The Insurance Receiver

PROMOTING PROFESSIONALISM AND ETHICS IN THE ADMINISTRATION OF INSURANCE RECEIVERSHIPS

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President's Message

I. George Gutfreund, CA, CIRP, CIR-ML

As spring is about to end and the early days of summer are upon us, let us reflect for a moment on what has happened at IAIR over the past winter and early spring. In February, we had a very successful insolvency workshop in Miami Beach, Florida organized by Paige Waters and her committee. This was a very thought-provoking and stimulating session whereat numerous commissioners, regulators, various consultants and insolvency practitioners had an opportunity to enhance their knowledge about insolvency proceedings in the U.S. The workshop had 148 attendees from all across the United States, Canada, Bermuda and the United Kingdom. This was truly a great learning experience and we look forward to next year's workshop, which will be chaired by Phil Curley.

The spring meeting of the NAIC in New York created several logistical problems for IAIR. As many of you are aware, IAIR does not automatically receive meeting rooms from the NAIC any longer. In addition, the NAIC has compacted its schedule from spreading over five days to less than three days. This has caused enormous problems for scheduling of IAIR functions and IAIR has been working very closely with the NAIC to try and avoid scheduling duplications. This is not always possible, and consequently, some of our members have not been able to attend our quarterly roundtables or participate in committee meetings. Your Board is seriously looking at this problem and a questionnaire has been prepared that is being circulated to the membership at large to ascertain the desires of the membership as to timing of specific IAIR events. Hopefully, once the results of the questionnaire are tabulated, we will be able to ensure that the majority of the memberships desires are fulfilled with respect to timing of events at NAIC meetings. We do realize that we cannot have 100% satisfaction where so many people and events are involved. Let me assure you, though, that your Board is working to find an amicable solution to the condensed NAIC meeting schedule. The Board has already scheduled its June board meeting for Friday afternoon instead of Saturday morning. This was facilitated in order to allow many of our members who are involved with the MARG committee to attend extra meetings that are required in order to move that project along quickly. In addition, hopefully this will free up some people for committee meetings, which can take place on the Saturday morning instead of on Sunday. We have also been advised by the NAIC that more of the meetings will now be taking place by telephone conference calls and that actual face-to-face meetings at the quarterly meetings will be further constricted. So until the full effect of the revised NAIC schedule is developed, please bear with us as we try to satisfy the needs of our membership, working alongside the NAIC for as long as possible but in the future it may be necessary for IAIR to have its own functions on its own timetable.

At the spring meeting of the NAIC, IAIR reintroduced the original format of the receiver's roundtable. In the early years, the roundtable was conceived as a form for receivers/liquidators/SDRs to meet and have open discussion pertaining to insolvency matters. As IAIR matured, the roundtable became an educational tool for the whole insolvency community and over the years it has moved away from serving the initial function for the receivers/liquidators/SDRs. Our roundtables have gained tremendous acceptance within the insurance insolvency community but over time have not provided a forum for our accredited members to have a floor for frank and open discussion. At the New York meeting, accredited CIRs and a specific list of known people functioning as SDRs and/or liquidators/receivers who are members of IAIR were given invitations to a receivers' only roundtable. Attendance was limited to 25 invitees only and I am happy to report at our first receivers' only roundtable, 24 participants were present. The group approved the continuation of the receivers' only roundtable and recommended that future roundtables be restricted to invitees who are CIR or AIR accredited members of IAIR, and if any additional seats are available after that listing has been canvassed, then people will be invited on an invitation basis only. So for IAIR members who are qualified to receive a designation, this is another reason for you to complete your applications and apply for certification as soon as possible. Plans are well under way for the June receivers' only roundtable and all CIRs and AIRs of IAIR will be invited to participate.

The various committees of IAIR have been very active over the past few months. The Education Committee has been planning and putting in place the framework for the NCIGF/IAIR Joint Seminar to be held November 4 and 5 in San Diego, California. The program is to look at the issues surrounding receivers, reinsurers and guarantee funds coordination. This is shaping up to be an excellent program and all members should reserve the dates so they will be able to attend this excellent workshop. In addition, the Education Committee has put together a Request For Proposal (RFP) for the

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I. George Gutfreund, CA, CIRP, CIR-MIL

preparation of an education program leading to the development of a course of study and examinations to obtain the IAIR accreditations. This RFP has been circulated and the responses are being analyzed. This is a tremendous initiative on the part of IAIR and the cooperation of the full membership will be required in order to make this project a success. In addition, we will need members to help and assist in implementing this new educational program for our membership at large. So if any of you are interested in getting involved with this project, I suggest you contact Kristine Johnson or Dan Watkins, Chairs of the Education and Accreditation and Ethics Committees.

As you can see, the Accreditation and Ethics Committee has a new Chair – that being Dan Watkins, who has replaced myself. Furthermore, Alan Gamse has become chair of the Website Committee replacing Bob Loiseau who has done an excellent job on Website, but preferred to spend more time working with the Accreditation and Ethics Committee in the development of new policies. I wish to thank Bob for his excellent work as Chair of the Website Committee.

Your Accreditation and Ethics Committee has been very busy over this spring in drafting a policy dealing with continuing education credits and a time frame for completing the credits is being considered. In addition, a draft policy regarding a disciplinary process to deal with possible breaches of the Code of Ethics has been drafted and is being reviewed prior to submission to the Board for approval, hopefully by the June meeting.

It is very gratifying to see that we have had an increased growth in CIR and AIR applications being submitted. The Accreditation and Ethics Committee is busily reviewing these applications and contacting the various applicants as to the status of their applications. It is also noteworthy to see that requests for new memberships in the organization have been steadily increasing over the winter months. It appears that a lot of people have been very impressed by our educational programs and what IAIR really stands for. Finally, the subgroup of IAIR members who have been asked to participate on the NAIC Accreditation Task Force have been busily working with this committee to help move along the whole accreditation process. This is an important endeavour for IAIR and also the NAIC and the total insurance insolvency community. The intention is that this endeavour will result in the preparation of a white paper dealing with accreditation in insurance insolvency administration.

So as you can see, IAIR has been busy over the past few months. As I have noted before, this is your organization and the organization needs your support to ensure that the many successful services we provide to our clients, educational programs we offer and professional opportunities continue. Every volunteer brings a personal touch. Whether it is through helping with the programs or coming to events or meetings, your presence will help to define our association. Please come out to participate. Every little bit helps and we will all benefit. Please contact any member of the Board of Directors, Committee Chairs or myself to offer your services. Each of us would love to hear your ideas and/or suggestions. With your help we can collectively work for the good of our Association.

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

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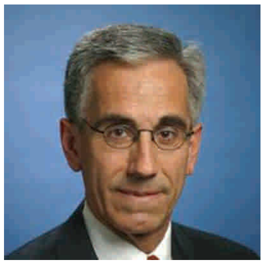
View from Washington

Charlie Richardson

A New Day for Insurance Regulation



A new day dawned at the NAIC meeting in March when Rep. Michael Oxley (R-OH), Chairman of the House Financial Services Committee, came to New York to unveil in a closed door session with Commissioners a comprehensive plan for federal insurance regulatory reform. The plan was developed by Chairman Oxley and Capital Markets Subcommittee Chairman Richard Baker (R-LA).

We are dealing with an across-the-board federal standards approach for the insurance industry which, for now, stops short of an optional federal charter. Chairman Oxley's speech touched on the issues that have been the focus of many Congressional hearings that I have detailed in prior articles, including speed-to-market, company and producer licensing, rate and form review/deregulation, market conduct, etc. Chairman Oxley also proposed a federal/state advisory council, with a national coordinator to ensure that the process moves forward and leaving open the possibility of enforcement by the states. You should obtain a copy of the speech at *http://financialservices.house.gov/News.asp?FormMode=release&ID=457* and read it from beginning to end.

Chairman Oxley pledged to work closely with the NAIC and individual state insurance commissioners as the concepts outlined in the speech were developed and legislation took shape. Those concepts are the culmination of 14 hearings held by Subcommittee Chairman Baker over the past three years.

As you would expect, the section of the speech that dealt with a new federal "coordinator" got the most play. Here are the key paragraphs:

"We want to build on our success with NARAB and the promises we have heard about the Interstate Compact, SERFF, and ALERT. We will focus our Federal tools on ensuring full participation in those programs with enforced deadlines and without deviations. We also want to take the excellent work you have done on NAIC and NCOIL model laws. Where there is consensus – make it nationwide. To resolve choice-of-law dilemmas, in some cases we can rely solely on the State of domicile."

"To make this all work and to coordinate future discussions over insurance tax policy and Federal-State uniformity issues, we want to create a Federal-State advisory council. This council would be equally run by State insurance commissioners and Federal entities involved with national insurance issues. Most of the work of this council could continue to be done by State experts in conjunction with appropriate Federal representatives. Some sort of national coordinator will be necessary to ensure that these reforms are implemented."

"For constitutional reasons, we may also need to create a purely Federal individual appointee who will have no authority other than to stamp "No" or "Yes" on the recommendations of the Federal-State advisory council. However, this individual would have no regulatory or licensing authority, and in fact no authority other than to approve or disapprove the limited set of coordination issues the Federal-State partnership is allowed to pursue. We realize this will be one of the most sensitive parts of the proposed concepts, and we want to work closely with you to ensure it's done properly."

Chairman Oxley's speech thus begins the tug of war over how far the federal government should get involved in an industry that for six generations has been regulated exclusively by the states. His concluding words to the assembled Commissioners set the tone:

"I want to conclude by noting our commitment, if you are willing to support our efforts, to working with the States and the NAIC as full partners in this process of developing legislation. We share the same goals of making a more competitive marketplace for consumers, with better availability and coverage capacity for consumers. We share the goal of working together to protect consumers from fraud. All of us recognize the need for improvement in the regulatory system. With these reforms, we can achieve improvements while retaining the benefits of State regulation that consumers currently enjoy. You are the experts, and we will need your input as the Committee moves forward with legislation over the next several months. We hope to have your support at our kick-off hearing at the end of March. This is a unique opportunity to forge a middle-ground consensus and create meaningful and lasting reform for consumers."

Where from Here?

Rep. Baker held another Subcommittee hearing on March 31 to kick off the legislative process and to dig into the specifics of the plan, now that he and Chairman Oxley have laid out their road map. At the hearing, there were witnesses from the NAIC (Commissioners Csiszar, Serio, and Kreidler), the industry (the AIA, PCI, Risk and Insurance Management Society, and Constellation New Energy) and the agent/broker community (the Big I and the CIAB), along with a consumer advocate (Bob Hunter of Consumer Federation of America). The discussion was vigorous, as the Subcommittee and the witnesses debated the NAIC's progress in improving the state-based-system, how much of a push for more reform needed to come from Congress, what the timeline

View from Washington

Charlie Richardson

for all this should be, etc. You can view copies of the witness statements at *http://financialservices.house.gov/hearings.asp?FormMode=detail&hearing=288:comm=1.*

There is so far no sign of comparable interest in federal insurance legislation in the Senate, in part because of ongoing jurisdiction issues over whether the Senate Commerce or the Banking Committee has jurisdiction. Recall that in the last Congress, federal insurance charter legislation drafted by Sen. Schumer (D-NY) was never formally introduced to avoid a parliamentary call that might put his bill in Commerce. The only sign of Senate interest in the federalization issue came late last year from Commerce's Ranking Democrat, Fritz Hollings (D-SC), who introduced S-1373, a bill that would create a full blown federal regulator. While there was a hearing in the Commerce Committee last October, the Hollings bill has no prospects for enactment.

Despite obstacles to action this year, the Oxley-Baker plan in the House Financial Services Committee will obviously position the proposal for serious consideration in the 109th Congress in 2005. That session will be Rep. Oxley's concluding one as FinServ Chairman. Sweeping insurance reform legislation may be among the laws he hopes to leave as a legacy – along with the Sarbanes-Oxley corporate responsibility law that passed in 2002.

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Receivers: Immunity and Its Limits

Teresa Snider and Kristen Brown [1]

More is required than honesty; a receiver is a fiduciary, he undertakes to care for the property and manage it for creditors, to act with assiduity and with reasonable competence.

In re C.M. Piece Dyeing Co., 89 F.2d 37, 40 (2d Cir. 1937).

In 1991, a plenary session of the National Association of Insurance Commissioners added a new section to the Insurers Rehabilitation and Liquidation Model Act (the "Model Act"): Section 9, Immunity and Indemnity of the Receiver and Employees. Section 9 provides that insurance company receivers and their employees [2] are immune from suit and liability in both their personal and official capacities. The concept of immunity has its basis in a larger goal – the efficient administration of the receivership. As courts have long recognized, without immunity, receivers could become "a lightning rod for harassing litigation." *Kermit Constr. v. Banco Credito Y Ahorro Ponceno,* 547 F.2d 1, 3 (1st Cir. 1976). Such an environment could dissuade qualified candidates from serving as receivers:

To subject citizens serving as public officers to suit and trial in every instance in which their good faith but mistaken actions caused injury to another "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

Elder v. Anderson, 23 Cal. Rptr. 48, 53 (Cal. Ct. App. 1962) (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)).

Subsection B of Section 9 of the Model Act sets out the parameters of the immunity afforded:

The receiver and his employees shall have official immunity and shall be immune from suit and liability, both personally and in their official capacities, for any claim for damage to or loss of property or personal injury or other civil liability caused by or resulting from any alleged act, error or omission of the receiver or any employee arising out of or by reason of their duties or employment; provided that nothing in this provision shall be construed to hold the receiver or any employee immune from suit and/or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of the receiver or any employee.

Many states have enacted, as part of their insurance insolvency statutes, Section 9 or a similar immunity or indemnity provision to protect receivers. [3] Even without, or prior to, such codification, courts have afforded protection for acts or omissions performed in the capacity as a receiver.

This protection for receivers – whether common law or statutory – is often invoked when the receiver files suit on behalf of the estate and a defendant lodges affirmative defenses or counterclaims that are directed at the receiver, not the estate. For example, in *Foster v. Rockwood Holding Co.,* 632 A.2d 335 (Pa. Commw. Ct. 1993), the Pennsylvania Insurance Commissioner, in her capacity as liquidator of Rockwood Insurance Company, brought suit against the former officers and directors of the insolvent insurer's holding company, seeking to recover more than $140 million in losses suffered by the insurer. The defendants' answers included several affirmative defenses directed at alleged actions or omissions of the Commissioner, such as failure to mitigate damages and negligence.

In analyzing the propriety of the district court's decision striking the affirmative defenses, the court drew a distinction between the affirmative defenses relating to the Insurance Commissioner's actions prior to her appointment as statutory receiver and those defenses relating to actions taken in the Commissioner's capacity as liquidator. As to the former, the Commissioner and Insurance Department were entitled to sovereign immunity by statute. *Id.* at 339 (citing 4 Pa. Cons. Stat. §§ 8521-8528). As to the latter, the *Foster* court determined that, as a liquidator, the Commissioner was entitled to immunity based on the purpose of Pennsylvania's insurance insolvency statute to protect the "public good" and the

[1] Teresa Snider is a partner and Kristen Brown is an associate at Butler Rubin Saltarelli & Boyd LLP. This article was originally presented at the April 2004 Mealey's Insurance Insolvency & Reinsurance Roundtable.

[2] Section 9 immunity does not extend to attorneys, accountants, auditors, and other professionals that the receiver retains as independent contractors.

[3] *See* Colo. Rev. Stat. Ann. § 10-3-514.5 (West 2004); Conn. Gen. Stat. Ann. § 38a-909 (West 2003); Fla. Stat. Ann. § 631.392 (West 2003); Ga. Code Ann. § 33-37-8.1 (2003); 215 Ill. Comp. Stat. Ann. 5/202 (West 2003); Ky. Rev. Stat. Ann. § 304.33-115 (2003); Md. Code Ann., Ins. § 9-205 (West 2004); Md. Code Ann., Cts. & Jud. Proc. § 5-410 (West 2004); Mo. Rev. Stat. §§ 375.650, 375.1166, 375.1182 (2004); Mont. Code Ann. §§ 33-2-1392, 33-2-1393 (2003); Nev. Rev. Stat. § 696B.565 (2004); N.C. Gen. Stat. § 58-30-71 (2003); Okla. Stat. tit. 36, § 1937 (2003); Or. Rev. Stat. §734.144 (2001); R.I. Gen. Laws § 27-14.3-9 (2003); Tex. Ins. Code Ann. § 21.28 (Vernon 2003); Utah Code Ann. § 31A-27-110 (2003); Wash. Rev. Code Ann. § 48.31.115 (West 2004); W. Va. Code § 33-10-39 (West 2003); Wis. Stat. Ann. § 645.08 (West 2003). Some states that do not have an immunity provision within their insurance insolvency code have a general statutory immunity for the discretionary acts of public employees. *See, e.g.,* Alaska Stat. § 21.06.165 (2003); Cal. Gov't Code § 820.2 (2004).

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statutory powers of the liquidator. *Id.* at 338. The court reasoned that the liquidator had the statutory "power to institute proceedings against [and recover damages from] the officers and directors of the insurer for any wrongdoing committed by those individuals which resulted in harm to the insurer" and that this power "should not be encumbered by an examination in court of the correctness of any specific act of the Insurance Commissioner in its receivership." *Id.* The court further found that forcing the liquidator to defend acts of regulatory conduct would frustrate the overall purpose of protecting the public and result in inefficiency and delay. *Id.* at 338-39. The court also noted that the "defendants should not be permitted to assert regulatory negligence to offset their own alleged culpability." *Id.* at 338.

The court analogized the propriety of this *de facto* immunity for the liquidator to the "no duty" rule that protects a bank receiver from an avalanche of suits:

The rule that there is no duty owed to the institution or wrongdoers by the FSLIC/Receiver is simply a means of expressing the broad public policy that the banking laws creating the FSLIC and prescribing its duties are directed to the public good, and that every separate act of the FSLIC as a receiver in collecting assets is not open to second guessing in actions to recover damages from wrongdoing directors and officers. If there is no wrongdoing by the officer or director, there can be no liability, but if wrongdoing is established, the officer or director should not be allowed to set up as a defense a claim that would permit the detailed examination of the FSLIC's action as receiver.

Id. at 337-38 (quoting *Fed. Sav. & Loan Ins. Corp. v. Burdette,* 718 F. Supp. 649, 664 (E.D. Tenn. 1989)). Thus, even absent explicit statutory immunity, the *Foster* court found that the purpose of the insolvency statute necessitated some level of immunity for the receiver for conduct in the course of the receivership.

A receiver taking over the affairs of an insolvent insurance company faces a monumental challenge. Without immunity from suits alleging that the receiver should answer personally for the good faith decisions and actions she takes in managing the estate, the efficient management of the estate could be jeopardized. Accordingly, courts and legislatures have recognized that receivers are entitled to at least some immunity, although they have placed certain limitations on the extent of the immunity afforded.

Limits on Immunity – Intentional or Wanton and Willful Misconduct

Immunity under Section 9 of the Model Act or under similar statutes is limited: a receiver and her employees have "no immunity for damages caused by intentional or wanton and willful misconduct." Based on this concept, courts will allow affirmative defenses and actions to be asserted against receivers where the requisite level of conduct is asserted. For example, a federal court denied the West Virginia insurance commissioner's motion to strike affirmative defenses that were directed to the commissioner's conduct as receiver and regulator because the defendant had alleged gross misconduct. *Clark v. Milam,* 152 F.R.D. 66 (S.D.W.V. 1993).

The *Clark* court rejected the commissioner's argument that affirmative defenses of comparative negligence, laches, waiver and estoppel, avoidable consequences, failure to mitigate, comparative assumption of risk, and unclean hands were "inconsistent with the doctrine of sovereign immunity." *Id.* at 71. Since the immunity provided by the West Virginia statute explicitly "does not reach 'acts or omissions which are malicious or grossly negligent,'" the court reasoned that the West Virginia Insurance Commissioner's qualified immunity is narrower than sovereign immunity. *Id.* [4] The court observed that "[a]lthough perhaps unlikely, it is theoretically possible Defendants could mount proof at trial establishing Plaintiff was malicious or grossly negligent in his activities as receiver." *Clark,* 152 F.R.D. at 71. Accordingly, the court allowed the affirmative defenses to stand. *Id.* However, because the court was troubled by the "shotgun approach" used by the defendants in selecting affirmative defenses, the court noted that it would consider sanctioning the defendants if it became clear the defendants had asserted any frivolous defenses. *Id.*

Similarly, the Missouri Supreme Court held "that the immunity provided to a deputy receiver for an insurance receivership…is conditioned upon actions taken in 'good faith' and it was error to dismiss a petition alleging the deputy receiver's actions were 'willful, wanton and malicious.'" *Avidan v. Transit Cas. Co.,* 20 S.W.3d 521, 522 (Mo. 2000) (en

[4] The statutory section in question is quite similar to Section 9 of the Model Act. The West Virginia statute reads:

No claim of any nature whatsoever that is directly related to the receivership of an insurer shall arise against, and no liability shall be imposed upon, the insurance commissioner…or any person or entity acting as receiver of an insurer, including surety, in rehabilitation, liquidation, or conservation as a result of a court order issued on or after the effective date of this article for any statement made or actions taken or not taken in the good faith exercise of their powers under law. However, this immunity shall not extend to acts or omissions which are malicious or grossly negligent. This qualified immunity extends to agents and employees of the receiver.

W. Va. Code § 33-10-39(a) (West 1990).

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banc). The statute at issue, Section 375.650.2, [5] provided two different immunities to the special deputy receiver. "First, he is allowed 'absolute judicial immunity.' Second, the statute also provides that the receiver 'be immune from any claim against [him] personally for any act or omission.' Both of these immunities, however, are conditioned upon his 'acting in good faith' in the performance of receivership functions." *Id.* at 525. At issue in *Avidan* were allegations by a former employee that the deputy receiver had acted in a willful, wanton, and malicious manner in violating the employee's civil rights under 42 U.S.C. § 1983. *Id.* at 525. The court held that it was error for the trial court to dismiss the plaintiff's civil rights claim because the plaintiff's allegations were not barred by statutory immunity – since such actions would exceed the good faith immunity provided by statute. *Id.*

Even where statutory immunity is granted to receivers, legislatures may restrict that immunity to cover only acts done in good faith or that are merely negligent as opposed to wanton and willful misconduct. This limitation ensures that incentives remain for receivers to act diligently and responsibly.

Limits on Immunity – Breach of Fiduciary Obligations

In a recent and lengthy opinion, the Missouri Court of Appeals held that a court overseeing the administration of a receivership of an insolvent insurance company has the power to surcharge a Special Deputy Receiver ("SDR") for breaching fiduciary obligations to the estate by overcharging for services. *McPherson v. U.S. Physicians Mut. Risk Retention Group,* 99 S.W.3d 462 (Mo. Ct. App. 2003).

In *McPherson,* the appellate court examined "the seeming tension between the statutory powers possessed by receivers to wind up insolvent insurance companies and the general supervisory powers of Missouri trial courts overseeing the administration of the receivership of these companies." *Id.* at 466. Specifically at issue was the supervisory court's order surcharging the special deputy receiver (the"SDR") for $771,752.95 in "damages" after an audit disclosed that the SDR had overcharged the receivership. *Id.* at 467. The *McPherson* court ultimately held that the trial judge should have recused himself, so the court reversed and remanded the case for trial before a different judge. However, the appellate court provided specific guidance for the new trial judge about the other issues raised in the appeal:

Several matters, however, need to be set out to aid the trial court in conducting the new trial; Judge Wells had the jurisdiction to order the audit [of the SDR's performance] which was presented for court approval; Wells had the authority to receive in evidence and accept the contents of the audit; in this insurance insolvency proceeding the trial court has jurisdiction to assess a reasonable surcharge against a special deputy receiver who has been afforded proper due process and discovery rights; Sauer, if she so chooses, may again present her claim for an increased hourly rate for unreimbursed time spent as SDR prior to April 29, 1999; the Receiver will not be allowed to recover the audit costs and the attorney's fees because of his admission during oral argument that the fees had not been requested, an admission that is binding under the law of the case.

Id. at 491.

The *McPherson* court held that the supervisory court had the power to impose a restitutionary surcharge, analogizing that power to "two inherent powers that courts definitely have. A court has the power to order a party who received money under a mistaken judgment to disgorge it…A court also has the inherent power to sanction bad faith litigation misconduct." *Id.* at 478. The appellate court reasoned that "disallowing a surcharge of the SDR would reduce the amount of recovery by creditors of USPM. Conversely, allowing a surcharge would signal to future receivers that they best pursue their responsibilities carefully and diligently." *Id.* at 480. Characterizing the overpayment as "unjustified fees," the court further reasoned that the surcharge was an appropriate method of obtaining restitution from the SDR for those fees, since the SDR's fiduciary duty to the estate obligated her to remit any overpayment. *Id.* at 480-81. *See also id.* at 484 ("As a fiduciary, [SDR] had a duty to exercise reasonable care, at a minimum.").

The SDR argued that the Missouri statutes "immunized her from liability for the acts and omissions upon which the

[5] Section 375.650.2 reads in full:

The receiver, special deputy receiver, commissioners and special masters appointed by the court, the agents and employees of the receivership and the commissioners and employees of the state of Missouri when acting with respect to the receivership shall enjoy absolute judicial immunity and be immune from any claim against them personally for any act or omission while acting in good faith in the performance of their functions and duties in connection with the receivership.

Mo. Rev. Stat. § 375.650. In Section 375.1182.5, the Missouri code also provides for immunity for acts or omissions in the performance of functions and duties in connection with a liquidation by the "director as liquidator" and for special deputies appointed by the director whose appointment is approved by the court. Section 375.1182.5 affords the same absolute judicial immunity as provided by Section 375.650.2, with the important difference that Section 375.650.2's "while acting in good faith" language does not appear in Section 375.1182.5. Section 375.650 applies to receivership proceedings initiated prior to August 8, 1991, while the broader immunity of Section 375.1182.5 applies to receivership proceedings initiated on or after that date. *Avidan,* 20 S.W.3d at 524-25 (interpreting Mo. Rev. Stat. § 375.1158.1).

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court based its surcharge because they were committed in the performance of her duties as liquidator of USPM." *Id.* at 482 (citing the aforementioned Missouri immunity statute for liquidators (*see* note 4, *supra*), Mo. Rev. Stat. § 375.1182.5). The court rejected this argument, stating,

[t]he purpose of the immunity statute is not to protect receivers (and, derivatively, SDRs) from court-imposed surcharges, but rather to prevent receivers (and SDRs) from becoming a lightning rod for harassing litigation. "[T]he receiver functions as an arm of the court by making decisions about the operation of a business that the judge otherwise would have to make." Immunity, then, is designed to ease compliance with judicial orders by barring third parties from hindering an agent of the court when the agent is complying with court orders, not when the agent evades the spirit of those very orders.

Id. at 482 (citations omitted). The *McPherson* court concluded that the SDR had "no immunity for acts beyond the scope of [her] authority." *Id.* at 483.

In sum, a receiver's fiduciary responsibilities to the estate are not obviated by the fact that the receiver has immunity for acts or omissions within the context of her responsibilities. Since failure to exercise reasonable care has the potential to damage third parties – in addition to damaging the estate – courts may conclude that statutory immunity does not apply to such acts or omissions.

Limits on Immunity – Acts Beyond Statutory Authority

Just as a receiver is not immune from suit based on breach of her fiduciary duty, a receiver is not immune from liability for acts taken outside the scope of a receiver's statutory duties. "The receiver functions as an arm of the court by making decisions about the operation of a business that the judge otherwise would have to make." *New Alaska Dev. Corp. v. Guetschow,* 869 F.2d 1298, 1303 n.6 (9th Cir. 1989). Accordingly, immunity serves to bar third parties from "hindering an agent of the court when the agent is complying with court orders, not when the agent evades the spirit of those very orders." *McPherson,* 99 S.W.2d at 482 (finding that there is no immunity for acts that are beyond the scope of the receiver's authority, such as acts that are not taken by a desire to further the interests of the insolvent insurer). The same reasoning applies when the receiver's acts go beyond the authority granted by statute – in other words, when the challenged action simply was not taken in the individual's capacity as a receiver.

For example, in *Executive Branch Ethics Commission v. Stephens,* the Kentucky Supreme Court examined whether a former insurance commissioner who subsequently served as deputy liquidator of a life insurance company estate was immune from an administrative action charging ethical violations in connection with his procurement of the appointment as deputy liquidator. 92 S.W.2d 69 (Ky. 2002). The court held that the relevant portion of the Kentucky insurance insolvency statute provides immunity "only to the liquidator or deputy liquidator because of any official actions they take regarding the liquidation proceedings …Immunity is not available to prevent an administrative agency from investigating that official for possible ethics violations." *Id.* at 74 (interpreting Ky. Rev. Stat. Ann. § 304.33-115). *See also Avidan,* 20 S.W.3d at 525 (reinstating a civil rights claim brought by former employee since allegations that deputy receiver acted in a willful, wanton, and malicious manner in violating the employee's civil rights, if proved, would not be a good faith execution of the deputy receiver's statutory duties).

Indemnification

Section 9 of the Model Act also provides that the receiver, if sued, will be indemnified out of the assets of the insurer for attorney's fees, expenses, settlements, and judgments. Any such payments are classified as an administrative expense and receive priority commensurate with that classification. Further, pursuant to Section 9, the "expenses incurred in defending a legal action for which immunity of indemnity is available" are to be paid "as they are incurred." If it is subsequently determined that the act, error or omission causing the damage did not arise out of or by reason of the receiver's duties or employment, or that the receiver's misconduct was intentional or willful and wanton, indemnification is not available. Accordingly, the Model Act states that in such case the indemnified receiver or employee is to repay the funds expended on his or her behalf.

Conclusion

Although rehabilitators and receivers have broad immunity for actions taken in performance of their official duties, there are limits to that immunity. A receiver is not immune from suit or liability for intentional or wanton and willful misconduct, nor is a receiver immune from liability for damages caused by the receiver's breach of her fiduciary duties to the estate. Further, the statutory immunity provided for receivers does not extend to acts that are outside the receiver's duties as a receiver. However, where a receiver is the target of a claim concerning acts taken on behalf of the estate, and done within her discretion as receiver, the costs of defense are generally paid out of the assets of the estate.

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The NAIC Looks at Internet-based Receivership Tools

A Summary of the 2003 Report and Recommendations of the Receivership Internet Use Working Group

Enya H. Carter [1]

How is the Internet used in receiverships? Who is the target audience for receivership information made available via the Internet? What is the minimal amount of information that should be made available to consumers and others through a Receiver's website? How can the Internet be used to reduce a Receiver's costs in claims evaluation and other processes?

The National Association of Insurance Commissioners (NAIC) addressed these and similar questions last year through a working group of the NAIC Insolvency Task Force. The Receivership Internet Use Working Group (the Working Group) was formed in 2002 for the purpose of reviewing the current use of the Internet by receivers throughout the states, and developing recommendations for appropriate future Internet use.

The Working Group's members included: Florida, Illinois, Maine, Michigan, Ohio, Oklahoma, Oregon, and Texas. Additionally, other states, interested parties and industry associations, including the National Council on Compensation Insurance (NCCI), the National Conference of Insurance Guaranty Funds (NCIGF) and the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA), actively participated in the Group's numerous conference calls and meetings. During the first several months of the project, Working Group members individually reviewed existing receivership related websites of various states and guaranty associations to determine how the Internet is currently used by receivers and the public as to receivership issues. Information gleaned during this initial phase of the project combined with the diverse experiences of the Group's members provided relevant feedback to the Group in establishing its final recommendations regarding Internet usage.

The Working Group's yearlong efforts culminated in a final report that was delivered to the NAIC at its 2003 Winter National Meeting in Chicago, Illinois. This article only summarizes the Working Group's seven recommendations for immediate and future use of the Internet in managing receiverships. The Working Group's full report is available on-line as the Receivership Internet Use Working Group – 2003 Report [2] at the NAIC website, *www.naic.org.*

Based upon the analysis of the Working Group, there are four distinct areas of interest where the use of Internet resources should be considered in order to more effectively and efficiently manage the receivership process. Those areas are:

- Delivery of information
- Capture of information
- Exchange and processing of information
- Development of standards

Although the Working Group acknowledged that significant security concerns and potential technology issues could arise in any of the identified areas, the Group focused on the potential benefits to receivership management through a more comprehensive application of Internet-based resources. Some of the benefits identified include increased efficiency, reduction of administrative costs and consistency of information provided to consumers and others.

Recommendation: Make More Information Available via the Internet

The Working Group recommended that states should use the Internet to make comprehensive information available on current and former receiverships to a variety of target audiences. The information the Working Group recommended be distributed or exchanged by way of the Internet is basic in nature and is information that a receiver is presumed to already have or additional information that provides a significant benefit to the target audiences.

Most state insurance regulators currently utilize the Internet to provide regulatory information and a limited amount of receivership information. Traditionally, receivers have staffed a consumer telephone line to provide information regarding pending receiverships. Naturally, there are significant labor costs associated with these traditional methods of storage and delivery of information. The delivery of information by way of the Internet could provide a potential cost savings to the receiver. Making additional information available via the Internet would enable the receiver's staff to provide the information on a timelier basis and to focus on other tasks. Some of the suggestions made by the Working Group are discussed below.

The Working Group analyzed existing receivership related websites and made recommendations as to the standard background information that should be provided for current receiverships in rehabilitation as well as those in liquidation. Although some of the target audience members are already knowledgeable

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[2] *Receivership Internet Use Working Group – 2003 Report*, http://www.naic.org/receivership/insolv_tf_wg_activities.htm.

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about the receivership process, the Working Group believed that basic information should be provided on these processes to enable those not as familiar with receiverships to better understand receivership issues and procedures.

The Working Group made recommendations as to the minimal amount of basic information that a receiver should provide on existing and former receiverships. A full listing of the minimum information requirements is set out in the Working Group's report. Similar minimum basic information would be provided on all closed estates for a minimum of 10 years after the date of discharge. For each company currently or formerly in receivership, making this minimal information available on-line could result in a significant reduction of inquiries from the target audience members. This benefit to receivers is expected to outweigh the time necessary to prepare the information for Internet access. In addition, the cost associated with making the information available on-line is expected to be far less than providing the information by any other means and should reduce personnel resources needed to handle inquiries.

The Working Group recommended that Frequently Asked Questions ("FAQs") regarding the receivership process be made available electronically to address the most common questions asked by the target audience. Whenever possible, links should be provided directing the individual to the area of the website responsive to a FAQ. A receiver should identify a minimum set of questions by topic to be covered, including:

- Questions regarding receivership in general: how the proof of claim process works, how claims will be evaluated and paid, definitions and terms, and statutory references;
- Questions regarding specific companies: status of coverage, status of any refunds, limitations of guaranty association coverage and deductibles, how to make additional payments, agent responsibilities, general creditor questions, and special contact information;
- Questions regarding the guaranty associations: how to contact a guaranty association and other general information, to include a link to the relevant guaranty associations.

Recommendation: Establish Electronic Links with Guaranty Associations

An analysis of the exchange of information via the Internet led the Working Group to a discussion of the ongoing data exchange between the receiver and the guaranty associations. Receivers and guaranty associations annually expend significant resources in resolving data issues. Subject to compliance with relevant privacy laws, the Working Group recommended that states establish an electronic link with guaranty associations to allow for the viewing of the receiver's claims data. The Working Group also recommended that a phase-in period be established to allow states sufficient time to meet this objective. Direct access between the receivers' and the guaranty associations' systems would eliminate errors occurring in the current methods for transmittal of information and existing duplication, resulting in additional efficiencies and cost savings to an estate.

Recommendation: Develop Internet-based Tools

Tool #1: Receivership Internet Template

In order to assist states in the presentation of information via the Internet, the Working Group recommended the development of an Internet template. Use of a template would provide uniformity in the presentation of information among receivers' websites.

Although a receiver would not be required to use the template, the template would, at a minimum, serve as a sample for guiding the receiver as to what information would be beneficial to provide. States infrequently involved in receiverships would benefit from the availability of a template, and target audience members who require information on multiple receiverships would more easily locate the information on the various websites. The Working Group recommended that the NAIC, in conjunction with the states, develop this technology, and provide it to each of the states. To best accomplish this goal, a Project Request has been submitted to the NAIC for funding of the Template.

Tools #2 & #3: Internet-based Proof-of-claim System and Internet-based Objection Process

To best harness the power of the Internet, particularly as it pertains to the potential exchange of receivership related information, receivers will need to make substantial changes to receivership processes such as Proof of Claims (POC) and objection processes which are essential to a receiver's evaluation of claims. A true online process for the electronic submission and storage of POC forms and objections could result in substantial cost savings to the receiver in that it would reduce current storage costs and provide better capability for sharing receivership data with guaranty associations. The development cost of an online process is estimated to be relatively expensive. Thus, the Working Group recommended that the NAIC, in conjunction with the states, develop the software application neces-

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sary for implementing online POC and objection processes for the benefit of all states. A Project Request has been prepared to request funding from the NAIC for these tools.

Tool #4: 24/7 Internet-based Claims Status

Since the claims procedure is an integral part of a receivership proceeding, the Working Group considered it desirable to allow claimants to check on the status of pending claims utilizing the Internet. A Project Request has been prepared to request funding from the NAIC for this tool.

Recommendation: Implement Best Practice Standards for the Use of the Internet in Receivership Matters

Many state receivers currently do not have the capability to prepare information for the Internet for estates they are administering, or are otherwise unable to take full advantage of the Internet's capabilities. In an attempt to provide some uniformity between the states, however, the Working Group attempted to identify best practices and "minimum standards" regarding immediate and future Internet technology and use. The Working Group determined that it is a best practice to provide information on the Internet for all current receiverships. At a minimum, the Working Group recommended that receivers utilize the Internet in accordance with the Group's recommendations for any company placed in receivership on or after January 1, 2005. The Working Group also recommended that information for existing estates be prepared and available on the Internet by January 1, 2006, potentially with a link to the NAIC's Global Receivership Information Database (GRID), which will have basic demographic information on receiverships. A summary of the "minimum standards" and "best practices" formulated by the Working Group, excerpted from the 2003 Report, is provided at the end of this article.

Conclusion

A Receiver's increased use of the Internet provides an opportunity to more effectively and efficiently manage the receivership process and results in significant cost savings to the receivership estates. The Working Group concluded that development of Internet based applications for these processes would benefit all states and that development should occur at a national level to reduce costs at the individual state level. The Working Group's recommendations to the NAIC for funding for further technological development in these matters has been well received and is anticipated to lead to the development of templates and software that may be used by all states to implement recommendations contained in the Working Group report.

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MINIMUM STANDARDS AND BEST PRACTICES
Excerpts from Appendix "A" to the "Receivership Internet Use Working Group – 2003 Report"

Item #	Topic	Minimum Standard [1]	Best Practice [2]	Minimum Standard Implementation Date
1	Background Information *(how receivership process works)*	Yes	N/A	1/1/05
2	Guaranty Association Contact Information	Yes	Direct Link to Guaranty Association's website	1/1/05
3	Basic Information for each Company in Receivership	Yes	N/A	1/1/05
4	Basic Information for each Company in Rehabilitation	Yes	N/A	1/1/05
5	Financial Data – Direct Link to the NAIC's Global Receivership Information Database (GRID)	Yes	N/A	Dependent on the availability of the NAIC's Global Receivership Information Database (GRID)
6	Supplemental Financial Data	No	Yes	N/A
7	On-Line Receiver Contact	Yes	N/A	1/1/05

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MINIMUM STANDARDS AND BEST PRACTICES

Excerpts from Appendix "A" to the "Receivership Internet Use Working Group – 2003 Report"

Item #	Topic	Minimum Standard [1]	Best Practice [2]	Minimum Standard Implementation Date
8	Related Entity Contact Information	Yes	Direct Link to website	1/1/05
9	Frequently Asked Questions	Yes	N/A	1/1/05
10	On-Line Inquiry Form *(including claim-related inquiries)*	Yes	On-Line status review by claimant	1/1/05
11	Closed Estate Information	Yes	N/A	1/1/06
12	Proof of Claims Forms – Process	Yes	N/A	1/1/05
13	Proof of Claims Forms – Download Capability	Yes	Multiple Formats for Downloading	1/1/05
14	Proof of Claims Forms – On-Line Submission	No	Yes	Pending development of technology
15	W-9 Forms – Process	Yes	N/A	1/1/05
16	W-9 Forms – Download Capability	Yes	Multiple Formats for Downloading	1/1/05
17	W-9 Forms – On-Line Submission	No	Yes	Pending development of technology
18	Feedback to Receiver	No	Yes	N/A
19	Objection Notices – Process	Yes	N/A	1/1/05
20	Objection Notices – Download Capability	Yes	Multiple Formats for Downloading	1/1/05
21	Objection Notices – On-Line Submission	No	Yes	Pending development of technology
22	Verification of Coverage	No	Yes	N/A
23	Loss Run Information – Available for Review	No	Yes	N/A – Security features necessary
24	Loss Run Information – Electronic Exchange	No	Yes	N/A – Security features necessary
25	Assessment Information	Yes	N/A	1/1/06
26	Data Sharing with Guaranty Associations	No	Yes	N/A
27	Third Party Administrators – Submission of Tax-related Information		No	Yes N/A

[1] Minimum Standard: Basic information available to the receiver that the receiver routinely makes available to various target audience members. A minimum standard represents a capability that some receivers may already have in place. It is believed that a minimum standard would not require substantial efforts on the part of a receiver or represents information that is essential to the target audience.

[2] Best Practice: Information that the receiver and various target audience members are in need of that, if provided via the Internet, would represent the optimal method of providing the information. It is believed that a best practice would have significant benefits to the receivership process due to the efficiencies to be achieved and the reduction in overall receivership costs as compared to the current method(s) of providing or exchanging the information. A best practice may involve development of a capability that most receivers do not presently have.

Reinsurance Arbitrations in Receiverships: An Arbitrator's Perspective

Robert M. Hall [1]

Introduction

As one with both insurance industry and receivership experience, I have participated in twelve arbitrations involving insurers in receivership as an arbitrator, umpire or counsel. In the majority, I have served as party arbitrator or counsel for the receiver.

There is considerable disagreement between receivers and reinsurers as to whether receivers are legally obligated to arbitrate disputes with reinsurers. While the legal issues can be debated elsewhere, [2] behind the debate is a persistent concern among receivers that reinsurance arbitration is inherently biased against insurers in receivership. The purpose of this article is to explore this concern based on my experience and observations.

Are Arbitration Panelists Inherently Biased Against Receivers?

Since arbitration clauses require that arbitrators have experience as insurance company executives, some receivers conclude that such arbitrators are inherently biased in favor of the solvent party to the dispute and against the receiver. This results, so the theory goes, with unconscious identification with the economic interests of the solvent party or conscious recognition of the possibility of future work for such party. This concern is exacerbated by several factors. The first is the tendency of some receivers to take positions with no basis in fact, law or physics arguing simply that they (the receiver) should prevail since creditors need to be paid. [3] Other relevant factors include the tendency of some reinsurers to use: (a) receivership as the trigger for due diligence which should have been performed at the outset of the relationship; and (b) different standards for insolvent clients than for solvent ones.

No matter how overreaching a receiver or how recalcitrant a reinsurer, it is impossible for either to be completely wrong, always, on every issue. Arbitrators learn to block out industry gossip and even past experience and focus on doing justice to the parties under facts of the dispute at issue. Moreover, the issues arbitrated are seldom receivership specific – most often they are common business issues that have little or no relationship to receivership law or procedure *(see next section, infra).* Finally, IAIR maintains a list of arbitrators with both industry and receivership experience. These individuals, presumably, would be free of any residual bias on point.

Do Industry Executives Have the Necessary Technical Knowledge of Receiverships?

Reinsurance contracts generally call for arbitration of disputes which "arise out of the contract." Technical issues of receivership law or procedure often do not arise out of the contract. For instance, the receiver of an insolvent reinsurer may have to arbitrate a coverage dispute, but the outcome of that dispute has no impact on priority of distribution of assets.

In my 12 arbitrations involving insurers in receivership, only one included the material involvement of a technical receivership issue and in that case the issue (setoff and recoupment) was a blend of contract and statute. For the most part, my arbitrations involved common disputes of coverage, allocation, misrepresentation and failure to properly administer the business. In these arbitrations, the fact that one party was in receivership was functionally irrelevant.

In any case, it is not unusual that arbitrators have to be educated on certain technical issues. Notwithstanding the concept of "expert arbitrators," it is impossible to be expert on all aspects of a sprawling industry. Wise counsel recognize the need to demonstrate how their positions on the issues of the day fall squarely within the broader principles of the insurance industry.

Finally, the IAIR list of arbitrators includes individuals who have both industry experience and technical knowledge of receiverships. Arbitration panels often lean members with particular and applicable technical expertise if provided in a balanced fashion.

[1] Mr. Hall is an attorney, a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator and mediator of insurance and reinsurance disputes. The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright 2004 by the author. Questions or comments may be addressed to the author at bob@robertmhall.com.

[2] See e,g, *Recent Case Law Developments with Arbitration in Receiverships*, International Journal of Insurance Law, Part I at 5 (1998). This article is available on my website: *www.robertmhall.com.*

[3] One example is a receiver who took a very sophisticated issue of federal jurisdiction to the United States Supreme Court and lost 9 - 0. At oral argument he focused on unpaid creditors rather than the issue for which the Court had granted certiorari.

Reinsurance Arbitrations in Receiverships: An Arbitrator's Perspective

Robert M. Hall

Arbitrations Are Too Slow and Expensive

This is sometimes a way of saying that the receiver is more comfortable in the friendly confines of the receivership court i.e. home court advantage. This is a tactical issue which is unrelated to the merits of arbitration itself.

More to the point, it is accurate to observe that many arbitrations have become too slow and expensive. However, this observation is not unique to receivership disputes – it is a general affliction. There are a number of reasons for this phenomenon. High on the list is the argument that counsel, and sometimes their clients, want them to be so. As the stakes increase and discontinued operations proliferate, there is greater incentive to win all costs, or at least very high cost.

It might be speculated that arbitrators are indifferent to or even welcome protracted proceedings for economic reasons. To the contrary, there is a great deal of eye rolling and grumbling from arbitrators when yet another discovery dispute which might delay the proceeding rears its head. A growing number of arbitrators charge a fee for the postponement of a hearing as a disincentive to protracted proceedings

Nonetheless, there is significant variation in the willingness of panels to focus and limit discovery to the issues of the day. Arbitrators, counsel and parties share the responsibility to return arbitration to the efficient dispute resolution mechanism it once was.

Conclusion

There is little evidence to conclude that reinsurance panels are inherently biased against receivers. Neither is it evident that lack of technical receivership knowledge on the part of the panel puts the receiver at a disadvantage. Technical receivership issues seldom play a material role in arbitrations and there are arbitrators available with such knowledge. While arbitrations have become slow and expensive, this is a general problem unconnected to receivership disputes.

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New York Court of Appeals Reaffirms Uniform National Standard for Administration of Insolvent Insurance Companies

Francine L. Semaya and William K. Broudy [1]

New York's highest court, the Court of Appeals, has issued a unanimous decision in favor of National Colonial Insurance Company in Liquidation ("NCIC"), directing that a trust fund on deposit in New York be transferred to NCIC's liquidator in Kansas, NCIC's domiciliary state. The decision is significant for its reaffirmation of a uniform national system for the orderly administration of insolvent insurance companies.

The decision [2] resolved competing claims between the NCIC liquidator and JPMorgan Chase Bank ("Chase"), the bank that held the trust (the "Trustee").

The matter arose from the liquidation of NCIC, a Kansas domestic stock property, casualty and fire insurance company. NCIC was declared insolvent by the Kansas Insurance Commissioner and was placed into liquidation pursuant to an order of the District Court of Shawnee County, Kansas (the "Kansas Liquidation Court") on or about July 16, 1993. The subject of the proceeding was a NCIC Trust Account, established by NCIC pursuant to Regulation 41 of the Rules and Regulations of the State of New York (11 NYCRR § 27.14).

The proceeding was commenced in 1994 by the Superintendent of Insurance of the State of New York (the "Superintendent") in Supreme Court, New York County, to take possession of the property and to conserve the assets of NCIC in New York. In particular, the Superintendent sought a conservation order to protect the assets of the NCIC Trust Account. Under Regulation 41, NCIC was required to establish the NCIC Trust Account in the amount of $750,000 "for the protection of all United States policyholders and beneficiaries on policies written in states where the company does business as an unauthorized insurer…" (Regulation 41, section 27.14(j)(1)). A Conservation Order was entered by the Supreme Court, New York County on December 20, 1994, designating the Superintendent as Conservator of the NCIC Trust Account.

The NCIC Trust Account is governed by the terms of a Trust Agreement. The NCIC Trust Account under the terms of the Trust Agreement and in accordance with Regulation 41 (11 NYCRR § 27.14(j)(2)) was irrevocable for a period of at least five years. The Trust Agreement provides that the NCIC Trust Account shall be exclusively available for "payment of claims under American Policies," defined as policies "issued to a resident of or with respect to, property situated in a state in which [NCIC] is not licensed to do an insurance business," referred to as the "American Policyholders." In addition, the NCIC Trust Agreement provides that after all claims made under American Policies are satisfied, the remaining funds, if any, should be used for the return of unearned premiums. Further, the express terms of the Trust Agreement provide that any funds remaining in the NCIC Trust Account be distributed to NCIC. The Superintendent discovered that Chase had breached its duty as Trustee of the NCIC Trust Account and had unlawfully released the entire NCIC Trust Account balance to NCIC in June, 1992, prior to the company's seizure and liquidation by the Kansas Insurance Commissioner and well before the end of the five-year irrevocability period of the Trust. The Superintendent demanded that Chase replace $750,000 into the NCIC Trust Account. Chase eventually acceded to the Superintendent's demand that the funds be restored to the NCIC Trust Account. Only under compulsion from the Department did Chase restore assets to the NCIC Trust Account.

After Chase restored the assets to the NCIC Trust Account, the Superintendent filed the proceeding to conserve the assets in the NCIC Trust Account and was designated as Conservator of the NCIC Trust Account, pending further order of the Court. The Conservation proceeding would have been commenced by the Superintendent as a matter of course to conserve NCIC assets in the New York Regulation 41 Trust Account, even if Chase had not improperly released the assets of the NCIC Trust Account. An affidavit of Chase, filed in the proceeding, acknowledged in the demand by the Department to restore the funds and acknowledged that the funds were restored by "recrediting NCIC's account in the amount of $750,000."

The Conservator's Petition that commenced the proceeding stated that the Liquidator and Chase had competing claims to the remainder of the NCIC Trust Account. Prior to the commencement of the Supreme Court, New York County

[1] Francine L. Semaya, Senior Member of Cozen O'Connor and Chair of it Insurance Corporate and Regulatory Department, represented National Colonial Insurance Company in Liquidation in the case reviewed in this article. William K. Broudy, a Junior Member of Cozen O'Connor, was on the Court of Appeals Brief. The views expressed in this article do not necessarily reflect the views of Cozen O'Connor, any of its individual partners, counsel, or associates, or those of its clients.

[2] *Levin v. National Colonial Ins. Co.*, 1 N.Y. 3d 350, 806 N.E. 2d 473, 774 N.Y.S. 2d 465, 2004 WL 303262 (N.Y.), 2004 N.Y. Slip Op. 00691, February 12, 2004. Page references are to 2004 WL 303262 (N.Y.).

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proceeding, Chase had filed a timely Proof of Claim with NCIC's estate, which was received by NCIC's claims administrator on July 18, 1994. The Order of Conservation was issued by Supreme Court, New York County on December 14, 1994. In November, 1999, the Liquidator sent a written notice to Chase, advising Chase that the Liquidator would recommend that the Liquidation Court allow Chase's claim in the amount of $750,000 (the initial principal amount of the assets in the NCIC Trust Account and the amount claimed by Chase in its Proof of Claim filed with the NCIC Liquidator). The notice also advised that Chase's claim would be assigned a Class IV distribution priority, would be deemed an unsecured claim of a general creditor and afforded Chase an opportunity to object to the Liquidator's determination of Chase's claim. Chase did not object or respond to the Liquidator in any way. Chase's claim against NCIC was properly filed with the Liquidator, was allowed by the Liquidator in accordance with Kansas Insurance Law and was approved by the Kansas Liquidation Court by order dated February 1, 2000 after notice and an opportunity to be heard were afforded to Chase. The approval of Chase's claim by the Kansas Liquidation Court constituted a finding that Chase had a claim against the assets of NCIC, and was premised on the fact that the assets of the NCIC Trust Account, the subject of Chase's claim, were assets of NCIC.

NCIC notified in excess of 84,000 potential claimants of the liquidation, including potential claimants in the states where NCIC did business as an unauthorized insurer. NCIC received in excess of 20,000 Proofs of Claims. No claims were made under the American Policies, the defined beneficiaries in the Trust Agreement. Chase was not a beneficiary of the NCIC Trust Account as defined in the Trust Agreement and did not have a secured claim to assets in the NCIC Trust Account. Under Kansas Insurance Law, which governs the NCIC Liquidation Proceeding, any remainder in the NCIC Trust Account is a part of the general assets of NCIC's estate. Accordingly, as a matter of law, the NCIC Trust Account was to be distributed to the Liquidator.

After it had been determined that there were no claims under the American Policies, the Conservator petitioned Supreme Court, New York County for an order directing distribution of the assets in the NCIC Trust Account. In the proceeding, NCIC argued that Chase not only violated the mandate of Regulation 41, but also breached its duty as Trustee when it released the entire balance of the NCIC Trust Account only three years after the NCIC Trust Account had been established and before NCIC was placed into liquidation. The release of all the funds in the NCIC Trust Account deprived the American Policyholders of the security mandated by Regulation 41, the reason for the establishment of the NCIC Trust Account. In addition the approval by the Superintendent, required by both Regulation 41 and by the Trust Agreement, was not obtained by Chase prior to the release of the assets of the NCIC Trust Account.

NCIC advised the Court that but for Chase's improper release of the assets in the NCIC Trust Account, all the assets of the NCIC Trust Account, with interest, would have been available at all times for the NCIC American Policyholders and then the remainder, if any, for the Liquidator to recommend and the Liquidation Court to approve distributions to other policyholders and creditors of the NCIC estate. When Chase recredited the funds to NCIC, NCIC was made whole as to the principal held in the NCIC Trust Account and from that point on, Chase's only ownership interest in the funds was as an unsecured creditor of the NCIC estate.

The Supreme Court, New York County, ruled in favor of Chase, but, on NCIC's appeal, that ruling was unanimously reversed by the Appellate Division, First Department and the funds were directed to be distributed to the NCIC Liquidator in Kansas. The Appellate Division decision [3] found that:

The Kansas court had and has jurisdiction over the proper disposition of this trust asset and the liquidator in that proceeding should determine distribution of such asset (KSA 40-3622[a], Insurance Law 7410). Chase's belatedly advanced claims to ownership, assuming that any remain viable, must be presented in the Kansas liquidation proceeding. The Kansas liquidation proceeding controls any distribution of the trust fund. Since Chase was afforded an opportunity to contest the Kansas determination which it did not exercise, Chase has been provided a full and fair opportunity to be heard in connection with its priority for distribution of such asset and such determination must be afforded full faith and credit. [4]

The Court of Appeals agreed to hear the case, pursuant to Chase's motion for leave to appeal.

In unanimously affirming the Appellate Division, the Court of Appeals stated that:

We find full faith inapplicable here, and instead rest our holding that Supreme Court lacked jurisdiction on the provisions of the UILA. [5]

[3] *In re Conservation of the Trust Funds, etc., National Colonial Insurance Company,* 296 A.D. 2d 354, 745 N.Y.S. 2d 28 (App. Div. First Dept. 2002).

[4] Id. at 745 N.Y.S. 2d 29, citation omitted.

[5] *Levin v. National Colonial Ins. Co.,* footnote 7, page 5, referring to the Uniform Insurance Liquidation Act (UILA).

New York Court of Appeals Reaffirms Uniform National Standard for Administration of Insolvent Insurance Companies

Francine L. Semaya and William K. Broudy

The Court analyzed the Uniform Insurance Liquidation Act (UILA), adopted by New York, and found that Kansas is a reciprocal state with New York for UILA purposes. The Court held that:

In 1939, the National Conference of Commissioners on Uniform State Laws endeavored to resolve some of the complexities of liquidating an insolvent insurance company with assets in multiple states by approving the Uniform Insurers Liquidation Act (UILA). New York adopted the UILA in 1940 "with the main purpose in mind of providing a uniform system for the orderly and equitable administration of the assets and liabilities of defunct multistate insurers" (G.C. Murphy Co. v. Reserve Ins. Co., *54 NY2d 69, 77 [1981]; see Insurance Law §§ 7408-7415). As NCIC is a "defunct multistate insurer," any analysis of New York's authority to administer its assets must begin with the UILA.*

Section 7410(b) of the UILA, entitled "Conduct of delinquency proceedings against insurers not domiciled in this state," sets forth the procedures that New York follows when assets of a non-domiciliary insolvent insurer are located both within and without New York, and when receivers have been appointed in New York and the domiciliary state. This provision – and the UILA generally – recognizes the authority of the domiciliary state and its receiver over all the insolvent insurer's assets, including those located in New York. [6]

Noting that the NCIC Trust is a special deposit under both New York and Kansas insurance laws, made for the benefit of a specified group of policyholders, the Court addressed the role of the New York Conservator as follows:

Notwithstanding the appointment of the Kansas liquidator and the liquidation proceeding underway in Kansas, the New York conservator had authority under the UILA to "recover" the Regulation 41 trust fund and "liquidate" from it any claims made under the covered policies (see Insurance Law § 7410[b]). Jurisdiction over the trust did not rest exclusively with Kansas, as the Appellate Division determined; however, neither Chase nor NCIC was the holder or beneficiary of a policy protected under the trust. Accordingly, their claims to the trust remainder could not be adjudicated by the Supreme Court under the UILA's special deposit authority. [7]

Concluding that the UILA is silent regarding adjudication of competing claims of ownership of a trust remainder, the Court found that:

in order to promote the UILA's goal of orderly and equitable liquidation proceedings, the domiciliary state is the proper forum in which to adjudicate competing claims to the trust remainder. [8]

In so ruling, the Court accepted NCIC's argument that the New York courts do not have jurisdiction. The Court stated that:

By entertaining Chase's claim of ownership, [the] Supreme Court delayed the orderly administration of claims in Kansas. Once the conservator determined that there were no special deposit claims, [the] Supreme Court should have "promptly transferred" the trust remainder to the Kansas liquidator. While the highly unusual facts of this case, involving withdrawal of the settlor's deposit to the trust and its replacement by the trustee, may complicate the UILA's plan for efficient administration, they should not be allowed to override it. [9]

The Court made it clear that it was guided by the National Association of Insurance Commissioners' Insurers Rehabilitation and Liquidation Model Act in reaching its unanimous decision. In summarizing its findings the Court stated that:

This approach is consistent with the modern trend in insurance liquidation as evidenced by the Model Act. In 1994, the Model Act was revised in a manner that substantially curtails the ancillary receiver's authority. Specifically, the current version of the Model Act requires that, upon entry of a final order of liquidation, all special deposits "shall be delivered to the domiciliary liquidator" and held as a "general asset for the benefit of all creditors," and limits the ancillary receiver's authority to proceedings that "support" the domiciliary proceeding (see NAIC Model Laws, Regulations and Guidelines, 555-1, Insurers Rehabilitation and Liqudation Model Act, section 55). These changes were intended "to discourage the retention of special or statutory deposits by nondomicilairy states in the event of a multistate insolvency." Further, the "basic principle behind the amendments is that insurers should be rehabilitated or liquidated in their state of domicile pursuant to the laws of that state, and that the domiciliary commissioner is in the best position to carry out that function." [10]

Francine L. Semaya, Chair of Cozen O'Connor's Insurance Corporate and Regulatory Department, orally argued the case before the Court in Albany. William K. Broudy was on the brief, with the assistance of Associate Gregg E. Englehardt. Chase was represented by in-house counsel Eileen J. Berkman and the Superintendent as Conservator appeared by Jack Franceschetti of Steven R. Harris & Associates.

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[6] *Id.* at page 3.
[7] *Id.* at page 4.
[8] *Id.* at page 5.
[9] *Id.* at page 5.
[10] *Id.* at page 5.

IAIR Accreditation Standards

I. George Gutfreund, CA, CIRP, CIR-ML

Insurance regulation has significantly changed in parts of the world, and more dramatic changes are about to happen with the implementation of the IAIS rules next year. In the United States, a debate continues as to whether federal or state regulation should prevail. A very important part of this debate centers on accreditation, i.e., accreditation of procedures and process, as well as accreditation of standards of practice and individuals to administer insurance insolvencies. In this light the NAIC has established an accreditation task force to deal with accreditation issues. IAIR was asked to participate in this task force and formed a small working committee to work with the NAIC. This opportunity signifies that IAIR has something to offer in the accreditation area.

Let us look at the IAIR accreditation process and what it means to you, our members, and the insurance insolvency community. 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 into 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 can contribute to the insurance insolvency community. The Committee realized that the standards originally adopted needed periodic 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 rewrite of the CIR standards in 1999 and of the AIR standards in 2000.

We should consider the importance of the IAIR accreditation process. During the past thirteen years, the Association has been able to improve the quality of insurance liquidations through its educational programs and quarterly Roundtables. These Roundtables allow our 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 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 commissioned the publication of a Resource Directory. This directory sets 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.

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While the above points highlight the major changes to the CIR standards and that the Association continues to refine the accreditation process, please be aware that the 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 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 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.

AIR Standards for Accreditation

Focusing on the specific changes to the standards, the revised 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 revised 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 revised 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 revised 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.

   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.

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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.

The AIR candidate may 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 AIR standards, as well as the Application for Accredited Insurance Receiver and accompanying Statement of Qualifications, can be viewed in their entirety 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 practitioner's 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. This will help to ensure true value to our designations and also help IAIR in the NAIC accreditation process. 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. IAIR should be able to have qualified CIR's and AIR's in every state and this is an achievable goal.

The Board of Directors and the A&E Committee at IAIR believe that the 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

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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

The A&E Committee updated our Code of Ethics and the revised Code of Ethics was approved by the membership in December 2003, taking into consideration the CIR and AIR standards and changes that have been taking place in the industry to date. The Committee has also commenced development of a disciplinary procedure and procedures for the removal of a designation. The Education Committee has issued a Request For Proposal for the design and 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 A&E and Education Committees needs the involvement and help of many more of our members. Finally, the A&E 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 members 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 members of the A&E Committee. Should you have any questions or desire additional information as to the 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 Loiseau, Tom Wrigley, Jay Deiner, Dan Orth, Joe DeVito, Belinda Miller, Mike FitzGibbons, myself, George Gutfreund, or the Chair of the Committee Dan Watkins.

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Meet Our Colleagues

Joe DeVito

Holly C. Bakke

Holly C. Bakke was appointed Commissioner of the New Jersey Department of Banking and Insurance in February 2002 by Governor James E. McGreevey.

As Commissioner, Ms. Bakke has promoted auto, health and banking reforms. New auto insurance reform legislation makes coverage more accessible and affordable for safe drivers, includes the nation's toughest penalties for auto insurance fraud, expands consumer protections, and includes measures to reduce the number of uninsured drivers. The New Jersey Home Ownership Security Act, known as the Anti-Predatory Lending Law, provides some of the strongest safeguards in the country to prevent homeowners from losing their homes and assets as a result of unfair mortgage lending practices.

The Commissioner also has made healthcare insurance a top priority:

- hosted national and international healthcare experts at Princeton University to begin an initiative aimed at making healthcare coverage in New Jersey more affordable
- assembled a Department team to meet throughout the state with consumers to listen to their experiences with healthcare insurance
- assembled working groups of healthcare experts to further dissect the problem and suggest solutions
- worked with the federal government and healthcare industry to bring providers into compliance with the federal Health Insurance Portability and Accountability Act

A staunch advocate of consumer rights, Commissioner Bakke opened the department's first Consumer Center in Newark on September 17, 2002 and opened a second Consumer Center in Camden on July 30, 2003 to assist consumers and conduct community outreach training.

From 1989 to February 2002, Ms. Bakke served as Executive Director of the New Jersey Property-Liability Insurance Guaranty Association, the New Jersey Surplus Lines Insurance Guaranty Fund and the New Jersey Medical Malpractice Reinsurance Association. She previously served as Special Deputy Commissioner of Insurance Litigation Practices for the New Jersey Department of Insurance and as an administrator for the New Jersey judiciary.

Commissioner Bakke is currently a member of the New Jersey State Bar Association, where she chaired the Alternative Dispute Resolution Committee and the Judicial Administration Committee. She has also served on Supreme Court committees focusing on criminal practice, civil litigation, and complimentary dispute resolution. A trained mediator, she has authored articles on alternative dispute resolution and family case and criminal management.

Ms. Bakke received her J.D. from Seton Hall Law School in 1982, was a Graduate Fellow at the Institute for Court Management of the National Center for State Courts, and earned her B.A. from Drew University.

Timothy W. Volpe

Tim Volpe is the managing partner of Volpe, Bajalia, Wickes, Rogerson & Galloway ("VBWR&G"), with offices in Jacksonville and Tallahassee, Florida. He is a graduate of the University of Florida, where he obtained his Bachelor of Arts degree, with high honors, in 1979; Master of Arts degree in 1982 and Juris Doctorate degree, with high honors, in 1982. While attending law school, he served as the Editor-in-Chief of the University of Florida Law Review.

Prior to establishing VBWR&G, Tim was a partner in the law firm of Smith Hulsey & Busey. While there, he represented the Florida Department of Insurance (now known as the Florida Department of Financial Services) as counsel in the receivership of Guarantee Security Life Insurance Company, the largest insurance insolvency case in Florida history. After the formation of VBWR&G, Tim has continued to represent the Department of Financial Services in insurance insolvency matters involving complex litigation. VBWR&G represents such other insurance company clients as Sunshine State Insurance Company and Florida Family Insurance Company.

Tim is married to the former Roslyn Bullard and has four children.

Meet Our Colleagues

Joe DeVito

Katherine Billingham

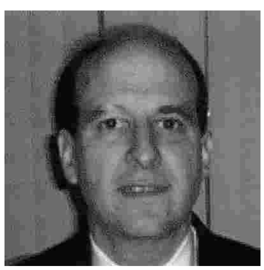
Katherine Billingham is a reinsurance consultant and an attorney. She graduated from Stetson University College of Law in 1982. Prior to founding her own law practice in 1990, she was the Vice President, Secretary and General Counsel of Universal Reinsurance Corporation. As such, she was responsible for the arbitrations, commutations, negotiations, litigation management and other run-off activities of Universal Re and several of its affiliated companies. Ms. Billingham was a leader in the very progressive commutation and run-off program of Universal Re that began in the mid-1980's and which helped set a "cutting edge" standard for such protocol in the industry.

In her practice she consults in arbitration and mediation advocacy, contract drafting, commutations and negotiations. She has had considerable experience in litigating asbestos and other excess coverage matters. Ms. Billingham has had significant involvement in a variety of not only domestic insurance and reinsurance issues, but also those of the London market. In addition to her law practice, Ms. Billingham has also established a consulting firm with her most recent client being Equitas.

Since 1990, Ms. Billingham has also served as acting Judge in the local courts, as mediator, and as court-appointed arbitrator and umpire in direct insurance matters. She has authored published articles on reinsurance arbitrations and commutations and has given presentations on the subject at the University of Wisconsin. She earned her CPCU designation in 1989. She is Vice Chair of the American Bar Association's Excess, Surplus Lines and Reinsurance Committee, a member of the International Association of Insurance Receivers (serving on its publications committee), is a member of the Ohio and Florida Bars, and is licensed to practice before several federal courts.

Ms. Billingham's undergraduate degree is in music (voice) and she is the choir director of her church. She also enjoys gardening, travel, wine collecting and spending quality time with her three children.

John Wickert



John Wickert is a partner in the law firm of Robinson Curley and Clayton, P.C., in Chicago, Illinois. The firm has experience in representing liquidators throughout the United States, especially in malpractice and director's and officer's actions. Mr. Wickert has performed work on behalf of liquidators from Illinois, West Virginia, Rhode Island, Louisiana, and Nevada.

Prior to joining his current firm, Mr. Wickert worked for the Illinois Office of the Special Deputy Receiver for almost three years, leaving with the title of Deputy General Counsel. In that position, he had extensive experience in collecting reinsurance, adjudication of claims, and the oversight of outside counsel. He also has been an associate of a firm that brought one of the first RICO actions arising out of the insolvency of an insurance company. He is a graduate of Marquette University and Northwestern University School of Law.

Mr. Wickert has had experience with life, property and casualty, and health insurance insolvencies, and he has also represented the receiver of a health insurance plan in federal court. In addition to litigation, Mr. Wickert has been involved in reinsurance arbitrations on behalf of liquidators.

Mr. Wickert has spoken at IAIR before, and he has filed amicus briefs on behalf of IAIR. He is also the former Chairman of the Chicago Bar Association Insurance Law Committee.

Mr. Wickert has been married for twenty years, and has two children, ages 17 and 18. His oldest child has just entered college, and while not working to pay for tuition, Mr. Wickert enjoys running, cooking and reading, especially about history and politics.

New York Roundtable Recap

Kristen Shikany [1]

The IAIR Roundtable at the New York meetings on Saturday, March 13th included a series of interesting presentations. The program, hosted by Neal Conolly, a consultant to Frontier Insurance, began with a presentation on the current developments in New York by Greg Serio, Superintendent of Insurance, New York, and Peter Molinaro, Senior Deputy Superintendent.

Current Developments in New York

Superintendent Serio opened the presentation by discussing the New York Department of Insurance's Mission Statement. One of its main tenets is fostering growth in the insurance industry of New York. Superintendent Serio introduced Peter Molinaro as one of the key people responsible for putting into play the mission statements since he stepped into the position of Senior Deputy Superintendent in Spring 2002. Superintendent Serio commended Senior Deputy Superintendent Molinaro for doing a commendable job in this regard via adopting new technology and new methods under his leadership. For a long time, the administrative law staff only worked on behalf of the claimants. Under Senior Deputy Superintendent Molinaro's lead the staff was able to see that there are two sides to the system – not only the claimants but the insurance companies as well.

Senior Deputy Superintendent Molinaro began by giving an overview of the goals of the Liquidation Bureau from the insurance department's perspective. One of which is an emphasis on rehabilitation rather than liquidation as this has benefits not only to the insurance company and policyholders, but to the community and tax base as a whole. When asked to oversee the Liquidation Bureau in 2002, he recognized that the department needed leadership and direction to reorganize the resources to help them accomplish these goals. Special Deputy Superintendent Jim O'Connor agreed to come over from the state fund and has had a significant impact in the year he has been there.

Special Deputy Superintendent O'Connor began by thanking the department for its support in the changes the Liquidation Bureau is trying to accomplish. He wasn't warm in his seat when the people started lining up to speak to him about Midland. Put into liquidation in 1986, Midland has presented a host of unique challenges. Special Deputy Superintendent O'Connor recognized that they needed to take a different, creative approach and put in a business plan that was outside of the ordinary of what the liquidation bureau was used to dealing with. On January 5, 2004, he signed on Bill Barbagallo, a Director at Navigant Consulting and head of Barbagallo & Associates, to work with the claims, reinsurance and IT staff to implement this plan. With the ultimate goal of getting the money back into the hands of the creditors, the plan is as follows. Bill's team was asked to gather all data necessary to define the value of the Midland estate and get such data into a condition to be utilized by an actuary. The actuary will then assist with the development of ultimate estimates that will allow them to determine a proposed distribution plan. The bureau will then determine how the process of resolution will occur and will provide a cafeteria-style menu of options to be brought to the Superintendent for consideration.

Special Deputy Superintendent O'Connor then introduced Bill Barbagallo who provided additional detail on the data gathering activities that were currently taking place at Midland. Bill was enthused about his role at Midland and the progress that he and the staff were making in such a short time period. He indicated that although the "devil is in the details" there were no problems that could not be overcome. He was quite surprised to find that the mindset of negativism that he has encountered at many bankrupt estates was not present with the staff of the Midland estate. He found that the Midland staff had a great deal of energy and enthusiasm with respect to the changes that were underway. Special Deputy Superintendent O'Connor's support and involvement was evident in the quick responses he has gotten with respect to all of his data requests.

Midland is one of the largest estates in the US and certainly the largest in New York. The goal was to determine the ultimate liability of the estate as well as its assets so that ultimately a distribution percentage could be determined. The three main "buckets of liability" under review were the major policyholder group, large guaranty funds and assumed reinsurance. Other issues factored into the mix that needed to be reviewed as well included premium, offsets, etc.

The plan is to tackle these buckets one by one beginning with the major policyholder group.

Bill's team was underway working with the Midland staff to evaluate major cases. Through his work on Transit and other estates, Bill has developed quite strong relationships with policyholder counsel

[1] Kristen Shikany is a Principal in the Chicago office of Navigant Consulting, Inc. and co-chairperson of the IAIR Publications Committee.

New York Roundtable Recap

Kristen Shikany

and was meeting with them to secure substantial information. The team was putting up case reserves as well as detailed captions regarding losses that would be forwarded onto reinsurers.

As is common in many estates, there are multiple systems in place at Midland. A good portion of the time over the first month was spent in finding all of the information and funneling it into a centralized location. This was a large undertaking but working with the IT staff, quite a bit of data has been accumulated. They are currently harnessing the data into a useable format and putting it into a central repository for projection purposes. There are holes in the data but the staff is now filling the holes via information already amassed and by contacting the policyholders. A detailed policy review is underway with the major policyholders to be reviewed first. Since Midland wrote mainly excess and umbrella policies, work needs to be completed to get an understanding of what lies below Midland (i.e., limits, attachment points, prior impairment, etc.).

The Reinsurance department has done a wonderful job of determining the reinsurance participants but unfortunately the reinsurance and claim systems do not talk to each other very well. Bill's team is working with the IT department to build the bridge between the two systems. The system piece is broader than just Midland and the hope is that the bureau can take advantage of any system improvements in other estates.

When queried regarding reinsurance collections and similarities with Transit, Bill informed the group that he has found some similarities to the Transit estate however one major difference is with regards to the reinsurance. While Transit had a large portion of its reinsurance placed internationally, Midland's reinsurers are dollar-wise largely domestic. There has been a couple hundred million in reinsurance collected to date with more to come.

Mission – Closing this Old Estate

Next, Mohsen Sultan, the Mission Estate Manager from the California Liquidation Office gave an update on Mission Insurance Company entitled "Closing this Old Estate." To recap its history, Mission consists of five individual companies: Mission, Mission National, Enterprise, Holland America and Mission Reinsurance. The companies wrote mainly workers compensation and property casualty, which included a healthy dose of long tail claims. Relevant Mission dates are as follows: Conservation date – 10/31/85, Liquidation date – 2/24/1987, Initial bar date - 9/12/1987, Final dividend bar date – 8/18/1995, Final Date to Liquidate Claims – 12/31/2003.

The closing plan was filed on 8/2/2002 and the judge requested it be finalized prior to his retirement. They have hired an ADR firm to resolve disputes more quickly and have cut the tail with all claims to be liquidated and made certain by 12/31/2003. The court approved the Tail Cutting plan in October 2003. Mission and Mission National have had six early access distributions and four interim distributions.

The remaining challenges include collecting the remaining receivables, resolving escrow accounts, commuting with the remaining reinsurers and retrocessionaires, implementation of the final liquidation dividend plan, obtaining tax clearance, stock distribution and completing sale of the Mission system software to other insolvents.

The key closing events that have happened recently or are soon to happen are as follows. A motion to proceed with the closing of Enterprise has been filed. A motion to close ancillary Mission Reinsurance is in progress with a motion to close ancillary Holland American to follow. A motion to approve the stock allocation is also in progress. The Mission National final distribution is planned for December 2004 with Mission Insurance planned in early 2005.

Mohsen was pleased to report that guaranty funds and other policyholder class claimants have been paid 67% of approved POC values to date for Mission and that the ultimate number will likely be higher. The percentage for Mission National is 75.7% and Enterprise is currently at 49.4% but will reach 58% by September. The approximate value of the Danielson stock was over $15M when only 9 months ago it was valued at $2M. Mission would love to sell but the 1.8M shares of stock cannot be sold as a block due to IRS rules on tax status. Mission has paid over $450M in interim and Early Access distributions and will pay a substantial sum when all is done. They have successfully collected over $1.0 billion in reinsurance over the last 18 years.

Acheivements

George Gutfreund, President IAIR, took a few moments to acknowledge several achievements of IAIR members. George presented James Gordon with a plaque of recognition for his service on the IAIR Board of Directors and for being the Association's Secretary for the past six years. Bob Greer was also presented with a plaque of recognition for his prior year's service as IAIR President. Finally, Michael Cass was recognized for achieving desig-

New York Roundtable Recap

Kristen Shikany

nation as Accredited Insurance Receiver in the area of Reinsurance.

Taxing Matters

Richard Bromley, partner in the Chicago office of Foley & Lardner LLP, presented next on "Taxing Matters for Non-Insurer Parent Companies: a 501(c)(15) Update." Dick's presentation was in the form of a very interesting case study on a matter he was involved in regarding an insurer placed into liquidation in 1990. The insurer was a wholly owned subsidiary of a non-insurance company which was not insolvent or in bankruptcy proceedings. Since the insurer's insolvency does not have the effect of breaking up a consolidated group, the insurance company remained a part of the group with the parent company responsible for filing the group's consolidated federal income tax return. Prior to liquidation the company had posted reserves which were an allowed deductions on the parent's consolidated tax return. The receiver had also made additions to reserves after 1990 which were also deductible on the consolidated return. As part of its duties, the receiver annually provided reserve information to the parent company for use in preparation of the consolidated tax return. Starting in 1997, the receiver began releasing reserves. These reserve releases should properly have been reported as income for tax purposes. Interestingly, however, at this same time, the parent stopped filing consolidated returns and took the position that any tax liability resulting from the reserve releases was the responsibility of the insurance company – not the parent. No returns were filed for the years 1998 and later.

Members of a consolidated group are jointly and severally liable for taxes, so the receiver was jointly and severally liable despite the fact that the deductions had benefited the parent in earlier years. The receiver was concerned about substantial liabilities for tax, interest and penalties. Because the magnitude of this potential liability could not be determined, there was no hope of closing the estate. Another concern was the very real risk of personal liability on the part of the receiver. Dick was brought in to act as tax counsel to the receiver and tax master to the receivership court to find a way to resolve the issue. Dick concluded that he could not play both roles without potential conflicts. Therefore, with the court's permission, he withdrew as tax master and acted only as counsel to the receiver.

When the insurer was placed in liquidation, all policies were cancelled so there was no new premium. Since the estate had no premium income, it met the technical definition of an insurance company that was exempt from tax under Section 501(c)(15) of the Internal Revenue Code. (That section entitles nonlife insurance companies with less than $350,000 in premiums to tax exempt status.) The estate needed to file an application with the IRS explaining why it was exempt. Because no premiums had been received after 1990, consideration was given to requesting exemption status back to 1991, the first year with no premium income. Ultimately, however, the receiver sought exempt status retroactively only to 1998, the year when the parent company stopped filing tax returns. The IRS did not ask whether or not the receiver had the parent's permission and the receiver did not bring up the issue. However, it was clear via the application that there was significant friction between the two parties. The IRS quickly gave permission, not only back to 1998, but all the way back to 1991. Since tax exempt entities cannot be part of a consolidated group for tax purposes, this retroactive exemption had the effect of dissolving the consolidation with the parent. Hence, the liquidator was not liable for any taxes, interest on penalties that might have been owing for the years when no returns had been filed. (Dick also noted that because the liquidator had not filed returns as an exempt entity for the earlier years, he filed in that capacity retroactively back to 1991 with all penalties waived.) This outcome ultimately resolved a number of problems but mainly paved the way for closing the estate and paying the claims.

Section 501(c)(15) can be a very fruitful and helpful tool for many insurance liquidation estates. Although that provision, by its terms applies only to P&C insurers, in liquidation, as life business is ceded off, a life insurance company may fail the special tax law definition of "life insurance company." At that point, it may qualify for exempt status under section 501(c)(15). So the provision may also be useful in life insurance company liquidations.

Dick cautioned, however, that section 501(c)(15) may cease to be available. He indicated that certain taxpayers (not liquidators) have been using section 501(c)(15) tax exempt insurance companies as tax shelters. The Administration and Congress have put forth proposals to shut down these tax shelters by severely limiting the scope of section 501(c)(15). Unfortunately, as drafted, the proposals would also make section 501(c)(15) unusable in most insurance liquidations.

Dick has since advised us that a provision of the Pension Reform legislation that was enacted by Congress and signed by the President in April 2004 greatly restricts the scope of section 501(c)(15). Effectively,

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it makes that provision unavailable for use by insurance liquidators. However, the Act provides a limited safe harbor for existing insolvencies.

In the case of a company which was in receivership, liquidation, or similar State proceedings on April 1, 2004, and which met the requirements of section 501(c)(15) as in effect for the last taxable year beginning before January 1, 2004, these amendments will not apply until the first taxable year beginning after the earlier of (1) the date the liquidation proceedings end, or (2) December 31, 2007. Therefore, section 501(c)(15) is available for existing insolvencies, but to take full advantage of that provision, the liquidation proceeding must be concluded by December 31, 2007.

European Developments

Morag Fullilove, a Brussels based consultant with the Fullilove Consulting Group, closed the afternoon with a presentation on new regulations in European insurance. Morag informed the group that the political environment in Europe is on the cusp of change. Morag compared the expansion of Europe by adding ten new countries to what it must have been like when the addition of the Louisiana Purchase doubled the size of the United States. With the addition of the new countries, all the European governmental institutions are being reconstituted. The European Parliament will dissolve in May and members will stand for election in new districts in June. The European Council and Commission must all be reappointed and expanded to include leaders from the new countries.

In the insurance area, David Deacon, the head of the EU Commission's Insurance Unit has already left his post. Deacon's overall boss, Frits Bolkestein, the dynamic Commissioner of the Internal Markets Directorate General is likely to leave as well.

Even the structures of the Commission's insurance advisory groups have changed. The current Insurance Committee has been replaced by the European Insurance and Occupational Pensions Committee (EIOPC) which will advise the Commission on technical issues. Of even greater importance is the appointment of the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS). This independent body is composed of the insurance regulators in each of the 25 Member States of the European Union. It will hire its own staff to be based in Frankfurt, Germany. For those familiar with the NAIC, the structure of this group will seem very familiar, but CEIOPS has clear legal authority to coordinate the implementation of European law and regulation. Under the leadership of Danish Supervisor, Henrik Bjerre-Nielsen, CEIOPS has already taken a leadership role on solvency issues by appointing five technical committees.

Morag reported that the Solvency II project, the European Union's name for the revamping of insurance solvency regulation, is moving ahead after a lull of nearly a year. Two draft papers have been released for comment and two or three more are expected by summer. These papers are giving shape to new proposals which are based on a three pillar approach to regulation (financial, supervisory, and marketplace). The solvency proposals, as they develop, will influence US and international regulation according to Morag as they explore more advance target capital requirements and internal management controls in the supervisory regime.

There is significant revamping in the area of reinsurance regulation in Europe. Morag said the European Commission is committed to releasing a directive imposing a reinsurance licensing scheme in April (n.b. The directive was released April 21). The big hang up in the proposal was the definition of solvency margins. The activity of the International Association of Insurance Supervisors (IAIS) has influenced the European draft and Europe's desire to move forward on the proposal. As there is very little reporting of reinsurance data, there is also a push for more data, both financial and operational through the IAIS and the other international groups who are concerned about the financial stability of the reinsurance market. The IAIS has just completed a plan to collect basic data beginning this year. The draft directive and other information on Europe can be found at *http://europa.eu.int/comm/internal_market/insurance/index.html.*

Accounting standards is the "big gorilla" per Morag since the International Accounting Standards Board (IASB) is just beginning to develop comprehensive (Phase II) accounting standards for insurance contracts. A set of uniform standards is essential for the new solvency regime in Europe. Although Europe seems committed to the application of the Phase I standards in 2005, but both banks and insurers are unhappy with the final language. There is pressure from the SEC to make sure the standards are adopted, but it looks like a final decision will not be made until the fall. Further details on accounting activity can be found at *www.IASB.org* for all that are interested.

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