



Society of Insurance Receivers

Fall 1994

NEWSLETTER

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Tolling Limitations Under Adverse Domination: Shipwrecks in What Used To be a "Safe Harbor"

Statutes of limitations have long been a make-or-break concern for receivers who inherit an insolvent insurer's or failed financial institution's claims against its former officers and directors, their attorneys, accountants, and others for years of misconduct. Until the last couple of years, the tolling doctrine of adverse domination provided a fairly reliable counterattack to limitations defenses. Under adverse domination, the limitations period on claims is tolled until a corporation is no longer under the control of those acting adversely to its interests.¹ Adverse domination derives from the virtually universal discovery rule (a statute of limitations is tolled until the plaintiff knows or reasonably should know of its claims)³ and the notion that corporate claims should not be time-barred until there is someone who can pursue those claims on behalf of the corporation.⁴

The Fifth Circuit initiated the erosion of the adverse domination doctrine in *FDIC v. Dawson*, 4 F. 3d 1303 (5th Cir. 1993), cert. denied, 114 S.Ct. 2673 (1994). The decision in *O'Melveny & Myers v. FDIC*, 114 S.Ct. 2048 (1994), that "[t]here is no federal general common law" for state law claims, id. at 2053, challenged the precedential value of a number of pro-receiver adverse domination decisions. And federal courts' post-*O'Melveny* attempts to divine-state law have yielded mixed results, at best, for receivers.

This article summarizes the developments in adverse domination jurisprudence since *Dawson*, focusing on two recurring issues: (1) whether adverse domination tolls the statute of limitations on negligence claims against officers and directors and (2) whether the doctrine tolls limitations on negligence claims against the insolvent's attorneys and accountants. Other issues not addressed here, but which receivers should consider when pleading adverse domination, are whether the applicable state law requires complete domination of the corporate board or the more prevalent majority control (an issue surveyed well in *Hecht v. RTC*, 635 A.2d 394, 402-

03 (Md. 1994)),⁵ and under what circumstances, if any, the applicable state law allows tolling under adverse domination when the insolvent insurer's independent shareholders, individually or as a class, were on notice of the corporation's claims against the officers, directors, and others (an issue discussed at length in *Clark v. Milam*, No. 2:92-0935, slip op. at 12-18 (S.D. W. Va. June 28, 1994) ("Clark I"), and in *Hecht*, 635 A.2d at 408).

Does Adverse Domination Apply to Negligence Claims Against Ds & Os?

The good news about adverse domination is that it continues to be a fairly reliable tolling mechanism for claims grounded in fraud. But since mismanagement lurks somewhere at the heart of most D&O litigation, receivers need a tolling device limited to fraud claims like the proverbial fish needs a bicycle. Since the Fifth Circuit's decision in *Dawson* (refusing to apply the Texas adverse domination rule to negligence claims), a number of courts have declined to apply adverse domination to negligence claims. While *Dawson* itself was limited to the "very narrow" adverse domination doctrine recognized under Texas law, 4 F.3d at 1312, and claims of "mere negligence,"⁶ its progeny have not been so circumspect.⁷

A quick tally of cases specifically addressing whether adverse domination will apply to negligence claims against officers and directors yields a sobering score: Adverse domination will not apply to these negligence claims brought under the state law of Texas, Florida, Arizona, Pennsylvania, Virginia, and Georgia.⁸ In Maryland, Michigan, and possibly West

Article contributed by Ellen G. Robinson with Judi A. Lamble, Robinson Curley & Clayton, Chicago, IL.

Virginia it will toll the limitations period on these claims.⁹ Despite this uneven score, there are many cases that have
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Safe Harbors

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applied adverse domination to negligence claims without specifically addressing the issue.¹⁰ (Defendants are quick to argue that a number of these decisions are no longer good law because they were overruled by either Dawson (being earlier decisions under Texas law) or O'Melveny (since they relied in part (or whole) on federal common law), but these arguments are riddled with exceptions).¹¹

The arguments in favor of applying adverse domination to negligence claims against officers and directors are straightforward. As the Maryland Supreme Court explained in *Hecht v. RTC*, 635 A.2d at 406:

[T]he directors and officers may be so disengaged from their responsibilities that they themselves are unaware of the breach of their duty to the corporation. Under these conditions, there is hardly greater likelihood that the corporation will be able to discover the cause of action.

Rejecting Dawson as an “unreasonable interpretation” of the adverse domination rule, *RTC v. Rahn*, No. 1:92:CV:174 (S.D. Mich. July 27, 1994), held:

Potential claims of negligence against the controlling directors raise the same concerns as allegations of fraud or other misdealings . . . Although [defendants] owed a fiduciary duty to [the failed thrift], these defendant directors could not have been expected to cause the corporation to sue them or to release information such that shareholders would be tempted to sue them during the period when they controlled the decisions of [the thrift]. The same self-interest is implicated regardless of whether the allegation is of merely negligence or of more culpable conduct.

Despite the logic of applying adverse domination to negligence claims, some courts reason that officers and directors who commit mere negligence do not prevent the company from discovering or asserting its claims. This argument is closely related to (and often confused with) the notion that adverse domination requires fraudulent concealment.¹² In the recent decision in *RTC v. Farmer*, Civ. No. 92-3310, 1994 WL 510532 (E.D. Pa. Sept. 16, 1994), for example, while the court noted that fraudulent concealment is distinct from the discovery rule and adverse domination, it refused to apply adverse domination to negli-

gence claims against officers and directors because Pennsylvania's fraudulent concealment statute reflected a policy of tolling only for those claims against “active participants in true wrongdoing.” 1994 WL 510532 at 10.

Whatever policies may be served by the “active wrongdoing” requirement, it ignores the fact that the sheer control of the company by those acting against its interests serves to conceal knowledge of claims from the company, even without active wrongdoing or fraudulent concealment on the part of the officers and directors.¹³ An intentional misconduct requirement also fails to take into account that the adverse domination of a company — through either negligent or intentional misconduct — prevents it from suing its officers and directors, since they will hardly initiate a lawsuit against themselves.¹⁴

From a policy front, defendants argue that if adverse domination is applied to mere negligence claims, the statute of limitations on corporate claims against its officers and directors would effectively be annulled.¹⁵ As Dawson reasoned:

[I]t could almost always be said that when one or two directors actively injure the corporation, or profit at the corporation's expense, the remaining directors are at least negligence for failing to exercise “every precaution of investigation.”

There is tension, however, between this argument and the discovery rule, from which adverse domination derives. Following Dawson's reasoning, it could be said that the discovery rule swallows the statute of limitations on claims of negligence in any arena, including medical malpractice and products liability cases. Yet courts have not hesitated to apply the discovery rule to these claims. Since the discovery rule applies almost universally to negligence claims without exceptions for D&O negligence, the protectionist philosophy espoused in Dawson is contrary to law.¹⁶

While defendants are riding the wave of recent cases in their favor, the reasoning and results in *Hecht*, *Clark I*, and *Rahn*, and the weight of earlier authorities applying adverse domination to negligence claims without addressing the issue directly, demonstrate that the issue has hardly been settled in defendants' favor. Because of the rapid developments in the area, however, receivers can expect a hard fight on the statute of limitations battleground.

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Potential claims of negligence against the controlling directors raise the same concerns as allegations of fraud or other misdealings.

President's Column

This issue marks the completion of the Society of Insurance Receivers third year. These have been busy years, full of achievements. Several activities are planned for the near future. I would like to highlight these activities so that members can take advantage of these programs.

A joint training program for staffs of receivers and guaranty associations is scheduled for San Antonio this November. Innovative case studies guaranty a stimulating learning experience. In addition, the interplay between receiver's staffs and guaranty funds' staff will surely lead to better understanding of their joint issues.

During the NAIC Winter Meeting in New Orleans, an all day conference will be held on Saturday, December 6. Presentations will feature a diversity of subjects including a mock take-over, arbitration techniques and sale of a charter. These presentations will shed light on some of the diverse issues facing many receivers. Be sure to take advantage of the conference during your time in New Orleans.

The annual NAIC/SIR Workshop is well into the planning stage. Another outstanding group of speakers have been lined up for an event that has always been a key learning experience. This year's dates are February 6 and 7 in Savannah, Georgia.

SIR's Roundtable in Minneapolis drew a full house again illustrating the wide range of subjects of interest to receivers. Speakers discussed interstate

compacts, the current state of directors and officers litigation, Superfund legislation and the pending Guaranty Fund Model Act.

A key SIR program is the publication of its Directory. An earlier call for data on members yielded unsatisfactory results. Rather than publish an inferior product, the Board decided to send proof copies to members this year and to target a March 1995 publication date. Our goal is to have the SIR Directory serve as a who's who of the receivership world. Please return your proof as soon as possible.

I am pleased to advise that your Board elected Richard Darling of Illinois' Office of the Special Deputy as a director to complete the term of Deanna Delmar who took early retirement this year. Deanna was an energetic achiever and we shall miss her.

Four openings on your Board are up for election this December. I believe you will agree that substantial new talent is being proposed to join your Board.

Special appreciation is deserved by Frank L. MacArthur of Delaware who negotiated a SIR members discount on Mealay's Insurance Insolvency Service.

Special thanks are also extended to Bill Latza and Martin Minkowitz of Stroock, Stroock & Lavan. They have given generously of their time on innumerable projects.

All your Board members look forward to being with you during the NAIC Winter Meeting in New Orleans. ■



Mike Miron
President, S.I.R.

Meet Your Colleagues



Karen Weldin Stewart **Director**

Karen Stewart is co-founder of the Society of Insurance Receivers and served as its first President from 1991-94 and as Chairman. Karen has been very active in SIR affairs and was a moving force in the creation of many of the services now provided to members. During her leadership the membership of the SIR increased to over 300 individuals.

Ms. Stewart chaired the NAIC annual Rehabilitators and Liquidators Workshop from 1991-93. She also has worked on the NAIC Handbook Working Group since its inception serving as regulatory Chair of the Takeover Chapter and is presently working on the Life and Health Supplement and the updating of the Claims Chapter.

Karen is also chairman of a company now known as Receivers and Professional Consultants, Inc. which was incorporated in Delaware in 1980. The objective of this organization is to assist state governments in the realm of insurance insolvencies by providing resources having experience and expertise in the insurance liquidation process.

Ms. Stewart was Deputy Receiver for the Delaware Department of insurance and was responsible for twenty receiverships. She was involved in most areas

of the liquidation process, most particularly the settlement of claims on both the direct and reinsurance side. Karen was responsible for bringing a data processing system to the Department's Rehabilitation and Liquidation Bureau including a claim's handling program which she designed and is used by other state's receivership operations.

Karen has been active in politics from early on having founded the state chapter for young members of a national political party, serving as its President and holding national office in 1983-85. She worked for the State Senate in Delaware for the Senate Majority Whip and Majority Caucus. Besides normal duties for the Senator, Karen worked on a research project for affordable housing and put together a series of proposed legislation for such housing for the poor and mentally handicapped.

Ms. Stewart began her business career in the retail industry in 1967 and was employed in various functions by major department store chains. In 1980 she purchased her own retail store and doubled its business within two years.

Karen has been active in various social and political organizations throughout her career including a political exchange program as a guest of the Israeli government. She enjoys horse riding and ballroom dancing in her spare time.

Francesca G. Bliss **Associate Member**

"Frankie" began her career as a Claims Adjuster with Transamerica Ins. Co. and for nine years was promoted to progressively responsible positions. Before being retained by the NY Insurance Dept. as part of the Rehab team at Empire Mutual, she had set up the NY Metro Office, managed the NY State Workers' Comp. operations and assisted in the management of the Westchester claims office.

At Empire (a successful rehabilitation), she had administrative/technical control of the Claims area and developed/implemented claims training programs.

As the Assistant Director of Claims with NYLB, she implemented procedures to expedite the handling of claims on behalf of the NY Security Funds, as well as assist in the drafting of legislation for amendments to the New York Insurance Law, including the US L&H amendments.

Ms. Bliss served on the Board of Directors of Midland Property and Casualty Co. (MIDPAC). She was the Administrator of the NY Insurance Exchange Syndicates, in Liquidation, including Heartland Realex, U.S. Risk and Pine Top. She was also Senior Administrator of the Union Indemnity Liquidation.

As Director, CAO, Ms. Bliss currently performs in the Liquidator's function in 29 domestic proceedings which involve Guaranty Fund operations in all 50 states, D.C., Puerto Rico and the Territories. She acts on behalf of the Superintendent as Conservator in 26 Conservations and as the Ancillary Receiver in 25 Estates where New York is Ancillary. In addition, she is the NY representative on four NAIC Working Groups of the Insolvency (EX5) Subcommittee.

Mr. Bliss received a B.A. degree from Marymount College (Tarrytown, NY) and completed post-graduate studies at Loyola University.

On a personal note, Frankie is married to David Bliss and is mom to Marc, age 12. Having just purchased and moved into a lovely home in Scarsdale

(with the dog and two cats in the yard), and with their sail boat (Blissful), she has a lot of “stuffs” on her plate. Anyone who knows Frankie has already realized that she is the co-captain of the ship (and its navigator); that is why some people may say she speaks like a sailor.

One of her goals is to try to schedule her work hours to less than 16 per day (although she is still

pulling over-nighters); otherwise, the pizza boxes are going to fill the garage. Part of the reason for the long days can be attributed to a lengthy “start-up time” (thank God for coffee).

Lastly, Frankie just loves air travel (how else can she exercise her knuckles until they turn white). And it is believed that she hates visiting Sicily (just watch her if she ever wins the lottery).

Nigel J. Bailey

International Principal Member

Nigel Bailey has developed a career in the financial services and insurance industry at the senior management level and has served as a regulator for these industries. After taking his mathematics degree at Birmingham University he started his career with Noble Lowndes as an actuarial student. After five years of technical experience, Nigel joined Bain Dawes (now Bain Clarkson) as an account executive involved in negotiations at the senior level with corporate clients.

In his first management position with Parkdale, he served as director of both Parkdale Pensions Management Ltd. and Parkdale Pension Trustees Ltd. building a pensions consultancy over a period of six years. Nigel next joined Taylor Gembridge as Life and Pensions Director where his responsibilities included insurance and investment advice for high net worth individuals with multi-national companies as clients. With a background in offshore financial services, he joined American International Group to start a new operation in Gibraltar where he created Gibraltar’s first unit trust.

Nigel’s current position began when he was recruited by the Foreign and Commonwealth office to go to the British Virgin Islands and sort out their offshore insurance industry. When he arrived, there was a lack of legislation and control and his efforts resulted in the removal of nearly 1,000 companies and the development of a new insurance act. Nigel was elected to the Executive Committee of the International Association of Insurance supervisors in 1993 and 1994. He is also vice president of the Caribbean Association of Insurance Regulators.

At the conclusion of his present contract this year, Nigel Bailey will be seeking a new challenge. With four years of regulatory experience and ten prior years at the senior management level in financial services and insurance, both on and offshore, he is interested in a region where there are opportunities to develop financial and insurance services.

Looking back, Nigel Bailey possesses four years of regulatory experience and 10 prior years at the senior management level in financial services and insurance, both on- and off-shore. At the conclusion of his present contract he is interested in a region where there are opportunities to develop financial and insurance services.



Douglas Hartz

Principal Member

Mr. Hartz entered college to pursue a career in the performing arts in piano, tap-dancing and acting. Being easily misled by the educational establishment he exited ten years later having been given the “Third Degree”, a JD in Emphasis Business Planning and leaving half complete course work toward a fourth, an LLM in Tax. The JD was proceeded by a BSBA in Emphasis Accounting and an MBA in (you guessed it) Emphasis Accounting. During this ten-year meandering into learning the business intellect, Mr. Hartz also worked, usually more than full time, leaping rungs on the bureaucratic career ladder at the Department of Defense (D.D.) as a Systems Accountant in Foreign Military Sales tracking billions of dollars in bullets. He also became a CPA, and after passing the bar exam with the highest score in the

state (again, being easily misled that it meant something, and conclusively proving genius at things he should never have intended to do), he leapt off the lofty rungs of the DoD career ladder and landed in deep ... insurer insolvency. Meanwhile, on the positive side, he and Ann (wife and sweetheart since 16), somehow managed to beget two sons, Nicholas and Chase who will hopefully become artists.

Mr. Hartz’s first insurance insolvency was Glacier General (as the name suggests, after nine years it is nearing closure) in Montana. Which, coincidentally, is the name of his third son (Chase’s idea really), Montana. Since then he has administered a dozen insolvencies in Colorado, Montana, Kansas, Wyoming, Utah, Nebraska and Texas and has been involved as a consultant, accountant or expert witness in many others. Mr. Hartz is the President of RES (Receivership & Examination Services) which is made up of much of the former Receivership Division of Hugh Alexander & Associates.



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Meet Your Colleagues

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He has been very involved with the SIR from its inception (clear back when naming it the Federated Association of Insurance Liquidators was considered), conducted the SIR's first claims training sessions and participated in subsequent staff training programs, and has remained involved in nearly every area of the SIR's activities. He currently serves on the Board of Directors and Chairs the Publications and Accounting Standards Committees.

Mr. Hartz has a great passion for receivership work, despite the hair loss it obviously causes, and the goals of the SIR. He feels honored by the associations that this work and the SIR have allowed him to make. On less serious notes, he feels that he has come full circle in finding a career that requires great business and legal acumen as well as acting and tap-dancing. He still plays the piano, voraciously reads history, psychology and business books, enjoys a very unquiet family life and had looked forward to watching the Colorado Buffalos in the Orange Bowl later this year. ■

SIR New Orleans Calendar Set for December 3, 4, 5

SIR Seminar

Saturday, December 3

Balcony I, 4th Floor, New Orleans Marriott

9:00 a.m. - 10:30 a.m.	Mock Takeover	<i>Pat Cantilo</i>
10:30 a.m. - 10:45 a.m.	Break	
10:45 a.m. - 12:15 p.m.	Fraud Presentation	<i>Randal Beach</i>
12:15 p.m. - 1:30 p.m.	Lunch	
1:30 p.m. - 2:30 p.m.	Arbitration	<i>John Nonna</i>
2:30 p.m. - 3:15 p.m.	How to Sell a Charter	<i>Tom Wrigley, Jo Ann Howard, Steve Schwab</i>
3:15 p.m. - 3:30 p.m.	Break	
3:30 p.m. - 5:00 p.m.	Roundtable	
5:00 p.m. -	Annual Meeting	same location

Sunday, December 4

Chartres Room, 5th Floor, New Orleans Marriott

8:00 a.m. - 1:00 p.m.	Committee Meetings
1:00 p.m. - 4:00 p.m.	Board Meeting

Monday, December 5

Chartres Room, 5th Floor, New Orleans Marriott

5:00 p.m. - 7:00 p.m.	Reception
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Minneapolis Roundtable

Vincent Vaccarello, a member of SIR's Board and a Special Deputy for the Commonwealth of Pennsylvania (Mutual Fire), reported that the Roundtable meeting of SIR "P" and "A" members, held in Minneapolis during the NAIC meetings, on Saturday afternoon, September 17, 1994, was an outstanding success.

Speakers and their topics are listed below.

Over 40 members of SIR (and guests) attended the meeting which lasted from 1:00 p.m. to 5:00 p.m. This meeting qualifies for various continuing education credits.

—Vince Vaccarello

Interstate Compacts

James W. Schacht Acting Director, Illinois Department of Insurance
Peter Gallanis General Counsel, Illinois Department of Insurance

Recent Developments in D&O Litigation and Statutes of Limitation

Ellen Robinson, Esq. Robinson, Curley & Clayton

Effect of Pending Superfund Legislation on Insolvent Estates

Steve Elliot NAMIC

Guaranty Fund Model Act

Kevin Harris NCIGF

Questions and Answers Case Studies

Vincent Vaccarello PA Insurance Department

Committee Reports

Jim Dickinson,
Chair

Reporters:

Northeastern Zone:

Allessandro Iuppa (ME)

William Taylor (PA)

Midwestern Zone:

(vacant)

Brian Shuff (IN)

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

Introductory Comment from the Chair

In preparation of our second quarterly SIR achievement report, information was received from

five reporters, including for the first time three reports covering liquidations outside the United States.

Thanks to all those individuals who forwarded the following timely reports; and for those participants who could have provided information and who were on summer vacation or had other valid reasons, you owe me!

RECEIVERS' ACHIEVEMENTS BY STATE OR TERRITORY

Receivers' Achievements by State

Delaware (Richard Cecil, State Contact Person)

Estates Closed - Second Quarter, 1994

	YEAR ACTION COMMENCED	DIVIDED PERCENTAGE	INSURANCE CATEGORY
Remco Insurance Co.	1985	100%	P&C

Ancillary Receiverships Closed

American Mutual Insurance Co of Boston (MA),
American Mutual Liability Ins Co (MA)
Commercial Standard Insurance Co (TX)
Eastern Indemnity Company of Maryland (MD)

Florida (Belinda Miller, State Contact Person)

Ancillary Receiverships Closed
First Quarter, 1994

American Fidelity Fire Insurance company (NY)
Pacific Marine Insurance Co (WA)
S & H Insurance Company (CA)

New Jersey (Robert Zetterstrom, State Contact Person)

Estates Closed - Second Quarter, 1994

	YEAR ACTION COMMENCED	DIVIDED PERCENTAGE	INSURANCE CATEGORY
Alpha-Net, Inc	1989	8.7%	Dental
Foundation Health Plan of NJ	1989	100%*	HMO

*to subscribers

Ancillary Receiverships Closed

Gateway Insurance Company (PA)

Texas (Gale Webb, State Contact Person)

Estates Closed - 1994

	YEAR ACTION COMMENCED	DIVIDED PERCENTAGE	INSURANCE CATEGORY
Eagle Life Insurance Company	1987	N/A	L&H
Excalibur Life Insurance Company	1990	N/A	L&H
Legal Protective Life Insurance Co.	1990	N/A	L&H
Signal Insurance Lloyds Company	1986	N/A	P&C
Southern National Life Insurance Co.	1989	N/A	L&H

Ancillary Receiverships Closed

American Druggists' Insurance Company (OH)
Americas International Reinsurance Co., Ltd
Carriers Insurance Company (IA)
Early American Insurance Company (AL)

Great Global Assurance Co. (AZ)
 Old National Insurance Co. (AL)
 Pacific Marine Insurance Co. (WA)
 Union Indemnity Insurance Co. of New York (NY)

*Offshore reinsurer associated with Southern National Life Insurance Co.

Virgin Islands (Larry Diehl, Contact Person)		YEAR ACTION COMMENCED	DIVIDED PERCENTAGE	INSURANCE CATEGORY
Estates Closed - 1994				
Phoenix Fire & Marine Insurance Co. (British Virgin Islands)		1991	N/A	P&C

Other Developments

Belinda Miller (FL), reported that despite an increase in the number of insurers placed in liquidation in Florida as the result of local hurricanes, the overall number of insurers under receiverships has been reduced from 100 estates being administered as of June 30, 1991, to 68 active estates as of June 30, 1994.

John Milligan-Whyte (International) has provided the following reports for the Mentor Insurance Limited and the SNL Insurance, Ltd. liquidations, both insurers being located in Bermuda:

Mentor Insurance Limited entered court supervised compulsory liquidation on June 6, 1985. Charles Kempe and Nigel Hamilton, who are chartered accountants with Ernst & Young based in Bermuda and London, respectively, are the Joint Liquidators. The opening years of the liquidation were highlighted by litigation undertaken to recover assets for the estate. In the later years a scheme of arrangement was developed which established June 30, 1993 as the final deadline for creditors to file claims against Mentor. The Scheme of Arrangement which used actuarial estimation techniques to value claims was approved by creditors and the Supreme Court of Bermuda. A total of \$485 million in claims was admitted by the Joint Liquidators prior to the payment of the first dividend of 25% to creditors on September 30, 1993. A further \$217 million in claims are currently being evaluated by the Joint Liquidators. It is anticipated that a final dividend of approximately 30% will be paid before the end of 1994. The use of actuarial estimations and a scheme of arrangement has greatly expedited the liquidation.

SNL Insurance, Ltd. entered compulsory court supervised liquidation on July 19, 1990. Christopher R. Whittle and R. Gil Tucker, two chartered accountants in practice in Bermuda, were appointed Joint

Liquidators. SNL was found to have liabilities of \$20 million and assets of \$2.5 million. A first and final dividend of approximately 8% was declared in August 1994. The Joint Liquidators now intend to close down the liquidation and apply to the Supreme Court of Bermuda for a release from their duties.

Jim Dickinson (KY) reports that during August 1994, the Franklin Circuit Court, Kentucky, approved a Plan of Organization and Reinsurance, and Order of Liquidation of **Kentucky Central Life Insurance Company**. The Plan will permit Jefferson-Pilot Life Insurance Company, North Carolina, to acquire Kentucky Central's operations with the transfer of existing life and annuity business to Jefferson-Pilot. If all of Kentucky Central's policyholders elect to participate, Jefferson-Pilot will acquire approximately \$900 million of assets. Under the Plan, Kentucky Central's policyholders may exchange their policies for new policies issued by Jefferson-Pilot. Jefferson-Pilot will make a substantial enhancement contribution in connection with the Plan and in addition, the state life and health guaranty associations will contribute an estimated \$100 million at closing to satisfy policyholders' obligations. Kentucky Central has approximately 360,000 policyholders compared to 1.4 million policyholders currently insured by Jefferson-Pilot.

Alex Spencer (NC) has informed SIR members that a settlement has been reached in the **American Security Life Assurance Company** liquidation with certain former officers and directors of this insurer in the amount of \$15 million. A RICO lawsuit was filed in August 1992 against former officials of American Security Life. The settlement agreement is subject to the approval of the Wake County Superior Court, North Carolina, with a hearing therein having been scheduled during September 1994. ■

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Committee Reports

continued

Publications Committee Report

Douglas A. Hartz, Chair

In August I assumed the Chair of the Publications Committee from Deanna Delmar, who will be sorely missed and is now surprisingly retired. Later that month, I had an opportunity to meet in Birmingham, Alabama with the first Chair of the Publications Committee and Editor of this SIR Newsletter, Nelson Burnett. I informed Nelson of Deanna's sudden retirement, her nomination of myself to Chair Publications and my acceptance of the appointment, upon which, to my shock and dismay, Nelson (out of character with the quintessential southern gentleman that he is) merely let out a rather sinister chuckle. Well, it has not been all that bad, yet.

Nelson later called to let me know that he was planning on making it to the NAIC meeting in New Orleans. I look forward to seeing him, as it seems I may have the last laugh. I am the beneficiary, I believe, of a lot more help in the Publications Committee than I remember in the early days of the SIR. I have an excellent Achievements Subcommittee Chaired by Jim Dickerson with a dozen reporters by region to which everyone should be reporting any positive developments in receiverships. I have a superb Assistant Editor, Mike Caas, who handles all of the Meet Your Colleague features (we will feature Vince Vaccarello (P), Robin Spencer (S- International) and a A and P or S member in the next issue). A greatly experienced Managing Editor, Morty Mann, handles all of the feature articles and news items. Each of the SIR Committee Chairs submits a report for each issue and the Chair of the last Round Table or Retreat also reports on those events. The guaranty

fund groups submit articles - NCIGF for the Summer and Winter issues, and NOLHGA for the Spring and Fall (since, both were included in the Summer 1994 issue there is no guaranty fund feature in this issue). Finally, but not of least importance, I have the advantage of a first-rate association administrator and publisher in Chase Communications.

In Publications, everything is delegated and set up to run fairly smoothly. I am, however, looking for another Assistant Editor to handle the coordination of the committee reports and ensure all are in for each issue. Everyone making submissions (including all achievement reports, colleague features, articles, news items and committee reports) should send a copy to myself at Receivership & Examination Services Company, Denver Office, 12601 W. 32nd Ave., Suite 100, Wheat Ridge, CO 80033-5299 and to Chase Communications at the address on the back cover. This will allow us to fit in everything that we can and ensure publication at least 30 days in advance of each quarterly meeting.

Although the Membership Directory Subcommittee matters were covered in the President's Column, I want to stress the importance of returning (by January 31, 1995) the "proof" regarding information on yourself to be included in the directory. On a nation-wide (and, in fact, world-wide) basis the administration of receiverships can be greatly improved through the use of experienced persons and the SIR membership directory should be an invaluable reference in finding those persons.

Accounting Standards Committee Report

Douglas A. Hartz, Chair

The organization of this Committee was begun at the Minneapolis NAIC meeting. The one thing that has become abundantly clear from that meeting is that this is a large undertaking. We will need participation from much of the SIR membership to determine what these standards should be and how generally accepted certain practices are in receiverships.

There will be a meeting in New Orleans on Sunday December 4, 1994 (exact hour to be determined later) in the Chartres Room, 5th Floor, New Orleans Marriott and I encourage anyone (not only receivership accountants, although I would hope to see all of them there) that is interested in this process to attend.

We're pleased to announce another

member benefit

Save on your subscription to

Mealey's Litigation Report: Insurance Insolvency

The officers of SIR have developed an opportunity for members to get a discount on subscriptions to this report. This is a special benefit of membership in addition to our workshops, newsletter and other activities.

Mealey's will allow a discount of 15% off the annual subscription price to subscribers who are paid up members of SIR once a group minimum of 50 SIR subscribers is met. The annual subscription price for Mealey's Litigation Report: Insurance Insolvency, which is normally \$795 will be discounted to \$675.75 — a savings of \$119.25 each year. This will apply to both new and renewal subscriptions which begin after the minimum of 50 is met. Subscriptions prior to that time will continue at the full price rate.

All SIR members will receive a direct mailing from Mealey's which will include a subscription form for the SIR discount. To qualify, SIR members must declare that their membership is current and paid in full. Mealey's will hold all discount applications until the minimum is met (estimated February or March 1995) and this program can go into operation.

Through this program SIR members who subscribe to "Insurance Insolvency" will save enough to largely offset their annual SIR membership fee. If this first discount program is well received, your Membership Benefits Committee will seek similar discounts on additional publications of Mealey's or others. We welcome your suggestions.

Watch for news of this money-saving benefit.

Delos H. Yancey, Jr. Elected Chairman of NOLHGA

NOLHGA is a voluntary organization of all 52 life and health insurance guaranty associations (including Puerto Rico and the District of Columbia). Guaranty associations, by law, provide a safety net for policyholders in the event of an insurance company insolvency.

Delos H. Yancey Jr., president and chief executive officer of State Mutual Life Insurance Company of Rome, Ga., was elected chairman of the Board of Directors of the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) at its 11th annual meeting here. Mr. Yancey is chairman of the Georgia Life and Health Insurance Guaranty Association and a director on the boards of the Kansas and Oklahoma associations.

Lawrence F. Harr was elected vice chairman of the board and Joseph J. Horvath was elected secretary-treasurer. Mr. Harr is senior executive vice president and general counsel at Mutual of Omaha and a member of the board of directors of the Nebraska Life and Health Insurance Guaranty Association. Mr. Horvath, a former NOLHGA chairman, is executive vice president, general counsel and secretary at Penn Mutual Life Insurance Company in Horsham, Pa. He is chairman of the Pennsylvania Life and Health Insurance Guaranty Association.

Elected to the board were Maynard J. Axtell, chairman and chief executive officer of National Travelers Life Insurance Company in Des Moines, Iowa, for a one-year term, and George T. Coleman and R. Neil Rucksdassel for three-year terms. Mr. Coleman is vice president, government relations, at Prudential Life Insurance Company of America in Newark, NJ, and Mr. Rucksdassel is vice president and general counsel as SAFECO in Seattle.

Re-elected board members include Charles LaShelle, president and chief executive officer of the Texas Life, Accident, Health & Hospital Service Insurance Guaranty Association, two-year term; Nicholas D. Latrenta, immediate past chairman of the board of NOLHGA and vice president, pensions, at Metropolitan Life Insurance Company in New York, three-year term; and Virginia K. Shehee, president and chief executive officer of Kilpatrick Life Insurance Company in Shreveport, La., three-year term.

Incumbent board members include James M. Jackson, vice president and deputy general counsel at Transamerica Occidental Life Companies in Los Angeles and chairman of the California Life and Health Insurance Guarantee Association; Donna T. Mundy, vice president, external affairs, at UNUM Insurance Company of America in Portland, Maine; and William A. Wilson, senior vice president, general counsel and secretary at The Variable Annuity Life Insurance Company in Houston.

Ex-officio board members are Robert F. Ewald, chairman of NOLHGA's Members' Participation Council and Jack H. Blaine, president of NOLHGA.

Staff officers re-elected were: Mr. Blaine; Christopher Bonner, vice president; Anthony R. Buonaguro, senior vice president; Willis B. Howard Jr., vice president; Richard W. Klipstein, executive vice president; and Paul Peterson, vice president.

September 30, 1994 and 1993

Treasurer's Report Balance Sheet

Assets		
	YTD	Prior YT
Current Assets		
Wilmington Trust Checking Acct	\$16,306.65	\$35,882.67
Wilmington Trust CD	25,523.36	
Accounts Receivable	290.00	
Investment Income Accrued	51.19	
Total Current Assets	42,171.20	35,882.67
Property, Plant and Equipment	1,367.50	
Total Assets	\$43,538.70	\$35,882.67
Liabilities and Equity		
Current Liabilities		
Account Payable	\$1,704.31	\$-----
Member's Equity		
Fund Balance	3,704.34	13,650.02
Special Reserve	25,000.00	
Net Income	13,130.05	22,232.65
Miscellaneous		
Total Member's Equity	41,834.39	35,882.67
Total Liabilities and Equity	\$43,538.70	\$35,882.67

Safe Harbors

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Does Adverse Domination Apply to Negligence Claims Against an Insolvent Insurer's Lawyers and Accountants?

It is no secret to receivers that lawyers and accountants play a critical role in masking the mismanagement of insolvent insurers and are often the deepest pockets to provide redress to the estate for the benefit of policyholders and creditors. It should therefore be no surprise that these "third parties" are trying to piggyback on Dawson and the decisions it has spawned, arguing that if adverse domination does not toll claims against negligent officers and directors, it surely should not apply to negligence claims against them.

The good news for receivers is that no cases that have addressed this argument directly have accepted it. *RTC v. Farmer*, 1994 WL 510532, rejected the attorney defendants' argument that the adverse domination doctrine was too narrow to cover the RTC's negligence claims against them. In *Clark I*, supra, despite the defendant lawyer's vigorous argument that adverse domination could not be applied to the professional negligence claim against her, the court held that adverse domination would toll the statute of limitations on the claim so long as the attorney's actions contributed to the adverse domination of the insolvent insurer. And in an earlier decision in that same case, the court applied adverse domination to toll an accountant malpractice claim against partners in *Coopers & Lybrand*, 847 F. Supp. 409 (S.D. W. Va. 1994) ("Clark II").¹⁷ Consistent with *Farmer*, *Clark I*, and *Clark II*, numerous cases over the last decade have applied the adverse domination doctrine without hesitation to toll the statute of limitations on negligence claims against third parties.¹⁸

Defendants attempt to overcome the weight of precedent by arguing that those adverse domination decisions based on federal common law were overruled by *O'Melveny & Myers v. FDIC*, 114 S.Ct. 2048 (1994). But since a large portion of these decisions considered state law along with federal common law, this argument is not particularly persuasive.¹⁹

Defendants also argue that even if adverse domination might apply to negligence claims against them where the officers and directors committed fraud, if the Ds and Os were only negligent they did not conceal their misconduct from the company, and thus did not prevent it from discovering and pursuing its claims against the attorneys and accountants. The obvious response to this argument is, of course, that where a company's adverse domination prevents it from suing its officers and directors, it is likewise preventing from suing the attorneys and accountants who —

through either negligence or fraud, it does not matter which — cover up the officers' and directors' misconduct and perpetuate their control of the company. The company's malfeasant officers and directors will hardly sue their attorneys and accountants when doing so would shine a spotlight on their own misconduct.²⁰

Finally, defendants sometimes contend that adverse domination can be asserted only against those who themselves dominate the insolvent company. This argument was rejected in *Farmer*, where the court held the attorney defendants' absence from the failed thrift's board was "immaterial." 1994 WL 51032 at 11. In *Clark I*, supra, the court found that so long as the attorneys made some contribution to the adverse domination of the company — an easy fact to allege given the central role of these third parties to so much of the mismanagement — they were subject to tolling under the doctrine.²¹

The bottom line on applying adverse domination to negligence claims against attorneys, accountants, and like professionals depends in large measure on the extent to which courts will rely on the Dawson cases addressing D&O negligence claims, especially given the few cases addressing the issue head-on. The scorecard for third parties still favor receivers, but the only sure bet is that receivers can expect third party defendants to put up as much of a struggle over statute of limitations defenses as their D&O counterparts.

Conclusion

Adverse domination used to be a reliable tolling principle to navigate past statute of limitations defenses asserted in cases brought by receivers against the officer and directors of insolvent insurance companies, and their attorneys, accountants, and other. Since Dawson and O'Melveny, however, the application of adverse domination to negligence claims has become a far riskier proposition. Receivers are well-advised to hone in the applicable state law before choosing the venue for their lawsuits and pleading their claims and to anticipate vigorous litigation of the issue.

Notes

1. FDIC and RTC cases are routinely recognized as precedent on statute of limitations issues in cases brought by the receivers of insolvent insurance companies.

2. *Int'l Rys. of Central America v. United Fruit Co.*, 373 F.2d 408, 412 (2d Cir.), cert. denied, 387 U.S. 921 (1967).

3. See. e.g. *In re Lloyd Sec., Inc.*, 153 B.R. 677, 684 (Bankr. E.-D. Pa. 1993).

4. See. e.g. *FDIC v. Henderson*, 849 F. Supp. 495 (E.D. Tex. 1994); *RTC v. Kerr*, 804 F. Supp. 1091, 1095 (W.D. Ark. 1992).

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Safe Harbors

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5. The "majority control" requirement has been the majority rule, but the recent deviation in *RTC v. Farmer*, Civ. No. 92-3310, 1994 WL 510532 (E.D. Pa. Sept. 16, 1994), which held that Pennsylvania requires "complete domination," may create waves in future litigation.

6. At least one post-Dawson court has decided that Texas would apply adverse domination to claims of gross negligence. *FDIC v. Henderson*, 849 F. Supp. 495 (E.D. Tex. 1994); but see, *RTC v. Acton*, 844 F. Supp. 307 (N.D. Tex. 1994) (refusing to apply adverse domination to gross negligence claims).

7. See, e.g. *RTC v. Artley*, 28 F.3d 1099 (11th Cir. 1994); *RTC v. Blasdel*, No. CIV 93-199 PHX RCB, slip op. (D. Ariz. Sept. 26, 1994); *RTC v. David*, No. C-93-3594 SAW, slip op. (N.D. Cal. Mar. 3, 1994); *RTC v. Seale*, 13 F.3d 850 (5th Cir. 1994).

8. See, e.g. *Dawson*, 4 F.3d 1303 (Texas law); In re Southeast Banking Corp., 855 F. Supp. 353 (S.D. Fla. 1994) (Florida law); *RTC v. Blasdel*, No. CIV 93-199 PHX RCB, slip op. (D. Ariz. Sept. 26, 1994) (Arizona law); *RTC v. Farmer*, Civ. No. 92-3310, 1994 WL 510532 (E.D. Pa. Sept. 16, 1994) (Pennsylvania law); *FDIC v. Coker*, 7 F.3d 396 (4th Cir. 1993), cert. denied, ___ S.Ct. ___, 62 U.S.L.W. 3659 (U.S. Oct. 3, 1994) (holding Virginia does not recognize adverse domination, but considering tolling under equitable estoppel [misrepresentation] theory); *RTC v. Artley*, 28 F.3d 1099 (11th Cir. 1994) (Georgia law).

9. See *Hecht v. RTC*, 635 A.2d 394 (Md. 1994); *RTC v. Rahn*, No. 1:92:CV:174 (W.D. Mich. July 27, 1994) (Michigan law); *Clark v. Milam*, No. 2:92-0935, slip op. (S.D. W. Va. June 28, 1994) (West Virginia law, but also certifying issue to state court).

10. See, e.g., *RTC v. Aycock*, Civ. A. No. 92-761, 1993 WL 557683 (E.D. La. Jan. 5, 1994); *RTC v. Scaletty*, 810 F. Supp. 1505 (D. Kan. 1992); *FDIC v. Paul*, 735 F. Supp. 375 (D. Utah 1990) (same); *FDIC v. Ashley*, 754 F. Supp. 179 (D. Kan. 1990); *FDIC v. Greenwood*, 739 F. Supp. 450 (C.D. Ill. 1989); *FDIC v. Carlson*, 698 F. Supp. 178 (D. Minn. 1988); *FDIC v. Berry*, 659 F. Supp. 1475 (E.D. Tenn. 1987); *FDIC v. Buttram*, 590 F. Supp. 251 (N.D. Ala. 1984).

11. *Askanase v. Fatio*, 828 F. Supp. 465 (S.D. Tex. 1993); *FDIC v. Nathan*, 804 F. Supp. 888 (S.D. Tex. 1992). Receivers can argue, of course, that Dawson did not overrule these cases because Askanase and Nathan analyzed whether the limitations period was tolled under the discovery rule as well as the adverse domination doctrine.

Defendants often cite *Farmers & Merchants Nat'l Bank v. Bryan*, 902 F.2d 1520 (10th Cir. 1990) to

exemplify adverse domination decisions grounded in federal common law. But they are overzealous in their invocation of *O'Melveny*. Many pro-receiver decisions on adverse domination acknowledged federal common law but also considered applicable state law. See, e.g., *RTC v. Kerr*, 804 F. Supp. 1091 (W.D. Ark. 1992); *FDIC v. Hudson*, 673 F. Supp. 1039 (D. Kan. 1987). Many more relied solely on state law. See, e.g., *FDIC v. Paul*, 735 F. Supp. 375 (D. Utah 1990); *FDIC v. Buttram*, 590 F. Supp. 251 (N.D. Ala. 1984).

12. See, *Dawson*, 4 F.3d at 1312; cf., *FDIC v. Coker*, 7 F.3d 396 (4th Cir. 1993), cert. denied, ___ S.Ct. ___, 62 U.S.L.W. 3659 (Oct. 3, 1994) (requiring fraudulent concealment in absence of an adverse domination rule recognized by Virginia).

13. *Hecht*, 635 A.2d 394, 405 (Md. 1994); *FDIC v. Hudson*, 673 F. Supp. 1039, 1042 (D. Kan. 1987).

14. See n.4, supra.

15. See, e.g., *Dawson*, 4 F.3d at 1312; *RTC v. David*, No. C-933594 SAW, slip op. at 6 (N.D. Cal. Mar. 3, 1994).

16. No survey of the state-by-state permutations of the discovery rule has been undertaken for this article; receivers should determine, of course, that the state law applicable to their claims supports this argument.

17. The receiver in *Clark* also asserted claims for aiding and abetting RICO violations, conspiring to violate RICO, and aiding and abetting the officers' and directors' breach of fiduciary duty and constructive fraud.

18. See, e.g. *RTC v. O'Bear, Overholser, Smith & Huffer*, 840 F. Supp. 1270 (N.D. Ind. 1993) (claims against appraiser); *Askanase v. Fatio*, 828 F. Supp. 465 (S.D. Tex. 1993) (claims against accounting firm); *RTC v. Platt*, No. 92-CV-277-WDS, 1992 WL 672942 (S.D. Ill. Oct. 23, 1992) (claims against attorneys); *FDIC v. Gantenbein*, No. 90-2303-V, 1992 WL 279772 (D. Kan. Sept. 30, 1992) (claims against law firm); *FDIC v. Nathan*, 804 F. Supp. 888 (S.D. Tex. 1992) (claims against law firm); *RTC v. Gardner*, 798 F. Supp. 790 (D.D.C. 1992) (malpractice and aiding and abetting claims against lawyer); *FSLIC v. Williams*, 599 F. Supp. 1184 (D. Md. 1984) (claims against employee).

19. see n.11, supra.

20. See, e.g. *RTC v. Farmer*, Civ. No. 92-3310, 1994 WL 510532 at 11 (E.D. Pa. Sept. 16, 1994); *RTC v. O'Bear, Overholser, Smith & Huffer*, 840 F. Supp. 1270, 1284 (N.D. Ind. 1993). Adverse domination has been applied to toll limitations on negligence claims against third parties where officers and directors were also negligent in *O'Bear* and *RTC v. Platt*, No. 92-CV-277-WDS, 1992 WL 672942 (S.D. Ill. Oct. 23, 1992).

21. In at least one often-cited case, the court declined to apply adverse domination to any claims against third parties on the unexplained theory that adverse domination applies only to officers and directors. See *FDIC v. Shrader & York*, 991 F.2d 216, 227 (5th Cir. 1993), cert. denied, 114 S. Ct. 2704 (1994). ■

NAIC Receiver's Handbook for Insurance Company Insolvencies

The NAIC published the first edition of the *Receiver's Handbook for Insurance Company Insolvencies* ("Handbook") in 1992, a project that took over two years to complete, with the help and expertise of over 60 authors. The Handbook was prepared at the request of the NAIC, but does not reflect neither the NAIC nor any particular insurance jurisdiction's position on Receivership.

Vincent Vaccarello, Assistant Special Deputy Rehabilitator of the Mutual Fire, Marine and Inland Insurance Company (In Rehabilitation) (Pennsylvania), serves as Chair of the then known Handbook Development Working Group). Vince was ably assisted by Debra J. Hall (né Anderson), formerly Chief General Counsel for the Illinois Office of the Special Deputy Receiver (currently Vice President and General Counsel of the Reinsurance Association of America) and Francine L. Semaya, formerly House Counsel for Integrity Insurance Company in Liquidation (New Jersey), one of the country's largest insolvencies, (currently a Partner in the New York law firm of Werner & Kennedy). The structure of the working group and advisory committee has been altered due to structural changes at the NAIC. While Vince

Vaccarello still Chairs the Working Group, Fran Semaya now serves in the capacity of Coordinator/Research Group Chair.

The purpose behind the *Handbook* is threefold. The *Handbook* serves to provide a general overview of the concepts, principles and procedures which should be of assistance to a receiver. It is not designed to be an instructional manual nor "a definitive statement of the law or procedural requirements of any particular jurisdiction." The editors and authors caution the users of this *Handbook* to consult the applicable statutes and as a guideline in the understanding and handling of a receivership.

Due to the everchanging law and regulatory environment, in this area, the regulatory coordinators, editors and authors have continued with this project. The 2nd edition of the *Handbook* will be published by the NAIC in late 1994, with a supplement to the 2nd edition to be available in the fall of 1995.

If you have any questions, or wish to participate on the *Handbook*, please contact either Vince Vaccarello at (215) 567-9600 or Fran Semaya at (212) 408-6915. ■

Mark Your Calendar

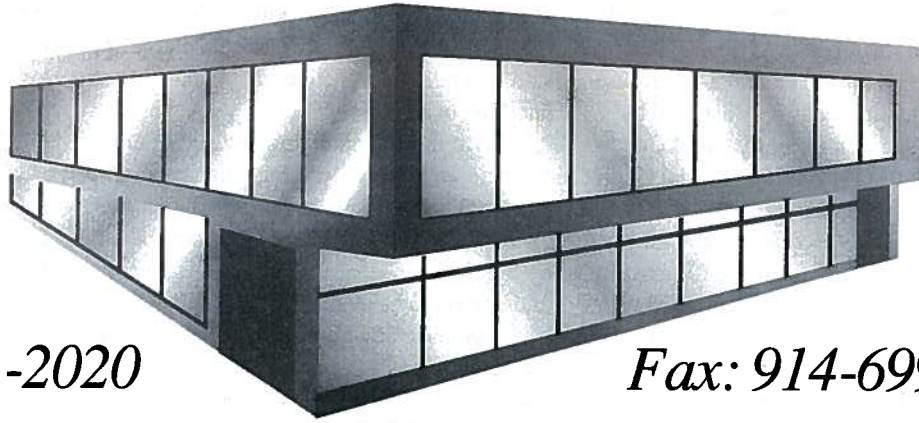
November 13 & 14, 1994	SIR/NCIGF Training Program	San Antonio, Texas
December 2, 1994	Louisiana Dept. of Insurance Fraud Seminar	New Orleans
December 3, 1994	SIR Annual Conference	New Orleans
<i>9 a.m. - 5 p.m. Open to all members. Annual meeting and the election of officers immediately following the Annual Conference.</i>		
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.



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