The Insurance Receiver

PROMOTING PROFESSIONALISM AND ETHICS IN THE ADMINISTRATION OF INSURANCE RECEIVERSHIPS

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Feature Articles

Departments

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President's Message

Joseph J. DeVito, MBA, CPA, AIR – Accounting/Financial Reporting, Reinsurance and Claims/Guaranty Funds

Joseph J. DeVito

Success is the achievement of a favorable or desired outcome. I believe that the road to success for IAIR during 2006 was well traveled by the dedicated members who have led us down new paths in the insurance community. We have experienced a "meeting of the minds" through programs that are designed to educate and integrate the various organizations that service the industry and protect the consumer. We continue to study the positive impact that our organization has and can have on receiverships.

It seems like only yesterday that I was composing a message thanking the outgoing Board Members and welcoming the new for 2006. Well, it's that time of year again and I find myself a little melancholy but also very excited….it's been such a rewarding year and I've enjoyed working with everyone! Since I will be continuing my Presidency for a second term, I have the pleasure of developing new relationships and exploring new paths. I am a proponent of a two-year term for this position because I believe that continuity plays an important role in the strides we are making in the insurance industry. The outgoing members can rest assured that their messages have been heard and will resonate into 2007…. many heartfelt thanks to Frankie Bliss, our outgoing Secretary and continuing chair of the Bylaws committee. Frankie has dedicated the past six years to the Board of Directors and we hope that she will take an active role in future IAIR activities. We will also deeply miss Dan Orth who has been a dedicated Board member and second Vice President. Dan is my personal "Body Guard" and a close friend. Dan has kept us on our toes for the past six years but always with the greatest degree of sincerity and integrity. Dan will continue to work on the A&E Committee so we will still be seeing a lot of him in 2007. How do I express my gratitude to Trish Getty? Trish is a well-known figure in the community…she's been a hard act to follow as President of IAIR and she's still hard to keep up with! Trish's unending strength and dedication has advanced the efforts of IAIR to the benefit of our members and of the insurance industry, as a whole. I am confident that Trish will be an integral part of our organization in the future and we commend her work with AIRROC as an Executive Director. Thank you all!

Turning to our newly elected Board members: Holly Bakke, Lowell Miller, James Kennedy and Ken Weine and our re-elected Board members: Francine Semaya and Dan Watkins...we welcome you and extend our appreciation for your interest in serving IAIR. Never hesitate to reach out to any and all members…we are all part of the same team!

Here are the officers for 2007:

Joe DeVito, AIR
President

Dan Watkins, CIR-ML
First Vice President

Francine Semaya
Second Vice President

Doug Hertlein
Secretary

Doug Hartz CIR-ML
Treasurer

One thing I've learned during my first term as President is that we have some very creative souls within our organization. Patrick Cantillo worked hard and quite creatively, I must say, along with some of our other members to successfully conduct the workshop held in February 2007 in Tucson, Arizona. Among the highlights: breakout sessions in information technology, asset management, document management, and human resources; update in legal, international, Model Act and Guaranty Funds; schemes of arrangements; update on Washington, DC; Guaranty Fund discussion; rehabilitation vs. runoff, breakout session for SAP, GAAP, GRID and financial reporting along with other relevant topics.

Under the direction of Mary Cannon Veed and Dan Orth, the new Designation Standards Committee is developing a training curriculum and testing mechanism for the accreditation program. We hope to introduce this curriculum in 2007.

We've got the momentum and we're moving forward with our state training seminars, "From Troubled Company to Receivership" and plan to conduct two or three new sessions in 2007. We are dedicated to continuing our shared vision and collaborative mission between the Receivers and the Guaranty Associations through our Guaranty Fund Liaison committee that is co-chaired by Doug Hertlein and Ed Wallis. Please give your thoughts, assistance and support to them in achieving the goals of these groups.

IAIR will be having a hospitality suite opened in New York for the first time and we look forward to seeing you there in March! Anyone interested in sponsoring the hospitality suite or any of the roundtable sessions, please let us know.

Before I close…thank you, Paula Keyes!

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Garamendi's Message Still Echoes in the Halls of Congress

By James Lee Witt and Admiral James M. Loy (USCG Ret.)

Last year, then-California Commissioner of Insurance John Garamendi took a bold step to alert America that, as a nation, we are not as prepared as we should be for the consequences of catastrophe. By convening a summit of the nation's insurance regulators for the purpose of preparing for and protecting America from catastrophes, Garmendi brought focus to an issue that haunts first responders, insurers and catastrophe experts.

James Lee Witt

Admiral James M. Loy

The fact that Commissioner Garamendi was joined by top regulators from New York, Florida and Illinois underscored the nationwide concern and acknowledged the reality that catastrophes are not contained and isolated events. These policymakers rightfully questioned whether we will have the mechanisms in place to enable families to be prepared for and protected from catastrophes when they strike.

A coalition of more than 150 organizations representing first responders, emergency personnel, building code experts, insurers and others began calling for the creation of a privately funded national catastrophe fund even before the onset of the devastating hurricane season of 2005. For these organizations, Garamendi's summit was an acknowledgement that regulators were hearing their call.

Mr. Garamendi was elected to serve as California's Lieutenant Governor. That's a public seal of approval for his vision. Hopefully, other regulators and elected officials will learn from his example and follow his lead.

The national economic impact of catastrophe is shouldered not by the residents of individual states, but by all Americans. Earthquake faults run all along the West Coast and throughout the Midwest, while hurricanes run throughout the Gulf and eastern shores. Had state, local and federal officials paid closer attention to preparing for natural disasters, the consequences from the 2005 Hurricane Season may have been less tragic.

As California marked the 100th anniversary of the great earthquake of 1906, it is worth noting that if an earthquake strikes today at the same location with the same magnitude as that of only a century ago, the likely economic losses are estimated to exceed $400 billion. Financial recovery in the wake of such a catastrophic event would be an unrivaled national economic challenge for our families, our communities and our nation.

San Francisco's experience in 1906 is thought by many Americans as the largest of all earthquakes to hit the United States, but the fact is, San Francisco's earthquake doesn't even rank in the top ten strongest earthquakes in US history.

Eight of the top ten earthquakes to rock the US occurred in remote parts of Alaska. But, two enormous earthquakes occurred along the New Madrid Fault, right in the middle of our nation, in 1810 and 1811. Had the Richter Scale been in use at the time, these quakes would have registered an eight. Their tremors were felt from Mississippi to Michigan, from Pennsylvania to Nebraska.

When the New Madrid series of earthquakes struck, our heartland was vast and uninhabited. Were either of the New Madrid quakes to occur today, the damage would be enormous.

The point is, catastrophe can strike anywhere in America. Catastrophe preparedness is not an issue for our coastlines alone; it is an issue for every American in every state.

Thankfully, America was spared from devastating hurricanes in the 2006 hurricane season, but we cannot forget that the 2005 hurricane season brought with it the most extensive and expensive damages our nation has ever incurred. In fact, 8 of the most costly catastrophes in US history occurred in the past 4 years. As the National Geographic noted at the outset of the 2005 hurricane season, "The mighty Atlantic conveyor belt is in high gear, and sea-surface temperatures are up. That means we could be in for decades of coast-crushing hurricanes."

With every possibility that America will be facing years of record-shattering catastrophes, the commissioners who participated in last year's catastrophe summit were absolutely right to call for a national financial backstop standing behind the private insurance market to help us repair, rebuild and recover from catastrophe.

The creation of a national catastrophe fund would assure the viability of the private market and its ability to provide coverage to families, businesses and communities.

Such a catastrophe fund would function much in the same way as personal IRAs. Insurers would be required to deposit a portion of homeowners insurance premiums into the fund, where they would grow free of taxes, just like in an IRA. And, just like IRAs, those funds could only be tapped for very restrictive purposes. The fund would only be used to help pay claims in the aftermath of a true catastrophe.

A national catastrophe fund would represent a true private-public partnership. All monies in the fund would come from the private sector. The government would offer important tax incentives so that funds could accumulate and be used to improve consumer protections to make sure people are better prepared for catastrophes, strengthen prevention and mitigation programs through stronger building codes and better enforcement, and promote effective coordination amongst all first responders - all of which can save lives and better protect property.

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Shortly after the national catastrophe summit, H.R. 4366, the Homeowners Insurance Protection Act of 2005, was introduced in the US House of Representatives by Reps Brown-Waite and Shaw.

That bill was discussed as a part of two hearings regarding catastrophe preparedness before the House Financial Services Committee. Although specific formal action by the Committee did not occur before the Congress ended its session, there is every reason to believe that the new Congress will take action on a similar measure.

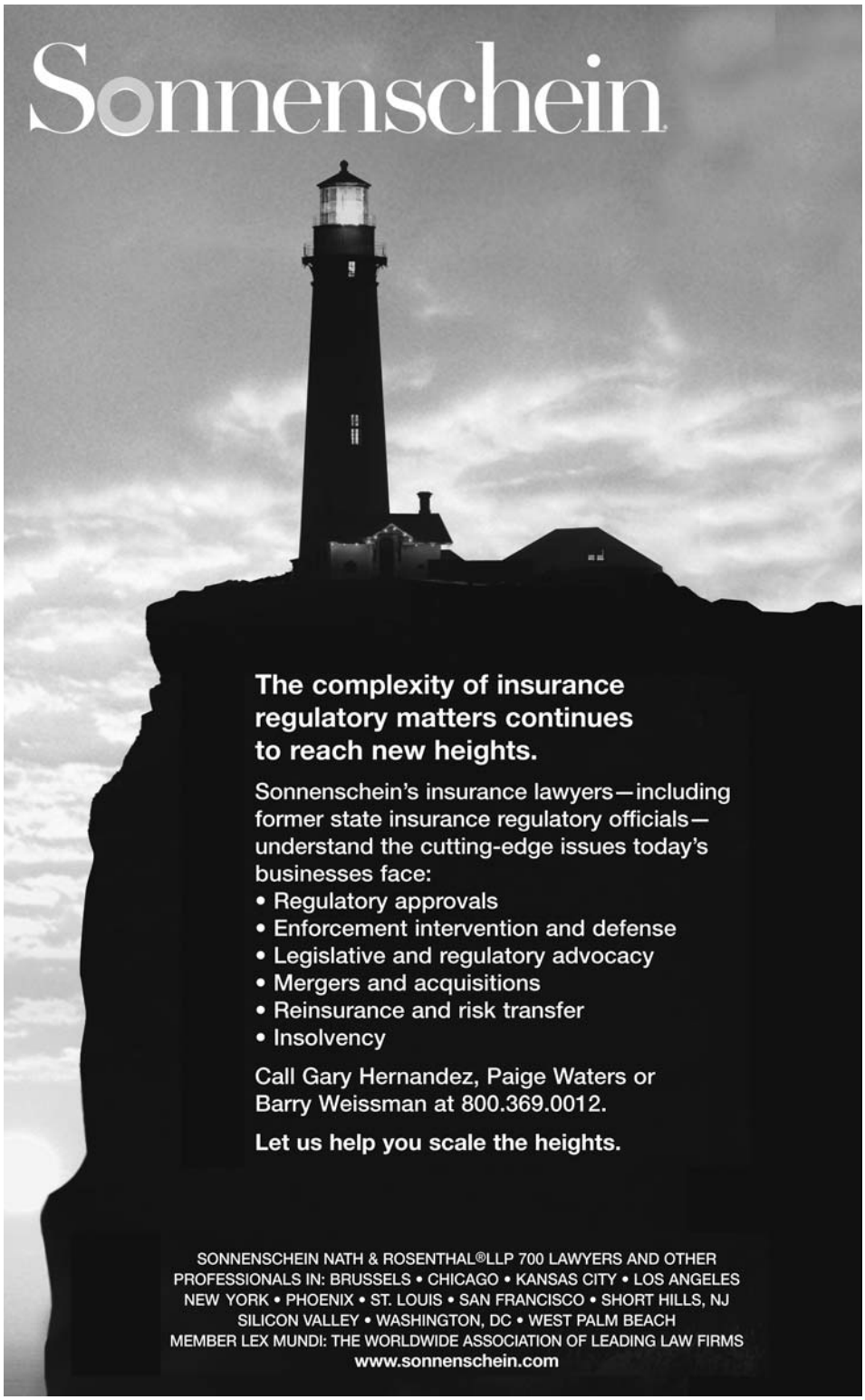
Clearly Congress has begun to recognize that American families need to be better prepared and protected from catastrophe. A program that meets these important national goals needs to protect homes at a lower cost, strengthen first responders and minimize the financial burden on consumers and taxpayers.

Such an approach would use private premium dollars to fund a backstop to the private market and state catastrophe funds. This fund would stand behind state catastrophe funds and pay claims when the state fund has exceeded its capacity.

Contributions to the fund would be based on actuarially sound and self-sufficient rates based on local exposures to ensure that there will be no subsidization of catastrophe-prone states by other states.

This concept embodies a market-based approach to a true national challenge that should be embraced by all members of the House of Representative and the Senate before the next catastrophe strikes.

James Lee Witt and James M. Loy are co-chairs of ProtectingAmerica.org. Mr. Witt formerly served as the Director of the Federal Emergency Management Agency in the Clinton administration. Admiral Loy previously served as the Deputy Secretary of the US Department of Homeland Security in the administration of President George W. Bush.



New Jersey Appellate Court Rejects Integrity Final Dividend Plan

Dennis G. LaGory

On October 2, 2006, the Appellate Division of the Superior Court of New Jersey rejected the Fourth Amended Final Dividend Plan, submitted by the Liquidator of Integrity Insurance Company. Prior to the recent issuance of surprising orders by the New Jersey Supreme Court, this decision appeared to mark the end of the Liquidator's decade-long effort to bring the Integrity estate to an early close. The following article briefly recounts the rather convoluted history of the case, summarizes the recent appellate decision and attempts to evaluate its significance.

Dennis LaGory

History of the Case

Integrity was a New Jersey domiciled stock company that wrote a variety of volatile risks. Its book of business included excess and umbrella policies, issued to numerous large manufacturing companies, which subjected the company to massive long-tail exposure for environmental contamination and product liability. The Liquidation Court declared Integrity insolvent in 1987. By the 1988 bar date, over 26,000 claims were filed against the estate. The vast majority of these were "policyholder protection" claims, by which an Integrity insured that was not aware of any specific claim asserted against it could reserve the right to seek coverage in the event a claim were to materialize, based on events that occurred prior to entry of the liquidation order. By early 1996, thousands of these claims remained contingent. The Liquidator estimated that the IBNR losses on these claims amounted to $1.321 billion.

The Liquidator weighed a number of alternative methods for administering the Integrity estate. One such alternative was a "run-off" scheme, by which the contingent claims would be paid as they were substantiated. The Liquidator rejected this scheme because it necessarily entailed leaving the estate open for decades. Another alternative was a "cut-off" scheme, by which contingent claims that were not substantiated by a date certain would not be paid. The Liquidator rejected this approach because, if it were employed, the three quarters of Integrity's policyholders who had submitted contingent, policyholder protection claims would receive no distributions from the estate. The Liquidator also feared that a run-off approach would leave approximately $876 million in potential reinsurance recoverables uncollected.

The Liquidator finally settled on a Final Dividend Plan ("FDP"). Although the FDP was amended several times over the years, its essential terms remained constant. The FDP contemplated that the value of a policyholder's contingent claim would be determined by an actuarial estimate of its IBNR, discounted to net present value. Once the estimated claim was approved by the Liquidator, it was to be presented to Integrity's reinsurers on the risk for the relevant policy years. The reinsurers were entitled to object to the allowance of a claim. They were, however, required to submit their objections to a special master appointed by the Liquidation Court.

The Liquidator filed the FDP with the Liquidation Court on June 17, 1996. The reinsurers, led by Munich Reinsurance Company ("Munich Re"), objected vehemently to the FDP on two principal grounds. First, they argued that neither the New Jersey Liquidation Act nor their reinsurance agreements authorized the Liquidator to allow claims based on actuarial estimates of IBNR. According to the reinsurers, the Liquidator could allow only "absolute" claims, in which the injured party and loss are known and where insurance coverage has been established. Second, the reinsurers argued that the FDP infringed their contractual and statutory rights to resolve disputes by arbitration.

The Liquidation Court judge, William C. Meehan, decided to follow a bifurcated procedure in evaluating the FDP. Initially, he would entertain arguments on the issue of whether the Liquidator possessed statutory authority to declare contingent claims absolute on the basis of actuarial estimates of IBNR liability. If the answer was yes, then he would allow a period of discovery and conduct an evidentiary hearing on the issue of whether the FDP is fair and commercially reasonable.

The Liquidator's Statutory Authority

In November 1996, Judge Meehan held that the Liquidator has authority to estimate net present value of IBNR losses and Integrity's pending case reserves on behalf of future claimants and to allow such contingent claims to participate in the final distribution of assets. Both the Appellate Division of the Superior Court and the New Jersey Supreme Court rejected the reinsurers' motions for leave to file interlocutory appeals from this ruling. By spring of 1997, a period of extensive discovery had commenced.

The Deliberative Process Privilege

Proceedings came to a virtual halt, however, for the better part of the period from spring of 1998 through the summer of 2000. This period was consumed by a dispute over whether the Commissioner of Banking and Insurance, in her role as Liquidator of Integrity, was entitled to assert the "deliberative process privilege" to avoid the reinsurers' requests for discovery of intra-agency documents analyzing and evaluating the FDP. The Superior Court required the Commissioner to produce the documents. The Appellate Division remanded the case for an in camera review of the documents. The dispute reached the New Jersey Supreme Court, which held that although a qualified deliberative process privilege exists to protect agency documents, the Commissioner, in her capacity as Liquidator, could not invoke it because, as such, she functions in both a public and private status. Accordingly, it was necessary for the court to conduct an in camera review and hearing in order to balance the Liquidator's need for confidentiality against the reinsurers'

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need for production. While these discovery issues were being resolved, yet another dispute between the Liquidator and Munich Re was unfolding.

The Suter Arbitration

In a matter that, at first, appeared unrelated to the proceedings on the FDP, the Integrity estate claimed it was entitled to reinsurance proceeds for certain policyholder claims for defense costs that the Liquidator had allowed. In January 1999, after Munich Re asserted these claims were not covered by its reinsurance agreements, the Liquidator filed an adversary complaint in the Liquidation Court. Munich Re removed the case to the United States District Court for the District of New Jersey, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The Liquidator moved for remand, arguing that the Munich Re had waived its right to remove the case by virtue of the "service of suit" clause in its reinsurance agreements. The District Court granted the Liquidator's motion and Munich Re appealed. The Third Circuit Court of Appeals reversed in August 2000, holding that: (i) the service of suit clause did not clearly and unambiguously waive the right to remove the case under the Convention; and (ii) New Jersey's Liquidation Act did not reverse- preempt the Convention under the McCarran-Ferguson Act.

Soon after the arbitration commenced in September 2002, Munich Re and the Liquidator settled their disputes -- including their dispute over the validity of the FDP. Thereafter, the Reinsurance Association of America ("RAA") prosecuted the challenge to the FDP.

Approval of the Plan

Finally, in November 2003, the Liquidation Court conducted the evidentiary hearing that was first proposed seven years earlier. The court entertained three days of testimony and arguments. On July 19, 2004, Judge Meehan entered an order approving the FDP, ruling that it employed generally accepted claims estimation techniques in a commercially reasonable manner, while protecting Integrity's policyholders and the public. In doing so, the court observed that although "an actuarial estimate is not a !00% guarantee . . .it is an evaluation . . . .generated by an actuary using the most up-to-date technology available . . . that is employed and relied upon by insurance and reinsurance companies including the RAA and its members on a regular basis for such transactions as commutations, takeovers and mergers." Judge Meehan did not specifically address the RAA's objection that the FDP impaired the reinsurers' arbitral rights. Instead, Judge Meehan merely noted that the FDP "provides for an objection process whereby a reinsurer may voice an objection for, inter alia, commercial unreasonableness that will then be considered before a Special Master and then be reviewed by this Court thereby protecting the reinsurer from an unreasonable estimate." The RAA appealed this ruling to the Appellate Division, which reversed.

The Appellate Decision

The principal grounds upon which the Appellate Division relied in rejecting the FDP were essentially those upon which the reinsurers based their motion for interlocutory appeal in 1996: that IBNR losses do not meet the statutory requirements for participation in the estate. The court first quoted the New Jersey Liquidation Act, which provides in pertinent part as follows:

"No contingent claim shall share in a distribution of the assets of an [insolvent] insurer . . . except that such claims shall be considered, if properly presented, and may be allowed to share where . . .[s]uch claim becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim against the assets of such insurer."

The court reviewed dictionary definitions of the term "absolute" and concluded that the term as used in the Act is "synonymous with 'unconditional' or 'non-contingent.'" According to the court, actuarial estimates of IBNR losses could not meet the statutory requirements.

"IBNR claims are actuarial estimates and are, therefore, not absolute. They are derived from standards of measurement that vary according to the judgment of the valuator. They are nothing more than an estimate of the value of a potential actual loss that accounts both for the possibility that the loss will not occur and for the possibility that the extent of the loss will differ form the actuarial estimate. Accordingly, IBNR claims are not absolute and are prohibited by the statute from sharing in the estate."

The court examined case-law from jurisdictions with statutes similar to New Jersey's and, thereafter, characterized the Liquidator's argument, that a contingent claim can become absolute upon her determination to settle it, as "alchemy." Nor did the court find any relevance in the Liquidation Court's observation that actuarial estimates of IBNR are commonly employed in the industry. According to the court, such estimates "are limited to voluntary agreements", which are unsuited to the mandatory claims allowance procedures such as those advocated by the Liquidator in the FDP.

The court then addressed the FDP's dispute resolution procedures. These prohibited arbitration of several disputes that would otherwise be arbitrable under the reinsurance agreements, including disputes over setoffs, as well as the allowance, amount, priority and allocation of claims. The court held that by thus prohibiting arbitration, the FDP impaired the reinsurers' rights under the Federal Arbitration Act and the Convention. In doing so, the court rejected the Liquidator's argument that because the FDP was approved pursuant to the New Jersey Liquidation Act, which regulates insurance, the reinsurers' federal arbitration rights were reverse-preempted by the McCarran-Ferguson Act. Citing the Third Circuit's decision that ordered the Suter arbitration,

New Jersey Appellate Court Rejects Integrity Final Dividend Plan

Dennis LaGory

the court found that allowing arbitration of the Liquidator's contractual claim against Integrity's reinsurers did not impair any provision of the Liquidation Act.

"This is not a delinquency proceeding or a proceeding similar to one. Nor is it a suit by a party seeking access to assets of the insurer's estate. Moreover, even if it were such, the Superior Court would have express authority to enjoin the plaintiff from proceeding in the event that it were to interfere with the proceedings before it. What this proceeding is is a suit instituted by the Liquidator against a reinsurer to enforce contract rights for an insolvent insurer, which, if meritorious, will benefit the insurer's estate. Accordingly, we fail to perceive any potential for interference with the Liquidation Act proceedings before the Superior Court."

It is difficult to gauge the effect of the appellate court's decision. Over the ten-plus years during which the proposal for the FDP has been pending, the Integrity estate executed commutation agreements with most of its major reinsurers. The prices of these commutations were largely based on the same actuarial techniques the Liquidator proposed to employ in the FDP.

The FDP saga underscores the importance of the legislative process in assuring the approval of such innovative measures. Ultimately, the Liquidator's proposal to allow claims based on actuarial estimation of IBNR losses could not survive scrutiny under a statute requiring a claim to be "absolute" before it could be allowed. Receivers who seek early closure of their estates in jurisdictions with statutory schemes similar to New Jersey's might contemplate advocating a change in the law. In this regard, they may wish to consider the NAIC's Insurer Receivership Model Act ("IRMA"). IRMA authorizes the liquidator to set a date certain for all contingent and unliquidated claims to become final. The liquidator is authorized to compel payment of claims thus allowed by reinsurers of the estate. These provisions effectively codify the provisions of the FDP and resemble a statutory scheme already in effect in Rhode Island.

Post Script

Because the Liquidator chose not to appeal the appellate court decision, it appeard the litigation over the FDP was concluded. However, in a wholly unexpected development, the Supreme Court of New Jersey issued orders on January 25, 2007, which granted an Integrity policyhoilder (i.e., the American Standard Companies Inc.) leave to intervene and file an appeal of the appellate court decision. The Supreme Court also allowed another popoilicyholder (i.e., Foster Wheeler L.L.C.) to file an amicus curiae brief in the appeal. It, therefore, appears that reports of the FDP's demise were premature.

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Dennis G. LaGory is partner with Schiff Hardin LLP in Chicago, IL. His practice areas are insurance, reinsurance and litigation. He is admitted to practice in the U.S. District Court, North District of Illinois and the U.S. Court of Appeals, Third Circuit.

Dennis G. LaGory's experience encompasses a broad range of issues involving the insurance and health care industries, including regulatory compliance, ERISA litigation, reinsurance and coverage litigation and arbitrations, and international reinsurance insolvencies, as well as transactional matters involving health, life, and captive insurers.

Mr. LaGory has extensive experience with insurance company insolvencies, and he currently represents clients in connection with the liquidations of the Home Insurance Company, Legion Indemnity Company, Legion Insurance Company, and Reliance Insurance Company.

He is a member of American Bar Association (Tort, Trial and Insurance Practice Section), International Association of Insurance Receivers, and Federation of Regulatory Counsel, Inc.

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- In the Matter of the Liquidation of Integrity Ins. Co., 2006 WL 2795343 (N.J. Super. App. Div. Oct. 2, 2006).
- In the Matter of the Liquidation of Integrity Ins. Co., 299 N.J. Super. 677, 691 A.2d 898 (Ch. Div. 1996).
- In the Matter of the Liquidation of Integrity Ins. Co., 165 N.J. 75, 754 A.2d 1177 (2000).
- 9 U.S.C. § 205.
- Suter v. Munich Reins. Co., 223 F.3d 150 (3d. Cir. 2000).
- Order, In the Matter of the Liquidation of Integrity Ins. Co., No. C-7022-86 (N.J. Super., Ch. Jul. 19, 2004).
- Id. at 4.
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- N.J.S.A. 17:30C-28(a) (1) (emphasis added).
- In the Matter of the Liquidation of Integrity Ins. Co., 2006 WL 2795343 at *3.
- Id.
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- In the Matter of the Liquidation of Integrity Ins. Co., 2006 WL 2795343 at *7 (quoting Suter, 223 F.3d at 160).
- IRMA, at §705.F.
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IAIR Road Show: Live and in-person! Experts on troubled companies! Coming soon to your state insurance department. Analysts and examiners – sign up now! (What *you* see is what *they* get!)

Daniel A. Orth, III

Daniel Orth

A novel idea. Put together a "road show" to bring directly to state regulator staffs, who are on the "front lines," an explanation of what happens to a company after its financial statements have been examined and analyzed and been found wanting. Give those who are the first to see the evidence that a company may be in trouble a clearer picture of why their job is so important. Give them an idea of what lies in store for a troubled company – its policyholders, employees and owners. Give them the opportunity to understand and appreciate more fully how their job, done well, can lessen the pain that will otherwise be inflicted on so many. And maybe point out some of the "red flags" they should be aware of and ready to identify.

Lightening does strike. Fires do break out. Floods and earthquakes, tornadoes and hurricanes do happen. People do develop cancer, suffer heart attacks and strokes. No one can prevent such events or the monetary losses that attend them. Not knowing when or whether such calamities might befall them, people seek protection against such losses. They pay a premium today in return for a promise that their insurer will be there for them tomorrow. "We, Perpetual Life and Casualty, do hereby promise, that when that day arrives, when that insured event occurs, when you suffer that covered loss, we will be there for you." And, while guaranty associations do provide a safety net of protection should an insurer fail, guaranty association coverage has a statutory limit that may be far below the protection promised in the policy and relied upon by the policyholder and other parties.

That is why insurance regulators must be constantly vigilant. They keep watch over an industry charged with a great responsibility to be there when the need arises; an industry that performs a function without which commerce would grind to a stop. Financial transactions could not be consummated if risks could not be removed by a promise in which everyone has faith. Would a bank lend money on a home on which there was no insurance against loss by fire? If it would, what interest rate would it charge for the loan? So a critical task for an insurance regulator is to be vigilant against financial instability on the part of an industry member. To that end, the regulator engages the services of financial examiners and analysts to review the financial statements required to be filed by insurers licensed in the regulator's jurisdiction. These are the "front line" financial troops that IAIR sought to reach with its "road show".

While it varies, of course, from one state department of insurance to the next, it can be said with some confidence that the larger population states have larger financial regulation "shops", each with a variety of personnel in terms of education, training, background and experience. While some of those personnel have a very good understanding of the progression of the process and what awaits a company they have identified as troubled, others know only some terms they may have heard, but they lack a full appreciation for what the terms mean, and their true significance to policyholders and other creditors of the company.

IAIR's stated mission is the promotion of professionalism and ethics in the administration of insurance receiverships. IAIR views education as a significant component of such promotion, which is why it has a permanent Education Committee. It was the chair of IAIR's Education Committee, Kristine Johnson, CPA, (Navigant Consulting) who originally conceived of the idea of taking insolvency education on the road to those who might be better armed to recognize potentially troubled companies if the receivers who dealt with them as failed companies could identify some red flags that became apparent, after the fact, to receivers. When the idea first surfaced, it did not have the highest priority, so it remained dormant, but not forgotten, for some time. Then in early 2005, Barry Leigh Weissman, Esq., AIR, (Sonnenschein law firm) picked up on the idea, developed an outline of subjects to be covered in such a presentation, and recruited presenters for each subject area. The idea of expanding the invitees from solely examiners and analysts, to include the staffs of state receivership offices came at about the same time, and the project was off and running.

The resulting program debuted in California for the San Francisco staff of the California Liquidation Office (CLO) on May 12, 2005. It covered the core areas of information technology, claims, accounting and reinsurance, and dealt almost exclusively with property and casualty insurer insolvencies. (The first program did also contain a segment on human resources which was not continued in subsequent programs.)

The overall program was greeted with enthusiasm by CLO management and by attendees. It was convenient and it had the attraction of being a very low-cost program. No CLO travel, hotel or meal expenses were incurred. The presenters volunteered their time and paid for their own travel, hotel and meal expenses.

The topics and presenters were:

Introduction - Barry Leigh Weissman, Esq., AIR, and David Wilson, Chief Executive Officer of CLO

Information - Jenny L. Jeffers, CISA, AES, (Jennan Enterprises) making participants Technology aware that information technology plays a key role in every aspect of an insurer's existence, even through liquidation.

Accounting - Joseph J. De Vito, MBA, CPA, AIR, (Navigant Consulting and IAIR President) and Richard Pluschau, CPA, CFE, (Pluschau Consultants Inc.) discussing early identification of financially troubled insurers and the financial and accounting considerations in the management of an insolvent insurance company.

Claims - William C. Barbagallo, AIR, (Navigant Consulting) explaining the claim department changes arising out of an insolvency.

Reinsurance - Barry Leigh Weissman, Esq., AIR, explaining reinsurance basics, what should be understood about it and how to protect it as an asset of the estate of an insolvent insurer.

IAIR Road Show: Live and in-person! Experts on troubled companies! Coming soon to your state insurance department. Analysts and examiners – sign up now! (What *you* see is what *they* get!)

Daniel A. Orth, III

The program was followed by a period of questions and answers.

In 2006 IAIR's Education Committee was chaired by Pam Woldow, Esq., (Attorney at Law) The enthusiastic response to the 2005 CLO program prompted an inquiry as to whether a repeat of the program in 2006 was desirable. It proved to be so and was held (without the human resource component) on June 29, 2006, at the San Francisco State University Conference Center. The cost for the use of the facility was $75 per person, which included lunch. Once again those invited were principally state regulators and receivership staff, although the 2006 program was opened to any IAIR member interested in attending. Additional emphasis was put on what receivers need in order to do their job when a company goes into receivership, what regulators can do to provide what receivers need, and ways for regulators and receivers to ensure a smooth transition.

When the agenda for the May, 2005, CLO presentation was disseminated, the lack of a guaranty association component was raised. In response, the concern was voiced that an open discussion between regulators and receivers might be "chilled" by the presence of "outsider" guaranty associations. The same issue was considered anew after the June, 2006, CLO presentation. This time a different conclusion was reached and a guaranty association component was added for programs to be subsequently presented by the IAIR road show team. Another change was an expansion of the presenter faculty. IAIR thereafter received requests from the Ohio, Florida and Utah departments to bring its road show to their offices.

The Ohio presentation was made on October 19, 2006. The agenda and presenter group was slightly different than the California CLO presentation had been. Pam Woldow (Pam Woldow law firm), Bill Rossback (Ohio Dept. of Insurance) and Mike Motil (Ohio Dept. of Insurance) made introductory remarks. Ohio Special Deputy Receiver Doug Hertlein gave a re-cap of some Ohio liquidations of note. Pam Woldow and Barry Weissman covered reinsurance and identified red flags for which examiners and analysts should be on the alert. Mary Jo Lopez (Navigant Consulting) discussed special areas of concern for which to be watchful in examining HMOs.

In Florida, on October 26 and 27, 2006, Francine Semaya, Esq., (Cozen O'Connor law firm) did the introduction and reinsurance, Jenny Jeffers did information technology, Bill Barbagallo did claims and Joe DeVito covered accounting.

The Utah presentation was held in Salt Lake City on November 1, 2006, as a tag-on (at the front end) to the IAIR/NCIGF Joint Summit held in Salt Lake City on November 2 and 3, 2006.

The Ohio, Florida and Utah programs all contained guaranty association components, with property and casualty and life and health sharing a single presentation slot on the program. Ed Wallis, Esq., formerly with NCIGF, presented the Property and Casualty component in Ohio and Florida, while Kevin Harris, Esq., of NCIGF presented in Utah. Daniel A. Orth, III, Esq., of the Illinois Life and Health Guaranty Association presented the Life and Health component in Ohio, Florida and Utah, with help from Frank Gartland in Ohio and Henry Grimes in Florida (sitting in for William Falck, Esq., whose son's wedding for some reason took priority.) Art Dummer's prior commitments made it impossible for him to be present at the Utah presentation. While Art was unable to make it, Utah's very involved and extremely capable Insurance Commissioner, D. Kent Michie, did spend time with the presenters and with his staffers prior to the meeting, and then delivered opening remarks after an introduction by Francine Semaya. The other Utah presenters were Jenny Jeffers, Mary Jo Lopez, Joe DeVito, Richard Pluschau, Dan Orth and Kevin Harris.

Following each presentation there were opportunities for questions and interaction between presenters and attendees. Comments and critiques were sought and obtained from attendees to enable the IAIR program to build upon its experience.

At the IAIR Annual Meeting in San Antonio in December, 2006, President Joe DeVito said that IAIR will continue, refine and improve its Regulator Education Program, but he said it will never again try to put on three presentations in a two week period. Too much of a good thing can cause "road show fatigue." Amen to that, Joe!

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Daniel A. Orth, III, is the Executive Director of the Illinois Life and Health Insurance Guaranty Association. He is an IAIR member, has recently completed two terms on the Board of Directors and he is one of the instructors for the IAIR State Training Program, which has now been presented in the states of California, Ohio, Nevada and Florida.

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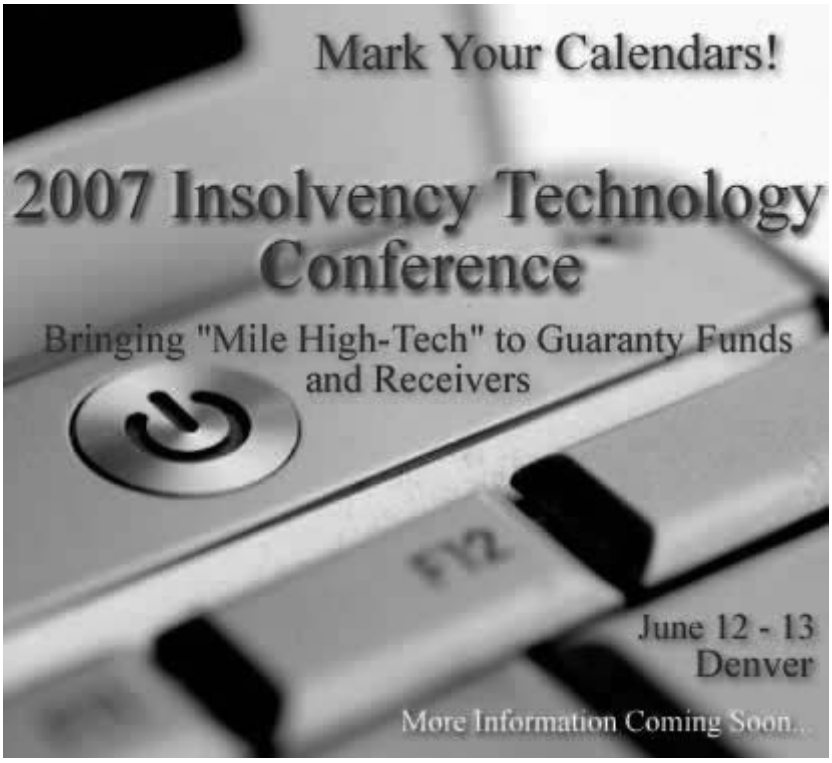
The IAIR State Training Program is designed to bring together the regulators and the receivers to teach them how information learned during the financial examination process can be used to facilitate a smooth transfer to the receiver, should the company go into receivership. It also introduces the regulators and receivers to each other in an effort to open the lines of communication between the parties. It does this while training staff of both entities in the receivership process.

This program can be individually designed to accommodate the needs of your state. We can do programs of one to two days in length and you may choose from the following topics:

Accounting
Claims
Guaranty Funds (Property & Casualty and Life & Health)
HMOs
Information Technology
Reinsurance

The program is NASBA approved.

If you would like more information about this very useful and informative program, please contact Paula Keyes at 407-810-0271 or pkeyes@iair.org.



2007 Insolvency Technology Conference to Help Guaranty Funds, Receivers Leverage Technology's Benefits

Not just insolvencies bring guaranty funds and insurance receivers together, as will be seen when the groups convene at the 2007 Insolvency Technology Conference in Denver June 12 and 13.

Hosted by the NCIGF and developed jointly by NCIGF and IAIR, the 1 ½ day-long conference will provide guaranty fund managers and receivers and their IT staff an in-depth discovery of the hottest technology topics as well as discovering how technology trends can improve operational efficiencies in insolvency administration.

The second annual event, which specifically is tailored to operation managers and IT staff, will focus on range of critical technology issues and topics, including:

- **Microsoft Vista and Office 2007**
- **Security**
- **Document Imaging (Paperless Office)**
- **Business continuity**
- **E-Discovery**
- **Web Technologies**
- **Uniform Data Standards (UDS)**

For guaranty funds and receivers alike, proficiency in the use of the latest tools will bring operational benefits to insolvency administration. We invite you to join us in the Mile High City; together we can unlock technology's power at the 2007 Insolvency Technology Conference.

Registration details are forthcoming; for more information email tom@ncigf.org.

The Where of Mediation: Choosing the Right Location for a Facilitated Negotiation

Paula M. Young

Very few authors have considered the importance of choosing a comfortable location for mediation. The textbook I use in my Dispute Resolution class advises readers that:

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You may want to resolve where the mediation sessions will be held, especially in a dispute where parties are located at great distance from each other. In a court-annexed mediation, the courthouse can be a convenient, neutral option. In a mediation in which multiple sessions are expected, the site could be alternated between offices of each attorney or party.

In reading that advice now, I see it as superficial and oblivious to the psychological and emotional impact location has on parties in mediation. Thoughtful consideration of the mediation environment enhances party self-determination, supports quality decision-making, and can enhance the appearance of the mediator's neutrality. It could be the most important decision made by a mediator or a lawyer representing a party.

One of the best discussions of the mediation environment appears in Barbara Madonik's I Hear What You Say, But What are You Telling Me? Strategic Use of Nonverbal Communication in Mediation (Jossey-Bass Pub. 2001). Her thesis is simple. "Environments send messages. . . . Th[e] [mediation] environment includes the physical surroundings that affect people's bodily comfort levels. It also involves some less tangible elements: the parties' relative levels of power, their feelings of safety, and arrangements that convey respect."

Power Imbalances

Madonik spends quite a bit of time talking about how the parties convey to each other their sources of power based on education, information, expertise, reputation, persuasiveness, negotiating skill, money or resource control, employment status, emotional intelligence, race, gender, age, religion, or ethnicity. Later, she recommends the use of a round table in mediation to help reduce the power-distance between parties and between the parties and the mediator. She says: "[I]t sends a strong nonverbal message of mediator neutrality and party equality." Careful selection of the chairs around that table can also send important nonverbal messages. Madonik recommends comfortable adjustable chairs that allow people to easily reach the writing surface of the table, especially if they are more diminutive in stature. Women, especially, may appreciate this flexibility in the seating arrangement. They may feel more vulnerable if positioned low in relation to the table or in relation to the other parties.

Safety

If people do not feel safe in the mediation process, they will not likely participate effectively. Madonik reminds us that feelings about safety and control begin before the mediation and end when the parties arrive safely at home after the session. Accordingly, she recommends that mediators:

- Provide maps and directions to the location.
- Choose a site accessible by private and public transportation.
- Choose a site that people will perceive as safe after dark.
- Tell parties in advance if parking is limited and provide, if possible, free parking passes.
- Advise parties of the location of bathrooms, phones, and fire exits.
- Survey parties in advance to learn of any special needs, such as:
  - * Handicap access
  - * Smoking areas
  - * Child care needs
  - * Translators, or
  - * Special dietary requirements.

I would add to this list other concerns about safety. One mediator tells the story about a mediation in which he asked all parties to leave any weapons they might be carrying with his secretary. Both lawyers stood up, removed their pistols, and deposited them with the secretary. Jeffrey Rubin, a Florida mediator and ethicist, tells the story of a shooting in a Boca Raton mediation involving a probate case. The brother, a firefighter, killed his sister and then tried to shoot everyone else in the room. Later, the brother committed suicide.

People practicing in family mediation often must anticipate high emotions and even undisclosed histories of domestic violence. I recommend that mediators take the following precautions to ensure the safety of the parties and the mediator:

- Keep the parties in separate waiting rooms.
- Make sure adequate staff is present to handle a situation.
- Create staggered departure times.
- Escort each party to his or her car after the session.
- Adequately train yourself and your staff to spot and properly intervene in potentially violent situations.

Party Comfort

To make parties comfortable, the mediator should consider many aspects of the physical environment: sounds (both pleasant, like music, and irritating), lighting, temperature control, wall color, carpet texture, the smell of the room and outside areas, and the shape

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of the room. Madonik takes an interesting approach to this topic by analyzing these elements from the perspective of persons with different information absorption preferences: verbal (reading), visual (charts and images); aural (listening); and kinesthetic (movement).

Coffee service invites people to mingle and engage in small talk and "sets up a strong kinesthetic, visual, and auditory welcome message for many parties." Parties with visual preferences will appreciate nice artwork on the walls of the main room and caucus rooms. They will also prefer a neat, dust free, and organized environment. Interestingly, visually-oriented people need a clean space in front of them to literally visualize and analyze the information they receive in the mediation.

Persons with auditory preferences will be easily distracted by noises. Yet, they need to listen carefully to the mediator and the other parties. They will prefer rooms free from phone interruptions, noisy conversations in adjacent rooms, ticking clocks, buzzing fax machines, or outside traffic and construction noises. People with kinesthetic preferences will like soft carpeting, comfortable chairs, and cozy rooms still large enough to allow then to get up and move around.

Madonik also recommends that the mediator carefully consider the color of the walls in the main room and caucus rooms. Reds may elicit unease and aggression. Yellows may make parties feel physically warmer, but the color may also elicit feelings of diligence or envy. Blues and greens evoke feelings of safety and tranquility. But, these colors also may make parties feel physically cooler.

Windows allowing natural light will make a room feel more spacious, but the mediator should be able to control any glare and outside distractions with curtains or blinds. Lighting fixtures should work properly. People with auditory and visual preferences will be distracted by buzzing or blinking fixtures.

Madonik also recommends that the main room and caucus rooms have adjustable temperature controls. The mediator may set the temperature higher in the morning and lower it after lunch when parties may feel more lethargic.

Amenities

I have already mentioned the subtle nonverbal messages conveyed by something as simple as coffee service. Several scholars have mentioned the importance of food in mediation to build rapport, to energize parties, and to show respect for their needs.

Most mediators will remember to bring flip charts, markers, calculators, and notepads for the parties. They will make available phones, fax machines, laptop computers, and printers. Madonik recommends that the mediator also make tissues available. "On-site tissues relieve [emotional] parties of embarrassment and tension. They communicate a clear nonverbal message that crying is an acceptable and normal event that happens during this stressful time."

She also suggests that mediators make available helpful props. For instance, in a mediation involving a vehicle accident, the mediator may have toy cars and trucks available. "The miniature size diminishes fear, puts things in a new perspective for parties, and allows people with a kinesthetic preference to communicate effectively about the accident."

At one training session I attended, two Texas mediators suggested that the mediator install Nerf basketball hoops and other toys in the caucus rooms. Parties waiting for the return of the mediator could work off some nervous energy, keep from getting too bored, and think through the issue last posed to them, especially if they had a kinesthetic preference.

Applying These Principles in a Specific Case

I broke my lower left leg in three places approximately a week before Christmas 2004. Some two years – and four surgical procedures -- later, I am now living with an ankle fusion that has left my left leg ¾ of an inch shorter than my right leg. I no longer wear high-heeled shoes or skirts. I do not yet know if the original orthopedist negligently treated my leg. I know that he severed and tied off the vein running on the inside of my leg and I also know that my later surgeons – the orthopedists to the Pittsburgh Pirates -- never suggested that his original surgical technique was skillful. I know that he did not order x-rays when I complained of pain in the ankle in the summer of 2005. I also know he abandoned my care when I continued to complain of pain in the ankle later that fall.

I now wonder whether I would have been a candidate for a total ankle replacement if the first orthopedist had responded to my calls and provided appropriate diagnosis of the deteriorating joint in the fall of 2005. As it turned out, x-rays taken in January and March 2006 showed that the joint deteriorated very rapidly during this time. By the second surgery, performed by the Pittsburgh orthopedist, I had lost all the cartilage in the joint and some bone.

The first orthopedist and I face significant structural barriers to a non-litigated settlement of this case. The reporting requirements of the National Practitioner Data Bank (NPDB) discourage physicians from settling malpractice claims except in very exceptional cases of liability or

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in contrived and narrow circumstances. Congress established the NPDB in 1986 in response to what it perceived as a rise in medical malpractice and a decline in the quality of medical care nationwide. Among other data, the NPDB collects information concerning medical malpractice payments resulting from a written claim or adjustment. Malpractice litigation can affect a physician's insurance coverage and rates. Health maintenance organizations and hospital medical staffs often use the information in the NPDB to make hiring decisions. They will shy away from a physician who has a record of any claims filed against him or her. Ultimately, it may be impossible for the physician to stay in practice. While patients do not have access to the data bank, the information can leak to the public in ways that could affect a physician's ability to attract new patients.

The reporting obligations surprisingly shift more negotiating leverage to doctors who tend to demand that their insurance carriers take all cases through a jury verdict, except those where liability is very clear cut. In doing so, doctors seek to avoid a report to the NPDB. Doctors already have significant bargaining leverage given that the overall win rate for medical malpractice plaintiffs (27%) is about half that found among plaintiffs of all tort trials (52%). Accordingly, injured patients must face the prospect of hiring an attorney who will do a very thorough cost-benefit analysis of the claim. The October 2006 issue of the ABA Journal featured an article on the effect of tort reform on medical malpractice cases in Texas. Texas plaintiffs lawyers anecdotally report that they are only taking med-mal cases in which liability is clear cut, the damages are easily proved (usually high economic loss damages), and the case can be worked up for $15,000 or less in costs, for an expected settlement of $150,000. A symposium issue of the Journal of Dispute Resolution reported that one med-mal plaintiffs firm takes only five percent of claims brought to it. The injured patient also faces the cost, time, and emotional stress of litigation that can extend over three or four years.

In October 2006, I learned about a pre-litigation med-mal mediation program sponsored by Drexel University College of Medicine. The program is designed to avoid any written demands that would trigger a NPDB report. It uses a co-mediation model and seeks to help doctors take responsibility for medical errors, share information, preserve the doctor-patient relationship, fix the problem without risk, obtain "closure," stay out of court, avoid costs, maintain control, and reach a confidential settlement.

Faced with these facts, I have fallen asleep many nights thinking about the context for the eventual negotiation – whether facilitated or not – that I expect to have with the first orthopedist. The environment needs to build trust and to encourage the exchange of information between the parties. I am primarily concerned – as are most injured patients -- with learning what happened, ensuring that the doctor does not make the same mistake with some future patient, and recovering money that makes me as whole as possible. I am not looking for a windfall and I want to ensure that local doctors in my rural community agree to treat me in the future.

Giving my Students an Opportunity to Analyze a Potential Dispute

For the past semester, my eighty Dispute Resolution students have analyzed the potential claim I may have against my first orthopedist. I have asked them to pretend to be my lawyer. In the first exam of the semester, they analyzed the potential sources of impasse to a negotiated settlement of the claim, whether I am the sort of person who is likely to bring a claim, whether I have a strong prima facie case under Virginia law, and what processes, other than litigation, might serve both parties better.

In the second exam of the semester, students (working in groups of three or four students) answered the following exam questions:

As attorney for Young: (1) Where would you suggest the parties hold the [mediation]? What factors would you consider in making that choice? What environment might facilitate negotiations? What amenities would you make available -- services, information, food & beverages, etc.?

* * *

(6) You now know that slightly elevating the emotions of a negotiating party will increase the likelihood of a favorable outcome for the party as well as for his or her negotiating partner. In other words, the individual and joint gains increase. How would you use this information in this specific context to facilitate the negotiation process?

The Professor's Sample Answers

After I grade each exam, I post on the class website a summary of the better answers. As background, the exam facts indicated that the first orthopedist had an unspecified ethnic background. The orthopedist had now taken a new job in Charlottesville, Virginia, which is about a seven-hour drive from Grundy where the law school is located.

So here is how the students analyzed the situation.

Location: The more successful answers recommended a location about half way between Grundy and Charlottesville. The groups scoring the most points for the first part of the question suggested meeting at a scenic neutral location, like a resort in Roanoke or the Mountain Lake Resort

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in Blacksburg. Several groups supported this recommendation by citing to a similar recommendation in Getting to Yes.

Other successful answers placed the mediation in hotel conference rooms in Roanoke, Blacksburg, or Charlottesville, at parks, a community center, and a day spa. Students suggesting places with less privacy, less confidentiality, and more distractions, like a coffee house, restaurant, schools, libraries, a business office, the attorneys' offices, or the doctor's office, scored fewer points. Students who thought about my handicap access issues scored higher points. Students that mentioned a "neutral location" without making a specific recommendation scored fewer points.

Students who recognized the importance of allowing the doctor to exercise great control over the selection of the location scored more points. He might feel more comfortable if he were on his "home turf" or controlled the decision. Higher scoring answers also needed to recognize that I, having the greater negotiation experience and better theory background, would want to make gentle suggestions that would shape the orthopedist's choices to ensure a good environment for the negotiation. I might also agree to pay for the orthopedist and his lawyer's accommodation at a resort or nice hotel to get more buy-in to the chosen location, more buy-in to the process, and as an act of rapport building (maybe I'm not a greedy lawyer/victim, after all).

Better answers considered the distance each party would have to drive (and whether I might need a driver), my teaching schedule, the orthopedist's professional schedule (especially with a new job), the noise levels associated with any choice, the comfort of the surroundings, and whether the location would elevate emotions by reducing stress and engendering feelings of relaxation and even pleasure. Good answers also considered the comfort of the room, the comfort of the furniture, table shape and size, the affect a lake view might have on the parties, and even a room with a working fireplace.

Several students mentioned the use of scented candles to elevate emotions. I cautioned them that this tactic could be a little tricky. A mediator does not want to seem too manipulative in creating the negotiation environment. Some people might actually have allergic or asthma reactions to some scented candles. It might work if the candles otherwise fit in the context of the negotiation location. In any event, the mediator would want to make sure the room smelled fresh. Some students also considered the affect indoor plants might have on the mood of the parties to the negotiation. Because I am a gardener, plants might have an especially calming affect on me. Several students recommended a portable fountain. Again, tricky. It might seem too contrived. But if the resort or hotel had a nice water feature, the mediator might make sure the parties had pre-negotiation drinks or dinner near the feature.

One group of students scored no points for this part of the question. They suggested the parties negotiate in a small windowless conference room with florescent lighting and neutral colored paint. The group failed to say where this sad room would be located geographically. While the group suggested the use of a round table (a plus), the students also would have had the parties sit in uncomfortable wooden chairs. That choice would have been especially uncomfortable for me, given my injury. These students also failed to consider whether I would even agree to this negotiation environment because of the many negative nonverbal messages – emotional and psychological -- it would send to the orthopedist that could undermine the problem-solving approach I wanted. It could also undermine the trust I needed to develop to allow information exchange and a possible settlement of the claim. In my sample answer, I fired these attorneys.

Amenities & Food: Students suggested the following amenities: phone; internet access (to find and download relevant articles on the medical issues; allow legal research on Westlaw); list of local sights and activities; fresh flowers (would appeal to me as a gardener, but again, be aware that some people may have allergies); quiet background music; a separate room for private meetings between client/counsel or for caucuses; comfortable temperature control; office supplies; white boards; flip charts; and magazines (especially ones that would elevate emotions).

Several students also considered the amenities the parties might want during periods not scheduled for negotiations: massage therapy, golf, exercise rooms, TV, tours of the area, shopping, off-site dining, and activities for kids if the orthopedist or the lawyers brought their families.

Students suggested that the mediator offer menu service or pre-ordered lunch with sandwiches, finger foods, fruit (especially attractive to me, the daughter of a dentist), cheeses, a vegetable tray, juices, bottled water, candies, and mints. Several students, now aware of the research showing that chocolate elevates emotions, suggested that it be available, especially if it were gourmet, including hot chocolate drinks. Recommended beverages included coffee, tea and perhaps even light alcoholic beverages, if contextually appropriate (i.e. rapport-building sessions; negotiations or information exchanges occurring over Sunday brunch or over dinner). One group recommended that the food remain light so the parties would not get lethargic.

Some students recommended donuts

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(without explanation), although I doubt I would be happy with this choice given my concerns about the weight I've put on with this injury. But the mediator might check ahead to see what each party considers his/her comfort foods. In that context, donuts might be one choice offered.

A few students were smart to consider any dietary needs the orthopedist might have because of his ethnic background.

Four students, guess who, recommended that the parties be prohibited from bringing outside snacks or beverages into the meeting room, although the members of this group did mention a scheduled lunch break (no specifics). Beverages would be limited to a shared pitcher of water poured into 8 oz. foam cups. They did recommend some Hershey Miniatures. And they would allow the parties to take "quick" bathroom breaks. Thank God for that!

Elevated Emotions: The most successful answer to this part of the question quoted heavily from the Shapiro article. Groups recognizing that the mediator would want to keep emotions positive and constructive earned more points. Several groups again recognized how the location of the negotiations could affect the parties' emotions. One group mentioned how my offer to pay for some aspect of the meeting (the mediator's fee, the hotel expense, dinner, etc.) could positively affect the orthopedist's emotions. If students had not mentioned chocolate as an amenity, it was time to do it here. One group also considered the principles of Feng Shui in affecting emotions. This suggestion was not crazy. Some scholars have written about the Viet Nam war negotiations in which the Asian participants made a very big deal about the placement, size, and shape of the negotiating table. They had concerns about Feng Shui principles of balance and harmony. The U.S. negotiators unwisely dismissed these concerns. If the orthopedist is Asian or if he or I otherwise believed in principles of Feng Shui, this suggestion could make a lot of sense.

In short, most of my students showed great creativity and emotional intelligence in picking a location for the mediation. The lesson I take from their work is that lawyers representing parties in mediation should consider the factors outlined above. While the mediator's conference room may offer an easy and inexpensive location for the mediation, it may not always provide the best negotiating environment. Even in less desirable environments, control what you can to elevate party emotions, build trust, and engender a problem-solving atmosphere.

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HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS (NITA 2004).

I have mediated in the tiny attorney-client consultation rooms of several local courthouses. The rooms typically have rectangular tables with uncomfortable wooden chairs. Often the locks on the doors do not work and so it is impossible to ensure confidentiality. In one courtroom, several people walked from an adjacent room through the mediation room on their way back into the courtroom. In one courthouse, inmates had laid a new floor in the one decently-sized conference room the court had available for mediations. They had installed stone tiles that caused sounds in the room to reverberate. The lighting in these rooms is almost always florescent. And the rooms do not have any windows or access to natural lighting. So, I don't think much of that recommendation. At the same time, mediators must make do with the resources available.

An excerpt of this discussion appears at http://www.mediate.com//articles/madonik.cfm. I am not providing pin-point citations to her materials.

This recommendation reminds me of a running joke we had in my former law firm. One of my partners, a big guy with a muscular build, supposedly "wound down" the chairs in our conference room every time he had a deposition or negotiation there. He then sat in a chair that was "wound up" to place him taller than the other parties. He, of course, denied the behavior. But it seemed that at every partners' meeting held in that room, most of us had our chins resting on the table top when we sat in the chairs. While this "hard-bargaining" tactic may have served his purposes as an advocate, it could prove disastrous in a mediation environment.

He tells this story in the context of asking whether a mediator could be held liable for not providing parties a safe environment.

For more on this topic, see M.H. Sam Jacobson, A Primer on Learning Styles: Reaching Every Student, 25 SEATTLE U. L. REV. 139 (2001).

At an advanced mediation training class I attended, Lela Love asked the participants to share a "master move." One woman mediator mentioned that she bakes chocolate chip cookies right before parties are expected to arrive at her office. The air is filled with the scent of this childhood treat.

For articles discussing the role of artwork or office décor in building rapport with clients, see Jill S. Chanen, Hispanic-Owned Firm Wants Office's Look to Reflect its Success – and its Client Base, 91-JUN A.B.. J. 54 (June 2005); Jill S. Chanen, Upholstered Chairs and Framed Art Add Welcoming Touches to a Sterile Office, 92-JUN A.B.A.J. 60 (June 2006).

Sharon Press, Director of the Florida Dispute Resolution Center, tells the story of a woman who filed a complaint against a Florida mediator for failing to provide a meal even though the woman suffered from low-blood sugar that interfered with her ability to think clearly. After an investigation, the grievance committee learned that the mediator had provided a meal. It was just not a very good meal in the opinion of the complaining party. See also Carol B. Liebman, Mediation as Parallel Seminars: Lessons from the Student Takeover of Columbia University's Hamilton Hall, 16 NEG. J. 157 (April 2000)(discussing the importance of food in a student-

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administration dispute).

CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 60-61 (2d ed. 1996) (describing the circle of conflict, causes of conflict, and interventions addressing specific causes of conflict, including structural causes of conflict). See also Paula M. Young, Structural Causes of Conflict: Something Else May Need to Change, ST. LOUIS LAWYER 14A (Feb. 6, 2002).
http://www.npdb-hipdb.hrsa.gov/.

Physicians and their lawyers seemed to have worked out several ways of avoiding the reporting obligation:

First, according to a 1993 decision of a federal court, a physician does not need to report payments made out of his own pocket. However, if the payments are made by his professional corporation, he must report them.

Second, apparently if a plaintiff makes only an oral, rather than written, demand for damages and the physician or hospital pays the claim, they need not report it.

Third, the NPDB Guidebook states that "payments made as a result of a suit or claim solely against an entity (for example a hospital or group practice) that does not identify an individual practitioner is not reportable under the NPDB's current regulations." Attorneys have worked out arrangements in which the name of a health care organization (hospital or group practice) is substituted for the name of the practitioner who would otherwise have to make a report. This commonly occurs when the organization provides the insurance coverage for the practitioner. http://www.npdb-hipdb.hrsa.gov/npdbguidebook.html.

Bureau of Justice Statistics, Civil Data Brief: Medical Malpractice Trials and Verdicts in Large Counties, 2001, http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtvlc01.pdf (last updated Jul. 2004).

Terry Carter, Tort Reform Texas Style: New Laws and Med-Mal Damage Caps Devastate Plaintiffs and Defense Firms Alike, ABA J. 30 (Oct. 2006).

Stephen D. Easton, Damages: The Litigation Environment, 2004 J. DISP. RESOL. 57, 65.

The NPDB Annual Report shows that the average delay nationally between the date of the incident resulting in the alleged injury and the date of payment (payout delay) is 4.6 years. For Virginia, the NPDB reports the following data:

In 2004, healthcare providers filed 186 payment reports involving physicians. This number would indicate the number of physicians who had to pay a medical malpractice claim of some sort in that year. Virginia has approximately 14,000 licensed physicians in active practice.

The 2004 mean payment was $283,567.

The 2004 median payment was $200,000.

In 2004, the average payout delay was 3.93 years. http://www.npdb-hipdb.hrsa.gov/npdbguidebook.html.

If you want a copy of the program materials, send me an e-mail.

Edward A. Dauer, Why People Sue in ADR Law and Practice (2000).

I have spent about $15,000 this past year to cover uninsured expenses, including travel expenses, deductibles, co-pays, private nursing, and medical equipment.

See, e.g., Daniel L. Shapiro, Emotions in Negotiation: Peril or Promise?, 87 MARQ. L. REV. 737, 87 MARQLR 737 (2004).

The film location for Dirty Dancing (Vestron Pictures 1987).

ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 61 (2d ed. 1991)("What does it take for you and others to relax? It may be talking over a drink, or meeting at a vacation lodge in some picturesque spot, or simply taking off your tie and jacket . . . .").

So much for supporting party self-determination about the mediation process itself.

Shapiro, supra note 20 Many mediators know this at an intuitive level. Their conference room tables often feature a bowl full of chocolate candy.

Meet the Commissioners

Frank Flood, Attorney,
Foster, Swift, Collins and Smith, P.C.


Frank Flood


Julie Mix McPeak

Julie Mix McPeak, Executive Director of the Kentucky Office of Insurance

Julie Mix McPeak was appointed executive director of the Kentucky Office of Insurance (KOI) in July 2006 by Governor Ernie Fletcher.

Director McPeak, a native of Louisville, was an attorney at KOI for nine years, including five as general counsel. In that capacity, she supervised the office's legal staff and outside counsel, represented the agency in court and administrative cases, drafted legislation and regulations, and served as lead counsel for insurer receivership litigation, as well as the rehabilitation or liquidation of insolvent insurers. She was co-counsel for Kentucky Association of Health Plans v. Miller, a case heard before the Supreme Court of the United States.

She is a 1990 graduate of the University of Kentucky and a 1994 graduate of the Brandeis School of Law at the University of Louisville. Most recently, Director McPeak was general counsel for the Kentucky Personnel Cabinet, working primarily with the state's self-funded health insurance plan. She has been an attorney for the Kentucky Commission on Human Rights and the Kentucky Health Policy Board, as well as an associate at Hodge & Kelley Law Offices in Louisville.

Director McPeak serves as chairperson of the NAIC's Life Insurance and Annuities (A) Committee and on the board of directors of the National Insurance Producer Registry (NIPR). She lives in Frankfort with her husband, Troy, and daughter, Anne

Does Kentucky have a separate receivership office?

No, in our state, the Executive Director acts as the insurance rehabilitator or liquidator, as the case may be. Our department will staff each new case as it occurs. This would typically combine KOI employees including financial, legal and examination personnel and outside contractors. Each case would have different needs and the staffing would reflect those different needs.

What are Kentucky's open insolvency cases?

Our current cases are AIK Comp (2004), a workers compensation group self-insurer, First Mutual Insurance Company (2001) and Kentucky Central Life Insurance Company (1993/1994). In Kentucky Central, we've made some great progress and see some light at the end of the tunnel on the case.

Over the past few years, we concluded the Medquest (1999) and Advantage Care (2000) cases, both of which were HMO's. We have also had some problems with unauthorized national business associations / health care trusts.

Do you use staff or contractors on insolvency cases?

We use a mixture of the two. We will hire a special deputy liquidator from the outside. He or she will work with our in-house counsel and a liaison official on the Department's staff who will make sure that all reports are timely file and we are kept apprised of the status.

Who are the Department personnel that work on insolvency cases?

David Hurt, our division director of financial standards and examination, is the "go to" person on issues such as insolvencies and reinsurer collateral. The Department's general counsel, Sharron Burton, also works on these matters. When I served as the KOI's general counsel, this was one of my responsibilities. Telitha Woods handles details on a day to day basis.

What are your biggest challenges as to insurance insolvencies?

We see our role as keeping current with our companies and ensuring that we receive accurate information from them. We have a good staff of examiners on board who are quick to act and take preemptive measures where necessary. So our biggest challenge is identifying those situations that need shoring up. We do our job when we prevent insolvencies.

From an insolvency viewpoint, what branch of the industry receives most of your attention, P&C, life or health?

We always have some issues with unauthorized insurers acting as MEWA's, and take decisive actions when we learn of one. We typically have two or three cases going at any one time. These can amount to a lot of claims that take several years to settle.

What is your Department's position on IRMA?

My perspective on IRMA is unique among the current sitting commissioners since I represented the State of Kentucky on the NAIC committee that was responsible for its drafting. Not surprisingly, I am a strong supporter of IRMA even though I realize that it is in many ways controversial. The statute is necessary because of the wide variance in the way the different states handle insolvencies and their issues. The difficulty in crafting IRMA was a result of many of the differences that the statute was intended to address. These differences are to be expected, I suppose, given that some states have large insolvency bureaus and many cases, and other states have few cases with a small number of department

Meet the Commissioners

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staff responsible for these cases. Kentucky would fall more in the latter category. The need for some uniform standards, however, is so obvious.

Is there anything on your insurance insolvency "wish list?"

I would like to see a better exchange of information and best practices training between the state departments. I feel that we have a lot to learn from our fellow regulators, particularly those with large bureaus that have handled a lot of cases. I am sure that we can learn how to handle certain issues that have not yet crossed our minds. Lessons learned from other departments could help us in our task of preventing situations before they become a crisis.

It would also help us to be able to better leverage technology advances for claims handling and administration of estates. This is hard to do in the middle of a case, but we would like to get there someday. This is something that an exchange of information between departments and among the contractors that work on insolvencies would help us on.

I also think our Department – and really all insurance departments – need to work more hand-in-glove with the guaranty associations. These relationships can be too competitive, and both receivers and associations have a huge role to play in these very important cases. I would like to see us develop good working relationships.

Over the past three years, has your Department had any insurer under "confidential supervision?"

No, we have not. We have worked with insurers overseeing the workout of financial or management issues. Sometimes this leads to filing of documents to create a rehabilitation case and sometimes corrective actions are taken and the matter never makes it to an official case. We try not to do anything on a confidential basis because we want our fellow regulators to have confidence in our domiciled insurers doing business in their states.

The question reminds me, however, that with all the criticism that the insurance insolvency system has gotten over the years, there are many, many success stories that are out there that no one ever hears about. So many times we have avoided insolvencies due to early interventions on the part of our office, company management or both. There is no record of all the times that our consumers have been protected by quick remedial action before insolvency occurs.

Editor's note: This Meet The Commissioners is the first installment of this new feature article for IAIR's The Insurance Receiver publication. It is intended to provide details regarding our insurance commissioners, who in most states serve as the statutory receivers, that will be of interest to IAIR's membership and that are not available anywhere else. The questions in future installments may be similar to those asked here; but, they may also be changed to reflect new developments or follow up on particularly interesting details.

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IAIR Headquarters Staff

The International Association of Insurance Receivers is managed by the firm of Paula Keyes and Associates LLC ("PKA"). They are headquartered in Altamonte Springs, FL, which is a suburb of Orlando. In addition to managing IAIR, PKA manages the Society of Financial Examiners ("SOFE").

There are three full time employees of PKA and one part-time employee. The following is some information about each of the employees and what their role is in the management of SOFE.


Paula Keyes

Paula Keyes, CPCU, ARe, AIR, CPIW, DAE
Paula is the owner of PKA and Executive Director of the AIR, a position she has held for 8 years. She has an insurance accounting background, having worked for four insurance companies and several insolvency consulting firms.

Paula is responsible for publications, educational programs, leadership meetings, marketing, committees and overseeing the work of the other PKA employees.

When not working, she enjoys traveling, reading, snow skiing and shooting pool.


Jeanne Lachapelle

Jeanne Lachapelle is the Director, a position she has held for 5 1/2 years.

Jeanne handles the membership database, continuing education credits, assists with educational programs and marketing.

She is originally from Rhode Island, but relocated to Florida six years ago to live near her brother and his family. Her hobbies include gambling, traveling, reading and listening to country/western music.


Brenda Lachapelle

Brenda Lachapelle is the Bookkeeper. She has been with PKA for 1 1/2 years, and since I know you are curious, she is Jeanne's niece and god-daughter.
Brenda is responsible for processing all funds received by IAIR, making all payments, preparing monthly financial statements, maintaining the investment accounts, reconciling all bank accounts, and processing all applications for educational programs, membership, designations, and testing.

Brenda also assists Paula with planning meetings and educational programs.

Brenda is a native of Florida, and in her spare time, she enjoys working out at the gym and line dancing to C&W music.


Gregg Burga

Gregg Burga is the Webmaster. In addition, he is the office computer/networking expert. Anything computer-related falls within his job description. Gregg maintains, updates, redesigns and hosts the IAIR website.

In addition, he owns a website design/hosting business and he works part-time for an internet service provider where he performs server-side services for clients.

When not working, Gregg enjoys DeeJaying, promoting musical events, running an internet radio station, and occasionally snowboarding.

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News From Headquarters

Congratulations to the following members, who have recently achieved IAIR designations:

Jose L. Rivas, AIR – Claims/Guaranty
Funds and Reinsurance
Executive Vice President
Regulatory Technologies, Inc.
Alpharetta, GA

David E. Wilson, CIR-Multi-Lines
CEO, Special Deputy Insurance Commissioner
Conservation & Liquidation Office
San Francisco, CA

2007 Board of Directors

First row (left to right): James Kennedy, Francine E. Semaya, Joseph J. DeVito, AIR, Lowell E. Miller, Harry L. Sivley, Jr., CIR-ML, Kenneth M. Weine, AIR, Mary Cannon Veed, AIR

Second row (left to right): Daniel L. Watkins, CIR-ML, Holly C. Bakke, William Latza, Legal Counsel, Patrick H. Cantilo, CIR-ML, Douglas L. Hertlein, Douglas A. Hartz, CIR-ML

Missing: William Barbagallo, AIR, Dorothy Cory-Wright, Edward B. Wallis

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