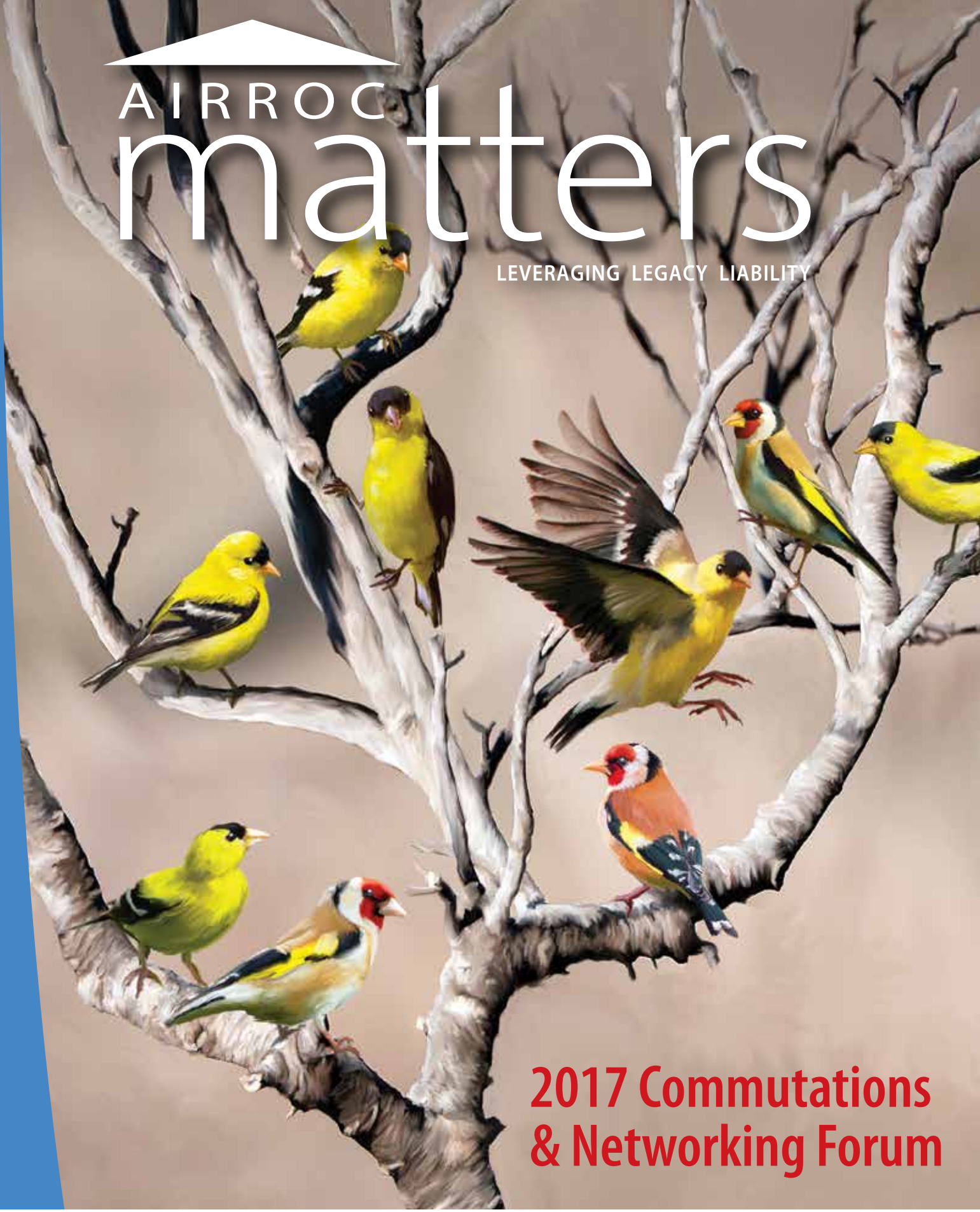
www.airroc.org Vol. 13 No. 3 Winter 2017-2018

AIRROC matters

LEVERAGING LEGACY LIABILITY



2017 Commutations & Networking Forum

IBT OR NOT TO BE? • SOMEBODY'S WATCHING • AIRROC & EECMA SHINE TOGETHER
PRECIOUS METALS • GETTING ARTSY IN JERSEY • HONORING JOHNSON • AWARDS FOR TWO

The Power of Collaboration.

SAUL EWING
ARNSTEIN
& LEHR LLP

saul.com

Meeting Your Insurance Needs

Full Service Counsel to the Insurance Industry

Saul Ewing Arnstein & Lehr's Insurance Practice brings a real world insurance industry and regulatory experience to a wide variety of insurance issues, including litigation, regulatory counseling, reinsurance, and corporate matters.

Contact us to find out how Saul Ewing Arnstein & Lehr's experienced insurance attorneys can help you with your next project.

Paul M. Hummer
Partner
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102
215.972.7788

A Hazy Shade of Winter

Maryann Taylor

Our gallant Editor, Peter Scarpato, has passed the pen to me while he recuperates from scheduled surgery. Warm regards and best wishes from all of us on the Publication Committee to Peter for a swift recovery!

It has been a long, strange year. As the world changes before our eyes, we can count on AIRROC as it continues its steady journey to raise the bar by being a trusted educator, network provider, and collaborative facilitator in enhancing and improving industry standards, honoring professionalism and shining a light on individuals who demonstrate that hallmark. The adage that *many hands make light work* has never been exemplified more by the support and contribution of our membership to the AIRROC mission.

We begin this issue with Luann Petrellis' article *Separate but Not Equal* in which she returns to a recurring theme: touting Rhode Island's Insurance Business Transfer ("IBT") legislation and then comparing and contrasting it with Connecticut's division statute.

Next, Eleni Iacovides provides another installment in her continuing series, *The Legacy Market: Resistance. Protection. Equivalence. Vision. That Order.* This article provides a look to the future and dishes on hot topics being discussed in the legacy space.

Barbara Murray follows her earlier article that introduced the watch list as an effective management tool (Fall 2017) with a "how to" guide to develop, use and employ this tool. As always, Barbara provides practical and pragmatic advice on the implementation of a watch list program in *Eyeballing Excellence*.

Our colleague and reporter extraordinaire, Connie O'Mara, provides a bird's eye view on the *Mega Superfund Symposium* that was held in Philadelphia. The program provided an in-depth analysis for environmental claims experts in the field in the first, of what we hope to be many, joint collaborations between AIRROC and EECMA.

Carolyn Fahey, our cherished Executive Director, highlights the relevance of our featured feathered friends on the cover with another successful Commutation and Networking Forum in the books. *One is Silver and the other Gold* weaves together the hosting state of New Jersey where AIRROC members flock each year to gather and the importance of relationships in this industry. This year's Forum did not disappoint with an enchanting kick off dinner at the Zimmerli Museum. The Education program showcased presentations from renowned professionals in the industry on a host of topics summarized by Publication Committee members Robert Goodman, Connie O'Mara and Ben Gonson. These topics included UK Employers Liability Portfolios, a look at the Evolving Insurance Workforce, the ripple effect of Viking Pump on the allocation landscape, how the Robotics Process Automation is changing the insurance industry and finally, an interactive session on What is Discoverable?

Tribute was paid to Stephen Johnson of Stradley Ronon and former Deputy Insurance Commissioner of Pennsylvania as the AIRROC 2017 Person of the Year. The 6th Annual Trish Getty Scholarship was awarded to two recipients, Ashley Myers and Samantha String, both juniors majoring in Risk Management and Insurance at St. John's University. AIRROC's charitable fundraising initiatives were presented to the Loud N Clear Foundation, a New Jersey addiction treatment program, and the Waipa Foundation in honor of our departed friend Doug Andrews, former Eaglestone CEO. We round out the issue with Present Value, by Fran Semaya and Peter Bickford.

On behalf of the Publication Committee, we wish you a joyous holiday season with peace and cheer in the New Year!

In the words of Peter Scarpato, "Let us hear from you." ●

Maryann Taylor, Vice Chair of AIRROC Matters, is a Partner at the New York -based law firm of D'Amato & Lynch, LLP. mtaylor@damato-lynch.com

Foley's Insurance & Reinsurance Litigation Team provides comprehensive counseling, litigation, and dispute resolution services to the insurance industry.

Our approach is to listen carefully to you in order to understand your specific business concerns and objectives. Armed with that knowledge, we work with you to develop a plan that will help you achieve your specific goals. At Foley, we never forget your business needs.

Tell us about your challenges and let us share how Foley can add value to your business. Contact Partner Neal Moglin in our Chicago office at nmoglin@foley.com or Bart Reuter in our Milwaukee office at breuter@foley.com.

Foley is a proud Corporate Partner of AIRROC.

FOLEY

FOLEY & LARDNER LLP

FOLEY.COM

BOSTON | BRUSSELS | CHICAGO | DETROIT | JACKSONVILLE | LOS ANGELES | MADISON | MIAMI | MILWAUKEE | NEW YORK
ORLANDO | SACRAMENTO | SAN DIEGO | SAN FRANCISCO | SILICON VALLEY | TALLAHASSEE | TAMPA | TOKYO | WASHINGTON, D.C.

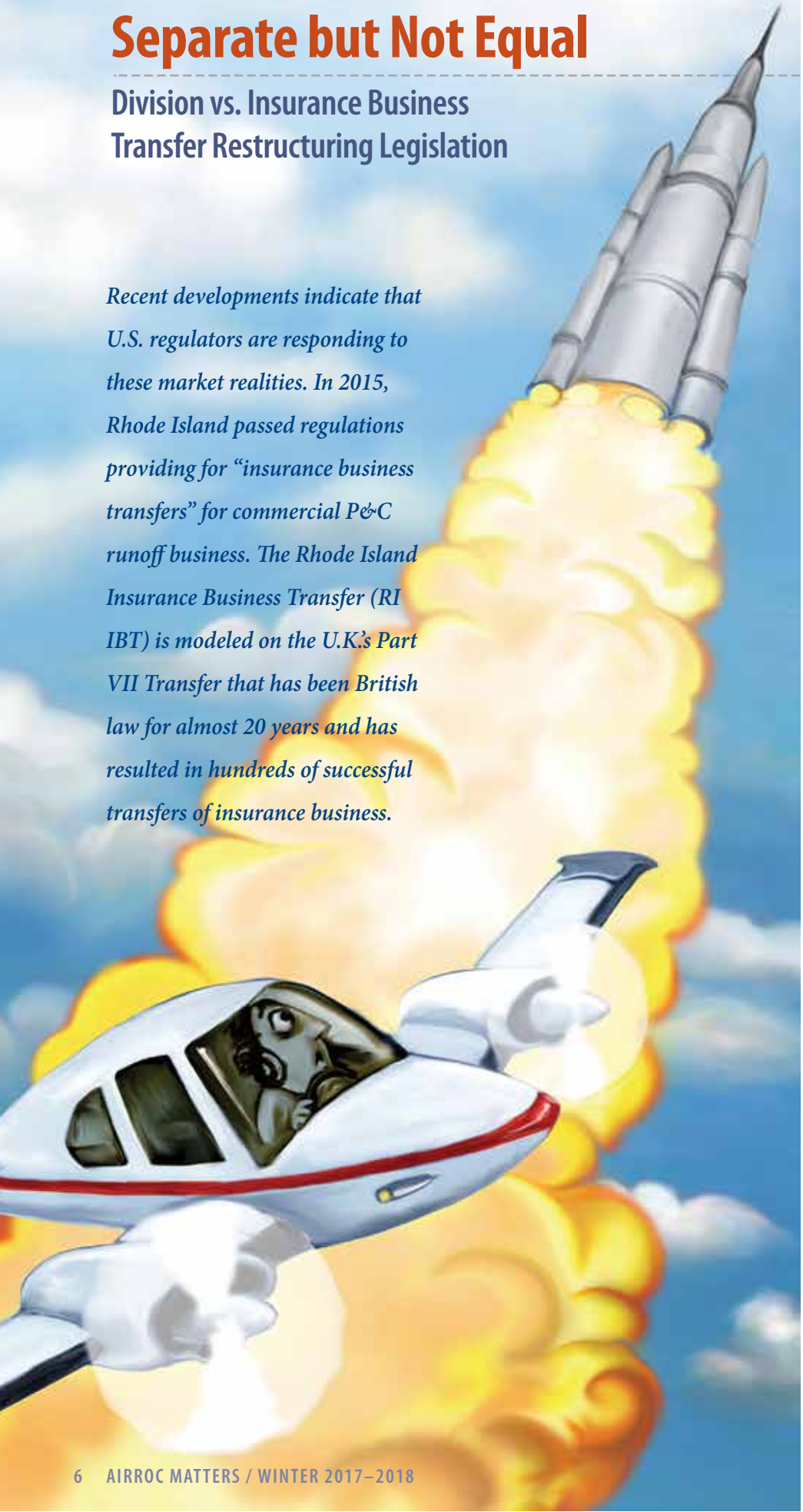
AIRROC matters

Vol. 13 No. 3 WINTER 2017–2018 www.airroc.org

Illustrations / R. Edwards
Photos / Jean-Marc Grambert
Stephen Magnotta

Separate but Not Equal

Division vs. Insurance Business Transfer Restructuring Legislation



Recent developments indicate that U.S. regulators are responding to these market realities. In 2015, Rhode Island passed regulations providing for "insurance business transfers" for commercial P&C runoff business. The Rhode Island Insurance Business Transfer (RI IBT) is modeled on the U.K.'s Part VII Transfer that has been British law for almost 20 years and has resulted in hundreds of successful transfers of insurance business.

The RI IBT is a court sanctioned novation of transferred policies from one carrier (that does not have to be a Rhode Island company) to another (that does have to be a Rhode Island company). Approval of an RI IBT is a multi-layered, transparent process that includes both regulatory and judicial review and approval. Like the U.K. Part VII transfer, the RI IBT results in a novation of the transferred policies, providing finality to the transferring company.

In May of 2017, the state of Connecticut passed Public Act 17-2 authorizing domestic insurers to divide. Hartford, a Connecticut domiciled carrier that is one of the state's largest employers, supported the law. The new statute allows a Connecticut domestic insurer to divide into two or more insurers and allocate assets and obligations, including insurance policies, to the new companies (i.e., new or resulting insurers). Resulting insurers are deemed legal successors to the dividing insurer and any assets and obligations are allocated to them as a result of succession and by direct or indirect transfer. Regulatory approval of the plan of division is required. A public hearing may take place, but no formal court approval is required. The commissioner must approve a plan of division unless (a) the interest of any policyholder or interest holder will not be adequately protected, or (b) the proposed division constitutes a fraudulent transfer. There is no requirement for policyholder approval.

While there are some similarities between the Connecticut division legislation and the RI IBT legislation, the differences in effect and application are striking.

Connecticut Division Statute

The Connecticut division statute is very similar to Pennsylvania's Business Corporations Law that also provides a procedure for companies to divide their business into separate entities. However, the Pennsylvania division statute has not enjoyed wide application. It was used once, in 1996, when the state insurance department approved a plan of restructure that placed all of ACE

While the Connecticut division legislation may provide an option for variable annuities, there are other lines of insurance that can challenge its effective application.

USA's Domestic Property and Casualty Insurance Group's runoff business within Century Indemnity Insurance Company, a subsidiary of Brandywine Holdings. Importantly, this transaction involved only commercial property and casualty liabilities. The process survived legal challenge, but, since then, no company has used the statute.

The Connecticut division statute requires minimal financial disclosure. The plan of division need only include "the manner of allocating [certain property] between or among the resulting insurers … the manner of distributing interests in the new insurers to the dividing insurer or its interest holders … and a reasonable description of policies or other liabilities, items of capital, surplus or other property the domestic insurer proposes to allocate to a resulting insurer." There is no independent review of financial information. A public hearing is at the discretion of the state insurance commissioner and there is no judicial review. The commissioner has the authority to approve a plan of division unless the commissioner finds that (a) the interest of any policyholder or interest holder will not be adequately protected, or (b) the proposed division constitutes a fraudulent transfer.

In the case of consumer lines of insurance such as long term care, a division statute like the one in Pennsylvania or Connecticut may not provide sufficient transparency and review requirements to ensure a successful transfer. The applicability of the division legislation to certain lines of insurance raises important questions regarding its utilization particularly as to policyholder protections and guaranty fund coverage. Asset adequacy and investments also are important issues. In addition, a company that considers taking advantage of the division statute needs to take into account state licensing requirements for the new company, notice to policyholders, and concerns about policyholder rights and protections.

Importantly, the CT division legislation was promoted by a company that seeks to use it for its variable life annuity business. Variable annuities involve a standard and recognized reserving process to determine the ultimate payout for the liabilities. Therefore, the variability in reserve outcomes should be minimal, and ultimately, the sales process between the buyer and the seller will determine whether more or fewer assets are necessary to consummate the transaction.

While the Connecticut division legislation may provide an option for variable annuities, there are other lines of insurance that can challenge its effective application. This is particularly so with long term care insurance, which involves an entirely different set of risks and considerations, including policyholder protections and rate increases. One of the key problems for the long term care industry is the high level of uncertainty associated with long term care reserves and the reserving practices the industry currently uses. In the case of a division, uncertainty about ultimate liabilities for long term care legacy liabilities likely will result in concern that the unknown exposure will be shifted to policyholders through future rate increases. In the case of variable annuities, the buyer or seller will absorb pricing risks, but in long term care there is a high probability that future experience variables will be borne by the policyholder in the form of rate increases.

An additional consideration is that the Connecticut division approval process is solely regulatory and whether the division would be enforceable in all relevant U.S. jurisdictions is unclear. Courts would apply the constitutional principle of full faith and credit if asked to examine whether the approval of the Connecticut Insurance Commissioner is enforceable outside of Connecticut. Article IV, Section 1 of the U.S. Constitution mandates that full faith and credit be given "in each State to the public acts, records, and judicial proceedings of every other state." It is unclear whether regulatory approval alone would be recognized and enforced in any other U.S. state without a court order.

Insurance Business Transfer (IBT)

In contrast, insurance business transfers (IBTs) are used worldwide and apply to all lines of business, both live and runoff. In the U.K. alone there have been hundreds of successful transfers, none of which have subsequently encountered financial difficulties.

Currently, Rhode Island is the only state that has legislation providing for IBTs. The RI IBT is a multi-layered transparent review process.

The IBT is a flexible restructuring tool. It can be used to combine similar business from two or more subsidiaries, putting all into a single company; to separate out different books of business, putting them into separate companies; or to transfer business between third parties. In contrast, the Connecticut division statute applies solely to Connecticut domestic companies, allowing them to separate business only within their corporate structure.

Currently, Rhode Island is the only state that has legislation providing for IBTs. The RI IBT is a multi-layered transparent review process. It requires notice to all policyholders and extensive financial disclosure by both the transferring and assuming companies. Both the regulator in the transferring company's home state and the RI regulator must approve the IBT plan. The review process also includes a report of an independent expert that must evaluate

BUTLER RUBIN SALTARELLI & BOYD LLP

Count on Butler Rubin

When complex issues arise, count on Butler Rubin to provide trusted counsel.

From underwriting to claims, allocation to insolvency and all areas in between, Butler Rubin's insurance and reinsurance practices are consistently cited for excellence.*

*Chambers USA Guide to America's Leading Lawyers, Leading Lawyers, Best Lawyers, US News and World Report

butlerrubin.com
(312) 444-9660

Helping clients solve complex issues in underwriting, claims, allocation, coverage, agency, insolvency and finite reinsurance as well as the non-litigation aspects of their insurance and reinsurance relationships.

Separate but Not Equal (continued)

the impact of the transfer on all affected policyholders, including transferring and non-transferring policyholders and policyholders of the assuming company, if any. Because of this analysis, a resulting good bank/bad bank scenario is avoided.

There also is a court hearing, during which policyholders have the right to voice their concerns. If the court finds that policyholders are not materially adversely affected, then it will approve the IBT plan and implement a novation of the transferred policies. It is only after this multi-layered transparent review process that the transferring company is released from liability on the transferred policies. In short, the RI IBT is a proven business model with an approval process that is a carefully monitored, transparent review that balances the needs of all stakeholders to the transaction.

Currently, the RI IBT only applies to commercial P&C runoff liabilities. While the IBT review process far exceeds the Connecticut division legislation in terms of scope and effectiveness, the Rhode Island statute's restriction to P&C runoff does limit its application. There are ongoing discussions about potentially expanding the IBT to all lines of business.

Conclusion: The IBT shows real promise

Companies need restructuring tools that have wide application to address a changing business and regulatory environment. The Connecticut division statute does not have wide application and appears to be more a legislative response to the particular needs of an important local company. The IBT is a proven business model, having been used successfully worldwide as a restructuring tool for all lines of business. The experience of the U.K. runoff market has proven that a well-designed IBT process can be an effective restructuring tool for insurers and reinsurers. When and if Rhode Island (and/or another states) does adopt legislation that applies the IBT to all lines of business, then U.S. (re)insurers will have an effective, flexible restructuring tool with multiple safeguards to protect policyholder rights. ●

The opinions stated herein are those of the author and do not necessarily reflect those of Pricewaterhouse Coopers or its affiliates.

Luann Petrellis is a Managing Director with PricewaterhouseCoopers specializing in developing strategies for insurance restructuring and runoff. She drafted the RI regulations providing for insurance business transfers.
luann.m.petrellis@pwc.com

AIRROC Board of Directors & Officers 2018

Back Row – left to right: David Presley (Enstar US); David Kenyon (Swiss Re); Bill Goldsmith (AIG); Bill Littel (Allstate). **Middle Row** – left to right: Jose Martinez, Jr., Secretary (CNA); Marianne Petillo, Treasurer (ROM Re); Karen Amos (Resolute Management Services); Ivan Jaffa (RiverStone ReSources); Andre Lefebvre (Arrowpoint Capital). **Front Row** – left to right: Betsy Mitchell (Armour Risk Management); Ed Gibney (R&Q); Leah Spivey, Chair (Munich Re America); Michael Fitzgerald, Co-Vice Chair (QBE); Carolyn Fahey, AIRROC Executive Director; Andrew Hill (Zurich). *Not Pictured:* Bill Teich, Co-Vice Chair (The Hartford); Peter Scarpato, Editor & Chair of AIRROC Matters (Brandywine Group).

AIRROC Advisory Council 2018

Front Row, left to right: Sandra Santomenno (Willis Towers Watson); Connie O'Mara; Stephen Johnson (Stradley Ronon); Carolyn Fahey, AIRROC Executive Director. **Back Row**, left to right: Marianne Petillo, Board Liaison (ROM Re); Steve McElhiney (EWI RE); David Alberts (Mayer Brown). *Not Pictured:* Debra Hall

The Legacy Market

Resistance. Protection. Equivalence. Vision. That Order.

Eleni Iacovides

In The Legacy Market article that ran in the Spring 2017 issue, we discussed the various exit and capital release tools available to the European insurance market with each providing different degrees of finality and capital relief. The second Legacy Market article which ran in the Fall issue, discussed the first finality statute available in the U.S. and steps taken by other states to adopt a similar framework. This third article in the Legacy series will discuss where we are today and the concerns and challenges we understand are currently being discussed in the market.

While approaching the end of another busy year, the European legacy market can look back and be proud for the transactions signed, approved, closed, and, of course, last but not least, for those rumoured to be in exclusive discussions with the various acquirers. The year may end with some surprising results, all of which will add to the growing attraction of the legacy space and the increasing trust and consequent collaboration between sellers and buyers.

The mechanism is long established, tried and tested, and with no failures. The legacy acquiring market can proudly boast zero failure. This, without any qualification or footnote, delivers the certainty and reputational promise made to clients and, most importantly, to policyholders.

Across the Atlantic, more than two years on, the Rhode Island statute remains "unused," while rumours that the first transaction will be announced in the early part of 2018 are widespread. This will be a welcome step in the right direction. But why is it taking so long? Why is the U.S. market not as enthusiastic as the European market about the availability of legal and/or economic finality for non-core or unwanted portfolios? Certain concerns have been consistently raised that provide valid and varied reservations of a market that is normally state-focused and state-managed and one that has consistently resisted federal legislation on any insurance aspect. I outline below some widely-discussed concerns and offer some thoughts from experience gained in the last few decades in Europe.

Reputation

Insurers are understandably concerned about their reputations when considering the transfer of a portfolio. This is particularly relevant when considering a transfer of a line of business that they wish to continue to underwrite. How will the acquirer treat their customers? Who may still have a policy with the insurer (a concern that is especially relevant in relation to direct policies, such as automobile or homeowner's policies)? Who will handle their claims? Will the acquirer unduly delay payment of claims? Will the acquirer try to treat policyholders less fairly given that the acquirer would not be interested in any future business?

These are all valid concerns, but express a failure to see the transaction in its entirety, which includes looking at it from the acquirer's point of view. Acquirers' core business is insurers' non-core or unwanted business. In order for them to be in a position to succeed, to continue to grow, to meet their business plans, to satisfy their shareholders' expectations and to achieve the plethora of business goals that all businesses have, they have to build a reputation of reliability and credibility so that they can continue to acquire more portfolios and to grow their own balance sheet. The reputation of the seller is only one side of the same coin. The acquirer is just as keen to preserve its own reputation in order to gain more business from the same client, new clients, to grow, and

/ (RE)INSURANCE SOLUTIONS

The (re)insurance industry in the United States, London and Bermuda has looked to Kennedys CMK for more than 20 years for everything from claims counseling, to complex coverage disputes with policyholders, to reinsurance disputes and commutations.

This experience has built a familiarity with the parties, attorneys, arbitrators, mediators, courts, judges and experts, and we use that to each client's advantage. Every Kennedys CMK recommendation — whether it means negotiating an early settlement or litigating through trial and appeal — is made with your long-term business interests in mind.

Kennedys CMK / solutions are your advantage

kennedyscmk.com

Kennedys CMK

The Legacy Market (continued)

to avoid any regulatory issues that may follow from policyholder complaints. It is obvious how the parties' interests in any transaction are aligned.

Policyholder protection

Policyholder protection is a key driver in any transaction approval process. It is quite rightly the most important driver for the approving regulator or court. The approving regulator or court must be satisfied that policyholders will be protected in the hands of the new owner. The examination process before approval is long and thorough, whether this is done by a regulator in the EU, or by a judge in the U.K. or Rhode Island. The Independent Expert's report, commissioned by the Rhode Island Department, would consider all interested parties, and will be an important element of the process as to whether or not the transfer is sound; the regulator will only approve a transfer if satisfied that policyholders will be just as protected, if not better protected, after the transfer. Equally, the acquiring insurer must show that its own solvency is sound pre- and post-transfer. Regulation 68 provides that both the home and the receiving regulators be involved in the approval process and that the court's approval is required to effectuate the transfer. Any new process is bound to be encountered with reluctance or doubt. The success of the process will be entirely dependent on the actual success of the transactions themselves. And this can only be seen once the process is used.

State v. Federal legal framework and regulation

In the Legacy article published in the Fall 2017 issue of AIRROC Matters, I questioned whether or not a EU-style legal finality would be possible in the absence of Federal legislation on this aspect of insurance law. State commissioners are understandably protective of their insurance industry and their policyholders. A uniform system would ensure that all transactions are reviewed in the same way and are decided within the same legal and regulatory framework, thus rendering state issues less relevant. In a uniform system, business transactions would be completed with certainty, not concerned with potential challenges by other states that do not have similar legislation; they would not be dependent on judicial interpretation on whether or not another state court's decision should receive full faith and credit. Reciprocity and equivalence are key ingredients to a level playing field in business transactions from which certainty would flow. Certainty is key to business transactions and to business success.

It would seem to me that this step goes a long way to recognising that regulators, no matter where they are, and insurers, no matter where they are, have a common goal…

U.S. and EU Covered Agreement

The Bilateral Agreement between the U.S. and the EU on Prudential Measures Regarding Insurance and Reinsurance, in short, the "Covered Agreement," provides a level playing field between U.S. and EU insurers that, principally, removes the need for authorisation and collateral in each other's jurisdiction. This is certainly a major step in terms of recognition, reciprocity, and equivalence that enables insurers and reinsurers to engage in transactions in each other's territory acknowledging each other's regulatory framework, noting the benefits of enhancing regulatory certainty and acknowledging that group supervision of insurers and reinsurers enables supervisory authorities to form sound judgments of the financial position of these groups. The Covered Agreement further "encourages the exchange of information between supervisory authorities in order to supervise insurers and reinsurers in the interest of policyholders and other consumers." In plain English, it says: if you are regulated by a sound regulatory system and respect basic insurance principles, then we trust that you do without further checks. And that's a good thing in terms of a global industry like insurance.

It would seem to me that this step goes a long way to recognising that regulators, no matter where they are, and insurers, no matter where they are, have a common goal: "to supervise insurers and reinsurers in the interest of policyholders and other consumers." It should follow from this, that any regulator, whether a U.S. state commissioner, a regulator of a EU member state, or the U.K. courts would review, assess, and approve a transfer with the same overriding principle. Does it not then follow that all we need in order for the Rhode Island process to be embraced by the industry and other states is a relatively small leap of faith?

Status quo or utopia?

In the EU, 28 member states (until Brexit, hard or soft, hits us) have a uniform legal framework and a set of rules that governs statutory portfolio transfers. The U.S. and the EU Covered Agreement commits that stated based collateral will be eliminated for EU insurers and reinsurers that meet the consumer protection standards set out in the agreement. So, if the EU and the U.S. can reach agreement on reciprocity based on the mutual respect of each other's legal and regulatory frameworks, can U.S. states perhaps achieve this reciprocity, in time? Or perhaps, take an even bigger leap of faith and find a way to agree that this aspect of insurance law and regulation will be governed on federal level? This would certainly achieve a level playing field for insurers, states, and commissioners while providing uniform and equal protection for policyholders. Is that not what we would call "win win" situation? ●

Eleni Iacovides, Group Chief Client Officer at DARAG Group Ltd.
e.iacovides@darag.eu

Eyeballing Excellence

Establishing and Executing an Effective Watch List Process/Policy

A well-executed watch list process can significantly benefit P&C insurance companies. From the initial establishment of the process, which includes identifying which exposures and claims to include, to the ongoing review of the process as new exposures and claim types emerge, the actuarial, claims, and underwriting departments significantly impact the success of a watch list process. Open lines of communication among these departments can pave the way for a successful watch list process.

Creating a watch list

In order to make effective use of watch lists, a company should have a thoughtful and comprehensive process in place to determine which exposures to monitor and how management should consider this information. Watch list processes of leading companies typically include the following items:

- A *vision statement* to establish the goal of the watch list program;
- Clear *ownership* and lines of accountability;
- A *defined process* that includes:
  - Identification of key risks to assess;
  - Assignment of appropriate and available resources;
  - Consistent reporting of facts, coverages, and issues;
  - Exposure calculations under various scenarios;
  - Specific reporting formats;
  - Routine intervals for reporting;
  - Process for updates as new information emerges;
- *Open lines of communication* for effective information gathering/sharing among underwriting, reinsurance, claims, actuarial, and risk management departments;
- *Reporting* of findings to internal stakeholders for potential remediation initiatives.

A clear vision statement serves as a guide in defining exposures or claims assigned to a watch list, including the key members of management (notably leaders from claims, actuarial, and underwriting departments) involved in performing a watch list assessment. While this component may appear obvious, a company should not underestimate the value of the vision statement in maintaining the proper focus of the watch list over time.

Critical to a successful watch list process is the determination of the process owner and the associated roles and responsibilities. The owner of the watch list process, typically a chief reserving actuary, a claims department leader, or another executive, plays a critical role in establishing accountability and facilitating the timely sharing of information among various stakeholders.

By guiding a consistent approach to identifying which exposures to include on the watch list and staying abreast of current developments and emerging trends, the process owner helps management better understand and execute the defined watch list process.

Leading practices also suggest that a company should formally document its watch list process and routinely review the process for necessary adjustments. A routine review facilitates up-to-date documentation that reflects existing resources and protocols as well as emerging issues that require assessment and reporting. An organizational culture driven by open communication across all stakeholders is well suited to develop and maintain an effective watch list process.

Identifying watch list exposures

The external environment, including changes in laws and regulations, drives the exposures selected to appear on a watch list. Much like organizational goals and objectives, which change over time, the evolving nature of watch list exposures necessitate routine assessment of and adjustment to the criterion underlying the watch list assessment process.

The criteria used to assess exposures for inclusion on a watch list may include:

- Types of coverage, time periods, and geographical regions of business underwritten;
- Limits and attachment points;

Developments on claims currently reported	Identification of new exposures to add to the watch list	Other industry emerging exposures not yet prime for formal addition to the watch list
Coverage interpretations/rulings	Trigger for placing the loss on the list	Types of losses
Changes in filing trends or exposures/damages	Filing trends	Coverages impacted
Industry perspective/strategies/reserving practices	Coverage and jurisdictional issues	Filing and exposure trends
Updates on resolution strategies	Exposure/damages estimates	
Revisions to applicable scenarios	Applicable industry reserving trends	
	Proposed resolution strategies	

Information included on a watch list

Watch list triggers	Existing claims	Potential claims	Reinsurance profile
Loss will potentially exceed a defined financial threshold • Assess from a gross and net perspective • Consider what is material • Address losses impacting multiple insureds Loss type has been defined as a trigger • Historical adverse development • Severity of injury • Filing trends • Outcomes may have significant impact on other claims or underwriting strategies Emerging losses that may present significant exposure in the future Claims in which several insured risks are subject to a common loss	Claim number Lines of business State in which loss occurred Policies currently exposed • Period/terms • Coverages afforded • Policy limits*/attachment points Exposure • Remaining limits/aggregates • Deductible limits/balances • Underlying coverage exhaustion • Loss/expense payments to date • Estimated full level of damages Description of loss Date of loss Jurisdictional/coverage issues Potential outcomes	Lines of business State in which the loss occurred Potential coverages at risk • Years underwritten • Coverages afforded • Volume of policies written Exposure • Limits exposed/attachment points • Potential range of damages Description of potential loss (filing trends/severity) Jurisdictional/coverage issues Potential outcomes	Reinsurance program structure Gross/net positions reflected in the potential outcome scenarios generated Notice provision and confirmation of notice issued to the reinsurers timely Issues that may give rise to reinsurer disputes

*written and remaining per occurrence / aggregate policy limits by year and coverage type

- Legal trends such as new court filings, rulings regarding legal interpretations and procedural requirements, and jury verdicts;
- New claim filings (inclusive of underlying carrier exposures), as well as reserve and payment patterns by industry, company, and carrier;
- New business strategies; and
- Discontinued business exiting strategies.

Asbestos, pollution, health hazard, and other complex exposures are perhaps most commonly found on watch lists, but prescient companies effectively utilize their claims and actuarial departments to stay abreast of current trends and identify emerging exposures and new claim types to incorporate into their watch list process.

The role of the claims department

Claims personnel typically play an important role in identifying exposures to include on a watch list. Thanks to their deep knowledge of the underlying exposures, claims personnel often have an early awareness of emerging loss trends and case law changes, which may impact the selection of watch list claims or loss types. A well–run claims department will establish processes for routinely and consistently tracking key issues and the associated exposures.

Leading claims department watch list processes typically include a quarterly assessment, as per chart on page 14.

The head of the claims department typically performs an assessment, relying on information he or she gathers from the claims team, underwriters, and reinsurance departments (similar to a routine large loss assessment process) and shares the findings with the actuarial department. The assessment includes a factual investigation incorporating the applicable coverage parameters and assessment of potential liabilities under various scenarios as follows.

Claims personnel may carry out scenario testing and litigation risk analyses due to the complex nature of watch list exposures and the associated coverage interpretation issues, such as what constitutes an occurrence or the allocation of exposure across various defendants or carriers. By carrying out several assessments, each incorporating different assumptions as to legal outcomes and ultimate damages, the claims department can provide management and the actuarial department a range of possible outcomes to consider. These assessments facilitate early identification of claims with the potential to breach excess coverage layers and, thus, early notification to reinsurers. Without such assessments, these claims are at risk for future reinsurance denials due to late reporting of claims, unexpected reserve development, and poorly developed litigation strategies.

Moving Forward. Meeting Goals. Progress Realized.

MORRIS, MANNING & MARTIN, LLP

A Law Firm with National and International Reach

Our lawyers can help you with:

- Regulatory issues applicable to run-off business and associated transactions
- Assumption reinsurance and loss portfolio transfers
- Tax issues associated with run-off transactions
- Litigation and arbitration of insurance, reinsurance and agency matters

Lew Hassett
Co-Chair

404.504.7762
lhassett@mmmlaw.com

Robert "Skip" Myers Jr.
Co-Chair

202.898.0011
rmyers@mmmlaw.com

Ward Bondurant

404.504.9532
wbondurant@mmmlaw.com

Jessica Pardi

404.504.7662
jpardi@mmmlaw.com

Joe Holahan

202.408.0705
jholahan@mmmlaw.com

Tony Roehl

404.495.8477
troehl@mmmlaw.com

Eyeballing Excellence (continued)

The role of the actuarial department

The actuarial function fills several key roles in the watch list process. Because they typically analyze aggregate data, actuaries have a different perspective from claims professionals and may identify different potential watch list exposures and emerging claim types by leveraging their knowledge of industry and reserving trends. Actuaries also may be responsible for quantifying the potential liability associated watch list claims, as well as their impact on underwriting and incurred but not reported (IBNR) reserves. Because claims and actuarial professionals have different perspectives, facilitating collaboration between these functions is advantageous to insurers.

Information included on a watch list

All company watch lists do not include the same information. The data, which is contingent upon the nature of the risk, legal issues, and the underlying business or exposure, may include what is in the chart on page 15.

Using watch lists for more than the core claims and actuarial assessments may require a company to collect additional data. For instance, a company that wants to consider watch list exposures in ongoing underwriting and pricing also will need to gather rating information, premium values, underwriting office and current underwriting goals/criteria.

Companies should regularly re-assess the criteria for inclusion of claims and exposures on a watch list and the related assessment process in light of the continual evolution of organizational goals and objectives, as well as the external environment (e.g., changes in laws and regulations).

Challenges and opportunities

One of the most common challenges in a watch list process is the timeliness of updates, assessments, and quality review. The difficulty lies in the speed with which unexpected new developments can occur in the underlying exposures or external influences. Accordingly, the process for adding or updating items on the watch list should be clear and flexible enough to allow authorized individuals to add new items and make ad hoc updates as new claims information or developments in pertinent events emerge. Companies should maintain available resources to carry out assessments when the need arises.

Aligning a watch list assessment with the reserve study schedule can provide efficiencies and valuable insights that management can leverage to make decisions. As with any organizational process, quality assurance of the watch list process should rely on adherence to sound policies that encourage both compliance and accountability.

The implementation of a robust watch list process will promote the timely identification of significant claims, facilitate appropriate reserving and underwriting actions, optimize litigation and resolution strategies, and lead to improved overall underwriting results. Successful watch list practices include a multidisclinary team of stakeholders defining watch list triggers and monitoring the assessment process. Leading practices suggest that companies leverage this information in developing and implementing long-term underwriting and claims strategies. ●

Vicki A. Fendley contributed to this article.

Barbara K. Murray, Director at PwC Actuarial Services. barbara.k.murray@pwc.com

For more information: Marc Oberholtzer, Principal, marc.oberholtzer@pwc.com, Samantha Lee, Senior Associate, Samantha.x.lee@pwc.com and Vicki Fendley, Director, vicki.a.fendley@us.pwc.com.

Go-to firm for reinsurance disputes in Philadelphia

- Chambers USA 2016

There's a reason we've been called a go-to firm for reinsurance disputes.
We understand the business of insurance and draw on years of experience applying strategic focus to uncover the nuances in each case.

Our reinsurance group balances aggressiveness and efficiency.
We counsel clients to avoid disputes before they develop, but if that's not possible, we possess the trial and arbitration experience necessary to bring the matter to resolution.

White and Williams LLP

Delaware | Massachusetts | New Jersey | New York | Pennsylvania | Rhode Island

whiteandwilliams.com

Whether advising on entering the run-off market, buying and selling portfolios and entities, resolving disputes, managing discontinued operations or achieving exit strategies, our lawyers get the job done.

MAYER · BROWN

Americas | Asia | Europe | Middle East | www.mayerbrown.com/insurance

Mega Superfund Symposium

ACRONYM FEST: ICYMI[1], EECMA[2] and AIRROC[3]

In a joint undertaking on September 7th in Philadelphia, EECMA and AIRROC presented a symposium on Mega Superfund Sites. In what seemed like a veritable snowstorm of acronyms, participants learned about the challenges that arise under CERCLA[4] in dealing with Mega Superfund Sites such as Portland Harbor, the Lower Passaic River, and other contaminated sediments sites where remediation costs are estimated in the billions. Panelists discussed key developments in the remediation and cost sharing negotiations of the largest and most complex environmental sites in the country as well as innovative strategies for dealing with the financial and technology challenges that they pose.

EECMA is an informal association of major and minor, domestic and international, property and casualty insurers and reinsurers. The members of EECMA are focused on continued education about the many issues surrounding environmental, asbestos, and other long-term exposure litigation that continues to challenge our policyholders and us. Every year, EECMA organizes a two day conference that includes industry specific cutting-edge topics presented by attorneys, consultants, and insurance professionals in the U.S. and throughout the world who are experts in their respective fields. EECMA's 2018 Conference will be held in Orlando, Florida on April 25-27, 2018.

CWF[5] stated that, "AIRROC was very pleased to have the opportunity to collaborate with EECMA to produce this program. AIRROC hasn't done a program that focused on these issues before and they are important to our members. A big thanks to EECMA and our sponsors for helping to make this happen."

Gregory Kelder offered, "EECMA appreciated the partnership with AIRROC and the opportunity to develop an agenda and assemble a group of experts that focused on the multifaceted complexities of large Superfund Sites."

The event got rave reviews from those who were there:

"Excellent comprehensive deep dive by fantastic speakers into what they said may potentially be a multi-billion dollar environmental claim exposure for the insurance industry. EECMA and AIRROC provide the very best bang for the buck in their formidable knowledge sharing." *Michael Diggin, Swiss Re.*

"Speakers were prepared and interesting. Excellent informative event." *Laura Archie, Argo Group.*

"Great deep dive into sediments, no pun intended. The collaboration between EECMA and AIRROC was a winning combination." *Leah Spivey, Munich Re.* ●

Connie D. O'Mara, connie@cdomaraconsulting.com

1. In Case You Missed It
2. Emerging and Environmental Claims Manager Association
3. Association . . . oh, you know this one
4. Comprehensive Environmental Response, Compensation, and Liability Act
5. Carolyn "Wadsworth" Fahey

photos / Stephen Magnotta


AIRROC
SECMA


Laska

News & Events

Regulatory News

Federal Insurance Office

A bill to reform the Federal Insurance Office (FIO) was introduced in the U.S. House of Representatives (H.R. 3861, the Federal Insurance Office Reform Act of 2017). Under H.R. 3861, the FIO would essentially be barred from domestic insurance issues, including the authority to engage in broad information gathering activities or issue subpoenas. The FIO would be moved to the Office of International Affairs within the U.S. Treasury Department and be largely limited to international matters. State insurance regulators and many in the insurance industry agree with the proposed diminished authority of the FIO.

Cybersecurity

The National Association of Insurance Commissioners adopted the Insurance Data Security Model Law on October 24, 2017. The model law, which was adopted after seven versions and much criticism from the industry, includes many, but not all, of the requirements of New York Regulation 500 (23NYCRR500), creates rules for insurance companies, producers, and other licensed entities "covering data security, investigation and notification of breach. The requirements include the creation and maintenance of information security program based on ongoing risk assessment, overseeing third-party service providers, investigating data breaches and notifying regulators of a cybersecurity event."

Covered Agreement Update

Both the U.S. and the European Union (EU) signed the Covered Agreement on September 22, 2017. Full implementation in the U.S. may take up to five years until all U.S. jurisdictions amend their current reinsurance collateral requirement laws and regulations to conform to the mandates of the Covered Agreement. At the signing of the Covered Agreement, the U.S. issued a policy statement, which provided that the Covered Agreement "affirms the U.S. system of insurance regulation, including the role of state insurance regulators as the primary supervisors of the business of insurance." U.S. regulators were pleased with the reaffirmation of the authority and primacy of state regulation and insurers and reinsurers are elated with the removal of "local presence" requirements in EU jurisdictions. While EU insurers and reinsurers will benefit from the provisions of the Covered Agreement, post-Brexit, Lloyds and London insurers will have to wait to see if a similar agreement will be negotiated between the U.S. and United Kingdom.

Industry News

A report issued in November by Willis Towers Watson P.L.C. predicted that merger and acquisition (M&A) activity in the insurance industry should increase for the rest of 2017 and several years to come. In fact, M&A activity continued strong into the second half of 2017 – just not in the insurer and reinsurer sectors. According to an October 2017 report by OPTIS partners, the number of insurance agency mergers and acquisitions rose from 350 for the first nine months of 2016 to 457 in 2017. Further, the largest M&A transaction reported in the first half of 2017 was from the brokerage section: the acquisition of USI by an investor group that included private equity firm KKR and Canadian pension fund CDPQ for $4.3 billion.

On the legacy front, the most interesting transaction (up to our column deadline) was a portfolio acquisition by insurance and reinsurance legacy specialist **Compre Group ("Compre")** from Swiss company, **AXA Insurance Ltd ("AXA")**, formerly Winterthur Swiss Insurance Company.

The acquired portfolio of insurance and reinsurance business in run-off was underwritten by RW Gibbon (Underwriting Agencies) Ltd. and RW Gibbon & Son Ltd. (the Gibbon pools) between 1962-1964. **Compre** has provided **AXA** with finality in all respects regarding its participation in the Gibbon pools for an undisclosed sum. According to its press release, the acquisition represents **Compre's** 26th portfolio deal and 10th acquisition of a company in run-off.

New Member

SunPoint Reinsurance limited ("SunPoint"), an international run-off reinsurance company, has become a

member of AIRROC. "As a veteran of the legacy insurance and reinsurance arena," said **SunPoint's** CEO—Global Head of P&C Run-off—Karl Wall, "I cannot overemphasize the value of AIRROC membership to **SunPoint**. Whether the objective is to network with others who face similar challenges in runoff, to collect reinsurance balances on legacy books, or to resolve related disputes in a commercial manner, AIRROC is a valued and trusted partner. AIRROC's mission of promoting the interests of entities with legacy business and enhancing knowledge both within and beyond the reinsurance arena is yet another important aspect of AIRROC membership that **SunPoint** recognizes."

People (and firms) on the Move

In October, the **Insurance & Reinsurance Legacy Association ("IRLA")**, a UK-based market body for insurance and reinsurance legacy professionals, elected a new director, **Darren Truman** of Enstar Group. Mr. Truman joins **Paul Corver** of R&Q, **Simon Barnes** of Zurich Centrally Managed Business and **Mark Hallam** of Swiss Re, who were unanimously re-elected. Also, at its annual awards dinner in November, the **IRLA** presented **Bob Howe** of AXA Liability Managers (UK) Branch with its Service to Legacy Award for 2017, and **Victor Nelligan** of PriceWaterhouse–Coopers LLP as its 2017 Legacy Young Professional.

In September, Philadelphia-based law firm **Saul Ewing** merged with Chicago-based **Arnstein & Lehr** to form the firm of **Saul Ewing Arnstein & Lehr LLP**, with 400-plus attorneys in Delaware, Florida, Illinois, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, and the District of Columbia. In addition to expanding its territorial reach, the combined firm is expected to add expertise in the fields of intellectual property, immigration, and foreign investment services to Saul Ewing's focus on representing insurers, reinsurers and others in the insurance industry.

Sean Thomas Keely, formerly with Hogan Lovells in New York, has joined **Freeborn & Peters LLP ("Freeborn")** as a partner in the Litigation Practice Group and a member of the Insurance and Reinsurance Industry Team in Freeborn's New York City office. Freeborn, an AIRROC partner law firm, recently expanded into the New York City market through its combination with **Hargraves, McConnell & Costigan P.C.** Sean can be reached at skeely@freeborn.com.

American International Group ("AIG") made a couple of important additions to its legal and regulatory presence by naming **Lucy Fato** as General Counsel and **Thomas Leonardi** as Executive Vice President, Government Affairs, Public Policy and Communications. **Fato**, who has held several top legal positions in the insurance industry including at Marsh & McLennan, will oversee AIG's global legal, compliance, regulatory, and government affairs function. **Leonardi**, who previously served as the Commissioner of Insurance at the Connecticut Insurance Department, and as an investment banker and venture capitalist, will oversee AIG's global public policy and government affairs and build lines of communication with the numerous regulators that oversee AIG at the state, federal, and international levels. ●

WINTER 2018

MARK YOUR CALENDAR

JANUARY 11-13
ABA Torts Trial and Insurance Practice Section (TIPS)
44th Annual Midwinter Symposium
Coral Gables, FL
www.americanbar.org

JANUARY 17
AIRROC Regional Education Day
New York, NY
www.airroc.org

FEBRUARY 7-9
IAIR 2018 Insurance Resolution Workshop
Scottsdale, AZ
www.iair.org

FEBRUARY 13-15
RAA Cat Risk Management
Orlando, FL
www.reinsurance.og

MARCH 13-14
AIRROC Spring Membership Meeting
New York, NY
www.airroc.org

MARCH 24-27
NAIC Spring Meeting
Milwaukee, WI
www.naic.org

If you are aware of items that may qualify for the next "Present Value," such as upcoming events, comments or developments that have, or could impact our membership, please email Fran Semaya at flsemaya@gmail.com or Peter Bickford at pbickford@pbnylaw.com.

One is Silver and the other Gold…

Carolyn Fahey

Message from the Executive Director

The 2017 Commutations & Networking Forum—or AIRROC NJ—is the main story in this issue of our magazine. Long-time readers may recall we always select a bird for the cover such as the ones you see on our past magazine covers below. We originally came up with the bird concept because "birds of a feather flock together" was a perfect symbol of the AIRROC community. And so, a new tradition began. Given that the American Goldfinch is the state bird of NJ, it was the clear choice for this year's avian selection.

In the course of my research, a few things caught my eye about these beautiful birds:

- The American Goldfinch can feed upside down which makes them INNOVATIVE. Innovation is a hallmark of our membership as we regularly seek to create solutions for all parties.
- They are an irruptive species – meaning they will move in great flocks from one location to another in search of areas that are more abundant in food. Said another way, they are both COLLABORATIVE and SAVVY like AIRROC which is always on the go creating meetings and conferences to best accommodate our members.
- When seen from the ground, these birds look like a giant undulating wave in the sky. They are unmistakably SOCIAL. We at AIRROC pride ourselves at being social particularly around our signature industry events.

For this issue I'd also like to recognize these notable happenings at 2017 AIRROC NJ:

- Monday's dinner at the Zimmerli Museum
- The inaugural Trish Getty Scholarship awarded to two very worthy students from St. Joseph's University, Ashley Myers and Samantha String
- The selection of Stephen Johnson as AIRROC Person of the Year
- Our fundraiser for the Loud N Clear Foundation, a relapse prevention program located in Farmingdale, NJ, and
- A donation to the Waipa Foundation in honor of Doug Andrews, former Eaglestone CEO and AIRROC member who our industry tragically lost in the Fall.

Attendance at AIRROC NJ remained solid and there was plenty of business accomplished along with the fun. The post-event survey results showed that 71% of attendees met with seven or more companies and 68% began working on, completed or progressed a commutation while there. These are high percentages that validate our mission and demonstrate our service to the industry.

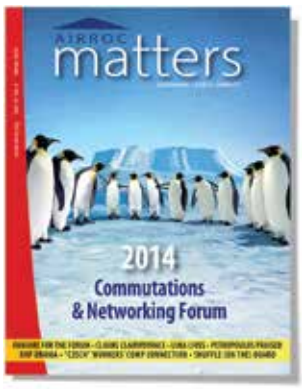
In the words of a children's song, "Make new friends but keep the old; one is silver and the other gold," you can continue to find us at conferences and meetings that build business and forge new relationships. Please join us.

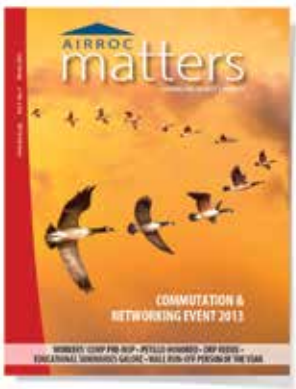
Happy Birthday AIRROC!

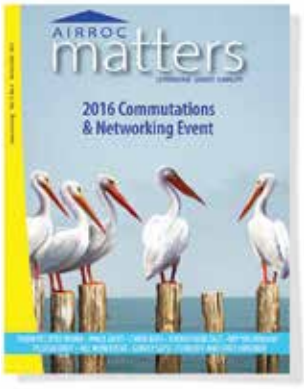
(and also to me…)

AIRROC turned 13 on December 14, 2017 (and I turn 21!)

So, regardless of the fact that only part of that statement is true, AIRROC is now officially a teenager…if I have anything to do with it we will keep growing and adapting to the needs of our members, partners, sponsors, speakers and participants! Let me know what you want to see next…







Carolyn Fahey joined AIRROC as Executive Director in May 2012. She brings more than 20 years of re/insurance industry and association experience to the organization.
carolyn@airroc.org

COMMUTATIONS & NETWORKING FORUM

Making Time for ART and AIRROC

We gathered for another year at New Brunswick's Heldrich Hotel where more than 200 attendees came together for three days in the setting we've grown accustomed to. The Monday night gala dinner was a special treat and held at a new venue, the Zimmerli Art Museum at Rutgers University. Surrounded by diverse art with more than 60,000 works in its collection, AIRROC members not only enjoyed a visual experience, but were able to use the platform to accomplish business.

photos / Jean-Marc Grambert

COMMUTATIONS & NETWORKING FORUM

BRAVO to the AIRROC Education Committee!!

Attendees at AIRROC NJ 2017 were treated to a potpourri of topics. We heard about the deals and best practices for managing **UK Employers Liability Portfolios** and how the **Viking Pump** decision might impact policies and coverages. We looked to the employees of the future with the **Evolving Insurance Workforce** and how insurers can attract and retain new talent. We also learned how the **Robotics Process Automation** is changing the way the insurance industry operates. Finally, we participated in an interactive session where the audience casted votes on **What is Discoverable?** at a hearing or arbitration. All of this excellent programming was organized by our Education Committee.

Legacy U.K. Employers Liability

Summary by Robert D. Goodman

The first session of the Education Day was entitled "Legacy U.K. Employers Liability – Update and Outlook." The panel consisted of: Richard Lawson, Global Head of Client Engagement at Pro Insurance Solutions Ltd; Ian Harvey, Head of Claims Strategy at Pro Insurance; and Joe Froehlich, Partner at Locke Lord, LLP. Richard Lawson provided an overview of the U.K. Employers Liability market, which he noted was similar to but not the same as workers compensation in the U.S. This coverage has been compulsory since 1972. It has never been very profitable and it has been marked by considerable volatility. The strategic fit has been difficult for insurers, as the coverage has stood apart from core lines of business. Capital management has also been difficult, with both short-term and long-term capital needs. In recent years, books of legacy business have slowly been coming to market. Initially, there was a sizeable gap in the valuation between sellers and buyers. That gap has closed, but not all the way. Rather, sellers have been willing to take less in order to achieve finality. Currently, approximately $6 billion has been sold, out of a total market value of approximately $12 billion.

Ian Harvey noted that the difference between U.K. EL and U.S. workers compensation is that there is still a requirement to establish negligence. Asbestos claims account for the vast majority (80-90%) of portfolio values. This picture has been the same for 15 to 20 years. The mesothelioma incidence in the U.K. is as high as anywhere in the world, with use of asbestos stretching into the late 1990s. It does not appear that claims have yet reached the top of the "bell curve."

Page 26 (from left): Leah Spivey, Munich Re America; Richard Lawson, Pro Insurance Solutions; (panel left to right) Marcus Doran, Armour Risk; Joe Froelich, Locke Lord LLP; Ian Harvey, Pro Insurance Solutions; Richard Lawson, Pro Insurance Solutions.

Joe Froehlich observed that, in the United States, asbestos claims have grown up outside of workers compensation; here, most claims are against manufacturers and distributors, not employers, and most coverage is provided under CGL policies. There may be a number of reasons why there has not been a decline in mesothelioma claims. One is the longer base-line life expectancy in the population. Due to the long latency period, asbestos-related mesothelioma typically develops in individuals in their 70's or older. In prior decades, when life expectancy was shorter, many mesothelioma cases did not develop because individuals died of other causes. Another reason that there has not been a fall-off in claims is that plaintiffs' lawyers have sought out new categories of claimants: wives allegedly exposed through household contact with asbestos dust, brake workers, welding-rod workers, etc. Finally, with the advent of the internet, information about mesothelioma and plaintiff's law firms that prosecute such claims is very easily obtained.

Ian Harvey noted that one silver lining is immunotherapy and the availability of drug trials for treatments that may kickstart the immune system. Both Mr.

Make connections and explore new concepts

Harvey and Mr. Froehlich noted that it was hard to know what the impact of such treatments would be on damages. Another difference between the U.K. and the U.S. is that the U.K. does not employ a jury system. Mr. Froehlich pointed out that, in the U.S., workers compensation cases go to a board, not a jury, but that asbestos cases are primarily not brought in the workers compensation system. Mr. Harvey discussed the possibility that there would be a rise in asbestos-related lung cancer cases, observing that the epidemiology suggests that there are as many asbestos-related lung cancers as mesotheliomas, but that the numbers are suppressed by the much larger proportion of cases caused by smoking. Mr. Froehlich noted that in the U.S., while the established plaintiff's firms stick to mesothelioma cases, the new entrants are more likely to bring lung cancer cases.

Mr. Harvey also discussed a number of types of EL cases that may be on the rise, including idiopathic pulmonary fibrosis and noise-induced hearing loss. Mr. Froehlich mentioned a number of recent developments in the U.S. asbestos litigation, including the adoption of a new case management order in New York City, permitting punitive damages but restricting the ability of plaintiffs to consolidate cases.

Robert D. Goodman is a Partner at Saul Ewing Arnstein & Lehr LLP. Robert.goodman@saul.com

The Evolving Insurance Workforce: Planning for the Future to Sustain Our Legacy

Summary by Connie D. O'Mara

Ursula Merten (PwC) teamed up with Fred Gindraux (SVP of P&C Casualty Business, Swiss Re America), David McAndrews (Director of National Accounts, p1 Runoff), and Barbara Murray (PwC) to describe and analyze the talent and knowledge management challenges facing our business.

While the general unemployment rate in the U.S. is around 4.4%, the rate is only 2.31% in the insurance industry. Another salient feature of our workforce is that people are retiring later, so that the average age of our employees is going up and we have four generations working together. The average age of Insurance Agents is 59, while the average age of Underwriters is 56, and the average age of Claims Handlers is 54. Constant technology innovation means that our current workforce must continue to adapt to new ways of managing data while maintaining the brain trust of the past.

The panel opined that industry leadership needs to demonstrate a culture that values both historical knowledge and experience as well as the ability to mentor newer staff, while still nurturing an innovative and challenging mindset for newer employees. Newer, tech-savvy staff can be used to "reverse mentor" those employees who need to adapt to evolving information management strategy.

What does the future look like? The "Sharing Economy" is projected to develop a "sharing" mindset as to staff and 20% of the work force will be contract employees by 2022. While the business tools may change over time, companies need to hire people who have "people skills" and can manage others, including customers, effectively, and who have a "growth" mindset so that they are open to new challenges, regardless of age.

Connie D. O'Mara, connie@cdomaraconsulting.com

What Is Discoverable? You be the Judge!

Summary by Robert D. Goodman

The third session was entitled "What is Discoverable? You be the Judge!" Don Frechette, Partner at Locke Lord LLP, moderated the panel consisting of: Christopher Bello, Vice-President, Senior Counsel, and Secretary of General

Page 27 (far right): David McAndrews, p1 Runoff; Ursula Merten, PwC; Fred Gindraux, Swiss Re; Barbara Murray, PwC.

COMMUTATIONS & NETWORKING FORUM

Educational Panels (continued)

Re Life Corporation; Bill Goldsmith, Associate General Counsel, AIG Reinsurance Dispute Resolution; and Jonathan Rosen, an arbitrator, mediator, and expert witness who previously served as Chairman of AIRROC, COO of The Home Insurance Company in Liquidation and, prior to Home's liquidation, Executive Vice-President and Reinsurance Counsel of Home.

Much of the session involved discussion of four hypothetical fact patterns in which the audience was able to vote as to the discoverability of information set forth in the hypotheticals. The panel also considered whether there is a need for discovery at all. Bill Goldsmith stated that, today, the answer is probably yes. Mr. Goldsmith noted that, in 1978, he (and perhaps most in the industry) would have taken a different position, but there has been a "sea change" in terms of the number of disputes, their size, and their impact. The panel agreed that the extent of discovery has to be tailored according to what is appropriate for each dispute, reflecting the size of the dispute, impact of the issues, remedies sought, fairness, what the arbitration clause mandates, and what the arbitrators need in order to decide the question presented. The panel also discussed cost-shifting for discovery and whether, if permitted, it should be based on the results of the arbitration or whether the discovery was sought in good faith. The panelists were generally of the view that good faith rather than the results of the arbitration should be determinative, noting that it was unlikely that arbitrators would be inclined to adopt one rule for the cost of discovery and another for the overall cost of the proceeding. Mr. Bello noted that, generally, he writes out the ability to shift costs, but he noted that discovery may be different in the case of true "fishing expeditions."

The first hypothetical involved a fact pattern in which the cedent admitted that it had engaged in "table cutting," contending that it needed to do so because of the competitive rate environment; the reinsurer alleged that the cedent had committed fraud and sought discovery going back ten years. The audience was evenly split on whether the discovery should be permitted. Mr. Bello stated that he would have to know why the discovery was needed. Mr. Goldsmith stated that he would defer ruling until other discovery had been obtained, but that he might ultimately permit it based on the seriousness of the fraud allegations. Mr. Rosen noted that the discovery sought would impose an unreasonable burden and that he would attempt to limit the discovery by time period and other parameters. Mr. Frechette stated that this is what the panel had done in the actual case on which the hypothetical had been based.

In the second fact pattern, the reinsurer sought documentation going back twenty years that would cost $100,000 to retrieve. Although some documentation bearing on the disputed issue was already available, it was inconclusive. The audience again split evenly on whether the cedent should be compelled to provide the requested documentation. On the issue of who should pay for the discovery, 25% said the cedent should pay, 13% said the reinsurer should pay, and 63% said "it depends." 56% of the audience said that it would not make a difference if the reinsurer no longer had access to its witnesses. Mr. Goldsmith and Mr. Bello favored deferring the issue of the documents until after the witnesses had been examined, observing that it might be a different question if the witnesses were unavailable. Mr. Rosen and Mr. Frechette tended to disagree, noting that one would likely want to use the documents in examining the witnesses and that the issue might come down to proportionality of the cost.

The third hypothetical involved hurricane claims where losses caused by storm surge were not covered, but losses caused by wind-driven rain were covered. A class action was brought on behalf of policyholders. Although drone evidence showed losses caused by storm surge, the cedent settled the claims on

Page 28 (far left): Don Frechette, Locke Lord; Bill Goldsmith, AIG; Jonathan Rosen, Arbitration, Mediation, Expert Witness Services; Christopher Bello, General Re Life

Expert speakers convey their knowledge to AIRROC NJ delegates

an individual basis "on the advice of counsel." The reinsurer invoked its audit rights and sought information regarding exactly what had been advised by counsel, but the cedent, citing the attorney/client privilege, refused to provide the requested information. The reinsurer sought formal discovery with respect to the same information, which the cedent also resisted. The audience voted, 76% to 24%, to deny the claim of privilege. Only 20% of respondents thought their answer would be different in the absence of an audit right. However, 58% of respondents thought their answer might be different if the cedent had not asserted that its decision was based on advice of counsel. Mr. Goldsmith stated that the cedent had not waived the privilege and that the legal advice it received was privileged and should not be produced. However, he noted that if you actually cede a settlement decision to an outside law firm (which did not appear to be the case in this hypothetical), then some courts have held that the law firm file may be discoverable. Both Mr. Bello and Mr. Rosen thought that the cedent could not hide behind a claim of privilege and that the audit right issue was irrelevant.

The last hypothetical concerned allegations of fraud by the cedent and the reinsurer's attempt to obtain records relating to the cedent's executives' text messages. These records were in the possession of the cell phone service provider and the relevant jurisdiction does not provide for third-party discovery. Only 9% of the audience thought that the panel should make the cedent request the data and pay for it; 23% would make the cedent request the data but would have the reinsurer pay for it; 45% would deny the request; and 5% said "it depends." A large majority of respondents (79%) said that it would not change their answer if the executives produced affidavits stating that they "virtually never" used text messaging for business, and 75% said that their answer would not change if the phones were not company phones but rather personal phones (with a stipend from the cedent). A consensus of the panelists rejected the discovery, with Mr. Rosen characterizing it as a "wild goose chase," and Mr. Goldsmith noting that the reinsurer had not met its burden of establishing some basis for its allegation of fraud.

Robert D. Goodman is a Partner at Saul Ewing Arnstein & Lehr LLP. Robert.goodman@saul.com

A New Allocation Landscape Under *In re Viking Pump, Inc.*

Summary by Robert D. Goodman

The fourth session was entitled "A New Allocation Landscape Under *In re Viking Pump, Inc.*" Bruce Engel, Partner at Freeborn & Peters LLP, moderated the panel consisting of Amy Kallal, Partner at Mound Cotton Wollan & Greengrass LLP, and Robin Dusek, Partner at Freeborn & Peters. Amy Kallal addressed the *Viking Pump* decision, stating that "it turns out" that New York is not really a pro rata state, but that "sometimes" it is. In 2002, the New York Court of Appeals applied pro rata allocation in an environment coverage case called *Consolidated Edison Co. v. Allstate Insurance Company*. The policies at issue in *Con Ed* contained "all sums" language in the insuring clause, but the occurrence language contained a limitation to losses "during the policy period." Although the *Con Ed* court stated the policy language did not mandate pro rata allocation, pro rata was more consistent with the policy language. However, the court recognized that differing policy language might compel an all sums allocation.

In *In re Viking Pump, Inc.*, the Delaware Chancery Court, applying New York law, held that an all sums allocation was required because of the presence of non-cumulation and prior insurance/continuing coverage language in the relevant policies. The case was transferred to the Delaware Superior Court, which held that horizontal exhaustion was required by New York law. The Delaware Supreme Court certified two questions to the New York Court of Appeals: First, whether pro rata or all sums allocation

Page 29 (from left): Robin Dusek, Freeborn Peters; Amy Kallal, Mound Cotton Wollan & Greengrass.

Freeborn

Your Future Is Our Purpose

Strength in Numbers

Meet One of the Largest & Fastest-Growing Specialist Reinsurance Teams:

- Reinsurance Dispute Resolution
- Insurance Coverage Litigation
- Corporate & Regulatory Insurance
- Insurance Insolvency
- Complex Commercial Litigation
- International Arbitration

Chicago | Springfield, IL | New York City | Richmond, VA | Tampa, FL

Visit us at freeborn.com

Joe McCullough | +1 312-360-6327 | jmccullough@freeborn.com

Daniel Hargraves | +1 212-218-8766 | dhargraves@freeborn.com

Technology – Driving the future of runoff.

As runoff companies are looking to grow and maintain profitability they face challenges associated with multiple legacy systems, ability to capture and use data, and limited consolidated processes. In this competitive market, many companies are looking to improve decision support, reduce processing costs, and increase productivity. EY's Insurance team can help you navigate your opportunities to leverage the latest in digital tools (such as robotics process automation) in finance, actuarial, and operations and transitioning runoff operations (such as claims) to a common operating model.

For more information contact:

Rajcan Surface
+1 312 879 3326
rajcan.surface@ey.com

Ian Sterling
+1 215 448 5868
ian.sterling@ey.com

Jay Votta
+1 212 773 0509
jay.votta@ey.com

EY
Building a better working world

COMMUTATIONS & NETWORKING FORUM

Educational Panels (continued)

was appropriate in the presence in the non-cumulation and prior insurance provisions and second, if all sums applied, whether horizontal or vertical exhaustion was appropriate.

The New York Court of Appeals held that all sums was required, citing the contractual language, policy reasons, and New York principles of contract interpretation. The court determined that the policy language was unambiguous and actually mandated all sums. The court noted that the provisions were intended to prevent stacking and that such language had been previously enforced in New York. Citing other states' case law, the court stated that a pro rata allocation could not be reconciled with such anti-stacking provisions. Because contracts are read to avoid surplusage, the presence of the anti-stacking provisions compelled an all sums result. On the second certified issue, the court held that vertical exhaustion must be used when an all sums allocation is utilized, as vertical exhaustion is conceptually consistent with all sums.

In one notable post-*Viking Pump* decision, the Second Circuit applied all sums and vertical exhaustion in *Olin Corp. v. One Beason Ins. Co. ("Olin IV")*. *Olin IV* featured two differences from the *Viking Pump* fact pattern: (1) The "prior insurance" had been issued by a different carrier; and (2) the primary insurance had yet to exhaust. One Beacon argued for a "hybrid" exhaustion approach, in which there would be horizontal exhaustion until its excess policies were attached. The court rejected this approach, holding that *Viking Pump* required that vertical exhaustion be used. The court did agree that One Beacon should be able, by virtue of the prior-insurance clause, to reduce its liability by settlement amounts made by Olin's other insurers. Neither *Olin IV* nor *Viking Pump* provides guidance concerning what allocation method should be used when a coverage chart includes policies both with and without non-cumulation/prior insurance language, and neither decision establishes that New York is an all sums jurisdiction for all purposes.

Robin Dusek discussed another New York Court of Appeals case involving allocation at the reinsurance level, the 2013 decision in *USF&G v. American Re*. Ms. Dusek noted that the concept of "Follow the Fortunes" does not necessarily mean "Follow the Allocation," especially when the interests of the cedent and reinsurer are not aligned. Prior case law has held that allocations must be made in good faith. The *USF&G* case adopted an "objectively reasonable" standard. This means that the allocation must be objectively reasonable in the absence of reinsurance. However, there is no obligation for the cedent to minimize its reinsurance recoveries. If there are ten objectively reasonable allocations, the cedent can pick any one of them. Recitations are of no importance under this standard. Likewise, subjective intent should be of no importance, so that a "smoking gun email" should not be relevant. By the same token, a reinsurer need not show subjective bad faith. That said, Ms. Dusek did not think that *USF&G* eliminated good faith from the test and noted that it likely would still be important if a reinsurer could show that allocation was inconsistent with the settlement.

There have been a number of post-*USF&G* decisions, but they have not really changed the landscape. These include the 2016 *Utica v. Clearwater* decision by the Northern District of New York currently on appeal to the Second Circuit. The district court held that the reinsurer had not come forward with any facts showing an objectively unreasonable settlement and thus granted summary judgement for the cedent. It is unclear how the court determined there was a "Follow Settlements" obligation from the follow the forms language in the reinsurance agreement. Two other decisions, *Granite State v. Clearwater* and *New Hampshire v. Clearwater*, held that the language was follow the forms, but not follow the settlements. It is not clear that either *Viking Pump* or *Olin IV* will impact reinsurance allocation issues. The analysis may be more complex, but it still will be very fact-specific.

Robert D. Goodman is a Partner at Saul Ewing Arnstein & Lehr LLP. robert.goodman@saul.com

Page 32 (from left): Jessica Niemiec, The Hartford; Brenda Craven, The Hartford; Karen Amos, Resolute Management; Marcus Doran, Armour Risk; Marcus Doran, Armour Risk; Ray Mastrangelo, Mound Cotton Wollan & Greengrass.

Page 33 (from left): Leah Spivey, Munich Re America; Ian Sterling, EY; Raju Saxena, EY.




Robotics Process Automation

Summary by Ben Gonson

The last presentation concerned Robotics Process Automation (RPA). The presentation was made by Raju Saxena and Ian Sterling, two senior managers at EY with extensive experience in Process Automation. They provided an overview of automation tools, with a specific focus on RPA, including what it is, its benefits, its uses in insurance, and the keys to implementation. Only about a third of the audience had even heard about RPA and no one had seen it in use.

Many companies face challenges that drive inefficiencies in their current process and limits the capacity to perform higher value-add work. These issues usually concern data (quality of information), process (limited number of streamlined processes), and technology. On top of that, there is an emerging insurance model that will drive more data in the future.

Automation tools can help improve upon current processes. There are several generations of robotics from scripting to machine learning and artificial intelligence. One of the key automation solutions, which surrounds scripting and AI and is quickly being deployed by companies, is RPA. As of 2016, almost 30% of firms have RPA technology deployed. Experts estimate that RPA will be close to a $5 billion industry by 2020. From 2013-2015, the annual growth rate in RPA spend was 125%.

So what is RPA? RPA is an enterprise-class software automation solution that runs unattended by people. It emulates business user behavior and simulates employees. RPA works well for manual and repetitive tasks. RPA works with the existing software, therefore it has a quick return on investment, unlike a Business Transformation project. Additionally, RPA is business driven with limited demands on IT. RPA has many benefits as it leads to increased efficiency and productivity, accelerated cycle times, improved quality/controls, and enhanced employee engagement.

As a result of these compelling values, RPA is growing fast in the insurance industry from underwriting, claims, and operations to finance, actuarial, and tax. This was demonstrated in the videos presented that showed examples of RPA in claims and actuarial reserving.

Before jumping into robotics, however, a company should have a sound plan for implementation. Most companies start with a Proof of Concept (PoC). A PoC proves the capabilities, educates the team on benefits, and generates excitement. Also key is selecting a software tool. There are many software tools available in the market, which is diverse and continuously evolving. When selecting the software, the company should consider what their planned use is, whether they want it to be attended or unattended, and the complexity of the software tool. Lastly, a major key for success is having core operating model building blocks. These include strategy and governance, life cycle processes, value measurement, alignment and change, technology, and enterprise integration. Once a PoC is completed, the life cycle usually includes an opportunity scan, process prioritization, development and deployment, and ongoing operations. ●

Benjamin N. Gonson is a Partner at Nicoletti Gonson Spinner LLP. bgonson@nicolettilaw.com

STROOCK

Tailored Expert Legal Advice to the **Insurance** Industry

Laura Besvinick
lbesvinick@stroock.com

Beth K. Clark
bclark@stroock.com

Michele L. Jacobson
mjacobson@stroock.com

Robert Lewin
rlewin@stroock.com

Lewis Murphy
lmurphy@stroock.com

Bernhardt Nadell
bnadell@stroock.com

Julie E. Nevins
jnevins@stroock.com

When It Rains.

We've Got You Covered.

Legal Protection. Locke Lord gives insurance and reinsurance companies, and insurance intermediaries the legal guidance and protection they need. Our reputation for providing innovative thinking in mergers and acquisitions, transactions, regulatory compliance, litigation and arbitration is the result of deep experience, and highly skilled people.

Locke Lord LLP

Practical Wisdom, Trusted Advice.

www.lockelord.com

Atlanta | Austin | Boston | Chicago | Cincinnati | Dallas | Hartford | Hong Kong | Houston | London | Los Angeles | Miami
Morristown | New Orleans | New York | Providence | Sacramento | San Francisco | Stamford | Washington DC | West Palm Beach

AIRROC Awards Trish Getty Scholarship

AIRROC Person of the Year 2017 Stephen J. Johnson

Stephen Johnson exemplified the attributes that earned him this award by beginning his acceptance speech with praise for this year's recipients of the Trish Getty Scholarship award. He led an enthusiastic round of applause for Ashley Myers and Samantha String (both students at Saint Joseph's University) and the prospect of a future in the insurance business that includes such bright talent. He believes in using his experience and skills to facilitate creative and innovative change in the industry and we could all witness that commitment to the industry through his immediate support of AIRROC's mission to support the next generation.

Stephen is currently serving industry clients in his practice with Stradley Ronon, where he advises clients on insurance and insurer-related issues with a focus on regulatory matters. Specifically, he assists clients in managing and restructuring their organizations to simplify operations and make better use of capital. While serving as Deputy Insurance Commissioner for the Pennsylvania Insurance Department's Office of Corporate and Financial Regulation from 1998-2015, he developed a reputation for a being a "facilitator," known for his ability to balance market and administrative solutions that resulted in more efficient mechanisms to wind down estates to the benefit of policyholders and taxpayers.

Stephen's resume includes numerous committees, task forces, and financial working groups of the National Association of Insurance Commissioners (NAIC). He currently serves on advisory councils for both Saint Joseph's University's Academy of Risk Management and Insurance and AIRROC.

AIRROC has acknowledged its industry leaders at the Annual Commutations and Networking Forum for the past 12 years and thanks this year's sponsor, EY. ●

Connie D. O'Mara, connie@cdomaraconsulting.com

6th Annual Award Recipients Ashley Myers & Samantha String

AIRROC presented the Trish Getty Scholarship to two very deserving St. Joseph's University students. The 6th Annual award recipients are Ashley Myers and Samantha String, who are both juniors majoring in Risk Management and Insurance. The selection committee had a difficult time choosing between the two candidates so decided to split the scholarship for the first time in its history. In presenting the scholarships, Ed Gibney highlighted their accomplishments.

Ashley Myers has a 3.8 GPA at St. Joseph's, and is presently the VP of Professional Development for *Gamma Iota Sigma*, the fraternity for professional risk management, insurance and actuarial students. She has already gained real-world experience, having interned at Philadelphia Insurance Companies during the summer of 2017. Ashley has also worked as a tutor for the Office of

Learning Resources, and is a member of the Women's Club Lacrosse Team.

Samantha String is also very involved with *Gamma Iota Sigma* as their VP of Chapter Operations. She worked with AIG this past summer as a Commercial Lines Underwriting Intern, and in the summer of 2016 for Apogee Insurance Group in the Internal Audit area. Samantha also planned and organized the 2017 Deductible Dash 5K, to foster networking in a casual setting between insurance industry professionals and risk management students. This inaugural event raised $5,000 for the Insurance Industry Charitable Fund (IICF).

The $5,000 annual scholarship was established by the AIRROC Board of Directors in honor of Trish Getty, the founding Executive Director of AIRROC. It is awarded to a student or students studying Insurance, Risk Management or Actuarial Science in need of financial aid for tuition. This year, the scholarship was split into two equal parts. In accepting their awards, both Mses. Myers and String thanked the audience and expressed how honored they were to have been chosen for this award and how vital this type of aid is to help in developing the next generation of talent for the insurance industry. ●

Gardere. Solutions tailor-made to fit your legal insurance needs.

Founded in 1909, Gardere Wynne Sewell LLP is one of the Southwest's largest full-service law firms. Serving clients with approximately 250 attorneys from three of the largest cities in Texas, as well as Colorado and Mexico, and covering more than 40 different areas of practice, we are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide.

Gardere's all-encompassing insurance practice offers national and international clients a one-stop shop for all of their insurance needs. From coverage advice to claims litigation to compliance with governmental regulations, our team is uniquely skilled at leading clients safely through the complex world of insurance.

AIRROC NJ 2017

COMMUTATIONS & NETWORKING FORUM

COMMUTATIONS & NETWORKING FORUM


matters

Founded in 1933, Mound Cotton Wollan & Greengrass LLP is among the oldest and most respected law firms in New York City, offering preeminent legal services in a wide array of practice areas. Headquartered in New York's financial district, MCWG is engaged primarily in the conduct of insurance, reinsurance, and commercial litigation.

Mound Cotton Wollan & Greengrass LLP

www.moundcotton.com

NORTON ROSE FULBRIGHT AND CHADBOURNE & PARKE

A winning combination for insurance

Norton Rose Fulbright and Chadbourne & Parke combined in 2017, bringing together two premier insurance practices.

nortonrosefulbright.com/chadbourne

More than 50 locations, including London, Houston, New York, Toronto, Hong Kong, Sydney and Johannesburg.

NORTON ROSE FULBRIGHT