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AIRROC matters

LEVERAGING LEGACY LIABILITY

Runoff Statutes Emerging and Growing

OK (E) DOAK • LEGACY LEAPS FORWARD • BREXIT STAGE LEFT? • "IRLA-BRATE!" • (ROUND)TABLE THAT
TALCUM POWDER KEG • LINK UP WITH TEICH • FLIPPER? • S'MORE SUMMARIES • PRES-VAL ADDED

"Oh, when the states, come marching in…"

Peter A. Scarpato

Oklahoma and other states are beginning to pony up to the legacy side of the aisle, recognizing the many benefits of statutes that give companies the flexibility to manage runoff business more effectively and efficiently. With mixed commerce and trade signals emanating from Washington DC, it behooves our state legislatures and regulators—guardians of the regional business of insurance—to advance progressive agendas making it easier to handle legacy business. We are cautiously optimistic that the word will spread, strengthening the will of commercially minded legislators to carry this trend forward. Only time will tell.

Aptly so, we begin with our featured piece, *A-OK in OK*, Carolyn Fahey and Fran Semaya's interview of Oklahoma Insurance Commissioner John Doak and others in the Department. In this timely and informative piece, our honored interviewees discuss Oklahoma Senate Bill 1101, the "Insurance Business Transfer Act," signed into law by Governor Fallin on May 7, 2018. This new law applies to all lines of business, and permits insurers to divest blocks of business without the onerous process of commutations. Seizing on this theme, Andrew Rothseid penned, *Legacy Watershed*, a revealing comparison of current legacy laws on the books, addressing such topics as: the potential benefits and limitations of these developments, the market appetite for such innovative approaches, and the availability of potentially better solutions.

Crossing the Atlantic, we land on, *Brexit: What's Going On?* Vivien Tyrell's take on the upcoming critical phases of England's exit from the EU, whether "hard" (without an agreement) or "soft" (with an agreement for a controlled transition). Ultimately, the debate will focus on heady concepts such as, "enhanced equivalence" and the ability of combative participants to reach common ground.

Who is ready for a party? IRLA certainly is! This year they celebrate 20 years of providing a space for international members to influence how legacy business is transacted. In their piece, *IRLA Celebrates 20 Years*, Vivien Tyrell and Carolyn Fahey chronicle IRLA's record breaking turnout at its May 2018 Congress in Brighton, England, all told through the replete kudos of international attendees. The party continues, evidenced by *IRLA Legacy Roundtable*, which contains excerpts of a discussion at the May, 2018 Congress among legacy elite, including our own Carolyn Fahey.

Jeffrey Odom's work, *Lanzo v. Johnson & Johnson, et al.: Is this the Beginning or the End?* tolls the bell for Johnson & Johnson, discussing a series of asbestos related talc verdicts totaling well over $500 million. In this latest mesothelioma case, a New Jersey jury handed down a whopping $117 million verdict in a case where the plaintiff alleged exposure to asbestos from a talcum powder product. To stem the tide, Jeff recommends that clients and insurers assert an aggressive attack on causation with an increased effort to find more effective methods of educating juries on the relationship between talc and asbestos.

Finally, in this issue, we introduce Legacy Link, the revamped Spotlight column, and in it we highlight a very worthy Bill Teich, the Co-Vice Chair of AIRROC. This article is followed by Carolyn's, *Dancing with Dolphins,* an apropos comparison of this most sociable mammal's qualities, and her work as Executive Director. Then we have Connie O'Mara's *Runoff Deal Market Forum,* and a plethora of educational summaries from our summer events. Last, but not least, you can read news about our industry in the ever intrepid Present Value.

Let us hear from you!

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Errors & Omissions

Mitchell S. Cohen, Esq. of the New York law firm Wechsler & Cohen, LLP, was inadvertently left off the Publication Committee members list in the Spring issue. Mitch can be reached at mcohen@wechco.com. We regret the error.

AIRROC matters

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A-OK in OK

Talking with the Oklahoma Insurance Department: Commissioner John D. Doak, Tyler Laughlin and Buddy Combs

Governor Mary Fallin congratulates Commissioner John Doak at the signing of the Insurance Business Transfer Act, May 7, 2018.

Carolyn Fahey and Francine Semaya recently had the pleasure of interviewing Oklahoma Insurance Department Commissioner John Doak and others in the Department. They talked about the Oklahoma Senate Bill 1101, known as the Insurance Business Transfer Act, that was signed by Governor Mary Fallin on May 7, 2018. This new law provides an efficient mechanism for insurance companies to divest blocks of business without the onerous process of commutations and it applies to all lines of business, not just Property & Casualty.

The law is viewed as a simple mechanism for an insurer to divest itself of a block of business to an Oklahoma domestic insurer. It includes a robust regulatory review process to ensure the protection of policyholders and claimants, as well as affected reinsurers. An independent expert will be utilized to review each proposed transaction, including the protection of policyholders and claimants rights. Once the proposed transfer receives domestic regulatory approval from the domiciliary state of the transferring insurer, and approval of the Oklahoma Insurance Department, the proposal will be filed with the Oklahoma County District Court, which will approve the transfer transaction provided there is no negative impact on affected policyholders and/or claimants.

Commissioner Doak made special mention during the interview that Tyler Laughlin and Buddy Combs had done extensive work on the Insurance Business Transfer Act for over two years. As well, the Oklahoma Insurance Department is very appreciative of their state legislators, Senator John Sparks and Representative Glen Mulready. Glen is running to be the next insurance commissioner and Commissioner Doak is optimistic that he is going to succeed, as he is very engrained in this Act and will be able to manage it effectively for the next eight years.

Carolyn Fahey: *Commissioner, first, I want to thank you for taking the time to speak with us today. Please tell us about your background in insurance before your election as Oklahoma Commissioner in 2010.*

Commissioner Doak: I was in insurance for about 25 years prior to my election.

My experience includes working at brokers, carriers and on the acquisition phases of the business. Early in my career I started a Farmers Insurance Agency. My unique and varied background has afforded me the privilege and honor of working with consumers from across the kitchen table to across the boardroom and even around the globe with different types of transactions. My diverse background uniquely positioned me to run for office. As a Political Science graduate from the University of Oklahoma, I always had an interest in politics.

Francine Semaya: *One of the biggest new developments in Oklahoma is the Insurance Business Transfer Act. How* *did the idea of simplifying the transfer of a block of business without having the approval of the affected policyholders or the reinsurers get started?*

Comm. Doak: I think it's been clear for many years that insurers have needed a mechanism in the U.S. to transfer blocks of business. The most common method of transfer by merger or acquisition of reinsurance did not offer the efficiency and finality that insurers have found with Part 7 transfers in the UK. Because the Insurance Business Transfer Act is modeled after Part 7, it provides insurers with the ease of transfer finality that they need while providing due process protections for policyholders and other stakeholders. We view ourselves as an emerging market in Oklahoma and a leader. Oklahoma is located directly in the middle of the U.S. –we believe that this law will put us on the map for the global insurance industry. We won't be a flyover state anymore; we'll be a point of destination for these types of insurance transfers.

Tyler Laughlin: I'm the Deputy Commissioner and I worked with Buddy Combs on getting the bill passed at the Capitol. I think it's important to point out that we believe that there are layers of protection for the policyholders. First, is the independent expert who will review the transaction to make sure that it makes sense for both the insurers in the transaction and that it protects policyholders. The law also provides for two appeal processes including one before the court. Policyholders will have a new insurer, but they will also have the chance to object to or make comments prior to any sort of transaction, so I think that's the key to the success of this law going forward.

Semaya: *What happens when a group of policyholders object when you are close to getting Court approval? Do you go back and restructure the transfer or would you stop the transfer if the objections were from the majority of the policyholders?*

Laughlin: I think it's too premature to say what we would do. Any objections will be case specific. There may be objections on the acquiring insurer's capital and surplus, and/or the company's ability to pay claims. We will take very seriously what the policyholders and claimants want and listen closely to their objections.

Oklahoma is located directly in the middle of the U.S. — we believe that this law will put us on the map for the global insurance industry.

Comm. Doak: Each transfer will be examined case-by-case, specifically looking at the transactions from the regulatory side. The team that will be dedicated to the review process will monitor the three levels. We also feel that the independent expert will be a great resource to the Local District Court and advise the judge on the issues. So we believe, that we have consumer protections in place.

Semaya: *You mentioned that other states are looking at or have similar laws. Did you look to the other states for their experiences in drafting similar provisions? How did other state laws positively or negatively impact your legislation?*

Comm. Doak: We did look at other state laws. The biggest thing we learned from other states' experience was to remove the commutation portion from these transactions. We believe that the removal of the requirement for commutations allowed this law to get passed. The idea of ending these contracts and paying policyholders is not very palatable to many in the industry. I think our law is stronger because of the exclusion of that idea.

Buddy Combs: Looking at the other states that have passed transfer laws, the one thing we learned, especially from Rhode Island, is that insurers were scared off by the commutation portion of the law. Rhode Island's law has never really been utilized to the extent that I would advocate that it should be. When we looked at Rhode Island's Law, we kept in some of its principal concepts but removed others that some of the industry find problematic.

Fahey: *Did you also get input from the companies who are active in the runoff arena such as from AIRROC's members?*

Comm. Doak: We reached out to individuals and entities that have expertise on matters under consideration. In this case, we've had numerous conversations with industry professionals and insurers having experience with the runoff space. We've also had conversations with groups opposed to the law, to end up with the best law possible.

We wanted the stakeholders to discuss the opportunities as well as the potential drawbacks to the proposed legislation. We specifically asked Rhode Island to weigh in during the interim study, which we believed allowed Oklahoma to develop a better product.

Fahey: *Some of the skepticisms that I've heard are related to the fact that other state regulators need to approve any book of business that's being transferred under the new legislation. Did you have the opportunity to speak with some of the other state regulators about the cooperation that would be needed to allow transfers to take place?*

Comm. Doak: We included this in our process and had conversations with other state regulators. Oklahoma was one of the first states to form captive laws. Other states followed our process, and we believe the same will happen here. Rhode Island regulators made presentations at an interim study for our legislators — we learned a lot from them. Through the NAIC we already have a good relationship with other regulators so I think we'll be able to find a way to work together on future transactions.

Semaya: *There are some states that are known to hold themselves out from following other states. How optimistic are you that states such as—and I'm not picking on California, New York, and Texas, for example — will timely cooperate with the transferring and give the approval that you need so that you can go forward and do the block transfers into a domestic Oklahoma insurer?*

Oklahoma Insurance (continued)

Comm. Doak: I think that's a good question. State-based regulation is something that we firmly believe in, and we believe state-based regulation is going to be the continued future of the U.S. regulatory environment. We respect the regulators in all jurisdictions, but sometimes we find ourselves on the other side of certain issues and at times we are very vocal. We always look at issues and we try to work with our fellow regulators. We hope they understand that these transfer transactions are being done around the world, and will benefit the U.S. insurance industry.

We feel that this is a unique opportunity for the state of Oklahoma for companies to benefit from the transfers. We anticipate that this will also create more jobs. We feel confident that this law will bring many ancillary benefits to Oklahoma, as we are committed to provide the leadership, expertise, talent, and resources to help companies manage through the transfer process.

Semaya: *Do you anticipate that the business to be transferred will come more from insurance receiverships, whether insurers in rehabilitation or liquidation, or from active insurers?*

Comm. Doak: I'm hoping that a large portion of these transfers will come from live insurers. Certainly, there will be a place for these transfers for companies in receiverships, and we may use this tool when appropriate in insolvency proceedings. The reasons for seeking to transfer business will be different for each company—whether it's because they no longer write a certain line of business, or because they want to devote their administrative resources to other lines.

Semaya: *What is it that makes Oklahoma's law much more appealing to the industry than the laws existing in the other states?*

Comm. Doak: I think our law is most like Rhode Island's law. There are really three main differences between Oklahoma and Rhode Island. First the Rhode Island law includes the provision on commutation. Second, the Oklahoma law applies to all lines of insurance, while Rhode Island's Law only applies to commercial P&C

Commissioner John Doak

business. In Rhode Island, life insurance, Workers' Compensation, and personal lines are specifically excluded. These lines of insurance can be transferred into Oklahoma. Finally, the Oklahoma law applies both to active businesses as well as business in runoff. In Rhode Island, companies can only transfer closed books of business. The Oklahoma law provides more flexibility in the types of policies that can be transferred into Oklahoma.

Fahey: *Knowing that the law will go into effect in November, have you received any interest from companies looking to explore a transaction?*

Comm. Doak: It's impossible to predict how many companies will respond to the legislation. We believe they'll respond once insurers see how we handle the transactions and understand the opportunity presented by the ability to engage in transfer transactions in the U.S. We have seen some recent documentation from the PwC Global Insurance Runoff Survey issued in May 2018, which estimates that the non- U.S. business potential to be approximately $335 billion. Another key piece of data is that 33 percent of the responding companies indicated that they were highly likely to use a business transfer solution before the next two years.

Fahey: AIRROC partnered with PwC to do the survey you referenced and assisted in gathering data from our members. I also had the honor of presenting to the chief financial regulators in March at the NAIC, to position AIRROC as a resource for questions as they consider these transactions. In May, I participated in a roundtable that was held at IRLA 2018 Congress in Brighton, England. IRLA is AIRROC's European counterpart. Since Europeans have had Part 7 transfers in force for so many years as a tool, there is a great interest in having something similar in the U.S.

Comm. Doak: That's good to know. I think that's one of the exciting things about our global community, where there is a lot of expertise. We understand these types of issues can be discussed and tweaked, and improved upon. Within state laws there is the unique opportunity to do that. We think this is a very good platform, and to launch the law in the right way is very exciting. Tulsa in the 1920s was known as the oil capital of the world, and now it is possible for Oklahoma to become known for the insurance business transfer.

Semaya: *Do you think there's a chance that it could be presented as an NAIC model and eventually adopted by the NAIC as a model law?*

Comm. Doak: I think that model process needs to be explored. Good ideas start within the NAIC, where our state-based regulation works with other interested parties.

Combs: Typically, the NAIC will not start something until there's a swell of states that are really starting to do this. As you see more and more, states start to adopt similar laws. I think there are five states that have a transfer mechanism in place. With added interest, we are going to start to get NAIC people interested and thinking that maybe the NAIC should do a model law to make sure we're engaging with the same information, and it's all uniform.

Once you get into that model law process at the NAIC, something like this will be fairly complex and have a lot of moving parts, so you're talking about two, three, four years for something like this to get done. The NAIC is nothing if not deliberate on these issues, which typically means by the time they get finished with something, it's a very good product.

Semaya: *On that note, if other states start to adopt similar laws to what you have in Oklahoma, how much do you think that might impact the amount of transfer business you were hoping to bring into Oklahoma?*

Comm. Doak: Well, obviously Oklahoma has not been afraid of competition, and I think this is not what we want to happen. I think by being very thoughtful about this, working through this multiyear phase as we have done, that Oklahoma will accomplish its goals. After a couple of years, there are states that are just starting to look at this, and I think that there's a significant intellectual capital, strong industry corroboration, educating state regulators and state legislatures that comes along with this multiyear process. I think we're uniquely positioned, especially with Oklahoma's very effective captive market.

Combs: Since 2013, we've gone from two captives to over 70 captives.

Comm. Doak: We look at this as an opportunity to be a leader with all of the changes in the industries that are happening, develop the expertise, and become, a center of excellence for these types of transactions. While Oklahoma is not the largest regulatory state, we believe that we've got the intellectual capital within our walls to be able to handle these types of transactions and make a name for the Oklahoma Department of Insurance.

Combs: We have to be thoughtful, efficient, effective, and deliberate about how we implement our laws. To that end, if we can do this in a very positive way and the industry realizes that Oklahoma has good processes in place, then we're going to establish Oklahoma as a place where these transactions can get done, efficiently and expeditiously.

Semaya: *Let's look broader at the insurance regulatory environment and state regulation of insurance overall. What do you think is the one most important challenge facing U.S. regulators today?*

Comm. Doak: That is in one word, innovation. Innovation is happening daily, hourly, around the market place and around the world. We have to be very flexible and we have to understand how new types of products and services can assist and protect consumers and most important, not begin to over-regulate.

Innovation and cyber breaches are on everyone's minds, probably in every boardroom discussion of every insurance company both domestically and internationally.

Semaya: *Imagine you had a crystal ball. Where do you believe insurance regulation will be five years from now; and 10 years from now?*

Comm. Doak: Well, it's hard to say, I think that the NAIC and my colleagues have invested a great amount of time and resources to innovation—from past NAIC President Commissioner Ted Nickel, to today's NAIC president, Commissioner Julie McPeak. But I think as the industry innovates, you will have to see insurance departments and regulatory schemes respond and keep up with innovation, just as the industry is doing now. Innovation and cyber breaches are on everyone's minds, probably in every boardroom discussion of every insurance company both domestically and internationally. I think in five to 10 years, you're going to hopefully see the regulatory scheme remain state based. Within our jurisdictions with our intellectual capital to be able to work together without any type of federal overreach into our space. Insurance departments will need to be ready to accept new and innovative ideas and help insurers to bring them quickly to the market.

Semaya: *For years, insurance departments didn't always work well together. Are you finding that now insurance regulators are working better together, that they are not putting roadblocks up as we have seen in the past?*

Comm. Doak: I don't know where my tenure stacks up, with eight years in office but, I did an analysis not too long ago that I've seen over 96 insurance commissioners, superintendents, directors come and go since I've been elected, which I think is very interesting. I think that we work together even though some of the Commissioners tend to come and go more frequently. I think state-based regulation is the fabric of a great U.S. economy. And the insurance industry holds that together, something that I am very, very proud about. So whether you're an appointed or elected Commissioner, or a Republican or Democrat, I have found that I've been able to work with my colleagues in an effective way, and, even though we may disagree sometimes, we still work together. And that's something I've been very proud about during my tenure. I've been on the NAIC International Committee, the Consumer Board of Trustees and able to do some very unique things within my career as a regulator. Looking in that crystal ball, I think that we have to do a better job internationally of letting our global counterparts know the strength of the U.S. state-based regulation and how we work together, which oddly enough many of them are still confused about.

Semaya: *There was a study done a while ago that the average length of an insurance commissioner is about 18 months.*

Comm. Doak: Yes, I do agree with that. And after being here eight years, I have been very pleased and happy to be elected by the people of state of Oklahoma to represent them, to protect consumers, to work with them through many difficult natural catastrophes in our state, and work with our state legislature and governor on an equal basis. Across the country elected commissioners stay longer and I think are more committed in certain areas and better understand consumer issues. I've traveled the state of Oklahoma no less than six times and in every one of our 77 counties through my tenure and worked with consumers on individual issues of which I'm very proud.

Fahey: *You have a very impressive record and have gained the respect of many at the NAIC and definitely in your constituency. What's next for you?*

Oklahoma Insurance (continued)

Comm. Doak: I never intended to be a career politician. I look forward to heading back into the private sector, as my wife reminds me that with two kids in college I'm definitely going to be working. But I think there's a lot of exciting aspects about insurance both domestically here in the U.S. with issues like the ones we discussed today and with some others involving the innovation and tech space, for example, that I am very knowledgeable in. My work, in natural catastrophes as well as on the international front, has given me a unique perspective. I appreciate having been elected in the State of Oklahoma, and I love the insurance sector that provides a unique challenge. I look forward to new challenges, and while I don't know what that is going to look like for me yet, I've always known that when you work hard and you do a good job, doors or opportunities will open up themselves.

Fahey: *Were you able to accomplish everything you hoped to, not only for Oklahoma but for the insurance industry overall in your years as commissioner?*

Comm. Doak: There are several things that I would like to finish or work on before my term ends. But I know that my colleagues around the country and I share concerns about certain issues from a 10,000 foot level. On a more state specific level, with Oklahoma being one of the top five catastrophe states in the U.S., we need to make sure that we maintain a very competitive, viable insurance market. I'm very proud to have just been nominated to the FEMA Natural Advisory Council to be able to assist by providing insurance expertise and advice on handling issues during major catastrophes, which is something that we've been noted for here in Oklahoma. I don't think I would have done anything differently, but I know that there's a consumer out there who we may have missed or someone who had an issue that didn't contact the insurance department until it was too late or didn't realize that the Department could assist. I know that this happens in every state, so I'm continuing to try to find new ways to connect with and educate consumers to let them know that the Department can

We continue to put Oklahoma on the map in a unique, positive way, leaving that as a legacy is very important.

be an advocate for them if they have an insurance issue.

Semaya: *Is there one issue that you wish you would have handled differently or that you wished you could have accomplished with a different result?*

Comm. Doak: No, I've been extremely happy with the way things have worked out. You have to build upon your intellectual capital and your decision process and move forward. There's nothing in this phase of my career that I would have done differently.

Semaya: *And finally, what would you define as your finest moment as Insurance Commissioner?*

Comm. Doak: Well, I think it's really three prong: one, is being able to assist Oklahomans at the time of their greatest need during natural catastrophes, and I can give you examples of the Moore Tornado with 80,000 claims. I've got front pages of all the newspapers, of all the natural catastrophes, events that have happened in Oklahoma. Making sure that Oklahomans know that their regulator is in their court and will make sure that we deploy our team at times of need.

I've also taken that knowledge to the national level at the NAIC with giving expertise on handling issues and providing commentary on international catastrophes. A recent example is going to Puerto Rico, assisting them at a time when the people had a very great need and working with the Commissioner there.

But one of the finest moments that I can think of is how we helped a 15-year-old girl by the name of Lilly Rhodes, who had her right arm severed in an ATV accident. We were able to work with the industry and Lilly was able to get one of the state-of-the-art prosthetics. This young woman was able to get an arm that really met her daily needs and made her more active. That is just one individual consumer that we've worked with in the past eight years, and what we've been able to do to help consumers. Insurance is something that I've been very proud to represent and be a part of because it can really make a dramatic difference in an individual life like Lilly Rhodes.

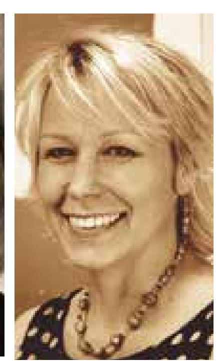
Semaya: *That's a wonderful accomplishment, and I hope she's doing well.*

Is there anything else that you would like us to include in our article that we might have missed?

Comm. Doak: Besides our hopes to make Oklahoma the center of the U.S. in insurance, we're very proud of Oklahoma. We continue to put Oklahoma on the map in a unique, positive way, leaving that as a legacy is very important. I represent Oklahoma, and we here at the insurance department have worked very hard to put together a law that might be attractive and efficient and have consumer protections involved in the financial services area, which we're excited about.

Semaya: *Carolyn and I want to thank you, Buddy and Tyler, and the rest of your staff for taking the time and making yourself available to us.*

Comm. Doak: Absolutely, we were glad to have this opportunity.



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Legacy Watershed

Andrew Rothseid

Capitalizing on the New Legislative Options for Runoff

New legislation is loosening the tight regulatory knot that's been wrapped around legacy insurance business in the U.S. Upcoming game-changers include:

1. Key amendments to the Rhode Island Voluntary Restructuring Statute (the 'Rhode Island Statute'), which, among other amendments (House Bill 8163), would allow (re)insurers to transfer eligible portfolios without requiring that the assuming company put the transferred business through a commutation plan.

2. The Oklahoma Business Transfer Act, which provides (re)insurers with the opportunity to transfer active and discontinued life and health and property and casualty exposures to an Oklahoma domiciled (re)insurer.

What are the potential benefits and limitations of these developments? What is the market appetite for such innovative approaches? Are there potentially better solutions to consider?

Legacy business ties up a huge amount of capital, staff time, and management attention. Yet the complex and diverse U.S. regulatory system makes it difficult to rationalize scattered portfolios and optimize capital.

Insurers and reinsurers wanting to ease the capital strain of legacy have favored the familiar defaults of sale of distinct legal entities or reinsurance of problematic portfolio of business. Yet these options can be expensive for the seller or reinsurance purchaser and, in the case of reinsurance, the liability can revert to the original issuing carrier. While sale eliminates the legacy business from the seller's balance sheet, there are few carriers whose entire business is in runoff. Even with a competitive bid process, the acquisition price may not reflect the value to the seller if the seller retained the business and managed the legacy risks to finality in a proactive manner.

In turn, the consolidators that are the main acquirers of runoff business may be storing up problems for the future, especially if the regulatory barriers to transferring portfolios and amalgamating them into larger administrative units make it hard to deliver the benefits of economies of scale. As the term suggests, this is a business model that needs to consolidate to accumulate value.

Similarly, while reinsurance — either as an adverse development cover or loss portfolio transfer — provides immediate balance sheet relief, the premium needs to be high enough to protect the reinsurer from adverse and accelerated claims development. As a result, the value in the portfolio can be diminished. Moreover, the liability can still remain with or revert to the original carrier.

Accelerated closure

Alternatives to sale or reinsurance include the commutation process available through the Rhode Island Statute. This enables an eligible Rhode Island domiciled carrier to crystallize its obligations and accelerate the payment to creditors of 100% of the net present value of agreed claims.

The commutation plan process has the advantage of providing full, final, and accelerated closure and capital release for (re)insurers without the inherent erosion of value that comes from sale or reinsurance. In turn, this transparent, court-monitored process provides claimants with certainty and finality — the Rhode Island Statute is consciously focused on knowledgeable counterparties, so personal lines and workers' compensation policies are excluded.

However, there has to date been only one commutation plan attempted and completed under the Rhode Island Statute — GTE REinsurance. Why? There may be a certain amount of market inertia in play, with many insurers preferring the familiarity of sale or reinsurance, even if the results leak value.

More pertinently, there simply isn't a large inventory of 'commercial liabilities' in runoff (as that term is defined in the Rhode Island Statute) residing on standalone balance sheets. This realization led to the 2007 amendments to the Rhode Island Statute, as well as those reflected in House Bill 8163, and to the implementing regulations, which allow portfolios to be transferred to a newly capitalized or existing Rhode Island shell entity.

> *…there simply isn't a large inventory of 'commercial liabilities' in runoff (as that term is defined in the Rhode Island Statute) residing on standalone balance sheets.*

Yet while the regulatory amendments have been in force since August 2015, there has once again been no uptake. Part of the reason may be continued inertia. Again, more pertinently, many (re)insurers would like the option of transfer, without necessarily going all the way to closure through a commutation as specified in the language of the 2007 amendments to the Rhode Island Statute.

This restriction may have contributed to what the Insurance Insider 2018 Legacy Barometer Survey suggests is diminishing interest in the Rhode Island process, though the poll findings don't take into account major legislative developments that have just been enacted.

What U.S. (re)insurers do appear to want but haven't had up to now is an option akin to the UK's 'Part VII Transfer.' through which a carrier can transfer its business or a portfolio of business — active, as well as discontinued — to another party. The advantages include

Legacy Watershed (continued)

providing a way to remove the business from the balance sheet. As a result of House Bill 8163, the transfer can pave the way for a commutation plan and closure but doesn't necessarily have to.

All change

What both the Oklahoma Business Transfer Act and House Bill 8163 offer is a Part VII-style transfer without the commutation plan requirement. (The Oklahoma Business Transfer Act does not include any provision that provides for a commutation plan. That option remains viable only in Rhode Island.) That makes them game-changers. Indeed, it would appear that Oklahoma, Rhode Island and other states are now jostling to bring legacy business, and the potential jobs that come with it, to their jurisdictions.

Oklahoma

While the eligible portfolios covered by previous legacy legislation have tended to be fairly narrow, the broad sweep of the Oklahoma Business Transfer Act covers "property, casualty, life, health and any other line of business the Commissioner finds via regulation is suitable for an insurance business transfer."

Key advantages of an Oklahoma transfer include being able to package up the portfolio for sale or management on a separate Oklahoma domiciled balance sheet. (The transferred portfolio can be an active (re)insurance portfolio. Oklahoma's Business Transfer Statute is not limited to runoff liabilities as is Rhode Island's.) Active business can go forward without the drag of the transferred portfolio. On top of savings in management time, the group gains more freedom in allocating capital. Further benefits include making it easier to place the business in a new entity, which would not only take it off the balance sheet, but also increase the scope for consolidation.

With home state approval, companies from other states can transfer their business into a host company in Oklahoma. Reinsurance is likely to play a key role in securing approval by enabling the assuming company to increase protection for policyholders without necessarily having to commit further capital.

Rhode Island

House Bill 8163 increases the scope of the Insurance Business Transfer (IBT) process by removing the stipulation that the entity into which eligible commercial liabilities are transferred has been formed or reactivated for the sole purpose of entering into a voluntary restructuring. (House Bill 8163 was passed by the Rhode Island House and Senate, and, on July 2, 2018, signed into law by the governor.)

By expanding the definition of 'voluntary restructuring', House Bill 8163 would also make it possible to use the Rhode Island process for "enhancing organization and maximizing efficiencies," while allowing "the transfer of assets and liabilities to or from an insurer." To this point, House Bill 8163 would allow for the creation of protected cell entities, which are frequently used in securitized transactions — for instance, insurance linked securities (ILS) or in 'rent a captive' structures — to avoid the intermingling of assets and liabilities from distinct parties.

Other options

Other notable developments include the Connecticut Division Statute, which allows separation of insurance business through a corporate division, though only for those already domiciled in the state. Similar provisions are already available through the general corporate division mechanisms found in the Arizona Entity Restructuring Act and the Pennsylvania Entity Transactions Act.

Aggregate versus eliminate

These developments have the potential to become important parts of the capital management tool kit. Many (re)insurers and consolidators want to use these new openings as part of plans to aggregate their assets and liabilities and realize economies of scale in their management.

Yet, they are no silver bullet. Although easing, the restrictions are still strong. The potential for pushback from legislators and regulators is highlighted by the Georgia governor's recent veto of division legislation similar to that enacted in Connecticut. The attitude of policyholders and reinsurance cedents is also yet to be tested, with potential legal challenges possible.

Moreover, it remains important to analyze and assess all options and match these against strategic aims and the nature of the legacy business in question — far from one option being superior to another, this is very much a fact specific scenario. While this requires expertise and possible third-party advice, the value gained and reclaimed could be considerable.

Ultimately, however much (re)insurers aggregate their portfolios, the liabilities have not been eliminated. Accelerated elimination of the liabilities through a commutation plan therefore remains the only option that provides true finality and should be one of the main capital management considerations.

Watch this space

What this all underlines is the importance of looking beyond the default options. And this applies to consolidators as well as (re)insurers, and to live as well as discontinued portfolios. Legacy management in the U.S. is at a watershed and we could be seeing more significant shifts ahead. While some industry participants remain cautious and skeptical, the Legacy Barometer Survey actually points to increasing optimism and opportunity overall. It will be very interesting to see how the emerging openings pan out and how effectively they are utilized. ●

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Brexit

What's Going On?

A good few eyes are focussed on the daily, if not hourly, developing news on the UK's departure from the European Union. What does it mean for the London Market and in turn for those who deal with its many participants both in the EU and throughout the rest of the world?

The run-up to Brexit might have resonances of Y2K and the millennium bug but it is distinctly different. Y2K was a fear of apocalyptic events the source of which was essentially out of the control of humans. Brexit is fundamentally in the hands of human beings to negotiate and it is their arguments and decisions which will determine what will happen. Will it be a hard Brexit — the UK leaving without an agreement with the EU on its terms of withdrawal? Alternatively, will it be a soft Brexit with an agreement which allows a controlled transition with all feasible protections put in place to avoid disrupted trade and markets.

The timeline

Time is running short. A lot of work has been done behind the scenes and now the process is speeding up in an attempt to get a timely agreement on the terms of withdrawal. Here are the significant dates:

On 23 June 2016 the Referendum was held in the UK on whether the UK should leave the EU resulting in a majority voting to leave.

On 29 March 2017 the UK served notice under Article 50 of the Treaty on the European Union triggering the UK's departure from the EU automatically on 29 March 2019 unless an extension is agreed between the UK and all 27 remaining EU Member States. In principle a transition or implementation period to the end of December 2020 has been agreed.

On 20 June 2018 the UK Withdrawal Bill was passed in the House of Commons after a lot of controversy including amendments proposed by the House of Lords. The result is that, if there is no deal, Parliament will be able to consider the position and can vote on a "neutral" motion. This is a motion which cannot be subject to amendments unless the Speaker of the House of Commons allows them. Although billed as a "meaningful" vote, opponents to Brexit consider it will not be if no amendments can be allowed.

A series of formal speeches and summits have taken place and continue to do so as an ever present backdrop punctuated by significant moves such as the agreement on the "divorce bill."

On 6 July Theresa May held her high profile and critical cabinet meeting at her country residence in Chequers in which the UK's detailed proposal on the terms of its withdrawal was thrashed out. It left two high profile resignations and numerous others in its wake. This was probably not unexpected and swift replacements were made.

The contents of this proposal were set out in a White Paper issued on 12 July: The Future Relationship between the United Kingdom and the European Union.

A critical summit will take place between representatives of the EU and UK in October 2018 when the principles behind the terms of the UK's departure ideally must be agreed. I.e. the proposals in the White Paper will have to be accepted, rejected, or modified — most probably in a combination of all three.

The deadline for negotiations with the EU finally to end is 21 January 2019 which takes into account the time needed for the UK's Parliament's approval.

On 29 March 2019 the UK will leave the EU.

The White Paper

Volumes can be written on the political manoeuvring going on which, depending on your view point, makes for exciting viewing or resigned indifference to the inevitable. Leaving politics to one side, currently the UK's last word on the subject is the White Paper. The White Paper is very detailed. It is variously described as an expression of hope or a first negotiating position by those critical of its middle way attempt to combine the requirements of "leavers" and "remainers." Other commentators suggest that there has been a great deal of conferring between each side's coal face technical negotiators. It is viewed, they say, as much more than a first stance but as a detailed basis of a future relationship now to be picked over and negotiated.

What will the new structures be upon which the future trading relationship is based?

Much airtime has been given to trading in goods so we must see the proposed structures in that context. Regulations apply to both goods and services with the critical "redline" relevant to both goods and services being removal of the role of the European Court of Justice. In order to deliver on the Referendum result the UK cannot to be subject to the rule of the ECJ. In order to avoid a hard Brexit, however, the White Paper proposes a limited role for the ECJ whereby the UK courts can take account of rulings of the ECJ. Also, a system of a joint rule book for regulation of goods with effectively joint tribunals consisting of representatives of the UK and EU will decide on certain defined disputes.

These structures as they relate to goods are a manifestation of the UK's proposal that we should have access to the EU's single market without being a member of that single market and its currently established customs union.

In the financial services area, at the core of the negotiations is the fact that EU and UK financial services are highly (if not inextricably) interconnected e.g. around £1.3 trillion of assets are managed in the UK on behalf of EU clients and London hosts all of the world's twenty largest international (re)insurance companies.

However, the proposal for financial services is somewhat different from the proposal on goods. Access to the EU market in financial services, it is suggested, will not be a shared rule book but should be in the form of "Enhanced Equivalence."

What in the White Paper relates to the insurance industry?

The banking industry is front of mind with the insurance industry fitting in behind. The two industries share the same threat, i.e. potentially losing share of their continental markets and in principle are subject to the same rules concerning

In the financial services area, at the core of the negotiations is the fact that EU and UK financial services are highly (if not inextricably) interconnected.

protecting customers and keeping their industry resilient.

Passporting, currently the bedrock of the single market in financial services, will go. A system of "mutual recognition" of each other's rules is not on the cards.

Enhanced equivalence not mutual recognition

Mutual recognition would have involved treaty guarantees allowing two-way market access even if the rules diverged between both sides over time. The new proposal in the White Paper is that the UK should have "enhanced" equivalence. Equivalence is the existing concept whereby preferential market access is granted to other countries deemed to have "equivalent" regulatory systems. There are many such equivalent countries including indeed the United States. The reason why the UK seeks an enhanced version of this market access is because of the very deeply intertwined relationship this sector has in all 28 countries. Putting the UK simply in the position of other countries with equivalent status would be hugely detrimental to consumers in all EU States, so the UK argues. The equivalence must be a special type. The UK also wants an extension of the concept to other areas, e.g. securities trading and corporate lending which are currently not included in EU directives. Indications from the EU's chief Brexit negotiator, Michel Barnier, suggest he is questioning a situation which would involve the UK working together with the EU in determining what equivalence meant in the UK. He is currently saying that equivalence should remain a unilateral decision, a gift, which can only be made by the EU and taken away by the EU. It should not be a joint effort with the UK. At the end of July the UK has reassured him that that was not what was intended and as far as financial services are concerned the UK will not have an undue influence in deciding whether it is equivalent.

The White Paper argues that: "Given the importance of financial services to financial stability, both the UK and the EU will wish to maintain autonomy of decision-making and the ability to legislate for their own interests. For example, in some cases, the UK will need to be able to impose higher than global standards to manage its financial stability exposure. In other areas, the UK market contains products and business models that are different to those found elsewhere in the EU, and regulation would need to reflect these differences." Recent utterances from the EU suggest a possible understanding and agreement on this.

What next?

It is proposed that enhanced equivalence is achieved through a bi-lateral arrangement which includes provisions for:

a. common principles for the governance of the relationship;

b. extensive supervisory cooperation and regulatory dialogue; and

c. predictable, transparent and robust processes.

Until the end of July, it seems true to say that the UK was arguing for a joint approach to establishing equivalence with either party being able to withdraw equivalence. We now know that this currently has not found favour with the EU. We will see how negotiations proceed. All eyes will be trained on the summit in October.

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IRLA Celebrates 20 Years!

Memorable Memories

It is a momentous year as IRLA (The Association of Run-Off Companies as it was originally known) was formed 20 years ago. IRLA began as a city-based group of like-minded (re)insurance, intermediary and professional service companies and professionals, and has become an association with the international breadth of membership to influence the way in which legacy business is transacted. In the past decade alone, the numbers on our database have almost tripled and Congress attendance has doubled since moving the event to Brighton six years ago.

There were times at the beginning of this decade when we thought the Association would wither on the vine but the rebranding and the market-wide increased focus on run-off has changed the landscape. The Association is seeing evidence of growth in the sector with growing numbers of members and increased attendance at our educational and networking events.

There was a record breaking turnout with more than 250 legacy professionals in attendance at the Congress in Brighton, England from May 14-16, 2018.

The global economic context in which we all work was set by the first speaker, bank economist, Neil Parker from NatWest Markets. From then onwards there was an emphasis on restructuring with voices from some of the global carriers and specialist consolidators giving us insight into their strategies in readiness for Brexit. The rationale behind Luxembourg, an EU location of choice, was explained as we were brought up to date with the attitudes of various regulators in relevant EU States. Day two had a specific slot on Brexit in which Jane Portas of PwC demonstrated how important collaboration with EU counterparts is in dealing with the hurdles presented by Brexit. We heard from a panel on the challenges and benefits of diversity in the workforce. We also heard from speakers on more granular areas such as claims trends and the comparison of U.S. and UK liability claims. Finally, we heard from the esoteric: e.g. doing business in the future and the increasing role of insurtech. On this last topic it was very helpful and timely to have the European General Data Protection Regulation, or GDPR, explained so that we could all appreciate why this dreaded legislation was needed in a world where scraping our personal data is the life source of the web-based economy. The deadline for compliance was the week after the Congress.

Against that background, how did the delegates find the event? What were the important takeaways? We asked a number of them and this is what they had to say:

On Insurtech…

"Whilst we all acknowledge that technology plays an important role in business and is increasingly growing in focus, people are the key to success."

Emma Lawton, BAI Claims Services

"The legacy market cannot ignore Insurtech; we all need to embrace the opportunity to engage in this space. An example very relevant to our market, includes, systems and technology being a material driver for clients looking for a Transaction solution. The savings achieved as a result of a system solution being put in place, as part of an LPT or Legal Finality, can be a significant contributor to the economics of the deal."

Mark Hallam, Swiss Re

On transatlantic claims…

"In comparing and contrasting claim trends on UK employers' liability and U.S. workers' compensation, we asked the question "are current claims trends in the U.S. a barometer for what's to come in the UK over the next few years." The conclusion drawn was that it could be(!) but for each different claim type there is a range of cultural, custom and practice, legal and socio-economic factors that could influence this and there may be stark differences between the UK and U.S. relating to those factors. Each claim type needs to be assessed individually."

Jerry Perrins, Pro Global

On the state of the legacy market…

The legacy market is becoming increasingly more sophisticated and accepted. Insurance companies are taking long term views on their required capital structures, selecting lines of business they do and don't wish to write, and what they want from any potential acquirer of their legacy business. At the same time buyers are expanding their interest in broader lines of business, ensuring that they have access to ever increasing levels of capital and ensuring that they have the capacity to adequately address issues such as TCF, risk and compliance. The result is a perfect storm in a growing market."

Simon Barnes, Zurich

On current claims trends…

"In the field of legacy personal injury claims, insurers and their advisors have successfully managed the threat from volume deafness claims and now is not the time to ease off. There is work to be done in asbestos claims to effectively manage future liabilities, but with appropriate strategy and collaboration, this can be achieved."

Gary Brankin, BC Legal

"Asbestos remains the 'New Asbestos'. Whilst there are many nascent risks- ranging from UV exposure, lead poisoning and opiate dependency- none seem ready (yet or in the future) to reach such devastating prominence as asbestos related litigation."

Boris Cetnik, BC Legal

On Brexit…

"During the regulatory update panel session there was inevitably time given to discussing Brexit. This has wide ranging effects across the whole financial services industry and we wanted to gauge the views of the Congress audience. A number of questions were put to attendees during the panel session using the interactive polling on the IRLA App. One was whether they considered Brexit an obstacle, an opportunity or both. Of those that responded 25% viewed it as an obstacle, 22% as an opportunity and 48% viewed it as offering both. This is pretty evenly split but indicates that the run-off sector is expecting an uptick in transaction activity arising from a possible hard Brexit. This is hardly surprising as many insurers that operate across the UK/EU border will have to decide what to do with their operations on the other side of the divide. However, to some extent this will also apply to run-off acquirers who have amassed portfolios over recent years. This clearly shows why it is both an obstacle and an opportunity."

Paul Corver, R&Q

On diversity and doing business in the future…

"Diversity, mentoring, training and development along with retention of new and top talent, plays a crucial role in effective management of doing business in the future."

Emma Lawton, BAI Claims Services

Perhaps it is on this last note that we mention the mood of the IRLA Congress this year which seemed to have a definite tilt in numbers towards the new generation of professionals joining the legacy field. Like AIRROC, with a view to the future, IRLA is welcoming the next generation and emphasising diversity. An excellent Congress. ●

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As part of IRLA's 20th anniversary celebration, the first Annual Report for 2017/18 has been released. It can be accessed at the following link. http://irla-international.com/html/annual-report/index.html






Photos / Ian Macaulay

IRLA Legacy Roundtable

Catrin Shi, News Editor
The Insurance Insider

Alan Augustin, Director
PwC

John Winter, Chief Executive
of Ruxley Ventures

AIRROC's Carolyn Fahey participated in The Insurance Insider Roundtable with other prominent players in the legacy market. It was held in May, 2018, during the annual IRLA Congress in Brighton, England. The Roundtable was a spirited and enlightening discussion on the current optimism in the legacy market, the impact of Brexit, and the overall outlook and trends for the legacy market.

An excerpt of the conversation highlights follows. The full text can be found at the link: http://www.airroc.org/irla-brighton-roundtable-2018.

Catrin Shi: We've just published our annual legacy survey and the response from the market has been overwhelmingly positive. So, to kick off the discussion, I'd like to ask if the legacy market is right to be so upbeat.

Alan Augustin: The legacy market is absolutely right to be upbeat. We've seen significant changes over the last 12 months, in terms of new capital coming into the market, deal size and deal opportunity. Coupled with some of the markets that are opening up as well, in continental Europe, and with new legislation in the U.S., there's an awful lot of optimism.

Chris Price: From an investment point of view, capital is plentiful and quite cheap. The other side of the coin is that the returns you earn on the assets afterwards are fairly low at the moment and, looking ahead, both of those might flip round as interest rates start to rise.

Shi: Is the U.S. market feeling just as optimistic?

Carolyn Fahey: Definitely optimistic! More and more carriers are coming to the table looking for finality.

Paul Corver: Some of the movements we have seen — especially, say, AIG setting up a reinsurance vehicle to pool $40bn of their exit liabilities to better focus and manage them — is an indication of where the big players are going. Zurich is being very active with disposals, so I think we'll start to see that cascade through a lot of the market.

Charlotte Echarti: From a reinsurance perspective, the biggest change is that the insurance and reinsurance markets feel much more comfortable with run-off transactions. With Hannover Re, five years ago, run-off was focusing on commutations. All reinsurance companies now are starting to be more active in the legacy market.

Barclay-Watt: There is more of an accepted overlap between what works for both buyer and seller. If you looked at the run-off performance of a business in a live composite and then in a run-off player, from both the perspective of the actual underwriting results and the infrastructure operating cost associated with it, it becomes much more justifiable because the results would be better on the run-off side of the fence.

Shi: What about Brexit? Is that going to stimulate further deal flow?

Zsolt Szalkai: Companies are still in the process of making a proper assessment of their situation and options before they make decisions. Seems that everybody is still in waiting mode to see what the final set-up is going to be and how it will be implemented. In the next few years, Brexit will definitely be a driver of more legacy transactions.

Nick Crossley: Like with Solvency II, there is a long implementation phase before the impact of Brexit is seen. There are clearly some stranded books about the market; they don't belong to any live carriers and at some point will need to be shaken out. But it will take a little while before we're in M&A execution phase after Brexit implementation.

Augustin: What we are seeing in the marketplace from Brexit is lots of restructuring activity as opposed to deal activity — mainly to ensure that you've got an operating model across Europe to be able to trade in the same way you did in the past. So a lot of the work is a zero sum gain just to have post-Brexit operating capability. The deals and the transactions will come once organisations have worked out opportunities from there onwards.

Corver: We'll possibly see more in continental Europe than in the UK. UK companies that have written European business have to decide whether to set up a subsidiary or branch in Europe. Are they going to be able to service it from the UK? Do they then want to, say, set up an Italian, German or French branch in order to service small books of business? Both look unlikely. There will be more incentive to get themselves sorted on big

David Barclay-Watt, Director
RBS

Nick Crossley, Executive Director
Ernst & Young LLP

Robert Margetts
Compre Group


Paul Corver, Chairman IRLA and Head of M&A (UK/Europe), R&Q


Charlotte Echarti, General Manager Run-Off Solutions, Hannover Re


Carolyn Fahey, Executive Director AIRROC


James Bolton, Director IRLA and Director of Quest Group

business, but on small business there will be a flow of deals.

James Bolton: That's what I've been expecting to see — European insurers putting their UK books into run-off and then doing small disposals. But we haven't seen much of that yet.

Robert Margetts: You might get a few people who think they've got a chance, at least, of getting a Part VII away now, before the end of the transition period. So you may get a little spike of people wanting to do something now, whereas before they may have thought there's no chance of doing something pre-Brexit. But I agree—it feels minimal at the moment and like there might be a shake-out after people have completed their restructuring post-Brexit.

Shi: Looking ahead, what emerging claims trends are coming through? People always talk about what is going to be the next asbestos.

Jim Bryant: North of 80 percent of IBNR for most clients I deal with seem to still be with asbestos. What we're all still waiting for is the next hearing loss. That has been a massive source of claims over the last five years. We never envisaged that that would come back to market because people say historically it was dealt with back in the 1990s. But if you're talking about a new category of claim, something like low-level respiratory conditions, perhaps—something that is easy to volume up.

Corver: That could very well be diesel fumes. The saving grace with diesel is that the U.S. didn't adopt it to any great extent. If 50 percent of the cars in the U.S. were diesel, incurring all the asthma problems that we see in the UK, then there would be significant claim movements in the U.S. What we have seen today, though, is the announcement of a $10bn suit that's been raised by Californian groups against opioid manufacturers.

Fahey: Technology itself opens up a really big issue. The cyber issue is huge in the U.S. There are many savvy people out there who figure out how to hack into corporate systems and we've seen big companies having data compromised. Opioids are another really big one for us. Concussion claims are still a big issue in the States. And talc is another one, with some recent developments in the litigation involving Johnson & Johnson.

Sean Keely: Opioids are huge now. More pre-emerging are the head injury claims. Those have tremendous possibility to embroil the market because they will go back years and years. And it's not just professional football; it's university and high school students. I say pre-emerging because we don't understand the science yet, and we're just starting to see some of the issues on the coverage side work through the courts.

Echarti: Looking at the past 12 months I could imagine that sexual harassment will be coming up, with #MeToo, #TimesUp, etc., as people start to file claims.

Keely: I agree. Now whether it's a legacy issue is a question but more and more states are looking at extending the statute of limitations. So when you're looking at not a two-year or a three-year problem but a 20-year problem, it becomes a legacy.

Bryant: From a claims perspective, over in a number of the U.S. states we got rid of the limitation time bar on abuse claims a couple of years ago now and the same has happened in parts of the UK. With the independent inquiry going on, there is an expectation that the same might happen across the remainder of the UK for asbestos, because it's all about prejudice in the UK. You can be out of time but if the defendant hasn't suffered undue prejudice, and the judges can still hear enough evidence to reach a sensible view, you can still bring your claim.

Shi: The insurance industry in general has a problem with gender balance and the gender pay gap. More needs to be done to support women through their careers so they attain more senior levels of management. So how good is the legacy industry at supporting women in their careers?

Echarti: It's developing. It is in the focus of the industry. Companies have set up women's networks and are supporting women in their careers. But it's also up to the women to decide to sacrifice a little


Jim Bryant, Partner Weightmans LLP


Chris Price, Head of Insurance Solutions UK AXA Liabilities Managers


Sean Keely, Partner Freeborn & Peters LLP


Zsolt Szalkai, President Premia Re Europ

Photos / Ian Macaulay

Roundtable (continued)

bit of their work-life balance to manage having a career alongside family.

Bryant: The transactional nature of a lot of it actually does lend itself to a more diverse approach in bringing teams on for short-term projects. Perhaps more could be done in that space. But to take Charlotte's point, IRLA also has its mentoring scheme. I've just put myself on it but I can't recall there being any female mentors currently. So maybe that's something we ought to be actively encouraging, to even up the numbers that have males mentored by females and females getting more involved in that space.

Augustin: There is some fantastic work being done at the moment. I know that the CII, through Inga Beale at Lloyd's, put out a recent research paper — 'Insuring Women's Futures' — on the interventions around important moments in females' lives and understanding how the industry can better support those.

Keely: Increasingly, it's become the consensus that it makes no sense at all to lose half the workforce. I was very encouraged when, back in the fall, AIRROC gave scholarships to two young women who were in a risk management programme at university. They were very excited about the industry and that just has to be cultivated.

Echarti: Support is good, but the mindset has to change because, as has been said, otherwise 50 percent of the workforce is missing. As soon as women were allowed to go into Lloyd's, they were there. And, for example, in my team I have 50 percent of women through all levels!

Shi: What's the one thing you would say is the biggest challenge for the legacy market in the coming year?

Bolton: One thing I'll be discussing is IFRS 17. It's not coming in yet but it does concern me. It's an awful lot of work and what it does to run-off isn't too good. Companies are going to discount their reserves, which makes M&A less profitable.

Price: The unexpected claims trends that we haven't even thought of yet that turn out to be major issues — maybe around demographics, maybe around climate change and pollution and things like that.

Fahey: In the U.S., it's the regulatory landscape and the waiting. There has been so much buzz about the states that are enacting legislation for finality tools and companies are waiting to see who will be first.

Bryant: One of the other things that we didn't touch on regarding claims is occupational cancers. As medical science is continuing to evolve around helping us understand what has caused or contributed to certain types of cancers, that's going to drive certain claims behaviours. Medical science is moving so fast, particularly in the asbestos area, and that's going to add value to the cost of claims.

John Winter: I take a very positive view. Since 2011, IRLA has grown to about four times what it was in those days and business is going well, we're all sitting here, making money.

Fahey: And to that point — AIRROC is seeing more interest in our market from capital providers and banks. Run-off deals are a hot topic right now.

Shi: That's a good note to finish on. Thank you all very much. ●

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ADVERTISERS IN THIS ISSUE

Lanzo v. Johnson & Johnson, et al.

Is this the Beginning or the End?

Recently, while on a family vacation, I drove past the Yellowstone Imerys talc-mining operations in Montana near Yellowstone National Park. The operation is set against a beautiful backdrop in one of the most naturally stunning areas of the country. The tranquil setting stands in stark contrast to the company's current turmoil as a defendant in one of the highest profile mass torts since asbestos litigation came on the scene over 30 years ago.

Imerys, a talc miner and supplier, along with Johnson and Johnson ("J&J") has suffered a series of verdicts in cancer lawsuits that have been nothing short of shocking. J&J's talc-based "baby powder" has been a cornerstone of the New Jersey-headquartered company for over 120 years, as well as one of the world's most trusted and ubiquitous products. It is now the target of every mass-tort plaintiff attorney in the United States.

The first asbestos related talc verdict was in 2006. The first ovarian cancer talc trial was in 2013. By 2017, there were multiple verdicts in ovarian cancer related talc lawsuits totaling well over $500 million dollars. Unfortunately, 2018 shows no sign of slowing down. J&J carried the brunt of these verdicts with Imerys picking up a significant portion. Most recently, in *Lanzo v. Johnson & Johnson, et al.*, a New Jersey jury handed J&J and Imerys another blow—$117 million in a mesothelioma case where the plaintiff alleged exposure to asbestos from talcum powder product

Jeffrey M. Odom

use over his lifetime. The jury found J&J liable for 70% of the judgment with Imerys liable for the remaining 30%. The panel awarded $80 million of the verdict as punitive damages. The verdict bridges the excessively high awards from ovarian cancer cases to the well-established arena of asbestos litigation. Plaintiff attorneys have tapped into a potential goldmine by connecting mesothelioma claims to talc litigation.

Ovarian cancer talc cases gained notoriety with a series of enormous verdicts in St. Louis, Missouri. Claimants were able to take advantage of a very plaintiff friendly jury pool and a judge who ignored basic rules of personal jurisdiction. The verdicts were alarmingly high in these cases notwithstanding the lack of causation evidence. The ovarian cancer talc link is premised on biased studies with no epidemiological support. Various government agencies, including the American Cancer Society, have issued statements concluding that an increased risk of ovarian cancer from talc does not exist. The *Lanzo* verdict changes everything.

Why should a plaintiff attorney invest significant resources in chasing down ovarian cancer claims with an inevitable and challenging appellate path when he or she can claim that asbestos contaminated talc causes mesothelioma, ovarian cancer or a number of other asbestos related diseases? Asbestos litigation is the largest and most mature litigation in the U.S. The scientific and epidemiological studies are endless, linking asbestos exposure to various forms of cancer, including mesothelioma. Undoubtedly, there will be a marked increase of talc-based asbestos claims in the coming years.

Undoubtedly, there will be a marked increase of talc-based asbestos claims in the coming years. These claims are not going away.

These claims are not going away. All of this will require defense counsel to take a more aggressive stance defending these claims at trial.

Particular focus is necessary on the lack of scientific support for talc-based cancer claims. Multiple studies of talc miners and millers from the mid-1970's to the early 2000's have shown no increased risk of mesothelioma or lung cancer. Plaintiffs' end run has been to lead the jury away from the glaring holes in causation and to focus on what are unfortunately "bad documents" for J&J. Although the corporate documents do not paint the company in a positive light, there is a reason J&J continues to take a firm defense position — talc does not cause cancer. The product is safe. A greater effort is necessary to convince jurors that bad documents do not cause disease. The epidemiology does not lie. Indeed, there was no definitive proof in the *Lanzo* trial that the talc at issue was asbestos-contaminated. How can decades of studies of miners of raw talc yield no recognizable increased risks of cancer and yet end users of talc-based products contract disease?

The *Lanzo* verdict highlights why traditional asbestos litigation defendants should be particularly concerned. A plaintiff who alleges daily talcum powder use but also spent a career working in a shipyard has the ability to string along manufacturing defendants and poison a jury with talc evidence. Plaintiffs are winning these cases because juries are accepting an incorrect and over simplistic view of talc and asbestos, all while being misled regarding the circumstances surrounding certain unfavorable corporate documents. Defense counsel need to revise the playbook. Decades of effectively challenging causation theories in traditional asbestos cases will not be enough. Talc changed the landscape. Clients and insurers should require an aggressive attack on causation with an increased effort to find methods that are more effective at educating juries on the relationship of talc and asbestos. *Lanzo* needs to be the last of these verdicts, not the mark of a trend going forward.

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Transforming the future of runoff
The runoff market is currently both challenging and competitive, with traditional runoff companies looking to grow and maintain profitability, while facing new entrants. As companies are looking to improve decision support, reduce costs, and increase productivity across the business (i.e. claims, actuarial), personnel face challenges around their current systems infrastructure, the ability to capture and use data, and the efficiency of their processes. EY's integrated Insurance team across finance, actuarial, operations, and IT has the experience to help you navigate your opportunities and leverage the latest in digital tools (such as robotics, data visualization, and common operating platforms) to overcome your challenges and transform your operations.
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Building a better working world
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With this edition, we are introducing Legacy Link, a new look and perspective that will replace our prior Spotlight column. In Legacy Link, we will highlight the personal side of the business. We hope to give our members a chance to connect by sharing professional experiences, hobbies and ideas that further our networking initiatives, and build our community of runoff claims professionals.

William Teich

Currently: Vice President, Strategic Claim Management, The Hartford
Co-Vice Chair, AIRROC Board of Directors

Tell us about your work history and lessons learned

I have been at The Hartford handling claims in some capacity for the past 32 years. I started in a Hartford all-line field office which was a great learning experience. I moved into environmental claims in the early 1990s handling direct claims for the northeast. From there, I moved to the company's ceded group and finally to assumed reinsurance, where I currently work. I have learned that there are always new challenges, regardless of which team you are on or how old the business is. It is how you respond to those challenges that defines your work history and the success of your organization. I also learned that it is better to surround yourself with talented people, listen to them, take their advice, and trust them to do their job and do it well. Lastly, I believe continuing education is critical; I found the Chartered Property and Casualty Underwriting program (CPCU) to be an outstanding foundation for all aspects of claim work, as well as similar programs such as Associate in Management (AIM), Associated in Reinsurance (ARe), Senior Claim Law Associate (SCLA) and Certified Legacy Insurance Professional (CLIP). I don't yet have the CLIP designation!

Potential second career

I would like to get involved in providing financial advice on a volunteer basis. United Way has a program to provide financial planning and/or tax advice in the Hartford area and I am looking to join that program this fall.

What do you like best about your current position?

I enjoy working with a number of business partners across the industry. The insurance industry is full of talented and interesting people with a wide variety of backgrounds. In assumed and ceded reinsurance claims, the relationships continue forever — even when we commute. I like the work and, while it seems amazing after 20+ years in the runoff business, new things come up on a regular basis. Lastly, The Hartford is a great place to work, which is why I have been there for 32 years.

What is your favorite book?

All of John Grisham's novels. I love a legal thriller and find all of his books to be a fun read. I can't wait for the next book to be published.

What might people be surprised to know about you?

I was a cheerleader at the University of Massachusetts as an undergrad. It was a great way to see the football and basketball games.

What sorts of trends do you see in the industry?

I have spent 25-plus years managing runoff claims and based on what I am hearing and seeing in our industry, I don't see runoff or discontinued lines going away any time soon. I think the recent PwC Global Insurance Runoff survey and the recent AIRROC Runoff Deal Market Forum highlighted the trends nicely. PwC estimates a $350 billion U.S. Runoff market and the panel at the forum projected it to be growing even larger (see https://tinyurl.com/yazbxm3b). The study also notes that there are a multitude of exposures beyond asbestos and environmental, and an increased focus on effectively managing the runoff business. I see challenges and opportunities for years to come.

How did you get involved with AIRROC?

I first became involved in discussing the need for a legacy insurance association in 2000, when I began working for Andrew Maneval handling assumed claims. We had ongoing discussions for a number of years until AIRROC was formed in 2004. Andrew and I both had a strong belief that there was a need for an industry group for insurance and reinsurance companies to get together and work through common interests and issues. Today more than ever, people recognize the importance of properly managing a legacy book, the importance of continued education, and communication within and outside the industry to allow us to address our common issues and concerns—the same goals as when AIRROC started in 2004. I am pleased to now have the opportunity to hold a leadership position as the Co-Vice Chair of the AIRROC Board of Directors for such an important industry association.

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Carolyn Fahey

Dancing with Dolphins

Message from the Executive Director

Dolphins are one of the most social of the animal species. Research has shown they have the ability to make friends and pods of dolphins can have 1,000 members or more.

I am just like the dolphin — I'm social and always making new friends at AIRROC where we have taken on an ambitious set of changes that I want to tell you about:

- We have a new location for AIRROC NJ 2018 at the Westin, Jersey City
- We have a new focus on runoff deals — "Art of the Deal" is the education theme for NJ
- We have new data on the size of the runoff market via PwC –$750 billion
- We have a new webinar training initiative in development

I'm happy to report an increase in interest in AIRROC and our members because of the focus on regulatory finality options. This has resulted in my being asked to speak at several regulator-only forums about how we can be a resource for information on runoff. Our Chicago Regional and Summer Membership Meeting yielded great turnout and solid education topics. Finally, be sure to read our Q&A with the Oklahoma Commissioner of Insurance where we discuss the enactment of another insurance business transfer law in Oklahoma, a big development for the market.

The next few months I will see many of my AIRROC "dolphin" friends in Philadelphia, Boston, New York, New Jersey and elsewhere. I look forward to those meetings and making new friends along the way. ●

Carolyn Fahey joined AIRROC as Executive Director in May 2012. She brings more than 22 years of re/insurance industry and association experience to the organization. carolyn@airroc.org

AIRROC Moves to Jersey City

for the 14th Annual NJ Commutations & Networking Forum

Mark your calendars: AIRROC's biggest event of the year will be held from **Sunday, October 14 to Wednesday, October 17, 2018**.

The AIRROC Board of Directors looks forward to seeing you at the upcoming networking forum. This year we will all experience, and enjoy a new and exciting venue, The Westin Jersey City Newport, located at 479 Washington Boulevard in Jersey City, New Jersey.

The hotel is just a few hundred yards from the Hudson River with spectacular views of the New York City skyline. It is less than 15 minutes via the PATH train to New York City, and boasts a number of restaurants and shops close by, as well as the full-service amenities expected from a fine hotel. "We chose The Westin based upon feedback that we received from many of AIRROC's members and delegates who asked us to consider a location closer to the city. Not only does it offer beautiful facilities and rooms, but it is very close to Manhattan as well as the major airports," said AIRROC's Executive Director, Carolyn Fahey.

Another exciting change is that we are structuring the Education Day around the "Year of the Deal" to keep the momentum going from the excitement around the June Runoff Deal Forum program which was brand new for AIRROC this year. The sessions will focus on the current deal environment, deal structures, due diligence, systems migration, and the regulatory landscape.

The event offers many features that continue to make it an industry "must -attend." Delegates benefit from two full days of reserved networking tables on Monday, October 15 and Tuesday, October 16. "We already have more than 60 companies represented among the delegates registered," said Fahey.

On Monday evening, AIRROC will be hosting a reception and dinner at Maritime Parc, a short distance from The Westin. Learn who AIRROC has chosen as the 2018 Person of the Year as well as meet the recipient of AIRROC's 2018 Trish Getty Scholarship.

Tuesday again provides for the opportunity to schedule meetings all day with other event attendees in order to progress matter between companies.

We will adjourn at noon on Wednesday October 17.

Ed Gibney,
Event Committee Chair

There will also be a two-hour cocktail reception early on Tuesday evening for all meeting attendees.

We look forward to seeing you at AIRROC NJ 2018!

Go to www.airroc.org and register now!!!!!

2018 Registration Rates

- AIRROC Members get one free registration per company; additional delegates from member companies pay only $695 (after September 14, $795)
- AIRROC Corporate Partners can register at the member rate of only $695
- Non-member rate is $995 (after September 14, $1095)
- Monday Education Sessions only, $295 for members and $495 for non-members
- Monday evening dinner only, $295 for members and non-members
- Meeting table reservation fee is $500 for members and non-members

Sponsorship opportunities are available. Please contact Carolyn Fahey at carolyn@airroc.org for more information.

Hotter than *Hamilton*

Runoff Deal Market Forum

By Connie D. O'Mara

The runoff market is almost as hot as tickets to *Hamilton.* That was the clear conclusion of a recent event sponsored jointly by AIRROC and Mayer Brown. In case you missed it, one panel member joked that there will be an "app" for runoff deals by next year. While a packed audience laughed at that line, the PwC Global Insurance Runoff Survey as well as the views from a highly distinguished panel of buyers and sellers presented a picture of rampant market appetite for runoff deal making. The momentum of 2017 is projected to continue into the foreseeable future. Here are some key take-aways:

1) An increased level of capital is flowing into the runoff sector. Returns on investment exceed returns in the active P&C market.

2) While Berkshire Hathaway may be the dominant player in large, long-tail deals, they are getting competition for mid-to-large deals from new players in this space and a strong group of competitors with increased capital. There are also small niche players and capital solution providers. This creates a wide portfolio of options for restructuring that can be tailored to a seller's needs and generates more competition regarding price.

3) The mix of business, traditionally long-tail asbestos, environmental and other health-hazard claims on policies expiring in the last century, is now changing. Underwriting years as recent as 2017 and multiple lines including auto third-party, self-insured programs and specialty construction are being included (e.g. QBE deal with Enstar, January 2017; Arch deal with Catalina, April 2018).

4) Whether the sales opportunities are being shopped around as the result of mergers and consolidations or by companies hoping to free up capital tied to underperforming business, some type of sale or transfer of exposures (auction, loss portfolio transfer, adverse loss development covers) is considered a critical strategy tool for optimizing the seller's balance sheet.

5) The key gap in the U.S. runoff market for companies seeking finality on legacy business is the lack of state supported exit mechanisms such as a UK Part VII transfer; while Rhode Island adopted Insurance Business Transfer legislation in 2015, and Vermont has passed Loss Portfolio Transfer legislation, a similar recently enacted statute in Oklahoma is broader. Other states are considering such measures, so there seems to be support developing in the regulatory arena.

6) Effective use of capital for runoff companies is focused on optimal claims management, reinsurance recovery, and the retention of personnel to manage loss development and expenses.

7) Data migration and systems present significant challenges for acquiring companies.

This first-ever AIRROC event gave attendees an opportunity to hear from major players in the evolving runoff market. It also set the stage for more in-depth discussion of these topics at the 14th Annual AIRROC NJ Commutations and Networking Forum from October 14th–17th at the Westin Jersey City Newport in Jersey City, NJ.

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CHICAGO

Educational Summaries

Chicago Annual Regional June 12, 2018

For the 6th year, AIRROC blew into the Windy City for a full day of education on June 12, 2018. The Chicago Annual Regional was hosted in the headquarters of the American Bar Association and co-hosted by Allstate and CNA. Our presenters and sponsors shared their expertise on a diverse set of topics with the participants. Thanks are extended to sponsors Butler Rubin Saltarelli & Boyd, Foley & Lardner, Freeborn & Peters, Husch Blackwell, Kennedys CMK, Mound Cotton Wollan & Greengrass, and Rimkus.

Flood Insurance 101

The National Flood Insurance Program (NFIP) has been in existence since it was created by Congress through the National Flood Insurance Act (NFIA) of 1968 to respond to the rising cost of tax-payer-funded disaster relief for flood victims. The NFIA granted FEMA (Federal Emergency Management Agency) the authority to establish and manage the program which allows interested persons to purchase flood insurance. A mortgage company may also require a property owner to purchase a certain amount of flood insurance coverage.

Buying flood insurance requires maintenance of reasonable flood standards. This can be too costly for some municipalities and is the reason flood insurance is not available in much of Puerto Rico. Instead, areas such as these rely heavily on federal aid under the Stafford Act and other programs. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) is a United States federal law designed to bring an orderly and systematic means of federal natural disaster assistance for state and local governments in carrying out their responsibilities to aid citizens.

Another flood insurance option is the Write Your Own (WYO) program which began in 1983. This was a cooperative undertaking between the private insurance industry and FEMA which allows participating insurance companies to write and service the standard flood insurance policies (SFIP) in their own names. The federal government retains responsibility for underwriting all losses and will back all flood policy claim payments made by a WYO insurance company. A WYO insurance company is subject to NFIP rules and regulations.

A Standard Flood Insurance Policy (SFIP) is a single-peril (flood) policy that pays for direct physical damage to the insured property. Replacement cost is covered if certain conditions are met, otherwise the policy will pay actual cash value. Under the NFIP these policies can be purchased through an insurance agent. The policy is then issued directly by the NFIP or by the participating WYO company.

Coverage under an SFIP is very specific. Some exposures are only insured under certain circumstances and some are not covered at all (living expenses such as temporary housing), so read the fine print! Also, SFIP coverage for building contents must be purchased separately. The claim process is fairly standard—a loss is reported and an inspection is completed. The Proof of Loss (POL) is prepared and once the insured signs off, the claim is paid. An insured may qualify for an advance payment where the initial POL requirement is waived with the flood damage assessment report submitted instead.

Considering the costs associated with some of the recent significant floods in the US—since Hurricane Katrina in 2005, the NFIP has paid out over $47 billion in flood insurance claims—it was only a matter of time before reinsurance came into play. Federal legislation in 2012 and 2014 granted FEMA authority to secure reinsurance from private reinsurers and capital markets. The NFIP reinsurance program helps FEMA manage future exposure of the flood program through transfer of risk to private reinsurers. Hurricane Harvey caused losses estimated at around $9 billion. Under the NFIP reinsurance program, FEMA recovered a little over $1 billion from private markets.

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Artificial Intelligence: The Next Frontier

Presenters Kathleen Fox, Tina Matic, and Nicholas Rosinia, Foley & Lardner LLP, shared their insights into the expansion of artificial intelligence (AI) in all facets of everyday life, including potential insurance implications. What was once thought of as novel technology, is now considered routine and commonplace,

Photos / Jason Gerber

as single-task AI has broadly developed in all uses; e.g., SIRI, virtual personal assistants, purchase prediction software, fraud detection, online customer support, and Netflix. While these single-task AI applications have seen profound development, general AI, wherein computers possess the level of intelligence of humans, is still emerging. The consensus of the presenters was that the pace of advancement in AI technology is attributed to the availability of big data sources, more powerful computers, and industry investment and support.

The presenters emphasized the advancements in AI in virtually every sector, such as self-driving cars, "chatbots" providing investment advice, AI monitoring employee tracking and productivity, AI interpreting radiology results, virtual nursing assistants and the development of prototypes in robot-assisted surgery. The presenters explained that the insurance industry is also seeing advancements through the use of AI in the underwriting process, enhancing speed, quality and efficiency. Along with development of touchless claims which uses AI to report the claim, capture damage, audit and communicate with the insured, Additionally, the industry has seen development of fraud reduction algorithms identifying data patterns flagging fraudulent claims. As the presenters explained, AI is pervasive across industries and rapidly becoming the norm. The presenters agreed that AI applications will continue to grow over the next decade.

The presenters then turned to a discus–sion regarding legal developments surrounding AI. The significant takeaways from the presentation is that the law relating to AI remains in its infancy and is continually developing. The small number of cases that have sought relief associated with AI concerned plaintiffs pursuing claims under traditional products liability, negligence and intentional tort theories. The scope of implicated parties in these types of lawsuits affects a wide array of industry participants, e.g., software developers, hardware developers, technology providers, distributors, and end users. Ultimately, how courts and legislators will address AI-related losses remains uncertain.

Next, the presenters raised various questions concerning coverage for AI losses under specific insurance products, e.g., CGL, cyber/data privacy, first-party, workers' compensation, business interruption, errors and omissions, and cyber. The presenters noted unique challenges for underwriting such losses, whether such losses fall within the insuring agreement, the impact of exclusions, and implications for companies that implement their own AI.

The presenters concluded highlighting that the increased use of AI and its significant growth has put the need for insurance coverage into sharp focus. While the coverage is available, claims, and case law are still developing; and there are certainly more questions than answers. The insurance industry will need to adapt to this everchanging landscape of technology.

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The Opioid Epidemic

The opioid epidemic is a crisis which encompasses the misuse of prescription and non prescription opioids in the United States. Opioids are a class of drugs that bind opioid receptors in the brain which blocks pain, slows breathing, has a calming effect, and an antidepressant effect. Statistics have shown Americans consume ten times the opioids of other countries. Hence, it has resulted in numerous legislative actions against pharmaceutical companies, manufacturers and distributors driving class actions suits and multidistrict litigation resulting in excessive insurance costs. There are three classes of opioids: natural (morphine and codeine), semi-synthetic (hydrocodone, oxycodone, and heroin), and synthetic (methadone and fentanyl). In the 1990s, doctors were afraid to prescribe opioids. However, it was believed that pain was undertreated and experts called for better pain assessment. In 2000, the Joint Commission on the Accreditation of Healthcare Organization announced pain standards for healthcare organizations. As a consequence, pain was considered "the fifth vital sign" and significantly increased the prescription of opioids resulting in an epidemic in the United States.

Accordingly, approximately half of the United States opioid market is treatment for non acute/non-cancer pain. From 2000 to 2016, approximately 600,000 people in the United States have died from a drug overdose which is estimated that 66% involved an opioid. Further, nearly 80% of Americans using heroin reported using prescription opioids

Educational Summaries (continued)

first. Heroin use has shifted from predominately minority men living in the cities and increased among most demographic groups.

As a result, there have been several legislative actions in 2018: (1) Attorney General Jeff Sessions announced that the DEA would conduct an operation to focus on pharmacies and prescribers who are dispensing unusual/disproportionate amount of opioids; (2) DOJ established the Prescription Interdiction and Litigation Task Force examining state and local government lawsuits involving opioid manufacturers; and (3) DOJ filed a "friend of the court" brief in the Multi-District Litigation seeking to provide the federal government's expertise and legal counsel to the court.

State and local governments are suing "Big Pharma" for costs associated with the opioid crisis. State Attorneys General in 41 states are investigating the role of pharmaceutical companies seeking the information how the companies market and sell prescription opioids. Actions are against manufacturers, distributors, and pharmacies. Additionally, there has been an increase in class action suits which include individuals and corporate entities that purchased health insurance, including individuals who paid for part of an employer-sponsored insurance plan resulting in increased healthcare costs covered by private insurers—$14B increase in nationwide private health insurance costs in 2013. The numbers have increased throughout the years and resulted in multidistrict litigation to reach universal settlements.

Due to these suits, the insurance policies that have been affected include: CGL which might come within the scope of coverage due to "occurrence" and "bodily injury" allegations. However, policies might not afford coverage because of the products exclusion. D&O generally cover defendants facing shareholder actions, derivative suits, and government inquiries and investigations. Doctors and pharmacists may be sued for opioid overdoses. Intentional versus negligent conduct is paramount for insurance coverage. Doctors and worker comp advocates argue that injured workers gave up their right to sue employers with the expectation they would receive comprehensive medical care.

In conclusion, there is an opioid epidemic in the United States which has been statistically proven. It has resulted in numerous legislative actions against pharmaceutical companies, manufactures and distributors driving legislative, class action suits and multidistrict litigation resulting insurance costs.

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Is Talc the New Asbestos?

Practically every baby in America has been dusted with it and many adults use it on a daily basis to stay fresh and dry. Talc is a clay-based mineral mined throughout the world. It is made up primarily of magnesium, silicon and oxygen. Talc, classified in two general types — cosmetic and industrial—is used in many applications. In cosmetic uses it can absorb moisture, prevent caking, make facial makeup opaque or improve the feel of a product. Talc is also used in food preparations like polishing rice and the manufacture of chewing gum and pharmaceutical tablets. But is talc making people sick?
Early litigation focused on the purity of talc which originally contained asbestos as the two minerals are often mined near each other. Asbestos, once thought to be the "miracle mineral," has now been shown to be the cause of many diseases. Since the 1970s, talc used in all consumer products has been required to be free of asbestos.

Nowadays, people are filing lawsuits against talc manufacturers over claims that talc exposure has led them to develop diseases such as mesothelioma or ovarian cancer. Talc is being demonized in the media and these allegations are angering juries who are responding with huge verdicts. As of May 2018, juries have awarded more than $900 Million to people who blamed talcum powder use for causing cancer.

If you are faced with a lawsuit involving talc, consider the advice provided at the recent AIRROC Education Day in Chicago. During her presentation, toxicologist Dr. Annette B. Santamaria, cautioned defendants to look closely at the types of studies being cited by plaintiffs in prosecution of their claims. The topic of talc safety is a growing debate in the scientific community. Some studies have found talc causes an increased risk of disease while others have not. The fact is that, to date there are no epidemiological studies showing any link between talc and cancer.

Jeffrey Odom, of Lane Powell advises there are several steps your defense counsel can




take which may help win your case. First, consider the jurisdiction. There are limits on where a defendant can be sued and jurisdiction can have a huge impact on a case. Plaintiffs tend to file cases in venues which they know are sympathetic. If there is no legitimate relationship between the defendant and the forum where the case is filed, counsel can work to get the case moved to a less plaintiff-oriented jurisdiction, to the federal level or possibly even get the case dismissed.

Another strategy for defense attorneys is to take the time to educate judges and juries with accurate scientific information. Don't allow a jury to be captivated by unsubstantiated medical claims or their own false assumptions. Take the opportunity to research and cite your own scientific data in support of your position. Also, make the plaintiffs expert a defense expert! Don't be afraid to wade through the foundation and get them to help you prove your facts. With your experts testimony calling out the lack of scientific proof, your position will be that much stronger.

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Legal Roundup

Melissa Baris, David Timmins and Scott Davis of Husch Blackwell presented "Legal Roundup: Recent Notable Court Decisions and the New Restatement of the Law of Liability Insurance." First, Melissa discussed the erosion of Bellafonte, using an example of an insurer that issued a policy requiring it to indemnify and defend, with defense costs outside of policy limits. In this example, the insurer also purchased facultative reinsurance, with limits of \$1 million, and paid indemnity to the original insured totaling \$1 million, plus defense costs. The question for analysis: Was the reinsurer's liability to the insurer under the certificate capped at \$1 million, or was the reinsurer also responsible for defense costs outside of limits? In Bellafonte, the court held that the Reinsurance Accepted amount was a cap on all payments by the reinsurer, including defense costs, deciding that under the certificate language, the reinsurer's obligations were unambiguously "subject to" the "amount of liability." However, Melissa reported that in a series of recent cases, courts have retreated from Bellafonte, holding in similar situations that the limitation of liability provisions are ambiguous as to whether they include expenses. Melissa opined that in this post-Bellafonte world, courts will look to specific policy language and extrinsic evidence, including evidence of underwriting intent and industry usage.

Next, David Timmins examined allocation and the unavailability exception via Keyspan East Gas Corp. The Keyspan case involved the plaintiff suing for indemnity for clean-up costs associated with long-tail contamination. In the trial court, Century filed a MSJ, arguing that pro rata allocation applied. In response, Keyspan argued that the allocation period should not include years in which insurance was not available in the marketplace. The trial court mostly agreed with Keyspan, holding that Keyspan was responsible for those years in which insurance was available but it did not buy it, and Century was responsible for those years in which insurance was not available. In the Appellate Division, the court reversed based on the policy language. The court certified the question to the New York Court of Appeals, in which the Appellate Division decision was affirmed, rejecting the unavailability exception. The Court held that the unavailability exception was inconsistent with the expectations of the insurer and the insured, as well as public policy.

Finally, Scott Davis discussed the draft ALI Restatement of the Law of Liability Insurance. While the draft has not been approved, courts have cited to the draft. Scott detailed some key provisions of the Restatement, emphasizing inconsistencies between the information in the Sections and the Comments, as well as significant departures from established law. For example, Section 27 provides that a carrier failing to reasonably settle will be liable for the full amount of any resulting judgment. A Comment states that these damages would include punitive exposure, even if the policy excludes coverage and/or punitive damages are not insurable. While, the Reporters' Notes acknowledge that every court has rejected this rule, the Restatement relies on dissenting opinions. Overall, the Restatement contains some novelties worth examining. •

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New York

Summer Membership Meeting

Networking and Education, NYC July 18, 2018

Even in the sweltering heat and thunderstorms, AIRROC took a bite out of the Big Apple at the Summer Membership Meeting on July 18, 2018. Much of the business was completed and new information was conveyed with the presentations crafted by the Education Committee for our attendees. If you missed it … here is what we learned.

What is Blockchain and what can it do for the Insurance Industry?

Christopher Grant McDaniel, President of The Institutes' RiskBlock Alliance and Edward Diffin, Partner at Freeborn & Peters, presented an overview of blockchain and distributed ledger technology, potential uses in the insurance industry, and issues that may arise as the technology is further developed. One of the use cases discussed involved an auto accident involving two vehicles. Today, after the incident is assessed by the parties involved, the drivers typically exchange insurance information. With the use of blockchain or distributed ledger technology behind the scenes the simple step of exchanging proof of insurance would be a matter of tapping the drivers' phones together. Another case discussed involved trucking companies. Trucking companies wishing to transport a load currently go through a 30-minute manual process for each load to prove they are insured to transport that particular load. This thirty minutes of downtime would disappear if the information was immediately available in a trustworthy source in one place. When you consider one trucking company does this process 200,000 times per day, you can see the savings that could be generated.

Blockchain is a distributed ledger replicated across a network of nodes. These nodes process transactions where every new transaction is built upon a portion of the previous transaction. In this way the ledger becomes immutable since changing one transaction a year ago would require changing every transaction that followed it. The salient characteristics of this emerging technology encapsulate an immutable and encrypted system of record that is entirely decentralized making it more or less indestructible. If ever there were to be a data entry mistake, an amendment can be entered alongside the existing data for that transaction. Distributed ledger technology also affords "smart contracts"— a decentralized bit of instructions or code that can be executed in real time given certain conditions are met. Smart contracts are rather like a vending machine dispensing a product in response to a series of actions. For example, if one purchases flight insurance in case of a delay, a non-biased data stream can trigger the instruction of a smart contract to execute and payout for the loss.

The examples of distributed ledger technology illustrated above are either existing or potential "use cases" of the RiskBlock Alliance consortium. Christopher Grant McDaniels shared a slide that listed the "wish list" of use cases, as well as another with a list of member companies currently participating in the consortium. The RiskBlock Alliance is a non-profit organization, industry-led blockchain consortium for the risk management and insurance industry that is developing this technology with a view to real production value. The framework is called Canopy, and Canopy 2.0 is an ecosystem in which distributed ledger technology software can be developed by participating member companies using the Canopy tools and frameworks to expand the ecosystem, developing further use cases and creating greater value.

Edward Diffin then discussed the various issues, both regulatory and contractual, that may arise in the implementation of this technology. He stressed that the technology is still in its infancy, so there are legal questions that still need to be answered. He noted that ordinary contract law principles should be considered when evaluating smart contracts. Since "nodes" can be located anywhere, and contract/regulatory law can differ from jurisdiction to jurisdiction, determining the law that is applicable to a blockchain may be difficult. Edward suggested having a traditional contract not on the blockchain, but linked to it, that provides what the parties intended with regard to use, their agreement to be bound by the "smart contract," and choice of governing law and jurisdiction, as well as a dispute resolution clause to be followed. The blockchain ledger would then be operating like a DocuSign for a traditional contract.

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Photos / Jean-Marc Grambert




U.S. and UK

The panel focused on four items: (1) The National Association of Insurance Commissioners ("NAIC") Insurance Data Security Model Law; (2) The New York Department of Financial Service ("NYDFS") Cybersecurity Regulation; (3) the EU General Data Protection Regulation ("GDPR"); and (4) US State Law Regulatory Updates. Here is a quick overview of each.

- **NAIC Insurance Data Security Model Law** — In 2017, NAIC promulgated a model law that establishes a legal framework for requiring insurance organizations to operate sophisticated cybersecurity programs to protect the security of "Nonpublic Information" and "Information Systems." The law applies to any individual or nongovernmental entity licensed, authorized, or registered under the insurance laws. Exceptions include licensees with fewer than 10 employees. South Carolina became the first state to adopt the Model Law on May 3, 2018, which will go into effect on January 1, 2019, with compliance requirements fully enacted by July 1, 2020. Several other states are in the process of adopting the NAIC model law.

- **NYDFS Cybersecurity Regulation–** The NYDFS Cybersecurity Regulation was effective March 1, 2017 and is applicable to any organization that is regulated by DFS. Certain companies are exempted such as those with fewer than 10 employees, those with less than $5 million in gross annual revenue for three years, or those with less than $10 million in year-end total assets. Companies were required to be compliant with most provisions by August 28, 2017, however, certain provisions are still subject to the transition period.

- **GDPR —** The GDPR became effective on May 25, 2018 in all EU Member States. The GDPR rules apply to almost all private sector processing of personal information by organizations in the EU or by organizations outside the EU which target EU residents. GDPR outlines specific responsibilities for organizations to ensure privacy and protection of personal data, provides individuals with certain rights, and provides regulators with certain tools to ensure compliance with the regulation. The maximum fines for non-compliance are the higher of € 20m and 4 percent of the organization's worldwide turnover.

- **State Law Updates** — As of March 2018, all 50 U.S. states, as well as the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands, have enacted breach notification laws that require businesses to notify consumers if their personal information is compromised. In addition, numerous U.S. states have recently introduced and passed new legislation to expand earlier data breach notification rules including to broaden the definition of personal information, mandate that certain information security requirements are implemented, and to mirror some of the significant protections provided by the GDPR. In 2018 alone, Alabama, Arizona, California, Colorado, Iowa, Louisiana, Nebraska, Oregon, South Carolina, South Dakota, Vermont, and Virginia, have enacted or updated their data breach notification laws. More states are expected to follow this trend.

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Perspectives in Telemedicine and Healthcare Risk Management

The morning session included a presentation by Brian Kelly and Mike Midgley of Swiss Re on the revolutionary technological progression in the healthcare industry, changing the way we access, deliver and receive care. They discussed some of the current applications and future possibilities for expansion and use, including in the workers' compensation sector in which it is not yet prevalent but ripe for application. Also highlighted were some of the associated risks and challenges telemedicine poses for the insurance industry, such as with professional liability and general liability lines as well as other enterprise risk management considerations.

Telemedicine is a significant and rapidly growing component of modern healthcare in the U.S. It is becoming increasingly popular and experiencing a growth surge. According to recent studies, 60% of physicians were interested in using video appointments. 90 % of healthcare executives said their

New York





Educational Summaries (continued)

organizations are currently implementing or developing telemedicine programs and experts estimate that telemedicine will attract 7 million patient users by 2018. Over 250 pieces of legislation have been proposed in over 40 states regarding telemedicine. Also at the state level, 33 states have mandated private payer reimbursement for telemedicine services. Telemedicine is being embraced by consumers, providers and insurers alike.

The official definition of "telemedicine" is the use of telecommunication and information technology to provide clinical healthcare from a distance. It has been used to improve access to medical services that would often not be consistently available in rural communities. Many rural communities are described as primary care deserts. Telemedicine can lead to better quality care with more health care provider interaction. It allows for more frequent follow-ups to manage chronic conditions. It may also be a quicker way for routing to preferred professionals to get a second opinion on a medical diagnosis. Patient convenience is a significant factor in users expressing a preference for telemedicine care options. Generally, telemedicine encounters are less costly than in-person visits and once the initial investments in the technology is made, it can lead to sustained cost savings.

Although telemedicine holds a lot of promise for primary care providers and patients, it is not without potential drawbacks. One such drawback is that not all procedures a patient may need can be performed remotely. Physical therapy, for example, frequently requires the use of equipment and often the personal face-to-face motivation of the therapist cannot be replaced. Other barriers include compliance with state laws and regulations. Doctors must be licensed in each state and issues arise when crossing state lines. Skeptics are also critical as to whether it will actually result in substantial cost savings or be cost neutral. Cybersecurity is also of grave concern implicating privacy and security issues. Compliance with legal and regulatory rules also present barriers. HIPAA requirements are applicable as well as rules on documenting patient encounters and prescribing drugs for pain management.

Telemedicine presents a distinctive set of risk management concerns. Risk




managers and insurance professionals recognize a multitude of potential risks associated with telemedicine services. Using an enterprise risk management (ERM) approach, risk managers assess these risks categorized into eight domains: operational, clinical/patient safety, strategic, financial, human capital, legal/regulatory, technology and hazard. Addressing important telemedicine risk issues will allow the organization to set standards and guidance around these services and be acutely aware of potential risk matters. Mitigating the risks of telemedicine allows the organization and clinical providers to deliver safe and trusted health care to patients as the use of telemedicine multiplies.

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#MeToo or Not Us

Nicole Stover and Jeffrey Grossman of Stradley Ronon Stevens & Young led a discussion on the highly charged topic #MeToo or Not Us: Revisiting Workplace Sexual Harassment Prevention and Response.

Given the increasing numbers of workplace sexual harassment claims and the corrosive effect they have on an organization's culture as well as their propensity to result in low employee morale, reduced productivity, and even institutional civil and individual criminal liability, many large corporations have begun offering employee training at all levels. The subtopics of training may include current trends and predictions, steps all managers can take to encourage reporting by employees (including witnesses, to such behavior, direct or indirect, involved or uninvolved) and training in leadership and accountability, civility training and the cost to the organization's financial standing and reputation in the community. Role playing has also become an element of training employees and managers in this increasingly relevant topic that cuts across all industries and most notably into government and Hollywood.

Mandatory annual sexual harassment training for employees in New York City is one feature of a package of legislation targeting sexual harassment in the workplace signed by Mayor Bill de Blasio on May 9, 2018. Most private employers in New York City will be required to conduct annual sexual harassment training for employees beginning April 1, 2019.

Further, the New York City Human Rights Law now includes new provisions applicable to small employers (those with fewer than four employees) with respect to claims of sexual harassment. This aligns the NYC Human Rights Law with the New York State Human Rights Laws coverage of sexual harassment claims.

Further, effective immediately, the statute of limitations for filing harassment claims with the New York City Commission on Human Rights is three years, rather than one year, from the date of the alleged conduct.

In addition to also imposing training requirements, New York State law will impose policy requirements and affect the use of nondisclosure agreements in the context of settling sexual harassment claims against employers.

The recent significant amendment to the Internal Revenue Code, Public Law No: 115-97 (the Tax Cuts and Jobs Act) disallows as "necessary and ordinary business expenses" deductions of payments in settlement of an action for sexual harassment or sexual abuse, if the settlement or payment requires the parties to enter into a non-disclosure agreement. This includes the payment of attorneys' fees related to such a payment or settlement, if they are included in the scope of the non-disclosure agreement.

The presenters also discussed the impact of such claims in future policies covering EPL, GL and D&O liabilities, led a discussion of hypothetical fact situations requiring smart management in the workplace and speculated as to the eventual expansion of the scope of laws designed to inhibit such acts by prohibiting settlements of actions for gender discrimination in compensation and the expansion beyond sexual harassment to other forms of harassment. ●

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News & Events

Francine L. Semaya & Peter H. Bickford

Regulatory News

Insurance Business Transfer Laws and Regulations — What's New?

On May 7, 2018, Oklahoma Governor Fallin signed the Insurance Business Transfer Act, which becomes effective Nov. 1, 2018. This new law provides a court supervised mechanism for insurance companies to divest blocks of business to Oklahoma domestic insurers without the onerous process of commutations or the affirmative consent of insureds. The Insurance Business Transfer Act applies to all lines of business, not just Property & Casualty. Under this law, blocks of business may be transferred from active insurers, reinsurers and insurers in receivership. For more information on the Act, see our in-depth interview with Oklahoma Insurance Commissioner John Doak, conducted by AIRROC's Executive Director Carolyn Fahey and Communications Committee member Fran Semaya, which can be found on Page 6.

The passage of this Act is timely considering the results of the PricewaterouseCoopers' Global Run-Off Survey, issued in January 2018, which found the U.S. to be "the largest single discontinued non-life insurance market in the world with an estimated value of US$335bn." Oklahoma is now added to a growing list of states that have adopted some form of regulatory mechanism for solvent runoff schemes and transfers, including Vermont, Rhode Island, Connecticut and Pennsylvania.

NAIC Annuity Rule

The National Association of Insurance Commissioners, currently drafting an overhaul to its annuity sales model law, most likely will not impose a fiduciary standard on insurers and insurance producers. The NAIC, has been working on more stringent annuity rules following the stricter investment advice standards enacted by the Department of Labor's fiduciary rule. The latter went into effect last June but was recently struck down by the 5th circuit court, a decision that went unchallenged by the current administration. The NAIC rule would apply to fixed and indexed annuities.

Compare the NAIC proposal to New York's recently amended Regulation 187, its suitability regulation, effective as of August 1, 2018, wherein the best interest standard is applicable to all sales of life insurance and annuity products prior to the sale and during the servicing of the product. The New York rule applies not only to new sales but to in-force transactions as well. Other states have either adopted laws or are considering taking action, but only New York's rule is active.

Industry News

According to a July 2018 report by Pricewater-houseCoopers (PwC), the first two quarters of 2018 saw 247 announced merger and acquisition deals in the insurance sector with a total disclosed deal value of $28.6 billion, compared with 302 deals worth $10.1 billion in the first half of 2017. The bulk of the value primarily is the result of two blockbuster deals announced in the first quarter: AXA SA's acquisition of XL Group Ltd, for $15.4 billion and American International Group's acquisition of Validus Holding Ltd. for $5.6 billion. The largest transactions in the second quarter were not acquisitions of other companies but a $2.75 billion IPO by AXA SA, and a controversial plan to take AmTrust Financial Services, Inc. private through a $2.95 billion purchase of stock.

There was some M&A activity of note, although far from the blockbuster category. In July AXA, in addition to its XL Group purchase and the IPO, also announced that it was acquiring a majority stake in Emirates Re, an Islamic reinsurer handling retakaful business, the Islamic alternative to reinsurance. The acquisition will be made through its specialist runoff acquirer and manager and an AIRROC member, AXA Liabilities Managers (AXA LM). AXA Liabilities Managers also announced in July that it had made its 18th legacy acquisition on the open market by acquiring the legacy assumed portfolio of Cologne-based Gothaer Finanzholding A.G.

In late July it was announced that U.S. private equity giant Apollo Global Management LLC was close to buying Bermuda-based Aspen Insurance Holdings in an all-cash deal. The specific terms were not available although the company was valued at about $2.4 billion in late July.

PwC predicts the likelihood of continued M&A activity through 2018 because of the positive effects of federal tax reform and the economies of scale on updating technology.

There was one other significant merger announcement in the second quarter affecting the insurance sector, but not involving the merger of insurers. In June, two leading U.S. property/casualty insurance carrier trade groups announced that they were talking about merging. The American Insurance Association (AIA) and the Property Casualty Insurers Association of America (PCI) said their respective boards have approved moving ahead with merger talks and due diligence, although there is work to do before any final recommendation is put before member companies. According to the lobbying groups, the merged association would speak for approximately 60 percent of the U.S. property/casualty market.

If the merger happens it will leave only two national groups representing primary property/casualty insurers on the national stage and in state legislatures: the newly merged group and the National Association of Mutual Insurance Companies (NAMIC).

Present Value (continued)

New Corporate Partners

AIRROC is pleased to welcome two new international law firms as corporate partners: Dentons and Husch Blackwell.

Dentons is the world's largest law firm with more than 58 locations serving 65+ countries, and is pleased to serve as a corporate sponsor of AIRROC. "We hope that our affiliation with AIRROC will serve to enhance market awareness of our strengths and expertise in the insurance runoff space. We routinely advise on exit solutions for discontinued and legacy businesses, including portfolio transfers, commutations, mergers and acquisitions, and reinsurance arrangements, amongst other matters. When disputes arise, we are uniquely positioned in the market to successfully resolve such matters, whether litigated, arbitrated or commercially negotiated."

Husch Blackwell is an industry-focused business and litigation law firm that delivers innovative and strategic end-to-end solutions to insurers and reinsurers around the world. It has over 700 attorneys in 18 offices throughout the U.S. In its words: "Drawing on extensive industry knowledge and experience, we help clients achieve their business goals efficiently and cost-effectively. Our membership in AIRROC is an important piece of our strategy, allowing us to connect directly with the leaders in the industry to learn about and solve the pressing problems of the day."

People on the Move

AIRROC Publication Committee member Frederick Pomerantz is now the Managing Member of newly organized Insurance Legal & Regulatory Consulting, PLLC, primarily dedicated to the business, transactional and licensing needs of individuals and corporations in the insurance industry, coast-to-coast and overseas. Fred can be reached at pomerantzf35@gmail.com.

Scott Fischer, former executive deputy superintendent for insurance at the New York Department of Financial Services, has joined the national and international law firm of Morgan Lewis & Bockius LLP as a Partner in its New York office. Scott works with members of the firm's finance team focusing on multiple aspects of insurance representations, including restructuring and bankruptcy, transactional, and regulatory matters. He can be reached at scott.fischer@morganlewis.com. •

MARK YOUR CALENDAR

FALL 2018

SEPTEMBER 12
AIRROC
Boston Regional Education Day
Boston, MA
www.airroc.org

OCTOBER 11-12
IAIR Technical Development Series VI
The End of the Road: Issues in Closing Receiverships
Insurance Law Center
UCONN School of Law
Hartford, CT
www.IAIR.org

OCTOBER 14
AIRROC NJ
14th Annual Commutations and Networking Forum
Jersey City, NJ
www.airroc.org

OCTOBER 19
Insurance & Reinsurance Legacy Association Ltd. (IRLA)
IRLA Annual General Meeting
London
www.irla-international.com

NOVEMBER 9
Insurance Federation of New York (IFNY)
Annual Awards Luncheon
New York, NY
www.ifny.org

NOVEMBER 15-18
National Association of Insurance Commissioners (NAIC)
Fall National Meeting
San Francisco, CA
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

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Dentons' insurance team routinely advises on exit solutions for discontinued and legacy businesses, including portfolio transfers, commutations, mergers and acquisitions, and reinsurance arrangements, amongst other matters. When disputes arise, we are uniquely positioned in the market to successfully resolve such matters, whether litigated, arbitrated or commercially negotiated. Our team combines technical expertise with market knowledge and has close relationships with key regulators which enables us to offer practical, commercially-minded approach to all our cases.

"International Law Firm of the Year",
Legal Awards, 2017

"They... have a very strong commitment to the insurance space",
Chambers USA

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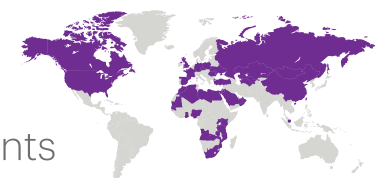
200
Insurance lawyers

50
States

5
Continents



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