

# The Insurance Receiver

PROMOTING PROFESSIONALISM AND ETHICS IN THE  
ADMINISTRATION OF INSURANCE RECEIVERSHIPS

## Spring 2005

Volume 14, Number 1

### Feature Articles

- 5** The Seventh INSOL  
Quadrennial Congress  
*Robert S. Hertzberg*
- 6** A.M. Best's Insolvency Study—  
U.S. Life/Health Insurers, 1976 to 2002  
*A.M. Best*
- 12** The Who of Mediation—Part I  
A New Look at Mediator "Styles"  
*Paula M. Young*
- 15** Formation of the Association of  
Insurance and Reinsurance Run-off  
Companies (AIRROC)  
*Peter A. Scarpato*

### Departments

- 2** President's Message  
*Trish Getty, AIR, Reinsurance*
- 3** View from Washington  
*Charlie Richardson*
- 17** Meet Our Colleagues  
*Joe DeVito*
- 19** Receivers' Achievement Report  
*Ellen Fickinger*



[www.iair.org](http://www.iair.org)

## President's Message

Trish Getty, AIR, Reinsurance

Change is inevitable to meet the expectations of our IAIR membership in consideration of the current challenges faced by insolvency providers. Your Board of Directors continues to address today's issues and serve you through education to assist you with administration of the insurance estates.



*Purpose:* Educate IAIR members about the ramifications of the changes on day-to-day administration of receiverships

- **Smart Act Committee**

Chair, Sue Kempler

*Purpose:* Educate IAIR members about the proposed Smart Act's impact on receiverships

First, I would like to extend our sincere thank you to George Gutfreund for his tremendous contribution as IAIR President in 2004.

I welcome our five new board members: Patrick Cantilo, Doug Hertlein, Hank Sivley, Susanne Twomey and Ed Wallis. You have a great board who welcomes your suggestions and input to keep this association appropriately focused on the members' needs.

We have an aggressive list of IAIR objectives for 2005. We realize that we will not be able to finish everything this year but your First Vice President, Joe DeVito, and I are committed to working together, as did George Gutfreund and I in 2004, to seamlessly carry on with our objectives through the transition of IAIR Presidents.

New appointments and committees:

- **Accreditation Education Committee**  
Chair, George Gutfreund  
*Purpose:* Establish an accreditation education program
- **Education Seminar Committee**  
Chair, Barry Weissman  
*Purpose:* Educate regulators on the insolvency process with a focus on Claims, Financial, IT, Reinsurance and International coordination
- **Model Act Revisions (MARG) Committee**  
Chair, Doug Hertlein

- **IAIR/NAIC Liaison**

Board member Susan Twomey has assumed this responsibility to establish and will maintain a regular dialogue with Doug Hartz of the NAIC regarding common areas and objectives of IAIR and NAIC.

- **CPE and CLE Credits**

Board member, Fran Semaya, has accepted responsibility to research the process so that CLE credits can be earned for attendance of IAIR events and roundtables. We will begin with one or two states and expand as we go along. Complying with each state's rules can be rather cumbersome. Paula Keyes, IAIR Executive Director, expects that in the very near future she will finalize the CPE credits with the NASBA for approval of an accountant's CE.

Changes and updates on other IAIR Committees:

- **Accreditation & Ethics**

Chair, Dan Watkins

We are encouraged to have a number of applications for CIR and AIR designations. As you may realize when you review the application, quite a lot of information is requested and properly preparing the application takes time. We thank the A&E Committee for the hours each of them spends reviewing, analyzing and verifying information before making recommendations on

each application. The process involves regular committee conference calls in addition to Chair and members' meetings and oral interviews during the NAIC meetings. We are very encouraged that more and more members are realizing the value of these accreditations and we ask for your patience as A&E processes the applications.

- **Education**

Chair, Kristine Johnson

Kristine deserves a great deal of credit for her energetic input and initiatives to keep our Roundtables valuable and interesting. Through her insight, we are somewhat reinventing our Roundtables. Beginning with our March Roundtable, we will revert to a true roundtable discussion. Kristine's intention is to present a popular subject or issue that we may extract from our Receiver's Roundtable. The Roundtable will be launched by a couple of speakers focused on the chosen subject. Then we will turn to an open forum of discussion, maybe even debate, with the attendees. We welcome your suggestions for topics.

- **Nominations, Elections & Meetings Committee**

Chair, Dan Orth

We thank Mike Marchman for chairing this committee in 2004. Since Mike has left the board, Dan has volunteered to chair this committee. Thank you, Dan.

- **Website Committee**

Chair, Alan Gamse

Alan has the challenge of reconstructing our website to make it fresh, current and more functional.

I would like to thank the chairs of all committees for their dedication and work. We encourage our members to roll up their sleeves and offer your services to contribute to the committees.

*trishgetty@bellsouth.net*

## View from Washington

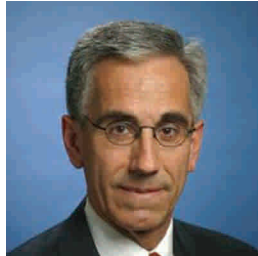
Charlie Richardson

### White House Economic Summit

On December 15–16, the President hosted a White House Conference on the Economy in Washington, D.C. to discuss the economic challenges we face and the steps the Administration thinks are necessary to ensure the economy will continue to grow, create jobs, and meet the needs of the American workforce and retirees. The two-day conference brought together economic experts, entrepreneurs, and workers to discuss key economic issues, such as tax and regulatory burdens, the impact of lawsuit abuse, the high costs of health care, the federal budget deficit, and the financial plight of the Social Security system. See <http://www.whitehouse.gov/infocus/economy/index.html#>. That has been used as a spring board by the President into two issues sure to dominate 2005—medical malpractice/tort reform and Social Security reform.

### GOP Play Book: Throw Deep to the 109th Congress

In the new Congress, Senate Republicans will be able to leverage four new seats (55–45), and with a 231 seat majority in the House, Republicans are close to their well-known high of 1995. President Bush's priorities include reform of Social Security to add private savings accounts and simplification of the tax code. Congress will take on revamping class action lawsuits, limiting medical liability awards and pursuing bankruptcy reform. In the 109th Congress, both the House Financial Services and Senate Banking Committees will be virtually identical to their current lineup. The "SMART" insurance regulation bill will be a priority in the House



upon introduction, and both committees are expected to take up bills to renew the terrorism risk insurance program and overhaul regulation of Fannie Mae and Freddie Mac.

### TRIA Renewal Complicated by Findings of Congressional Budget Office Paper

Due to the increasing belief that the threat of terrorism toward the U.S. will continue indefinitely, Congress should perhaps allow TRIA (P.L. 107-297) to expire at the end of 2005, or add cost-based premiums to the program, according to a recent report published by the Congressional Budget Office (CBO). The CBO concluded that permitting TRIA to end would act as a direct incentive for policyholders and property owners to take actions (e.g., retrofitting existing structures) to reduce their exposure to losses. The Bush administration is expected to weigh-in on TRIA's future in the summer of 2005, when the Treasury Department is scheduled to deliver a report to Congress on the reinsurance program.

### Negotiations on Asbestos Bill "Outsourced" to Judge

Edward Becker, the former U.S. appeals court judge recruited by new Senate Judiciary Committee Chairman Arlen Specter (R-PA) to negotiate a national trust fund to compensate victims of exposure to asbestos, told lawmakers on January 11, 2005, that a final agreement on a dollar amount is politically unlikely. Although not written into the asbestos bill discussion draft, a speculated fund worth \$140.25 billion is viewed as adequate by business, but too low by labor. Once the fund is operational, Becker indicated,

there is a stay on all the claims, and unless the administrator is literally overwhelmed, the "tort system is shut down."

### Leahy and Kennedy Targeting Medical Malpractice Insurers

Sen. Patrick Leahy (D-VT) and Sen. Edward Kennedy (D-MA) have been seeking cosponsors for a bill, applicable only to medical malpractice insurers, limiting the protections of the McCarran-Ferguson Act that exempt the insurance industry from antitrust laws. The senators believe that this exemption allows collusion among medical malpractice insurers, producing higher premiums than would occur in a more competitive market. Under the proposed bill, medical malpractice insurers would not be subject to the entire body of antitrust laws, but would be subject only to provisions that address price fixing, bid rigging, and other similar antitrust laws that address the "collusive" behavior Sens. Leahy and Kennedy believe exist in the medical malpractice market.

### GAO To Financial Regulators: The World is Passing You By

The Government Accountability Office reported November 8 that the US financial services regulatory structure has not kept pace with industry changes since passage of the Gramm-Leach-Bliley Act and the rapid integration for options, ranging from consolidating the regulatory structure within "functional" areas—banking, securities, insurance, and futures—to the more radical option of combining all financial regulators into a single entity (a political nonstarter). The report was requested by Senate Banking Committee Chairman Richard Shelby (R-AL), who has promised additional hearings on financial and insurance regulation in this 109th Congress.

## View from Washington

Charlie Richardson

### Spitzer in the Wind

New York Attorney General Eliot Spitzer sued Marsh & McLennan, the top U.S. insurance brokerage firm, in October alleging that it steered clients to insurers with whom it had arranged kickbacks ("contingent commissions"), and that the firm solicited rigged bids for insurance contracts to deceive its clients into believing that true competition had taken place. A U.S. Senate Government Affairs Subcommittee hearing looking into the scandal was held on November 16. The hearing focused on the role of brokers receiving payments from both client and insurer. A theme raised by Senator Fitzgerald (R-IL) and some witnesses was whether federal agencies such as the FTC should also regulate anti-consumer insurance practices. Mr. Spitzer also has suggested that his probe will widen to look into earnings "smoothing" disguised as insurance policies. Since then, individual states, the NAIC and state attorneys general have gotten into the act in a big way.

### Inquiring States Want to Know

Eliot Spitzer's probe into the use of bid rigging and incentive fees by insurance companies prompted inquiries in several states. The various approaches taken by

state officials and regulators include subpoenas and informal inquiries to individual companies, the creation of a legal task forces that will investigate the charges, and the implementation of a "whistle-blower" hotline where complaints about companies and brokers can be submitted to the state attorneys general. Additionally, the NAIC Task Force on Broker Activities held a public hearing during the NAIC Winter National Meeting in New Orleans to receive comments on the proposed broker disclosure amendment to the Producer Licensing Model Act, and that amendment was approved in January.

### Double Recovery for WTC Lessee

In December, a federal jury decided that the attacks on the World Trade Center on September 11, 2001, were two "occurrences" for purposes of insurance liability. The jury agreed with Larry Silverstein, owner of a 99-year lease on the property, that two plane collisions at two different towers entitle him to a double payout of his insurance policy. In three years of litigation, this jury was the first to find two occurrences instead of finding that the collisions were coordinated attacks and, thus, one occurrence.

*crichardson@bakerd.com*

**The Insurance Receiver** is intended to provide readers with information on and provide a forum for opinion and discussion of insurance insolvency topics. The views expressed by the authors in **The Insurance Receiver** 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, 174 Grace Boulevard, Altamonte Summers, FL 32714, Tel: 407.682.4513, Fax 407.682.3175, Email: IAIRHQ@aol.com.

Paula Keyes, CPCU, AIR, ARe, CPIW, Executive Director; Jeanne Lachapelle, Assistant Director; Jaime Mills, Office Manager; Gregg Burga, Administrative Coordinator.

#### PUBLICATIONS COMMITTEE:

Jerry Capell, Kristen Shikany, Publications Committee Co-chairs; Frankie Bliss; Joe DeVito; Ellen Fickinger; Linda Lasley; Robert Loiseau, CIR-P&C; Liz Lovette, CIR-ML; Charlie Richardson; Debra Roberts; Sharon Rose; Mary Cannon Veed; Ken Weine.

#### OFFICERS:

Trish Getty, AIR-Reinsurance, President; Joseph J. DeVito, MBA, CPA, AIR-Accounting/Financial Reporting, Reinsurance, and Claims/Guaranty Funds, First Vice President and Treasurer; Daniel Orth, III, Second Vice President; Daniel L. Watkins, CIR-ML, Secretary.

#### DIRECTORS:

The Honorable Holly C. Bakke; Francesca G. Bliss; I. George Gutfreund, CA, CIRP, CIR-ML; Kristine Johnson, CPA; Harry L. Sivley, Jr., CIR-ML; Vivien Tyrell; Patrick H. Cantilo, CIR-ML; Douglas L. Hertlein; Francine L. Semaya; Susanne Twomey; Edward B. Wallis.

#### LEGAL COUNSEL:

William Latza and Martin Minkowitz of Stroock Stroock & Laven LLP.

#### ACCOUNTANT:

Stephen Phillips, CPA, FLMI, AIR of Cunningham, Porter & Phillips.

Copyright © 2005 by the International Association of Insurance Receivers.



## The Seventh INSOL Qaudrennial Congress

13th–16th March 2005, Sydney, Australia • Register on-line at [www.insol.org](http://www.insol.org)

*Robert S. Hertzberg, President of INSOL International*

It is now only one month until INSOL 2005. We hope you will be able to join us in Sydney. We are pleased to let you know that the Welcome Cocktail Reception will be held at the Overseas Passenger Terminal. This is situated on Circular Quay directly opposite the Sydney Opera House. This venue gives you a superb view of the harbour. There are many restaurants in the area and I am sure many of you will have a leisurely dinner after meeting old friends and new at the reception.

The Technical Programme, as you will see in the registration brochure, follows a chronological path of the issues that we face in dealing with troubled companies. We hope that you will find of interest some of the more fringe issues which are becoming of increasing importance, for example the session on Media Issues. The Stress Management Session should be particularly lively as we have a number of interesting guest speakers, including Dr Feelgood and Kieren Perkins. Dr Feelgood, aka Dr. Sally Cockburn, is Australia's leading health communicator. She has had regular radio and TV slots since 1990 and discusses issues as far ranging as pillow talk to health issues. Kieren Perkins is known to Australians as the holder of eighteen Australian swimming records, three world records and three Commonwealth records. He is also the winner of an Olympic Gold medal in 1996.

In addition to the main programme, we have a number of ancillary meetings that we would encourage you to attend. In particular, we have developed a special half-day to cover smaller practice issues as we recognise that a large number of our members are sole practitioners. Individual programmes for the open Ancillary meetings are available to view on our web site at [www.insol.org](http://www.insol.org), or we can e-mail them to you on request.



To complete the Technical Programme, we will end with our Farewell Dinner, which will take place at the Convention Centre and will be a superb evening.

On the 17th of March, Deacons will be sponsoring an INSOL 2005 Golf Tour-

namment. Tournament details are in the brochure. It looks to be a great day out. Numbers are limited therefore registration is on a first come first served basis. To guarantee your place in the tournament, please get in touch with them.

We would also like to thank all our sponsors for their support of this event:

- Main Sponsors BMC Group
- Clayton Utz
- Kroll/Ferrier Hodgson
- Financial Times
- Allens Arthur Robinson
- Begbies Traynor
- Blake Dawson
- Coudert Brothers LLP
- Foley & Lardner
- Henry Davis York
- Kennedy Strang
- Litigation Lending Services
- PricewaterhouseCoopers
- RSM Corporate Advisory Services
- The Turnaround Management Association, Australia Chapter

**INSOL 2005**  
Sydney, 13th - 16th March  
SEVENTH WORLD CONGRESS

SPONSORED BY

**bmc**

**CLAYTON UTZ**

**FH** **FERRIER HODGSON**

**Kroll**

**FT**  
FINANCIAL  
TIMES

For further information and secure on-line booking facility, visit [www.insol.org](http://www.insol.org)

## A.M. Best's Insolvency Study— U.S. Life/Health Insurers, 1976 to 2002

A.M. Best

Since 1976, the U.S. life/health industry has experienced wide variations in its financial impairment rates. As with property/casualty companies, [1] the common denominator among life/health company impairments was a diminished operating environment, with impairment peaks often triggered or exacerbated by external factors that stressed already vulnerable companies to the breaking point.

Even so, industry impairments have remained relatively rare, ranging from about 1-in-250 companies in more stable times to 1-in-35 companies during more difficult periods. Since the "run-on-the-bank" crisis that brought life/health impairments to a peak in 1991, the industry has reined in investment risk and impairments have declined meaningfully, with 2002's impairment count representing a 26-year low. Over the 27 years of the study, impairments averaged 20.3 annually, for an average annual impairment frequency of 0.92%, or 1-in-109 companies.

These are some of the findings of a new report by A.M. Best Co. on life/health insurance company impairments during the last 27 years. *Best's Insolvency Study, Life/Health, U.S. Insurers, 1976 to 2002* updates the landmark insolvency study first published in 1992, as well as all intervening reports on insolvency. The new study examines 547 financially impaired companies (FICs) [2] that, in the aggregate, provide a broader basis for analyses of life/health insurer impairment causality than ever used before.

The companies covered by the study include those that underwrite life insurance, annuities and accident and health insurance. Excluded are managed-care companies, which, due to the nature of their business and regulation and to a more limited history of impairment data, will be covered in a future supplemental study.

The objectives of the study were to bring about a more thorough understanding of insurer financial impairments, including their characteristics, the economic, political and social environments in which they occur and other factors that contribute to the profile of high-risk insurance companies; and to validate the procedures and philosophy behind a Best's Rating. A.M. Best Co. is the oldest, most widely recognized, full-service rating agency specializing in the insurance industry. In its 105-year history, A.M. Best's financial information and ratings on insurance companies have helped to encourage a financially strong industry through the prevention and detection of insurer insolvency.

The current study produced overall findings that were broadly consistent with those of the first study period (1976 to 1991). Changing economic, political, societal and insurance industry market factors affected the operating earnings of individual companies. In turn, operating earnings affected the pattern and magnitude of the industry's financial impairments, which varied by industry sector.

The life and annuity segments were more vulnerable to negative surprises in the

credit and equity markets, and to economic disruptions that had an adverse impact on investments. The accident and health sector was more vulnerable to negative underwriting surprises. Further, the primary causes of impairments and company characteristics of the impaired insurers held reasonably constant between the studies.

The current study also confirmed the predictive value of a Best's Rating in signaling companies that are more vulnerable to financial difficulties.

### Scope of Life/ Health Impairments

Life/health insurers faced deteriorating balance sheets and rapidly mounting financial impairments when the first edition of *Best's Insolvency Study—Life/Health* was published in 1992. That first study period of 1976 to 1991, as updated in the current study, saw the industry's annual impairment frequency rise from roughly 1-in-320 companies in 1976 to a high of 1-in-35 companies in 1991.

This second study added data for 1992 through 2002, a period when impairments fell off markedly. The annual impairment count in 2002 actually matched the study's low count in 1976.

During the 27 years of the current study, 547 life/health insurers became financially impaired. This equates to an average of 20.3 companies and an average impairment rate of 0.92% annually. In

[1] An article in Winter 2004 Edition of *The Insurance Receiver* highlighted the results of Best's Insolvency Study—U.S. Property/Casualty Insurers, 1969 to 2002. Please note that sections common to both studies, *State Regulatory Resources* and *Best's Impairment Rate and Rating Transition Study*, have not been repeated in this article but are available in the Winter 2004 P/C article.

[2] A.M. Best designates a company as financially impaired as of the first official action taken by the insurance department in its state of domicile, whereby the insurer can no longer conduct normal insurance operations. State actions include supervision, rehabilitation, liquidation, receivership, conservatorship, cease-and-desist order, suspension, license revocation, administrative order or any other action that restricts a company's freedom to conduct business normally. Companies that enter into voluntary dissolution and are not under financial duress at the time are not counted as financially impaired. A.M. Best emphasizes that the financially impaired companies (FICs) in this study might not have been declared technically insolvent. An FIC's capital and surplus could have been deemed inadequate to meet legal requirements, or there may have been regulatory concern regarding the company's general financial condition.

## A.M. Best's Insolvency Study— U.S. Life/Health Insurers, 1976 to 2002

A.M. Best

other words, somewhat less than 1-in-100 life/health companies typically became impaired annually.

The years with the highest impairment counts were 1983, and 1989 to 1991, with 1991 being the all-time high. The 1983 surge in impairments stemmed primarily from accident and health (A&H) insurers, as casualties of rapidly rising medical care costs and the soft A&H market. Also contributing to the 1983 surge was the financial impairment of six subsidiaries of Baldwin United. The 1989-1991 period accounted for 175, or 32%, of all the impairments. During this time, health insurers once again succumbed to escalating health-care costs and intense competition, and a significant number of impaired life insurers had problems with affiliates or with overstated assets due to exposures from lower quality assets.

The overall favorable post-1992 trend is reflected in the marked improvement in the average number of FICs per year, at 15.2 for the second period, compared with 23.8 in the first period. The latter study period also contrasted favorably with the property/casualty industry, where the average number of FICs jumped appreciably during 1991 to 2002, to 32.5 per year, up from 22.0 per year between 1969 and 1990.

### External Factors and Effects on Operating Results

The U.S. life/health insurance industry underwent unprecedented transformation between 1976 and 2002. The changing economic, political, societal and insurance industry market factors of this period significantly affected not only the operating earnings of individual companies, but also the pattern and magnitude of the industry's financial impairments. Many of the factors driving impairments

remained common throughout the 27-year study period.

### Economic Climate and Financial Markets

Best's Life/Health Leading Indicators—a weighted index of broad measures of the U.S. economy, interest rates, stock prices and inflation—suggests that the primary external factors behind the impairment spikes in 1983 and 1991 were the lagged effects of severe recession and falling long-term interest rates. The 1991 spike also was affected by an earlier drop in stock prices. The combination of factors helped trigger a crisis in the commercial real estate and commercial mortgage markets, with real estate values falling and mortgage defaults soaring. The same factors also contributed to the collapse of the junk bond market. These were areas of relatively heavy investment for some life insurers at the time.

### Profitability Trends

The volatility in premium growth in the 1980s was driven partially by the effects of the double-dip recession in the early 1980s and by financial market distortions that culminated in the 1987 financial market collapse. The latter circumstance also helped to depress margins on either side of the 1987 profit margin trough. A portion of the margin pressure also is attributable to accelerated premium growth, which under statutory accounting generally penalizes bottom-line results, due mainly to the immediate expensing of business acquisition costs.

As with the impairments seen in the property/casualty industry, overall earnings had a basic underlying relationship with the industry's financial stress. Although stressed profit margin is a major factor common to total industry impairments, the impact of external factors and product and market trends on earnings, and correspondingly on impairments,

differed by the major industry segments: life, annuity and A&H. While all three segments experienced common impairment peaks in 1983 and 1991—times of economic distress—other periods of heavy A&H impairments tended to vary from those of the life and annuity segments. The differences in impairment patterns by the life, annuity and A&H segments can be explained to a large extent by the varying nature of the market, product and profit trends.

### Asset Mix and Quality

The industry's asset composition and risk profile evolved from 1976 to 2002. To fund the industry's new product mix, respond to the changing market and economic environment and meet profit objectives, insurers needed to invest in higher yielding assets with an appropriate maturity match and acceptable degree of risk. This became increasingly difficult to achieve as the equity market and interest rates grew more unstable. Some of the key trends driving the industry's heightened risk profile included:

- In the 1980s, insurers took on increasing amounts of credit and investment risk, primarily non-investment grade bonds.
- In the 1990s, institutional products with short-term put options and deposit-like features with low or no surrender charges added to the liquidity pressures on insurers in those markets.
- Asset management strategies grew increasingly complex, adding new risk that may not have been well understood.
- Low interest rates in the late 1990s and 2000s contributed to narrowing profit margins and liquidity issues, particularly with respect to in-force blocks of business with minimum interest-rate guarantees.



## A.M. Best's Insolvency Study— U.S. Life/Health Insurers, 1976 to 2002

*A.M. Best*

Among the major trends in the 1990s was the growth of separate account assets, which went from 5% of admitted assets in 1976 to 36.8% in 2000, before dropping to 28.5% in 2002 after the stock-market woes of 2000/2001. Among invested assets, money increasingly was shifted into bonds, which accounted for a near-term high 79.3% of insurers' portfolios in 2002. Another important change in the industry's asset mix was the reported decline in directly held mortgage and real estate investments, which fell to 12.2% in 2002 from 37.8% of invested assets in 1975. Effective exposure to mortgages, however, is much greater than stated due to increased investment in collateralized mortgage obligations.

Companies briefly reduced their proportionate exposure to non-investment grade bonds following the collapse of the junk bond market in the early 1990s, falling to 5.1% of bond investments in 1995 from 11.5% in 1990. From that point, the proportion of non-investment grade bonds began to rise, reaching 8.5% in 2002, its highest level since 1990.

After the 2001 recession, U.S. corporate bond default rates rose to their highest levels in more than a decade. In contrast to the high default rates seen among junk bond issues in the early-1990s, these defaults included several large issuers (e.g., energy trader Enron Corp. and telecommunications company WorldCom) that carried investment grade ratings almost until the time of default.

The industry has had varying success in generating after-tax profits as a percent of its capital and surplus (C&S). In 2001, C&S growth slowed to its lowest rate (1.4%) in at least 20 years. Contributing to the minimal 2001 growth and 2002's continued slow growth in C&S were the unprecedented levels of realized and unrealized capital losses. This reflected the

continuing volatility of the equity markets, low interest rates and the deteriorating credit quality of fixed-income assets.

It is important to note that the extent of the exposure of the life/health insurance industry's profitability, and resulting C&S levels, to the effect of the economy and the financial markets was preconditioned by narrowing profit margins and liquidity issues that resulted from increasingly aggressive competitive market conditions.

### Impairment Analysis by State

In the analysis by state, impairment frequency (i.e., the number of impairments as a percentage of domiciled insurers) is a more meaningful measure than an impairment count. Some of the states with the highest number of impairments also had the most domiciled companies, while their impairment frequencies were more varied.

Concentrations of companies within certain states reflect a number of factors, including: capitalization requirements, size of insurance market, laws of incorporation, taxes and regulatory environments, which may, or may not, encourage company formation. Arizona, Texas, Louisiana, Illinois and New York were the top five states in domiciled insurers.

The average impairment frequency for all states and territories in the study was 0.92%. The highest average impairment frequencies by domicile were recorded for New Mexico (6.0%), Alaska (4.1%), Montana (3.1%), Idaho (2.9%), Wyoming (2.0%), Oklahoma (2.0%) and Florida (2.0%), which were between two and more than six times the national average. Louisiana's impairment rate of 1.9% was just twice the national average.

On the more positive side, the District of Columbia, Guam, Maine, New Hampshire, Nevada and the Virgin Islands had

no impairments during the study period, while nine other domiciles had impairment frequencies less than half the national average: Connecticut (0.2%), Iowa (0.2%), Wisconsin (0.2%), New York (0.2%), Puerto Rico (0.3%), Minnesota (0.3%), Ohio (0.3%), South Carolina (0.3%) and Massachusetts (0.4%).

Five states accounted for 54% of the 547 life/health insurance company impairments from 1976 to 2002: Texas had 113 impairments; Arizona, 84; Louisiana, 48; Oklahoma, 29; and Florida, 21. These five states also ranked highest in impairment counts during the first study period from 1976 to 1991. In the added years of the second study period, 1992 to 2002, the top four states by impairments remained the same, with Alabama in fifth place.

A.M. Best found an overall meaningful improvement in impairments between the periods 1976 to 1991 and 1992 to 2002. Broken out by domicile, fifteen had no impairments in the latter period: Colorado, Iowa, Maryland, Minnesota, Nebraska, New Mexico, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Vermont, Wisconsin, West Virginia and Wyoming. These were in addition to the six domiciles with no impairments during the 27 years of the full study. Indiana, Washington, California and Arizona also showed significant improvement.

In contrast, the more meaningful impairment deterioration was seen among Alaska, Ohio, North Dakota, Mississippi, Utah, Alabama, Missouri, Georgia, New York, Massachusetts, Kentucky, Hawaii, Connecticut, Arkansas and Pennsylvania.

### Impairments and Company Characteristics

The business characteristics of financially impaired life/health companies held reasonably constant between the original



## A.M. Best's Insolvency Study— U.S. Life/Health Insurers, 1976 to 2002

*A.M. Best*

and the new study. Of the 547 life/health companies that became impaired from 1976 to 2002, inclusive, most were smaller, younger stock companies.

The A&H insurance segment accounted for 46% of the FICs over the last 27 years; the life insurance and annuity segments followed with 38% and 16%, respectively. However, based on annual average FIC frequencies during this period—a more meaningful measure of the impairment magnitude—the industry rankings were: A&H at 1.31%, annuities at 1.02% and life insurance at 0.65%.

The average C&S of roughly 93% of the impaired life/health companies was less than \$20 million in terms of inflation-adjusted 2002 dollars. In contrast, the average C&S of approximately one-half (49%) of all life/health companies fell into that category.

Reflecting their small size and/or pending financial distress, many of the FICs experienced abnormal premium growth in the period leading up to impairment. By industry segment, the A&H insurer impairment frequency was double that for life insurers. The annuity company impairment frequency fell between the other two.

In any industry, the likelihood of failure is greater in a company's earlier years—the life/health industry is no exception. New life/health companies are far more susceptible to pricing, marketing, reserving, asset/liability matching and other management errors. Whereas only 18% of all life/health companies are less than 20 years old, 46% of the FICs were in business for less than two decades when they became impaired.

The analysis of each business characteristic explored in this section was based only on those FICs where related detail was available. In all instances, information was available for at least 60%, and up to 80%, of the impaired companies.

### Causes of Impairments

Over the course of the study, inadequate pricing was the leading cause of impairment, involving 22% of the companies for which a primary cause was identifiable. The proportional breakout by industry segment for the FICs by this cause was 46% A&H, 38% life and 16% annuity. Although rapid growth was the third largest primary cause, at 17% of impairments, it can be closely linked to inadequate pricing. A&H companies also dominated this category, representing nearly 70% of the population.

Impairments caused by affiliate problems represented the second largest group, at 20% of FICs. This category is defined as investments in, or inter-corporate transactions with, one or more related companies that cause, or have the potential to cause, financial difficulties for the entire group. In 1990 and 1991, the upturn in affiliate-related FICs was driven by the savings and loan crisis, depressed real estate market and the collapse of the high-yield bond market in 1989 and 1990.

Investment problems was the fourth largest cause, at 14% of impairments. This category is closely related to impairments caused by affiliates. There were no more than four FICs attributed to investment problems in a given year before or after 1991—the year several high-profile impairments occurred. In 1991, impairments caused by investment problems were primarily among companies affected by the 1990 collapse of junk bonds, the downturn in the real estate market and loss of policyholder confidence which led to unacceptable levels of surrenders and corresponding liquidity problems for these insurers.

The fifth leading cause of impairment, representing 9% of the identified FICs, was alleged fraud. Fraud was the secondary cause in roughly 15% of the FICs for

which the cause of impairment was identified. A.M. Best strongly believes that even this percentage is understated.

Significant change in business ranked sixth as the primary cause, at 5% of impairments. Again, A&H companies were the largest industry segment in this category, at about 39%. Another contributor to the impairment of insurers is reinsurance failure (3%). Miscellaneous causes of impairment (10%) include lawsuits, inappropriate reinsurance transactions, failure to file annual statements and nonconformance with insurance department directives.

### Outlook for Impairments

The outlook for the life/health industry for 2003 and 2004 is for flat or negligible growth in the number of impairments. This is due to the industry's improving operating performance and general balance sheet strength. The outlook, however, varies by business segment. A projected decrease in the number of impairments among life insurers is expected to be offset by a rise in impairments among smaller, less-efficient major medical carriers and long-term care writers. Managed care companies are excluded from this assessment.

As noted earlier, the industry's operating environment and impairment frequency are affected by developments in the fixed-income and equity markets, interest rates and the economy. There also are societal, regulatory and geopolitical factors. Terrorist risks are not considered a primary threat to life/health insurer solvency, especially if Congress extends the Terrorism Risk Insurance Act (TRIA) to cover group life insurance. As such, A.M. Best's impairment outlook for the life/health industry is based on five positive assumptions tempered by five possible offsetting factors, as outlined below.

## A.M. Best's Insolvency Study— U.S. Life/Health Insurers, 1976 to 2002

A.M. Best

### Positive Assumptions

*Subsiding investment issues and improving credit quality.* Recovering equity markets and near-term credit market stability have created a more positive environment for the life insurance industry.

*Sophisticated capital modeling systems.* Since the early 1990s, the industry has benefited from new modeling systems that measure capital adequacy and serve as early warning systems of financial impairment.

*Improved risk mitigation and expense containment.* A.M. Best has observed that more life insurers are better positioned for the future than they were before 2000. These companies are employing more advanced risk-management techniques to create better value and mitigate the complex risks within their organizations.

*Increased merger and acquisition activity.* After having slowed almost to a standstill during the difficult economy of the early 2000s, merger and acquisition activity is picking up.

*Stronger corporate governance.* The heightened corporate governance and financial disclosure requirements imposed by the Sarbanes-Oxley Act of 2002 are expected to have positive implications for the financial strength of the industry.

### Offsetting Factors

*Uncertainty regarding factors affecting the fixed-income and equity markets.* A.M. Best's view of the operating environment is tempered by a number of uncertainties that could dampen momentum in the investment markets, including vulnerability in the economy and in the credit and currency markets, and geo-political instabilities.

*Inadequate pricing continues to pressure profit margins.* A. M. Best remains concerned about the continuing trend in inadequate pricing of products and product features.

*Liquidity pressures from fixed and variable annuity guarantees.* The growth of variable annuities with secondary guarantees is raising liquidity concerns, especially for insurers with larger blocks of this business

*Lack of reinsurance coverage.* Shrinking capacity is making life reinsurance coverage increasingly difficult and expensive to obtain, even as insurers' needs to spread risk increase.

*Insurers' increasing use of alternative investments.* Like other complex investment strategies, there are inherent risks from these credit-related products that are difficult to measure.

### Best's Ratings of Impaired Companies

An analysis of the ratings' development of life/health companies shows that as impairment nears, the company's Best's Rating generally deteriorates at an accelerating rate. Overall, the higher the rating, the lower is the risk of impairment, and vice versa. Further, impairment frequencies are higher for the industry than for companies with a Best's Rating.

A.M. Best formally followed 335 (61%) of the 547 FICs covered by this study for at least one year prior to impairment and provided letter Financial Strength Ratings (FSRs), or the equivalent, to 175 of those impaired companies. Best's Rating system identified nearly all companies approaching impairment by significantly lowering or eliminating their Best's Ratings.

Of the total 547 FICs, 533, or 97%, were rated "B" or below in the Vulnerable category, or were among the nonletter-rated companies (including those not followed) in the year of impairment. Only 14 of the total 547 FICs had a Secure Best's Rating ("B+" and above) in the year of impairment. Even so, A.M. Best had downgraded eight of the 14 at least one rating level.

Putting those numbers in perspective, consider that for the 27 years covered by the study, the annual average number of life/health insurers with a Secure Best's Rating was roughly 727. The 14 FICs rated Secure in the year of impairment averaged just 0.52 companies per year over the 27 years of the study. This translates into an average annual financial impairment rate for companies with a Secure Best's Rating of 0.07%, or just 1-in-1,400 companies. This contrasts with the life/health industry's overall 0.92% impairment rate, or 1-in-109 companies, during the period of the study.

A.M. Best currently reports on approximately 1,950 U.S. life/health insurers (excluding managed-care companies). Best's rating system, while not perfect, has proven to be extremely effective in monitoring this large number of companies representing virtually all insurers operating in the United States.

The rating activity and modifiers that can be a part of a Best's Rating also are important indicators of an insurer's current financial strength. As a company's financial strength begins to deteriorate, rating activity typically accelerates. These rating actions often can involve the assigning of rating modifiers. Today, A.M. Best uses its "u" (under review) rating modifier to signal to the public and investors that the rating is subject to a near-term change. In the past, A.M. Best also has used modifiers such as "c" (contingent rating) to indicate that an insurer's financial strength has declined, but not enough to warrant a change in the letter rating.

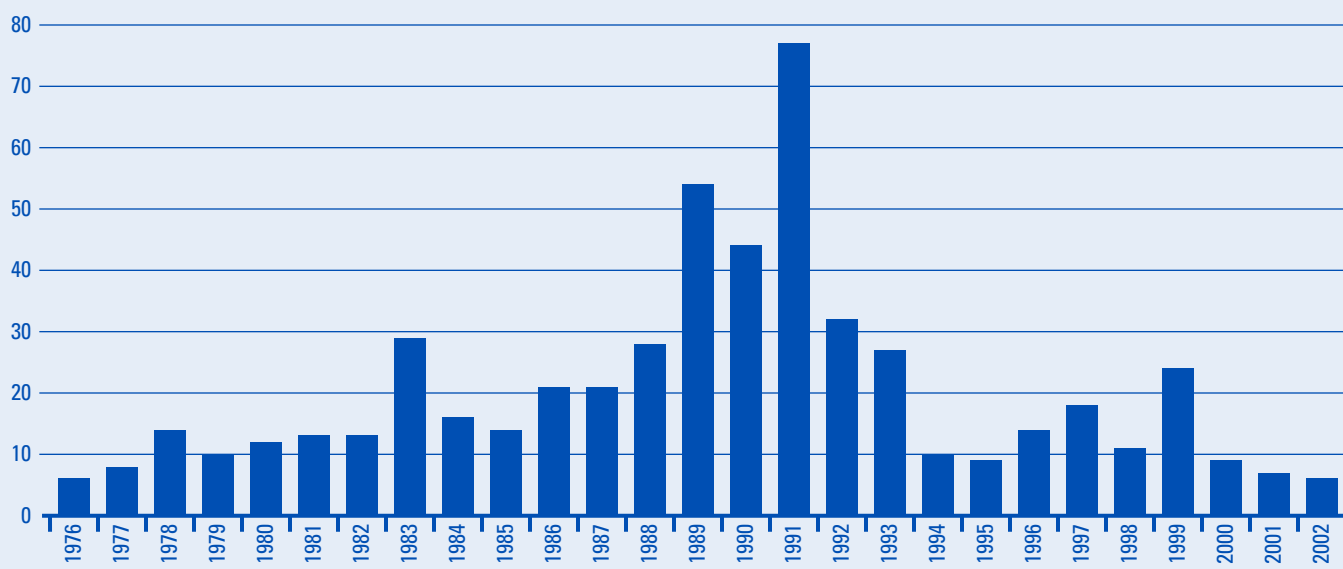
In A.M. Best's opinion, the procedures and philosophy behind a Best's Rating are the most effective approach to developing consistent and reliable ratings.

James Peavy  
908.439.2200, x5644  
james.peavy@ambest.com

## A.M. Best's Insolvency Study— U.S. Life/Health Insurers, 1976 to 2002

A.M. Best

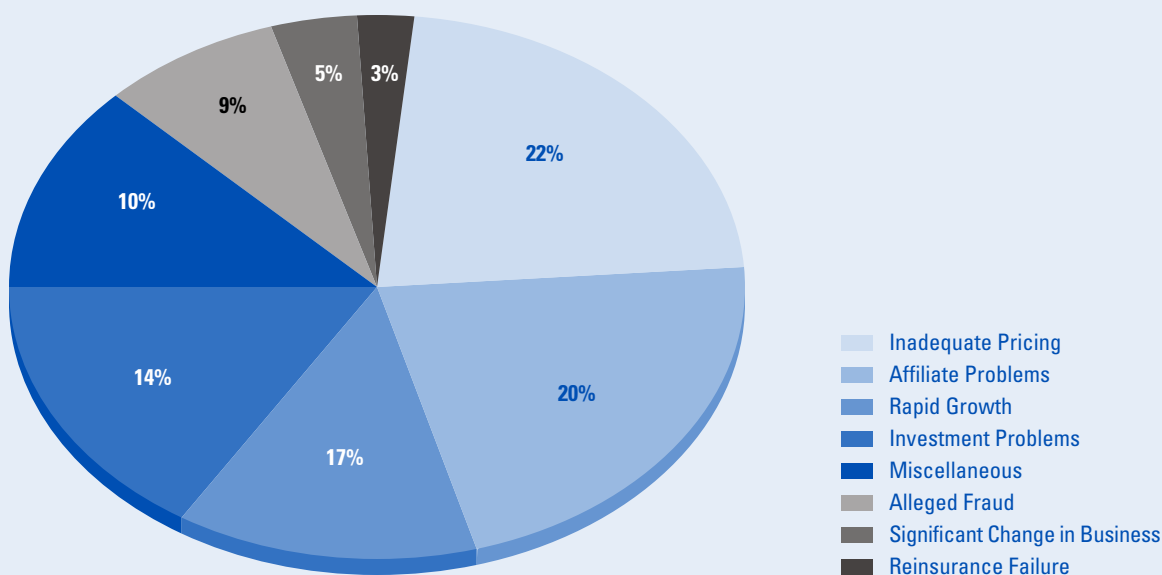
### ANNUAL NUMBER OF LIFE/HEALTH IMPAIRMENTS



	Total Impairment Count	Average
1976 to 2002:	547	20.3
1976 to 1991:	380	23.8
1992 to 2002:	167	15.2

SOURCE: A.M. Best.

### PRIMARY CAUSES OF LIFE/HEALTH IMPAIRMENTS (1976–2002)



NOTE: Breakout is only on companies with sufficient information available.  
SOURCE: A.M. Best.

## The Who of Mediation—Part I: A New Look at Mediator “Styles”

Paula M. Young <sup>[1]</sup>

In 1994, Len Riskin, the C.A. Leedy Professor of Law at the University of Missouri-Columbia and Director of its Center for the Study of Dispute Resolution, inadvertently started a great debate about what “style” of mediation was “best.”



When he published the article entitled, *Mediator Orientations, Strategies and Techniques*, <sup>[2]</sup> he described four styles of mediation based on how broadly the mediator defined the problem presented by the parties (and thus the depth of intervention the mediator was likely to take) and the role of the mediator—either facilitative or evaluative. According to this analytical scheme, a mediator could be: narrow/facilitative, narrow/evaluative, broad/facilitative or broad/evaluative.

The two-dimensional grid based on this analysis supposedly predicts the strategies each type of mediator is likely to use, and, Riskin thought at the time, the amount of self-determination the parties would have in the process. <sup>[3]</sup> This analytical scheme came out of an invitation from a Kansas City law firm whose partners hoped its lawyers would participate more effectively in mediations by, among other things, making more skillful choices about which mediator to use. <sup>[4]</sup> Unexpectedly, the Riskin grid—as it quickly became known—began to polarize the mediation community. It led to the labeling of mediators.

On the problem definition dimension of the original grid, a mediator who defined the problem narrowly would consider and help the parties resolve only the litigation-related issues. If the mediator defined the problem increasingly more

broadly, he or she might next consider business interests, then personal, professional or relationship interests, and finally community interests involved in the dispute.

The other dimension of the grid focused on the role of the mediator and identified two roles or styles of mediation: evaluative and facilitative. One can look at these two styles from several perspectives: their focus, goals, processes used, and outcome orientation. According to several authors, facilitative mediation—the style of mediation most frequently taught to new mediators—focuses on providing the parties consensus building process-skills. Mediators using this style assume that the parties are intelligent and capable and that they understand better than any mediator ever could the dispute and possible resolutions of it. Mediators using this style intend to enhance the participation of all parties involved in the mediation, generate party-to-party discussions, and reopen and improve channels of communication. They also use techniques designed to identify each party's interest and needs underlying their hard-

ened positions, help the parties evaluate unreasonable expectations, and help the parties identify solutions to the dispute through brainstorming and option generation techniques. Facilitative mediators generally show a preference for joint sessions rather than caucus and reserve caucus for times when the parties can not talk to each other face-to-face. The mediator remains responsible for the process, but not for the outcome. <sup>[5]</sup>

Evaluative mediators are often defined as focusing on the substance of the dispute. They assume the parties need more help in assessing or predicting litigation outcomes and formulating solutions to the dispute. The techniques of evaluative mediators often include review of the underlying legal documents, assessment of the law or facts underlying the dispute, and active participation in the resolution of the dispute through case evaluation, the prediction of outcomes at trial, or other substance-oriented assistance. Often, these mediators use more caucuses, in which the mediator may attempt to convince the parties to accept a recommended solution. They often apply pressure to settle. They typically control the expression of emotion as not being helpful or as actually hindering the process. The style looks a lot like shuttle diplomacy and makes the mediator more responsible for correctly translating for the other party the verbal, non-verbal, emotional, and psychological communication of the other side expressed during caucus. These me-

[1] Paula M. Young is an assistant professor at the Appalachian School of Law located in Virginia teaching negotiation, mediation, and arbitration. In 2003, she received a LL.M. in Dispute Resolution from University of Missouri-Columbia. That same year, she was a visiting faculty scholar at Pepperdine's Strauss Institute of Dispute Resolution. Her description of insurance insolvency law was published by the Missouri Bar in *Supervision, Rehabilitation and Liquidation of Troubled Insurance Companies*, Missouri Insurance Practice, Ch. 2, Fifth Edition (2004). She served as General Counsel for the receiver of Transit Casualty Company as an advocate in litigation and mediation with reinsurers. Missouri and Virginia have recognized her as a mediator qualified to handle court appointed cases.

[2] 12 Alt. to the High Cost of Litig. 111 (1994).

[3] See Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, 9 No. 2 Disp. Resol. Mag. 22 (2003). The three core values of mediation are (1) party self-determination, (2) the mediator's impartiality and neutrality as to the parties and the outcome, and (3) confidentiality.

[4] *Id.* at 22.

[5] Douglas Noll, *Peacemaking: Practicing at the Intersection of Law and Human Conflict* 91-92 (Cascadia 2003).



## The Who of Mediation—Part I: A New Look at Mediator “Styles”

Paula M. Young

diators see themselves as “dealmakers” willingly deciding what is best or “fair” for the parties. One author suggests that most evaluative mediators are lawyers or retired judges who tend to “revert to their default adversarial mode, analyzing the legal merits of the case to move towards settlement.” He suggests this “legalized” style is more akin to early neutral evaluation or non-binding arbitration. [6]

Even these short descriptions show how quickly this debate becomes one of stereotypes. Less skillful mediators, some argue, use the more heavy-handed evaluative style. On the other hand, only touchy-feely people wearing Birkenstocks are truly facilitative.

The style discussion got even more complicated when, in 1994, R. Baruch Bush and Joseph Folger published a book entitled *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994). Bush and Folger introduced the concept of yet another style of mediation known as the transformative style. The focus of mediators using this style is on relationship-building. A mediator using this style views the primary goal of the process as allowing parties to experience moral growth. Settlement itself is not the principle goal. The mediator seeks to generate mutual respect between the parties and to get each party to truly appreciate the interests and viewpoints of the other party. These mediators see conflict as an opportunity to transform people from fearful, defensive, and self-centered beings to confi-

dent, responsive, and caring beings. These mediators hope to transform the parties into relatively self-sufficient problem-solvers so they can resolve future controversies that arise between them. The mediator consciously avoids judgments about the parties’ views or decisions, including whether they are “fair.” These mediators cede control of the process to the parties, allowing the parties to make process-related decisions, including the need for any ground rules. They also allow for expressions of emotions. These mediators care very much about the empowerment and recognition of the parties. Noll suggests that the transformative mediation process is not another style, but an orientation to outcome, joined by two other orientations: the problem-solving orientation and the narrative orientation. [7]

The problem-solving orientation focuses on solving problems (duh) and reaching a settlement of the dispute. This orientation sees conflict as a clash of interests and needs, as generally described by Roger Fisher, William Ury and Bruce Patton in *Getting to Yes* (2d ed., Penguin 1991). The focus of this orientation is to search for common interests and to look for ways to satisfy the parties’ interests and needs in a collaborative way that “expands the pie,” if possible, or looks for value creating trades. Its opposite approach is the distributive-adversarial-positional form of negotiation. Noll suggests that this overall orientation is then further subdivided into the bargaining

mode and the therapeutic mode based on an analysis by Susan Silbey and Sally Merry in *Mediator Settlement Strategies*. [8] Under the bargaining mode, the mediator claims substantive expertise in law and adjudication. He or she may achieve settlement by criticizing the litigation system for its cost, inefficiency and unpredictability. Mediators using the therapeutic mode, in contrast, claim substantive expertise in managing interpersonal relationships. The therapeutic mediator “focuses on emotional concerns, criticizing the legal system for its tendency to ignore emotions and destroy relationships.” [9]

The narrative mediation orientation finds its description in John Winslade & Gerald Monk’s, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey-Bass 2000). These Australian mediators suggest that reality is constructed from people’s conversations or discourses with each other. [10] Conflict, according to this orientation, is normal and expected. The mediator helps the parties construct a new narrative about the conflict that re-frames the parties’ perception about it so they can solve the dispute collaboratively. [11] The orientation assumes that conflict reflects culturally created perceptions of unmet needs. “Problems are seen as constructed within a pattern of relationships, and social context is the key to understanding self and identity.” [12] The mediator helps the parties change the context of the dispute to a new one in which new choices become possible for the parties. The mediator searches for an outcome

[6] *Id.* For a more comprehensive discussion of these styles see Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 Harv. L. Rev. 7 (1996); Kimberlee Kovach & Lela Love, “Evaluative” Mediation is an Oxymoron, 14 Alt. to High Cost of Litig. 31 (1996). Noll, *supra* note 4, at 86-89, 91-99; Charles Craver, *Mediation: A Trial Lawyer’s Guide*, 35 Trial 37 (June 1999).

[7] Noll, *supra* note 4, at 100-106.

[8] 8 Law and Policy J. 7, 12-19 (1986).

[9] Noll, *supra* note 4a, at 101.

[10] John Winslade & Gerald Monk’s, *Narrative Mediation: A New Approach to Conflict Resolution* 41-44 (Jossey-Bass 2000); Noll, *supra* note 4, at 104.

[11] Winslade & Monk, *supra* note 9, at 41-44.

[12] Noll, *supra* note 4, at 104.

## The Who of Mediation—Part I: A New Look at Mediator “Styles”

Paula M. Young

defined as a new reality without the conflict-laden story. [13]

Even before Riskin developed the first grid, another scholar put mediators into three categories: the thrashers, the bashers and the hashers. [14] Trasher mediators, often experienced trial lawyers, “spend much of the time ‘tearing apart’ the cases of the parties.” [15] The technique discourages direct party negotiations. After this trasher process, the mediator suggests to the parties more “realistic” settlement options. Basher mediators, according to Alfini, focus on the opening settlement offers the parties bring to the mediation. The basher then attempts to move the parties to a number somewhere in between the original offers. Most bashers are retired judges “who draw on their judicial experience and use the prestige of their past judicial service to bash out an agreement.” [16] Trashers and bashers will likely keep the parties in mediation until they reach a settlement. The hashers, in contrast, encourage party-to-party negotiation. One described himself using these terms: “[f]acilitator, orchestrator, referee, sounding board, scapegoat.” [17] The hasher is less likely to keep the parties at the table if one of them expresses a desire to leave. [18] “Flexibility is the hallmark of the hasher style of mediation...they are willing to employ trasher and basher methodologies if they believe it to be appropriate in a particular case.” [19]

Perplexed? You betcha. Especially if you, as a mediator, saw your interventions as

far more complex and variable.

### Riskin’s New Grid System

A decade after his first “grid” article, Riskin looked again at the question of mediator style, orientation, or strategies. Perhaps influenced by his 20-year experience in mediation, or his understanding of “living in the moment” derived from his mindfulness meditation practice, or perhaps because of the increasingly shriller debate about which style was “best,” he took a more nuanced and fresh look at the original grid. [20] He now suggests, I think, that we mediators should be gentler with each other. Instead of labeling ourselves and each other (bad, bad evaluator or flakey, inefficient facilitator, or weird transformative mediator), mediators can ask instead what the parties need in the moment. Mediators can also listen better when the parties ask us for what they need in the moment. He suggests that we consider the interventions or actions that mediators take during a mediation as if they were a series of frames in a motion picture. In each frame, what is the mediator doing and why? In that moment, what approach is the mediator taking? What strategy or technique is the mediator employing? What orientation is the mediator exhibiting? In the moment, is that choice effective? If not, what happens in the next moment? If so, what opportunities did the intervention create in the next moment? The

mediation process gains through this analysis a dynamism both in practice and theory that we may have missed before.

The new Riskin system asks whether the mediator is using a strategy, style, technique, approach, or orientation – in that moment – at her own direction (mediator influence) or at the invitation of the parties (party/lawyer influence). During any mediation, the answer to that question will depend on the needs of the moment. Even the most evaluative mediator will have moments of highly facilitative interventions. Even that mediator will have moments when he or she will focus on emotion or the need for the parties to empathize with each other and truly understand each other’s perspectives. As Riskin explains, by example: “At [one point on the grid evaluating problem definition], the mediation is focused on a narrow problem and nearly all of the influence to develop the problem definition has come from the mediator. At [a second point on the grid], the [same] mediation has a broader scope, and although the mediator’s influence in determining that problem definition still predominates, the other participants also have experienced some influence. At [a third point on the grid], the participants have influenced the development of a broader problem definition.” [21]

Lawyers, mediators or scholars could develop additional grids relating to each meta-process in the mediation: Will the

[13] *Id.* at 106.

[14] James Alfini, *Trashing, Bashing and Hashing it Out: Is this the End of “Good Mediation”?*, 19 Fla. St. U. L. Rev. 47, 66-73 (1991).

[15] *Id.* at 66.

[16] *Id.* at 69.

[17] *Id.* at 71.

[18] *Id.* at 72.

[19] *Id.* at 73.

[20] See Leonard Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, 9 No.2 Disp. Resol. J. 22 (2003).

[21] *Id.* at 25.

## The Who of Mediation—Part I: A New Look at Mediator “Styles”

Paula M. Young

mediator request pre-mediation submissions? (Yes, because she finds them useful, therefore disclosing mediator influence.); Will she focus only on the legal positions of the parties and not consider underlying interests? (No, unless the lawyers explain they want something more akin to early neutral evaluation, therefore disclosing lawyer/party influence.); Will she use caucuses? (No, because she has decided that the best work occurs when the parties are together, therefore disclosing mediator influence.); Will she make a mediator's proposal when the parties cannot close the gap? (Yes, but only as a last resort and only if the parties request it, therefore disclosing shared mediator and party influence.)

Lawyers and clients could also use these grids, Riskin suggests, to determine predispositions toward influence – theirs and the potential mediator. This knowledge would help lawyers choose the best mediator for the particular dispute involving particular parties. [22] They would know in advance, for instance, that they wanted an evaluation of the legal case. They could then choose a mediator willing to provide that evaluation. [23] Or they could use, instead, an early neutral evaluator.

Riskin's new grids (one no longer suffices) focus on behaviors in the moment and over time rather than on labels that apply to the mediator throughout the mediation interaction. Yet, again, Riskin has enlivened the debate over mediator styles by providing these new analytical tools. Lawyers and clients can use them to participate in mediation at a much more sophisticated level and with more control over the process.

[pyoung@asl.edu](mailto:pyoung@asl.edu)

## Formation of the Association of Insurance and Reinsurance Run-off Companies (AIRROC)

Peter A. Scarpato, AIG, AIRROC Board of Directors

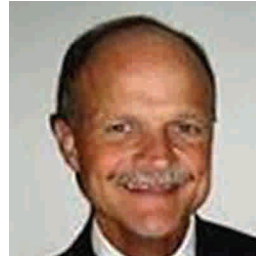
The prospects for improved communication, coordination and understanding among active and run-off companies, receivers and liquidators, and their representatives took a major step forward this fall with the creation of the Association of Insurance and Reinsurance Run-off Companies (“AIRROC” or “the Association”), a New York non-profit corporation.

AIRROC's mission statement is simple and clear:

*The mission of the Association is to promote and represent the common business interests of insurance and reinsurance companies in run-off. The Association's objectives will include improving professional and managerial standards and practices, and enhancing knowledge and communications within and outside of the run-off industry through educational activities.*

Thus, for every company impacted by run off, the Association will strive (a) to find and promote common interests, (b) to assess, improve and standardize existing practices and procedures, and (c) to increase the level of communication, knowledge and understanding among seemingly diverse groups.

AIRROC's structure openly permits input and contributions from all interested parties. Voting Membership and non-voting Associate Membership is limited to risk-bearing entities (insurance/reinsurance companies, underwriting pools) and receivers or liquidators of companies that previously underwrote or currently administer run-off insurance or reinsurance business. However, participation in



AIRROC's all-important committees is open to qualified non-members. In addition, membership is not limited to property and casualty but includes all lines.

### Common Interests

“It's no coincidence that AIRROC's logo—a capitalized presentation of our acronym under a broad triangle—evokes the image of the Association's members under one roof,” says Trish Getty, AIRROC's Executive Director and Ex Officio board member. “AIRROC has gathered a group of companies involved in or impacted by run-off who will work together to improve communications and serve common business, educational and strategic interests.” According to Ms. Getty, “If diverse parties are given a forum to work together, they can resolve many issues between them. AIRROC gives them that forum.”



Given the impact and importance of run off to the entire industry, AIRROC has already attracted many talented and experienced participants. The Association currently has 23 charter members, including major US and international insurance and reinsurance companies, well-known receiverships and liquidations that impact a significant portion of US and overseas business and third-party administrators and run-off managers that handle runoff for or against the first two groups. An eleven-member board of directors, including representatives from all three groups, manages and executes AIRROC's

[22] *Id.*

[23] The ability of mediators to provide legal advice, information or evaluations may be constrained by state rules of conduct or ethical codes.

## Formation of the Association of Insurance and Reinsurance Run-off Companies (AIRROC)

*Peter A. Scarpato, AIG, AIRROC Board of Directors*

affairs through five officers (Andrew Maneval, Chairman, Art Coleman, Vice Chairman, Joe DeVito, Treasurer, Ed Gibney, Secretary and Trish Getty, Executive Director) and eleven committees, all chaired by one board member. And it is through these committees that AIRROC will accomplish its core tasks.

### Improve and Standardize Practices and Procedures

The following five committees will evaluate current run-off practices and procedures, set appropriate benchmarks and matrices to measure performance and explore various methods and strategies to ensure success:

- **Benchmarking Research Committee:** study production metrics, evaluate run-off companies' compensation plans and set standards for personal and professional development;
- **Early Closure Committee:** study closure strategies, claims estimation and cut-throughs;
- **Intermediary Services Committee:** research and monitor solutions to industry trends, intermediary performance issues and the impact of privacy issues on the development of a common database;
- **IT Committee:** research solutions for various IT platforms needed to produce effective run-off reports;
- **Reinsurance Committee:** work with run-off companies, insurers and receivers to set minimum criteria for common document requirements and streamline the reinsurance collections process.

### Communication, Education and Understanding

The remaining six committees will focus on communication, education and understanding:

- **Commutation Event Committee:** organize annual commutation event by partnering with other event sponsors;
- **Education Committee:** provide a forum to distribute information on the receivership process, regulators' and reinsurers' concerns, and effective strategies to resolve run-off issues;
- **Legislative/Amicus Committee:** monitor legislative efforts to change the insolvency and run-off industry, liaise and share information and recommendations with other trade groups, and work with the NAIC on relevant issues including progress of the Model Receivership Act;
- **Marketing Committee:** promote AIRROC membership, industry awareness of the Association's efforts and accomplishments, and AIRROC website advertising;
- **Publications Committee:** create AIRROC publication, determine and solicit applicable articles or papers, liaise with other related publications and create news releases for AIRROC website;
- **Website Committee:** construct and oversee maintenance of AIRROC website.

### The Time for AIRROC is Now

AIRROC's goals, objectives and committees will address critical factors the industry must accept and actions it must take to understand, manage and ultimately realize maximum value from run-off business. In his recent article, "Questions of Value" (Run Off Business, Issue Nine, Summer 2004, pp. 18-20), Dan Schwartzmann of Pricewaterhouse Coopers' discontinued Insurance Business unit, discusses the erosion of value caused when companies refuse to make "changes in behaviour, procedures and business practices" required to effectively handle runoff. He concludes: "Successfully adapting to the new environment to maximize the potential rewards will involve collaborative working with all stakeholders under a new framework" (*Id.* at pg.19).

AIRROC provides the organizational framework and industry participation necessary to achieve this purpose.

For further information contact Trish Getty at [trishgetty@bellsouth.net](mailto:trishgetty@bellsouth.net). Website construction is underway and in the near future can be accessed at [www.airroc.org](http://www.airroc.org).



## Meet Our Colleagues

*Joe DeVito*

### Matthew L. Foley

Matt Foley has joined IAIR with a background unique to our organization. Matt is a partner of a Merrill Lynch Wealth Management Group based in Paramus, NJ- a suburb of New York City. He is responsible for delivering consulting and advisory services to institutional relationships countrywide- including insolvent insurance entities.

He and his Merrill Lynch Group advise and work with state insurance departments, individual insurance companies, industry consultants and attorneys re-



garding the following insolvent company investment management issues: 1) Investment Management Consulting, 2) Asset and Risk Management and 3) Institutional Trading.

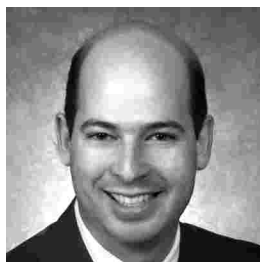
In addition to membership in IAIR, Matt is one of 3,500 people worldwide holding the prestigious Certified Investment Management Analyst (CIMA) professional designation from The University of Pennsylvania's Wharton School of Business. This designation allows Matt and his team to develop, refine and implement Investment Policy State-

ments for fiduciaries and work closely with them to ensure prudent management of assets on an ongoing basis.

A graduate of Villanova University, he currently lives in Upper Montclair, New Jersey with his wife, Wendy, and twin children, Connor and Paige. In addition to golf, Matt enjoys playing the bagpipes and running (he twice completed the Dublin, Ireland Marathon). An ambitious traveler, he has summited Mt. Kilimanjaro in Africa and hiked the Inca Trail to Machu Picchu in Peru.

### James A. Friedman

James Friedman is a shareholder in the Madison office of Godfrey & Kahn, S.C., LaFollette Godfrey & Kahn. The firm has represented the Wisconsin Insurance Security Fund with respect to insurer liquidations for over 25 years. James assumed responsibility for the firm's guaranty fund and liquidation claims and litigation practice in the summer of 2001, just in time for the Reliance and PHICO (and Home and Legion...) liquidations. Since then, he has represented the Wisconsin fund and guaranty associations from nearly a



dozen other states in litigation around the country.

James is an active participant in the National Conference of Insurance Guaranty Funds and the National Organization of Life and Health Insurance Guaranty Associations,

helping to plan the last two NCIGF Legal Seminars. He joined IAIR in 2002. James also edits chapters in NCIGF's and NOLHGA's annotated model guaranty fund acts.

James is a member of his firm's Litigation Team and Insurance Team, which provides

a full range of corporate, regulatory, and litigation services to both domestic and foreign insurers and reinsurers. He handles a variety of insurance-related litigation, general commercial litigation, and appellate matters. James recently was named to *In Business* magazine's "Forty Executives Under 40" list.

Before joining the firm, James served as a law clerk to the Honorable Donald W. Steinmetz of the Wisconsin Supreme Court. He received his J.D., *cum laude*, and a Master's degree in public policy from the University of Wisconsin, and a B.S. with high honors in electrical engineering from Georgia Tech.

## Meet Our Colleagues

Joe DeVito

### Joseph W. Muccia

Joe Muccia is a partner in the law firm of Brown Raysman Millstein Felder & Steiner LLP, with offices in Los Angeles CA, Morristown NJ, Hartford CT and New York City. Joe is a leader of the Brown Raysman commercial litigation department with vast experience in the trial of diverse matters before courts and arbitration panels throughout the country. For many years, much of Joe's practice has involved



representing liquidators and rehabilitators of insurers, and receivers, in complex litigation concerning officer/director responsibilities, accountants' liability, vendor claims, disputes with insurer affiliates and related matters.

Joe's law firm is known nationally for its litigation and insurance expertise as well as its technology practice. This combination of practice experience brings unique talent to complex litigation.

Joe also is an experienced and trained arbitrator and adept in mediation of complex multiparty disputes.

Joe graduated *magna cum laude* from Fordham College where he was elected to Phi Beta Kappa. He received his JD from Fordham Law School where he was an Editor of the Law Review.

Joe and his wife Peggy live in Hastings-on-Hudson and in Port Jefferson, New York. Peggy is an occupational therapist working with special students of grade school age. Peggy and Joe enjoy traveling, they are avid golfers, and they love their work.

### Eric C. Osterberg

Eric Osterberg is a commercial litigator with the law firm of Brown Raysman Millstein Felder & Steiner LLP in New York City. He works with receivers in a variety of litigation contexts, including in lawsuits against former officers, directors, accountants and other employees and professionals to recover funds belonging to insurance companies in rehabilitation or liquidation.

Eric has authored a number of publications including A Primer on Intellectual Property Risk Management and Insurance, published in Les Nouvelles (June 2003), republished in The Licensing Journal Vol. 23 No. 10 (November/December 2003) and Insurance and Management of Intellectual Property Risks, with Melvin



Simensky, 16 Entertainment and Sports Lawyer No. 2 at 3 (Summer 1998), republished in 17 Cardozo Arts & Entertainment Law Journal No. 2 at 321 (Spring 1999). He is co-author of a copyright law treatise entitled Substantial Similarity In

Copyright Law, published by the Practising Law Institute in 2003.

Eric received his J.D. from Emory University where he served as a member of the Board of Editors of the Emory Law Journal and his B.A. from Northwestern University where he was a member of the Northwestern Rugby Football Club.

Eric lives in Wilton, Connecticut with his wife Shelly, daughter Kelley (4) and son Lars (2). Eric is an avid golfer, hockey fan, and music lover.



Joe DeVito

# Receivers' Achievement Report

Ellen Fickinger

Chair:	Ellen Fickinger
Reporters:	Northeastern Zone: J. David Leslie (MA); W. Franklin Martin, Jr. (PA)
	Midwestern Zone: Ellen Fickinger (IL); Brian Shuff (IN)
	Southeastern Zone: Eric Marshall (FL); James Guillot (LA);
	Mid-Atlantic Zone: Joe Holloway (NC)
	Western Zone: Mark Tharp, CIR (AZ); Evelyn Jenkins (TX)
	International: Jane Dishman (England); John Milligan-Whyte (Bermuda)

Our achievement news received from reporters for the third quarter of 2004 is as follows:

Under OSD supervision, **American Mutual Reinsurance, in Rehabilitation (AMRECO)**, continues to manage the reinsurance runoff of their business, reported **Mike Rauwolf (IL)**. Also under OSD supervision, **Centaur Insurance Company, in Rehabilitation** continues to manage the runoff of their business as well. Total claims paid inception to date for Loss & Loss Adjustment Expense, Reinsurance Payments and LOC Drawdown disbursements are as follows:

Total Claims Paid Inception to Date	AMRECO	Centaur
Loss and Loss Adjustment Expense	\$ 30,449	\$53,294,715
Reinsurance Payments	\$169,574,948	\$ 4,945,493
LOC Drawdown Disbursements	\$ 9,613,386	\$13,876,555

## RECEIVERSHIP ESTATES CLOSED

State	Name of Insurer	Category	Licensed	Year Action Commenced	Payout Percentage
IL	Inland American Insurance Company	P&C	Yes	1997	Class A 100% \$1,527,698 Class D 47.5% \$3,182,485

(Mike Rauwolf, State Contact Person—IL)

State	Name of Insurer	Date Estate Closed
MD	Grangers Mutual Insurance Co.	7/26/04
	PrimeHealth Corporation	7/12/04

(James A. Gordon, State Contact Person—MD)

## DISTRIBUTIONS

Early Access and other Funds paid to Guaranty Funds or Associations and disbursements to policy/contract creditors.

Estate	Loss and LAE	Early Access Distribution	Return Premium	Reinsurance Payments
Agora Syndicate, Inc.	\$ 1			
Alliance General Insurance Co.	\$ 114	\$ 15,075		
Alpine Insurance Company	\$83,630			
American Horizon Insurance Co.	\$ 84	\$ 17,110		
American Mutual Reinsurance Co.				\$231,393
American Unified Life and Health Co.		\$ 85,000		
Back of the Yards	\$ 2,253			
Centaur	\$ 1			
Coronet	\$ 28			
Crown Casualty Company	\$ 350			
Delta Casualty Company	\$ 98	\$ 32,817		
First Oakbrook Corp. Syndicate	\$ 51			
Gallant Insurance Company	\$ 410	\$2,910,097		

## Receivers' Achievement Report

Ellen Fickinger

Estate	Loss and LAE	Early Access Distribution	Return Premium	Reinsurance Payments
Illinois Earthcare Workers Comp.	\$ 3,367			
Illinois Electrical Workers Comp.	\$ 344			
Illinois Environmental Services	\$ 2,284			
Illinois Insurance Co.		\$ 31,787		
Inland American Insurance Co.		\$ 3,609		
Legion Indemnity Co.	\$ 3,688	\$ 304,703	\$3,335	
Oak Casualty Insurance	\$ 329			
Pine Top Insurance Company	\$ 2	\$ 610		
Prestige Casualty Company	\$ 1			
Statewide Insurance Company	\$ 1,002			
United Capitol Insurance Company		\$ 162,047		
Valor Insurance Company	\$ 1,291	\$2,000,000		
Western Specialty Insurance Company		\$ 100,000		

(Mike Rauwolf, State Contact Person—IL)

Estate	Guaranty Funds	Interest Amount
Grangers Mutual Insurance Co., In Receivership	District of Colombia Ins. Guaranty Association	\$ 471
	Georgia Insurers Insolvency Pool	\$ 767
	Property & Casualty Insurance Guaranty Corp. (MD)	\$ 2,429
	Tennessee Insurance Guaranty Association	\$ 139
<b>Total Interest on Policy Claims Paid</b>		<b>\$ 3,806</b>

Estate	Distribution to Owners
PrimeHealth Corporation	\$25,176

(James A. Gordon, State Contact Person—MD)

Estate	Guaranty Fund
PHICO Insurance Co.	\$ 2,240,671
Reliance Insurance Co.	\$375,000,000

(W. Franklin Martin, Jr., State Contact Person—PA)

**Frank Martin (PA)** has provided an update on the **Fidelity Mutual Life Insurance Company (FML), in Rehabilitation**. As of September 30, 2004, **FML** showed a statutory surplus in excess of \$88 million after reserving for all policyholder liabilities. Claims continue to be paid at 100% and policyholders have full access to their cash value. The Rehabilitator anticipates paying out approximately \$10 million in dividends in 2005. Further, the Commonwealth Court approved, on a preliminary basis, the Third Amended Plan for Rehabilitation on August 20, 2003 which included commencement of the bid process for selection of an investor. Indications of interest from potential bidders were solicited by **FML's** investment banker beginning in September, 2003 and the due diligence period ran from December, 2003 to July, 2004. Two bids were received, but for several reasons, the Rehabilitator ultimately concluded that it was not in the best interests of policyholders to complete the current bid process. The Rehabilitator petitioned the Court in December, 2004 for permission to end the bid process, reject all bids and present to the Court by January 31, 2005 a proposal to conclude the rehabilitation of **FML**.



efickinger@osdchi.com





## When obstacles loom ahead...look ahead...

Conservation. Rehab. Insolvency. The challenges you face may be complex and labor intensive. But they need not stop you in your tracks.

Allow the experienced insolvency professionals of Navigant Consulting to assist you in achieving results. Our professionals bring varied expertise: managing an insolvency for results; accumulating, organizing and computerizing data; evaluating claims; analyzing, billing and collecting reinsurance; finding assets; tracing cash; valuating books of business; untangling intercompany accounts; maximizing system effectiveness with minimal additional investment; and forensic accounting and testimony in support of litigation.

Working side-by-side with receivers, guaranty funds and counsel, we help you successfully over the obstacles.

Contact » Bill Barbagallo, 213.452.4500, [bbarbagallo@navigantconsulting.com](mailto:bbarbagallo@navigantconsulting.com)

Jerry Capell, 312.583.5734, [jcapell@navigantconsulting.com](mailto:jcapell@navigantconsulting.com)

Tim Hart, 202.481.8440, [thart@navigantconsulting.com](mailto:thart@navigantconsulting.com)

Kristine Johnson, 312.583.5713, [kjohnson@navigantconsulting.com](mailto:kjohnson@navigantconsulting.com)

[www.navigantconsulting.com](http://www.navigantconsulting.com)

©2005 Navigant Consulting, Inc. All rights reserved. "NAVIGANT" is a service mark of Navigant International, Inc. Navigant Consulting, Inc. (NCI) is not affiliated, associated, or in any way connected with Navigant International, Inc. and NCI's use of "NAVIGANT" is made under license from Navigant International, Inc.

**NAVIGANT**  
CONSULTING