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PRESIDENT'S MESSAGE

James Kennedy, Esq.

IAIR has been busy since we met in San Francisco. At that meeting, we thanked Alan Gamse, Lynda Loomis and Lowell Miller for their service on the IAIR board, and welcomed three new board members - Chad Anderson, Mark Bennett and former Commissioner John Doak. Just as the new board was settling in, board member Tamara Kopp gave us some good news and bad news. The good news was that she was taking an exciting new position, but the bad news (for us) was that she would be leaving the board as a consequence. Tamara made tremendous contributions to IAIR, and we wish her well in her new position.

This left us with a position to fill on the board, and a number of members were nominated. I am pleased to tell you that the board selected Doug Schmidt of Husch Blackwell as our new board member. Doug has been a member of IAIR for over twenty years, and has been active in many events. We look forward to working with him.

Our Insurance Resolution Workshop in February was a great success, thanks to co-chairs Steven Davis and Rowe Snider, and the IAIR Education Committee. As a native New Orleanian, I thoroughly enjoyed listening to Louisiana Commissioner James Donelon. The discussion of insurance issues was served with a side of Louisiana history. (Now we all know why lamp posts on Bourbon Street are greased during Mardi Gras.) And yes, we did have beignets. Mark your calendar for February 25-27, 2020, when we hold our next workshop in Charleston.

For the past few years IAIR's educational activities have included participating as guest lecturers at the Insurance Solvency at the University of Connecticut School of Law. Bill Goddard has invited us back this year, and IAIR members have participated in a number of classes. This is an opportunity for us to pass on our experience to the next generation.

Finally, another NAIC meeting is almost here. IAIR has been active in providing comments on NAIC activities related to insurance insolvency, and this is certain to continue. Here is a preview of some of the topics that will be discussed at the upcoming NAIC meeting:

RECEIVERSHIP AND INSOLVENCY TASK FORCE (RITF)
The RITF will continue work on the referral from the Financial Stability Task Force, which requests that the RITF consider whether changes are needed to address recovery and resolution laws. Over the past year, the RITF has been reviewing U.S. receivership laws and laws in other jurisdictions with respect to cross-border groups, and misalignments between federal and state laws that could impede a recovery or resolution of an insurance group.

RECEIVERSHIP LARGE DEDUCTIBLE WORKERS COMPENSATION WORKING GROUP
The working group completed a survey of laws governing the treatment of large deductible workers' compensation policies in a receivership, and recommended that states adopt statutes providing for the collection of deposits. One of the next tasks will be to focus on drafting guidance regarding the collection of deductible deposits. If only we could pronounce the acronym for this group - just try saying "RLDWCWG".

RESTRUCTURING MECHANISMS WORKING GROUP
This new working group will evaluate restructuring statutes and methods, and study the legal issues involved in the processes. The panel discussion on this topic at the IAIR workshop generated a spirited discussion, and there will be more on this at the upcoming IAIR Issues Forum.

RECEIVERSHIP FINANCIAL ANALYSIS WORKING GROUP
The is a closed session, which means we really can't tell you anything about what is going on in there for ninety minutes. Sorry.

I look forward to seeing you in Orlando!

2019 INSURANCE RESOLUTION WORKSHOP RECAP

Rowe Snider, Workshop Co-Chair, Partner, Locke Lord LLP

IAIR members and other guests gathered in the Crescent City on February 13-15 to spend Valentine's Day at the 2019 IAIR Insurance Resolution Workshop, held at the Royal Sonesta Hotel in the heart of New Orleans' French Quarter. Following Wednesday evening's opening reception and an evening of dining, the audience awoke Thursday to a New Orleans-style breakfast before the presentations began. The intellectual sustenance began with a panel discussion of Investment Vehicles for Runoff/ Troubled Companies, with ideas served up by Ranbeer Bhatia (Armour Group Ltd), Vince Burke (Mazars USA) , Anthony Latini, Jr. (Boenning & Scattergood, Inc.), and Stephen Schwab (DLA Piper). The audience next heard from Rebecca Freitag and Tom Vasey of Merlinos & Associates, whose engaging presentation postulated Non-Traditional Regulatory Roles for Actuaries. The morning was completed by a panel reporting on work of the NAIC's Receivership Large Deductible Worker's Compensation Working Group, featuring Oklahoma's James Mills, who served as the Working Group's 2018 Chair, Tamara Kopp of the Missouri Insurance Department, and Tom Streukens of American Guaranty Fund Group, who rounded out the panel by providing the guaranty fund perspective on the subject.

The day-one luncheon featured a keynote address by Commissioner James Donelon, who related in fascinating detail the challenges the State of Louisiana faced from the devastation of Hurricane Katrina in 2005. This review of relevant local history was followed by a panel of distinguished present and former regulators, including Commissioner Donelon, Commissioner Mike Chaney of Mississippi, Former Commissioner John Doak of Oklahoma, and Former Commissioner Jose Montemayor of Texas. Their wide-ranging discussion of various issues of the day, moderated by Rowe Snider of Locke Lord LLP, was followed by a lively question and answer session. The afternoon continued with the theme of distinguished insurance regulators, with John Finston, former general counsel of the California Department of Insurance and now with Drinker Biddle & Reath LLP, moderating a panel comprised of Steve Johnson (formerly with the Pennsylvania Insurance Department, now with Stradley Ronon Stevens & Young LLP) and Norris Clark (formerly with the California Department of Insurance, now with Locke Lord LLP). They discussed the pros and cons of Supervised Runoffs vs. Receiverships: Lessons from the Past. The afternoon closed with an expert

LA Commissioner James Donelon offers his keynote address at the 2019 Insurance Resolution Workshop.

Commissioners Panel at the 2019 Insurance Resolution Workshop.

Long Term Care Panel at the 2019 Insurance Resolution Workshop.

panel discussion of the continued expansion of statutory Business Transfer and Division Legislation in the United States and Abroad, featuring insights from Stephen Schwab (DLA Piper) , Andrew Rothseid RunOff Re.Solve), Dan Schwartzer (Schwartzer Consulting), and Nader Tavakoli (EagleRock Capital Mgt.).

On Friday morning, having survived Thursday night on Bourbon Street, the audience was roused by an engaging presentation on Long Term Care, appropriately entitled "Les Bons Temps Devant Nous? (Good Times Ahead?)." Patrick Cantilo (Cantilo & Bennett) led off the discussion, presenting the audience with a combination of novel graphics and substantive insights. He was joined by Vince Bodnar (Genworth Financial) , Peter Gallanis (NOLHGA), Tim Luedtke (Temple Univ.), and Larry Rubin (PwC), who each provided further insights into the plight of the line from their various perspectives. Peter Gallanis offered back-to- back sessions, as he next paired up with NCIGF's Roger Schmelzer to provide the audience with "A Contemporary Look at the U.S. Guaranty Fund System," contrasting our domestic system with its international counterparts. Last but not least, all the various threads of the New Orleans insurance sojourn were brought together by Pennsylvania's duo of P&C Receivers, Reliance's David Brietling and Legion's Robert Haberle, who each provided an overview of their respective estates and discussed the various issues now facing each of them arising from the process of closing theses venerable estates. Steven Davis and Rowe Snider, the Workshop Co-Chairs, closed the program by thanking all who presented and attended. James Kennedy, IAIR President, reminded everyone to save the date for next year's workshop, February 25-27, 2020 at the Wyndham Mills House in Charleston, SC.

A LOOK ABROAD

This article was originally published in the February 2019 issue of the NOLHGA Journal and has been reprinted with permission of NOLHGA.

A LOOK ABROAD

International regulators focus on resolution and recovery, and the EU considers harmonization of its members' guaranty schemes

While the first six months of 2018 were quiet in terms of international standard-setting activity regarding insurance company resolutions, the second half of the year was quite the opposite. We caught up with Sara Powell and Scott Kosnoff (Partners with the Faegre Baker Daniels law firm, where they represent the guaranty system on public policy matters in Washington and internationally), who were kind enough to give us the lowdown.

NOLHGA Journal: *Were you surprised at the amount of international activity relating to resolution matters in the second half of 2018?*

Sara: Not at all. We knew the first half of 2018 would just be a waiting game. We expected the next ComFrame consultation to come out in late summer, including the resolution-related elements. The ComFrame consultation document dropped on July 31, and we were off and running.

Scott: As a reminder, "ComFrame" is short for the Common Framework for the Supervision of Internationally Active Insurance Groups—a set of supervisory standards focusing on the effective group-wide supervision of internationally active insurance groups (IAIGs). ComFrame seeks to assist supervisors in "addressing group-wide activities and risks; identifying and avoiding supervisory gaps; coordinating supervisory activities efficiently and effectively between the group-wide supervisor and other involved supervisors." ComFrame also provides a framework for supervisors to work together in supervising an IAIG across borders, although it is not intended to create a one-size-fits-all approach to regulation.

NOLHGA Journal: *Was there anything notable in the resolution-related elements of ComFrame?*

Sara: The vast majority of the changes made since the 2017 ComFrame consultation are for clarification, consistency, or organization purposes. The main resolution-related material is embedded in Insurance Core Principle (ICP) 12, which addresses market exits and winding up. While none of the revisions contained in ICP 12 relate expressly to insurance guaranty schemes (IGSs), NOLHGA and the NCIGF submitted comments emphasizing:

- Resolution powers should not be exercised in a way that denies policyholder protections that would otherwise be afforded by an IGS

- Crisis Management Groups (CMGs) should consult with IGSs when they engage in resolution planning

Scott: While not directly related to resolution, much of the insurance industry was keenly interested in seeing the amplified ComFrame sections on recovery planning, which are now embedded in ICP 16—enterprise risk management for solvency purposes. The 2018 consultation added more background on the application of the proportionality principle (which allows supervisors to increase or decrease the intensity of supervision according to the risks posed by a particular insurer) and on supervisory expectations for recovery planning. The IAIS also announced that its Resolution Working Group (ReWG) would be working on an application paper on recovery planning.

NOLHGA Journal: *Have we seen the application paper yet?*

Sara: Yes. In fact, we've already seen a couple versions of it.

In early September, the ReWG shared a preliminary version of the application paper with NOLHGA, the NCIGF, and the other participants in a September 12 stakeholder session in Basel. The ReWG released a public consultation version of the application paper on November 12, with comments due on January 7.

The purpose of the application paper is to provide recommendations and guidance to supervisors (and additional information to insurers) regarding recovery planning for all types of insurance legal entities and groups. The application paper does not contain any new requirements or standards for recovery plans. It simply provides additional details and examples to amplify the recovery planning standards in ICP 16 and the related ComFrame material.

NOLHGA Journal: *Can you explain what is meant by the term "recovery planning?"*

Scott: The application paper defines a "recovery plan" as a plan, put together by an insurer, that "identifies in advance options to restore financial strength and viability if the insurer comes under severe stress." The application paper says that recovery plans differ from an Own Risk and Solvency Assessment (ORSA), noting that "[t]he objective of the ORSA is to prevent an insurer from coming under severe stress." A recovery plan, on the other hand, assumes the insurer is under severe stress and needs to take corrective action.

NOLHGA Journal: *Does the application paper on recovery planning say anything about IGSs?*

Scott: Not specifically. The paper does say that cooperation and coordination with respect to recovery planning may affect stakeholders other than supervisors, such as resolution authorities and IGSs. The paper goes on to say that supervisors should consider establishing cooperation arrangements with such stakeholders.

NOLHGA Journal: *Any other highlights from the Basel meeting?*

Sara: That's about it as far as the IAIS ReWG stakeholder session. The next day, however, the Financial Stability Board's Cross Border Crisis Management Group held an invitation-only Resolution Workshop. The first presentation was made by the CEO of the Guarantee Scheme of German Life Insurers, Jörg Westphal. Westphal gave an overview of the Mannheimer Life insolvency and emphasized the importance of early involvement by the IGS. He explained that early involvement allows an IGS to prepare for the insolvency and helps make a company's entry into receivership go more smoothly. He also stressed the importance of supervisors and IGSs working together cooperatively. As Charlie Richardson would say, NOLHGA and the NCIGF have been singing from the same hymnal for years!

NOLHGA Journal: *Why was the FSB interested in IGSs?*

Scott: The European Union is currently reviewing its standards with respect to Member States' insurance resolution frameworks. In July 2017, the European Insurance and Occupational Pensions Authority (EIOPA)1 called for the establishment of a minimum harmonized and comprehensive framework in the area of recovery and resolution of insurers and reinsurers. As a follow on to that, in July 2018, EIOPA published a paper on resolution funding and IGSs, raising the question whether the EU should require some degree of minimum harmonization with respect to IGSs among EU Member States. That paper states the following:

At present, there is no harmonized approach to guarantee schemes in insurance like the guarantee schemes in other sectors of the financial markets – Deposit Guarantee Schemes (DGS) and Investor Compensation Schemes (ICS). Member States have therefore adopted their own approach to [IGSs], which show noticeable differences in design features, such as scope, coverage and funding. These differences in national IGSs, together with differences in insolvency laws, have led to a situation where policyholders across or even within the same Member States are not protected to the same extent in liquidation.

Needless to say, we will continue to watch the developments in EU minimum standards related to resolution and particularly IGSs.

NOLHGA Journal: *Harmonization seems like a big step! But do we really care about that? EU initiatives don't impact us here in the U.S., right?*

Sara: You're correct that EU policies do not directly impact U.S. insurance regulation. Practically speaking, however, we have seen examples where regulatory policies initiated in Europe have made their way to the United States, particularly in those instances where the IAIS adopts the EU policy as the basis for an international standard. We saw this with ORSA and are again seeing this phenomenon play out with group capital requirements and potentially recovery planning.

NOLHGA Journal: *What are we doing to make sure that the well-tested U.S. guaranty system is not weakened as a result of this globalization of insurance regulation?*

Sara: That's a great question, and we're glad you asked. Especially in the context of resolution and policyholder protection matters, the United States can speak to the rest of the world from a position of experience and strength. Over the last few years, Peter Gallanis has been a real force in educating foreign financial regulators about the U.S. guaranty system's successful track record, including when he was invited to speak at the 2017 Financial Stability Board's Resolution Workshop. It was apparent from the comments of other presenters and FSB members that none of the other countries had the experience of the United States. In fact, most of the other countries that participated in the workshop had handled only one insolvency, if any!

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Scott: Additionally, the U.S. guaranty system was invited to present at EIOPA's Seminar on Recovery & Resolution in Insurance this past October. We joined forces with the Greek IGS to provide an overview of the existing guaranty schemes in the EU and the U.S.

We were somewhat worried that the all-European audience might not be interested in hearing about the U.S. system, but we received far more questions than any other presenters. It's clear that European regulators are serious about how they might harmonize the EU's IGSs, and they appeared eager to learn from the U.S. experience. We expect there may be other opportunities to share lessons learned in the U.S. with EIOPA and the EU.

NOLHGA Journal: *That sounds like a great result. How did we get that invitation?*

Scott: EIOPA actually directed the speaking invitation to the International Forum of Insurance Guarantee Schemes (IFIGS). Peter and Roger Schmelzer thought it wise for the U.S. guaranty system to be represented at the EIOPA seminar, given EIOPA's importance from an international standard-setting perspective and the impact it has on the IAIS. We floated the idea of a joint presentation to the IFIGS Chair, Nikos Zacharopoulos from Greece, and he enthusiastically agreed. This was a good example of how working with IFIGS enables the U.S. guaranty system to connect with a broader group of international policymakers.

End Note

1. By way of background, in the insurance area, EIOPA seeks "to contribute to the establishment of high-quality common regulatory and supervisory standards and practices in the European Union. EIOPA's powers include issuing guidelines and recommendations and developing draft regulatory and implementing technical standards." Among other things, EIOPA "provides input into the European Commission's policy-making with regards to [IGSs] with a view to contributing to the assessment of the need for a European network of national [IGSs] which is adequately funded and sufficiently harmonised."

MARK YOUR CALENDARS FOR THESE UPCOMING IAIR EVENTS

NAIC SPRING 2019 NATIONAL MEETING
April 6-9, 2019 | Orlando, FL

NAIC SUMMER 2019 NATIONAL MEETING
Aug 3-6, 2019 | New York, NY

NAIC FALL 2019 NATIONAL MEETING
Dec 7-10, 2019 | Austin, TX

IAIR INSURANCE RESOLUTION WORKSHOP
Feb. 25-27, 2020 | Charleston, SC

THE IMPACT OF THE TAX REFORM ACT ON THE INSURANCE INDUSTRY

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Touted as the most significant federal tax legislation since 1986, Public Law 115-97 – informally known as the "Tax Cuts and Jobs Act" (the "TCJA") – was enacted on December 22, 2017. This article examines the potential impact of several provisions of the TCJA on the insurance industry.

The changes in the TCJA to domestic corporate tax provisions, including the corporate tax rate reduction and elimination of the alternative minimum tax, should benefit insurance companies.

However, a number of provisions that apply specifically to insurance companies were included as revenue raisers. Among these are changes in the tax reserve calculations for life and property and casualty ("P&C") insurance companies, changes to the deferred acquisition cost and proration rules for life companies, and a modification of the discounting rules for P&C companies. Although these changes may increase the taxable income of insurance companies, they are not as onerous as earlier proposals, and they are intended to reduce the tax compliance burden by simplifying reserve calculations and better aligning such calculations with evolving statutory accounting practices.

International tax provisions are likely to have significant consequences (mostly unfavorable) for insurance companies with activities outside of the United States.

GENERAL CORPORATE PROVISIONS

- The federal corporate income tax rate is reduced to 21%.
- The corporate alternative minimum tax is repealed.
- Net operating losses ("NOLs") incurred after 2017 cannot be carried back, but can be carried forward indefinitely to offset only up to 80% of taxable income in any year.
- Taxable income is generally recognized no later than when it is taken into account as revenue in the taxpayer's financial statements.

INSURANCE COMPANY TAX PROVISIONS

NOLS OF INSURANCE COMPANIES

The TCJA repeals the previous special operations loss carryover and carryback provisions for losses generated by life insurance companies after 2017 and applies to them the general corporate NOL rules (described above). P&C companies, however, continue using the old rules, which allow NOLs to be carried back for two years and carried forward for 20 years, and to offset 100% of taxable income.

COMPUTATION OF LIFE INSURANCE RESERVES FOR TAX PURPOSES

The TCJA changes the computation of life insurance reserves for purposes of determining the deduction for reserve increases. Life reserves for most contracts generally are the greater of (a) the net surrender value of the contract, or (b) 92.81% of the reserves determined under the statutory reserve method. For variable contracts, the net surrender value of the contract is replaced with the separate-account reserve amount (if greater than the net surrender value). Life reserves cannot exceed the amount of statutory reserves in the financial statements of the company. The TCJA requires using CRVM/CARVM in effect as of the date the reserve is determined instead of the issue date, which is expected to simplify calculation of life reserves.

The difference for existing contracts between the new reserve and the old reserve is taken into income (or deducted) ratably over eight years.

The TCJA shortens the period for taking into account income or loss resulting from other changes in method of computing life insurance company reserves to four-years for income and one year for losses.

DISCOUNTING FOR P&C COMPANIES

The TCJA changes computation of reserves for P&C companies by extending the discount period for long-tailed policies and using a method that generally should increase the discount interest rate. The TCJA provides that the interest rate used for discounting reserves is determined based on the corporate bond yield curve rather than mid-term AFRs.

The TCJA also repeals the election permitting a taxpayer to use its own historical loss payment patterns and extends the period over which some reserves are discounted.

Any income (or loss) resulting from the adjustment is included ratably in income over eight taxable years starting in 2018.

DEFERRED ACQUISITION COSTS

The TCJA increases the capitalization rates of "specified policy acquisition expenses" from 1.75% to 2.09% for annuity contracts, from 2.05% to 2.45% for group life contracts, and from 7.7% to 9.2% for all other specified contracts. The amortization period is increased from 120 months to 180 months.

PRORATION RULES

Life insurance companies are required to reduce their deductions, including the dividends received deduction ("DRD") and the reserve deduction, to reflect that a portion of their tax-exempt income is used to increase policyholders' reserves or is attributable to policyholders. The TCJA simplifies the calculation of the DRD and reserve deductions by fixing the company's share at 70% and the policyholders' share at 30% (instead of the previous complex allocation formulas).

P&C companies are required to prorate the deductible amount of their incurred loss reserves. The TCJA replaces the previous 15% proration percentage with 25% to account for the corporate tax rate reduction.

LIFE INSURANCE CONTRACTS IN THE SECONDARY MARKET

The TCJA overrules the portion of Revenue Ruling 2009-13, which held that on sale (but not surrender) of a life insurance policy, the seller's basis is reduced by the cost of insurance. The TCJA's repeal of this holding applies retroactively to sales of life settlement policies entered into after August 25, 2009. A number of new reporting requirements apply to purchases of insurance policies by persons unrelated to the insured.

INTERNATIONAL TAXATION

BEAT

A new Base Erosion and Anti-Abuse Tax ("BEAT") imposes a minimum tax on a corporation's "taxable income" calculated by adding back deductions for payments to foreign affiliates and a portion of net operating loss carryovers. The BEAT applies to taxpayers that have average annual gross receipts in excess of $500 million (for the three prior tax years) and a "base erosion percentage" of at least 3% for the taxable year (2% for a member of a financial group). The BEAT may affect insurance companies with foreign affiliates because base erosion payments include any premium or other consideration paid to a related foreign reinsurer. Currently, it is unclear whether the addback of deductions will apply to gross premiums or net profit on the ceded business.

PARTICIPATION EXEMPTION AND REPATRIATION TAX

The TCJA shifts the U.S. corporate tax system closer to a territorial system by providing a participation exemption for foreign-sourced dividends (but not for Subpart F inclusions) paid by certain foreign corporations to 10% U.S. corporate shareholders and imposes on 10% U.S. shareholders a one-time tax on unrepatriated and previously untaxed earnings and profits of specified foreign corporations at the rate of 15.5% for cash and other liquid assets and 8% for other earnings. There is an election to pay this tax in installments over eight years.

The TCJA repeals the indirect foreign tax credit for dividends received from a foreign corporation, but retains it for Subpart F inclusions.

MODIFICATIONS OF CFC RULES

Notwithstanding the general territoriality rule, the TCJA imposes a new tax on a U.S. shareholder's share of a controlled foreign corporation's ("CFC") "global intangible low-taxed income," or "GILTI," at a 10.5% rate. GILTI is active income in excess of an implied return of 10% of the CFC's adjusted basis in tangible depreciable property used to generate the active income.

The TCJA changes the definition of "U.S. Shareholder" for purposes of the application of the Subpart F provisions. Under the new definition, a "U.S. Shareholder" is a person who owns at least 10% of the vote or value of the foreign corporation (previously, value was irrelevant). Another significant change is that certain stock owned by foreign persons may now be attributed to a U.S. entity in which it owns an interest for purposes of making the U.S. person a "U.S. Shareholder." Many existing corporate structures will have to be reexamined and modified in light of these changes.

PFICS

The TCJA changes the passive income test for purposes of the passive foreign investment company rules by generally excluding income derived in the active conduct of an insurance business by a corporation only if the applicable insurance liabilities constitute more than 25% of its total assets.

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THE PERFECT RECIEVER NO 18: YOU AND WHAT ARMY? (SHOULD YOU SUE?)

By Patrick Cantilo, Cantilo & Bennett

And then the Devil laughed and asked God: "Oh yeah? And where are YOU going to find a lawyer?" That punch-line may be unkind to my profession, but not so much as Billy Shakespeare's character, Dick the Butcher, who in Henry VI, Part 2, Act IV, Scene 2, famously recommends heartily to an aspirant to the throne: "The first thing we do, let's kill all the lawyers." Maligned though we may be, it is often among the first thoughts of a receiver to enlist our service for the purpose of recovering assets from those suspected of holding them inappropriately, or at least of owing them to the Receiver (for various reasons), and for the purpose of avoiding obligations of various kinds. I devote the 19th number of this eclectic series to the determination of when to sue.

As a wee little infant, in swaddling clothes, and with nary an iPhone in sight, I came to realize early on that none is more powerful than he who can deploy platoons of lawyers with but the flick of a wrist. For it is the fear of protracted, expensive, and devastating litigation that the civilized bully can use most effectively to oppress those of limited means but with something to lose. O.K. So wielding the power of potential litigation may make us feel a little taller and more imposing. But when and how should we unsheathe this powerful weapon? The sad reality, as your own lawyer will tell you behind closed doors for the modest sum of $750 per hour plus reasonable expenses, is that litigation just ain't all that it's cracked up to be. It is expensive, lengthy, unpredictable, and produces unexpected consequences. Here, then, are a few tidbits to guide your decision-making process.

There are two categories of circumstances in which receivers typically consider initiating litigation: to recover assets, and to avoid liabilities. The two share some characteristics and differ in others. Apart from distracting receivers and keeping them from looking at inappropriate material on the internet (like blueprints for *humongous* walls to be paid for by neighboring countries), the purpose of this article is to assist them in evaluating whether or not to sue.[1] Whether offensive (asset marshaling) or defensive (claim rejection), there are several things we can predict about lawsuits we might file:

1. They will be more expensive than we thought,
2. They will take longer than we expected,
3. They will take more of our individual time and effort than we expected,
4. They will take more of our staff's time and effort than we expected,
5. They will aggravate us more than we expected,
6. They will seldom fully resolve the issue(s) for which they were filed,
7. They will seldom produce precisely the result(s) we were seeking, and
8. They will have more collateral and unintended consequences than we expected.

In short, they are perfect!! As usual, I will now pretend that I have something useful to say. In this instance, my "wisdom" is spilled from two different buckets. The first contains guidance on whether to sue. The second aims to help you prepare to do so if that is your decision.

WHETHER TO SUE

To sue or not to sue. That is the question. Whether 'tis nobler in the mind to suffer the slings and arrows of outrageous fortune, or to take arms against a sea of troubles and by opposing end them.[2] you might ask. This question cannot be answered completely unless the alternatives are considered sufficiently. I propose this method for doing so:

First, define the goal - for example to make the insurer's auditor pay for having failed to detect and report the insolvency when she should have, or to limit the liability under a claim to no more than one hundred thousand dollars, or to get clear title to the home-office building. It is very useful, maybe even necessary, to make an estimate of the economic value of that goal.

Then, apply a measure of realism to the magnitude of the goal. For example, in the claim against the auditor consider two things carefully: (a) what is the maximum that

the lawyers think they can reasonably recover after fees and expenses (bearing in mind both, the merits of the case, and the defendant's ability to pay damages), and (b) how much do you really NEED from this case?

Finally, identify all the viable alternatives. Can or should this claim be negotiated, mediated or arbitrated? Is there a viable co-plaintiff with whom I can split costs? Is there a reasonable prospect of settlement without litigation? What if I do nothing? What are the costs and likely outcome of each?

If upon evaluation, it becomes evident that the claim or defense is worth pursuing, and that doing nothing is not a viable option, then the possible alternatives should be considered. I start with what are generally bundled together as methods of alternative dispute resolution (ADR). They include negotiation, mediation, assisted settlement conferences, and arbitration. Some writers would add conciliation to this list but I view it as a type of mediation. What these devices have in common is that they do not result in a judge making the final decision to resolve the dispute subject to appeal. It is important to note, however, that there are important differences among these ADR devices.

Perhaps most significant is the distinction between arbitration on the one hand, and the other methods on the other. While arbitration generally results in a binding and dispositive result even over a party's objection, mediation and settlement conferences generally cannot produce a non-consensual resolution. They are devices aimed at assisting the parties to enter into a voluntary settlement. It is therefore arguably incorrect to view mediation and settlement conferences as alternatives to litigation. Indeed, they should generally be part of every material litigation.

In considering alternatives to filing suit the analysis should always begin with negotiation. When successful, it is typically by far the cheapest and fastest way to resolve disputes. Thus, before proceeding with another mechanism, it is almost always advisable to begin with a dialogue with the opponent(s) to determine whether a simple negotiation can produce an acceptable settlement. If that fails, considering other mechanisms is advisable but it should be borne in mind that one can negotiate at any time during the life of a dispute.

If stand-alone negotiation is unsuccessful, mediation may be a good alternative. Although most mediations are commenced after a lawsuit has been filed, there is no reason not to do so before as well. A mediation is simply a settlement conference guided by a neutral who does not have the power to decide the dispute but will advise the parties singularly and together on ways to resolve it. Typically, the mediator will act as a shuttling emissary conveying each party's position to the other in ways that minimize hostility. A good mediator also assists the parties in viewing the merits of their respective positions more objectively. Mediations are confidential, typically by statutory requirement. Thus, parties can be candid with each other and the mediator without prejudicing their litigation positions. Very importantly, there is no real limit to the number of times that parties can mediate the same dispute before resolving it. It is not uncommon for parties to undertake two or three mediations in the same case, often with different mediators, before reaching settlement. Mediations are more formal than negotiations and include the benefits of a neutral's assessment and "shuttling diplomacy." Like negotiation, however, they cannot compel a party to settle involuntarily. They generally do not entail any discovery or formal proceedings and are therefore much cheaper and faster than arbitration.

Assisted settlement conferences are generally a variation of mediations in which the neutral is a judge. Sometimes the judge presiding over a dispute will offer to bring the parties into chambers for a settlement discussion. This is almost universally a terrible idea. It enables the parties to present "evidence" and argument to the court that would be impermissible under the applicable litigation rules. And while the court might provide assurances that *what happens in settlement discussions stays in settlement discussions*, many judges are almost human and cannot overcome the subconscious bias created by the impermissible material. The better approach is to have a retired, or at least uninvolved, judge preside

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[1] I will not address defending litigation filed by someone else, though many of the considerations discussed here may well be applicable in that circumstance as well.

[2] Loosely, that Shakespeare guy again. This time from Hamlet, Act 3, Scene 1.

[3] That is itself a complicated subject that cannot be discussed at length here, but see Matter of Kinckerbocker Agency (Holtz), 4 N.Y. 2d 245, 149 N.E. 2d 885 (N.Y. 1958).

over the discussions. Under those circumstances the advantage over other mediators is that the court will be perceived as providing the parties a more reliable or authoritative assessment as to the merits of each party's position, hopefully out of earshot of the other party. Of course, the same result can be obtained by a conventional mediation in which the mediator is a retired judge or even a very seasoned mediator. However, assisted settlement conferences often also include a report to the court by the mediator that can serve as an additional impetus for settlement.

Negotiation, mediations and assisted settlement conferences are typically used to attempt to end litigation early, saving expenses and uncertainly. They are therefore typically part of, not necessarily alternatives to, litigation. Arbitration, by contrast, truly is an alternative to court-based litigation. In fact, the prevailing party is typically authorized to procure a court judgment confirming the arbitration award. Appealing that judgment is typically far more difficult than appealing a court judgment in a contested litigation matter. Most often the decision to arbitrate is made by at least one party long before a dispute arises, by including in a governing contract (such as a reinsurance treaty) a provision mandating it as the exclusive means to resolve disagreements. In many instances, such clauses are controlling and (in the absence of mutual agreement) arbitration is the sole means of resolving a dispute. There are cases, however, in which the courts have enabled a party to ignore such provisions.[3] Thus, in at least some cases, parties will make a conscious decision to push for arbitration or to oppose it, rather than litigate.

Arbitration is popular because it is believed that compared to litigation:

1. It can be materially cheaper;
2. It can be less public;
3. It can be faster and provide certainty sooner;
4. The parties have more control over the decision maker; and
5. It may consume far less resources.

While these assumptions may often be true, they are not universally so. Some arbitrations can be just as lengthy, expensive and disruptive as litigation in court. Moreover, they are disfavored by many because:

1. The decision makers are selected by the parties or their representative and are therefore less likely to be truly neutral,
2. Appeals from adverse results are very difficult,
3. The governing rules are much less stringent than in litigation, and
4. Looser discovery and evidence rules may make it harder to prove one's case.

A more detailed exploration of arbitration is beyond the scope of this article, but this should serve as a useful summary for the decision-making process. In some cases, the receiver will have fully considered these alternatives and determined that it is time to sue. The following are some simple preparatory steps that will enhance the probability of success.

PREPARING TO SUE

Whether this is offensive (asset marshaling) or defensive (claim-defeating) litigation, the receiver as plaintiff should fully understand the likely scope and complexity of the case, have a preliminary idea of the magnitude and timing of costs, and a preliminary assessment of the probability of success. Although this may seem obvious it is overlooked more often that it is observed: resources devoted to the lawsuit should be commensurate with its importance. It is very helpful in that regard to:

1. Select counsel appropriate for the case both in terms of familiarity and cost,
2. Establish a preliminary budget in cooperation with counsel and review it regularly,
3. Understand and plan for necessary experts and extraordinary costs (like travel abroad), and
4. Establish a preliminary time line with counsel and review it regularly.

Before actually filing suit, there are additional steps that will enhance the chances of success and also give the receiver more control over her litigation. Some of these include:

1. Identify and ascertain the existence of key indispensable evidence, including witnesses. The best case but without evidence in support is no case at all.
2. Assign a member of your staff to monitor its progress.
3. Determine what company staff will be necessary for the case and establish their positions on key issues before filing.
4. Explore whether insurance is available to fund at least part of the case.
5. Determine whether the case may adversely affect the collectability of D&O or E&O insurance.
6. Explore possible collateral effects of the case (i.e., will it impact reinsurance recoveries, claims against management, positions in other lawsuits, etc.).

7. Consider the likely view of the receivership court regarding the litigation. It may be helpful to brief the court at the appropriate time before filing the suit.
8. Determine what positions you will have to take in the litigation and assure that they are not inconsistent with positions you are taking elsewhere in the receivership.
9. Finally, before actually filing, make one last attempt to settle without having to file suit.

Suing (offensively and defensively) is an unavoidable part of managing a receivership of any size. Exhausting other alternatives and planning for it tend to make the process less frustrating and surprising. In closing, as the cost of litigation mounts, I note this as well: lawyers' kids gotta eat too!

Patrick Cantilo is a very old Texas receiver who once was president of IAIR and served on its board of directors for ten years until he showed up at a meeting and they promptly booted him out! He practices law with Cantilo & Bennett, L.L.P. in Austin. Over the decades he has represented or worked for about half the states in various insurance insolvency or regulatory projects.

IAIR AWARDS AIR DESIGNATIONS

As most of you know, as part of its mission to promote professionalism in the administration of troubled insurers and those in receivership, IAIR serves as a credentialing organization for insolvency practitioners. IAIR currently offers two professional designations, the Certified Insurance Receiver and Accredited Insurance Receiver, to qualified individuals, with the two designations reflecting depth of expertise and different types of insolvency practice.

Recently, Gina Cook a Senior Consultant with Risk & Regulatory Consulting LLC was awarded the designation of AIR, Claims and Guaranty Funds effective March 1, 2019. Karen Heburn, a Senior Manager also with Risk & Regulatory Consulting LLC was awarded the designation of AIR, Accounting & Financial Reporting and Asset Management and Reinsurance, effective December 3, 2018. Fred Heese, of Heese Consulting, was awarded the designation of AIR, Accounting and Financial Reporting effective December 3, 2018.

LAST SUMMER, IAIR ALSO AWARDED THE FOLLOWING DESIGNATIONS:

Elena Byron, Supervisor with Risk & Regulatory Consulting, was awarded the designation of AIR – Claims and Guaranty Funds, Leo C. Garrity, Jr., Senior Manager with Risk & Regulatory Consulting, was awarded the designation of AIR – Accounting and Financial Reporting and Eric Scott, a Director with Risk & Regulatory Consulting was awarded the designation of AIR-Legal.

Please take a moment to congratulate these IAIR members on their achievement.

U.S. LEADS INSURANCE POLICYHOLDER PROTECTION AROUND THE WORLD

By Roger Schmelzer, President & CEO, NCIGF

On January 1, I began a one -year term as Chairman of the International Forum of Insurance Guarantee Schemes (IFIGS). My colleague at NOLHGA, Peter Gallanis has been involved since the earliest days of IFIGS and I joined him a few years ago.

The objectives of the Forum are to facilitate and to promote international cooperation between Insurance Guarantee Schemes and other stakeholders in the development of policyholders' protection. From time to time it may communicate views, ideas and experiences to interested parties. IFIGS is a voluntary not for profit membership network. It is independent of any government authority. Currently there are twenty-five members and the membership is growing.

I took on this responsibility because of my very strong sentiment that the insurance industry is absolutely essential to the world economy. The insurance promise makes opportunity a possibility. Our support of it keeps the industry strong and gives comfort and peace of mind to policyholders. Guaranty mechanisms ready to protect insurance consumers undergird the sanctity of the insurance promise by assuring the viability, commitment and reputation of the insurance industry.

IFIGS is well-positioned to be the global definitive expert on supporting the insurance promise. All protections do not have to be structured the same way, but the important role of policyholder protection mechanisms must be articulated clearly and effectively to regulators as they work as overseers of the global insurance industry.

To build the value of the organization, IFIGS members have set three long-term strategic objectives:

- **Information Sharing.** IFIGS will collect information and be the global expert regarding insurance guarantee schemes and will be an active resource for IFIGS members, supervisors and standard-setters.
- **Member Outreach.** IFIGS will develop a plan for actively recruiting new members and encouraging more active participation and leadership by existing members.
- **Reputation Enhancement.** IFIGS will work to heighten its profile with supervisors and standard setters, including those that may be involved in developing new insurance guarantee schemes.

Examples of IFIGS effectiveness are not hard to find:

1. The consultation paper published by the IAIS in mid-November, 2018 concerned a proposed holistic framework for the assessment and mitigation of systemic risk in the insurance sector. The initial IAIS consultation included the following statement:

"In addition to the direct economic effects of an insurer's failure to pay claims on consumption, by a reduction of policyholders' wealth, a number of correlated failures could have additional knock-on effects, such as through some insurance guarantee schemes."

IFIGS, in partnership with NOLHGA and NCIGF, commented on the consultation paper and strongly objected to that statement. The offending comment was removed from the revised paper.

It would have been nothing short of a disaster for global regulators to continue their consideration of approaches to insurer oversight if they believed that policyholder protection schemes could spread contagion! It could take decades to change that thinking and no one country could do that alone. But by working together, IFIGS and its members played a strong advisory role that regulators took seriously. That is the value of being collaborative and building on that strategy.

2. A July 2017 paper published by EIOPA (European Insurance and Occupational Pensions Authority) stated that a minimum degree of harmonization of policyholder protection schemes in the European Union would benefit policyholders, the insurance market and the financial stability of the EU. IFIGS was invited to present on the role that insurance guarantee schemes can play in resolution during an EIOPA recovery and resolution seminar.

Thanks to our active participation in IFIGS, the U.S. made a joint presentation (with Greece) to an audience of European regulators and companies, and our presentation drew more interest from the audience than any other presentation over the day and half seminar. From this experience it was confirmed what we had already learned; that European regulators are very curious about our state-based system of policyholder protection. As EIOPA continues to deliberate on harmonization, the background

continued on next page

we provided should prove useful.

3. Finally, on another occasion, Peter Gallanis and I, joined by a colleague from Canada, were asked to represent IFIGS before a working group of international regulators (including James Kennedy from the Texas DOI and Alex Hart from the Federal Insurance Office) who were drilling down on the relationship between regulators and policyholder protection mechanisms. My understanding is that we were helpful in providing background on ways to collaborate to provide a more effective safety net to consumers.

A primary goal is to spread the value of our engagement with IFIGS to IAIR and the NAIC. And to take that back to the IFIGS membership and international regulators.

Our resolution mechanism—composed of receivers and guaranty funds-- is by far the most experienced and effective system in the world. The broader the expertise we can bring to the table, the more impactful we can be on behalf of the individual policyholders and claimants we serve.

For more on particulars of other mechanisms around the world, a good, but not definitive, resource is a discussion paper published by EIOPA. Read more.

I am happy to discuss this organization and the value of the United States' participation. Please feel free to contact me. Further information may also be obtained from the IFIGS website at www.ifigs.org.

WELCOME TO OUR NEWEST IAIR MEMBERS

MOSES CHAO
Moses Chao, a Receivership Oversight Analyst with the Texas Department of Insurance, recently rejoined IAIR. Moses graduated from Oklahoma State University with a BA in Accounting and MS in Quantitative Financial Economics. Moses holds CFE designations from the Society of Financial Examiners and CFE designation from the Association of Certified Fraud Examiners.

ANDREW HOLLADAY
Andrew has been with the National Conference of Insurance Guaranty Funds since 2008 and is the Chief Information Officer. He holds a Bachelor's Degree in Philosophy from Loyola University of Chicago.

STEPHANIE MOCATTA
Stephanie has over 30 years' experience in the insurance industry, mainly in troubled companies, those in run-off or insolvencies. She founded SOBC in 2007 and as CEO has led the merger with Sandell Re to enable SOBC Sandell to provide a full range of services to troubled companies or those with difficult or challenging run-offs. Prior to 2007 Stephanie worked in a variety of insurance entities, including Equitas, in its early days at 'NewCo' and the Whittington Group where she helped lead the company to become the major outsource provider of run-off services in the UK. Stephanie went to Cambridge University in 1982 to to study Veterinary Medicine.

COMMISSIONER GLEN MULREADY
Glen Mulready became the 13th Oklahoma Insurance Commissioner after receiving 62 percent of the vote. He was sworn into office on January 14, 2019.

Starting as a broker in 1984, Glen rose to serve at the executive level of the two largest health insurance companies in Oklahoma. In 2007, he joined Benefit Plan Strategies, a company helping businesses provide employee benefits and health insurance to their employees.

In 2010, Glen successfully ran for state representative and quickly became the point person for the House of Representatives on insurance issues and was appointed chairman of the Insurance Committee after the 2014 elections.

BLAKE OBATA
Blake is the Executive Director of the Hawaii Insurance Guaranty Association. He holds a Bachelor's Degree in Accounting

JOHN PETERS
John is an Assistant Chief Analyst with the Texas Department of Insurance.

ARTHUR RUSSELL
Arthur is the Executive Director of the Mississippi Insurance Guaranty Association. Prior to becoming the Executive Director, he was the Claims Manager. He also serves on the NCIGF Board of Directors and the Public Policy, Education and Audit Committees.

Prior to joining the Mississippi Insurance Guaranty Association, Arthur worked for several insurance companies including Nationwide, USF&G, AIG and The home Insurance Company.

Arthur holds a Bachelor's Degree in Marketing from Jackson State University and is a Senior Claims Law Associate.

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