5)

The ***INSURANCE RECEIVER***
Volume 5, Number 4
Winter 1997

In this Issue

Features

Departments

Mark Your Calendar

IAIR Reinsurance Roundtable
March 15, 1997 1-5 p.m.
OMNI Rosen Hotel - Orlando, Florida
Salon 6 - 2nd Level
Hosts: Paula Keys & Liz Lovette

INSOL International '97
March 23-26, 1997
New Orleans, Louisiana

SPECIAL IAIR/INSOL Program
March 23, 1997
See Page 16 for details and registration form.

San Antonio Meetings Recap

By Tom Clark, Crawford & Lewis

Why can't we be friends.
Sly and the Family Stone, 1970

Reminiscent of a time in our country's history when all of society was divided that provided the inspiration for this song, the NAIC/IAIR Insolvency Workshop kicked off in San Antonio by providing a controlled forum for the exchange of perspectives between the two opposing factions: Receivers and Reinsurers. The NAIC/IAIR Workshop's focus was on estimation as a means of expediting the closure of estates.

In one of the first Breakout Sessions on reinsurance issues, estimation was tackled with some level of tact and diplomacy. Leonard Minches provided a concise historical review of how we have come to this point in time. Speaking on behalf of the reinsurers' perspective, Leonard Minches offered that creating an atmosphere of cooperation with reinsurers from the outset would go a long way towards smoothing the road towards estimation due to the reinsurer's greater interest in commutation as a means of claims resolution. Speaking on behalf of the receivers, Stephen Schwab agreed that a cooperative relationship is the best arena for success; however, he bolstered the receivers' position with an overview of the recent cases, some denying and some allowing estimation. In short, Stephen made a sound argument for the statutory adoption of estimation as being the quickest means by which estimation can become integrated into the estate closing process. However, as an interim resolution, both speakers encouraged a cooperative relationship between receiver and reinsurer to avoid conflict and expedite recovery.

Moving into prognostication, the speakers asserted that in the near future (assuming estimation becomes an accepted tool), the following will occur:

Reinsurers will modify contractual language:

1. Reinsurers will engage in actuarial reassessment of rates and reserves; and

2. Receivers will realize that estimation is substantially more difficult to utilize in practice than current understanding would allow.

Pirates? What pirates?

The next Session, "Pirates of the Caribbean", moderated by Robert Craig of Kennedy, Holland DeLacy & Svoboda, might better have been captioned "What Pirates of the Caribbean?" Commencing with a Geography 101 lesson, the audience was introduced to the panel: the Turks and Caicos represented by Conrad Griffiths of Misick & Stanbrook, Barristers and Attorneys; the Bahamas represented by Emerick Knowles of Alexiou, Knowles & Co.; and Guernsey represented by John Darwood of the Guernsey Financial Services Commission. On the domestic regulatory side, the State of California was represented by James P. Harrington, Jr., Chief Investigator with the California Department of Insurance.

With geographic proximity firmly lodged in the audience's collective mind, Bob set the scene - a hypothetical company, "Good Guy Insurance Co.," intent on paying high salaries to its executives while failing to properly reserve for claims, organizes in California. With tongue firmly planted in cheek and adopting the axiom of never knowing a man until you walk a mile in his shoes, Bob turned the audience and panelists into conspirators in Good Guy's hypothetical attempt to utilize an alien reinsurer, "I'll Never Pay Re," located in the Caribbean, to avoid undue scrutiny and oversight from the California Department under current regulatory schemes, in order to achieve its nefarious goals of paying excessively high salaries to its executives.

Through this scenario, the audience was introduced to recent modifications in California's surplus lines law which closed the loophole that had previously allowed the hypothetical scenario to transpire with little regulatory scrutiny. Now, California looks primarily to the direct writer; however, Bob segued into a discussion of the how the reinsurer's domicile could effectively defeat the modification in California's law to the detriment of Good Guy's creditors.

All of the participants became engaged in a discussion of how each would regulate an insurer, including filing requirements, confidentiality, and reciprocity issues. Additionally, John Darwood explained the efforts of the Cross Border Supervisory Group, which is a collective effort geared towards fostering cooperation among the various sovereign nations, commonwealths, and protectorates located in the Caribbean, as well as encouraging the tightening of regulatory controls. Members include Anguilla, the Bahamas, the Cayman Islands, the British Virgin Islands, Guernsey, the Isle of Man, Jersey, the Netherlands Antilles, and the Turks & Caicos. Other nations awaiting membership approval are Aruba, Beliz, the Cayman Islands, Grenada and Montserrat. Unfortunately, due to prevalent volcanic activity on Montserrat, the government's efforts have been directed to matters of substantially greater importance — like surviva — so its acceptance into the Group has been delayed as a result of these exigent circumstances.

In the latter half of the presentation, the panel discussed issues relative to enforcement of judgments in the Caribbean, and direct investigation and pursuit of assets to satisfy domestic insolvencies. The confidentiality schemes seem to be the greatest hindrance to recovery of assets, particularly since a seemingly innocent request for confidential information can land you in jail in the Turks & Caicos. In short, just like Dorothy, you'll find that you're not in Kansas anymore when dealing with Caribbean countries; however, if you know the schemes of regulation, your abilities to pursue recoveries can be just as successful.

The afternoon session commenced under the joint moderation of Kristine Bean of Peterson Consulting and Jim Stinson of Sidley and Austin. The afternoon was split into two parts: 1) Estimate on Trial; and 2) a Status Report on the Practical Impact of Estimation Prominent Estates in Liquidation.

Estimation on Trial

The afternoon of the first day began with an entertaining illustration of how the Receiver versus Reinsurer controversy might play in

a court of law, albeit one untethered by the burdensome constraints of a Code of Evidence or a Code of Civil Procedure. The acting judge, Bill Sneed of Sidley & Austin, proved to be a willing participant and catalyst in the production as he engaged Susan Stone, also of Sidley & Austin, acting as the Receiver's counsel, in the pitfalls of estimation. Susan led with the contention that current schemes of runoff or cutoff do little to address the concerns of the creditors and result only in windfalls for the reinsurers or excessive fees for the lawyers and liquidators; thus, estimation is a natural evolution that provides for a win/win solution for all parties (presumably excepting lawyers and liquidators). Susan's adversary, Peter Chaffetz of Chadbourne & Parke, ably presented the reinsurer's contentions that insolvency powers are not drawn from the common law, but are born of express legislation, in the absence of which the Liquidator should be powerless. Additionally, Peter rolled out the logical concerns from the reinsurer's perspective, namely: dollars going to the wrong people and the loss of a contractual right to assume a defense. After taking the matter "under advisement" (as opposed to immediately ruling in favor of the Receiver, as has apparently occurred in previous presentations), the somewhat honorable judge took his seat back amongst the audience and proceeded to campaign for re-election.

The first session then moved into the equivalent of expert testimony from an actuary, David Powell of Tillinghast-Towers Perrin; a reinsurance consultant, Lauren Kingsmore of Peterson Consulting; and finally and most certainly not least, the reinsurance industry, represented by Debra Hall, General Counsel for the Reinsurance Association of America.

After filling the room with the typical caveats and provisions, David presented some rather substantial food for thought: specifically, there are substantial limitations on predicting the ultimate liability for long tail claims.

Many of these concerns are related to the subject matter of the specific long tail claims and how those claims have matured in ways that were not anticipated by the actuary at the inception of the forecast.

Lauren followed with a discussion of the multitude of factors that must be taken into consideration in setting up the claims for estimation.

Debra closed the session with a clear, concise "let there be no confusion" presentation of the reinsurers' opinions of the entire matter: namely, estimation results in reinsurers paying the wrong amount and claimants receiving the wrong amount. Debra contended that because estimation is almost wholly dependent on actuarial estimates, those estimates have huge variances; thus actuarial estimates are suited for limited purposes and most certainly not for compelled settlements. However, Debra did provide a number of alternatives, specifically: 1) Run Off companies, similar to what transpires in the UK; 2) Liquidation Trusts; 3) Bifurcations; and 4) Asset/Liability transfers to Guaranty Funds.

In closing, Debra offered the prediction that estimation may result in nothing more than the substitution of litigation with reinsurers for the other factors which keep estates open; as such, estates will not be closed any quicker if estimation is forced upon reinsurers.

Where are they now?

The second part of the afternoon was a joint status report from the Receivers or other representatives of the various large insolvencies from throughout the country. Taking part in the presentation were: Dick White for Integrity; Melissa Kooistra for Mission; Tom McCarthy for Transit; Jim Dickinson for Delta American; Robert Wilcox for Southern American; Jack Craft for Holland America; Frankie Bliss for Midland and Ideal; and Rick Bingham for PineTop. In summary, all reported that they are struggling with the implementation of day-to-day claims processing. Each reported on the historical status of the respective liquidations and how estimation is being considered or implemented into their respective locales.

A well-attended cocktail party followed, after being relocated due to the inclement weather. Late night activities found the longest bar in Texas well-attended and Mike Marchman soundly in charge of the pool table.

Friday morning arrived much too early for most of the participants; however, the coffee was strong and the topics engaging.

First off was the Recent Developments presentation that left everyone with a substantial amount of information to digest, including the impact of GIC Pools, the utilization of Co-managed Liquidation Trusts, and the integration of Banks and the Sale of Insurance into the regulatory scheme.

They're not Crazy or Stupid; they just look that way afterward.

Victor Palmieri

Closing out the session was the jewel in the crown, a presentation by Victor Palmieri of The Palmieri Company, and Charles LaShelle of the Texas Life, Accident, Health & Hospital Service Insurance Guaranty Association on Confederation Life Insurance Company.

Pointing to the lack of discrimination or hesitance in which the market responds to fluctuations, Mr. Palmieri empathized with the plight of former executives of insolvent insurance companies, leaving us with the memorable quote above.

He advised that overcoming past recriminations was the first order of business in addressing the problems with Confederate Life. Because its business crossed international borders and involved numerous claims in both Canada and the United States, the difficulties faced were innumerable. However, by utilizing a comprehensive rehabilitation strategy that sought to maximize purchase enhancements and asset values, while maintaining liquidity, liquidation and settlement support, and policyholder confidence, Mr. Palmieri achieved his desired result.

Space does not allow for a full account of precisely how this was accomplished, but the effort resulted in a resolution of $2.5 billion of insolvency and the hope of paying all claimants a distribution of full principal plus 5% (excepting GICs) by the end of this year, while paying death benefits in full as they accrue.

He deserves our admiration for a job well done.

As the workshop ended, the attendees departed under sunny skies and a forecast of substantially warmer weather for the upcoming weekend, much to the chagrin of everyone.

See you in Orlando!

President's Message

(Continued from Page 2)

This should prove to be an interesting year for all members of IAIR. The winds of insolvency are once again circling around the property and casualty side of the insurance industry, and it is your president's view that we are on the verge of another uptick of property and casualty insolvencies similar to the 1984 through 1986 time frame.

Time will tell; however, all signs point to the inevitable results of recent cash flow underwriting.

Your board has designated 1997 to be the year in which the IAIR membership grows significantly.

Each of you should have received an extra application form in your recent dues mailing. We strongly encourage you to solicit your associates, employees, or other professionals in the field to join IAIR.

Our mission of education and professionalism as well as our accreditation standards can certainly be assisted by an improved membership to allow us to accomplish the goals and directions of your organization.

I hope to see as many of you as possible in Orlando and would also like to solicit any members with ideas for improvements in IAIR, its communications, or its educational directives, to please contact myself or any member of the IAIR Board.

IAIR Roundtable Schedule

NAIC Meeting - March 16-19, 1997
Orlando, Florida
IAIR Roundtable - March 15, 1-5:00 p.m.

NAIC Meeting - June 8-11, 1997
Chicago, Illinois
IAIR Roundtable - June 7, 1-5:00 p.m.

NAIC Meeting - September 21-24, 1997
Detroit, Michigan
IAIR Roundtable -
September 20, 1-5:00 p.m.

NAIC Meeting - December 7-10, 1997
Seattle, Washington
IAIR Roundtable -
December 6, 1-5:00 p.m.

NAIC Meeting - March 15-18, 1998
Salt Lake City, Utah
IAIR Roundtable - March 14, 1-5:00 p.m.

The INSURANCE RECEIVER

The IAIR newsletter is intended to provide readers with information on and provide a forum for opinion and discussion on insurance insolvency topics. The views expressed by the authors in the IAIR newsletter are their own and not necessarily those of the IAIR Board, Publications Committee or IAIR Executive Director. No article or other feature should be considered as legal advice.

The INSURANCE RECEIVER is published quarterly by the International Association of Insurance Receivers, 5818 Reeds Road, Mission, Kansas 66202-2740 (913) 262-2749 FAX: (913) 262-0174.

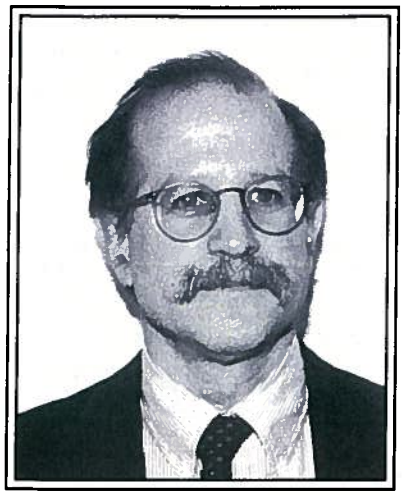
Frank Bistrom, CAE, Executive Director; Jane Male, CAE, Associate Executive Director.

Editorial Board: Doug Hartz, Publications Committee Chair; Michael Cass, Tom Clark, Linda Lasley, Jim Stinson, and Mary Veed, Assistant Editors.

IAIR Officers: Richard Darling,CIR - President; Doug Hartz, Vice President; Mike Marchman,CIR - Treasurer; Robert Deck,CIR - Secretary.

Directors: Betty Cordial; James Gordon, CIR; Michael Surguine; Robert Craig; Elizabeth Lovette; & Lennard Stillman, CIR & Philip Singer.

Meet Your Colleagues



James A. Gordon, CIR

Jim Gordon is Executive Vice President, General Counsel, and principal of Maryland First Financial Services Corp., located in Baltimore. Jim has been a Special Deputy Insurance Commissioner in Maryland since 1985, as well as the receiver of apartment complexes, mental health facilities and securities broker/dealers.

Maryland First serves as receiver of four property and casualty insurance estates and provides services for two others. The firm's attorneys and accountants can provide claims analysis and investigative services to the insurance industry, including Guaranty Associations, focusing on fidelity, contract surety and business interruption losses.

Prior to forming Maryland First, Jim was in the General Counsel's office of Maryland Casualty Company, where he served as Associate General Counsel. He is a graduate of Cornell University and the University of Maryland Law School.

The majority of the insolvencies which Jim has managed resulted from the fraudulent activities of the principals of those companies. As a result, Jim has worked closely with law enforcement officials on the state and national levels. This activity included the successful prosecutions of 11 principals and the recovery of assets in places as varied as Anguilla, Guam, Saipan, the Federated States of Micronesia, Liechtenstein, Luxembourg, Switzerland, and Israel.

Jim has recently been appointed to the Board of IAIR and since 1985 has served on various NAIC task forces studying insurance insolvencies. He also serves on the Board of the Chesapeake Foundation for Youth Development.

Jim is married to Ann Clary Gordon, a real estate lawyer with the Baltimore firm Shapiro and Olander. They have one son, Holter Graham, who was recently featured in the movie "Fly Away Home". Jim enjoys all sports and the outdoors, and hopes that he and Ann can find some unspoiled land in her home state of Montana.

William S. Taylor

William S. Taylor is the Pennsylvania Deputy Insurance Commissioner for the Office of Liquidations, Rehabilitations and Special Funds.

Prior to his appointment in 1991 as the Deputy Commissioner, Bill served as the Director of the Bureau of Administration and is a 17-year veteran of the Pennsylvania Insurance Department.

The Office of Liquidations currently manages 21 estates in liquidation with assets of over $693 million. Bill also serves as the Deputy Rehabilitator of Fidelity Mutual Life Insurance Company, which has $1.1 billion in assets.

Bill earned a bachelor's degree in Economics from Elizabethtown College and a master's degree in governmental administration from the University of Pennsylvania. He is a veteran of the U.S. Air Force and served tours of duty in the U.S. and Japan.

As Deputy, Bill oversees the Catastrophic Loss Benefits Continuation Fund for automobile accident victims; the Workers' Compensation Security Fund for claimants insured by 19 insolvent insurance companies; and the Underground Storage Tank Indemnification Fund, which provides funds to claimants for the clean-up of certain underground leaks.

In addition to serving as zone reporter for IAIR's Achievement Subcommittee, Bill is also the Pennsylvania Insurance Department's representative to the Insolvency Committee of the NAIC.

Home for Bill and his wife, Mary, is in Lancaster County, Pennsylvania. Mary has been an elementary school teacher for 21 years.

Bill and Mary have a married daughter who is also an educator, and a son who recently graduated from Penn State University. Bill's interests include woodworking, canoeing, and gardening.

James W. Schacht

Jim Schacht is head of the National Insurance Regulatory practice at Cooper & Lybrand L.L.P. Prior to joining Coopers & Lybrand, he spent over 31 years with the Illinois Department of Insurance.

Beginning his career at the Department as an examiner, he later served as Acting Director of the Insurance Department on three separate occasions, and in 1989 became Special Deputy Receiver for Illinois, a position he held until he left government service in 1995.

Jim has been active in the NAIC for over 20 years, having served in a leadership capacity on a number of task forces and subcommittees including a major role in developing model regulations on casualty loss reserve certifications, annual CPA audits, guaranty fund laws, holding companies, insovlvencies and reinsurance. Most recently, he chaired the group which developed the legislation for an Interstate Compact for Receiverships.

In December, 1990, Jim received the NAIC's distinguished Robert E. Dineen Award in recognition of his outstanding contribution to insurance regulation. In 1996, he received the National Association of Mutual Insurance Companies Chairman's Award for his service and contribution to regulation and the insurance industry.

Jim's receivership experience dates back to 1973, when the Equity Funding Life Insurance Company was seized. Fortunately, as he describes it, the phony assets about equaled the phony business, so the real policy holders didn't suffer a loss.

Jim and his wife, Carol, have five children, three of whom are still at home. He enjoys watching his second oldest son play high school football and marveling at how his other two sons got to be so smart. His two daughters have already left the "nest".

Amy Jeanne Weaver, AIR

Amy Jeanne has practiced insurance insolvency law in God's Country (Austin, Texas) for nine years. During this tenure, Amy Jeanne has worked on over 75 insurance company receivership estates, both ancillary and domicilary.

While an attorney for the Receiver at the Liquidation Division of the Texas Department of Insurance, she managed more than 50 estates, being in charge of all administrative and litigation issues.

At that point in history, this included handling all guaranty association claims and litigation.

Since the Legislature determined it was time for her to go into private practice, Amy Jeanne has worked on receivership estates in claims litigation matters and represented Special Deputy Receivers as general counsel for the last five years.

She has enjoyed watching the receivership process grow and change during this time, and has participated in many titillating and fascinating pieces of litigation concerning issues of statutory interpretation of liquidation issues.

Okay, as you can tell, Amy Jeanne is a geek, and really enjoys insolvency law.

She has spoken at three of the NAIC/IAIR Insolvency Workshops on Topics such as expert witnesses, creditors committees, and distribution of assets. She currently serves on the IAIR Education Committee.

Amy Jeanne has been granted the designation of Accredited Insurance Receiver (AIR), and believes that makes her the youngest person with that designation who owns a hot pink mini-skirt.

Amy Jeanne is a fifth-generation Texas lawyer, and celebrates by having a Texas Independence Day Party. Anyone who wants to escape from temperatures that start with a minus sign is welcome to join her in Austin on March 2, next year.

Receivers' Achievement Report

Jim Dickinson, Chair

Reporters: ***Northeastern Zone** - William Taylor (PA)*
***Midwestern Zone** - Ellen Fickinger (IL), Brian Shuff (IN);*
***Southeastern Zone** - Roger Hahn (FL), James Guillot (LA); **Western Zone**, Mark Tharp (AZ), Jo Ann Howard (TX);*
***International** - Philip Singer (England), John Milligan-Whyte (Bermuda)*

I would like at this time to announce that Ellen Fickinger, Illinois Office of the Special Deputy, will be succeeding me as Chair of the IAIR Achievement News Subcommittee beginning with the Spring 1997 IAIR newsletter. I have in the past enjoyed preparing articles for our publication with the valuable input of our Zone and International reporters, together with the assistance of our State Contact Persons. Many thanks to everyone who has helped me since 1994 with our quarterly articles and who have made the IAIR publication a success, especially to Doug Hartz and Frank Bistrom for their oversight and leadership. *Jim Dickinson, Chair*

RECEIVERS' ACHIEVEMENTS BY STATE

Illinois *(Mike Rauwolf, State Contact Person)*

Estates Closed (Third Quarter, 1996)	**Year Action Commenced**	**Insurance Category**	**Dividend Percentage**
Cadillac Insurance Company (MI)	1989	P&C	No distributions
(Ancillary Receivership)			made in Illinois

Disbursements for the Third Quarter 1996

Receiverships	***Amount***
American Mutual Reinsurance Company	$1,267,510
Centaur Insurance Company	216,957
Equity General Insurance Company	29,794
Inter-American Insurance Company	3,216,149
Merit Casualty Company	86,688
Pine Top Insurance Company	64,608
Sub-total	$4,881,706
Plus eight (8) additional estates where disbursements for each estate were below $10,000	14,960
Total	$4,896,666
Summary by Disbursement Category:	
Payments to various guaranty funds/associations (including administrative expenses)	$3,003,388
Payments to policyholders/contractholders (including loss adjustment expenses	413,306
Payments to ceding companies	1,479,972
Total	$4,896,666

Maryland *(James Gordon, State Contact Person)*

Estates Closed	**Year Action Commenced**	**Insurance Category**	**Dividend Percentage**
Eastern Indemnity Co. of Maryland	1985	Surety	N/A

Disbursements made to Guaranty Associations during 1996

Receivership	***Amount***
Eastern Indemnity Co of Maryland	$ 232,254

Disbursements made to Policy/Contractholders during 1996

Receivership	*Amount*
Eastern Indemnity Co of Maryland	$ 335,563
Land Title Research of Maryland	3,277
Trans-Pacific Insurance Company	44,758

New Jersey *(John Kerr, State Contact Person)*

Disbursements made to Policy/Contractholders (3rd Quarter, 1996)

Receivership	*Amount*
Integrity Insurance Company	$ 1,428,000

Pennsylvania *(William Taylor, State Contact Person)*

Early access sisbursements made to various state guaranty associations during 1996

Receivership	*Amount*
Highland Mutual Insurance Group	$ 2,000,000
Life Assurance Company of Pennsylvania	15,000,000
National American Life Insurance Company of Pennsylvania	94,500,000

Other Developments

Jim Gordon (**MD**) reported that extradition proceedings against Martin Bramson have followed his deportation from Liechtenstein with his subsequent arrest in Switzerland. Mr. Bramson was associated with the failure of the **Trans-Pacific Insurance Company,** and at the time of his arrest in Liechtenstein he had in his possession in excess of $3.0 million in gold and various currencies.

Bill Taylor (**PA**) provided an additional update covering the rehabilitation of **Fidelity Mutual Life Insurance Company**. Policyholder death benefits and annuity payments continue to be paid at 100%. No guaranty association assessments are anticipated to be needed to rehabilitate this company. A second petition has been filed with the Commonwealth Court to further relax and modify the court-ordered moratorium restricting the exercise of policy options.

This petition requests that (1) the number of hardship criteria that contractholders must satisfy be reduced and the maximum hardship benefit available to contractholders be increased; (2) changes be permitted in the designated retirement date for individual deferred annuity contractholders whose designated retirement date exceeds 65; and (3) individual deferred annuity, life and endowment contractholders who were required to choose between limited settlement options after the date of rehabilitation be allowed to change their selected settlement option.

The terminated agents are continuing litigation to obtain payment of full commissions in cash, although the parties are currently engaged in settlement negotiations.

The Rehabilitator has been meeting with the Policyholder Committee representatives at the request of the court to resolve their primary objections to the Second Amended Plan filed in June of 1996. The Rehabilitator is hopeful that a court-approved bid process will take place in 1997 to select an outside investor.

Vince Vaccarello (**PA**) reported that **Mutual Fire, Inland & Marine Insurance Company** was successfully rehabilitated after a 10-year rehabilitation period, and its petition to terminate rehabilitation and request for discharge of the Rehabilitator was granted by the Commonwealth Court of Pennsylvania on December 26, 1996.

Mutual Fire at one time was purported to be the fifth largest insolvency of a property and casualty insurer in the United States.

In October, 1996, Mutual Fire's settlement agreement with KPMG Peat Marwick LLP received the approval of the Commonwealth Court of Pennsylvania, with the accounting firm agreeing to a $32.0 million payment to the Rehabilitator to settle all claims brought against it by Mutual Fire.

SUBSTANTIVE CONSOLIDATION IN INSURANCE COMPANY INSOLVENCY PROCEEDINGS

by Lorraine M. Weil and Harold S. Horwich, Hebb & Gitlin, Hartford, Connecticut

Substantive consolidation is a doctrine with a long history in federal bankruptcy cases. Under the doctrine of substantive consolidation, all of the entities conducting a single business enterprise are made subject to the jurisdiction of the bankruptcy court and their assets and liabilities are pooled. The foregoing is effectuated without regard to the technical separateness of such entities or the fact that some of them are not otherwise subject to bankruptcy proceedings.[1] Substantive consolidation has not been widely used in insurance company insolvency proceedings, but it should be available to receivers in appropriate circumstances. This article discusses the bankruptcy doctrine of substantive consolidation and examines the basis for utilizing substantive consolidation in insurance company insolvency proceedings. It also discusses the advantages and pitfalls of substantive consolidation, and some practical alternatives.

Substantive Consolidation in Bankruptcy

Substantive consolidation in bankruptcy is a court-created doctrine; it has no express statutory basis. The power to substantively consolidate rests in the equitable powers of the bankruptcy court.[2] The doctrine was initially developed in cases decided under the Bankruptcy Act of 1898[3] and has been carried forward by the courts to cases decided under the current Bankruptcy Code.[4] Substantive consolidation recognizes the realities of a single enterprise, ignores the artificial legal distinctions between the entities engaged in that enterprise, and treats the assets and liabilities of such entities on a combined basis in the pending bankruptcy case. The doctrine of substantive consolidation is invoked to ensure that creditors of the enterprise are treated equitably. *Soviero v. Franklin Nat'l Bank*,[5] decided by the United States Court of Appeals for the Second Circuit under the Bankruptcy Act of 1898, is illustrative of the foregoing points.

In *Soviero*, a retail carpet business was conducted in the form of fifteen corporations under common ownership. Fourteen of those corporations were in the business of retail carpet sales. Of those 14 corporations, one (the "Bankrupt") was in bankruptcy proceedings; 13 (the "Affiliates") were not. The fifteenth corporation ("Realty"), also a non-bankrupt, owned the land and building where the Bankrupt conducted its business. The Bankrupt's bankruptcy trustee sought to have the Affiliates and Realty turn over all their assets to be administered in the Bankrupt's proceedings. The Referee entered the turnover order and the District Court affirmed. On appeal the Second Circuit relied upon the following facts:

(1) The same persons were officers, directors and shareholders of the Bankrupt, the Affiliates and Realty.

(2) The Bankrupt and the Affiliates were in the same business (selling carpet at retail). Realty owned the real estate where the Bankrupt did business.

(3) The Bankrupt paid money to finance the organization of the Affiliates and Realty.

(4) Although each corporation filed separate tax returns, individual accounting records were kept by the same staff of bookkeepers at the Bankrupt's place of business.

(5) None of the corporations maintained corporate minutes reflecting their activities.

(6) The President of the Bankrupt informed creditors that the Bankrupt was a consolidated enterprise and issued a consolidated financial statement, which listed, without separation, assets of the Affiliates and Realty as assets of the Bankrupt.

(7) The Affiliates had no working capital, and whenever they required funds, the funds were provided by the Bankrupt with bookkeeping entries setting up the payments as loans and exchanges.

(8) When one Affiliate failed, the Bankrupt paid the losses.

(9) The Bankrupt agreed to be liable on the Affiliates' leases, provided security deposits when necessary, and at times paid the rent.

(10) While each Affiliate maintained a bank account to pay local obligations such as rent and utilities, proceeds from sales were turned over to the Bankrupt for deposit to its account.

(11) The Affiliates sold only by sample.

(12) Inventories were assigned arbitrarily at the end of the year to the Affiliates where they were reflected in the consolidated financial statement and relied upon for tax purposes.

(13) Suppliers shipped to the Affiliates but billed, and were paid by, the Bankrupt.

(14) The Bankrupt paid all labor charges, advertising charges, union dues and welfare payments, insurance and accounting charges of all the companies with an end of the year charge for an arbitrary allocation by bookkeeping entries.

(15) All guaranties given to purchasers were in the Bankrupt's name and did not mention the Affiliate which made the sale.

(16) The Bankrupt's stationery referred to the Affiliates as branches.[6]

The Second Circuit affirmed the turnover order on the grounds that (a) the predicate for piercing the corporate veil had been met and (b) piercing the corporate veil to permit the assets of all the entities to be administered in the Bankrupt's proceedings was appropriate "for only then could `all the creditors receive that equality of treatment which it is the purpose of the bankruptcy act to afford.'"[7]

Soviero and other relevant authorities indicate that to substantively consolidate a bankruptcy debtor with a non-bankruptcy debtor, two requirements must be met: (a) the predicate for "piercing the corporate veil" must be satisfied; and (b) substantive consolidation will achieve the equitable treatment of all creditors of the consolidated group.[8] It should be noted that although the remedies of piercing the corporate veil and substantive consolidation may have similar conceptual underpinnings, they are separate and distinct remedies.[9]

Applicability of Substantive Consolidation in Insurance Insolvency Cases

There is a strong argument that the bankruptcy doctrine of substantive consolidation ought to be applied in insurance insolvency cases in appropriate circumstances. In fact, without specifically alluding to the doctrine, some insurance insolvency courts recently have done so.

It is appropriate to apply the bankruptcy doctrine of substantive consolidation in an insurance insolvency context because bankruptcy proceedings and insurance insolvency proceedings have the same origins (i.e., equity receivership) and similar purposes. Because of such similarities, state courts properly look to bankruptcy doctrines for guidance when application of the bankruptcy doctrine furthers the purposes of the state insurance insolvency laws.[10]

Application of the doctrine of substantive consolidation may benefit the receiver and further the purposes of the insolvency laws in many insurance insolvency cases. For example, when a single insurance enterprise has been conducted through a corporate group, if the technical separateness of the entities is recognized, not all of the group may qualify as an "insurer" within the meaning of the insurance insolvency laws (i.e., only the nominal "insurance company" may qualify as an "insurer" within the meaning of the statute). If the receiver is directed to operate the "insurer" in insolvency proceedings, the receiver may face grave difficulties. The nominal "insurance company" may have no employees or insufficient property needed for its operation because its business (or significant portions of its business) has been operated by a non-insurer affiliate such as a managing general agent. The "insurance company's" records and information may be maintained on the systems of a "non-insurer" affiliate. The "insurance company" may not even have an actual "home office" because it shares administrative offices with other "non-insurer" members of the group. It may be very difficult or even impossible for the receiver to identify with any certainty which funds and other assets belong to the "insurance company" (as distinguished from other "non-insurer" members of the affiliated group). Thus, bringing the entire insurance enterprise into the insurance insolvency proceedings will give the receiver the tools the receiver needs to operate that enterprise, and will free the receiver of the burden of trying to identify and obtain possession of assets on an entity-by-entity basis.

Substantive consolidation may have other advantages to the receiver as well. For example, the "insurance company" may have causes of action against its "non-insurer" affiliates. Those causes of action may not support prejudgment remedies under applicable law, thus leaving the non-insurer free to dissipate its assets pending judgment. Because substantive consolidation treats the group's assets and liabilities on a consolidated basis, it is a fair substitute for claims by group members against each other, and is so treated.[11] Moreover, bringing the "non-insurer's" assets within the insolvency proceedings effectively "freezes" them.

On a related point, to the extent that the "non-insurer'" members of the group have preferred particular creditors, those asset transfers may be unassailable outside of insolvency proceedings. Bringing those entities into the insolvency proceedings makes the insolvency avoidance powers (including preference avoidance) available to the receiver as to these entities.[12]

Without expressly alluding to the doctrine of substantive consolidation, the Court of Appeal of Louisiana has applied the doctrine in three published opinions. In the seminal case of *Green v. Champion Ins. Co.*[13], the liquidator sought a declaratory judgment that nine affiliates of the nominal insurance company, Champion Insurance Company ("Champion"), constituted a "single business enterprise" with Champion. Champion's affiliates included the holding company of the group and three corporations that were general agents of Champion. The trial court granted judgment (the "SBE Judgment") declaring that Champion and its affiliates constituted a "single business enterprise" under Louisiana law.

In affirming the SBE Judgment, the Court of Appeal cited 18 factors gleaned from cases in other jurisdictions to support the conclusion that a corporate group constituted a "single business enterprise" and that corporate separateness could be disregarded.[14] Applying those factors to the evidence, the court concluded:

> John Eicher, Naaman Eicher and members of their immediate family were the controlling shareholders of all of the corporations. The directors and officers of the various corporations were the same persons in varying capacities. John and Naaman Eicher dominated the affairs of all of the corporations.
>
> In several instances, one of the corporations would entered [sic] into transactions without economic justification. Directors did not act independent [sic] and in the primary interest of the particular entity. Such transac-

Continued on Page 12

SUBSTANTIVE CONSOLIDATION . . . *(Continued from Page 11)*

tions were entered into solely for the benefit of another member in the group. There was a tremendous amount of intercompany debt due to the lack of adequate initial capitalization. These corporations were financed primarily through intercompany debt among members of the group. The financial viability of each corporation was dependent on its ability to collect receivables from other members of the group.

Common employees existed among this group, USU had most of the employees while Champion had none. Some employees were compensated by more than one member of the group. The employees of the group performed services without regard to which of the corporations provided their remuneration. Some corporations received the services of these employees without having to compensate them.

The corporations received virtually no business other than that given to it by members of the group. Substantial intercompany debt was created to enable other corporations or individuals to use the assets of one corporation to make purchases or invest in one of the other corporations. Cash would leave one corporation and flow through a series of other corporations or individuals within a short period of time thereby creating assets or capital on the books of those involved. These funds would ultimately be returned to the initial corporation in the lending cycle. Corporate formalities were not observed with respect to annual shareholder meetings, formal board meetings, and corporate authorization for major transactions.

Most of the entities were operated out of one office located in Baton Rouge. Most accounting was performed at the Baton Rouge office. . . . Activities between members of the group were not properly reflected on the books of these corporations. Documentation of many of these transfers was inadequate. Many of the transactions entered into between corporations in this group were not conducted at arm's length.

Funds were transferred without obtaining proper collateralization and without a repayment schedule. Interest on a number of intercompany transactions was not recorded or paid on a regular and recurring basis. Value of in-kind services were not recorded. Professional fees incurred by one corporation were paid for and expensed on the books of another corporation. Costs for the construction of a shareholder's home was buried in Champion books as part of the cost of constructing Champion's office building. In many material respects, there was no clear allocation of profits and losses as evidenced by the existence of a sweep account.

In terms of structure, finance, and operations, this evidence demonstrates that the [affiliates] . . . were not operated as separate entities. They functioned as a single economic entity despite the internal compartmentalization of ownership and operation by means of separate incorporation.[15]

The foregoing analysis strongly resembles the analysis used by the Second Circuit in *Soviero v. Franklin National Bank*.

In defining the effect of the SBE Judgment, the *Green* court further observed:

Upon finding that the corporate defendants constitute a "single business enterprise," the assets of each of the affiliated corporations are pooled together to satisfy the claims of their creditors. The trial court's judgment does not allow the Liquidator to regulate the non-insurer corporations. The court is simply allowing the Liquidator to gather the assets that are properly includable in the liquidation. . . .

The appellants contend that the trial court judgment is inequitable since it does not provide relief to the creditors of Champion affiliates. . . . These creditors are entitled to assert the same rights they had against the debtor corporation against the "single business enterprise"; however, the extent of recovery would properly be limited to the pool of assets of the larger business entity. The priority by which the creditors of this "single business enterprise" are to be paid is governed by the Insurance Code for purposes of this liquidation.[16]

In two later cases, the Court of Appeal of Louisiana again approved orders bringing the assets of a non-insurer into pending insurance insolvency proceedings. In *Brown v. Automotive Casualty Ins. Co.*, an affiliated insurance premium finance company was declared a "single business enterprise" with a casualty insurer in liquidation proceedings.[17] *In State ex rel Guste v. Green*, a risk retention group subject to insurance insolvency proceedings and affiliated entities not so subject were declared a "single business enterprise".[18]

Further, in unpublished orders, a Missouri trial court consolidated non-insurers with their insurer affiliates in liquidation proceedings. In *In re The Liquidation of M&M Companies*, the Director of the Missouri Department of Insurance filed a Verified Petition for Liquidation alleging that three alien insurers and three of their non-insurer affiliates were "insurers" within the meaning of the insurance insolvency statutes because each was:

a. a person who has done, purports to do, or is doing an insurance business in this state, or

b. a person organized to do an insurance business in this state, or

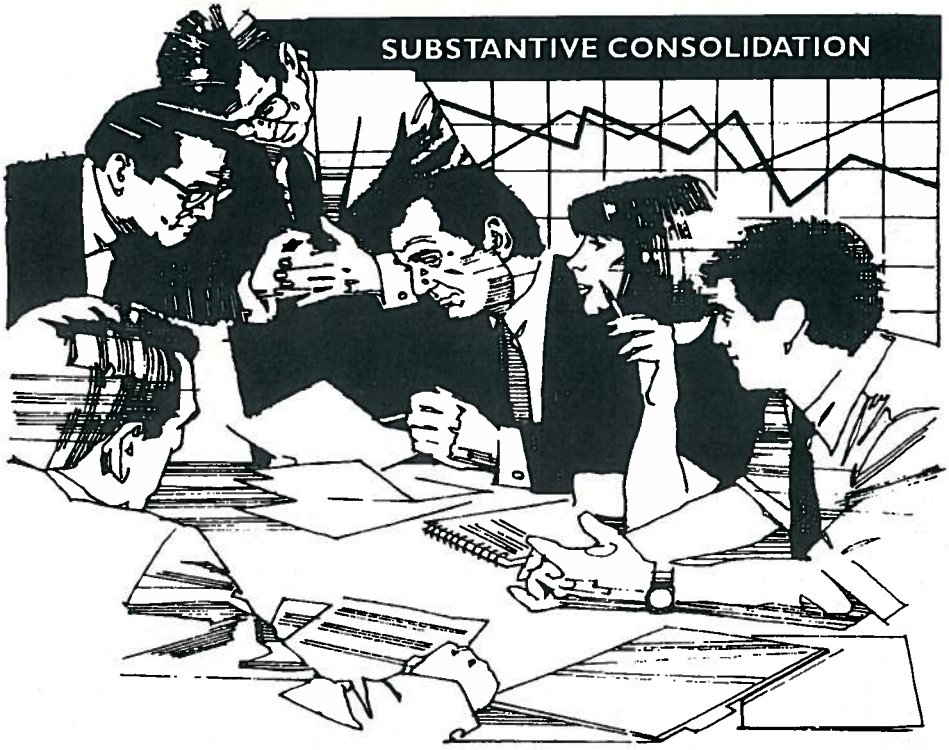
c. a person who has acted as the alter ego and mere instrumentality of other defendants who have done, purport to do or are doing an insurance business in this state.[19]

Pursuant to an April 2, 1996 order, the court appointed the Director liquidator of, among others, the insurers and the three non-insurer affiliates.[20] The April 2, 1996 order further provided:

The Liquidator will be permitted to treat the assets and liabilities of the Defendants which he determines to be derived from the insurance businesses of the Defendants as belonging to a single business enterprise, in which each of the Defendants is the alter-ego or mere instrumentality of the other, to avoid the undue expense and delay that would result from attempting to separate and identify the several assets and liabilities of each of the Defendants.[21]

Federal Bankruptcy Alternative

Although in many circumstances substantive consolidation will be a useful remedy for the receiver, there are circumstances where the distribution and other consequences of the application of the doctrine will militate against its invocation. One risk for the receiver is that imprudent invocation of the doctrine of substantive consolidation could completely or substantially eliminate any return for policyholders and/or creditors. That would result if



substantial claims against the "non-insurer" constituted senior priority claims under applicable law against the consolidated assets. For example, the United States Supreme Court has held that federal law granting claims of the United States first priority in non-bankruptcy insolvency cases preempts inconsistent insurance insolvency priority statutes subordinating such claims to the claims of general unsecured creditors.[22] Thus, if there is a substantial federal claim (e.g., tax claim) against the target non-insurer entity, that claim would attach as a claim in the consolidated case with priority senior to general unsecured creditors (and, if unconstitutional provisions are not severable from the remaining state-law priority provisions, perhaps policyholders as well).[23] Accordingly, there might be nothing left from the consolidated estate for those classes of claims.

Although the consequences of substantive consolidation may militate against invocation of the doctrine in some cases, in a "single business enterprise" situation the receiver may still be left with a need to place the "non-insurer's" assets and business affairs under some form of control either for operational or collection purposes. In that situation, the receiver might consider instituting involuntary bankruptcy proceedings against the target non-insurer.

In general, an involuntary bankruptcy petition may be filed against any "person" who otherwise qualifies as a debtor under the Bankruptcy Code.[24] The involuntary petition must allege certain statutory grounds for relief (e.g., the target is generally not paying its undisputed debts as they become due).[25] A petitioning creditor must qualify as "a holder of a claim...that is not contingent as to liability or the subject of a bona fide dispute..."[26] Such claims must aggregate "at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims...."[27] In most cases, three such petitioners must join in the petition.[28]

The receiver often will qualify as the holder of a non-contingent, unsecured claim against the target non-insurer. For example, under state law the receiver succeeds to causes of action of the insurer (among others) against third parties, including the target affiliate.[29] The receiver's standing to file an involuntary petition may often turn on whether the receiver's claim against the target is "subject to bona fide dispute." Courts have construed that phrase variously.[30]

It is important to note that the "insurer" cannot be substantively consolidated into the non-insurer's bankruptcy proceedings. That is because a "domestic insurance company"[31] and a "foreign insurance company...engaged in such business in the United States"[32] are precluded from being bankruptcy debtors. Generally, those limitations are deemed to be jurisdictional in nature. Substantive consolidation is a judge-made doctrine, and cannot override limitations on the court's own jurisdiction or express statutory provisions of the Bankruptcy Code.[33] Thus, the "insurer" cannot, as a jurisdictional and statutory matter, be substantively consolidated into the non-insurer's bankruptcy case.

Nevertheless, in appropriate circumstances involuntary bankruptcy proceedings may offer the receiver certain benefits. Such proceedings may provide an opportunity to displace the target's management with a trustee, thus assuring that the target's assets will not be dissipated by insiders.[34] If the receiver constitutes a major creditor in the case, the receiver may be able to influence the election of a trustee of the receiver's choosing, or at least have substantial input with the trustee selected by the United States Trustee.

Furthermore, if the receiver is a major creditor, the receiver (subject to federal bankruptcy priority claims and on a ratable basis with the non-insurer's other general creditors) may be a major beneficiary of the trustee's recovery efforts on behalf of the target's bankruptcy estate. Those recovery efforts may include bankruptcy avoidance actions which may be in some respects more valuable than those which would be available to the receiver under state law if the target were substantively consolidated into the insurer's insolvency proceedings.

For example, the elements of a voidable preference may be less difficult to establish under federal bankruptcy law than under state insurance insolvency law.[35] In bankruptcy, certain transfers are subject not only to state fraudulent transfer law, but also to a federal fraudulent transfer statute which may be more favorable to the trustee than state law.[36]

Unperfected liens may be avoidable in bankruptcy (thus making a secured creditor's collateral available for distribution to unsecured creditors) which would not be avoidable in state proceedings.[37]

Moreover, because of nationwide service of process available in

(Continued on Page 14)

bankruptcy and the broad jurisdiction of the federal courts over suits by the trustee, in many cases the trustee may be able to prosecute claims cost-effectively in the "home" forum, while the receiver might have been required to prosecute similar actions in diverse and distant fora.

Conclusion

The bankruptcy remedy of substantive consolidation is applicable to insurance insolvency proceedings. In cases where a single insurance business has been operated through a nominal insurer subject to insurance insolvency proceedings and affiliated entities not subject to such proceedings, recourse to that remedy may address certain problems of the receiver charged with operating/liquidating the nominal insurer. However, even in a "single business enterprise" situation substantive consolidation may not always be an appropriate course for the receiver. In determining the propriety of seeking substantive consolidation, the receiver should consider the possibility and impact of commencing involuntary bankruptcy proceedings against the non-insurer entities participating in the single insurance enterprise.

[1] Substantive consolidation is also used in bankruptcy to combine the pending bankruptcy cases of different entities into one case. *See, e.g.*, Union Savings Bank v. Augie/Restivo Baking Co. (*In re* Augie/Restivo Banking Co.), 860 F.2d 515 (2d Cir. 1988). Unless otherwise noted, this article will deal with substantive consolidation only in the context of the administration of assets of entities not subject to bankruptcy proceedings in the pending bankruptcy case of their affiliate.

[2] 5 Collier on Bankruptcy ¶ 1100.06 at 1100-33 to 34 (15th ed. 1996).

[3] *See, e.g.*, Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941); Soviero v. Franklin Nat'l Bank, 328 F.2d 446 (2d Cir. 1964); Maule Indus., Inc. v. Gerstel, 232 F.2d 294 (5th Cir. 1956); Fish v. East, 114 F.2d 177 (10th Cir. 1940); *In re* Eilers Music House, 270 F. 915 (9th Cir. 1921); *In re* Rieger, Kapner & Altmark, 157 F. 609 (S.D. Ohio 1907).

[4] *See, e.g., Simon v. New Ctr. Hosp. (In re New Ctr. Hospital), 187 B.R.* 560 (E.D. Mich. 1995); Heller v. Langenkamp (In re Tureaud), 59 B.R. 973 (N.D. Okla. 1986); *In re* Crabtree, 39 B.R. 718 (Bankr. E.D. Tenn. 1984); *In re* 1438 Meridian Place, N.W., Inc., 15 B.R. 89 (Bankr. D.D.C. 1981). *See also* First National Bank v. Rafoth (*In re* Baker and Getty Fin. Svcs., Inc.), 974 F.2d 712 (6th Cir. 1992); Drabkin v. Midland-Ross Corp. (*In re* Auto-Train Corp.), 810 F.2d 270 (D.C. Cir. 1987).

[5] 328 F.2d 446 (2d Cir. 1964).

[6] 328 F.2d at 447-48.

[7] 328 F.2d at 448-49 (citation omitted).

[8] *See* notes 4 and 5, *supra*.

[9] Note, *Substantive Consolidation in Bankruptcy*: A Primer, 43 Van. L. Rev. 207, 218 (1990). See also Kroh Bros. Dev. Co. v. Kroh Bros. Management Co. (In re Kroh Bros. Dev. Co.), 117 B.R. 499, 501 (W.D. Mo. 1989)

[10] *See, e.g.*, Garamendi v. Executive Life Ins. Co., 17 Cal. App. 4th 504, 515, 21 Cal. Rptr. 2d 578, 585 (2d Dist.), *rev. denied*, 1993 Cal. LEXIS 5693 (Cal. 1993); Herstam v. Board of Directors of the Silvercreek Water & Sanitation Dist., 895 P.2d 1131, 1137 (Colo. Ct. App. 1995); People *ex rel* Jones v. Chicago Lloyds, 391 Ill. 492, 63 N.E.2d 479 (1945), *rev'd on other g'nds sub nom.* Morris v. Jones, 329 U.S. 545, *reh'g denied*, 330 U.S. 854 (1947); *In re* Rehabilitation of Mutual Benefit Life Ins. Co., 258 N.J. Super. 356, 609 A.2d 768 (App. Div. 1992).

[11] *See* Flora Mir Candy Corp. v. R.S. Dickson & Co. (*In re* Flora Mir Candy Corp.), 432 F.2d 1060, 1063 (2d Cir. 1970)(substantive consolidation eliminates intra-group claims).

[12] *See* In re Baker and Getty Fir. Svcs., Inc., 974 F.2d 712; *In re* Auto-Train Corp., 810 F.2d at 276-80; *In re* Tureaud, 45 B.R. 658, 663 (Bankr. N.D. Okla. 1985), *aff'd*, 59 B.R. 973 (N.D. Okla. 1986); *In re* Crabtree, 39 B.R. 718.

[13] 577 So. 2d 249 (La. Ct. App.) *cert. denied*, 580 So. 2d 668 (La. 1991).

[14] 577 So.2d at 257-58.

[15] 577 So. 2d at 258-59 (footnote omitted).

[16] 577 So. 2d at 259-60.

[17] 644 So. 2d 723, 727-31 (La. Ct. App. 1994), *cert. denied*, 648 So.2d 932 (La. 1995).

[18] 657 So. 2d 610, 615-21 (La. Ct. App. 1995).

[19] Angoff v. M&M Management Corp., Case No. CV194-779CC, Verified Petition for Liquidation ¶5 (emphasis added).

[20] Angoff v. M&M Management Corp., Case No. CV 194-779CC (Mo. Cir. Ct. April 2, 1996).

[21] Id. ¶34 at 16.

[22] *See* Fabe v. United States Dept. of Treasury, 508 U.S. 491 (1993).

[23] *See* Duryee v. United States Dept. of Treasury, Case No. C-2-88-778 (S.D. Ohio August 15, 1995) (*Fabe* on remand).

[24] 11 U.S.C. §§ 101(41), 303(a).

[25] 11 U.S.C. § 303(h).

[26] 11 U.S.C. § 303(b).

[27] *Id.*

[28] See 11 U.S.C. § 303(b)(1). In some circumstances, a single petitioning creditor will suffice. See 11 U.S.C. § 303(b)(2).

[29] *See*, e.g., Ins. Rehab. and Liq. Model Act § 24(A)(8).

[30] *See* 2 Collier on Bankruptcy ¶ 303.08 at 303-39 to 303-42.

[31] 11 U.S.C. § 109(b)(2).

[32] 11 U.S.C. § 109(b)(3).

[33] *Cf. In re* Plafcan, 93 B.R. 176, 177 (Bankr. E.D. Ark. 1988). *See also* FDIC v. Colonial Realty Co., 966 F.2d 57, 59 (2d Cir. 1992).

[34] *See* 11 U.S.C. §§ 701-02, 1104(a). See also 11 U.S.C. § 303(g).

[35] *Compare, e.g.*, N.Y. Ins. Law § 7425(a) *with* 11 U.S.C. § 547(b).

[36] *See* 11 U.S.C. § 548.

[37] *See* 11 U.S.C. § 544(a)

1997 CHARGES

(Adopted by Executive (EX) Committee on January 10, 1997

Insolvency (EX5) Subcommittee

The duties of the Insolvency (EX5) Subcommittee shall be administrative and substantive as they relate to issues concerning insurer insolvencies and insolvencies guarantees.

Such duties include, without limitation, monitoring the effectiveness and performance of state administration of receiverships and the state guaranty fund system, coordinating cooperation and communication among regulators, receivers and guaranty funds, monitoring ongoing receiverships and reporting on such receiverships to NAIC members, developing and providing educational and training programs in the area of insurer insolvencies and insolvency guarantees to regulators, professionals and consumers; developing and monitoring relevant model laws, guidelines and products; and providing resources for regulators and professionals to promote efficient of operations of receiverships and guaranty funds.

1. Monitor and discuss issues arising with respect to receiverships of "nationally significant" multistate insurers and guaranty association activities involved with these receiverships.

2. Monitor guaranty association assessments in relation to system capacity.

3. Produce annual supplement to the Receivers Handbook for Insurance Company Insolvencies.

4. Monitor activities concerning the Interstate Insurance Receivership Compact and other interstate compact proposals relating to insurer insolvency.

5. In Cooperation with the International Association of Insurance Receivers, plan and hold a workshop on current issures in insurer insolvency for regulators, guaranty association personnel, professionals and consumers.

6. Continue development, testing and implementation of uniform data standards for both property/casualty and life health insolvencies to facilitate the exchange and use of information concerning receivership administration among receivers, guaranty funds and other interested parties.

Make a report by 1997 Winter National Meeting.

7. In conjunction with the National Conference of Insurance Guaranty Funds and the National Organization of Life and Health Insurance Guaranty Associations, develop financial reporting standards for receivers and guaranty associations, to include standardized methods of computation of administrative expense and the allocation of administrative expense to specific receiverships.

Make a report by 1997 Winter National Meeting.

8. In coordination with the Accident and Health Insurance (B) Committee and the Risk-Based Capital (EX4) Task Force, make appropriate recommendations to ensure the protection of consumers who purchase health insurance or health care from entities that do not participate in state guaranty associations in the event of the insolvency of such entities.

Make recommendations by 1997 Winter National Meeting.

9. Continue to identify and report issues related to claims of the federal government in insurer insolvencies, other insolvency-related issues concerning asserted federal supremacy, and other matters requiring interaction between receivers and the federal government.

10. Recommend appropriate amendments to the Insurers Rehabilitation and Liquidation Model Act concerning the adjudication of claims and the content of liquidation orders.

Make recommendations by 1997 Winter National Meeting.

11. Recommend appropriate amendments to the Insurers Rehabilitation and Liquidation Model Act related to an insolvent insurer's participation in swap agreements and derivative instruments.

Make recommendations by 1997 Winter National Meeting.

Consider whether the Life and Health Insurance Guaranty Association Model Act should be amended to remove coverage for unallocated annuity contracts.

Make recommendations by 1997 Winter National Meeting.

INSOL '97

By Philip Singer

INSOL '97 is the world congress of INSOL International. The congress which takes place every four years will this year be held 23-26 March 1997 in New Orleans.

INSOL International is the International Federation of National Associations of Accountants, Lawyers and others who specialize in the field of Insolvency. IAIR is an active member and is represented on the Governing Council of INSOL.

For those of us whose special interests include insolvency in the insurance industry, IAIR are holding a special one-day seminar as part of its continuing educational program, dedicated to International Insurance Insolvency Issues.

In order for the complex regulatory, legal and procedural issues surrounding Insurance Insolvency, which multiply dramatically when those problems become international, to be adequately ventilated, the program has been carefully constructed in a refreshingly innovative and practical way which will both educate and entertain.

The program will examine the interplay of state and federal regulation in the United States as it affects the law and practice of insolvency both within and outside of the Insurance Industry, coupled with an examination of the problems of cross-border insolvencies as they affect Bermuda, Canada, the United Kingdom and the United States.

Those problems will be investigated and addressed by panels of experts drawn from each of these jurisdictions over the course of the day, utilizing a novel multi media case study created for the program.

Right now, even the panelists do not know what their conclusions are likely to be or whether, indeed, they can find final solutions to the very real, practical problems with which they will be confronted.

The program has been prepared by a working party of members of the IAIR under the Chairmanship of IAIR Director and INSOL Council member Philip Singer of Coopers & Lybrand, London.

The membership of the panel reads like a Who's Who from the world of Insurance Insolvency, who have among them an encyclopedic knowledge and enormous experience of Insurance Insolvency.

"For many members of IAIR this will be the once-in-a-lifetime opportunity to attend INSOL."

Anybody who has any interest in International Insurance Insolvency Issues should be there — it will be the event of the year, if not the millennium, and should not be missed.

A registration form is attached and you will see that IAIR members enjoy a significant discount. INSOL can also arrange hotel accommodations, should you request.

Because of the limitations of space and the anticipated full house, early booking is recommended.

Be there!! INSOL holds its congress only every four years, and it could be 20 years or so before INSOL returns to the North American continent.

For many members of IAIR this will be their once-in-a-lifetime opportunity to attend INSOL.

We all look forward to seeing you there.

IAIR PROGRAM

The program comprises a case study involving a group of insurance companies situated in the United States, Bermuda, Canada and the UK with a US-based holding company.

The sessions will explore and examine the issues to be dealt with by those companies, when faced with possible insolvency.

Anybody who has any interest in Insurance Insolvency Issues should be there —it will be the event of the year, and probably the millennium, and must not be missed.

Because of the limitations of space and the anticipated full house, early registration is recommended.

Panelists include:

From Bermuda
Malcolm Butterfield, PKMG
Robin Mayor, Conyers Dill & Pearman
Peter Mitchell, Coopers & Lybrand

From Canada
Bob Sanderson, KPMG

From UK
Colin Bird, Price Waterhouse
Ian Bond, Coopers & Lybrand
Gerry Weiss, President, European Insolvency Practitioners Association
Andrew Wilkinson, Clifford Chance

From US
Jonathan Bank, Chadbourne & Parke
Harold Horwich, Hebb & Gitlin
Jim Schacht, Coopers & Lybrand

Program Schedule

March 23, 1997

8:00 a.m.-4:00 p.m.

8:00-8:30	Registration
8:30-10:00	Session 1
10:00-10:30	Refreshments
10:30-12:00	Session 2
12:00-1:00	Lunch Break
1:00-2:30	Session 3
2:30-2:45	Refreshments
2:45-4:00	Session 4 & Wrap Up

International Insurance Insolvency Workshop - March 23, 1997
Sheraton Hotel, New Orleans

Should you require help with hotel accommodations or if you require further details about INSOL '97, please call the INSOL '97 Registration Department at 202 / 857-1173 or Fax: 202/429-5112.

Registration Form:

Name: _____ Phone: _____

Company: _____

Address: _____

Registration Fee: IAIR members US $325
IAIR non-members US $425

(A discount of US $50 is available on the above prices if registering for INSOL '97 as well)

Method of Payment:

Check - Checks must be made payable to "INSOL '97" in US dollars
Credit Card - Only Visa or MasterCard accepted

Credit card company (circle): VISA MasterCard Card number: _____ Expiry date: _____
Name on card (print):_____
Signature: _____

[ ] Wire transfer

Please attach a copy of the bank advice to this form, including the following reference. "Registration Payment for (Insert your name) for INSOL '97"

INSOL Bank Details
Crestar Bank, NA, 1445 New York Avenue NW, Washington, DC 20005 - 2108
ABA #054-000-522
Final Credit to: INSOL, Account #206-708-246

Instructions: After completing this form, mail it with payment to -
INSOL '97, Department 3282, Washington, DC 20042-3282, USA.
Alternatively, fax the form to 202/429-5112

Atlanta NAIC meeting recap

By Mary Cannon Veed

The NAIC Fall Meeting was held in Atlanta, in what the NAIC's publicity people labeled "the Capital of the New South". And you thought the Interstate Compact was a subversive idea.

December meetings are always a curious hodgepodge. The NAIC's year is closing, new officers are being elected and the various task forces are busy trying either to complete charges or explain why not.

At the working group level, that tends to mean a lot of talk but precious little direction, which is pretty much what happened.

Most of the attention in recent meetings has focused on what I like to think of as the groundwork for the next wave of insolvencies - banks selling insurance, new risk bearers selling new sorts of insurance, new (foggier) definitions of proper investments, and balance sheet finagles to "restructure" companies back to solvency.

Don't get me wrong — I don't mean to say those are bad ideas. Some of them are probably very good ones, as long as we are willing to accept the idea that with more variability and maneuverability in the industry, we make it probable that somebody will step into a hole and become grist for a receivership.

Insolvency is the failure of a company; it is not necessarily a failure of the regulatory system.

On the other hand, we are going to look back on the talk we heard in Atlanta, in the heat of an "anything goes" market where it is easier to sell your troubled company than liquidate it, with some amusement. When the pendulum swings in the other direction, when some "unexpected" catastrophe or economic lurch once again sorts out the sheep from the goats, today's children of Adam Smith will assert that it's all the regulators' fault for not making the system goof-proof.

The truth is that goof-proofing is expensive. It creates a market that is mentally flaccid, structurally rigid, and directly and indirectly overpriced. But it is also a fact that some of the newly "prudent" investments will turn out to be bad ones, some of the new insurance will be surprisingly unprofitable, and some of the new capital structures will turn out to be smoke and mirrors.

On our own turf, the principal accomplishment was the completion of the revisions to the Life and Health Guaranty Association laws.

A last-minute move to explicitly exclude coverage of "pooled" GICS generated a fair amount of debate.

As I understand it, most people are convinced that they are uncovered under the current law, but the opinion is not unanimous. Neither was the opinion about whether they ought to be. The debate superficially centered around whether the owners of such instruments were more or less likely to be economically substantial than the owners of things that were or weren't admittedly "covered". Since there isn't much unanimity about who is in the latter category, either, the debate tended to be circular, and instinctual. The committee, following equally strong instincts, punted, deciding to leave the coverage of pooled GICS unchanged.

The amendments to the Liquidation Act that are supposed to cover "swaps" attracted technical comment from regulators, which sent the long-suffering but perennially late advisory committee back to the drawing board for the umpteenth time.

Two issues seem unresolved: how to be sure that the language, which is awesomely complex and convoluted, doesn't become obsolete the next time somebody invents a new swap gimmick, and, lurking under the table, the question of why swap arrangements should get an exemption from the fundamentally unfair (to the swapee's) effect of policyholder priority, when cedants, banks, trade creditors and even the federal government do not. Until somebody articulates an answer to this one, the interpretative yardstick that we will need to distinguish between swaps and other reciprocal transactions, offsettable or not, will be missing.

The highlight of the meeting, naturally, was the Interstate Compact's open forum, which kicked off its effort to draft a new uniform receivership law. The forum played to a packed room for four solid hours. Some form of collective mania kept everyone glued to their seats for most of that time. Part of the allure, I am sure, was the clashing Titans ably expressing conflicting views on the issues we all live with on a daily basis.

But those who came to see fireworks went home impressed with the degree of constructive work going on.

How we're going to do it I don't know, but I am convinced that we will get a worthwhile product out of all that commotion.

PostScript: This law is going to affect YOU, even if your state is allergic to compacts. If you're *not already* on the Compact mailing list, drop a line to: Cathy Travis at OSD (222 Merchandise Mart Plaza, Suite 1450,Chicago, IL, 60654, fax 312-836-1944) and get there!

IAIR Board of Directors in action! *Pictured are: (from left to right) Treasurer Michael Marchman, CIR; Vice President Doug Hartz; President Richard Darling, CIR; Secretary Bob Deck, CPCU, CIR; Tom Wrigley, CIR; Director Philip Singer; Legal Counsel Bill Latza; Directors Michael Surguine, Bob Craig, Betty Cordial and Jim Gordon, CIR.*

ORMOND INSURANCE AND REINSURANCE MANAGEMENT SERVICES, INC.

SERVICES OFFERED

- ❑ **Administration of MGA, Primary or Reinsurance Books of Business**
  data processing, accounting, underwriting claims, regulatory filing, rehabilitation strategies. . .
- ❑ **Arbitration and Litigation Support**
  expert testimony, discovery work, case management, depositions, litigation assistance, reconstruction of records, arbitration panel member. . .
- ❑ **Audits and Inspection of Records**
  pre-quotation, contract compliance, aggregate exhaustion, reserve adequacy. . .
- ❑ **Commutation Negotiations**
  reserve determination, present value calculation. . .
- ❑ **Contract Analysis**
  analysis of reinsurance contracts, analysis of primary or excess coverage, contract drafting. . .
- ❑ **Reinsurance Recoverable Administration**
  reporting, collections, letter of credit control, security review. . .
- ❑ **Special Projects for Rehabilitators, Liquidators, and Insurance Company Management**
  reconstruction of premium and loss history, loss development analysis, reserve determination. . .
- ❑ **Statutory Accounting**
  annual and quarterly statement preparation, diskette filing, premium tax returns. . .
- ❑ **Client Representative**
  settlement conferences, attend informational meetings, monitor activities of defense counsel. . .
- ❑ **Reinsurance Data Systems**
  main frame and PC systems in place for processing of underwriting, claims and accounting for assumed, ceded or retrocessional business

ORMOND INSURANCE AND
REINSURANCE MANAGEMENT SERVICES INC.

140 South Atlantic Avenue, Suite 400
Ormond Beach, Florida 32176

Telephone: (904) 677-4453
Telefax: (904) 673-1630

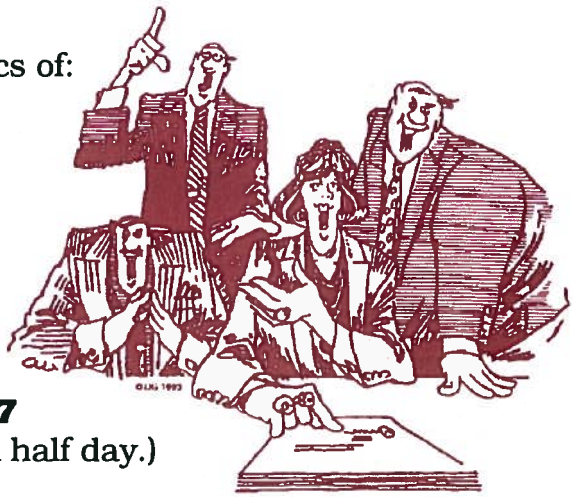
John B. "Jay" Deiner
Executive Vice President
Secretary & General Counsel

A.L. "Tony" DiPardo
Senior Vice President

William T. "Bill" Long
Senior Vice President

What: **I A I R Training Seminar**

Three concurrent sessions covering the topics of:
- Reinsurance
- Claims
- Accounting



Where: University Place
Executive Conference Center & Hotel
Indianapolis, Indiana

When: **Thursday and Friday - June 26 & 27, 1997**
(Thursday is a full day and Friday is a half day.)

Who: **This seminar should be attended by staff members of receiverships, insurance departments and vendors involved in the rehabilitation and liquidation of insurance companies.**

Cost: **To be announced**
Will include continental breakfast and lunch. Dinner is on your own.

Dress: Casual business attire

Individual topics and presenters to be announced!

International Association of Insurance Receivers

5818 Reeds Road
Mission, Kansas 66202-2740

Address Correction Requested

SHAWNEE MISSION KS

FIRST CLASS
U. S. POSTAGE
PAID
PERMIT NO. 264

FIRST CLASS