The Insurance Receiver

PROMOTING PROFESSIONALISM AND ETHICS IN THE ADMINISTRATION OF INSURANCE RECEIVERSHIPS

WINTER 2005

Volume 14, Number 3

Feature Articles

www.iair.org

President's Message - WINTER 2005

Trish Getty, AIR, Reinsurance

Because we did not meet in September due to the Katrina disaster, our progress has not been as significant since I last wrote to you but several committees have continued to work diligently. Most noticeable is the fabulous new face of IAIR's website. Alan Gamse and his Website committee have spent endless hours on the redesign of our site. The committee continues to address issues concerning utilization tools available on the website for visitors. Thank you, Alan, for your persistence, time and attention to detail.

We extend our heartfelt sympathies to our family and friends who suffered such loss from Katrina's ravages. Gratitude is extended to all of those who have given of themselves to help the victims reconstruct their lives.

The Accreditation & Ethics committee, chaired by Dan Watkins, constantly works to review applications for the CIR and AIR designations. The approval process is tedious requiring many, many hours of the committee members so I would like to again thank them for giving so much of their time and energy to IAIR.

The Bylaws Committee, chaired by Francesca Bliss, is currently reviewing the IAIR bylaws to determine whether any changes are necessary since our association changes over time.

Hal Horwich has graciously agreed to serve as Chair of our Publications Committee. Thank you, Hal.

I look forward to attending the American Conference Institutes' "Insurance Insolvency" seminar in New York November 14/15 where several IAIR members will speak. Two IAIR members, Jody Hall and Francine Semaya (IAIR Board member), are co-chairs of the seminar. Please take advantage of 15% discount of the registration fee that ACI offers to IAIR members.

Remember that Mealey's offers IAIR members 25% off registration fees for almost all of their conferences.

I would like to remind our IAIR membership that this is your association so we welcome your comments and suggestions particularly with respect to education. Let us know what topics are important to you so that we can consider them for our roundtables or annual seminar.

November 2-3, 2006, we will hold the IAIR/NCIGF Joint Workshop in Salt Lake City. The IAIR Annual workshop, chaired by Patrick Cantilo (IAIR Board member), will be held on February 2-3, 2006 at the Hilton San Diego. Watch our website (www.iair.org) for details and mark your calendars to attend both workshops!

Since this is my last message as IAIR President, I want to thank our Board of Directors for their support and Paula Keyes for working so closely with me throughout 2005.

View from Washington

by Charlie Richardson

As this article is being written late September, almost nothing seems as important as the impact of Katrina and Rita on the economic and political life of our country. That is certainly true for the insurance industry. Congress' and the Administration's every waking hour is focused on that – and will be for the rest of this year and next as the 2006 midterm elections loom larger and larger in the minds of people who must face the voters a year from now.

The Numbers. Daily, we receive escalating estimates of the staggering costs that are involved here. You start with the cost of rebuilding, relocating, and dealing with a monumental human and infrastructure tragedy in multiple states. You then have to look at the insured losses, either through private insurance carriers or the federal flood insurance program. Next is gaging the impact of all that on the economy as a whole, particularly from the standpoint of our petroleum resources – the bankruptcies of Delta and Northwest were precipitated to some degree by soaring fuel prices. And then, for those reading this article, you have the costs to the insurance and reinsurance industries that may shake the foundation of some companies and possibly send some over the insolvency edge. While it is far too early to quantify those cascading costs, we all know in our heart of hearts that we could easily be talking upwards of a trillion dollars over the next decade.

Naturally, Congress cannot help but take the enormity of the situation into account as it considers a TRIA extension (see below), insurance and bank regulatory reform, possible federal hurricane/ natural disaster insurance legislation, tax cuts and Social Security reform (now less and less likely), etc.

Flood Versus Wind. Of course, one of the biggest insurance related issues on the horizon is the tension between the typical homeowner policy exclusion for flood damage and the realities of the New Orleans disaster. Were the damages we saw so vividly on TV the result of wind or water? What if both? The Mississippi Attorney General waded into that controversy mid-September on the side of wind in a lawsuit against five leading insurance companies. Plaintiffs' counsel have followed, all as part of the interpretation of insurance policies on which billions of dollars of coverage are riding.

Hurricanes, Tight Fall Schedule Complicate a "Revamped" TRIA. With Congress heavily engaged in fashioning Gulf Coast relief proposals, it is increasingly uncertain that lawmakers will have the time or the inclination to pass the "revamped" TRIA (Terrorism Risk Insurance Act) program that Treasury Secretary John Snow called for in July. TRIA (P.L. 107-297) expires on December 31, 2005. The Administration says it opposes a straight extension of TRIA, preferring that insurers assume greater risk exposure. But with few legislative days remaining in the session lawmakers will be challenged to overhaul the reinsurance program with proposals to raise the coverage trigger, expand coverage to include group life insurance _ or address natural disaster issues, which some lawmakers have been pressing for. Mark-ups are expected this fall in House and Senate committees, yet time constraints make a limited extension of TRIA into 2006 all the more likely.

GAO Report and RRGs. In September, the General Accountability Office issued its long-awaited report on risk retention groups. The report takes stock of where the movement towards RRG's stands today and then suggests that Congress consider granting the partial preemption from state regulation only to states that adopt consistent regulatory standards for RRG's. In short, the GAO thinks some RRG practices should be reigned in, and concluded its press release by saying,

"The combination of single-state regulation, growth in new domiciles, and wide variance in regulatory practices has increased the potential that RRGs would face greater solvency risks. As a result, GAO believes RRGs would benefit from uniform, baseline regulatory standards. Also, because many RRGs are run by management companies, they could benefit from corporate governance standards that would establish the insureds' authority over management." You can get a copy of the report at www.GAO.gov (Report GAO 05-536).

View from Washington

by Charlie Richardson

NAIC/Marsh Settlement. The National Association of Insurance Commissioners announced September 21 a multi-state settlement (see http://www.naic.org/Releases/2005_docs/MARSH_Settlement.pdf) with Marsh & McLennan Companies Inc. that will allow state regulators to enforce compensation and disclosure reforms the insurance broker agreed to in January 2005 as part of an $850 million settlement agreement with New York Attorney General Eliot Spitzer. A lawsuit filed by Spitzer charged that Marsh had for years taken kickbacks from insurers in return for inducing its clients to buy insurance from them, and had engaged in bid-rigging schemes. In addition to setting aside $850 million for a restitution fund for aggrieved clients, Marsh agreed in the settlement with Spitzer to change its business practices in a variety of ways, including discontinuing the practice of taking "contingent commissions" from insurance carriers, providing clients with additional information, adopting new company-wide standards for the placement of insurance, naming a corporate compliance officer, and establishing a corporate-compliance committee of the board of directors. Under the newly announced agreement with more than 30 states working through the NAIC, regulators in the signatory states will have the authority to take action under state insurance laws and regulations to enforce the agreement, and will receive ongoing compliance reports from the company. Regulators also will be able to continue ongoing investigations with Marsh's cooperation.

Solvent Schemes of Arrangement: What is a solvent scheme?

by Vivien Tyrell

The solvency of an insurance/reinsurance company is maintained by the interaction of four main features:

- claims development remaining on course with projections made at the time the company's reserves are established
- the company's own reinsurances being of high quality allowing speedy recoveries and there being no risk of their own insolvency
- adequate performance of the company's own investments
- shareholder support being given when necessary.

It is sometimes the case that it is in the interests of creditors and shareholder investors for there to be an early exit from a company in run-off. This will allow creditors to be paid an amount representing what is due to them in a lump sum or series of lump sums over a short period. Shareholders will receive back their own investment. Both shareholders and creditors will be able to utilise the funds recovered in the way in which they prefer, control of such funds having been returned to them.

The idea behind solvent schemes of arrangement has its origins in estimation schemes of insolvent companies which were implemented to deal with the staggering increase in the early 1990s in longtail claims. These arose from occurrence based policies written sometimes as far back as the 1940s and 1950s for the benefit of policyholders in the United States. Predominantly consisting of asbestosis, health-hazard and pollution claims, some new sub-categories have, in the last few years, joined their ranks such as health-hazard claims based on electro-magnetic field exposure. Since the late 1980s the increase in these longtail claims made against London Market insurance/reinsurance companies has been exponential, bringing about a need for additional reserves and parental or other support.

Where a London market company in run-off is sufficiently reserved and/or has sufficient shareholder support the company will remain solvent. There is a prospect however of some twenty or thirty years having to pass before each and every longtail claim crystallises. It is only at this point, when the identity of the creditor and the amount of the claim is fixed (by judgment or agreement), that the amount will become due and payable by the company in run-off.

Twenty or thirty years in some cases might be an optimistic estimation of the length of the administration. An early exit for creditors and shareholders will mean a reduction in the administration costs of processing such claims as the period of the administration can be reduced to about three or five years; in some cases this period can be even shorter. Insurance companies in run-off have often pursued aggressive commutations strategies but this has not always meant finality.

BAIC

On 21 July Mr Justice Lewison handed down judgment in the first ever opposed sanction hearing of a solvent scheme of arrangement in the case of an insurance/reinsurance company, British Aviation Insurance Company Limited (unreported, judgment citation: [2005] EWHC 1621 (Ch)). He did not sanction the scheme and it therefore failed.

The essential feature of a solvent scheme of arrangement is that creditors' contractual relationships with the company are brought to an early end and the surplus reserves and other assets balancing the liabilities of the company, in the form of those creditors' claims, are released to the company's shareholders. In simple terms under an estimation scheme, the fair value of a creditor's claims including unascertained claims (outstandings and IBNR), is established either by agreement or adjudication and then paid to the creditor. All of this takes place over a very short period, sometimes as little as one year, whereas, without a solvent scheme, the run-off could continue, as we have said, for 20, 30 or more years.

Lewison J's judgment goes through the three stages which make up schemes of arrangement under Section 425 of the Companies Act 1985, namely:

- the first hearing before the court where directions are ordered convening the creditors' meetings and directing the way in which the meetings are to be held

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- the meetings themselves
- the sanction hearing at which the judge exercises his discretion as to whether or not to sanction the scheme.

The judgment then examines the extent to which BAIC cleared the hurdles set at each stage.

The following summarises the way in which BAIC fell short of the requirements:

Order for directions convening the meeting

Where there are creditors with different rights, they fall into separate classes and a separate meeting must be held for each class. The requisite majorities (simple majority by number and three quarters in value of creditors present and voting in person or by proxy) must be attained at each meeting before the scheme can proceed. Lewison J held that there was more than one class of creditor; therefore to convene only one meeting of all creditors, which BAIC had done, was incorrect and left him with no jurisdiction to sanction the scheme.

The judge held that the original test to determine which creditors formed a separate class (the test in the case of Sovereign v Dodd [1892] 2 QB 573) still applied, namely, whether the rights of those at the meeting are "not so dissimilar as to make it impossible for them to consult together with a view to their common interest". If the test is met, the creditors will fall within one class.

However, Lewison J concluded that in determining what those creditors' rights were, the "appropriate comparator" must be identified. In other words, one must look at the existing rights of the creditors without a scheme and see to what extent such rights are changed under the terms of the scheme. If there is a difference in the way in which the rights are changed, there will be different classes. In the case of an insolvent insurance/reinsurance company the appropriate comparator would be the rights of the creditors in an insolvent liquidation (see Chadwick LJ in Re Hawk Insurance Company Limited [2001] EWCA). In such a liquidation, the supervening insolvency rules automatically change creditors' contractual rights, including the way in which their claims are to be treated.

By statute, in an insolvent liquidation, creditors' unascertained claims (outstandings and IBNR) must be estimated. If an estimation scheme is therefore proposed by an insolvent company, creditors with paid loss claims, outstanding claims and IBNR can rightly consult together with a view to their common interest as their rights are the same without the scheme and the scheme itself does not change them in any way relative to each other. However, a very different picture emerges in the case of a solvent scheme of arrangement. There, the appropriate comparator is the continuation of the solvent run-off under which creditors are entitled to claim and enforce payment under their contracts as and when their claims mature.

Applying the appropriate comparator test, the judge concluded that creditors' claims for IBNR fell within a separate class and therefore a separate meeting ought to have been held for such creditors in relation to those claims.

He also considered the position of reinsureds who were also reinsurers of BAIC (debtor/creditors). He could see that they would have a special interest (based on their contractual obligations owed to the company) in shortening the run-off thereby capping both the inwards liability of the company and also their own liability to pay the company. He acknowledged, however, that if debtor/creditors set-off their claims and debts due and voted in respect of the net amount of their claims, they would not form a separate class of creditors. However, when reaching the third stage of exercising his discretion whether or not to sanction the scheme, he disregarded their votes because of their special interest.

Lewison J did not hold that there should be a separate class for direct insureds but, saving the most damning part of his judgment to the penultimate paragraph, he opined in strong terms that it would be unfair for a scheme to be implemented which re-transferred the risk to direct insureds such as manufacturers who had paid a premium for that risk to be transferred to BAIC.

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The meeting stage

The judge concluded that the way in which claims were admitted for voting purposes meant that the meeting not only was improperly convened, but was also not properly conducted.

The opposing creditors' IBNR had been valued at a nominal amount. In some cases there was a 'catch 22' where creditors' claims were rejected for voting purposes and yet they had been told that they would be admitted under the scheme for agreement and adjudication.

The order for directions had required the chairman to ascribe a "genuine value" to a claim. An arbitrary value of one dollar on a claim could not be placed on IBNR as this was simply not valuing such claims at all. There must be a reasonable relationship between the size of the claims for voting purposes and the size of the claims allowed under the scheme.

Creditors had asked for more time to put in supporting evidence of their claims but the company had refused their request. The judge was left with an uneasy feeling that IBNR claims had been brushed to one side.

In view of these inadequacies, the judge could not rely on the fact that the requisite majorities had voted in favour of the scheme. This had the consequential effect of removing from BAIC the argument that various terms of the scheme which the judge questioned were a reflection of what creditors desired. The company argued that "creditor democracy" supported the terms of the scheme. The judge made the point that "the corollary of a fully functioning democracy is a fair and free election where electors are treated equally".

Although there was a low turnout to the meeting compared to the whole creditor population, this was not a valid reason for refusing to endorse the majority vote. However, the judge found it relevant in deciding whether the results of the meeting could have been affected by collateral factors such as special interests of certain creditors.

The sanction stage

The judge had already concluded that he did not have jurisdiction to sanction the scheme because of the way in which the meeting had been convened and conducted, but in case he was proved to be wrong on appeal, the judge helpfully went on to exercise his discretion and explain it fully.

The judge referred to the age old test applied by the court in deciding whether to sanction the scheme: whether "the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve" and concluded that such test should not be rigidly applied in isolation. He decided to take into account other factors, saying that to listen only to the voice of the majority would be at odds with the court having an unfettered discretion to decide whether or not to sanction a scheme on grounds of fairness.

In his view the following aspects of the scheme were not fair:

- a bar date of 120 days was too short and he would have extended it to one year
- the 'Estimation Methodology' in BAIC was not a true methodology but simply a list of types of evidence required to be submitted by a creditor. Although this might have been the best that could be achieved, the judge concluded that best was not good enough and he could not sanction the scheme as there was a danger of unequal treatment of creditors.

- the reversion to run-off clause allowed the company to decide when to bring the scheme to an end at its sole discretion without setting out any reasons. The criteria was it being in the best interests of the company without any express reference to the best interests of creditors.

He disagreed with the list of benefits put forward by BAIC:

- the only benefit of an early conclusion of the run-off enured to the company not to the creditors
- the saving of costs enured entirely to the company

- although early payment to creditors was an advantage, this had to be balanced against the fact that creditors

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would no longer be indemnified but paid an estimate of their claim and the loss of this indemnity was unfair

- the simplicity of the adjudication procedure in the scheme was of itself largely necessitated by the scheme and therefore not a self standing advantage to creditors
- the parentage of BAIC (its principal shareholders are RSA and Aviva) meant that creditors did not run the risk of a future insolvency if the run-off developed adversely.

Discovery in solvent schemes

This is not usually ordered. However in the recent Scottish case of Scottish Lion, certain creditors applied to have disclosure of the details of the other creditors so that they could ascertain whether they could properly consult together with a view to their common interest. The application was fiercely defended by the company which was roundly defeated before the Scottish Court of Session. The company was not only required to disgorge details of creditors but also specifically requested financial information by a specific date. The company did not comply. Instead it withdrew the scheme and was penalised in costs.

The future

What is the way forward? The judgment cannot be said to be one which wholly turns on its facts although there are certain important facts specific only to BAIC (for example the special interests of certain creditors). However, it is important that the judge felt that he could not implement the wishes of the majority voting at the meeting, because the meeting had not been properly convened or conducted.

Since BAIC (which is not being appealed) there have been four further solvent schemes which have been sanctioned. In each case there was no opposition at the sanction hearing and the judges in question took heed of Lewison J's judgment. In the cases of La Mutuelle and Scottish Eagle, which were before the English Court, Mr Justice Evans-Lombe approved the schemes although only one class meeting had been convened in each case and was able to distinguish the facts from BAIC.

The case of Mercantile and General had a faltering start before the sanction hearing, this time held in Scotland. Opposition papers had been filed but the opposing parties settled and did not appear at the hearing. The judge adjourned the hearing for one week before his concerns were allayed concerning the fact that only one meeting was held. He finally approved the scheme although again the hearing was technically unopposed.

In the case of DAP (a pool scheme), the boards of the companies decided, following the BAIC decision, to apply again to court for a fresh order convening multiple meetings for paid loss claims and IBNR prior to meetings being held. This did the trick for Lewison J and it was successfully sanctioned.

These are examples of cases where the meetings were correctly convened and conducted. It seems that creditor democracy has prevailed and that in those instances the judges sanctioning the schemes considered the scheme to accord with the wishes of properly represented creditors and gave the desired order.

The future? There will be more solvent schemes. Increasingly they will be more complex. There will be more consultation with creditors before a scheme is proposed. There will be longer notice periods and greater assistance to creditors enabling them to understand the scheme and its implications, greater transparency and greater scope for creditors to confer.

When Can A Receiver Ignore Priority Of Distribution Statutes?

by Robert M. Hall

[Mr. Hall is a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator and mediator of insurance and reinsurance disputes. The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright 2005 by the author. Questions or comments may be addressed to the author at bob@robertmhall.com.]

I. Introduction

On September 22, 2005, the Superior Court of New Hampshire handed down In the Matter of the Liquidation of the Home Insurance Company Docket No. 03-E-0106 which has been published in Mealey's Reinsurance Litigation Reports Vol. 16 Issue 11 (Oct. 6, 2005) at B-1. It is worthy of note since it has significant implications for both creditors and debtors of insolvent insurers.

The fact situation of this case is unusual and bears explanation. Home's UK branch was a reinsurer for the AFIA book of business. ACE reinsured Home 100% and agreed to administer the claims of Home's cedents. One of the AFIA cedents, Agrippina, had a clause in its reinsurance contract with Home which allowed Agrippina to cancel back to inception in the event that the Home became insolvent. In addition, the Home liquidation had an unusually long gestation period which allowed both debtors and creditors to obtain a much more precise understanding of the assets and liabilities of the estate than is usually the case.

By the time the facts of this case arose, it was evident that recoveries from ACE on the AFIA business had the potential to be a major asset in the estate. It was equally evident that the AFIA cedents, as general creditors under the New Hampshire priority of distribution statute, were unlikely to recover on their claims against the estate. As a result, the AFIA cedents told the receiver that absent a recovery from the estate outside the priority of distribution statute, that they would decline to file proofs of claim against the estate and/or would seek a cut-through to or other direct recovery from ACE. Failure to file proofs of claim meant that the receiver would be unable to collect reinsurance recoverables on such claims from ACE. As a result, the receiver agreed to pay 50% of the net proceeds of the recoveries from ACE (as much as $72 million) to the AFIA cedents, thus bypassing creditors with a higher priority status.

The above cited decision was on remand from an earlier decision, dated April 24, 2004. The New Hampshire Supreme Court remand was for additional findings of fact. For purposes of this article, the two Superior Court decisions will be considered together.

The Superior Court ruled: (1) that payment of $72 million to AFIA cedents was a practical necessity in order to collect very significant assets due the estate since the AFIA cedents gave notice that they were not going to incur the significant time and expense necessary to file proofs of claim without some financial incentive; (2) there was a real possibility of side deals between the AFIA cedents and ACE which would deprive the estate of reinsurance recoverables; and (3) the receivership code grants the receiver broad power to preserve and collect assets. Each of these rulings will be examined below.

II. Assets of the Estate

The clear tone of the Superior Court was that technical defenses should not stand in the way of the receiver collecting significant assets of the estate. However, the reinsurance recoverables from ACE are not assets of the estate unless and until the estate becomes liable for matching liabilities from the AFIA cedents. Stated differently, the estate must incur substantial new liabilities before it can seek reinsurance recoverables. Even under the best of circumstances, the net worth of the estate is not increased by the deal with AFIA cedents. The only real issue is the shift of assets and liabilities among classes of creditors and debtors.

III. Time and Expense of Proofs of Claim

While at American Re-Insurance Company from 1983 to 1995, I was very active in receivership matters. During the mid-1980's, I organized a team from the financial and law departments to determine the amounts due to and from insolvent cedents and retrocessionaires and to file proofs of claim against estates when appropriate. Since it was and is

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difficult to determine what assets will be available for distribution early in what may be a 20+ year estate, a policy decision was made to file proofs even when general creditor status might make recovery unlikely. This is not a difficult task to perform since normal retrocessional collection activity requires that the necessary information be available. Moreover, this information is required to be filed in Schedule F of a US insurer's financial statements.

Today, many insurers and reinsurers have entire departments devoted runoff activities, which includes insolvencies and other discontinued operations. The upshot is that the AFIA cedents, if they so desired, could have produced the information necessary for proofs of claim against an estate in the ordinary course of business. They declined to do so for tactical reasons since it became evident that the receiver might be willing to pay them, outside the priority of distribution statute, for that which ceding insurers do routinely.

It is obvious that the $72 million paid to the AFIA cedents had no connection to the costs of filing proofs of loss in the estate. It was a partial settlement of the cedents' claims against the estate measured in terms of a percentage of the reinsurance recovered from ACE.

One must wonder whether in the future any cedent to an insolvent reinsurer will file a proof of claim without some financial incentive which will reduce the assets available for higher class creditors. With $72 million as the base line for routine proofs of claim, cedents now have a cash cow to offset their general creditor status.

IV. Possible Side Deals between ACE and AFIA Cedents

The treaty between ACE and the Home contained a standard insolvency clause i.e. that reinsurance recoverables on claims allowed in the receivership proceeding are paid to the receiver without diminution due to the insolvency. This contractual obligation is mirrored in receivership law in many states. There is no question in the reinsurance community that such clauses are effective as written. In fact, reinsurers usually prefer it so in order to avoid collateral claims for reinsurance recoverables by guaranty funds, insureds, claimants and other creditors.

One of the reasons why the import of the insolvency clause is settled law in the United States is Ainsworth v. General Reinsurance Corp., 751 F. 2d 962 (8th Cir.1985). In this case, General Re had reinsured Medallion which had become insolvent. A third party had obtained a $485,000 verdict against a Medallion insured and a claim based thereon was made against the receiver and General Re. General Re settled the claim for $25,000 and obtained a release for itself and Medallion and the claim against the estate was withdrawn. Nonetheless, the receiver contended that General Re had no right to so reduce its obligations to the estate under the insolvency clause and the court agreed:

General Reinsurance would contend that because the direct settlement discharges the liability of the insurer, . . . and obviates any determination of a claim of liability in the insolvency proceeding, General's obligation is similarly discharged. We think the result contended for is inconsistent with the insolvency clause. It seems very clear that the payment has not been made directly to the Receiver, that the reinsurance has been diminished because of the insolvency, and the obligation of the reinsurer has ceased to be an asset of the insolvent estate.

Clearly, the reinsurer has the right to defend against a claim on its merits, but is not given a right to reduce its obligations by taking advantage of the willingness of the insured and the insured's oblige to take less because of the insolvency.

Thus, any reinsurer which settles a claim with a claimant against an estate faces the possibility of paying the claim a second time to the estate pursuant to the insolvency clause. Obviously, reinsurers are loathe to do so.

The Superior Court noted evidence that the AFIA cedents might attempt some sort of side deal with ACE for direct payment, possibly in the form of a cut-through. Theoretically, this would allow the AFIA cedents to bypass the estate and to collect directly from ACE. Cut-throughs are designed to give an insured prospective security with respect to a small or poorly rated insurer. Cut-throughs which change the rights and obligations of the parties long after losses have occurred cannot be effected without

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the agreement of all the relevant parties i.e. AFIA cedents, the Home and ACE.

Even prospective cut-throughs contain significant risk to reinsurers if the cedent becomes insolvent. The claimant can seek recovery for its loss pursuant to the cut-through and the receiver can seek recovery for the same loss under the insolvency clause and pursuant to Ainsworth, supra. Given this risk, ACE would have been foolhardy to negotiate a side deal with the AFIA cedents which did not have the receiver's approval. The bottom line: (a) AFIA cedents were posturing on the side deal in order to achieve compensation outside the priority of distribution statutes; and (b) ACE was seeking a commutation directly with the receiver which did not require the approval of the AFIA cedents.

V. Receiver Authority to Ignore Priority of Distribution Statutes

The Superior Court ruled that $72 million payment to the AFIA cedents to encourage them to file proofs of claim fell within the general powers of the liquidator enumerated in RSA 402-C:25. Among other things, this statute authorizes the liquidator to "do such other acts as are necessary or expedient to collect, conserve or protect its assets or property . . . upon such terms and conditions as he deems best . . . ." The court also ruled that this payment was within the definition of "administrative cost" for purposes of the priority of distribution statute RSA 402-C:44: "the actual and necessary costs of preserving or recovering the assets of the insurer; . . ."

A technical problem with this argument is that described in Section II, supra. The reinsurance recoverables are not assets of the estate until the proofs of claim are filed by the AFIA cedents and approved by the liquidation court. Even then, ACE might have defenses to the claims. See Endnote 2. Therefore, the receiver is paying $72 million for prospective or anticipated assets and not current assets.

However, the more substantive problem arises from the text of the priority of distribution statute itself. The first section of RSA 402-C-44 states:

The order of distribution of claims from the insurer's estate shall be as stated in this section. . . . [E]very claim in each class shall be paid in full . . . before the members of the next class receive any payment. No subclasses shall be established in any class.

ACE argues with substantial vigor that payment of $72 million to a small slice of general creditors to induce them to file proofs of claim: (a) deprives higher level creditors of assets due them under priority of distribution statute; and (b) creates a subclass within the general creditor category and provides this subclass with special benefits not available to others. ACE further argues that general language concerning the powers of the liquidator cannot supersede the specific statutory structure given to the distribution of assets.

The Superior Court's answer to these arguments is that at the end of the day, there are more assets in the estate for policyholder claims. The problem with this sort of "end justifies the means" rationale is that it can subsume many if not most of the specific provisions of the receivership code. If, through some unusual factual twist of fate, it would produce more assets for policyholder claimants, could the receiver ignore voidable preferences and fraudulent transfers and allow non-mutual setoff? If the prime directive is more assets for the estate, why not allow the receiver to re-write contracts after the fact to increase assets and decrease liabilities? If receivership codes are meant to create a balance between the rights of debtors and creators, is an "end justifies the means" basis for a court decision of this magnitude an appropriate vehicle to achieve this balance?

VI. Conclusion

Based on the two decisions of the Superior Court in the Home receivership, the answer to the question posed by this article appears to be that a receiver can ignore a priority of distribution statute when to do so will benefit a favored group of creditors. Nonetheless, there are substantial issues to be posed to the Supreme Court on appeal concerning the need for the receiver to comply with a specific distribution statute and the problems presented by providing a windfall benefit of $72 million to a small slice of general creditors for filing routine proofs of claim in the Home estate.

The Who of Mediation - Part III: Lawyers in the Mix

by Professor Paula M. Young

In late October 2005, I conducted a mediation involving four parties, all of whom were represented at the mediation by counsel. The presence of lawyers at the mediation was itself unusual according to some limited empirical research. Two studies in Arizona, two studies of California courts, and a study of sixteen courts nation-wide indicated that in divorce and child custody mediations held since 1992 to 2001, seventy-two to ninety percent of the mediations involved one pro se party. Thirty-five to fifty-six percent of the mediations involved two pro se parties. Data assembled by the National Center for State Courts showed that lawyers played no role in mediation in forty-three percent of the 205 court-related divorce mediation programs studied. Other sources report that up to eighty-eight percent of family law cases, not necessarily in mediation, involve one pro se party. Moreover, sixty-nine to seventy-two percent of cases filed in a Wisconsin urban area court involved at least one pro se party. If a court referred these parties to mediation, they likely did not retain counsel to represent them in the process.

Lawyers as Spoilers?

Some mediators prefer that lawyers do not participate in mediation. They consider lawyers potential "spoilers" because the traditional adversarial role they play, and perhaps their mindset, may keep them from exploring creative solutions to the dispute. Some mediators also believe lawyers take an adversarial point of view to information gathering and exchange. Accordingly, lawyers may view information as simply enhancing a client's legal case and should, therefore, be used for winning. It should not be shared except at trial and certainly should not be shared to explore value creating trades or other settlement options. Other commentators contend that lawyers compromise the mediation process by jealously viewing it as an intrusion into their domain of competence. They also argue that lawyers cannot adapt "professionally to a situation of controlled and defused, rather than polarized and contentious, conflict."

Lawyers' Views of Mediation

These lawyer attitudes found expression in some recent research. Beginning in 2000, Julie Macfarlane, a Canadian law professor, analyzed forty lawyers working in Toronto and Ottawa about their attitudes about a new rule requiring mandatory mediation of commercial cases. She developed five "ideal types" to characterize the comments of the lawyers. The "pragmatist" viewed mediation as an extension of the adaptive settlement role these trial lawyers played before courts required mediation. Mediation, they believed, offered an early opportunity to assess and prepare a case, to limit the rising costs of litigation, and to provide to business clients the rapid resolutions of disputes they sought. Yet, these lawyers still saw themselves as taking the lead in the mediation process.

"True believers," another group indicating positive attitudes towards mediation, used quasi-religious metaphors to talk about how mediation had affected their orientation to practice strategies and conflict resolution. They felt "converted" or "transformed" in the ways they sought to meet clients needs and expectations and in identifying the changes they had experienced personally and professionally. They viewed mediation as a new form of adversarial process and recognized the distinct skill set it required. A true believer often ensured that his or her client played an important role in the mediation process. They were more likely to use non-lawyer mediators who could handle and appreciate the heightened emotions of the parties to the disputes.

The "instrumentalist" used mediation simply to advance the client's unchanged adversarial goals. The instrumentalist either used the tool strategically to fish for information or to reduce the expectations of the opposing party. The lawyer played the dominant role in the process. He was more likely to use an evaluative mediator and was surprised if the process resulted in non-monetary or integrative, rather than distributive, solutions.

The "dismisser" regarded mediation as the latest fad, offering little over traditional unassisted lawyer-sponsored negotiation. He acknowledged that mandatory mediation required earlier preparation of the file, but viewed this development as an intrusion on his or her

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autonomy and control. The dismisser often viewed the utility of the mediation process as providing a "reality-check" for his unruly client or for opposing parties who, at least from his viewpoint, were poorly represented. The dismisser sought evaluative mediators with judge-like authority.

Finally, the "oppositionist" viewed mediation as a danger to the legal system, to the role of adversarial dispute resolution, and to his or her role as a winner-takes-all advocate. He or she viewed mediation as a response to government inefficiencies and court back-logs. He or she viewed mediators as unskilled and manipulative. Accordingly, mediation felt risky for him or her because of the perceived loss of control.

Several factors seemed to affect these attitudes. Lawyers who had had more experience in mediation tended to view it more favorably. Also, when the leadership in the local legal community strongly supported mediation, lawyers in that community also tended to show more support for the process. In addition, attitudes of lawyers reflected the attitudes of the businesses or industries from which they drew their clients. Some of those clients were more litigious and some more settlement-oriented.

Macfarland questioned whether we could expect to see over time more convergence in the attitudes of lawyers. With time, they would participate in more mediations and become more aware of the different skill set mediation requires that is distinct from the traditional positional bargaining skills they already have. At the time of the research, one lawyer explained: "I'm still at a loss as to what role I really play."

A recent study by the ABA Committee on Dispute Resolution examined what factors affect an attorney's advice to clients to try ADR. At least sixty percent of the 2,330 attorneys surveyed had served as an advocate on behalf of a client in a case using ADR or they had served as a third-party neutral. The survey concluded that if an attorney had any experience with ADR, he or she was much more likely to recommend ADR to a client. The article concluded by recommending that more attorneys be encouraged to participate in ADR, with the message of the study seeming to be "try it, you'll like it."

A study conducted in 2001 of Arizona lawyers, most of whom had tort or personal injury practices, showed that lawyers were less likely to discuss ADR options with their clients or opposing counsel if they were less familiar with the processes. Attorneys who expected mediation to produce earlier and satisfactory settlements also thought the benefits of ADR outweighed any costs associated with the processes. Less knowledgeable attorneys were less likely to believe that ADR would produce benefits for their clients.

Taken together, the studies suggest that mediation conducted by skillful mediators sells itself. Over time, lawyers who have good experiences in mediation and feel competent in the new process will recommend its use to clients. The research may also suggest that as lawyers become more skillful in the process they may be less reliant on mediators offering evaluative or judge-like styles.

The Vanishing Trial

A recent study shows that nearly all federal cases settle before trial. In 1962, judges and juries resolved 5,802 civil cases, defined as tort, contract, prisoner, civil rights, labor, and intellectual property cases. These trials constituted about 11.5 percent of the dispositions of the 50,320 cases filed with the courts. By 2002, parties had increased civil case filings to nearly 259,000 – an increase of 146 percent over 1962 filings-- but the dispositions by trial fell to 1.8 percent. These statistics, taken from data compiled by the Administrative Office of the United States Courts, show that federal judges tried fewer cases in 2002 than they did in 1962. Judge Patrick Higginbotham reported that in 2001 "each United States District Court judge presided over an average of just over fourteen trials a year. Over half of these trials lasted three days or less in length and 94 % were concluded in under ten days." In other words, most judges spent less than forty-two days presiding over trials. Each judge handled six "other contested matters," but taken together, the traditional trials and the "other contested matters" averaged a day or less in length. In 1962, the average federal judge conducted 39 trials each year.

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State court statistics give a similar, but yet incomplete, picture. Based on data provided by the National Center for State Courts for 22 states, jury trials fell by 33 percent during the period of 1976 through 2002. Bench trials fell to 15.2 percent of total civil dispositions in 2002. Scholars and commentators are not quite sure what to make of the data. Some suggest that increasing use of ADR, especially mediation, explains the drop in the number of trials. What the data says to me is that lawyers play a more significant role as agents of settlement than as litigation advocates. I explain to my students that they will far more likely use over their lifetimes the negotiation and mediation skills that I teach than they will likely use the rules of evidence or their appellate advocacy skills.

Lawyers' Increasing Sophistication in Mediation

Lawyers are increasingly more skillful in representing clients in mediation. Many lawyers are now trained as mediators. Law schools increasingly teach the skills required to represent clients in mediation. A recently published book finally puts in one place much of the good advice on representing clients in the process. Dwight Golann has also authored a new book called Resolving Disputes that he says reflects the perspective of lawyers representing clients in ADR processes. Several law firm websites now have pages dedicated to preparing clients for mediation.

Some lawyers are so skillful that they are "borrowing" the mediator's power by influencing the structure of the process; getting the mediator to focus on the issues identified by the lawyer; getting the mediator to support a "hard bargaining" strategy; asking the mediator to explore imaginative options; using the mediator's neutrality to enhance the attractiveness of the client's offer; asking the mediator for information about the other side; using the mediator to educate an unrealistic opponent; and asking the mediator to apply impasse-breaking techniques. At least one scholar argues that mediation's adoption of attorney dominance of the process, evaluative interventions, marginalization or abandonment of joint sessions, and a focus on monetary settlements represents a successful adaptation of the process to the needs of "litigotiation."

Other scholars have found that "lawyers believe [] their primary role in mediation is to provide a check on unfairness" and to protect their clients from undue pressure from the mediator or "unfair bargaining advantage that the other party may have." Studied lawyers reported that in mediation they tried to reduce conflict, act reasonably, and facilitate settlement. Based on the research, these scholars ask us to "bring in the lawyers" to mediation.

Borrowing Lawyers' Power

I view the presence of lawyers in mediation as an opportunity to partner with skilled colleagues. In the last mediation I conducted, I intended to borrow their power. My appointment to the case came through a sophisticated country judge sitting in a courthouse in an adjacent county. The case involved the sale of a private residence. The buyer, a woman nearing retirement, had hoped to return to her central Appalachian roots after spending most of her life working in a manufacturing plant in northern Virginia. The building inspection, however, came back with a comment about the aging roof and cracks in the foundation. It spooked her a bit. Then an appraiser not familiar with the realty market in that county provided an appraisal for the bank that was about one-fifth lower than the price the woman had offered on the house. Now, she felt exploited. Without an agent she trusted to help her work through these emotional responses, she backed out of the deal.

When I first moved to Virginia, I was shocked to find that lawyers participated in every, or nearly every, real estate closing. At first, I guessed that lawyers had maintained a strong lobby that had kept this part of the real estate business in their hands. This past summer, I learned from another country judge – who presides in a courthouse located about thirty-five miles from the Cumberland Gap – that titles to real estate located in Virginia are especially complicated. Some of them may go as far back as the first settlements in the New World. Jamestown, after all, is a popular tourist attraction that people visit after they tour the old Williamsburg colony, Monticello, and the Yorktown battlefield. A lawyer

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who had joined us for lunch exclaimed that some of his biggest malpractice worries related to the accuracy of his title opinions.

The revised Model Standards of Conduct for Mediators, a set of aspirational ethical guidelines, provide that the mediator may only accept cases in which he or she has the competence needed to satisfy the reasonable expectations of the parties. The mediator must discuss the situation with the parties and take appropriate actions, if he or she learns during the course of the mediation that the mediator cannot conduct the mediation competently. Based on the results of the discussions with the parties, the mediator may need to withdraw or seek appropriate assistance. Virginia's mandatory Standards of Professional Conduct contain a similar provision.

Thus, when I got the court-appointment to mediate this real estate case, I quickly called the lawyers for the four parties – the seller, the breaching buyer, the seller's listing agent, and the buyer's agent – to advise them that (1) I am not licensed to practice law in Virginia; (2) even though four states have licensed me to practice law, I am on inactive status in each; (3) I had never handled a real estate lawsuit while I was actively practicing law; (4) my code of professional ethics precluded me, as a mediator, from giving legal advice, and (5) if I gave legal advice, I was likely engaging in the unauthorized practice of law. Did they still want me?

As the day of the mediation approached, I had a few butterflies in my stomach. If one or more of the lawyers expected me to evaluate the legal strengths of the parties' cases – something I would hesitate to do anyway and would only do after providing certain procedural safeguards – I was not going to meet their expectations. But I hoped that I could enlist the lawyers to provide their own candid analysis of their clients' cases. They would provide the legal analysis and advice as I played quite consciously "dumb."

Some of you may recall the character, Joseph Miller, played by Denzel Washington in the film Philadelphia. He plays the lawyer for another lawyer, Andy Beckett, whose firm has dismissed him from a high-paying, high-status job when his superiors suspect he has AIDS. Throughout the film, Miller says: "Explain this to me like I'm a six year old." And so, throughout the mediation I asked the lawyers to explain relevant Virginia real estate law to me "like I was a six-year old." Of course, I could guess at the law, but the real audience was the explaining lawyer's client, the other lawyers' clients, and the lawyers. I set up this interaction in a private meeting with the lawyers after each client had made an opening statement. I asked them to help me by explaining their legal theories without rancor, without escalating the conflict, and with some candor. I probed their presentations with general questions. I would then ask if a certain theory or piece of evidence created a "soft spot" in that client's case. The lawyers felt secure enough, in joint session, to make concessions about the strengths of their cases or defenses, typically through a shoulder shrug or a slight nod "yes" or the body language signally "maybe." Without this give and take among the lawyers, we would not have settled the case. In other words, the lawyers did the heavy lifting that day. I just suggested to them how to do the lifting and when I needed it done.

Using Pre-Mediation Questionnaires

Prior to the mediation, I circulated to the lawyers a confidential pre-mediation questionnaire modeled on a form developed by Richard Sher, a well-known St. Louis mediator. It asks the lawyers to disclose the status of the case in the litigation process and whether any dispositive motions are pending. It asks about the status of discovery and how much more discovery the parties need to do. It asks about the facts of the case, the claims and defenses of the parties, the disputed issues of liability or damages, the amount and characterization of damages sought, the attorneys' fees incurred to date, and the expected fees the client will incur getting the case to trial. Next, it asks about the history of negotiations and why that lawyer believes the negotiations have failed so far. It then asks for a candid assessment of the "soft spots" in the claims or defenses and whether the client has sufficient information to form a realistic assessment of the legal case or the settlement options. If not, the questionnaire asks the lawyer for what additional information the client needs.

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It also asks about settlement authority, who will be attending the mediation, and for any additional information the lawyer thinks may be helpful in settling the case. This form helps the lawyer, the client, and me get ready for the mediation with a structured analysis of the case.

Representing Clients in Mediation

When I teach representational skills to my students, we consider the phases of the mediation process:
(1) counseling your client about mediation;
(2) preparing your client for mediation;
(3) preparing your case for mediation; and
(4) appearing in pre-mediation, mediation, and post-mediation sessions.

This article will focus on the first three phases of the process. A later column in this series will consider in more detail the role of lawyers in the mediation itself.

Counseling the Client about Mediation
In counseling a client about mediation, a lawyer may wish to cover the following topics:

- The advantages of mediation over litigation in potentially reducing the cost of and time expended in resolving the dispute.
- The disadvantages of mediation in that the outcome is not binding unless reduced to an enforceable agreement.
- That mediation creates no legal precedent.
- Whether the case is "ripe" for mediation.
- Whether the client has sufficient information or discovery to make informed decisions at the mediation.
- Whether the parties should request a pre-mediation conference.
- The scope of confidentiality provided by rule or statute and any additional expectations about confidentiality that the parties may need to cover in the agreement to mediate.
- Whether the parties need a standstill agreement.
- The choice of mediator.
- The location of the mediation.
- Who should attend the mediation and whether the client should bring an expert witness, a fact witness, other supporters, or anyone else.
- What pleadings, demonstrative evidence, or other information the client or lawyer should bring.
- The stages of the mediation process.
- The distinction in the role of a mediator compared to a judge or arbitrator.
- The techniques mediators may use.
- When mediation may not be appropriate for the situation because of domestic abuse, extreme imbalances in bargaining capacity, or when the client is impaired by drugs or alcohol.
- That mediation is a voluntary process that the client may terminate at any time.

Preparing the Client for Mediation
The lawyer may also wish to:

- Explain what is expected of the client during the mediation.
- Remind the client that the object of mediation is not to "win," but to reach a satisfactory resolution. Remind the client that mediation is simply a continuation of earlier negotiations.
- Encourage the client to value in the mediation process the pre-existing relationships between the parties or the improved relationships mediation can create.
- Ensure that the client or client's representative has authority to settle.
- Discuss who will give each portion of the presentation and the role the client will play in the overall process and decision-making.
- Advise the client to develop a working relationship with the mediator, use the mediator as an ally, and protect the client's credibility and trustworthiness with the mediator.
- Coach the client on more effective communication styles. Ask the client to avoid confrontational or adversarial communication, if possible Encourage professional and courteous behavior and the use the language of persuasion.
- Work with the client to prepare an opening statement.
- Prepare a confidential memo for the mediator if he or she has not requested case information in another form.
- Have the client view a videotape of a mediation session.

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Preparing the Case for Mediation

The lawyer must also develop a strategic negotiation plan with the client. The lawyer will likely:

- Discuss the costs, risks and benefits of not reaching a settlement.
- Discuss the best result each party can hope for in litigation.
- Discuss the worst result that could happen in litigation.
- Ensure that the client knows the facts and issues of the case.
- Examine the legal and factual strengths and weakness of each party's case.
- Explore the client's position, goals, and interests. Establish a list of priorities, possible trades, and rapport-building "throw away" items.
- Surmise the opposing party's position, goals, and interests.
- Explore the client's emotions that the dispute, the other party, or aspects of the mediation may trigger. Allow the client to express those emotions before the mediation, but reassure the client that a skillful mediator will help the client manage the emotions and their appropriate expression during the mediation.
- Advise the client on how to best put forward his or her interests.
- Advise the client about any confidential information which should, as a matter of strategy, not be disclosed to the other side or disclosed only when strategically appropriate.
- Help the client set reasonable expectations for mediation.
- Identify sources of objective criteria that will allow principled bargaining.
- Prepare the client to expect unforseen evidence or arguments that may arise during the course of mediation.
- Prepare the client for questions the mediator or the other party may pose to him or her.
- Identify possible impediments to a negotiated solution, including relationship issues, data or information problems, conflicting interests, structural sources of the conflict, and value-based sources of conflict.
- Brainstorm possible solutions to the situation, especially focusing on solutions that can satisfy the interests of both parties. Ask the client to identify and list all the responses he or she can make to satisfy the other party's interests.
- Ask the client to identify and list all the responses the other side can make to satisfy the client's interests.
- Determine whether any limits exist on a party's ability to settle.
- Discuss negotiation styles.
- Develop an opening offer strategy.
- Practice, in role-play, the agreed strategies and styles.

How lawyers prepare clients for mediation depends on their client representation skills, their experience with the process, their attitudes towards mediation, their expectations about the process, and the client's expectations about the process. Over ten years ago, I represented a client in mediation for the first time. Instantly, I was a "true believer." After that transformation in perspective and professional goals, I have spent the last decade assembling the skills I need to teach students about mediation, represent clients in the process, and serve as a skilled neutral. While mediation may no longer be the latest fad, lawyers still have plenty to learn about effectively using the process on behalf of our clients.

Meet Your Colleagues

Joe DeVito

Suzanne Sahakian

Suzanne Sahakian is a partner with the law firm of Dykema Gossett PLLC in Detroit, Michigan, where she leads Dykema's Insurance Team. Her practice focuses on insurance company insolvencies and guaranty fund issues on a state and national level, complex commercial litigation, insurance coverage disputes, and appellate work. She serves as general counsel to the Michigan Property and Casualty Guaranty Association and also represents other state insurance guaranty funds.

Suzanne is a member of the NCIGF Legal Committee and Amicus Subcommittee and participates on NCIGF coordinating committees. Her presentation at the 2004 IAIR Insolvency Workshop on "Delay Issues In Contested Receiverships" was based on experiences Michigan faced during the lengthy Legion rehabilitation. Her work with the Michigan guaranty association has resulted in a number of significant appellate decisions on net worth, late-filed claims and exhaustion. She has argued cases on appeal in the Michigan Court of Appeals, the Michigan Supreme Court and the U.S. Sixth Circuit Court of Appeals.

Prior to her law career, Suzanne was a ballet dancer, studying in Boston and with American Ballet Theatre in New York City (she still has a ballet barre in her home). She has an A.B. in English from the University of Michigan, an M.A. in English from Bryn Mawr College, and her law degree from Georgetown University. She is an avid photographer and the mother of three -- a makeup artist, an eclectic musician, and a freshman high school athlete. Her husband, a former practicing lawyer, writes novels and teaches college writing and fiction.

TOM RIDDELL

Tom Riddell is a partner of KPMG LLP, London office. He is part of a team of four partners and 34 staff (mainly accountants and actuaries) who specialise in insurance run-off work. The team has been specialising in run-off since 1990, initially as a result of appointments as office holders on insurance insolvencies in the London market, and in the last few years providing other client advice including advising on solvent schemes.

Tom's particular work interests have been as liquidator of National Employers' Mutual General Insurance Association (closed this year), and as one of the Scheme Administrators of English & American Insurance Company Limited. This company has gross liabilities of US$1.2bn, (predominantly US exposures), and is not expected to be finished for another four or five years.

Tom is the provisional liquidator of HIH companies in the UK – this provides very interesting work, in close co-operation with the Australian Liquidators. The group's collapse was subject to a Royal Commission. Many unusual transactions were involved, including financial reinsurance arrangements with a number of reinsurers in various jurisdictions.

In relation to solvent schemes, Tom published an article in the Spring 2005 edition of the American Bar Association's Tort Trial & Insurance Practice Excess, Surplus Lines and Reinsurance Committee Newsletter, which was predictive of the issues raised in the recent BAIC judgment. He is very interested in this topic and supportive of the scheme solution for London market run-offs, provided of course the creditors are treated fairly.

Tom has a commerce degree from the University of Melbourne, and a law degree from the University of Queensland. He worked as a school teacher in Australia and Papua New Guinea before becoming a chartered accountant. He moved to London from Sydney in 1997. There is said to be a "honeymoon period" for people who move to London, but it remains Tom and his wife Beate's favourite city, so no more moves are planned.

Meet Your Colleagues

Joe DeVito

JOSE L. RIVAS

Jose Rivas is Executive Vice President of Regulatory Technologies, Inc., (RTI) a multi-disciplinary firm widely experienced in all facets of the insurance industry. Mr. Rivas' firm works with regulators in insurance supervision, rehabilitation and liquidations. RTI also has a vigorous targeted market conduct exam practice, which Mr. Rivas serves as examiner in-charge. In addition, Jose and RTI provide superior consulting services, and due diligence for the insurance marketplace.

Jose worked as a claim executive for insurers for over 18 years with industry leaders such as Progressive, AIG and GMAC. He has in-depth knowledge of all commercial and personal lines business, including regulatory and legal issues that govern them. Over the past years, he has been responsible for a wide range of assignments in the receivership arena including: loss portfolio assessment and evaluation, run-off operations, claims audits, subrogation recovery, significant exposure to health and disability claims, dispute resolution, reinsurance and claims management.

Mr. Rivas is an active member of IAIR working on his Accredited Insurance Receiver (AIR) certification in practice areas of claims/guaranty funds, reinsurance, and asset management. Mr. Rivas is also a participant in the ClaimNet project spearheaded by the NAIC.

Mr. Rivas has a BA degree in Business Administration. Jose holds the professional designations of AIC and INS. He was born in Cuba, lived in Mexico and Spain, and speaks Spanish. He is married to Cyndi and has one daughter Madison, a freshman in college. In his spare time, Jose enjoys golf, white water rafting and travel.

Richard W. Schuermann, Jr.

Richard (Rusty) W. Schuermann, Jr. is a partner in the law firm of Kegler, Brown, Hill & Ritter, Co. LPA located in Columbus, Ohio. Rusty has worked for the past eighteen (18) years with the Ohio Department of Insurance and in the capacity of Special Counsel to the Ohio Attorney General on numerous insurance company insolvencies and related supervision, rehabilitation and liquidation proceedings. He also regularly represents other clients on regulatory matters involving insurance and transportation issues at both the state and federal levels. Rusty and his partner, John P. Brody, also an IAIR member, have provided legal counsel to the Ohio Liquidator on all facets of liquidation and rehabilitation-related matters involving property and casualty and health care companies, including reinsurance, workers' compensation, auditor and D&O litigation, as well as matters involving third-party administrators and agents. They have litigated matters involving liquidation issues in both the state court, including the Ohio Supreme Court, and federal courts. They have recently been involved in litigation advocating that the Ohio Liquidator cannot be compelled to arbitrate liquidation matters according to a decision issued by the Ohio Tenth District Court of Appeals, Benjamin v. Pipoly (2003), 155 Ohio App. 3d 171, 800 N.E. 2d 50).

Rusty has also been involved in legislative efforts involving liquidation issues, as well as transportation matters. Rusty has also worked with other departments of insurance on regulatory and licensure matters for national clients of the firm. The firm has a strong government and administrative law practice and is the Ohio member of the State Capital Global Law Firm Group: 50 independent United States law firms located in their respective state capitals and 50 international member firms with practices in the capital cities and major commercial centers of other countries around the world.

Rusty has a Juris Doctor degree from

Meet Your Colleagues

Joe DeVito

the University of Dayton School of Law and a Bachelor of Science from the University of Dayton. Rusty currently serves on the Board of the Central Ohio Diabetes Association, a cause to which he and his wife Lauren have been dedicated for many years. Rusty has served on other state and local boards/commissions and is certified and presides as a local judicial magistrate. Rusty and Lauren reside in Columbus and he enjoys coaching his daughters, Emilee and Hadley, in softball and basketball and is an avid bicyclist. He is also considering playing more golf now that he has become familiar with Phil Curley's rules of golf distributed at the February IAIR meeting in Orlando.

News from Headquarters

Paula Keyes, CPCU, ARe, AIR, CPIW, DAE
Executive Director

IAIR Has A New Board of Directors

First Row: Mary Cannon Veed, AIR; Joseph J. DeVito, AIR, President; Trish Getty, AIR, Immediate Past President; Jody S. Hall; Patrick H. Cantilo, CIR-ML. Second Row: Daniel L. Watkins, CIR-ML; William Barbagallo, AIR; Douglas A. Hartz; Edward B. Wallis; Douglas L. Hertlein; Dorothy Cory-Wright; Francine L. Semaya; Daniel A. Orth, III; Harry L. Sivley, Jr., CIR-ML; and William Latza, General Counsel. Missing: Francesca G. Bliss

At the Annual Meeting of the association on Sunday, December 4, 2005 in Chicago, recent designees of IAIR were recognized:

Daniel L. Watkins, CIR-ML, Chair of the Accreditation and Ethics committee congratulates Frederich J. Bingham, CIR-ML; Mary Cannon Veed, AIR-Legal; Robert Fernandez, AIR-Asset Management; and Dana W. Rudmose, AIR-Accounting/Financial Reporting. Not in attendance, but acknowledged was Jimmy D. Blissett, AIR-Claims/Guaranty Fund, Accounting/Financial Reporting and Asset Management.

Recognition was also given to retiring Board of Directors: Kristine Johnson I. George Gutfreund, CA, CIRP, CIR-ML Vivien Tyrell. And resigning committee chairs: Finance Committee – Joseph J. DeVito, AIR Education Committee – Kristine Johnson And the 2005 President Trish Getty, AIR

IAIR thanks each of these individuals for their hard work, dedication and service to the association.

The IAIR display booth

The IAIR display booth has a new look! For those of you familiar with the display booth, which is used at all NAIC quarterly meetings, the new look is a definite improvement. This display is our face to the world at the NAIC meetings. We use it to promote membership, our designation programs, educational seminars and other happenings within the association.

Iair Members

You Can Now Update Your Online Membership Information!!!

The IAIR website redesign now allows members to update their individual membership information on the website. To do this, go to www.iair.org to Members Services Log In at the bottom of the page. Enter your User Name and Passcode. The first option will be My Membership Information. Change any of the data desired and click the SAVE button at the bottom of the page. Your new information is now available.

To verify that the new information displays properly, go to the Home button on the bottom of the page, then to Membership at the top of the page. From there click on Membership Directory in the middle of the page and check your entry.

Please note that the 2006 Membership Directory will use the data as it appears on the website Membership Directory, so please check your data immediately and keep it updated as necessary.

If you have any questions, contact the IAIR headquarters at info@iair.org.

INSOL INTERNATIONAL CONFERENCE DIARY

Scottsdale is located in central Arizona in the heart of the lush Sonoran Desert.

Scottsdale 2006 will be held at the AAA Five-Diamond Fairmont Scottsdale Princess which reflects the dynamic environment that surrounds it – where sun-washed stone and bright green cottonwoods rise up to meet the pale-blue sky and majestic purple mountains. The hotel is one of the 'Leading Hotels of the World'.

What better venue could we have chosen for our Annual Regional Americas conference.

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Cape Town image courtesy of South African Tourism

INSOL 2009 sees Vancouver as our host city, situated on British Columbia's beautiful coastline. Vancouver is one of the most scenic cities in the world. The Congress will be held at the Vancouver Convention & Exhibition Centre, which has a spectacular waterfront location. Our two Congress hotels will be the Pan Pacific Hotel and the Fairmont Waterfront both superb hotels to stay at and both connected to the Convention Centre.

Vancouver has quite a mild climate but the coastal mountains that form the backdrop to the city allow for skiing and hiking on Grouse Mountain most of the year so you can ski in the morning and go to the beaches in the afternoon.

Make sure you have the dates for Scottsdale 2006 in your diary.

For further information please contact Tina McGorman, Conference Manager, at tina@insol.ision.co.uk