The
INSURANCE RECEIVER

Promoting professionalism and ethics in the administration of insurance receiverships.

Volume 10, Number 2 **Summer 2001**

IAIR Accreditation Standards Revised

D'Oench, Duhme: A New Tool for Insurance Receivers

New Insolvencies - Easing The Pain

President's Message

by Elizabeth Lovette, CIR-ML

While attempting to gather my thoughts for the business at hand, I was reminded of a moment, a now somewhat ironic and humorous moment, that occurred while I was attending the spectacular Health Care Insolvency Program held a few years back in Tucson. Those of you fortunate enough to be in attendance may recall that this seminar brought to the forefront the numerous, unique complexities associated with the demise of HMOs and other alphabet entities. I can't recall at this point in time whether my associate, Fred Greve, or myself leaned to the other and remarked that even if given the opportunity [in the stagnant receivership market existing at that time], we would not want to tackle something as ghastly as a large HMO receivership. What I distinctly recollect is unanimous agreement on the point accompanied by expressions that looked as if we each had consumed curdled milk or something similarly foul.

I bring this moment up for two reasons: 1) Indiana Insolvency, Inc. currently is up to its elbows in administering the receivership of Indiana's second largest HMO; and 2) the benefits of IAIR membership have in so many ways aided me in this endeavor. Those of you who have had the pleasure of dealing with an HMO insolvency, particularly a sizeable one, know that a host of complex challenges present themselves that do not exist in a typical life and health insolvency. Because of my involvement in IAIR, I knew where to turn for help and guidance. My thanks, by the way, to my numerous IAIR colleagues who have patiently bestowed their wisdom and advice when answering my pleas for help. The ability to draw upon the collective experiences of fellow members, to have instructive resource materials available from previous IAIR seminars and roundtables coupled with participation in IAIR's Health Care Insolvency Taskforce have enabled me to stay in front of, rather than behind, this receivership. And really this is what IAIR is all about. Coming from someone who firsthand has truly reaped the rewards of IAIR membership, I strongly encourage anyone thinking of joining our fine organization to do so. I have no doubt that professionally and personally you will only benefit. To existing IAIR members, share your stories with colleagues or others that you encounter in the receivership community; mine is certainly not unique. What better way to promote membership!

Marketing Committee

I am pleased to report that Trish Getty's presentation to the commissioners at the Midwestern, Western and Northeastern Zone meetings in New Orleans was enthusiastically received. Great job, Trish!! Now that a majority of regulators have been informed about the purpose and objectives of IAIR, let's make certain we capitalize on the momentum that has been achieved. To this end, many worthy ideas are circulating in the Marketing Committee including the idea of proposing a charge to the NAIC Insolvency Task Force to recognize

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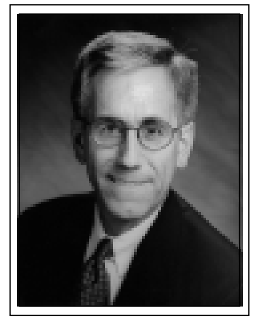
View From Washington

By Charles Richardson



Switcheroo

Just when we thought the political dust had settled, along comes Vermont Senator James Jeffords to announce his departure from the Republican party, thus giving control of the United States Senate to the Democrats. That switch portends possible significant implications for the insurance and financial services industries, simply because the Democrats in the Senate are seen as more interested in new privacy and optional federal charter "reforms" than Republicans and more likely to push for hearings yet this year on perceived shortcomings in the state-based system of insurance regulation. Leading the reconfigured Senate Banking Committee is Senator Paul Sarbanes (D-Md), who took over from Senator Phil Gramm (R-Tx).

Tax Reform

President Bush signed into law in June the broad tax reduction legislation that had become the centerpiece of his new administration. The legislation gradually reduces the estate tax and fully phases it out in 2010. Life insurance companies and the agents who sell estate planning insurance products will now have to adapt to the new marketplace and attempt to take advantage of the tax bill's reduction of individual tax rates and enhancements to retirement savings programs.

Reliance

After months of press and industry speculation, giant Reliance Insurance Company was placed in rehabilitation by Pennsylvania authorities on May 29. Insurance Commissioner Diane Koken, with her rehabilitation team, now begins the job of figuring out what can be done to deal with Reliance's debt burden and to make sure that policyholders are protected.

Insurance Fraud

The U.S. House of Representatives is considering legislation, HR-1408, to implement a national computerized network that would permit both state and federal regulators to access shared information on "bad actors" in the financial services industry. The legislation is designed to catch individuals, like Martin Frankel, who have been able to move among the securities, banking, and insurance industries without regulators of one industry becoming aware of fraudulent acts in another industry. The House Financial Services Subcommittee on Financial Institutions & Consumer Credit passed the legislation on June 13. A full committee mark-up is expected by the end of June.

President's Message

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IAIR's accreditation program and those individuals who have been certified as specialists by our organization. I believe this idea is well worth pursuing, and I encourage anyone interested in furthering this effort to contact Trish Getty, Mary Veed or myself. The new IAIR Marketing Brochure is now available with the much-anticipated Resource Directory scheduled to soon go to print. If interested in obtaining these materials, please contact IAIR's Executive Director, Paula Keyes.

IAIR 2002 Insolvency Workshop

Keep open the dates of January 24-25, 2002, to attend IAIR's Insolvency Workshop in San Antonio, Texas. The Insolvency Workshops in the past have always been co-sponsored with the NAIC, but this is IAIR's first foray in solely sponsoring this event. I have no doubt with Jim Stinson at the helm of the planning committee that the Workshop will be anything less than a resounding success.

In closing, I must point out that IAIR's membership is at an all time high. This fact alone speaks volumes about the direction our organization is headed. To those of you that contribute tirelessly in your efforts to promote IAIR, many sincere thanks. Our committees can always use new faces and new ideas, and I welcome, encourage and challenge those of you not involved to become involved. IAIR, your organization, will only benefit.

IAIR Roundtable Schedule

NAIC Meeting - Spetember 22 - 26, 2001
Boston, MA
IAIR Roundtable
March 22, 1:00 - 4:00 p.m.

NAIC Meeting - December 8 - 12, 2001
Chicago, IL
IAIR Roundtable
June 8, 1:00 - 4:00 p.m.

NAIC Meeting - March 16 - 20, 2001
Reno, NV
IAIR Roundtable
March 16, 1:00 - 4:00 p.m.

***The* INSURANCE RECEIVER**

is intended to provide readers with information on and provide a forum for opinion and discussion of insurance insolvency topics. The views expressed by the authors in *The Insurance Receiver* are their own and not necessarily those of the IAIR Board, Publications Committee or IAIR Executive Director. No article or other feature should be considered as legal advice.

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New Orleans Meeting Recap

By Mary CannonVeed

It's always a pleasure to attend an NAIC meeting in San Francisco, especially in early summer. The great weather, the elegant culture, the proximity to e-commerce ground zero...What's that you say? We aren't going to San Francisco? About face! Forget elegance, and plan on muggy weather instead of bay breezes, poor boys instead of Dungeness crab, and Bourbon Street instead of Fisherman's Wharf --it's New Orleans instead. Who wanted dot.com's anyway?

So what does one take home from the Summer National meeting, besides those Hurricane glasses? Even after this interval (and I'm late writing this article, as usual - sorry Jim and Paula), the most apt metaphor I can think of is the hoary one that compares the legislative process to sausage making - with the added complication that we're watching from inside the meat grinder!

As usual, I undoubtedly missed a lot, but there seemed to be two varieties of sausage in this particular kitchen. The first, and most relevant to this article, was Doug Hartz' valiant effort to do something about turning the URL into a Model Act. That process really has reached the messy stage, and it's extremely difficult to tell it if will turn out to be an elaborate exercise in doing nothing, or something a little more useful.

The atmosphere surrounding the Working Group is very different from that in the old RLAG, and it's made for some very odd juxtapositions. One of the reasons the RLAG was able to accomplish as much as it did, in spite of the diversity of interests involved in it, was that it started with some basic principles in common. Again and again, when things got sticky, we found confusion and disagreement could be resolved by referring back to those ideas and measuring whatever topic bothered us against them. They were never officially promulgated, but became such a mantra I feel safe in repeating some of them:

A. Leave your client at the door. (Jim Stinson's line). The object of the exercise is to create the best possible liquidation law for everyone concerned. Anyone caught trying to get a short-term advantage in whatever fight he was involved in at the moment gets frowned at.

B. Transparency. Liquidating insurers is challenging, but it's not enough to accomplish that if no one outside the "magic circle" understands what you did, or why, or believes in the integrity of the process.

C. Professionalism. The liquidation community has grown up. It knows its business, and it is not afraid to let outsiders watch it work, or to explain why it does what it does. We expect that liquidations will be conducted efficiently and fairly. The pressure of example is the most effective way to encourage any laggards to catch up.

D. "It's their money, stupid." Liquidation based on the idea that since policyholders could not possibly understand what had happened to their insurance, and could contribute nothing useful to the process, they should have only sanitized information and no standing to question it became obsolete about the time we began repealing blue laws and abandoning defined benefit pensions and telephone monopolies. It's time to bring the policyholder back in to the liquidation process.

E. Ignore the squeaky wheel. To get a new regulatory scheme adopted, you need buy-in from three groups: the regulators, the regulatees, and the beneficiaries. A solution that gives too much weight to the interests of one group will hit the rocks when it moves to the next phase of the adoption process, which will be dominated by somebody else with a different agenda.

One does not have the sense that any such consensus exists among the Model Act Working Group members. As a result, the several meetings in New Orleans careened crazily from point to point. The instinctive reaction of any regulator to the sort of "sunshine"

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IAIR ACCREDITATION STANDARDS REVISED

by I. George Gutfreund, CIR-ML

As we approach our tenth anniversary, it is interesting to reflect upon how far our organization has come. From humble beginnings in 1991 when a few dedicated insolvency professionals formed the Society of Insurance Receivers (subsequently renamed the International Association of Insurance Receivers) we have grown to a professional organization encompassing almost 400 members. In the formative years of the Association, an accreditation and ethics committee was established to develop a method for accrediting members who possessed the experience and professional skills necessary to take responsibility for administering insurance company insolvencies. This initiative resulted in the design and implementation of a certification program with two basic designations: Certified Insurance Receiver (CIR) and Accredited Insurance Receiver (AIR). The Association conferred the first designations on qualified members in December 1996.

As the Association matured, the Accreditation and Ethics Committee (A&E Committee) continually reviewed the standards for accreditation. The purpose of the Committee is to establish and maintain benchmarks for high professional standards which accredited individuals could put forth to the insurance insolvency community. The Committee realized that the standards originally adopted needed revision to ensure that they remained current with the evolution of the marketplace and allowed our members to advance professionally, both within the Association and the insolvency community. This resulted in a significant re-write of the CIR standards in 1999 and of the AIR standards in 2000.

Prior to looking at the revisions to the CIR and AIR standards, we should consider the importance of the IAIR accreditation process. During the past ten years, the Association has been able to improve the quality of insurance liquidations through its educational programs and quarterly Roundtables which allow its members to openly discuss new and innovative insolvency techniques. State insurance commissioners and regulatory officials have begun to appreciate the importance of IAIR as shown by their contacts with IAIR requesting referrals of accredited liquidation professionals to them. This has resulted in IAIR's accredited members receiving liquidation appointments or engagements in specific states.

The purpose of the committee is to establish and maintain benchmarks for high professional standards which accredited individuals could put forth to the insurance insolvency community.

The Board of Directors of IAIR has decided that only accredited CIRs and AIRs will be placed on a list for distribution to parties (such as regulators) seeking the services of accredited insolvency professionals. Since the requests have been coming in to the IAIR office for qualified insurance insolvency professionals, IAIR has commissioned the publication of a Resource Directory. This directory will set out the credentials and areas of experience of the IAIR members. With this bit of background, our members should realize it is in their best interest to seek certification under the CIR or AIR standards.

CIR STANDARDS

The CIR standards were significantly amended in 1999. Liz Lovette in her article Thinking about applying for the CIR designation? Now is the time! summarizes the changes to the CIR designation. Quickly paraphrasing her article, the major significant changes were to:

(a) expand the population of members eligible to qualify for the designation;

(b) remove the requirement that the applicant have "overall control and management responsibility on a day-to-day basis of all facets and parts of a receivership";

(c) allow senior level personnel or others that have gained the requisite experience to qualify for CIR;

(d) utilize relevant experience that may, but does not have to be, obtained from working on insurance receiverships;

(e) require that applicants must now satisfactorily complete a personal interview with representatives of the A&E Committee.

While the above points highlight the major changes to the CIR standards, please be aware that the revised CIR standards, as well as the Application for Certified Insurance Receiver and accompanying Statement of Qualifications, can be viewed in their entirety on IAIR's website at www.IAIR.org.

AIR STANDARDS

Once the CIR standards were rewritten, the A&E Committee turned its attention and focus on the AIR designation. The Committee reviewed the reasons and/or necessity for the Association having two designations and what was trying to be accomplished. After extensive research, debate and analysis of the demographics of our membership, the Committee decided that the AIR designation, if amended, could serve a more useful role in our organization and in the insurance insolvency community at large. From the analysis of the demographics of our Association, it was quickly determined that our membership is comprised of individuals having specialized skills in specific areas that are crucial to successful insolvency proceedings of an insurance company. The best way to summarize the results of the Committee's thinking is to envisage a CIR as a chief executive officer of an entity and the AIR as the department vice presidents possessing expertise in their areas of responsibility. The A&E Committee reviewed the many components of a

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IAIR ACCREDITATION STANDARDS REVISED

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successful liquidation and came to the conclusion that seven areas predominantly stood out. These seven areas (more specifically discussed below) also conformed to our members' demographics thus enabling them to seek accreditation in a specialty area. Accordingly, the revised AIR standards now allow members who have extensive experience in one or more areas of the insurance insolvency system, but who may not have the level of overall experience required for a CIR designation, or who simply choose to identify themselves as specialists in one field, to do so.

New AIR Standards for Accreditation Focusing on the specific changes to the standards, the new standards require five years' experience in the business of insurance, while the requirement of experience at a supervisory or managerial level has been dropped. The old standard pertaining to insurance receivership experience has been totally amended and the new standard now requires applicants to "be able to demonstrate substantial involvement over a period of three years with one or more insurance insolvencies in the practice area(s)" applied for. The new standards require that the applicant can qualify with either a Bachelors Degree or business experience of at least ten years. This deletes the requirement that applicants must have functionally equivalent related business experience. The new standards have also reduced the continuing education requirements to two years preceding the date of the application for the AIR designation instead of three years.

The most significant change to the AIR standards is the recognition of seven specific practice areas; reinsurance, claims/guaranty funds, legal, accounting/financial reporting, asset management, actuarial and data management. An applicant can now apply for AIR accreditation in one or more of these specific designated practice areas. The requirements for accreditation are reproduced below.

Practice Areas. Applicant must, in addition to the above requirements, meet the following requirements for applicant's selected practice area(s):

1. Reinsurance: Document substantial involvement and special competence in the reinsurance area, as well as specific experience in one or more of the following areas: reinsurance accounting, reinsurance underwriting or experience in the negotiation of, including pricing, of assumptions, commutations and/or portfolio transfers.

2. Claims/Guaranty Funds: Document substantial involvement and special competence involving claims and guaranty funds (or similar organizations that exist in other countries), and also the following:

- Working knowledge of the claims function as it exists in an ongoing insurer, as well as the particulars involved with insolvencies,
- Understanding of insurer insolvency and guaranty fund laws as such are involved with in the administration of claims, and
- If Applicant's experience involves receiverships administered in the United States, Applicant must demonstrate a basic understanding of the NAIC Uniform Data Standards.

The most signifigant change to the AIR standards is the recognition of seven specific practice areas.

To the extent applicable, claims experience may be obtained by employment/engagements with companies or Guaranty Funds.

3. Legal: Applicant must have a law degree, be admitted to practice in at least one jurisdiction and document substantial involvement and special competence with legal matters arising in connection with insurance insolvencies.

4. Accounting/Financial Reporting: Document substantial involvement and special competence with accounting principles, tax issues and financial reporting required in insurance insolvencies. An applicant may qualify under this practice area regardless of whether the applicant is professionally licensed as a Certified Public Accountant, or Chartered Accountant or similar designation that exists in other countries, so long as the applicant otherwise qualifies hereunder.

5. Asset Management: Document substantial involvement and special competence in the management of the variety of assets typically found in insurance insolvencies, including the unique legal issues that may arise.

6. Actuarial: Applicant must be: (i) a Member of the American Academy of Actuaries, have an ASA, ACAS or higher designation, or be a member of a similar recognized organization and possess a similar recognized designation from another country, and (ii) document substantial involvement and special competence with engagements involving insurance receiverships.

7. Data Management: Document substantial involvement and special competence with information technology as applied to insurance receiverships.

As with the CIR designation, the AIR candidate will now have to satisfactorily complete a personal interview with representatives of the IAIR A&E Committee. In addition, AIR applicants must submit a list of three references to attest to the applicant's substantial involvement and special competence in the specialty area being applied for. The references themselves must be knowledgeable of the applicant's work experience as it relates to the applicant's insurance insolvency involvement. The applicant shall not submit partners or associates to serve as references. Finally, to maintain the AIR designation, the applicant must now submit evidence of participation in approved continuing education activities of at least 30 hours every two years on the approved IAIR membership renewal form.

The newly revised AIR standards, as well as the Application for Accredited Insurance Receiver and accompanying Statement of Qualifications, can be viewed in their entirely on the IAIR website at www.IAIR.org.

Oral Interviews of AIR and CIR Applicants

One major revision adopted in both the CIR and AIR standards is the creation of an oral interview process. This requirement was adopted by the A&E Committee to better evaluate each candidate's skills. Although a written application is still required, the A&E Committee has found from years of reviewing them that certain key information is missing or cannot adequately be demonstrated in a written application. Through the oral interview process, the applicant is given the opportunity to demonstrate to the Committee (a) the ability to administer professional engagements; (b) the ability to apply the applicable insolvency legislation and jurisprudence; (c) appropriate experience and sound judgment in business matters, i.e., analysis and decision making; and (d) a high standard of business ethics and professionalism. The interview process also allows the Committee to assess the applicant's capacity to analyze situations and make decisions. By linking theoretical knowledge and practical experience, the applicant must show that he or she can arrive at sound practical decisions, taking into consideration applicable laws, regulations, professional standards and ethics.

Other Considerations

We all know that insurance insolvency is a highly specialized area requiring practitioners with sophisticated insurance and insolvency experience. As we continue down the road of globalization of industries, the insolvency practitioner must also possess the skills and knowledge to deal with trans-border, trans-jurisdictional insolvencies. This has been borne out by recent insolvencies over the past few years. In a number of jurisdictions, insolvency legislation has been amended to require that only qualified insolvency practitioners act as liquidators. In the United States, the recently drafted Uniform Receivership Law ("URL") goes so far as to require that the person who a commissioner designates to run a receivership must be one who is qualified to do so. Based on these trends, the A&E Committee urges all of IAIR members who feel they may be qualified to become a CIR or an AIR to submit their applications for certification. The professional accreditations which members can gain through this process are presently the only formal credentials a practitioner can offer as evidence of his or her qualifications in the field of insurance insolvency.

We all know that insurance insolvency is a highly specialized area requiring practitioners with sophistocated insurance and insolvency experience.

The Board of Directors and the A&E Committee at IAIR believe that the revised accreditation program is a vehicle that can provide commissioners and other constituencies in the insurance insolvency arena with expert assistance when they are faced with a receivership or potential receivership situation. In addition, the AIR designation can provide members with recognition by insurance companies and/or regulators requiring individuals with specific skill sets to do specific assignments. As noted above, with the printing of our resource directory, accredited members can publicize both their professional accreditation and skills.

CONCLUSION

As we embark on the next ten years of our Association, the A&E Committee is presently in the midst of updating our Code of Ethics, taking into consideration the revised CIR and AIR standards and changes that have been taking place in the industry to date. The Committee has also commenced discussions as to the development of a formal education program to help members achieve or retain accreditation as CIR or AIR designates. This is a huge task and the Committee needs the involvement and help of many more of our members. Finally, the Committee will continue to monitor the standards in place for accreditation, and as circumstances require, will review, investigate and recommend to the Board the appropriate changes in order to maintain the high level of professionalism and integrity associated with our accreditation program. The A&E Committee is always looking for new blood to help with the development of these programs and any member wishing to volunteer can do so by contacting the chair, or any other member of the A&E Committee.

In closing, I would like to acknowledge the tremendous effort put forward over the years by the retiring members of the A&E Committee Kevin Harris, Len Stillman and Linda Walker Span. Should you have any questions or desire additional information as to the revised CIR or AIR standards, or the operation of the A&E Committee, or be willing to volunteer your services as a member of the Committee, please do not hesitate to contact any current member of the A&E Committee: Liz Lovette, Bob Craig, Bob Loiseau, Tom Wrigley, Paula Keyes, Jay Deiner, Dan Watkins or your author, George Gutfreund, Chair of the Committee. Finally, please accept my thanks in advance for your participation in the new designation programs or as members of the A&E Committee.

News From Headquarters

SAVE THIS DATE

IAIR INSOLVENCY WORKSHOP
WORKERS' COMPENSATION INSURERS:
TEMPORARY OR PERMANENT DISABILITY?

PLUS – OTHER HOT TOPICS, INCLUDING PRIVACY CONCERNS AND MANAGED HEALTH CARE INSOLVENCY ISSUES

January 24-25, 2002
Hyatt Regency San Antonio
San Antonio, Texas

10th Anniversary Celebration!!!

At the December 2001 IAIR meeting in Chicago, there will be a dinner/dance to mark the 10th anniversary of IAIR which will be on Saturday, December 8th. Mark this date on your calendar and plan to join us in honoring 10 years of IAIR history.

A SPECIAL THANK YOU

We would like to thank those companies that served as Patron Sponsors of our quarterly round table and reception held in Boston during the NAIC Meetings:

Baker & Daniels

Cross River International

DeVito Consulting, Inc.

eoshealth, inc.

FitzGibbons, Tharp & Assoc.

Frost & Jacobs

KPMG, Inc.

Mealey Publications, Inc.

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PARAGON R/I Risk Mgmt. Serv., Inc.

Peterson & Ross

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Quantum Consulting Inc.

Robinson, Curley & Clayton, P.C.

Stroock, Stroock & Lavan LLP

Taylor - Walker & Associates, Inc.

The IAIR Website Has a New Look!

We have not only made it more pleasing to the eye, but it is also more browser compatible. This means that virtually any browser will be able to open the site and it will look the same. In the past, tables and pictures did not always properly open, particularly in Netscape.

IAIR is also trying to make the website as user friendly as possible, so if you have any suggestions or comments, please contact Gregg Burga at webmaster@iair.org.

New Insolvencies - Easing the Pain

by Barb Cox

After a period of calmness and quietude, a number of new insolvencies have appeared recently among the property and casualty insurers. We have no reason to believe this recent trend will reverse itself. This article, inspired in part by this new flurry of activity, suggests some ways the burial process could be made less painful for all players. In writing this article I borrowed shamelessly from the 1998 IAIR/NCIGF White Paper, "Strategies for Managing Receiverships" wherein the ideas of many talented and experienced folk, both from the receiver and guaranty fund communities, are set out. Many thanks to the entire White Paper Group which includes, in no particular order, Holly Bakke, Kristine Bean, Steve Durish, Rosalind Conway, Steve Uhrynowycz, Ron Bain, Alden Ives, Karen Weldin Stewart, Leonard Minches, Suzanne Sahakian, Jim Culotta, Mary Canon Veed, Tom Wrigley, Keith Carson, Bob Greer, John Gates, Joe Scognamiglio, Pat Wooldridge, Pete Gallanis, Doug Hartz, Jim Kennedy, Larry Mulryan and Mike Surguine.

Despite my rampant stealing of the ideas of others, both within the White Paper group and otherwise, I must state that the opinions and ideas expressed herein should be viewed solely as my own, though in many cases they may be shared by many.

Before the Bubble Bursts - or What Can be Done in Advance

The IAIR/NCIGF White Paper suggested that steps could be taken, before new insolvency activity is even expected, to improve the process of liquidation from start to finish. These ideas included information gathering, education of the judiciary, maintenance of applicable state law and insuring that qualified individuals were in place, or could be put into place easily, to oversee the estate.

Information Gathering: The White Paper points out that "examiners are adept at gathering information about an insurer during a financial or market conduct examination. The transmission of this existing information or, additional training in the gathering of supplemental items for their work papers only, would be beneficial and useful for a receiver to have in preparation for on-site arrival. The location and numbers of the various bank accounts of the insurer, location and inventory of the insurer's assets, copies of reinsurance matrixes and facultative certificates, names and addresses of managing general agents, specific information about the insurer's data processing software and hardware, provider agreements and other such information would shorten the receiver's learning curve for operations and allow the receiver to hit the ground running when he or she gets to the company. Information supplemental to existing requirements or formatted in a separate questionnaire to companies would be expected to be more of a viable option in examinations targeted for specific regulatory purposes as opposed to regular triennial examinations so as not to be a burden to all insurers. "

Education of the Judiciary: Well-informed judges would certainly make the liquidation process easier. In some jurisdictions, one judge is assigned all the insolvency activity. In others, insolvencies are assigned on a rotation. That problems result from inexperienced judges presiding over an insolvency was identified in both the NCIGF/IAIR White Paper and in Receivership of Insolvent Insurance Companies – Final Report of the Tort and Insurance Practice Section Task Force on Insurer Insolvency wherein it was stated "[b]ecause there are few insurer insolvencies, judges may be assigned an insurer insolvency only once in their careers. Receivership courts do not generally gain the insolvency expertise needed to effectively oversee an insolvent insurer's estate. " Steps are being taken by IAIR and NCIGF to develop a judges' training package in portable format that can assist in these matters. The White Paper also suggests that "a state could consider legislation mandating all insurance receiverships be assigned to a particular division or to special masters with receivership or bankruptcy experience. Having one judge hear all receivership matters has the obvious benefit to a receiver of consistent and predictable outcomes. "

Maintenance of State Laws and related matters: Up-to-date laws, both with respect to the state liquidation acts and the guaranty fund acts can do much to avoid many insolvency headaches. Much progress has been made over the past several years in enacting uniform guaranty association laws, to the extent uniformity is appropriate. We have also had great luck getting rehabilitation and liquidation orders properly drafted so that the funds are not triggered before their time and, when triggering is appropriate, this is done effectively as well.

The "Fabe cure" effort is well along, with cured statutes in place in 39 states. The federal government has continued to challenge the state distribution priorities, even in cured states. However, recent decisions have upheld the claim priorities set out in cured statutes, and application to estates pending at the time of statutory enactment. This effort has been a success story that receivers and the funds can share. The minority of states who have not yet instituted Fabe cures would be well advised to do so soon.

No discussion of legislation related matters would be complete without a mention of the recently formed Model Act Revision Working Group or "MARG" Group which, under the illustrious

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New Insolvencies - Easing the Pain

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leadership of Doug Hartz, is doing a re-look at the current NAIC Model. A major focus of this effort is determining what can be borrowed from the Receivership Compact's liquidation act, the "Uniform Receivership Law," and incorporated into the NAIC Model. Hopefully, this will result in a model act which is palatable to all parties to the liquidation and viable in state legislatures.

In light of the current and expected future insolvency activity, the importance of prompt and substantial early access to the guaranty funds cannot be overly stressed. Part and parcel to this is strong language both in early access statutes and in distribution priority law.

Qualified Special Deputy Receivers: The need to put qualified receivers in place was identified in the White Paper. The White Paper makes the following suggestions that would help to insure that a qualified individual is in place:

If a state insurance department handles its receiverships by contracting with non-department individuals to act as special deputy receivers ("SDRs"), consideration should be given to maintaining a pool of pre-screened and approved potential SDRs to shorten and streamline the awarding of an appointment. If such a pool is established, departments should institute procedures to insure that opportunity for participation is available to a wide and diverse group of qualified individuals. Also, care should be taken to comply with any applicable policies and state and federal law with regard to minority hiring, etc. Some minimum qualifications for appointment might include:

· International Association of Insurance Receivers accreditation;

· Prior experience with receivership or bankruptcy case administration with such experience also being required of subcontractors, if any, handling areas such as claims, accounting, legal, asset recovery, reinsurance; or

· Insurance industry managerial experience particularly with a run-off outside of receivership.

There should be a process to verify and evaluate qualifications (e.g. a detailed questionnaire to evaluate planning, execution and cost-effectiveness), as well as an objective process for selecting the most competent and experienced candidates to ensure timely and cost-effective administration of future receiverships.

For states that have no in - house expertise with receiverships, IAIR, NAIC, and NCIGF could consider developing a standing group comprised of individuals with varied receivership experiences who would be available to assist those states in preparing for an insolvency or in managing an insolvency.

The IAIR/NCIGF White Paper suggested that steps could be taken, before new insolvency activity is even expected, to improve the process of liquidation from start to finish.

Once a Company Becomes Troubled

Once it becomes evident that a company is troubled, a tension is created between the desire to remedy the company's problems by restoring it to a "viable entity" status, and the desire to insure that the hole doesn't get bigger, which places an even greater burden on the system, should the company ultimately be placed in liquidation. The White Paper points out that "[i]t is important that the department prevent a scenario where a company "self-liquidates" - that is, a scenario in which the company consumes available resources before the takeover, leaving the department with a low or no asset estate." While an insolvency is an unfortunate occurrence in any state and government officials are understandably concerned about the possible impact on the local economy, consideration should also be given to the burdens put on policyholders and taxpayers should an unavoidable liquidation be delayed.

The need for a large assessment to be called in order for the guaranty funds to meet their obligations results in recoupments in the form of increased rates, surcharges or premium tax offsets. Even setting aside these rather obvious financial concerns, other problems result when department resources are focused too much on saving the entity and too little on preparing for the liquidation that is sometimes inevitable.

The White Paper suggests that steps can be taken during the troubled company phase that can greatly expedite the transition to liquidation. "If examiners are sent to the company, the examiners can be gathering insolvency information as well as performing their normal financial examination. Under the NAIC Model Hazardous Financial Condition Regulation, a troubled company can be ordered to take short-term actions which would be beneficial should the company be placed in receivership. The troubled company can be ordered to suspend or limit the amount of new and renewal business, reduce expenses, purchase reinsurance, suspend or limit dividends, and limit or discontinue certain investment practices. If it appears that the troubled company can't meet time frames and achieve goals set in cooperation with the department or under a department order, the department should consider, keeping confidentiality issues in mind, contacting its SDR pool to determine availability and otherwise prepare for receivership."

Certainly, the goal of a rehabilitation is to return the company to solvency. A period of rehabilitation, whether or not the company can realistically be restored, can provide valuable time for preparations to be made if solvency proves to be an unobtainable goal. The White Paper suggests that "[c]ompany personnel can sort claims by state, can further sort claims by priority and level of hardship within a state, and can otherwise sort policyholder data by state. The NCIGF could be contacted to determine whether it is necessary to organize a coordinating committee. Should one be organized, it would be a valuable resource to the receiver and available to offer assistance relative to guaranty associations. If rehabilitation proves futile, the state prioritization of claims which has been accomplished during the rehabilitation, particularly with regard to on-going benefits, will assist the receiver in timing the entry of a liquidation order and the transfer of claims files in such a way that disruption of benefits is minimized." It is important that the transition to liquidation be made in such a way that ongoing claimant benefits for lines such as workers' compensation are not interrupted. It is essential that adequate assets remain during the period immediately preceding the order of liquidation to pay such benefits such that a gap does not occur between the time the company ceases claims paying activities and the guaranty associations are able to commence their work. Locating claims files and establishing procedures for orderly transfer of such files to the guaranty funds will also go a long way to insure that benefits to deserving claimants are not delayed. In some cases, the company may have made use of third party administrators to handle claim pre-liquidation. Claims files may be stored in various locations, making this step even more essential and adding to the initial confusion if steps are not taken in advance to deal with this situation.

While the funds have proven time and again their ability to perform in a variety of adverse situations, a period of rehabilitation also affords the funds valuable time to gear up from "peacetime army" status should a large insolvency occur after a period of low activity.

The Hammer Falls - After the Order of Liquidation

As always, a high level of communication and coordination among the receiver of the new estate and the guaranty funds is essential during this early post-liquidation period. The cooperative relationships that have evolved during recent years will do much to enhance the ability of the receivers of future insolvencies and the guaranty funds to pursue their mutual goal of protecting policyholders and claimants. The White Paper makes a number of suggestions on specific procedures that could be used to formalize this relationship and enhance the efficiencies of the insolvency process.

The final liquidation order should be forwarded to all ancillary states, guaranty associations and the appropriate financial institutions in each of the states in which the insolvent company was licensed to transact business. At the earliest possible time, the domiciliary liquidator should convene a meeting between himself or herself, the guaranty associations and the ancillary states in order to disseminate as much information about the insolvent company and receivership operations as possible. Such information should include, but not be limited to, the nature of the business of the liquidated company, the location of its principal insurance businesses, a complete and detailed compilation of its reinsurance treaties, a list of the agents and brokers with whom the company dealt, and, where appropriate, information regarding arrangements for meetings with managing general agents.

Much can be done both before and after an insolvency occurs to make the liquidation process more efficient, less painful, and more successful.

The early delivery of claim files to the appropriate guaranty associations will facilitate the guaranty associations' decisions to retain the insurer's counsel or appoint new counsel for those claims in litigation. At the same time, the domiciliary liquidator should establish procedures for the dissemination of information and coordination of actions among the receivership, the guaranty associations and ancillary states. A standing committee or team of receivership and guaranty association personnel could be established to review such things as the details of the of the applicable reinsurance contracts, the coordination of claims filing, bar dates, the evaluation of assets of the liquidated company for early access purposes, and procedures pertaining to guaranty association settlements with claimants to the extent such settlements have an impact on the receivership.

Conclusion

As the authors of the IAIR/NCIGF White Paper pointed out two years ago, much can be done both before and immediately after an insolvency occurs to make the liquidation process more efficient, less painful, and more successful in serving the needs of the unfortunate policyholders and claimants of the insolvent insurance company. Those involved in managing receiverships were well advised to heed the strategies outlined in the White Paper at the time it was authored, and even more so now in the busier times we face and in the time of future challenges we may encounter.

Meet Your Colleagues

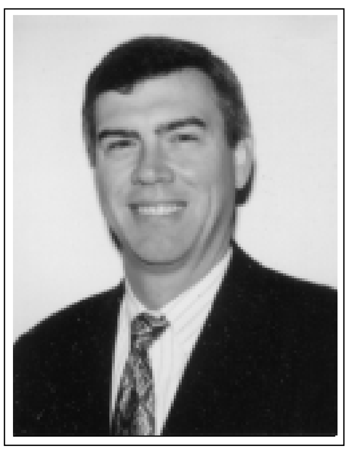
JOHN C. CRAFT

Jack Craft has practiced law in Kansas City since 1965, primarily in the fields of insurance recieversship and regulatory law. He is the chairman and a founding member of Craft Fridkin & Rhyne, L.L.C., with offices in Kansas City and Jefferson City, Missouri.

He has also long been active in metropolitan Kansas City area of civic affairs and charitable causes. Craft is a graduate of the University of Nebraska and Northwestern Law School in Chicago. He is married to Karen J. Craft, and they have two daughters.

Craft's law practice relates primarily to insurance, regulatory and business matters. Early in his professional career, Craft served with the Missouri Attorney General's Office, representing the interests of a number of Missouri agencies, including litigation support for the Missouri Director of Insurance. Craft also served as an Assistant U.S. Attorney in the Western District of Missouri. Since 1975, Craft has served as counsel to the Director of the Missouri Department of Insurance in the Director's capacity as receiver for several Missouri-domiciled insolvent insurance companies, with responsibility to marshal assets on behalf of claimant creditors and policyholders. Craft's engagements as receivership counsel have continued for over twenty-five years and through six gubernational administrations. Craft has also served as a special deputy liquidator and conservator. On several occasions, he has been engaged on behalf of liquidators in other states as well as Missouri.

For several years, Craft has been a member of the International Association of Insurance Receivers (IAIR), the Federation of Regulatory Counsel (FORC) and an associate member of the Insurance Regulatory Examiner Society (IRES). He has participated as a lecturer in a seminar panel presentation for the IAIR on issues involving receivership claims estimation and reinsurance recoveries.

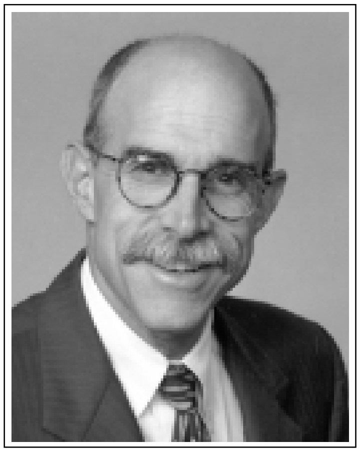


JOHN FINSTON

John Finston is a partner in the law firm of LeBoeuf, Lamb, Greene & MacRae who lives in Alameda, California across the bay from San Francisco. He matriculated from Johns Hopkins University with an engineering degree and received his J.D. from St. John's University. John joined LeBoeuf in 1980 and became a member of the firm in 1989. He currently heads up his firm's insurance insolvency practice and is the editor of the firm's Insurance Insolvency Newsletter. He has been an integral part of several LeBoeuf offices and is admitted to practice law in New York, Massachusetts, the District of Columbia, Oregon and California.

John has concentrated his practice in insurance regulatory, ratemaking, transactional and insolvency matters. He advises clients in the many aspects of regulatory approval, including acquisitions, management agreements, service agreements, complex reinsurance agreements and extraordinary payments between affiliated companies. John has had an active practice in the insurance insolvency area for many years. He has acted as counsel for insurance commissioners, advised troubled companies with respect to developing plans to avoid insolvency, advised creditors and service providers with respect to their rights and obligations against insolvent insurers and has represented the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) in connection with five separate life insurance insolvencies. John also represents reinsurers in drafting complex reinsurance transactions and has an active insurance companies merger and acquisition practice. He also represented several companies on the rate and administrative hearing matters arising out of California's Proposition 103 and the California Automobile Assigned Risk Plan in connection with rate hearings before the California Department of Insurance.

For those few moments each month John is not in the office, he is an avid naturalist and enjoys hiking and backpacking with his family in the California and Oregon.



HAL HORWICH

Hal Horwich is a partner in the financial restructuring group at Bingham Dana LLP an international law firm. Hal joined Bingham Dana in 1999 with the rest of the financial restructuring group of Hebb & Gitlin, where he had been a member since 1980. Hal's principal office is in Hartford, but divides his time in the firm's Boston and New York offices.

Hal's practice involves three principal areas: representing receivers and insurers in insurance company insolvencies; representing insurance companies and other institutional creditors in bankruptcy and reorganization cases; and representing insurers in alternative risk transactions.

Hal has represented receivers as lead counsel in liquidations of managed care organizations, property casualty companies and life insurance companies. These cases have included analysis and prosecution of claims against third parties such as accountants, law firms and financial institutions and reinsurance disputes (both ceding and assuming). These cases have also involved creative strategies for early closure of estates.

In bankruptcy cases, Hal has also represented insurers in many major Chapter 11 cases. This included representation of sureties with multi-million bond and financial guaranty exposures in The LTV Corporation; Allegheny Health Education and Research Foundation; Wickes Companies, Inc., Paramount Petroleum Corporation, and Triad America Corp. LTV involved several successful appeals of bankruptcy court rulings to the Second Circuit Court of Appeals. Hal has also represented property casualty insurance companies and health insurers in major bankruptcy cases including Pan Am Corp.; Eastern Air Lines, Inc.; National Convenience Stores, Inc.; Midway Airlines, Inc.; Al Copeland Enterprises, Inc. and Bank of New England, NA.

Hal has also been involved in the negotiation and implementation of many financial insurance transactions including financial guaranties, residual value insurance and targeted risk products such as efficacy insurance.

Bingham Dana is a leader in international insolvency matters. Hal has been involved in cases involving proceedings in the United Kingdom, Bermuda, Cayman Islands, and Japan. The firm has represented many debtor companies in connection with their international insolvency problems including Singer; Outboard Marine, Montgomery Ward, and many others. The firm has also represented insurance companies in connection with foreign insolvency workouts and proceedings around the globe.

Hal has published several articles and lectured on topics in his practice when time permits. He is admitted to practice in New York, Massachusetts, Connecticut and Illinois.

MIKE RAUWOLF

Mike Rauwolf has been a member of IAIR for many years and is the Illinois state contact person for the IAIR Receivers' Achievement Report. He is a number crunching guy who, after completing the accounting curriculum at Illinois State University, could think of no better use for his time than to sit for, and pass, the CPA exam. Mike later went on to earn the FLMI designation. Further evidence of Mike's penchant for pain was his enrollment in the Graduate School of Business at the University of Chicago. He earned his MBA degree from U. of C. in 1997 but will be paying off the tuition for years to come.

Somewhere in between all of this studying and test taking, Mike managed to meet and marry his lovely wife Kim. Mike and Kim enjoy traveling, Italian cooking, and spending time with their three young children ranging in ages from 11 to the baby just born last September. The Rauwolfs keep a hectic schedule of school activities, sports and music lessons.

Mike is the Audit and Special Projects Manager for the Office of the Special Deputy Receiver (OSDR) in Illinois. Mike and his team of CPAs handle the financial fieldwork and investigations for the OSDR, provide litigation support to the Receiver's counsel, oversee the annual audits of estates and perform various internal investigations. Mike has provided testimony in numerous court cases involving solvency related litigation and collection actions and served as a testifying expert in receivership accounting in a recent liquidation trial.

Receivers' Achievement Report

by Ellen Fickinger

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

Our achievement news received from reporters for the fourth quarter of 2000 is as follows:

Mike Rauwolf (IL) provided updated information on two companies under OSD supervision. **American Mutual Reinsurance, In Rehabilitation (AMRECO)** continues the reinsurance run-off of their business. Total claims paid inception to date; Loss and LAE $30,449, Reinsurance Payments $135,858,350, and LOC Drawdown disbursements $9,613,386. Further, **Centaur Insurance Company, In Rehabilitation** also continues the run-off of their business, total claims paid inception to date; Loss and LAE $53,280,164, Reinsurance Payments $4,945,493, and LOC Drawdown disbursements $13,876,555.

Continuing with our collection information from **James Gordon, CIR (MD)** for **Grangers Mutual Insurance Company**, collections during the fourth quarter of 2000 totaled $47,844.39.

Further updates were received on the progress of **Fidelity Mutual Life Insurance Company (FML), In Rehabilitation** as reported by **Frank Martin (PA)**. As of March 31, 2001, **FML** showed a statutory surplus in excess of $136,000,000 after reserving for all policyholder and creditor liabilities.

When **FML** was placed in rehabilitation on November 6, 1992, the Commonwealth Court imposed a moratorium on cash surrenders, withdrawals, policy loans and other contractual options. Death benefits continued to be paid and policyholder dividends and interest continued to be credited. The moratorium was imposed to stop the excessive cash surrenders that had threatened **FML**'s solvency and to permit financial rehabilitation. Since November 6, 1992, the Rehabilitator has petitioned the Court 5 times to modify the moratorium to allow the exercise of various policyholder options and to allow access to limited amounts of cash. Currently, petitions are pending by both the Rehabilitator and the court appointed Policyholder Committee to terminate the moratorium completely. However there is a dispute as to the timing of the termination. Under the Rehabilitator's petition, unpaid general creditors would also be paid their principal amount with simple interest of 6% per year when the policyholder moratorium is terminated. Most general creditor claims have already been settled and paid under a court order authorizing immediate payment for those creditors willing to waive interest.

In 1999, the Rehabilitator obtained court approval to pay policyholder dividends in the approximate aggregate amount of $70 million beginning in January 2001, plus an additional approximate $15 million in interest credits paid to nontraditional policies. In May of 2001, the Rehabilitator filed a petition for court approval of 2002 policyholder dividends in the approximate aggregate amount of $65 million. Prior to 2000, **FML** had been paying an approximate annual amount of $8 million in policyholder dividends.

RECEIVERS' ACHIEVEMENTS BY STATE

New York (F.G. Bliss, State Contact Person)

Use and distributions made to policy/contract creditors and Early Access

Receivership	Security/ Guaranty Funds	Policy/Contract Creditors	Other Creditors	Total
Consolidated	$677,533.00	$0.00	$0.00	$677,533.00
Cosmopolitan	$2,799,274.00	$0.00	$0.00	$2,799,274.00
Horizon	$121,106.00	$0.00	$0.00	$121,106.00
Ideal Mutual	$1,039,327.00	$32,709.00	$0.00	$1,072,036.00
Long Island	$92,991.00	$0.00	$0.00	$92,991.00
Whiting	$11,842.00	$0.00	$0.00	$11,842.00
Total	$4,742,073.00	$32,709.00	$0.00	$4,774,782.00

Illinois (Mike Rauwolf, State Contact Person)

Use and distributions made to policy/contract creditors and Early Access

Receivership	Loss and Loss Adjustment Expense	Early Access Distribution	Return Premium	Reinsurance Payments
American Healthcare Providers	608,475	0	0	0
Amreco	0	0	0	889,060
Back of the Yards	186,199	0	0	0
Centaur	813,328	0	0	0
Coronet	593	0	0	0
Edison Insurance Co.	608,918	5,253,478	640	0
Illinois Healthcare Ins. Co.	7,825	0	146,804	0
Inland American Ins. Co.	0	585,000	0	0
Merit Casualty Co.	0	638,943	0	0
Millers National Ins. Co.	0	149,049	0	0
Optimum Ins. Co.	0	1,000,000	0	0
Pine Top	1,591	12,867	0	0
Prestige	0	155,245	0	0
River Forest Ins. Co.	0	650,000	0	0
State Security	40	749,999	0	0

Receivership Estates Closed	Category	Licensed	Year Action Commenced	Payout Percentage
Security Casualty Co., In Liquidation **Closed 12/20/00**	P&C	Yes	1981	Class A - 100% - $5,086,810 Class D - 100% - $14,952,628 Class G - 6.8741% - $3,130,607
Associated Life Ins. Co., In Liquidation **Closed 12/07/00**	Life, A&H	Yes	1987	Class A - 100% - $589,048 Class D - 9.6609% - $653,067
United Equitable Life Ins. Co., In Liquidation **Closed 12/14/00**	Life, A&H	Yes	1990	Class A - 100% - $101,146 Class D - 37.5964% - $4,729.210

Maryland (James A. Gordon, State Contact Person)

Use and distributions made to policy/contract creditors and Early Access

Receivership	Amount	
Grangers Mutual Ins. Co.	$23,227.64	(MD)
	$9,797.84	(DC)
	$8,685.36	(NC)
	$450.12	(TN)
Total	$42,160.96	

Pennsylvania (W. Franklin Martin, Jr., State Contact Person)

Use and distributions made to policy/contract creditors and Early Access

Receivership	Amount	
Westmoreland Casualty Co.	$3,051,071.00	(GF)

Receivership Estates Closed	Category	Licensed	Year Action Commenced	Payout Percentage
American Independent Business Alliance Health Plan	Health - MEWA	No	1990	50.8% to Class B claimants

D'Oench, Duhme:

A New Tool for Insurance Receivers to Help Protect Policy Holders, Creditors and the Public

by Greg Mitchell

I. Introduction

As the firewalls traditionally separating the banking and insurance industries continue to deteriorate, a critical evaluation of the similarities between the two industries has become increasingly important. A careful analysis of the reasoning behind federal and state banking statutes and court decisions relating to insolvency may prove beneficial in an insurance insolvency.

One such protective measure is the application of the well established D'Oench, Duhme doctrine to insurance liquidations. While the reasoning in many court decisions has long supported the applicability of the D'Oench, Duhme doctrine to insurance liquidations, use of the rule is finally receiving deserved attention. In this article, we first explain the history of the doctrine as it has been applied to the banking industry. Next, we detail the various reasons that the doctrine applies to insurance receiverships. Finally, we explain and dispel the main argument against its application.

II. History of the Rule

A. The Birth and Life of the Doctrine

The D'Oench, Duhme rule was born in the 1931 Kentucky case of Denny v. Fishter. In Denny, a bank was undergoing liquidation. A dispute arose when the banking commissioner sought to collect on a note found on the bank's books which had been executed by Mr. Fishter. Mr. Fishter incurred this recorded obligation ostensibly to help the bank liquefy a frozen asset. In a verbal discussion, the two parties expressly agreed that the bank would never collect on the note. Unfortunately for Mr. Fishter, the effort to help the bank failed, as did the bank. The commissioner took possession of the bank's records with the institution's financial health in ruins. The only information the receiver had regarding the notes was the record of the transaction. According to this record, the notes were good, valid and most importantly, they were due. When the commissioner tried to collect, however, Mr. Fishter denied liability citing the agreement he made with the bank's officials. The court found that "Mr. Fishter may have acted in the best of faith and as an accommodation to the bank, but by his conduct he had occasioned loss to others (i.e. the creditors, depositors and the general public) who had no knowledge of his secret agreement with the bank. As between [Mr. Fishter] and [the innocent creditors and depositors], Mr. Fishter must bear the loss." Thus, Denny held that in a heavily regulated industry, as between the parties to a secret, unrecorded transaction and the uninformed creditors and depositors/policy holders, the former must bear the risk of loss occasioned by the agreement.

The United States Supreme Court later adopted Denny's reasoning in D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation. The Court relied on Denny in fashioning what has become to be known as the D'Oench, Duhme doctrine. Simply put, the doctrine states that one cannot deny liability for notes or other obligations based on oral or written side agreements. A unanimous Supreme Court has since reaffirmed the rule as recently as 1987 in Langly v. Federal Deposit Insurance Corporation . Later codified by Congress by the enactment of FIRREA, the D'Oench, Duhme doctrine became a tool for the Resolution Trust Corporation to defeat similar claims of no liability due to side agreements arising out of the S & L crisis of the 1980's.

B. Similarities between the banking and insurance industries lead courts to apply the D'Oench, Duhme doctrine to insurance receiverships.

Courts applying the D'Oench, Duhme doctrine to insurance receiverships reason that the similarities between the banking and insurance industries merit the rule's application to both. The common characteristics are evidenced in many ways, including the similarities between banking and insurance laws and the strong public interest element in each field.

Taking the state with which we are most familiar, Kentucky banking laws and insurance laws bear a striking resemblance. From the capital required to commence operations to the duties and powers of liquidators, the Kentucky statutes elicit the belief that the insurance and banking industries are fraught with many identical concerns. As an example, note the comparison between Kentucky's examination requirements for both industries. KRS 304.2-210 lists the requirements for examination of insurers. Subsection one indicates that "the commissioner shall examine the affairs, transactions, records and assets of each authorized insurer as often as reasonably necessary". These examinations must occur no less frequently than every three years. According to subsection three, the commissioner may, "in lieu of making his own examination, accept a full report of the most recently completed examination of a foreign, or alien insurer certified by an insurance supervisory official of another state". In addition, the insurance commissioner may participate in joint examinations of insurers or be represented in an examination by an examiner of another state.

KRS 287.450 details the examination requirements for the banking industry. According to the first subsection, every bank doing business in the state shall be subject to inspection by the commissioner no less frequently than once every twenty-four months. Under the fourth subsection, the commissioner may accept the examinations made by the Federal Deposit Insurance Corporation in lieu of making his own examination. In addition, the banking commissioner may enter into joint examinations or joint enforcement actions with other bank supervisory agencies having concurrent jurisdiction over any branch of an out of state bank or any branch of a state bank located in any host state.

The same concurrence of language and responsibilities exists in the area of duties and powers of liquidators (insurance law) or receivers (banking law). Under Kentucky banking law, the receiver has the "power to collect all debts, claims and judgments belonging to the bank and to do any other acts necessary to preserve and liquidate its assets". The liquidators, under insurance law, have the power to collect all debts and monies due the insurer. The insurance liquidator, like the banking receiver, has the power "to do such other acts as are necessary or expedient to collect, conserve or protect its assets or property". The insurance liquidators have the power to "conduct public sales of the property of the insurer." The banking receivers have the power to "sell any and all real and personal property [of the bank]."

In addition to the statutory similarities, both industries involve the public interest to an equivalent degree. Banks accept deposits and at least implicitly assure depositors that their money will be safe. Depositors place a great deal of trust in and dependence upon the bank's proper functioning. In the event of bank failure, the public trust erodes, the economy suffers immediately, and in the long term, the public endures multiple hardships.

Likewise, the insurance industry heavily involves the public interest. Policy holders invest in the security that if anything goes wrong, whether a car accident, an untimely death or a major health problem, they will remain protected. Insurance companies, like banks, rely on the public trust as a most valuable asset.

There is no basis for viewing the importance of protecting the public trust in the insurance industry as inferior to protecting the public trust in the banking system. To acquire trust, insurance providers market their products and assure potential customers that money provided, in the form of premiums, will be money well spent. Like banks, when insurance companies fail, not only will the individual policy holders suffer, but the general public suffers as well. Those who had coverage under the defunct company must seek coverage elsewhere, many times at higher premiums. Premiums may increase for all customers as a new batch of consumers add to the demand of the surviving companies' services. If other companies will not, or can not take on the added customer load and its associated risk, publicly funded agencies must provide the service. The public has every reason to be concerned about the proper functioning and dissolution of insurance companies as well as banks.

III. Reasons for Denny's continued application to the insurance industry.

Denny's basic tenet is that if a person permits a note, which allegedly does not represent a real obligation, to be placed among the assets of a heavily regulated company, that person should be prevented from denying liability when the receiver tries to collect. For several poignant reasons discussed below, this tenet applies with equal force to insurance liquidations.

Most importantly, the Denny rule protects the public interest inextricably intertwined with the insurance industry. As stated recently in another Kentucky decision, "The business of insurance is affected with the public interest and the state has an important and vital interest either in the liquidation or reorganization of such a business." Hence, the state utilizes insurance receivers to effectuate its inherent responsibility—to protect policy holders, creditors and the public from the harms associated with an insurance company's failure. There is no basis for viewing the insurance receiver's role as being inferior to the banking commissioner acting as receiver. In many states, both are statutorily charged with protecting the public as liquidators and typically they have nearly identical powers. The public policy statements enumerated at great length in Denny are just as applicable to the public policy statements of many state insurance rehabilitation and liquidation laws. The Denny court quoted Cedar Bank v. Olson saying, "The banking business is fraught with public concern. Banks do business through permission of the law subject always to its provisions for the protection of depositors, creditors and stockholders. Public faith, credit and honesty in business transactions are a bank's main assets . . . To sanction any arrangement, whereby the real assets and securities of the bank are to be regarded as less than or different from the apparent assets and securities, would tend to defeat the entire statutory purpose of the regulatory statutes". The same may be said of the insurance industry.

When liquidators take possession of an insurance company's written records with the purpose of liquidating its assets, they only have the company's records to consider. They cannot possibly know of oral side agreements affecting the value and indeed the very existence of various assets. The Denny court emphasized that the inherent danger of oral side agreements is that regulators cannot review them. Allowing such agreements to affect the company's assets would open the floodgates of insurance company executives' assertions that the CEO promised this or the director promised that. To avoid this scenario, and to protect policy holders, creditors and the public from its effects, Denny placed upon those in charge of the company's operations the responsibility of memorializing any agreement that affects the company's recorded assets. In this sense, Denny's risk of loss reasoning may apply equally to insurance liquidations. Denny held that as between the parties to a secret oral agreement that affects the assets of a heavily regulated company versus the innocent policy holders and creditors, the former should bear the risk of loss occasioned by the agreement. In the insurance industry context, this holding protects the public by requiring an insurance company's records to accurately represent the real assets of the company. The public will then be assured that a particular company is financially healthy before investing in it or purchasing a policy.

In addition, similarities between the two industries lend further support to Denny's application to insurance company liquidations. As previously discussed, state statutes governing the two industries are remarkably similar. Banks are subject to state regulation and

(Continued on page 18)

D'Oench, Duhme: A New Tool

(Continued from page 17)

examination as are insurance companies. The state can place companies in either industry into liquidation. In both cases, the primary protection for the creditors/ policy holders and the public comes through state regulatory examinations of the company's written records. In Denny, the court of appeals held that frustration of the regulatory examination process was key to its decision. In insurance cases, oral side agreements tend to effectuate the same type of frustration of the regulatory examination process. Insurance company liquidations, like bank liquidations are frustrated when those formerly in control of the entity avoid liability based on agreements not reflected in the insolvent organization's records.

IV. Counter argument: Insurance Company Liquidators Merely "Stand in the Shoes" of the Insolvent Company.

The argument most forcefully asserted against Denny's application to insurance liquidations is that insurance receivers merely "stand in the shoes" of the insolvent company. If correct, the liquidator can only assert the claims of the defunct company. In addition, the liquidator is subject to the same defenses as the failed organization. If accurate, those claiming that the company made an oral side agreement that affects the assets could easily assert that via promissory estoppel, his or her detrimental reliance on the company's promise eliminates the liquidator's ability to refuse to honor the agreement.

On the other hand, if the argument has no merit, the liquidator can assert not only the company's claims, but the creditors' and policy holders' as well. In addition, and most importantly for this issue, the individual claiming existence of an oral side agreement could not assert a promissory estoppel defense because the liquidator made no promise, nor did the creditors or policy holders. While the courts disagree as to whether the liquidator merely stands in the shoes of the defunct company, the weight of the authority and the force of logic point to the result espoused here—that the insurance liquidator represents the interests of the policy holders, creditors and the public and is therefore not subject to the same defenses as the defunct company.

The California Court of Appeals held, in Arthur Anderson , that the insurance commissioner, in his capacity as liquidator, may recover from the plaintiff on behalf of the liquidated estate (for the benefit of policy holders and others) for damage caused to the liquidation estate by negligent misrepresentation in the plaintiff's audit report. The plaintiff then argued that the receiver is subject to the same defenses as the entity for whom the receiver acts. To this, the court responded "the insurance commissioner acts not in the interest of the equity owners of the company, but rather in the interests of the policy holders.

According to the New York Appellate Division, in Corocan v. Hall , "the superintendent of insurance, as liquidator of an insolvent insurer, has paramount and exclusive standing to assert claims not only on behalf of the insurer, but also on behalf of its creditors and policy holders." The court reasoned that this ability stems from the purpose of the insurance liquidation statute, which like those in other states, is to insure equitable treatment for creditors and to avoid preferences by providing that any matter affecting the assets available for distribution be the subject of a single integrated administration.

In J.D. Wheeler v. American National Bank of Beaumont , the Texas Supreme Court held that an insurance company's receiver could maintain a cause of action, on behalf of the creditors, policy holders and claimants of the institution in receivership against the bank for having knowingly misrepresented the financial condition of the institution in receivership, as reflected in the records.

In the West Virginia case Cordial v. Ernst & Young , the court held that the insurance liquidator's appointment is not solely for the benefit of the corporation but is for the more general benefit of the "policy holders, creditors, shareholders or the public". Rather than being deemed to solely represent the interests of the corporation, the court explained that the insurance commissioner, as a receiver, represents a broad array of interests, including the public interest.

Finally, in Bonhiver v. Graff , the Minnesota Supreme Court held that "the receiver represents the rights of creditors and is not bound by the same fraudulent acts of a former officer of the corporation.

Thus, the authority establishes that the receiver's powers and responsibilities are not exactly parallel to those of the defunct insurance company. Rather, the receiver typically represents the interests of the creditors, policy holders and the public. It follows that the liquidator should not be subject to the same defenses as the company. These cases agree with the Kentucky legislature and many other state legislatures that adopt the Model Insurance Rehabilitation Act. According to KRS 304.33-240, the liquidator may "pursue any creditor's remedies available to enforce his claims . . ."; "prosecute any action which may exist in behalf of the creditors, members, policy holders or shareholders of the insurer against any officer of the insurer or any person . . ."; and "exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policy holder or member . . ."

CONCLUSION

In an era of growing industry consolidation and globalization, the challenges and difficulties associated with insurance liquidations require receivers to utilize the necessary tools to protect the various interests involved. The principles espoused in the D'Oench, Duhme doctrine provide those in charge of liquidating the assets of defunct insurance companies with the ability to effectuate their purpose—to protect the interests of policy holders, creditors and the general public.

New Orleans Meeting Recap

(Continued from page 4)

provisions that litter the URL is naked hostility, and plenty of it was evident. Nor did it seem that any attention was being paid to the survivability of the final product: once a Model is reported out of committee, will the Legislatures pass it? Instead, (and maybe I'm judging too soon here), the sessions settled into a "regulators' Christmas list" of provisions that would simplify the lives of liquidators by eliminating inconvenient defenses and due process requirements, reminiscent of Congressmen attaching pet projects to a crucial appropriations bill. Unfortunately, all too often the result of that tactic is to leave the appropriations bill unpassed, and everyone wonders what happened.

Of course, it's early days yet. It's important to the process that everyone get their wish list out on the table, if only so that someone else can explain why Santa missed their stocking in the final product. Maybe the responses are still pending, and the scales will even in the next few meetings. But the fact is that no Legislature will accept anything billed as a "comprehensive revision" to an important law unless it is backed by a significant degree of consensus - and that consensus hasn't been built yet.

The second variety of sausage was multistate regulation. It is hard to tell how much of the high-level talk will ever trickle down to reality, but the sheer weight of numbers is beginning to look significant. Of course, the PR for the meeting was dominated by the announcement that NARAB has been averted, because 36 states have adopted licensing reciprocity (and 45 expected by December). It's easy to put that down to the coercive effect of GLB and to expect it to represent lip service to the idea of national producer licensing that will be forgotten as soon as the immediate crisis clears. But look a little deeper:

* 11 states have implemented CARFRA (unified rate and form filing) on a trial run basis. At the end of July, the first ever CARFRA-filed life insurance policy was approved - approved in less than thirty days, too, which is a land speed record. CARFRA itself is only 9 months old, a child prodigy by NAIC standards.

* SERFF (centralized electronic rate and form filing) is in place in 44 states, and as of the last few weeks, is free of licensing fees.

* ALERT, which permits "file once, apply many" license applications, is in effect in 46 states and the District of Columbia, with just about every other state lined up to join by the end of the year.

* A project to establish a multi-state Form A procedure was launched, as was a scheme to "encourage" review of non-CARFRA filings within 30 days, and another to pursue multistate market conduct examinations.

* Using NAIC models, 43 states have adopted privacy rules which, if not completely congruent, are at least intelligently comparable.

Most of these initiatives are not directly GLB-driven. They represent genuine, internally generated progress toward rationalization of regulation, not because Congress says it ought to happen, but because it's the right thing to do. That motivation may not disappear when the GLB storm blows out.

As has been consistently the case the last few years, the IAIR Roundtable was unquestionably the high point of the meeting, in spite of sudden changes of program provoked by our members' tendency to have sudden changes of plan. The intense interest, thorough preparation, and audience participation in these things continues to amaze me. Nobody watching one could fail to be impressed with the skill, professionalism, and dedication of these people, invariably jammed into a too-small room with not quite enough chairs, on a perfectly good Saturday afternoon, to discuss topics that would glaze the eyes of any rational human being. As always, Dorothy Corey-Wright's presentation on UK developments was of surprising relevance to the Americans in the audience. ______ O'Shea's presentation on different approaches to troubled HMO's in Louisiana was thought-provoking and well-planned.

But the presentation that called for action was that the continuing discussion of "IAIR's future". The fundamental idea is that it is silly for our group to have worked to hard to have accumulated such an impressive quantity of skill and expertise, only to watch as time and time again insurance solvency decisions are made as if the decisionmakers worked in a vacuum. A substantial number of states have no IAIR participation; an even larger number do not have high-level regulatory participation. And, of course, it is the states which don't have large stables of active receiverships that most urgently need to maintain contact with the liquidation community - and which, by and large, don't. How to bridge the gap?

And there is a second prong to the problem: With the announcement of the new AIR accreditation standards, which finally make it possible to obtain recognition for receivership related skills and experience without actually going on a state payroll, we are poised to build a genuine pool of accredited and transferable receivership talent that those decisionmakers need to know about. How do we get their attention?

For one thing, Trish Getty and the Membership Committee are presenting a sort of "road show" to individual states and the Zone Committees, trying to get the attention of the people in the big offices. That's good as far as it goes, but there's more that can be done. It's "charge writing" time again in the NAIC season, and the mood among the Commissioners obviously recognizes and appreciates the benefits of the sort of reciprocal exchange of expertise that resulted in the laundry list of co-ordination projects outlined above. Why should insurance receivership be left out? The next EX5 set of charges should include one requesting the Insolvency Task Force to investigate and report upon the IAIR accreditation process, and consider whether to recommend the use of IAIR accreditation in planning receivership activity. If rate filing and Form A can be dragged out of the state-by-state closet, can receivership be far behind?