The Insurance Receiver

PROMOTING PROFESSIONALISM AND ETHICS IN THE ADMINISTRATION OF INSURANCE RECEIVERSHIPS

Summer 2005
Volume 14, Number 2

Feature Articles

Departments

www.iair.org

President's Message

Trish Getty, AIR, Reinsurance

This has been an incredibly busy year thus far for IAIR. Since many committees meet throughout the year, I believe that I best serve you by summarizing our association's activities.

Before doing so, I would like to first thank the IAIR Board of Directors who remains focused to bring value and direction to our association. They spend many hours of their valuable time developing committee objectives and providing the oversight that protects your interests in this receivers' community. I also thank the many committees' members who offer their time and experience to bring solutions to IAIR to keep us current on salient issues.

Our sincere gratitude is extended to Kristen Shikany and Jerry Capell of Navigant Consulting for their years of work both as Publications Chairs and editors of "The Insurance Receiver."

IAIR's new Publications Chair is Peter Scarpato, a seasoned author who has been published internationally. He comes to IAIR with many years of experience in the insurance industry. Peter is President of Conflict Resolved and most recently SVP of AIG, Global Surety Division. He is coordinating with current contributors and soliciting related articles from other authors. We anticipate a seamless transition period.

Accreditation Education Committee

Chair: George Gutfreund

Committee Members: Patrick Cantilo, Richard Darling, Michael Fitzgibbons, Harold Horwich, Bob Loiseau, Elizabeth Lovette, Francine Semaya and Hank Sivley

Purpose: Establish an accreditation education program

Update: During the Spring NAIC meetings, the committee met and discussed the areas of study for the designation program, timelines, streams and phase of the program as it relates to existing standards of designation and projected cost. An RFP (request for proposal) will be drafted in the near future to be circulated to various institutions.

Accreditation & Ethics Committee

Chair: Dan Watkins

Update: By early March, six AIR/CIR designations were recommended and approved by the IAIR board. Congratulations to AIR designees, Bill Barbagallo, Dave Hamilton, Frank Mulcahy, John Murphy and Barry Weissman and to CIR designee Jim Young. Thank you, A & E Committee for your endless hours of work.

Education Seminar Committee

Chair: Barry Weissman

Committee: Bill Barbagallo, Joe DeVito, Bob Fernandez, Jenny Jeffers, Dick Pluschau, Francine Semaya and Susanne Twomey

Purpose: Education for regulators in the insolvency process with focus on Claims, Financial, IT, Reinsurance and International coordination

Update: The first staff training workshop is scheduled for May 12, 2005 in San Francisco with many attending from the CLO. The target audience is receivers and regulatory staff.

MARG Committee

Chair: Doug Hertlein

Committee: Frankie Bliss, Hugh Brock, Henry David, Wayne Johnson, Frank Martin and Ed Wallis

Update: Doug has pulled together another fine committee. The MARG and Smart committees are working very closely together so that the MARG presentation at our September roundtable will have very little overlap, if that is possible.

Nominations, Elections & Meetings Committee

Congratulations to Hank Sivley who will serve as Chair.

Smart Act Committee

Chair: Sue Kempler

Committee: Frankie Bliss, Henry David, Doug Hertlein, Kathleen McCain and Ed Wallis

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

Update: Get ready for a very informative roundtable in June! The committee has worked quite diligently to prepare a meaningful presentation and discussion.

Website Committee

Chair: Alan Gamse

Committee: Katherine Billingham, Kristine Johnson, Paula Keyes, Bob Loiseau, Greg Mitchell, Frank Mulcahy, Sharon Rose, Jim Schacht and Dale Stephenson

Update: The budget is set and an RFP has been developed and distributed to certain vendors. We strive for timely information on our website and the possibility of paying for workshop registrations on-line.

We thank Elizabeth Biaett for her tremendous work to present a very informative Roundtable in March.

A note of gratitude goes to Sharon Rose, who has agreed to provide the recap of our roundtables for "The Insurance Receiver."

continued

IAIR board member Patrick Cantilo has agreed to serve as Chair of our 2006 Annual Insolvency Workshop. Good luck, Patrick! We are counting on you for another tremendous event.

We trust you will like the new version of the Membership Directory that will include the Resource Directory each year. Thank you, Paula, for your great efforts in compiling this very helpful booklet.

Finally, I have diligently worked with the American Conference Institute and Mealey's to gain a deep discount, generally 25%, off of registration fees for IAIR members for certain conferences. I hope that many of our members are able to take advantage of these great savings. We continue to strive to bring great value to IAIR members, particularly with respect to education.

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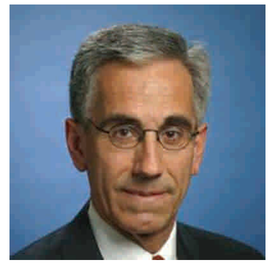
View from Washington

Charlie Richardson

SMART Update



On March 18, the NAIC sent a strongly worded letter to Chairmen Oxley and Baker criticizing their SMART draft legislation for federal insurance regulatory standards. Review meetings are scheduled in April, May and June on SMART's thirteen titles, as the House staff gears up for pushing SMART forward this summer and fall. The NAIC's letter may impact negatively how much input the NAIC will have in the dialogue with the drafters of SMART the next few months as the legislation is prepared for formal introduction.

In the meantime, IAIR and the Tort Trial and Insurance Practice Section of the American Bar Association are both in the middle of studies of the SMART draft, which includes Title XIII on receiverships. The NAIC's MARG group is trying to complete a new receivership model that it hopes can be used as a template for Title XIII rather than the URL used by the House staff in crafting Title XIII last year.

New Congress—Old Issues

With a stronger Republican majority in the Congress this year, the stage is set for more activity affecting financial services than in the last Congress. Class action reform has already passed. Our list of nine remaining sure issues (not in any specific order) includes:

- TRIA Extension (the Senate held a hearing on it April 14)
- Asbestos Trust Fund
- Medical Malpractice Reform
- Bank Regulatory Relief
- Sarbanes/Oxley Oversight of SEC and Public Accounting Board
- SMART Bill and Oversight of State Insurance Regulation
- Regulating the Rating Agencies
- Predatory Lending Regulation and Reform of RESPA
- GSE Regulator Reform (i.e., Fannie Mae, Freddie Mac)

The 2005–06 Oversight plan of the House Financial Services Committee is a breathtakingly broad agenda for the involvement of the House in the insurance business.

Of course, the buzz over the investigations of various aspects of the insurance industry by New York Attorney General Eliot Spitzer continues, first focused on Marsh and contingent commissions and now on AIG and finite reinsurance. The SEC, state regulators, and the Financial Accounting Standards Board have gotten into the act in a big way. Congress reads the newspaper like everyone else and can be expected to ask in response: Do the problems that Spitzer has uncovered in

View from Washington

Charlie Richardson

a state-regulated industry suggest there should be more federal regulation? If so, in what form?

SEC Holds Public Session on Implementing Internal Control Provisions of Sarbanes-Oxley

The Securities and Exchange Commission held a roundtable on April 13 to solicit public feedback and comments on the implementation of Sarbanes-Oxley internal control provisions. Section 404 and rules adopted by the SEC require companies that file annual reports with the SEC to report on management's responsibilities to establish and maintain adequate internal control over the company's financial reporting process, as well as management's assessment of the effectiveness of those internal controls. Section 404 and the auditing standards of the Public Company Accounting Oversight Board (PCAOB) require the accounting firm that audits the company's financial statements to report on management's assessment, as well as on the effectiveness of the company's controls.

The NAIC/AICPA Working Group continues its consideration of whether Section 404 and other Sarbanes-Oxley requirements should be visited on insurance companies as "best practices."

Congress Primed to Implement Historic Change to U.S. Bankruptcy Law

The United States Senate passed (74-25) the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (S. 256) on March 10, paving the way for the House to take action. Advocates of bankruptcy reform have been working since the mid-1990s to pass this legislation. The House is expected to begin debate on, and likely pass S. 256 by the time you read this article. At its core, the bankruptcy legislation would create a "flexible means test" to raise significantly the bar for borrowers fully to eliminate debt by filing for bankruptcy.

Some Insurers Say Asbestos Draft Bill Unsupportable

Fifteen insurance companies submitted a letter to Senate Judiciary Committee Chairman Arlen Specter (R-PA) in April advising him to consider alternative legislation to his current asbestos reform bill, whose unresolved issues were characterized as "unfixable." Specter's draft bill would create a private, no-fault trust fund to compensate victims who have suffered exposure to asbestos. Under the draft bill, these victims would agree to relinquish any right to legal action in exchange for a monetary award from the $140 billion trust fund. A growing number of Republicans on the Senate Judiciary Committee are demanding that the bill be amended to restrict certain groups such as smokers who cannot demonstrate asbestos injury.

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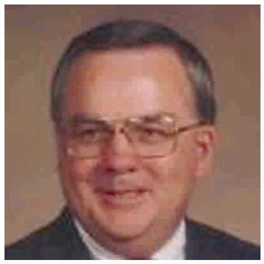
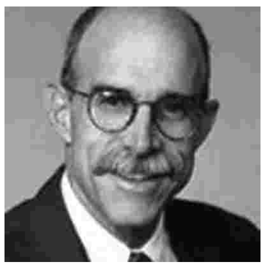
The Insurance Receiver is intended to provide readers with information on and provide a forum for opinion and discussion of insurance insolvency topics. The views expressed by the authors in **The Insurance Receiver** are their own and not necessarily those of the IAIR Board, Publications Committee or 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.

Affiliate Transactions Within Insurance Company Groups: Proposed Improvements to Regulation of a Recurrent Problem

Harry L. Sivley, CIR-ML and Harold S. Horwich [1]





Intercompany transactions within an insurance holding company group have become commonplace. In most cases, they are beneficial to the enterprise as a whole and regulators approve them. For example, pooling transactions permit companies to efficiently deploy capital, loans and dividends permit access to capital markets and lower capital costs, and operating or management arrangements often permit access to facilities or personnel where they might not otherwise be available. Sometimes such transactions permit insiders to make a profit on transactions with the insurance company; however, such profits are not illegal where the price that the insurance company pays to the insider is no more than the market rate.

When an insurance company becomes insolvent, there is frequently evidence that the insurance company has been abused in intercompany transactions. This article is the result of deliberations by the Current Developments Task Force of the International Association of Insurance Receivers on the effects of intercompany transactions within insurance company groups. [2] The article considers transactions that have contributed to the insolvency of insurance companies. It also discusses suggestions for regulating such transactions to prevent, or at least detect, potential abuses.

Tax Sharing Agreements

Tax sharing agreements are common in complex corporate groups. Typically, the parent corporation files the tax return on behalf of the group. The members of the group then contribute to the tax burden or receive the tax benefit according to a formula. In many instances, the formula follows the contribution or benefit that would be received if the company were a stand-alone taxpayer; however, arrangements vary widely. Whatever the sharing arrangement, under applicable tax law, the parent corporation acts as the agent for the consolidated group and, therefore, would receive any tax refund and any notice of a deficiency. [3] This creates significant issues when one or more members of the group become the subject of insolvency proceedings.

Where a tax refund is owed, the subsidiaries may attempt to claim a property interest in the refund, while the parent will assert that the subsidiaries only have a claim against the parent. Where taxes are owed, there will be a question as to whether the claim by the parent against the subsidiaries is entitled to priority or whether it is simply a general claim. There has been litigation involving these claims. [4]

A tax sharing agreement is required to be approved by a regulator under the Holding Company Act. In considering approval, the first step is to develop an understanding as to how funds flow among the members of the group in the event that taxes are owed or refunds are available. It is not uncommon for tax sharing agreements to leave aspects of the transaction undocumented.

In some transactions, the tax benefits of the subsidiary are transferred to the parent with no provision for consideration to the subsidiary. If so, regulators should either insist that fair consideration be paid for

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[2] Special thanks to Jon Arsenault, General Counsel of the Connecticut Insurance Department and Lewis Scotti for their interest and insight.

[3] See 26 C.F.R. § 1.1502-77(a)(2)(v) and (viii).

[4] In two recent cases, the dispute arose where the holding company was in bankruptcy and one or more of the insurance company subsidiaries were subject to state receivership proceedings. Thus, the courts had to address the threshold issue of which court would resolve the dispute – the bankruptcy court or the state receivership court. The bankruptcy courts in *Wagner v. Amwest Ins. Group, Inc. (In re Amwest Ins. Group, Inc.)*, 285 B.R. 447 (Bankr. C.D. Cal. 2002), and *Koken v. Reliance Group Holdings, Inc. (In re Reliance Group Holdings, Inc.)*, 273 B.R. 374 (Bankr. E.D. Pa. 2002), both concluded that the state receivership courts should resolve the tax refund disputes because the bankruptcy court's subject matter jurisdiction was pre-empted by the McCarran-Ferguson Act, 15 U.S.C. § 1101, *et seq.*

Affiliate Transactions Within Insurance Company Groups: Proposed Improvements to Regulation of a Recurrent Problem

Harry L. Sivley and Harold S. Horwich

the benefits or that the transfer should be recognized as a dividend distribution.

Where consideration is to be provided to the insurance company subsidiary, regulators should carefully consider the financial condition of the members of the group. For instance, where the parent company is weak, the subsidiary runs a risk that the parent will retain the tax refund that is owed to the subsidiary. Under these circumstances, the regulator should consider imposing a requirement that any tax refund be held in trust for the subsidiary or that it be subject to a security interest in favor of the subsidiary. Likewise, payments by the subsidiary to the parent with respect to taxes should be held in trust by the parent for the payment of such taxes.

Reinsurance and Intercompany Pooling

Pooling arrangements allow companies to deploy capital and surplus more efficiently. They also reflect the reality that some multi-company groups are operated as a single entity. However, pooling arrangements typically disguise the actual performance of the individual companies that make up the pool. Financial reporting is done on a pooled basis. As such, regulators cannot identify the financial condition of any single member of the group. Identifying the financial condition of a single company is important for insolvency purposes because claims under the pooling agreement are junior to policyholder claims. Therefore, single company financial statements would permit a regulator to determine whether policyholders of that company will be paid in insolvency proceedings. A requirement that companies prepare a set of non-pooled financial statements was widely opposed by the industry when pooling issues were considered by the NAIC several years ago.

Regulators should be aware that pooling can enable weak companies with weak lines of business to bring down stronger companies. Instead of bringing down one company, the entire group fails. The Home State Insurance Pool provides good example. In Home State, the historically weak business of the New York and New Jersey subsidiaries brought down stronger Georgia and Connecticut subsidiaries. Due to pooled financial statements, regulators could not ascertain the financial condition of the individual members and could not, therefore, seek to avert receivership for at least the stronger companies. Moreover, once the companies were in insolvency proceedings, the pooling transactions could not be unwound. Instead, certain companies had claims against the estate of others. These claims were on a par with the claims of general creditors.

In considering an application by companies that seek to form a pool, a regulator must recognize the reality that in an insolvency, assets may be unavailable. [5] As such, regulators may limit applications for pooling where policyholders could be injured by an uneven distribution of assets at the time of insolvency. For example, in cases where substantially all policyholder claims would be covered by guaranty funds, pooling may be less of a concern. Also, it may be less of a concern where all entities can be liquidated in a single proceeding or in a cooperative environment with other regulators. As a practical matter, pools that cede all risk to one company without retrocessions back should probably not be approved.

Regulators should also consider requiring the pool to notify the regulator if the mix of pooled business changes. While changes in the agreement (including percentage of risk) typically require approval, changes in the mix of business do not. Changes in risk may have more impact on the pool in some instances than change in percentage participation.

Capital Transactions and Loans

Holding company structures are often used as a means to raise capital through debt. Raising debt at the holding company with a subsequent equity investment in the insurance company appears advantageous from the perspective of the insurance company. However, management of the holding company is typically the same as the management of the insurance company. As such, there can be an enormous amount of pressure on the insurance company to declare dividends to service the debt. Regulators are entitled to notice prior to ordinary dividends and need to approve extraordinary dividends. Also, regulators have the right to insist on approval of even ordinary dividends. Where there is any doubt about a company's financial future, regulators should insist on prior approval of all dividends and should exercise their veto power judiciously. In the case of the Reliance Insurance group, it appears that the insurance companies continued to provide dividends to the holding company long after they were probably insolvent. [6]

Personal liability for directors and officers for illegal dividends or fraudulent transfers should be a deterrent to such dividends. The potential for liability of certified public accountants and actuaries

[5] Harold S. Horwich and Lorraine M. Weil, *Regulation of Intercompany Pooling Agreements: An Insolvency Practitioner's Perspective,* 17 J. Ins. Reg. 3 (1998).

[6] In June of 2002, the Pennsylvania Department of Insurance filed a lawsuit against former Reliance Group Holdings Chairman Saul Steinberg and 17 former officers, directors and attorneys for Reliance to recover millions of dollars allegedly wrongfully diverted from the insurance subsidiaries, including $500 million in dividends distributed to various holding companies. *See* Joseph N. DiStefano, *Pa. Sues Former Reliance Executives,* Phil. Inq. June 25, 2002 at pg. D01.

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should also be a deterrent. It is doubtful that regulators can do much more to deter attempts to pay holding company debt with insurance company assets.

A related problem arises from intercompany guaranties. In some instances, an insurance company will be required to guaranty the performance of an affiliated insurance company in connection with the affiliated company's licensure. Such guaranties present a danger to the guarantor and a challenge to the regulator. Where the affiliated company is not under the jurisdiction of the regulator, the regulator may have difficulty in determining the true condition of the guaranteed company in sufficient time to avoid a call on the guaranty. Such a call may present a regulator with a serious dilemma. On the one hand, a claim under a guaranty would be junior to the claims of direct policyholders in insolvency proceedings. On the other hand, a regulator would prefer not to put a company into receivership simply to avoid an obligation under a guaranty. However, where the payment of the guaranty could put the guarantor company in jeopardy, the regulator may have no choice.

Loans by the Insurance Company to Affiliates

Insurance companies are often the entities within a multi-company organization that have funds. As such, they are the entities that typically lend funds to the group. Accounting standards typically require intercompany debt to be repaid in not more than one year if it is to be shown as an admitted asset.

Financial statements often show intercompany debt as an admitted asset. However, there have been instances where, in hindsight, it was clear that the loan could not have been repaid at the time of the financial statement. Regulators should consider requiring that in order for an intercompany debt to be considered an admitted asset, it must either be documented and fully secured by collateral having a value well in excess of the debt, or there must be audited financial statements of the company that owes the obligation to support the company's and the accountants' conclusion that the debt is an admitted asset.

Operating and Management Arrangements

It is common for insurance companies to acquire goods and services from affiliates. Each of these transactions has its own set of risks for the insurer. As a contractual matter, these risks may not be materially different from transactions done with outsiders. However, where the same individuals control both the insurer and the affiliate, the risk is magnified because the insurer may not enforce its rights under the contract in the same way it would if the contract were with a third party.

Insurers often use the information systems of affiliates. This includes both hardware and software. These arrangements may be under leases or licenses that may be terminable by the affiliate upon default. Thus, in the event of a receivership, the receiver may have no access to the insurance company's information systems if the affiliate has terminated the lease or license prior to the commencement of the receivership. The most critical item of property of any receivership is the insurance company's information. Without it, the company does not exist.

The buildings and equipment used by an insurance company are often owned by an affiliated company. While not as critical as information systems, the absence of premises and equipment can make it nearly impossible to administer a receivership estate. The receiver may be faced almost immediately with the prospect of having to find a place from which to conduct the receivership.

The affiliates may employ all of the individuals who work for the insurance company under a management agreement. In the event of a receivership, these individuals may become inaccessible to the receiver if the affiliate has other substantial business for which those individuals are needed. This may leave the receiver at the mercy of the affiliate. This risk may be particularly exacerbated when the affiliate that provides employees is in another country.

Regulators should consider requiring contractual provisions in each of these contracts that make these contracts available to the receiver. Such provisions are relatively common in certain types of leasing and lending transactions. In essence, the receiver would have the right to enter into an agreement with the affiliate to obtain the item in question on the same terms as the insurer. This right would exist regardless of whether the prior contract was in default or had terminated or had amounts owed under it. Such agreements would include terms providing for specific enforcement and submission of the affiliate to the jurisdiction of the receivership court. While such arrangements may not always be fully enforceable according to their terms (particularly in an insolvency proceeding of the affiliate), it would strike a balance between the need to permit legitimate transactions and the need of the receiver to conduct the ongoing business. [7]

[7] Such arrangements may not be enforceable under the Bankruptcy Code. However, under the McCarren-Ferguson Act, there may be a basis for obtaining specific performance. Also, certain types of agreements are enforceable against debtors in bankruptcy.

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General Provisions

Regulators are commonly frustrated by the reluctance of an insurer's affiliates to provide information about themselves. In complex holding companies, this can thwart a regulator's ability to understand the financial status of an insurer. In many states, legislation exists that requires such disclosures, and regulators should insist on receiving timely and complete information or exercising their rights promptly under the law. Often the unwillingness to provide information is itself a warning sign for regulators.

Frequently, a regulator that comes into an insolvency situation discovers that transactions have occurred that violate the Holding Company Act or other specific statutes that restrict transactions with insurers. It is submitted that legislation should be considered that gives a liquidator the authority to avoid transactions that violate the Holding Company Act or other specific provisions of insurance law such as restriction on assumption of debt and granting of liens. These provisions should not be a trap for the unwary because they typically affect only affiliates and sophisticated parties, such as financial institutions that transact business with insurance companies and their holding companies. Such parties would be in a position to protect themselves by disclosing such transactions to regulators and obtaining prior approval.

Often in holding company insolvencies, it is discovered that the affairs of an insurer are hopelessly intertwined with those of its affiliates. However, current receivership statutes do not provide a means for bringing those companies into the receivership proceedings. Some courts have permitted the use of substantive consolidation to bring non-insurer affiliates into a receivership proceeding. It is submitted that receivership statutes should be modified to specifically authorize substantive consolidation of entities that are affiliated with an insolvent insurer where their affairs have been extensively intermingled. However, even with such authorization, there may be jurisdictional obstacles to substantive consolidation. For instance, an affiliate that is regulated by a different set of regulators, such as a bank or securities firm, could not be substantively consolidated. Also, where an affiliate has become the subject of Federal bankruptcy proceedings, substantive consolidation would be stayed by the bankruptcy. Moreover, substantive consolidation would be barred unless the bankruptcy court abstained from exercising jurisdiction and dismissed the bankruptcy case in its entirety. While the McCarren-Ferguson Act gives broad deference to state law in insurance insolvency matters, it seems unlikely that it would be found to pre-empt a bankruptcy case in its entirety, except where the affiliate had no legitimate existence apart from the insurance company.

Frequently, intercompany transactions are not detected until an examination is conducted by the insurance regulator. Often, more timely information could prevent deterioration of companies due to intercompany transactions. It is submitted that insurance regulators should develop a set of standard interrogatories dealing with intercompany transactions to be answered in connection with quarterly financial statements. Such interrogatories could detect stale intercompany receivables, changes in existing operating transactions, new transactions not previously reported or defaults in existing transactions.

Conclusion

The Current Developments Task Force has considered a wide variety of ways to improve the regulation of intercompany transactions. The foregoing suggestions are those considered by the Task Force to be feasible. The Task Force hopes that regulators will find them useful in preventing and dealing with insurance company insolvencies.

The European Union Considers Establishing Guaranty Funds

Morag Fullilove [1]

European insurers have been inundated with new regulations in the financial services area over the last few years; but, in spite of promises to slow down that level of regulation, the European Commission will complete its massive Solvency II project on prudential supervision [2] and may also propose mandatory guaranty schemes for the European Union in 2006.

The European Commission has been examining the issue of guaranty schemes (what in the US are called a guaranty funds) since November 2001. This investigation originally came at the request of the Irish delegation following the insolvency of Independent Insurance Company. [3] In its white paper, the Irish representative gave the reasons for a European wide protection program as follows:

1. Policyholders—especially personal policyholders—assume that State supervision of insurance undertakings is effectively a guarantee that their claims will be met.
2. Doing nothing involves tolerating situations of discrimination between policyholders which are incompatible with the spirit, and possibly the letter, of EU law.
3. Doing nothing may encourage Member States to introduce additional 'common good' measures which would make it more difficult for insurers from other Member States to operate on their markets
4. Leaving policyholder protection up to each Member State is contrary to the trend towards home-country consumer protection. [4]

In addition, the adoption of a directive on the reorganization and winding-up of insurance undertakings reinforced the protection of insurance creditors by means of a system of general or special privileges. The Commission recognized that while this directive improved the situation of insurance creditors, it created a problem that, after the winding-up of the insurance undertaking, not enough funds remain to pay insurance claims.

A third motivation for the Commission was the establishment of guaranty schemes in the banking and securities area during the 1990s. Much of European regulation for insurance, banking, and securities in Europe is based on a common structure (often called the Basel Accord) and in many jurisdictions there is a unified regulator for all three sectors. The lack of consumer protection through a guaranty scheme in the insurance area leaves it out of sync with the other areas in the Commission's view.

The proposal for guaranty schemes remains controversial and is opposed by much of the private sector. The Comité Européen des Assurances (CEA), the trade association representing European insurers, has spoken against the mandatory establishment of insurance guarantee schemes from the beginning. The CEA, as recently as March 2005, said, "Consumer protection against the failure of insurance companies depends principally on the efficiency, quality, and relevance of prudential rules for insurers and the effectiveness of national authorities' supervision. The existence of guarantee schemes would provoke distortion of competition to the detriment of solid and responsible insurers." [5]

The European Commission has surveyed European Members States several times in the past two years regarding their positions on guaranty schemes. Many countries raised concerns regarding guaranty schemes, viewing them as creating a morale hazard and as being costly to administer. The Commission has been strong, though, in pushing for the need for a more uniform protection system in light of the expansion of the European Union in 2004, the ability of insurers to market across borders, and the need to ensure consumer confidence.

The Commission and its Insurance Committee, composed of representatives from the various Member States, have released several papers on the topics over the intervening years, but the most recent paper [6] issued this January by the Commission's working group on guaranty schemes now has recommended that each Member State should ensure the existence of at least one scheme. If the Commission prepares a directive (legislation) on the issue and it is adopted by

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[2] See coverage of the Solvency II project in The Insurance Receiver, Fall 2003.

[3] European Commission, Annex to MARKT/2061/01, page 2.

[4] European Commission, Annex to MARKT/2061/01, page 4.

[5] *CEA Executive Update,* Issue 42, March 2005, page 3.

[6] European Commission, MRKT/2529/05

The European Union Considers Establishing Guaranty Funds

Morag Fullilove

Parliament and the Council, the guaranty schemes would have to conform to the conditions established by the directive.

At one point the Commission considered recommending a single insurance guaranty scheme for the entire European Union, but the Member States wanted to establish and control separate funds in each country. This principle of Member State control parallels the insurance supervisory structure which is administered at the Member State level, even though it is based on European-wide laws. In addition, the decision has been made to establish only minimum standards for the guaranty schemes at the European Union level and to allow individual member states to increase levels of coverage, if they so desired, further expanding home state authority over the funds.

The European Commission's Working Group on Insurance Guarantee Schemes decided at its last meeting to recommend that all Member States develop guaranty funds, although just which lines of insurance those funds would cover remains to be decided. There was a tentative decision that both life and non-life coverage would be provided, although these lines would be separately accounted for and managed within the guaranty scheme or split into separate funds. There remain some objections to covering non-life lines at all.

Member States which have guaranty funds in place would be allowed to maintain those as long as they conform to the provisions of the directive. The current state of guaranty fund protection is mixed in Europe. Motor guarantee funds exist in most of the Member States because they were required by the Motor Insurance Directive. According to the Commission's research, currently 15 of the 25 Member States [7] do not provide any other form of consumer protection through a guaranty fund. [8] Six Member States (France, Germany, Malta, Spain, The Netherlands and the UK) have some form of guaranty scheme or similar mechanism for life insurance. Eight countries (Denmark, Finland, Germany, Ireland, Malta, Norway [9], Spain, and UK) have a guaranty scheme for non-life. [10]

The insurance guaranty schemes would be allowed either to provide coverage for insurance claims or to continue to provide insurance coverage. Where a scheme provides assistance for restoring the financial situation of the portfolio, it must guarantee the continuation of the insurance contracts by assuming and administering the covered portfolio or by facilitating the portfolio transfer.

The guaranty schemes would apply to all insurers operating in a Member State, regardless of home state. Current regulation in the European Union allows a company licensed in one Member State to sell insurance in any other Member State on a "passport basis" operating through branches. The regulator of the home state (state of domicile) is responsible for the supervision of the insurer.

There has been extensive discussion as to how the various schemes would be coordinated among the Member States since existing schemes have different funding requirements. The Commission's working group seems to be moving towards a "topping up proposal" to level out the requirements in the various member states. Under such a provision, "An insurance undertaking operating in a host country through a branch should be authorized to join the host country's scheme so that it may offer the insurance claims the same cover as is provided by the insurance guarantee scheme of the country in which the branch is located." [11] If the branch does not join the host state's guaranty scheme, it will be up to the home state supervisor to ensure that the insurance undertaking meets its obligations. The arrangement for coordination of the funds is the longest and most complicated section of the current paper. This "topping up" proposal was not universally accepted, though, with concerns being expressed that, "The insurance companies and consequently the policyholders of the host Member State would have to 'finance' the bankruptcy of insurance companies which are not based in their Member State." [12] In the end, the issue was left open for further comment.

There remain many open issues including the levels of claims covered and the priority of payments. The current suggestion would include coverage beginning at a 100 Euro [13] minimum claim and a 10 percent self retention, however full coverage would be provided for claims arising out of compulsory insurance and third party liabilities. Member States would be

[7] These numbers should possibly be 16 of the 25 since Latvia's answers to the survey were confusing, saying that they had a fund, but the numbers were too small to be significant.

[8] European Commission, Annex to MARKT/2501/04, page 13.

[9] Although not part of the European Union, Norway participated in the survey and the discussion on the guaranty schemes.

[10] European Commission, Annex to MARKT/2501/04, page 13.

[11] European Commission, MARKT/2529/05, page 5.

[12] European Commission, MARKT/2529/05, page 7.

[13] Currently a Euro (€) is worth about $1.32 (US).

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allowed to provide greater or more comprehensive coverage; although the working group recognized that greater harmonization of the coverage levels would reduce concerns about the "topping up" provisions. Investment products would be covered at levels established in the deposit guaranty scheme directives.

The aim of the guaranty schemes is consumer protection, but the Commission is still undecided as to which consumers are to be protected, although they are very focused on individuals and small businesses. The Commission feels it is these consumers who"are not in a position to assess whether an insurance company will be able to fulfil its obligations and whether premiums are accurately reflecting the real risks." [13] They have proposed two options for defining small business: either those with a balance-sheet total of 6,200,000€, a net turnover of 12,800,000€, and an average number of employees during the financial year of 250 or those with a balance sheet total of 3,650,000€, net turnover of 7,300,000€, and an average number of employees during the financial year of 50. The Commission has recommended against defining small business as anything smaller than these two options.

Even though the question as to what lines of insurance the guaranty schemes should cover is still to be decided, reinsurance, energy insurance, marine, transport, and aviation would be excluded, although there was some discussion regarding coverage for small boats.

In preparing its paper, the Commission has spoken to both to the National Conference of Insurance Guaranty Funds (NCIGF) and the National Organization of Life and Health Guaranty Associations (NOLHGA). The Commission is expected to continue work on the proposal through 2005. Even if a directive is sent to Parliament and the European Council next year, it will probably be at least three years until that directive is adopted by the Member States.

Detailed information on the current proposal is available on the European Commission's website at *http://europa.eu.int/comm/internal_market/insurance/guarantee_en.htm.*

[14] European Commission, MARKT/2529/05, page 12.

The Who of Mediation—Part II: Wisely Choosing a Mediator

Paula M. Young [1]

Most states do not license or certify mediators. They do not require a minimum level of training, continuing education, background checks, or character and fitness reviews. In most states, a person who has lost his or her professional license in one area can nonetheless (and easily) open shop as a mediator. Most states do not have standards of ethics that apply to all mediators [2] and no grievance procedure allowing a client who believes something has gone terribly wrong in the mediation to report the wrongdoing. [3] Most states do not have the authority to sanction or otherwise prevent the activities of rogue mediators.

A few states have standards of ethics and some entry barriers to the profession consisting primarily of minimum training requirements. In Missouri, a person can become a "Rule 17 qualified" mediator with less time spent in training than he or she spent watching TV the same week. But even these ethics rules and modest training requirements typically only apply to mediators who seek to be listed on mediator rosters in court-connected mediation programs.

In other words, just about anyone can hang up a shingle advertising his or her ability to conduct private mediations. For lawyers and clients and other mediation parties, this information should tell you that the "buyer [must] beware." You need to take the time to choose your mediator wisely and with care. Mediators vary greatly in skill, training, experience, and temperament. Parties choosing a mediator must approach the task on a case-by-case basis, considering the facts, emotions, relationships, and law of the dispute as they may affect the attributes you need in mediator.

A good mediator can enhance the likelihood the parties will reach agreement. A bad mediator will impede the settlement process and may undermine the parties' relationship, as well as their confidence in the mediation process as a means for resolving future disputes. Bad mediators will cost the parties additional time and money.

Recently, I read all (yes, all) the advisory ethics opinions and grievance filings involving mediators issued by the ethics panels in Florida. It brought home to me that a lot of sloppy mediation occurs that affects the core values of mediation: impartiality of the mediator, confidentiality of mediation communications, and party self-determination.

Party Satisfaction with Mediation

An empirical study of party satisfaction with the mediation process and mediators shows that 65 to 82 percent of parties to family mediations viewed their mediators as warm, sympathetic, and sensitive to feelings. They were also helpful in standing up for a party's rights in disagreements with spouses, staying focused on the important issues, and ensuring the parties had clear and sufficient information for decision-making. But 18 to 35 percent of parties did not share these feelings after the mediation. [4]

Another set of studies revealed that a majority of parties participating in court-connected civil mediations felt the mediation process was fair and gave them sufficient opportunity to present their cases. A majority of parties felt they had control over the process or had input in determining the outcome. Most parties thought the mediator was neutral, did not pressure them to settle, understood their views and issues, and treated them with respect. A majority of parties felt the mediated agreement was fair. Most attorney-advocates shared the same feelings. But some minority of parties and attorneys did not have these feelings about the experience. [5]

Yet another study showed that 61 percent of disputants in fifty-four waste management mediations were satisfied with the

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[2] Only Alabama, Arkansas, California, Florida, Georgia, Kansas, Massachusetts, Minnesota, New Jersey, North Carolina, Tennessee and Virginia have mandatory codes of ethics for "rostered" or certified mediators or those mediators participating in court-connected programs. California and Iowa have standards that apply to mediators in court-connected child custody disputes or other family disputes.

[3] Apparently, only Florida, Georgia, Maine, and Virginia have formal grievance systems.

[4] Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?,* 22 Conflict Resol. Q. 3, 17 (2004).

[5] Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases,* 22 Conflict Resol. Q. 55, 65-66 (2004).

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mediation process and the outcome. But 39 percent of mediation-disputants were not. [6] In short, the studies suggest that perhaps a third of mediating parties are unhappy with the process or the mediator!

Another study suggested that parties' satisfaction with mediation correlates with the control they have over the process. [7] Parties may therefore feel best about the process when they play an important role in choosing the mediator. Yet, some courts still designate mediators for particular cases without regard for the case-by-case nature of the selection process.

Factors to Consider in Choosing a Mediator

The Judicial Council of Alaska developed an easily accessed and well-informed guide for choosing a mediator. [8] It describes (1) the qualifications a mediator needs; (2) what makes a mediator competent; (3) the five steps it recommends in choosing a mediator and (4) additional resources. The Mediation Council of Illinois also developed a set of 10 interview questions parties can pose to prospective mediators. [9] The questions ask about the mediator's training—both quantity and quality, whether he or she has had any hands on mentoring, supervision or internship training, whether the mediator continues to "sharpen the saw" by attending continuing education programs and mediation-related conferences, and whether she consults regularly with other, more experienced mediators. [10] The questions then turn to the mediator's level of experience: How many mediations has the mediator done, overall and in the particular area of practice that relates to the dispute? What percentage of the mediator's professional life is devoted to mediation? It then turns to the mediator's style or approach, which I discussed in my last article. [11] Next, the interview considers the honesty, integrity and professionalism of the mediator by asking about any ethics complaints filed against him or her, whether the mediator belongs to mediation-related organizations like the Association for Conflict Resolution, the Association of Attorney-Mediators, or state mediator organizations, and whether the mediator provides pro bono mediation services as a community service. It asks for roster listings, which reflect some measure of confidence expressed by third-parties in the mediator. It also asks whether the mediator carries liability insurance for his or her mediation practice.

These two easily accessed tools provide a place to start your investigation. And good mediators will not hesitate to respond to any question about his or her professional background. But I recommend an even more thorough analysis.

Personal Qualities of a Good Mediator

Some time ago, I wrote an article called *Qualities of a Good Mediator and the Lessons New Mediators Learn.* [12] In that article, I surveyed the thoughts of a number of conflict resolution experts about the personal qualities of effective mediators. Woody Mosten looks for mediators who are good listeners, effective communicators, patient, tolerant, neutral, empathetic, persistent, trustworthy, flexible, creative, positive, and optimistic. [13] Also, conflict should not scare them or put them off their game. I would add to this list intelligent, even-tempered, encouraging, confident, civil, considerate, open-minded, and persuasive. A mediator should also have an appropriate sense of humor. Professor John Cooley would add that the mediator should have good judgment, be well-organized, punctual, and respectful of lawyers and their clients. [14]

He or she should also be quiet when appropriate and intervene vigorously when appropriate. "A mediator who primarily allows open discussion will be helpful if parties and lawyers are sophisticated enough to conduct their own negotiation. On the other hand, where the parties are unsophisticated, emotional, or lack familiarity with the bargaining process, then a mediator who is more directive would be appropriate." [15]

[6] E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 Conflict Resol. Q. 191, 199 (2004).

[7] Robert A. Baruch Bush, *What Do We Need a Mediator For? Mediations "Value-Added" for Negotiators*, 12 Ohio St. J. on Disp. Resol. 1 (1996).

[8] *http://www.ajc.state.ak.us/Reports/mediatornain.htm.*

[9] *http://www.mediationcouncilofillinois.org/choosing.html.*

[10] Many people don't realize that the practice of mediation typically occurs in a private context with strict limits of confidentiality conducted by sole mediators who get little feedback unless they go out of the way to solicit it.

[11] Paula M. Young, *The Who of Mediation—Part I: A New Look at Mediator "Styles"*, 14 The Ins. Receiver 11 (Spring 2005).

[12] Paula M. Young, St. Louis Lawyer (newsletter of the Bar Association of Metropolitan St. Louis) 10A (August 7, 2002).

[13] Forrest Mosten, *Mediation Career Guide—A Strategic Approach to Building a Successful Practice* 23 (2001).

[14] John W. Cooley, *The Mediator's Handbook: Advanced Practice Guide for Civil Litigation 28* (NITA 2000).

[15] Kimberly K. Kovach, *Mediation: Principles and Practice 136* (3d ed., Thompson-West 2000).

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Parties need to feel comfortable with the mediator. So in selecting a mediator you may also want to consider the mediator's cultural sensitivity. Should the mediator or co-mediators mirror the parties' race, gender, ethnicity or culture? Yes, "[w]hen the parties believe that the consideration of race, gender, or culture of the mediator would help resolve the dispute" [16] or when these attributes are major factors in the dispute. [17] For similar reasons, the parties may want to consider the mediator's age. [18]

Availability and Affordability

Often, the well-respected mediators are booked months in advance. Accordingly, the parties must determine if they can endure the wait. If not, a rising star with a more open calendar will be the better choice.

Parties often pursue mediation because it tends to be less costly than litigation. Parties can choose from no-cost or low-cost community mediation projects. Or, they may engage private mediators who will charge $100 to $300 per hour. Some mediators charge $1,500 to $3,000 per day, or charge according to the number of parties, the complexity of the case, or the money demand made in the complaint. They may charge cancellation fees. They may charge pre-mediation fees related to intake or background phone calls or the review of papers or briefs.

Mediators should not hesitate to discuss fee issues. Most ethics codes, whether aspirational or mandatory, require the mediator to disclose all fees and costs in the mediation agreement, a retention letter, or the mediator's opening statement. Most ethics codes also preclude contingency fees and referral fees because of their potential affect on mediator impartiality. [19] These codes may also instruct mediators to return any unused fees.

Certification or Roster Status

Most courts will not allow mediators to mediate cases pending in the courts without some assurance the mediators meet basic training requirements. Whether a mediator is certified, qualified, or rostered may offer some assurance that he or she has at least some minimal level of training. In Virginia, where I now live, entry level mediators (essentially small claims mediators) must have 20 hours of training, including two hours of ethics training. [20] They must also take a four-hour course on the Virginia judicial system. Persons wanting to do more complex court-connected civil mediations need an additional 20 hours of training. Family dispute mediators must have 32 hours of training in family systems, the social, emotional and psychological aspects of custody and visitation issues, an understanding of the grounds for divorce, parenting issues, support issues, property issues, debt and bankruptcy issues, tax issues, and the use of experts in mediation. They must also take an 8-hour course giving them some expertise in screening for and addressing domestic abuse. Virginia re-certifies mediators every two years after they show additional experience and training.

In contrast, Missouri Supreme Court Rule 17.04 requires only 16 hours of basic training for mediators. By comparison, I now have over 1,400 hours of training.

When choosing a mediator, you should ask for the mediator's list of training programs. Most well-organized mediators keep an updated list of all the training programs they have attended. You should then attempt to assess the quality of the trainers. Training quality depends on the hands-on experiences offered the trainees and the quality of the feedback provided by the trainers. Abramson says: "Information on the quality of training programs can be difficult to acquire by the newcomer although the information is widely known to dispute resolution professionals. You should ask around." [21] The Association for Conflict Resolution lists approved family mediation training programs by provider and state. To be listed, the program must provide fifteen training outcomes. [22]

You may also want to evaluate the quality of the mediator's other professional training as a lawyer, therapist or accountant, for instance. Does he or she have any specialized degrees?

And finally, does the mediator, in turn, train other mediators? Is he or she well-recognized in the field for his or her training work?

Process Skills and Expertise

Mediation skills do not come naturally to any of us. Some people call mediation an art. Some people call it a craft. Medi-

[16] Fred D. Butler, *The Question of Race, Gender & Culture in Mediator Selection,* Disp. Resol. J. *36 (Jan. 2001), available on Westlaw at 55-JAN DRI 36.

[17] Douglas H. Yarn, *Alternative Dispute Resolution: Practice and Procedure in Georgia,* ch. 6, § 6-15 (2d ed.), available on Westlaw at GAADRPRAC § 6-15.

[18] Phyllis M. Hix, et al., *Mediation, or is it? Everything You Thought You Knew, but Maybe Didn't,* 65 Def. Couns. J. 256, *260 (April 1998), available on Westlaw at 65 DEFCJ 256.

[19] Hon. Daniel E. Klein, Jr. et al., *Mediation: A Handbook for Maryland Lawyers at 44,* available on Westlaw at MEDI MD-CLE 39. *See also* discussion below.

[20] Office of the Executive Secretary, Supreme Court of Virginia, Form ADR-1003, available at *http://www.courts.state.va.us/drs/forms/home/html.*

[21] Harold I. Abramson, *Mediation Representation: Advocating in a Problem-Solving Process 130* (NITA 2004).

[22] *http://www.acrnet.org/referrals/trainers.htm.*

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ators acquire their skills through hard work and hands-on experience. Good mediators spend their spare time reading books about interest-based negotiation, mediation and conflict resolution. We do *pro bono* work to gain additional experience early in our mediation careers when no one will hire us. So don't be afraid to ask how many mediations the mediator has done and the nature of the disputes she has mediated. You might even ask about her settlement rate. [23] But you should "avoid at any cost [a mediator] whose only goal is to achieve an agreement." [24] And "[b]e wary of a mediator who overstates the advantages of mediation." [25]

Mediators learn listening, paraphrasing, reframing and astute questioning skills. Our questions can be probing, but as non-threatening as possible. Mediators learn techniques to facilitate communication between the parties. We develop a firm understanding of the stages of mediation, but also demonstrate flexibility in handling the mediation agenda. Mediators can explain the process clearly and effectively to the parties.

Mediators gain sensitivity to the needs of parties for equality, respect, security, face and safety. We learn to spot and deal with high conflict personalities. We understand the psychological barriers to negotiation. And the really good mediators handle emotional expressions skillfully without cutting them off prematurely. We know if, when and how to engage in joint sessions and private caucus with parties. We know the rules of confidentiality. We also know and adhere to the aspirational or ethical guidelines that apply to our practices and we practice consistently with the most rigorous set of ethical rules.

Style or Approach

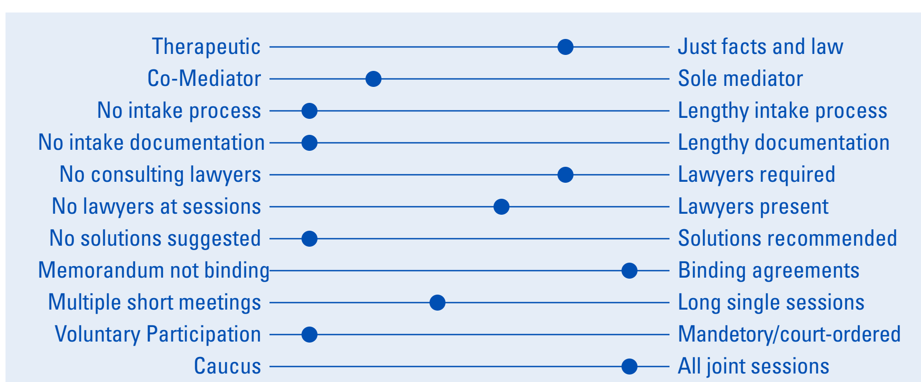
As I mentioned above, in my last article I discussed the different mediator styles or approaches. I won't repeat that discussion here. However, Woody Mosten has yet another tool for considering a mediator's style or approach—the Mediator's Abacus. [26] Envision a 12-wire abacus. The "x's" represent beads on the abacus wires indicating how a particular mediator might characterize himself or herself on the indicated approaches to mediation. Thus, a lawyer-mediator is more likely to focus on the facts and law of the dispute rather than on the therapeutic, psychological, or emotions aspects of the dispute. He may co-mediate about as often as he conducts solo mediations. She will have a brief intake process with little documentation. He may advise the parties to consult with lawyers as often as they like during the process, and he may ask them to have an attorney review any draft agreement before they sign it. And, so on.

Again, the style or approach of the mediator is an especially important factor to consider when choosing a mediator.

Legal and Substantive Experience

Some people believe that only attorney-mediators or retired judges serving as mediators should mediate litigation-related disputes. These comments begin to frame one of the debates about the qualities of the most effective mediators. Many parties assume that the mediator should have substantive expertise, with the ability to do very rigorous case evaluations or legal reality testing. They argue that these mediators possess intimate experience with juries, know the judges in which the dispute is pending, and have personal knowledge of the legal issues and recent verdicts that may affect a party's negotiating leverage. Judges and well-respected lawyers may also provide the high status or authority parties seek.

If you seek this sort of expertise, then you are looking for a mediator who possesses great credibility and reliable analytical



[23] Although a more accurate measure of the mediator's skill may be the percentage of mediated cases that do not go on to trial. Many cases settle outside mediation, but before trial, because the parties made substantial progress during the mediation session.

[24] Ann M. Haralambie, *Alternatives to Litigation,* 12 Family Advocate 52, *53 (Summer 1990), available on Westlaw at 12-SUM FAMADVO 52.

[25] Robert D. Benjamin, *Considering Mediation: What Lawyers and Clients Should Know,* 18 GPSolo 28, *31 (2001), available on Westlaw at 18 No. 7 GPSOLO 28.

[26] Mosten, *supra* note 13, at 85.

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and evaluation skills. You will probably want to ask the mediator what type of legal practice he or she has and how many years of experience the attorney has in that practice area. How much trial experience does the attorney-mediator have? How many mediations in the relevant subject-matter area has she done? When the judge was on the bench, what was the nature of the caseload he handled? Does the judge have a disposition and personality that is appropriate for the mediation context? Can he successfully shift from an adjudicator's behavior to a mediator's behavior?

Similarly, if the dispute involves a highly specialized or technical nature—like construction, environment, securities, computer technology, child custody, tax, or insurance coverage—you may want to hire an engineer-mediator, biologist-mediator, broker-mediator, computer scientist-mediator, therapist-mediator, accountant-mediator, or claims manager-mediator. You would ask that prospective mediator similar questions about his or her subject-matter expertise.

One writer suggests that lawyers choose other lawyers and retired judges as mediators simply because it is their way of adapting an otherwise unfamiliar process to "look like something that is more familiar to them." [27] Another commentator says: "Many advocates, especially lawyers, insist that subject-matter expertise is not only important but imperative in the mediation of their disputes. This does not, however, explain why retired judges, who normally possess no such expertise are used by lawyers more often than other [attorney-mediators]." [28] However, if legal expertise were enough to carry the day in mediation, then the Microsoft mediation —conducted by well-respected Judge Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals—should have been a great success. Instead, that mediation is a textbook example of how the failure to master the process skills and apply a well-developed body of mediation and negotiation theory led to impasse on more than one occasion and rejection of the deal by state attorney generals who Posner had excluded from the process. [29]

In jurisdictions, like Virginia, that prohibit a mediator from providing legal advice, allow the mediator to provide legal information only in highly constrained circumstances, and limit evaluations to three situations, [30] the legal experience of the mediator is potentially irrelevant, a trap for the ethically careless mediator, and a risk to party self-determination. The mediator, unlike an arbitrator, is not deciding the matter. And real risks come with this highly evaluative style. I will deal with that topic in a future article. Another writer says: "An aggressive [presumably lawyerly] questioning style and a tendency to focus on fault and historical fact often limits a lawyer's creative problem-solving ability and can aggravate positional behavior." [31]

Most mediators, including myself, will tell you that having good people skills, process expertise, and other qualities are far more important than knowledge of a particular area of law. Even the author quoted above concedes: "Mediation can also be successful even if a mediator is not well versed in the subject matter of a case. In fact, a mediator who does not have subject-matter expertise but who offers an open mind could be more effective….A mediator who lacks subject matter expertise [] might provide the parties with a read on how a jury member—who most likely will not have subject matter expertise—would react to each party's position." [32] Many experts in the field, including myself, believe that non-lawyers bring backgrounds, skills and professional experience that may help the parties see the dispute in a new light. Non-lawyers also may have better skills at handling the inter-personal relationship issues existing in the dispute and the emotions fueling the dispute.

As Hal Abramson says in his new book: "Just because someone is trained as an attorney or judge does not mean the person is qualified to serve as a problem-solving mediator. A former judge, for instance, can successfully advance settlements by bringing to bear her vast experience in evaluating and deciding cases. But, only a person formally trained in problem-solving mediation knows the nuanced structure of the mediation process and the refined techniques of mediators." [33] But a short time later, Abramson concedes: "You are better off with a mediator who has some substantive understanding of the dispute. However, you should unambiguously instruct the mediator to not give any substantive opin-

[27] Butler, *supra* note 16, at *37.

[28] *Id.*

[29] *See* Ken Auletta, World War 3.0: Microsoft and its Enemies 309-316 & 339-368 (Random House 2001).

[30] Va. Sup. Ct. R. Pt. 6, Sec. II, 2.11 (2004).

[31] Yarn, *supra* note 17, at §6-15.

[32] Peter B. Hutt II, et al., *Techniques for Resolving False Claims Act Cases Through Mediation*, 37 Procurement Lawyer 1, 20 (2002), available on Westlaw at 37-SPG PROCLAW 1.

[33] Abramson, *supra* note 21, at 129-130.

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ions, unless both sides specifically request the mediator to do so." [34] He believes a mediator with some substantive knowledge can perhaps "hit the ground running," better understand what is really at stake, and can more credibly communicate with the parties and their lawyers. But Abramson cautions that a knowledgeable attorney-mediator may have extreme difficulty hiding his opinions and so may exhibit conduct in the mediation that undermines his neutrality or the parties' perception of his neutrality.

If I were looking for a mediator, I would find someone with substantial process knowledge and skill, who had solid training and extensive hands-on experience before I would hire a less experienced attorney-mediator or retired judge-mediator. In a perfect world, the mediator would have significant process and substantive expertise, and would know when to leave the substantive expertise out of the mediation. This discussion should again highlight how selection of the mediator must consider the specific facts and circumstances of a particular dispute.

Impartiality and Neutrality

Greg Firestone, a Florida mediator, spoke about mediator impartiality at the October 2003 conference of the Association for Conflict Resolution. [35] He suggests you think about these issues along two dimensions that create four quadrants on a grid. On one side of the grid are the terms "parties" and "outcome." On the other side of the grid are the terms "impartiality," which relates to relationships, and "neutrality," which relates to conduct. The resulting four quadrants are: "impartiality-parties," "neutrality-parties," "impartiality-outcome," "neutrality-outcome." In searching for a mediator, you want someone who can maintain impartiality and neutrality in these four quadrants.

Impartiality-Parties

The mediator's impartiality towards the parties is often discussed in terms of conflict of interests. When choosing a mediator, you need to learn if the mediator has any current or prior relationships with the parties or their counsel. Does she get most of her business from one company or firm? Can she remain impartial to the party who is not the repeat player in the referral system? Exclude anyone that has a relationship you feel may bias the mediator towards the party with whom he or she has had a prior relationship. Mediators should err on the side of over-disclosure of conflicts of interest or potential conflicts of interest. They should check for conflicts with the same care imposed on lawyers by legal ethics rules. Mediators must also avoid creating any conflicts of interest during the course of the mediation – for instance, by buying stock in the company owned by one of the parties. Finally, mediators should avoid creating an appearance of impropriety by representing parties in the future in the same or similar matter. It is fair game for you to ask a mediator how he handles the conflict of interest issues. The leading cause of ethics grievances filed against mediators in Florida relate to impartiality.

Neutrality-Parties

Next, you need to consider whether the mediator can maintain, through his or her conduct, neutrality towards the parties. Will the mediator become frustrated, disrespectful, or heavy-handed if he or she believes you or your client is uncooperative? Does he hold any racial or cultural biases? Can he work with people that express racial bias? Does she think in traditional ways that may impose gender biases or reinforce gender-role expectations in the mediation? Does anger make him uncomfortable in a way that he may cut off your client's expression of it? Does crying make the mediator uncomfortable in a way that he may suppress the expression of sadness, fear, vulnerability, regret and other emotions expressed in this way or other ways? Can she work with borderlines, narcissists, sociopaths and other high conflict personalities without those parties pushing her buttons or manipulating her? The mediator should also be willing to withdraw from the mediation if the parties perceive she is no longer impartial towards each party.

Impartiality-Outcome

Does the mediator brag about a high settlement rate? Should you be concerned that he views your case as the next notch on his belt? Will he work hard for his settlement rate even if it requires coercive interventions that disfavor one party? Does she accept referral fees from lawyers who regularly use her in mediation, therefore consciously or unconsciously creating a bias in favor of the referring attorneys and their clients? Does he have a vested interest in the outcome because his fee is based on a percentage of the agreed settlement? "Lawyers should decline to retain a mediator whose fee is based on a percentage of the ultimate settlement [where not precluded by the ethics code]. [I]t smacks of impropriety and at the very

[34] *Id.* at 131-32.

[35] Greg Firestone, *Impartiality and Neutrality: Are these Concepts Still Relevant to the Practice of Mediation*, Session 4.05, Association for Conflict Resolution, Oct. 15-18, 2003, available through Convention Recordings Int'l Inc. at *www.conventionrecordings.com.*

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least, raises serious questions about the mediator's ability to remain neutral." [36] Does she believe that all civil rights related mediations must result in an agreement consistent with Title VII law? Does she feel that certain terms must go into every settlement agreement? Can he mediate with impartiality as to the outcome in an air pollution case if his son suffers from severe asthma? Can she mediate with impartiality an abortion clinic real estate boundary dispute if she opposes abortion?

Neutrality-Outcome

Finally, consider whether the prospective mediator can maintain neutral behavior towards the outcome. Does he or she use coercion, intimidation or other heavy-handed tactics to get an agreement? Do the mediator's case evaluations seem mistakenly skewed in favor of one party in certain types of cases? Does she add terms to the settlement agreement on which the parties had not agreed?

Conclusion

Choosing the mediator is the most important decision you will make on behalf of the client who plans to participate in mediation. Make the choice wisely and with care.

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[36] Klein, *supra* note 19, at 44.

Meet Our Colleagues

Joe DeVito, AIR-Accounting/Financial Reporting, Reinsurance and Claims/Guaranty Funds

Debra J. Hall

Debra Hall is Senior Vice President and General Counsel of the Reinsurance Association of America (RAA), the nation's leading trade association representing the U.S. p/c reinsurance industry. After graduating from law school in 1980, she became an Assistant Attorney General for the State of Illinois and later Deputy Chief Counsel for the Illinois Department of Corrections. She enjoyed those first 7½ years of her career as a litigator and in doing what she considered to be rewarding work with the Illinois prison system.

When she was asked to join the Office of the Special Deputy (OSD), she committed to only one year, observing that insurance, and reinsurance in particular, sounded very boring. Several years later she was still there, not bored, as the OSD's Chief General Counsel. With the OSD, Debra was very active in receivership matters at the NAIC, including redrafts of the model receivership law, the setoff debates, and as co-editor and contributing author to the first edition of the Receiver's Handbook.

In her position at the RAA, which she has held for 13½ years, Debra has primary responsibility for developing RAA policy at the state, federal and international levels, managing amicus briefs and other RAA litigation, and providing comprehensive analysis to members on legal/regulatory issues affecting the reinsurance industry. Though a representative of the reinsurance industry, she understands and continues to be cognizant of the problems that receivers face. She recently accepted an assignment to be an expert on behalf of a receivership estate.

Debra's personal interests include gourmet cooking, boating and sharing life with her husband, Bob and yellow Labrador, Bailey.

Robert M. C. Holmes

Rob Holmes is a Chartered Accountant and founding principal of Prowis Inc., a Toronto based business-restructuring firm dedicated to helping companies restore confidence and sustain success. Prowis offers a spectrum of services from advisory options and strategies to address individual issues to on-site resources with the ability to act as a Chief Restructuring Officer, including full responsibilities in finance, operations, or both.

A former partner and senior vice-president in the Financial Advisory Services Group at PricewaterhouseCoopers LLP, Rob's specialized experience over nearly three decades includes international postings in South Africa, England and Canada. His diplomacy, curiosity and patience contribute to his well-respected creative approach to his work, which is why clients agree Prowis is a leader in their industry in Canada.

Rob has been a member of the International Association of Insurance Receivers since 1987 and is a Certified Insurance Receiver – Property & Casualty (CIR C&P). He is also a member of the Turnaround Management Association, an international body dedicated to corporate renewal. Rob is a CIP (CIRP) as a member of The Canadian Association of Insolvency and Restructuring Professionals, which is the national professional organization representing 922 general members acting as trustees in bankruptcy, receivers, agents, monitors and consultants in insolvency matters.

Rob possesses specialized experience in insurance, healthcare, manufacturing, retail, finance, hospitality, real estate and construction. Notably, he was in charge of the largest liquidation of a Canadian P&C insurance company, which had operations in New York and Bermuda and significant reinsurance contracts in all major markets.

It is no coincidence that Rob is a principal at Prowis. Not only has he committed himself to helping people to restore confidence and sustain success in their business, he lives by these principles as a loving husband, father and grandfather. Whether he is relaxing at the cottage or running in the morning before work, he regularly goes out of his way to offer advice and support to those in need.

Meet Our Colleagues

Joe DeVito,AIR-Accounting/Financial Reporting, Reinsurance and Claims/Guaranty Funds

Jenny Jeffers

Jenny Jeffers is the owner of Jennan Enterprises located in Tallahassee, FL. Jennan Enterprises has been in business for 30 years providing information services including system development, data conversion, training, receivership IT management, UDS data conversion and processing for both receivers and guaranty associations and information system auditing for the insurance regulatory industry.

Jenny has provided multiple information technology services for the insurance industry for over 20 years. Her involvement with the insurance industry began with the Florida Department of Insurance where she developed software for various divisions. This led to her work with the Florida Receiver where she implemented the first UDS system for that state as well as managed the IS departments of several receiverships. Additionally, Jenny developed the UDS software for FWCIGA (Florida Workers Comp Insurance Guaranty Association) and does work for various other Guaranty Associations around the country, including Western Guaranty Fund Services and Louisiana Guaranty Fund. She was engaged by NCIGF and the State of Pennsylvania to assist in the processing of data in the UDS format from the Reliance and Legion receiverships to the Guaranty Funds and back from the Guaranty Funds to the receiverships. She has served on the National UDS Committee, representing the perspectives of both receivers and guaranty associations.

Jenny also has extensive experience with the regulatory community and has performed the IT portion of both Financial and Market Conduct examinations for the last 12 years. Last year, Jenny earned the CISA (Certified Information Systems Auditor) with ISACA and the AES designation from SOFE.

Jenny has two daughters - Jennifer Oldson, DVM who is practicing veterinary medicine in Fairfax,VA. and Kerri Keiger, a molecular biologist working with DNA and RNA research in Austin, TX. Jenny loves reading, crossword puzzles and really LOVES playing with DATA!

Joseph C. Gavalis

Joe Gavalis is a founding partner of CTG & Associates, an investigative and consulting firm with offices in Georgia and Oregon. CTG specializes in litigation support and forensic accounting for receiverships, employee benefit plans and related businesses. CTG was the primary consultant retained by the Federal Receiver and 74 employee benefit plans to investigate the $500 million Capital Consultants investment fraud. To date, more than $350 million has been recovered and made available to the victims.

Joe retired from the U.S. Department of Labor, Office of Labor Racketeering, after a 28 year career in federal law enforcement. During his tenure, he served as a supervisory resident agent in Atlanta, was special assistant to the director, Office of Special Investigations, and served as the national coordinator, Organized Crime and Racketeering Program, Washington, DC. He was the Labor Department's representative to the NAIC Special Committee on Anti-Fraud and served as national coordinator on ERISA and insurance fraud cases. Joe conducted more than 100 training seminars for law enforcement personnel and educational institutions on anti-fraud, insurance and labor racketeering issues. A nationally sought-after speaker, he continues to present similar training sessions for both the private and governmental sectors.

Joe holds a BS degree from the University of Bridgeport. His two passions are golf and travel. With his wife, Susan, whose career is in the travel business, he's visited many exotic corners of the world, and played golf in most of them.

Joe DeVito

Receivers' Achievement Report

Ellen Fickinger

Chair:		Ellen Fickinger
Reporters:	Northeastern Zone:	J. David Leslie (MA); W. Franklin Martin, Jr. (PA)
	Midwestern Zone:	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 fourth quarter of 2004 is as follows:

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)

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
Alliance General Insurance Company		$ 3,213		
American Horizon Insurance Co.		$ 258,183		
American Mutual Reinsurance Co.				$33,795,009
American Unified Life and Health Co.		$ 69,729		
Associated Physicians Insurance Co.		$ 44,710		
Coronet	$ 2,700			
Delta Casualty Company	$ 50	$ 7,310		
First Oakbrook Corp. Syndicate	$ 60			
Gallant Insurance Company	$ 1,485	$ 300,000		
Illinois Insurance Company	$ 84	$ 19,943		
Legion Indemnity Company	$ 300	$ 305,722		
Oak Casualty Insurance	$ 1,239	$ 1,935876		
Pine Top Insurance Company		$ 89		
Prestige Casualty Company	$ 500			
Statewide Insurance Company		$ 973,321		
United Capitol Insurance Company	$ 812	$ 114,221		
Valor Insurance Company	$ 3,933	$3,500,000		
Western Specialty Insurance Company		$ 32,000		

Receivers' Achievement Report

Ellen Fickinger

OTHER INFORMATION

Name of Insurer	Category	Comments
American Mutual Reinsurance, In Rehabilitation	P&C	Under OSD supervision, this company is managing the reinsurance run-off of their business. Total claims paid inception to date: Loss & Loss Adjustment Expense: $30,449 Reinsurance Payments: $203,369,957 LOC Drawdown Disbursements: $9,613,386
Centaur Insurance Company, In Rehabilitation	P&C	Under OSD supervision, this company is managing the run-off of their business. Total claims paid inception to date: Loss & Loss Adjustment Expense: $53,294,715 Reinsurance Payments: $4,945,493 LOC Drawdown Disbursements: $13,876,555

efickinger@osdchi.com

Salt Lake City Roundtable Recap

Sharon J. Rose [1]

The March 2005 Roundtable was held on March 12 in Salt Lake City, Utah and was well organized by Elizabeth Biaett of EAB Associates and Rheta Beach, Special Deputy Liquidator for the Utah Insurance Department. This was the first Roundtable held after the IAIR Board of Directors decided to return to a roundtable discussion format.

Before the Roundtable began, Dan Watkins, Chairman of the IAIR Accreditation and Ethics Committee, recognized John Murphy for achieving AIR designations in Claims/Guaranty Funds and Reinsurance and Barry Weissman for achieving AIR designations in Legal and Reinsurance. Others unable to attend the roundtable and receive their designations were Jim Young, CIR designation in Multiple Lines (ML); Bill Barbagallo, AIR Claims/ Guaranty Fund and Reinsurance; Frank Mulcahy, AIR Legal; Dave Hamilton AIR Accounting/Financial Reporting.

After the presentation of designation plaques, Dan encouraged all IAIR members to pursue AIR or CIR designations.

A presentation on insurance fraud investigations by Joe Christensen, head of the Fraud Division of the Utah Insurance Department, led off the Roundtable. Christensen, with video from several KSL TV newscasts highlighting the efforts of the Utah Fraud Division, discussed ways to identify claims fraud through analysis of insurance company data and public records. Insurance fraud is the 2nd most pervasive crime in the U.S., preceded only by income tax fraud. He cited several current scams including "capper" recruitment of Utah residents to travel to other states, such as California, for unnecessary medical procedures for which out of state providers charge excessive amounts for the "emergency" procedures. The recruited "patients" are then paid cash or receive plastic surgery procedures in exchange for the unnecessary procedures. Christensen also detailed oxycontin prescription fraud activity in which prescriptions for oxycontin are written and filled and the drugs then sold on the black market. He also discussed the Wasatch/MRIK Strategic Bankcorp scam and other forms of insurance fraud such as physician double billing for procedures, identity theft to get insurance cards to have surgery, patients having legitimate claims but padding the claims to collect additional funds.

Lauren Robertson, a CPA with EAB Associates and assisting the California Conservation and Liquidation Office discussed the status of efforts to recover hundreds of millions of dollars in the Executive Life Liquidation from French insurance companies and banks.

Betty Cordial updated participants on the status of criminal prosecutions in the Martin Frankel/Thunor Trust cases. Receiverships in Tennessee, Alabama, and Missouri have interacted and sometimes clashed with Federal authorities in Connecticut, Washington, DC and other jurisdictions on recovery of assets and prosecution of those involved. It was her opinion that the Federal authorities did not want states interfering with the Federal prosecution. Betty strongly encouraged policyholder representatives to participate in federal proceedings as fully as possible. Receivers have a right to represent the victims, both policyholders and claimants, to participate in the system, have a right to speak before the presiding court, make statements and be informed about what was occurring. Betty discussed some of the light sentences given to the principals in the Frankel case. There may have been some debate in the audience whether Betty's presentation crossed the line between assertive and aggressive, but I felt she was just providing the facts to the audience.

The next presentation was from the Host Commissioner from Utah, Kent Michie, who was accompanied by his Chief Deputy, Neal Gooch and Chief Financial Examiner, Steven Fry. The Commissioner, a philosopher at heart, led a discussion in which he encouraged participants to seek truth and "do the right thing" in their work with troubled companies. His comments were laced with quotes supporting his belief that people need to be of high ethical standards, morality and character. There are many interests that surround the receivership business, and those in the business should remember there are more interests than creditors and debtors—there is the public interest. He stated that "we have an obligation to uphold the public good." Commissioner Michie encouraged everyone to try to be philosophical and see things from the bigger picture.

This led into comments from Roundtable participants about projects in which the NAIC Receivership and Insolvency Task force is engaged including the GRID database. Dale Stephenson and Peter Gallanis cited the NAIC whitepaper on Cooperation with Guaranty Associations in Receiverships as an important milestone in setting out basic goals of the Guaranty Association process in protecting policyholders. Lead-time is critical to analyze issues and get the data and information necessary to "hit the ground running." There is a definite need for ongoing dialogue of how to properly manage the entire process and try to avoid the "my

[1] Sharon J. Rose is a Project Manager for The Law Offices of Daniel L. Watkins.

Salt Lake City Roundtable Recap

Sharon J. Rose

side your side" perspective. Dan Orth reminded the participants of the effort put forth by IAIR and its officers to lift the level of professionalism. He also commented on the effort to increase cooperation between regulators, receivers and guaranty associations and the need for a supporter in the NAIC to continue the effort. When everyone works together, the public is the one that gains.

Frank Martin, Chair of the Model Act Revision Working Group, took the opportunity to make a pitch on behalf of the model act. He discussed several areas of recent work by the Model Act Revision Group (MARG) and conveyed that there is a lot of uniformity in the process. A number of receivers who are members of the working group agreed that other constituencies have good arguments. The group has revised sections on preference and fraudulent conveyances and brought the Act in line with the Federal Bankruptcy Act, which would allow receivers to collect assets faster. Frank also reminded everyone about a conservation proceeding for an insurance company. Conservation could be a way station on the way to rehabilitation or liquidation and would allow regulators 180 days to get their arms around and decide where the troubled company is going to go.

In giving a little historical background, Mary Cannon Veed pointed out that a call for professionalism among receivers began with the first wave of P&C liquidations in the 1980's. The most dramatic changes are the greatly improved jobs the Guaranty Funds are doing and a vast improvement in liquidators.

A panel led by Robert Hall discussed do's and don'ts of arbitration where one party is insolvent and whether arbitration can really be faster, cheaper and better than litigation. Rob Graham, Jim Stinson, Fred Kohm and Barry Leigh Weissman participated with Hall in the discussion. According to the panel, there are tactical issues associated with managing the arbitration process. Arbitration is not litigation but there is a need for due diligence, a need to identify issues and give care to the selection of arbitrators who understand the industry and have credibility. Look for someone reasonably fair who will take the matter seriously and render a reasonable decision. It was also stressed that solid preparation should identify strengths and weaknesses of the case and allow presentation of data on claims and issues in a complete and straightforward fashion. Controlling costs, focusing arbitration on things truly at issue and doing that in a reasonably efficient way will minimize costs to the estate and maximize the likelihood of success. The panel also discussed problems in the process, how they arise and how they can be addressed. Arbitration helps focus discussion between the parties and gives an opportunity to continue discussion toward a reasonable settlement. Receivers need to get counsel involved early in the process and focus on how they are going to collect reinsurance. Receivers should select arbitrators who have reinsurance experience, who understand the business side of reinsurance and are experienced with reinsurance arbitration.

All in all, the roundtable format gave participants a chance to express their views and engage in some interesting discussions with others in the receivership industry.

John Murphy receiving his plaque from AIR.

Barry Leigh Weissman receiving his plaque from AIR.

Director of the Fraud Division in Utah—Joe Christensen doing his roundtable presentation, "Fraud—YIKES!"

Mormon Church in Salt Lake City.

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