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AIRROC matters

LEVERAGING LEGACY LIABILITY

Dispute Resolution: Warfare or Win-Win?

DISPUTE RESOLUTION SPECIAL EDITION • MEDIATION DIPLOMACY • GOOD/BAD FAITH
ACCESS VS. FOLLOW THE SETTLEMENTS • THE BRIDGE TO IAIR

AIRROC Soldiering On

Maryann Taylor & James Veach

As we celebrate the beginning of a new year, the Publications Committee welcomes a new co-chair, Keith Kaplan. We look forward to serving with Keith who joins our battle tested and triumphant co-chair, Leah Spivey, as we march forward to higher ground. We start the year off with a Special Edition on Dispute Resolution, a theme which we have covered in the past as a Special Edition (Spring 2008) but worth re-examining given that it is a mainstay of the run-off experience. In length, *War and Peace* this is not, but in substance, the collection of articles is expansive in scope, exploring some tactical and technical strategies as well as some diplomatic solutions.

Our lead article is an interview with our very own Editor and Vice Chair, Peter Scarpato, who sat down with Connie O'Mara to discuss the virtues of mediation in *The Art of Mediation Diplomacy: Letting the Other Side Have It Your Way*. Mediation is the "Win-Win" in our military metaphor in that it sets the stage for dispute resolution with less aggression and all-out war, where the parties shape their future and control the outcome.

Next, Michael Goldstein and Mónica Matos-Desa explore the tension between the access to records clause and follow the settlements doctrine in *Trust…But Verify: Do Access to Records and Follow the Settlements Conflict?* The take away sentiment is that a cedant's cooperation with a reinsurer's reasonable request for records will benefit all.

Bruce Friedman poses a real life dilemma and raises the question, "Are there consequences for a reinsurer's refusal to honor loss presentations?" in *Stretching Good Faith to the Breaking Point.* The piece provides a case study and contemplates changes to the current reinsurance dispute resolution mechanism to deter bad behavior.

We start the year off with a Special Edition on Dispute Resolution, a theme … worth re-examining given that it is a mainstay of the run-off experience.

Key Coleman gives us the lowdown on AIRROC's Dispute Resolution Procedure ("DRP") mock arbitration workshop held in Chicago on February 7, 2013. Hooah.

Steven Bazil and William Brady provide an analysis of the various state law treatment of interest in *Tactical Advantage Hidden in the Mixed Bag.* Advantageous jurisdictions that provide ample pre and post-judgment interest may act as a catalyst towards resolving debt collection disputes.

Another "Win-Win" situation to boast about is highlighted by James Veach. Jim brings us up-to-date on a joint cooperation agreement between AIRROC and the International Association of Insurance Receivers (IAIR). AIRROC and IAIR recently executed a Memorandum of Understanding, forging a strategic alliance which will benefit each party's members.

Carolyn Fahey offers us a taste of what is in store for 2013 in *A Virtual Beehive of Activity.* Becoming a Corporate Partner is just one of the many enhancements AIRROC has to offer that will ensure our continued success. Our Partners so far this year are Butler Rubin, Cozen O'Connor, Freeborn Peters and Locke Lord.

Finally, we close with *Present Value*, the inaugural edition penned by Fran Semaya and Peter Bickford who have taken over the reins from our fearless friend, Nigel Curtis.

We stand at attention and encourage your feedback.

Let us hear from you. ●

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AIRROC matters

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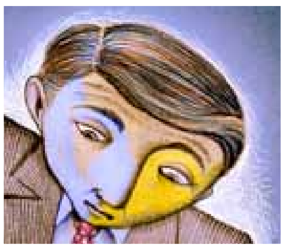

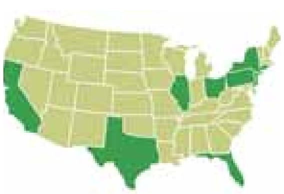

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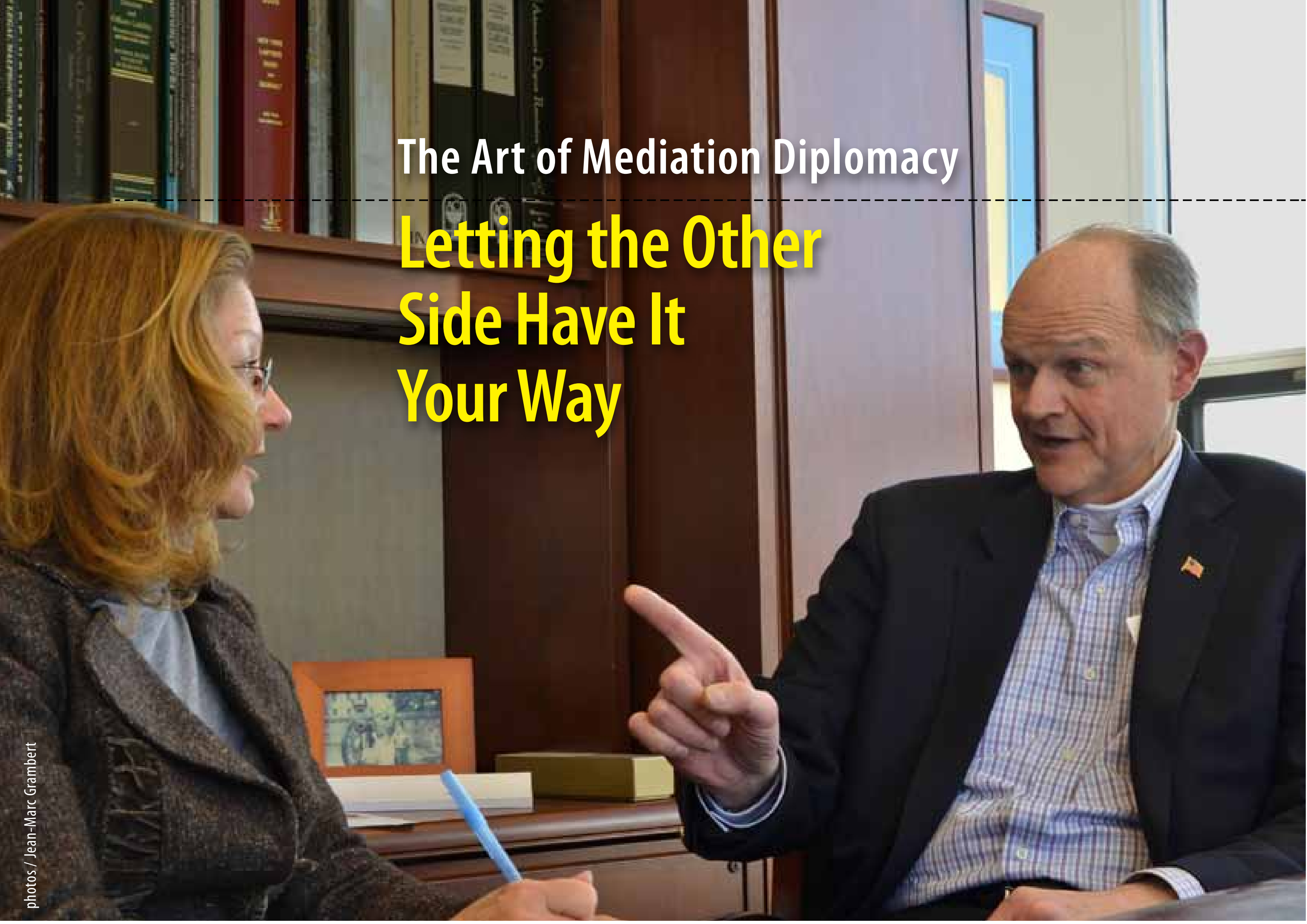
The Art of Mediation Diplomacy

Letting the Other Side Have It Your Way



photos / Jean-Marc Grambert

Peter Scarpato, a neutral in the National Academy of Distinguished Neutrals, and the indefatigable editor of this magazine, has been educating lawyers, company personnel, and parties to disputes about the benefits of mediation and how to get the most out of it. He is a founding Board Member of the Re/Insurance Mediation Institute, Inc., a non-profit created to foster the integrity and use of mediation to resolve insurance and reinsurance disputes. He agreed to give us his views on the state of mediation in the industry.

Connie: *Peter, what is the state of mediation in the insurance and reinsurance arenas these days?*

Peter: When you talk about insurance and reinsurance, we are considering two separate areas. For direct insurance claims, the use of mediation is stable because carriers continue to use it by private agreement or court order. Thus, for direct claims, it's pretty robust. On the reinsurance side, it is interesting because if you had asked me about a year and a half ago I would have said yes there is definitely an increase. I was receiving many calls for and had handled several reinsurance mediations. But, in the last year and a half it has tapered off. I don't really know why but I have some suspicions.

Connie: *What are your suspicions about the slow-down?*

Peter: My speculation is that after the financial crisis, companies were looking for alternative ways to resolve disputes without spending money on litigation. Now that a few years have gone by and the economy is getting back on track, there may be a return to litigation or arbitration as usual.

The number of arbitrations is also down in general. There are more existing cases settling before hearing and award. Many arbitrators have said that they have had scheduled hearings that did not happen because the parties settled at some point during discovery. Interestingly, there was a decrease in new cases perceived by everybody including lawyers and arbitrators. But, I have noticed in the last 2 or 3 months an increase in activity, possibly because of year-end.

Connie: *What barriers do you see to parties using mediation to resolve disputes?*

Peter: Before discussing several more specific barriers, I'd like to mention what I think is the most fundamental, broader barrier, and that is the parties'

Connie D. O'Mara

misperceived expectations of the process. Unlike arbitration or litigation, the true theme of mediation can be summed up in one phrase: like the art of diplomacy, mediation is letting the other side have it your way. Simply, properly prepared parties and lawyers understand that mediation is about getting what you *really need*, not every last thing you may want, in a manner that the other side can accept. It's about evaluating every move against two sets of rules: yours and theirs. And it's about letting them know you understand and are trying to accommodate their issues while satisfying yours. Not that you necessarily agree with every one, but that you know what they are and are making reasonable proposals impacted in part by them. If parties accept this, mediation will work.

One big problem is that older, and even more recent reinsurance agreements do not have a mediation clause. So right away it's not even something that's on the radar screen. If somebody suggests it, there is the fear that they look desperate, the "white flag" effect. If mediation was automatic because the alternative dispute resolution clause required it, nobody would have that fear. I should note that the Re/Insurance Mediation Institute, Inc. (ReMedi) recently released a form mediation clause and agreement for use by the market.

But, again, even absent such a clause, people need to understand that mediation can assist both parties and increase their understanding of what the dispute is really about so that even if it does not settle, they get a better idea of what needs to be done to tailor a case to its central issues. Instead of a "white flag," mediation can be viewed as a mutually beneficial opportunity.

Another barrier is that people may have had a bad experience with a mediator. Sometimes that happens because the parties' reinsurance case winds up in court and they either get a court-appointed mediator or a judge who does not understand the business or just tries to force the parties into a settlement. Having a knowledgeable, experienced industry mediator solves that problem.

A further barrier is that people feel mediation is a waste of time with no finality since the other side will just stonewall them. Well, there are two answers to that. Number one, statistically, parties who mediate have a higher track record of settling cases either at the mediation or sometime later (before hearings) than parties who do not mediate, so clearly statistics show that there is a benefit to mediation. Also, even if they don't settle, parties can and do learn a great deal about their dispute preparing them to handle it more effectively and efficiently. Counsel and their clients can prepare in advance and refine their expectations by running "the chess game" in their mind, plotting out what is going to happen, how they are going to respond, and where they would like to end up. By developing an acceptable range or steps of numbers that they would settle for, parties come prepared and increase the chance of longer negotiations and better settlements.

... parties who mediate have a higher track record of settling cases either at the mediation or sometime later ...

Plus, if all else fails, parties can turn to their mediator, a disinterested, knowledgeable neutral, and say: "What do you think this case should settle for?" This process of requesting "the mediator's number" can be done in a way that is confidential. Finally, you can also do a hybrid "Arb/Med" case, where the mediator first hears your arguments and, like an arbiter, makes a decision and seals it in an envelope. Then, the parties mediate with that sealed envelope sitting on the table, knowing that if they don't mediate in good faith, they are going to get this award. If they settle the mediation the award is ripped up and they never see it.

Connie: *Are companies in run-off more prone to see a financial disincentive to mediation?*

Peter: A runoff manager should look at the size of the dispute and how much is at stake and calculate with counsel the varying costs to mediate or arbitrate/litigate. If they decide on the latter, they might save money in the short term but will wind up spending more in the long term if they go to a final hearing and award or verdict. A good runoff manager performs a cost-benefit analysis and says what do I get out of this now and if I had to spend dollars now, what is that going to look like if we do not settle and go to arbitration? And don't forget the risk of spending all that money and losing as well.

Another dynamic impacting the use of mediation in runoff is that people say, well, runoff is runoff, and once the parties resolve a dispute, there is no continuing business relationship to protect by using mediation. But, while there might not be continuing ongoing business, it is probably not the last runoff claim that you will ever have with this company; you might have similar claims, or that runoff company might be involved with you somewhere else. Thus, for example, the parties can mediate and settle on an acceptable loss reporting/payment protocol that accommodates both the cedant's desire for more prompt settlements and the run-off reinsurer's need for better information and timed payments. Regardless of whether you are in runoff or active, if you use mediation to come up with resolutions that are workable for both sides, that is a good reputation to have in the business. These are things that companies should consider even if the dispute involves runoff business.

Connie: *I know that you, both on your own and through ReMedi, have been doing a great deal to educate people on the benefits of mediation. How is that going?*

Peter: ReMedi gives companies and lawyers an overall perspective about the pros of mediation, which are that it is faster, less costly, and preserves goodwill and reputation. But the most important "pro" is this: because mediating parties

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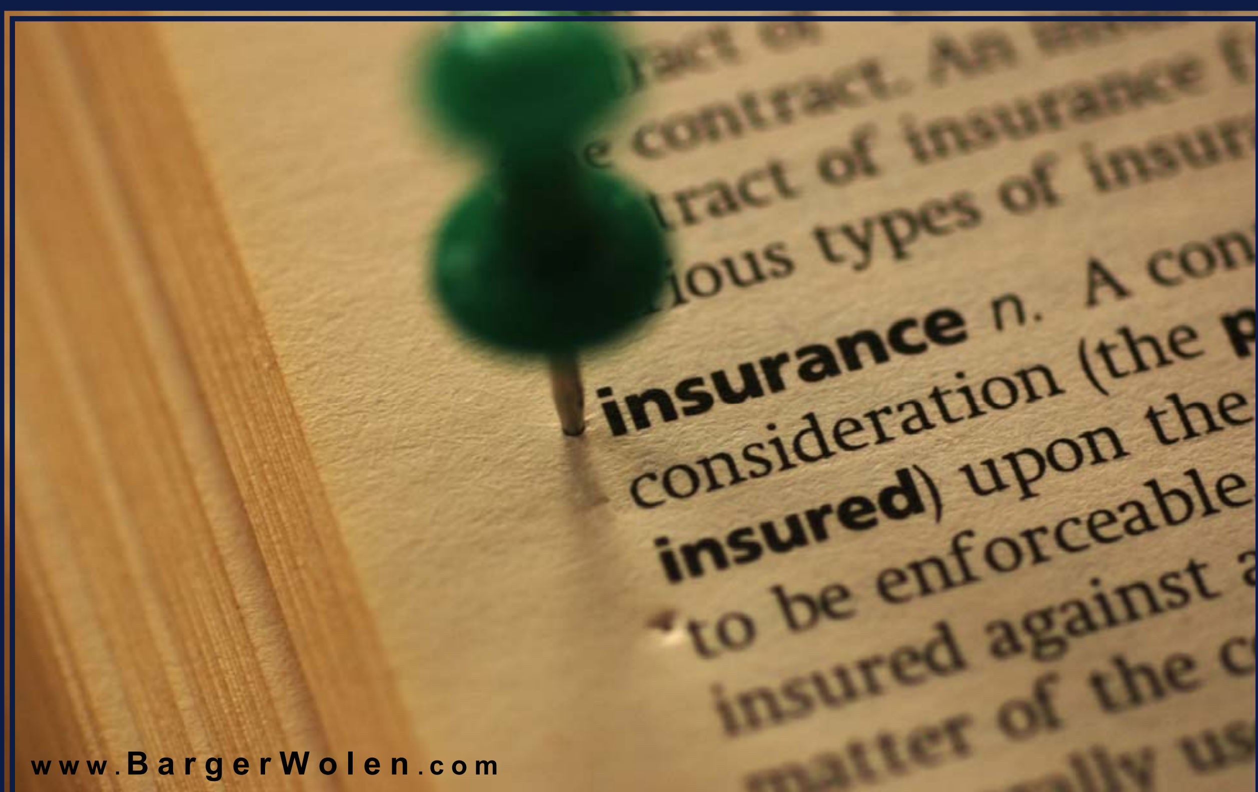

For 35 years, the attorneys in Barger & Wolen's ***Reinsurance Practice*** have served clients from our offices in:

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The Art of Mediation Diplomacy (continued)

themselves are making the decisions and crafting the settlement terms, they have the power and opportunity to fashion a result that best serves what they need out of their dispute, including "outside-the-box" terms beyond the power of a panel or judge. *They* are in control, not some third party court or arbitration panel, where they have no seat at the table during deliberations.

With the right mediator in the middle who understands not only the business issues but also the psychological dynamics, a dispute can be seen as an opportunity not as a misfortune. *Somebody* is telling you that something needs to be fixed, and you have the opportunity to sit down with a person in the middle who can help you navigate both the emotional and substantive road blocks between the parties to resolve and fix that problem without spending hundreds of thousands of dollars.

With the right mediator in the middle who understands not only the business issues but also the psychological dynamics, a dispute can be seen as an opportunity not as a misfortune.

We are educating people on how to prepare for mediation with a settlement mentality rather than a litigation mentality. The prep includes the advance planning I previously discussed: thinking about the steps of the mediation like a chess match. What is logically going to come up, what are competing arguments, and what is your best alternative to a negotiated agreement? Develop a mediation budget that includes not just how much you might be getting or how much you might be paying to settle, but how much you also might spend to get the result you want if you arbitrate or litigate. We tell parties to have these numbers in their pocket because they may work out a deal at some point in the mediation that is better than

their walk away number, so they can make a cost-benefit comparison and a rational decision. We teach people about preparing for the dynamic of dispute tension and how you defuse that tension and focus on solving the problem, not judging the participants. So there are a series of steps to make people understand realistically how to be in the right frame of mind before sitting down at the table.

The mediator should also know when to do a reality check for each side — give them a sense of what their realistic chances of success are, what big boulders are in the way. He or she can get a party to start thinking about things that do *not* support their position because parties naturally hear and value material that supports their arguments and often fail to give adequate weight to material that does not support their side.

At the end of the process, if you settle, you want a mediator to require parties to memorialize the essential terms of their settlement in writing before walking out the door. Even if its just paper and pen with signatures at the bottom. You do not want parties waking up the next day and saying "I really gave up too soon, so forget it." If you do not settle, the mediator can follow up with the parties in a week or two and say: "I have been thinking about this and I just want to see where you are. Is there something that you want to get back together on?" A mediator should ensure the parties understand he or she is still available, that they have a vehicle to get back to talking with the other side.

Connie: *Is there anything that AIRROC could do to support mediation?*

Peter: First and foremost, with its streamlined, available Dispute Resolution Procedure, or "DRP" as it is called, AIRROC is in the forefront of supporting reasonable and effective alternative dispute resolution techniques. Beyond that, AIRROC's frequent membership and annual meetings offer a tremendous preset platform for mediation because they attract companies and members from across the globe and provide the means and opportunity to get disputing parties together in a collegial, communicative environment. This environment provides a forum for more education about how mediation works and the pros and cons of using it. For example, AIRROC did a program a few years back that I moderated at one of the membership meetings in New York where we did a mock mediation. I participated in an AIRROC educational program in Chicago in the first week of February on the DRP.

One interesting proposal we could do at the October Rendez-vous is to have mediators available so that when parties are discussing deals and resolving disputes, facilitators are available to help if they need someone to break an impasse. This would take some advance planning, but if members expressed an interest, I would be happy to work on making it happen. ●

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Trust...But Verify

Do Access to Records and Follow the Settlements Conflict?

Michael H. Goldstein and Mónica Matos-Desa explore the delicate balance between the access to records clause and follow the settlements doctrine.

illustration / Rafael Edwards

Michael H. Goldstein & Mónica Matos-Desa

Access to Records

Reinsurers seek access to documents relating to underlying coverage and allocation issues in order to determine whether a cedant's settlements and allocations are reasonable, in good faith, and involve a covered claim. Often, they will request access to coverage counsels' opinions, communications with the insured and its counsel, claims adjusters' investigation reports and written analyses, and determinations of coverage and allocation issues. Such requests are typically made pursuant to an "access to records" clause in the reinsurance contract.

A typical access to records clause gives a reinsurer the right to "inspect, examine, audit and verify any of the policy, accounting or claim files relating to business reinsured" under the reinsurance contract, or require the cedant to "make available for inspection . . . all books, records and documents relating to the reinsurance certificate or claims."[1] In addition, a contract may require a cedant to provide reinsurers with "details of claims" or "particulars" of claims in loss settlement or loss reporting clauses.[2] Where the parties have "contractually" agreed to provide such information, they have implicitly agreed that the "particulars" or details of the underlying claims are relevant, and the terms of the agreement should control under basic contract law.

Typical access to records issues include:

- Should a reinsurer be current in payment of losses in order to gain access to records?
- Is coverage for claims settled by a cedant relevant?
- Is the cedant's rationale for settlement of claims relevant?
- Is the cedant's rationale for allocation of settlement amounts to its policies relevant?
- Is coverage counsel's advice relevant/privileged?
- Is in-house counsel's advice on coverage or allocation relevant/privileged?
- Are the cedant's claim handling and allocation decisions, and factual bases for those decisions, relevant?

Additional considerations that come into play when asserting a claim for records are confidentiality/non-waiver agreements, the right to review documents only versus copying of requested documents, and the role of the reinsurer's third-party representatives, *i.e.*, outside counsel or claims consultants.

> *Reinsurers often seek information regarding the allocation of complex claims involving multiple years and layers of coverage.*

These issues aside, in accordance with typical access to records clauses, a cedant is obliged to provide full and complete disclosure to a reinsurer where the requested information is arguably relevant to the disputed claim(s), accounting and/or underwriting issues. Full disclosure of pertinent information in the formation, as well as performance of a contract, is the *sine qua non* of reinsurance. Furthermore, because information concerning underlying risk "lies virtually in the exclusive possession of the ceding insurer," reinsureds are obligated to provide prompt and full disclosure of material information to reinsurers.[3] Such an obligation is owed in accordance with the principles of utmost good faith between the cedant and reinsurer.

A broad access to records clause allows a reinsurer to ascertain whether the reinsured is ceding business and calculating premium in accordance with the terms and conditions of the reinsurance contract.[4] Reinsurers often seek information regarding the allocation of complex claims involving multiple years and layers of coverage. Although reinsurers are accorded broad rights of access to a cedant's records, access may be denied where the requests are unreasonable.[5] Moreover, some cedants will oppose complete access to their claims files because the requested documents are allegedly privileged and/or are "irrelevant" based on the follow the settlements doctrine. Other cedants will be forthcoming in making their direct claim files available, including coverage counsels' reports and analyses, as well as their internal coverage analyses and determinations, if underlying coverage disputes have been resolved. If coverage disputes are still pending, cedants might fairly place some limitations or restrictions on reinsurers' access to privileged communications with coverage counsel.

Follow the Settlements

Follow the settlements is a well-established reinsurance doctrine that "binds a reinsurer to accept the cedant's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured."[6] Stated another way, it prevents reinsurers from second guessing good-faith settlements and obtaining de novo review of determinations of the reinsured's liability to its insured, as long as the claim is arguably within the scope of the insurance coverage that was reinsured.[7] In recent years, several courts have extended the application of follow the settlements to post-settlement allocations.[8] Some cedants have relied on those decisions to severely limit reinsurers' access to documents that would presumably support the cedant's coverage/allocation decisions.

A reinsurer's duty to follow the settlements is not inherent in all contracts, although it has been considered customary within the industry to follow the doctrine even in the absence of an explicit clause.[9] In a contract where there is no express "follow the settlements clause," contractual language requiring a reinsurer to reimburse its reinsured for underlying

Footnotes in this article can be found online at: http://www.airroc.org/goldstein-footnotes

Trust…But Verify (continued)

settlement payments may constitute a "follow the settlements" clause. In *Employers Reins. Corp. v. Mass. Mut. Life Ins. Co.*, for example, the contract language stated that "the Corporation shall reimburse the Reinsured or its legal representative promptly for loss against which indemnity is herein provided." The court held that this language clearly constituted a "follow the settlements" clause.[10]

Defeating Application of Follow the Settlements/Follow the Allocation

A reinsurer has a heavy burden in attempting to defeat application of the follow the settlements doctrine, requiring a showing of gross negligence, recklessness, bad faith, "an extraordinary showing of a disingenuous or dishonest failure," or that the settlement "was not even arguably within the scope of the reinsurance coverage."[11] Follow the settlements is not absolute, however, and will not apply in a number of circumstances.[12] These circumstances include:

- Original claim is not even arguably covered – allocation is unreasonable and has no good faith basis in facts of the underlying claim; [13]
- Cedant's expenses billed to the reinsurer are in excess of the stated reinsurance limit;[14]
- Settlement with the insured is fraudulent, in bad faith or a product of collusion;[15]
- Cedant breached its duty to adjust the claim in a prudent businesslike manner by reckless or grossly negligent conduct.[16]

Access to Records v. Follow the Settlements/Follow the Allocation

Follow the settlements does not preclude a reinsurer from discovery into whether the reinsured's liability stems from an unreinsured loss.[17] A party's refusal to provide access to records based on the position that the reinsurer must simply follow its settlements would nullify a reinsurer's right of access to records and claim details, hindering the reinsurer's ability to determine if a cedant's actions are in compliance with contractual obligations.

Follow the settlements language cannot be used to override the actual terms of a reinsurance agreement; instead, the parties' bargain must be enforced as written.[18] Under New York law, "effect and meaning must be given to each term of the contract, and reasonable effort must be made to harmonize all of its terms."[19] The position that a reinsurer is unable to access documents pertaining to an underlying claim, for the purpose of determining whether the loss was covered under a contract, would contravene basic contract law and overturn a fundamental underpinning of the reinsurance relationship.

> *…follow the settlements should not override an access to records clause if the documents are sought for the purpose of determining whether the loss is covered by the contract.*

A follow the settlements clause should also not trump the broad federal rules of discovery if the relevant forum is federal court. Under Fed. R. Civ. P. 26(b)(1), parties may obtain discovery regarding any unprivileged matter that is relevant to any party's claim or defense. Indeed, the Federal Rules allow discovery "encompass[ing] any matter that bears on, or that reasonably could lead to other matters that could bear on, any issues that is [sic] or may be in that case." [20]

Thus, follow the settlements should not override an access to records clause if the documents are sought for the purpose of determining whether the loss is covered by the contract.

Recent Developments in Case Law

In *Hartford Acc. & Indem. Co. v. Argonaut Ins. Co.*, 2008 U.S. Dist. LEXIS 47985 (D. Conn. 2008), the court found for the cedant, upholding its argument that the follow the settlements clause overrode the access to records clause in that case. The reinsurance contract at issue contained both an access to records clause and a follow the settlements clause. The reinsurer suspected that the cedant acted in bad faith in billing a claim and therefore refused to pay the cedant's bill and demanded the cedant's records. The documents at issue contained all of the cedant's primary and excess policies, data on all available reinsurance, and loss reserves data.

Based on Second Circuit case law,[21] the court found that an inconsistency in how its reinsured evaluated and settled the underlying claim and ceded the claim was not sufficient to overcome the follow the settlements clause, and therefore discovery into the inconsistency was not relevant or a proper subject of inquiry. In upholding the follow the settlements clause as a shield to the reinsurer's right of access to records, the court stated "if all policies involved in the underlying insurance dispute were turned over to the reinsurers, the entire follow the fortunes doctrine would be undermined." The court continued by noting that "the protections afforded insurers would be illusory, settlements would be discouraged and the door would be wide open for reinsurers to relitigate and seek judicial review of every settlement."

In *Travelers Cas. & Sur. Co. v. Century Indem. Co.*, Civ. No. 3:10CV400, 2011 U.S. Dist. LEXIS 132131 (D. Conn. Nov. 16, 2011), the court found that certain documents were to be produced to the reinsurer as relevant, while limiting the disclosure of other types of documents under the access to records clause. There, the cedant paid asbestos-related loss claims, then billed the reinsurer, allocating losses as 'one loss.' The reinsurer refused to pay, alleging that the cedant did not act in good faith in assessing and allocating asbestos-related losses. The documents at issue included all of the cedant's memos, letters, and papers relating to the cedant's billing as a single loss occurrence, and the cedant's underlying coverage determination. The

Trust...But Verify (continued)

cedant argued that the documents were too broadly defined and largely irrelevant, that they were privileged, and that the privilege had not been waived.

As to the reinsurance billing documents, critically, the court found that the "information regarding the evaluation of the reinsurance claims is relevant to this lawsuit." The court ordered the cedant to provide "all documentation evaluated and/or relied on by the [cedant] in reaching its 'theory that the claims against [cedant's insureds] constitute a single reinsurance occurrence,'" which included, but was not limited to, "any memos, correspondence, documents, materials relied on, analyses, evaluations regarding its theory on reinsurance billing . . . relied on."

As to the cedant's underlying coverage determination documents, the court found that the "first step should focus on discovery into [cedant's] evaluation of its losses with regard to a single loss presentation of claims on the reinsurance treaty." The court did agree with the cedant that the access to records clause did not permit the reinsurer to "learn of any and all legal advice obtained by a reinsured with a reasonable expectation of confidentiality." Thus, the court rejected the reinsurer's document request with respect to underlying coverage documents.

The New York Court of Appeals recently decided a major reinsurance allocation dispute in a way that will have significant impact on the way cedants and reinsurers analyze their conflicting rights and obligations under a contract which has follow the settlements provisions, and perhaps the manner in which cedants and reinsurers interpret their rights under access to records clauses and other reporting requirements.

In *USF&G et al.*[22] the Court of Appeals partially reversed summary judgment the trial court had granted *USF&G* on a reinsurance billing arising from asbestos claims it settled with its insured for $975 million, plus $12.3 million in fees to counsel for the asbestos claimants. The reinsurers challenged the allocation of the settlement to the excess of loss reinsurance contract on which they participated. The trial court had granted and the appellate division affirmed summary judgment for *USF&G* according the cedant a very high level of deference based on follow the settlements allowed cedants in settling and allocating claims.

In reversing summary judgment on two of three grounds the Court of Appeals held: "But to say that a cedant's allocation decisions are entitled to deference is not to say that they are immune to scrutiny." The Court further found that in scrutinizing allocation decisions, "objective reasonableness should ordinarily determine the validity of an allocation" which the Court explained "must be one that the parties to the settlement of the underlying insurance claims might reasonably have arrived at in arm's length negotiations if the reinsurance did not exist."

Reinsureds are obligated to provide prompt and full disclosure of material information to reinsurers.

In light of finding this, the Court then proceeded to scrutinize the *USF&G* allocation decisions in considerable if not excruciating detail. It is evident from the decision, as well as the briefs and the oral arguments, that there was considerable discovery regarding underlying coverage dispute between *USF&G* and its insured as well as the settlement negotiations between them. It is also possible although not entirely clear that privileged communications were produced in discovery. Certainly it seems that work product was produced. *USF&G* also apparently submitted affidavits of its executives who were engaged in the negotiations. It also seems clear from the record that *USF&G* produced, whether voluntarily or not, a very large volume of documents from its direct claim files.

One conclusion that can be drawn by implication, among many from *USF&G*,[23] although the Court did not specifically address the issue, is that at least under New York law, cedants cannot make broad unilateral decisions unreasonably restricting reinsurers' access to records and claim detail based on a sweeping and overbroad interpretation of follow the settlements to shield their settlement and allocation decisions from the scrutiny of reinsurers and courts.

In sum, follow the settlements should not supersede an access to records clause if the reinsurer's request is reasonable and relevant to the disputed claim or underwriting / accounting issues. Reinsureds are obligated to provide prompt and full disclosure of material information to reinsurers. While a cedant has the unilateral right to impose limits on access to records in order to protect its attorney-client privilege in connection with pending coverage litigation with its insured, the cedant's cooperation with a reinsurer's reasonable record requests regarding coverage/allocation decisions will reduce expensive and time-consuming disputes. ●

Any views or opinions expressed in this article do not necessarily reflect the views or opinions of Mound Cotton Wollan & Greengrass or its clients. In addition, this article is not intended as legal advice for specific matters.

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Stretching Good Faith to the Breaking Point

illustration / Myers Creative Services

Are There Consequences for a Reinsurer's Refusal to Honor Loss Presentations?

During ongoing business relationships, the reinsurance marketplace is self-policing. The need to maintain commercial integrity and desire to work with client companies will generally control reinsurers' claim conduct and cedants' presentations. Broker pressure and grading systems on the reinsurer's timely claim response add incentives to resolve reinsurance presentations on a reasonably expeditious basis.

When books of business are discontinued and reinsurers enter into runoff, the dynamic actually changes. Adjusting claims by supporting the cedant's presentation may, in many cases, give way to adjusting by delaying collection, ratcheting up the cedant's costs, increasing the pressure to commute or find reasons to challenge the presentation.

Evaluating, discussing and even disagreeing over a reinsurance claim are eminently acceptable business behaviors, even if a court or panel eventually concludes that the claim should be paid. Most reinsurance disputes fall into this category.

This article does not condemn a reinsurer's good-faith denial. Rather, this case study illustrates the dubious claims adjusting of a reinsurer or retrocessionaire and the following dispute resolution process, raising the question whether the reinsurer engaged in a course of performance, whose primary goal was to force the cedant to withdraw the claim or settle for a fraction of its fair value. We then examine bad faith in the reinsurance context and address how the arbitration process responds to a reinsurer's bad behavior.

A Case Study

The Reinsurance Claim

An excess of loss facultative reinsurer providing five consecutive years of coverage compromised its cedant's cession by paying less than 100% of the billing. The reinsurer had queried the cedant's decision to present losses and damages flowing from multiple sexual molestation claims as a single annual occurrence. Assessing its litigation options, the reinsurer concluded that, if litigated in the jurisdiction where the sexual abuse had occurred, the likelihood of prevailing on its denial would be less than 20%. Thus, the reinsurer made an 80% payment to its cedant.

The reinsurer (now, retrocedant) passed the 20% discount along to its excess of loss retrocession treaty on precisely the same basis as it settled the inward claim, and took multiple, full annual retentions, deriving no benefit from its compromise settlement.

The Retrocessionaire

After being billed, two treaty retrocessionaires under common management request details about the underlying claims, some the retrocedant should possess, and some that would require inquiry of the original ceding company. After months of letter exchanges, the retrocessionaires invoke the access to records provision and request an audit.

At the audit, the retrocessionaires are given a copy of the retrocedant's inward claim files and permitted to debrief the reinsurance claim handler with primary responsibility for the inward presentation who negotiated the settlement. The audit concludes after the exit interview, during which no unanswered questions remain.

After the audit, the retrocedant requests payment. Receiving no response, the retrocedant sets a deadline for either payment or denial. The retrocessionaires request additional time to digest the information and to make an informed decision. The retrocessionaire ultimately denies the presentation only because the underlying sexual molestation claims

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"could not possibly constitute a single occurrence."

The retrocedant arranges a conference call to see if the retrocessionaires will reconsider. (The billing is less than $1 million, and the retrocedant is concerned about collection costs if the matter cannot be resolved.) The retrocedant reiterates to the retrocessionaires that while it disagreed with the original cedant's single occurrence presentation, it felt that it would lose a "follow the settlements" battle in litigation. The retrocedant simply tried to settle on the best available terms. The retrocedant also relates that, during negotiations, the original cedant maintained that, for insurance purposes, the claims should be viewed as a negligent and continuing failure to supervise, since the acts of sexual molestation themselves would not be covered events. The retrocessionaires reply that if the retrocedant had truly followed the settlement of the original cedant, why did it not pay the full amount of the billing?

The retrocessionaires maintain their position that the underlying claims were multiple occurrences which the retrocedant should have presented on that basis. A demand for arbitration follows and two arbitrators are appointed but not an umpire.

The Arbitration

When the non-confidential arbitration commenced, retrocessionaire A sought to disqualify retrocedant's counsel, maintaining that the firm had represented the retrocessionaire six years earlier in an unrelated reinsurance dispute. Counsel declined to withdraw since no relationship currently existed between the two matters or between the firm and the retrocessionaire. The retrocessionaire then asked the federal court to order such disqualification, limiting its legal expenses by using in-house counsel. Because it could not proceed until the federal court ruled on the request, the arbitration was delayed for nine months. During the disqualification action, retrocessionaire A offered to withdraw its challenge if the retrocedant permitted it to unilaterally appoint an umpire.

The Court applied New York's judicial legal standard and denied the disqualification request given the absence of a "substantial relationship" between the two matters.

While the disqualification action involving retrocessionaire "A" was pending, the retrocedant attempted to move its arbitration forward against retrocessionaire "B," which was never previously represented by retrocedant's counsel. Retrocessionaire "B" refused to proceed, claiming that the contract required that all retrocessionaires "act as one" in any arbitration.

The retrocessionaires reply that if the retrocedant had truly followed the settlement of the original cedant, why did it not pay the full amount of the billing?

The retrocedant was compelled to initiate a separate lawsuit seeking an order requiring retrocessionaire "B" to submit to arbitration. About the time that the Court denied the disqualification request, a different judge ruled that retrocessionaire "B" had to submit to arbitration immediately and that the arbitrators must determine contractual issues. The arbitration involving both retrocessionaires was then able to proceed on the merits.

Discovery in the arbitration revealed that the retrocessionaires knew, when they first received the single occurrence presentation, that it would be denied. The retrocessionaires conceded that they did not expect that the retrocedant could provide any additional information during the claim adjustment process that would cause them to honor the presentation.

Also, one retrocessionaire had been a direct treaty reinsurer of the same original cedant for the same sexual molestation claims. When that retrocessionaire received a treaty billing, it asked questions, sought information, and queried the single occurrence presentation. After it denied the claim, an arbitration demand was issued, at which point the retrocessionaire moved to disqualify the original cedant's arbitration counsel–a different firm. Ultimately, it settled the direct reinsurance presentation on a discounted basis. When questioned how the retrocessionaire could challenge the retrocedant's claim adjustment process and ultimate discounted settlement here, when the retrocedant handled the inward claim as a direct reinsurer in precisely the same manner, the retrocessionaire maintained that the retrocedant should have offered an additional discount over and above the discount previously negotiated with the original cedant.

In short, retrocedant had direct and circumstantial evidence of the following bad faith in the claim adjustment process: i) retrocessionaires already possessed the underlying claim details that they sought from retrocedant; ii) the audit was a tool to locate documents in retrocedant's file that could be used against it in a dispute against retrocedant; iii) the claim denial was intentionally delayed by stringing out the adjustment process and leading retrocedant to believe that the matter would resolve once retrocessionaires completed their due diligence process; and iv) one retrocessionaire was denying retrocedant's presentation even though it acted in the identical manner as retrocedant when adjusting and settling the claim as a direct reinsurer.

Does Retrocessionaires' Claim Adjustment Process Rise to the Level of Bad Faith?

The basic question is, "What constitutes a reinsurer's bad faith when denying a reinsurance presentation?" Only a handful of decidedly fact-sensitive judicial decisions exist on this issue.

Related questions include: Should state unfair insurance claim settlement practices statutes or regulations apply in the reinsurance context? Does the reinsurer have to act in the same bad faith manner as would deny a cedant the right to invoke follow the settlements? Is reinsurance bad faith merely the absence of good faith or violation of a duty to act in utmost good faith when dealing with a cedant? The best answer is that bad faith will be judged subjectively. The gravity–and numerosity–of the alleged offensive conduct, as perceived by arbitrators, will determine whether the denial was in bad faith.

In this Case Study, did the retrocessionaires' claim adjustment processes amount to bad faith? Again, this finding will be subjective. If one were to poll the readers, we would not to be surprised if they were strongly divided on the issue.

Because reinsurance arbitration panels rarely grant discovery regarding other contracts, a cedant is unlikely to discover a particular reinsurer's pattern or general practice of bad behavior. Without evidence of malicious intent, a concession of wrongdoing or an ability to demonstrate a consistent pattern of bad behavior–and provided the reinsurer is represented by capable, credible counsel–bad faith in the reinsurer's claim adjustment process is unlikely to be found.

The Cumulative Effect of Bad Behavior during the Dispute Resolution Process

The adage of "more is better" applies here. Questionable claim adjustment tactics that fall short of "foul play" cross the line when adding in delay and cost-enhancing tactics during arbitration. The cumulative effect of these bad acts–the ability to blackboard multiple acts which in isolation might not be troublesome–plus the absence of a good faith defense to payment, may be the best, if not the only blueprint for proving reinsurer bad faith.

Where the alleged bad faith is practiced under the nose and in the face of arbitrators, chances improve that the panel will view the pre-dispute conduct differently.

In our Case Study, the panel had the benefit of witnessing additional actions that could be "tacked on" to the above listing of pre-dispute actions:

1. retrocessionaires raised new, previously unstated defenses during arbitration, including dubious contractual defenses;

2. retrocessionaires moved (unsuccessfully) for a summary determination that the sexual molestation claims constituted multiple occurrences;

3. in denying the motion, the panel emphasized application of follow the settlements and urged the retrocessionaires not to reargue this issue if the matter proceeds to a hearing;

4. despite the panel's clear message that the reinsurance presentation should be honored, retrocessionaires only offered to pay 50%;

5. in the pre-hearing brief, retrocessionaires informed the panel that they had nominated the umpire ultimately selected;

6. retrocessionaire "A" had pursued a dubious disqualification action, delaying the arbitration and substantially increasing retrocedant's collection costs;

7. retrocedant was forced to proceed in court to bring retrocessionaire "B" to the arbitration table;

8. the disqualification action was of dubious merit since the retrocessionaire offered to forgo the challenge if permitted to choose the umpire;

9. retrocedant was forced to move forward with a hearing as to alleged unresolved issues;

10. at the hearing, retrocessionaires reargued the denial of the summary judgment motion, failing to introduce any new facts not before the panel when it originally denied the motion.

Is the Current Arbitration Process an Effective Deterrent?

A panel's willingness to find bad faith and award damages–typically attorneys' fees–to combat or deter bad faith depends upon a number of variables:

1. Does the reinsurance contract permit arbitrators to award bad faith damages?

2. Does applicable law otherwise limit arbitrators' power to fashion remedies?

3. What are panel members' backgrounds and experiences?

4. Will word of the arbitration outcome be circulated?

For this presentation, assume that arbitrators have broad authority to issue all appropriate relief and to allocate arbitration costs. We thus will consider the panel constituency and likelihood that the arbitration outcome will be a matter of public record–or at least the subject of scuttlebutt at AIRROC and ARIAS conferences.

Reinsurance arbitrators are drawn from pools of industry professionals with diverse backgrounds. Some have reputations as cedant-oriented, some reinsurer-oriented and others closer to midline. In our 30 years' handling reinsurance disputes, many to final hearing, an award of costs was issued in fewer than 5% of the cases. This statistic may or may not result from the sense that these disputes were waged in good faith, with reinsurers raising viable defenses, even where rejected by the panel. In each case where costs were awarded to a single party, the umpire was selected from the slate proposed by the award recipient.[1]

The apparent aversion to cost awards, however, can be attributed to other factors. Industry professionals are loathe to attach labels to their colleagues' actions. Findings of bad faith are almost never expressed, even if costs are awarded. The bad faith connotation draws parallels to fraudulent conduct. Arbitrators steer clear of finding bad faith unless it is totally unavoidable from the cumulative facts.

Another factor militating against awarding costs is the camaraderie generated by the arbitration atmosphere. Exchanges of gossip and war stories during the hearing of "gentlemen disagreements" make issuance of a punitive award less likely. Some arbitrators set the bar so high as to require a demonstration of intentional deceit or actual fraud before finding bad faith.

We must not forget that arbitration is big business to industry arbitrators; for some, income from panel service is their only compensation, particularly for those who are no longer active company officers. The single-most important consideration for umpires–whose vote is generally decisive–in addition to achieving a just outcome, is to avoid jeopardizing future engagements, including possible engagements by both sets of lawyers and companies involved in a particular dispute, or at a minimum, taking action that will all but assure them of getting stricken from future umpire slates by the lawyer or party on the other side. Acceptability to the largest market is the key to self-promotion. Being regarded as "mainstream" rather than "extreme" will generally maximize the likelihood of future appointments.[2]

Other arbitrators may be concerned about whether they have the power to award attorneys' fees, particularly given the various grants of authority in arbitration provisions. Likewise, arbitrators may wish to avoid publicity in a potential court action concerning the conduct and the extent of their authority.

What is the Benefit and/or Detriment of Avoiding Bad Faith Findings?

The likelihood of a panel finding that a reinsurer acted in bad faith is as remote as the panel finding that a cedant made a bad faith presentation. Consequently, for reinsurers considering the downside of resisting a reinsurance presentation, the possibility of being charged with the cedant's collection costs is an insignificant risk.

Even in the one-off chance that a panel awards bad faith damages, it is an isolated event, typically confidential, and of little precedential value. From an overall "cost of doing business" perspective, an adverse determination 5% of the time is certainly worth the risk of operating a business model designed to extract discounts in negotiating reinsurance presentations or commutations.

The integrity of the marketplace requires that a reinsurer's risk of carrying a cedant's collection costs is a significant factor. Without doubt, run-off reinsurers' credibility is irreparably tainted by rogue companies whose business model is to increase cedants' administrative burdens and collection costs. Run-off reinsurers do not want to be painted with the same broad brush.

The likelihood of a panel finding that a reinsurer acted in bad faith is as remote as the panel finding that a cedant made a bad faith presentation.

However, a panel's general reluctance to hold reinsurers accountable for bad faith creates an incentive, effectively rewarding bad behavior, since the reinsurer is typically directed only to pay the claim in full, possibly with interest. If that is the only downside, it actually invites a repeat bad faith performance.[3]

Where less than $1 million is in dispute, the cost factor becomes a greater consideration for cedants. If a full blown dispute cannot be economically justified, a cedant is virtually compelled to leave money on the table to maximize its recovery on a net basis. While the reinsurer, presumably, incurs the same legal costs in resisting a claim as the cedant does in pursuing collection, that cost is "recovered" by savings achieved by successfully conducting its claim mitigation business model through negotiated discounts.

The current reinsurance dispute resolution mechanism simply does not deter bad behavior. Unfortunately, however, because reinsurance arbitration is such a bonanza for retired industry professionals, it is unrealistic to expect arbitrators to be more concerned about regulating claim conduct than about future assignments. All companies alike must therefore approach potential disputes recognizing that they will likely be responsible for their own costs.

That said, the so called "American Rule" applicable to US court litigation, requires litigants to bear their own attorneys' fees except in exceptional defined circumstances. The American Rule is routinely cited to arbitrators in response to a demand for attorneys' fees.

Unfortunately, the American Rule has helped perpetuate an avalanche of frivolous litigation. There are few consequences to filing meritless lawsuits, as a practical matter. Reinsurance arbitration has already picked up litigation's bad habits. Requiring each party to bear the cost of its own attorneys and of the arbitration process, no matter what, is one bad habit that should be soundly rejected.

Postscript

By the way, the retrocedant prevailed in the Case Study, but was not awarded costs. The amount in dispute was less than $1 million, and the cedant's cost is pursuing collection, including costs associated with the incidental litigations, exceeded its recovery.

Endnotes

1 Anecdotally, actual awards of costs and attorneys' fees are as likely to reflect personality conflicts or arbitrary determinations as calculated assessments–but the evidence is scant and subject to dispute.

2 There may be a minority of arbitrators, however, who receive party appointments because they are perceived as favoring one side.

3 The same logic holds true for a cedant who may gerrymander settlement dollars in an allocation designed to maximize a reinsurance recovery, but faces little downside from such an effort.

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AIRROC Ed Gusts Through Chicago

AIRROC's Dispute Resolution Procedure (DRP)

Does anyone still remember the old-style CLE conference where you would fly into a sunny resort, and then leisurely cram two days of intensive learning into a four day trip, only to return home stressed-out because the many plates you had spinning had all come crashing down? In order to participate, you had borrowed from the two cruelest of lenders, the bank of billable hours and the S&L of "personal time." It seemed like a great investment at the time, but the returns were hardly justified.

AIRROC's Dispute Resolution Procedure Workshop on Feb. 7 of this year was nothing like that.

In fact, AIRROC continued on its roll, with yet another flawless execution of the "new-style" workshop: a 1-day format (a potential fly-in, fly-out affair), packed with information and fearlessly performed in the dead of winter in Chicago. According to Carolyn Fahey, AIRROC's Executive Director, "people need to come to Chicago anyway…they can either tack on a few days visiting with key clients or they can do a complete turn-around within 24 hours." Jim Sporleder of Allstate commented: "We in the Chicago area appreciated having the meeting here...with today's expense pressures, AIRROC companies really like the 'free' training sessions for their employees."

The Dispute Resolution Procedure (DRP)

The purpose of this particular workshop was to highlight one of AIRROC's most innovative industry solutions, the Dispute Resolution Procedure, or DRP. AIRROC developed this solution in response to the many disputes over reinsurance balances that are, by everyone's assessment, too small to arbitrate. Patrick Frye, of Edwards Wildman, describes the process "as a middle ground between expensive lawyering and doing nothing."

Features of DRP

The three key features of the process are:

1. A single umpire is appointed by agreement among the parties. To keep costs in line, these qualified umpires agree to perform DRP arbitrations for $150/hour.
2. No discovery, unless specifically agreed upon by the parties.
3. No live witness testimony, unless specifically agreed upon by the parties.

Fact Pattern

Foley & Lardner, our gracious hosts for the day, lent us their master-mind of wit, Neal Moglin, who cleverly constructed a matter that simply "cried out" for a DRP solution. The fact pattern included the insured, ACME, which had used asbestos

Key Coleman

photos / Jason Gerber

in its manufacture of anvils. ACME's insurer, Coyote Insurance, covered the risk for 3 years. After a favorable settlement with ACME, however (that included a policy buyback), Coyote allocated its entire reinsurance loss to the third year, the only year in which it had reinsurance coverage from the ailing Road Runner Re. Road Runner, a 1% treaty participant, was sore over late notice, an issue that is impacted significantly by "choice of law."

While the parties had only $180,000 at stake, these issues were simply not ripe for compromise. After "civil" discussions, Road Runner and Coyote agreed upon the DRP as the most efficient solution.

Workshop Structure Makes All the Difference

The workshop participants divided into two teams and held separate meetings with counsel. Each team learned of certain so-called "bad facts" that would shape its arguments going forward. For instance, Road Runner's "late notice" contention was compromised by an earlier memo in which Road Runner was made aware of the underlying loss; consequently, the reinsurer decided not to push for discovery.

Participants gained valuable insights from these break-out sessions. Michael Stick, of Butler Rubin, said the "sessions during which the delegates worked in teams to develop a strategy for resolving the dispute…provided an opportunity to see how industry members with different perspectives (ceding company, assuming company, in-house counsel and outside counsel) approached the same issue."

Rapid Ruling

The umpire issued a fast, "winner-take-all" ruling, stating Coyote performed an improper allocation by putting the entire loss into one year. The umpire made no attempt to re-allocate the loss more fairly, but instead ruled that Coyote's allocation was simply not reasonable and would not be enforced.

This particular ruling drove home the point that the DRP is not a miniature mediation process intended to evoke a settlement. Instead, it allows parties to reach a conclusion based on the merits, in spite of the matter's size.

Conclusion

On behalf of Foley & Lardner, Mike Pontrelli commented "we were gratified by the turn-out, and impressed by the wealth of experience that participants brought to the day's sessions." The learning environment was indeed collegial while the format was user-friendly. John Kloecker and Rowe Snider of Locke Lord summed up the day nicely, agreeing "The workshop showed that AIRROC is living up to its value proposition." ●

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Tactical Advantage Hidden in the Mixed Bag

Pre and Post-Judgment Interest Awards: A Brief State Overview

As you can imagine, it is difficult for five people to agree on the color of the sky on any given day. Therefore, it should come as no surprise that each of the 50 States have their own unique interpretation of fairness when it comes to the awarding of pre-judgment or post-judgment interest. The manner in which pre and post-judgment interest is awarded is as unique as the 50 States. In some jurisdictions, the rates are fixed; in others, it can fluctuate on either a monthly or quarterly basis. Some states allow for simple interest, others allow for interest to be compounded, and some states have different rates for pre and post-judgment awards altogether.

In certain states, Pre and Post-Judgment interest is mandatory whereas in others it is within the court's discretion. This may require additional evidence in order to demonstrate that awarding pre-judgment interest is warranted. In some states, pre-judgment interest must be requested by the parties during the pleadings stages and could be waived if not requested early in the proceedings.

Given the widespread disparity amongst the 50 States, it is important to appreciate the jurisdiction's unique laws concerning both Pre and Post-Judgment interest as early in a dispute as possible. This importance is magnified when dealing with a reinsurance debt, as often times the amount of pre and post-judgment interest can eclipse the underlying amount in dispute. A firm understanding of this area of law can lead to tactical advantages over one's opponent in a courtroom or in front of an arbitration panel.

A solid understanding of pre and post-Judgment interest rates is also beneficial to those who draft reinsurance contracts and/or commutation agreements. States typically allow parties to set their own contractual rate of pre-judgment and post-judgment interest. If one is able to set the rate for pre-judgment interest before a dispute arises, it may eliminate future disputes between the parties. Clearly establishing a future rate of pre-judgment interest (if a dispute arises) may be incentive for reinsurance disputes to settle as States will typically allow a higher rate of interest even over those set as the maximum amount under State law.

This article offers a brief synopsis of some of the jurisdictions where reinsurance disputes are most likely to be found. However, one should always consult with a licensed attorney from the relevant jurisdiction for further advice. The pre and post-judgment interest award laws for a number of states are as follows.

State Specific Pre and Post-Judgment Laws

California

a. Parties to a contract are free to set their own pre-judgment legal rate of interest, provided it does not exceed 10% per annum.

- Pre-judgment Interest – "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, **in its discretion**, fix, but in no event earlier than the date the action was filed" (emphasis added). Cal. Civ. Code § 3287(b) (2012).
- California has articulated two scenarios when considering the awarding of Pre-Judgment Interest under Cal. Civ. Code § 3287: "Whether the debtor knows the amount owed or whether the debtor would be able to compute the damages." *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal. App. 3d 1154, 1173 (Cal. App. 3d Dist. 1991).

California looks toward the certainty of the damages in determining whether pre-judgment interest is mandated. An award of pre-judgment interest is intended to make the plaintiff whole "for the accrual of wealth which could have been produced during the period of loss." *Levy-Zentner Co. v. Southern Pac. Transportation Co.*, 74 Cal. App. 3d 762, 795 (Cal. Ct. App. 1st Dist. 1977).

- "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach." Cal. Civ. Code § 3289(b)(2012).

b. Post-Judgment Interest - Accrues at a rate of 10% per annum, calculated on a simple basis, until the judgment is satisfied. Cal. Civ. Code Proc. § 685.010(a)(2012).

Connecticut

a. Connecticut Courts are given discretion to award pre and post-judgment interest at a rate of 10% (simple) per annum:

- In the absence of an agreed-upon rate, Connecticut law will allow for interest to be awarded at a rate of 10% per annum, calculated on a simple basis, from when the principle amount becomes due. Conn. Gen. Stat. § 37-3a (2012).

• The above statute applies to both civil actions and arbitrations. *Id.*

1. Interest from the date of an arbitration award to the date of a judgment was warranted becausethe losing party knew the award amount, and also knew the amount would not change following a remand to the panel for clarification

of the award; an award of interest was equitable under the circumstances. See *Hartford Steam Boiler v. Underwriters at Lloyd's*, 2008 Conn. Super. LEXIS 1714 (Conn. Super. Ct. July 9, 2008).

2. Trial courts have discretion to award prejudgment interest on an arbitration award retroactively. Prior to the date of its judgment affirming the arbitration award; a trial court ordered that statutory interest be paid on an arbitration award where the insurer wrongfully delayed payment. See *Bodner v. United Services Auto. Assoc.*, 1991 Conn. Super. LEXIS 1269 (Conn. Super. Ct. May 28, 1991).

• Where an insurer clearly showed its entitlement to reimbursement from the insured of the deductible portions of sums which the insurer paid on certain property damage claims under insurance policies it had issued to the insured, and the insured's defense that the policies should have been written without deductible clauses was dilatory, frivolous, and unsupported by any evidence, the insurer, pursuant to Conn. Gen. Stat. § 37-3a, was awarded interest of 10 percent per annum for the insured's wrongful retention of the sums it owed the insurer. See *National Union Fire Ins. Co. v. D.J. King, Inc.,* 1997 Conn. Super. LEXIS 3404 (Conn. Super. Ct. Dec. 22, 1997).

Delaware

a. The legal rate of pre and post-judgment Interest shall be 5% over the Federal Reserve Discount Rate. 6 Del. C. § 2301(a) (2012).

• The current legal rate of interest in Delaware is 5.75% (as of January 30, 2013). See 6 Del. C. § 2301(a)(2012) and Federal Reserve Discount Rate http://www.federalreserve.gov/newsevents/press/monetary/monetary20130108a.pdf.

b. The awarding of pre-judgment interest is discretionary and must be requested by the party.

• "Delaware law generally holds that a successful plaintiff may be awarded prejudgment interest as a matter of right. This right is not self-executing, however. For the court to grant prejudgment interest, the plaintiff must ask for it by way of at least a general allegation of damages in an amount sufficient to cover actual damages plus interest. The Court also is entitled to grant such relief as the facts of a particular case may dictate. As part of its discretion to fashion an appropriate remedy, this Court has the discretion to award either compound or simple interest." *Whittington v. Dragon Group, L.L.C.*, 2011 WL 1457455*16 (Del. Ch. Apr. 15, 2011) (internal citations omitted).

• Pre-judgment interest is calculated from the date payment is due; where the underlying obligation to make payments arises out of a contract, a court should look to the contract to determine when interest begins to accrue. *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992).

1. A court generally will not award compound interest absent an express contractual or statutory provision so permitting. See *Charlip v. Lear Siegler, Inc.*, C.A. No. 5178, slip op. at 11, Walsh, V.C. (Del. Ch. July 2, 1985).

c. Post-judgment interest begins to accrue when the Court renders its decision. In an action in which the court granted equitable rescission of the parties' agreement the plaintiff was entitled to post-judgment interest from the date that the judgment was entered to the date of payment. See Creative Research Mfg. v. Advanced Bio-Delivery LLC, *2007 Del. Ch. LEXIS 15 (Del. Ch. Jan. 30, 2007).*

Florida

a. When contracts are silent, pre and post-judgment interest rates are set on a quarterly basis by the State CFO:

• With regard to pre and post-judgment interest, the Chief Financial Officer of Florida sets the rate of interest that shall be payable on judgments for the calendar quarter beginning January 1 and adjusts the rate quarterly on April 1, July 1, and October 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 400 basis points to the averaged federal discount rate. Fla. Stat. § 55.03(1)(2012).

• These statutes do not affect a rate of interest established by written contract or obligation. Id.

• The current judgment rate of interest as of January 1, 2013 is 4.75%. (Chapter 2011-69, Laws of Florida.)

b. The interest rate is established at the time a judgment is obtained and such interest rate shall be adjusted annually on January 1 of each year in accordance with the interest rate in effect on that date as set by the Chief Financial Officer until the judgment is paid. Fla. Stat. § 55.03(3) (2012).

• Pre-judgment interest was computed pursuant to Fla. Stat. §§ 687.01 and 55.03, with the interest rate to be computed separately for each year utilizing the

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Tactical Advantage Hidden in the Mixed Bag (continued)

applicable statutory rate in effect during the period that the interest was charged. See *Talking Walls, Inc. v. Hartford Cas. Ins. Co.*, 2005 U.S. Dist. LEXIS 46089 (N.D. Fla. July 5, 2005).

• Pre-judgment interest at the statutory rate is calculated from the date of the breach. See *Naples Med. Ctr., P.A. v. ProMedCo Mgmt. Co.* (In re ProMedCo of Las Cruces, Inc.), 2002 Bankr. LEXIS 1975 (Bankr. N.D. Tex. Nov. 20, 2002).

Illinois

a. Pre-judgment interest is discretionary:

• Pre-judgment interest is awarded at the court's discretion. See *Licciardi v. Collins*, 536 N.E.2d 840 (Ill. App. Ct.1st Dist. 1989).

• Creditors shall be allowed to receive interest at the rate of 5% per annum for all moneys after they become due on instruments of writing, (reinsurance contract) on money withheld by an unreasonable and vexatious delay of payment. 815 Ill. Comp. Stat. 205/2 (2012).

• Illinois' Interest Act is applicable in the absence of an agreed to lawful rate of interest. *Bovinett v. Rollberg*, 440 N.E.2d 210, 221 (Ill. App. Ct. 5th Dist. 1982).

b. Illinois Courts are required to award post-judgment interest, including when an arbitration panel issues an award:

• Post-judgment interest shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied. 735 Ill. Comp. Stat. 5/2-1303 (2012).

• Illinois courts are required to award post-judgment interest from the date of an arbitration award until the award is paid because the court confirmed the arbitration award and entered judgment. *See Robertson-Ceco Corp. v. Nat'l Union Fire Ins. Co.*, 292 F. Supp. 2d 1082 (N.D. Ill. 2003).

Ohio

a. Ohio Courts are allowed to assess interest on a compounded basis, so long as it does not exceed 8% per annum:

• The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum payable annually. ORC Ann. 1343.01(a) (2012).

1. An insurance policy is an instrument of writing for the forbearance or payment of money at any future time. *See Florence v. New York Life Ins. Co.*, 357 N.E.2d 35 (Ohio 1976).

• Parties may stipulate for the payment of interest at any rate not exceeding 8% per annum payable annually (with limited exceptions). *See* ORC Ann. 1343.01(b) (2012).

• At any time within one year after an award in an arbitration proceeding, any party to the arbitration may apply to the court of common pleas for an order confirming the award. The court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected. ORC Ann. § 2711.09 (2012).

Pennsylvania

a. When contracts are silent, Pennsylvania uses the same rate when awarding pre and post-judgment interest:

• Pennsylvania utilizes a 6% per annum legal rate of interest, calculated on a simple basis, where a contractual rate of interest is silent. This rate holds true for both the awarding of pre-judgment and post-judgment interest. 41 P.S. § 202 (2012); see also *Widmer Eng'g, Inc. v. Dufalla*, 837 A.2d 459 (Pa. Super. Ct. 2003).

• Parties could contractually agree to a higher rate of interest than that provided for in 41 P.S. § 202, in anticipation of non-payment of money due under a contract. A 18% rate of interest was permissible. *See Amerisourcebergen Drug Corp. v. Meier*, 2005 U.S. Dist. LEXIS 9653 (E.D. Pa. 2005).

b. When a date of loss is fixed, interest awards are mandatory in Pennsylvania when certain conditions are met:

• Pre-judgment interest in a contract action may be recovered only if: (1) a defendant commits a breach of contract to pay a definite sum of money; or (2) a defendant commits a breach of contract to render a performance, the value of which in money is stated in the contract; or (3) a defendant commits a breach of contract to render a performance the value of which is ascertainable by mathematical calculation from a standard fixed in the contract; or (4) a defendant commits a breach of a contract to render a performance the value of which in money is ascertainable from established market prices of the subject matter. *Black Gold Coal Corp. v. Shawville Coal Co.*, 730 F.2d 941, 944 (3d Cir. Pa. 1984).

1. Recovery of prejudgment interest under this standard is a matter of law, **not of discretion** (emphasis added). *Id.*

Insurers are entitled to pre-judgment interest calculated starting from the date of loss. *See Rite Aid Corp. v. Liberty Mut. Fire Ins. Co.*, 2006 U.S. Dist. LEXIS 57094 (M.D. Pa. 2006).

New Jersey

a. The rate of pre and post-judgment interest is governed by the New Jersey Rules of Court:

• When applying the above principles to a recent reinsurance dispute, a United States District Court for the District of New Jersey looked toward the following as to when and how Pre-Judgment interest is calculated:

1. Given the nature of reinsurance billings, the accrual date for purposes of pre-judgment was set at the date as to when the Plaintiff commenced legal proceedings. See *Munich Reinsurance America, Inc. v. Tower Ins. Co. of New York*, 2012 U.S. Dist. LEXIS 39885 *8 (D. N.J. Mar. 23, 2012).

2. A Court may apply the Cash Management Fund Rate without the additional 2% rate of interest, as set forth under N.J. R. 4:42-11(a)(iii) because the additional 2% should not be imposed on large contract awards as a matter course. Further, the plaintiff could not point to

Tactical Advantage Hidden in the Mixed Bag (continued)

basis for the Court to apply the enhanced rate for Pre-Judgment interest. *Id.* at 16.

• Post-judgment interest for contract actions, exceeding the monetary limit of the Special Civil Part [$15,000] is governed by the New Jersey Rules of Court and calculated as follows:

1. The annual rate of interest shall equal the average rate of return, to the nearest whole or one-half percent, for the corresponding preceding fiscal yearof the State of New Jersey Cash Management Fund as reported by the Division of Investment in the Department of the Treasury. N.J. R. 4:42-11(a)(ii).

a. The current rate for 2013 is 0.25%. *See* http://www.judiciary.state.nj.us/civil/PostPre-JudgmentRates.pdf.

2. Judgments entered after September 1, 1996 and exceeding $15,000 at the time of the entry shall be calculated at the above-referenced rate of 0.5% plus 2% per annum. N.J. R. 4:42-11(a)(iii).

3. Pre-judgment interest shall be calculated in the same amount and manner provided for by paragraph. N.J. R. 4:42-11(b).

New York

a. Pre and post-judgment interest rates can differ:

• New York sets a maximum 9% statutory rate of interest, calculated on a simple (not compound) basis. *See* NY CLS CPLR § 5004 (2012). *See also Till v. Paul Frederick Fox & Affiliates*, 261 A.D.2d 853 (N.Y. App. Div. 4th Dep't 1999)

• Contractual parties may agree to a different rate of pre-judgment interest as they see fit. See *Citibank, N.A. v. Liebowitz,* 110 A.D.2d 615 (N.Y. App. Div. 2d Dep't 1985)

b. Pre-judgment interest accrues when an insurance company presents its losses to its reinsurer:

• An insurance company was entitled to pre-judgment interest on its award under CPLR § 5001 in action against a reinsurance company from the time of the reinsurance company's anticipatory breach. Where the reinsurance company was found to have improperly failed to indemnify the insurance company for payments made in connection with its settlement. Pre-judgment interest is recovered from earliest ascertainable date the cause of action existed and, in this case, when the insurance company first made demand on the reinsurance company. *See Aetna Cas. & Sur. Co. v Home Ins. Co.*, 882 F. Supp. 1328 (S.D. N.Y. 1995).

c. Courts will allow interest on confirmed arbitration awards:

Successful parties in arbitrations are entitled to interest on award from its date of entry of judgment. See *East India Trading Co. v Dada Haji Ebrahim Halari*, 114 NE.2d 213 (N.Y.S. 1952).

Texas

a. Pre-judgment Interest - Creditors may charge and receive from the obligor legal interest at the rate of 6% a year on the principal amount of the credit extended beginning on the 30th day after the date on which the amount is due. See *Tex. Finance Code § 302.002 (2012).*

b. The awarding of pre-judgment interest is mandatory when the date of loss is firmly established:

Pre-judgment interest is recoverable as a matter of right when an ascertainable sum of money is found due and payable at a definite date before judgment. Jarrin v. Sam White Oldsmobile Co., 929 S.W.2d 21, 24 (Tex. App. Houston 1st Dist. 1996).

c. Post-judgment Interest rate can be up to 18%:

• If an insurer is liable for a claim under an insurance policy, the insurer is liable to pay the holder of the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18% a year as damages, together with reasonable attorney's fees. Tex. Ins. Code Ann. § 542.060(a)(2012).

• A money judgment earns post-judgment interest at a rate equal to the lesser of:
(1) the rate specified in the contract, which may be a variable rate; or
(2) 18% a year. Tex. Finance Code Ann. § 304.002 (2012).

Conclusion

A firm understanding of your jurisdiction's respective pre and post-judgment interest laws provides your side with a "carrot and stick" approach to reinsurance debt dispute resolution. As disputes often center on aged reinsurance balances, a prompt settlement in a jurisdiction which provides creditors with substantial remedies for pre and post-judgment balances should be pointed out to the opposing party as early and as often as possible in a dispute.

Potential pre and post-judgment remedies should also be considered prior to a dispute. A reinsurance company, with a significant national presence, should also consider setting the applicable laws which provide an adequate remedy if the opposing parties wish to delay settlement and litigation/arbitration becomes necessary from the outset. The act of preselecting applicable laws favorable to the creditor from a pre and post-judgment Interest perspective can have an effect on current reinsurance agreements or on reinsurance agreements already in effect where commutations are possible.

An effective practitioner should utilize whatever advantages his or her jurisdiction provides as the amount of pre and post-judgment interest available may act as the catalyst toward resolving a dispute in a timely fashion. ●

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Building Bridges

James Veach

AIRROC and IAIR Agree on Mutual Efforts

illustration / Rafael Edwards

AIRROC's Board of Directors and the Board of Directors for the International Association of Insurance Receivers (IAIR) have agreed to advance their common goals through a Memorandum of Understanding (MOU). AIRROC's Board approved the MOU during its October 15, 2012 meeting at the AIRROC Rendez-vous. The IAIR Board approved the MOU on December 1, 2012 during the IAIR meeting at the National Association of Insurance Commissioners' (NAIC) Fall Meeting in D.C.

Founded in 1991 by current Delaware Commissioner of Insurance Karen Weldin Stewart and others in the receivership community, IAIR, originally known as the Society of Insurance Receivers, strives to exchange information among, and enhance standards for, persons working in insurance receivership, restructuring, and run-off. IAIR also offers accreditation to its members through educational programs offered during the year and at NAIC meetings. IAIR has approximately 280 individual members.

IAIR publishes a newsletter, The Receiver, which you can read online at www.IAIR.org. In the latest issue of The Receiver, IAIR's President, Francesca Bliss (formerly a New York Department of Insurance Special Deputy Superintendent who oversaw the New York Liquidation Bureau), announced the AIRROC-IAIR MOU along with another agreement IAIR entered into with the ABA Tort Trial and Insurance Practice Section. The Receiver, *President's Message,* at 2 *(Fall/Winter 2012).*

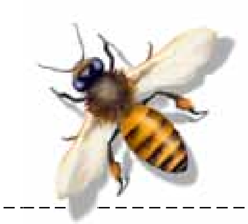
In President Bliss's view, these joint efforts will "expand . . . IAIR's benefits . . . to other professional organizations who share (IAIR's) mission." Meanwhile, AIRROC Executive Director Carolyn Fahey, who attended the IAIR Fall meeting in D.C., said that she is "pleased that AIRROC and IAIR have entered into this agreement to help support each other's initiatives."

The AIRROC-IAIR MOU will allow the parties to:

- link to each other's websites;
- exchange articles between AIRROC Matters and The Receiver; and
- offer brochures and promotional material to each party's members, all of whom will receive a 20% discount off the non-member registration fee for any program sponsored by the other party. IAIR and AIRROC will also assist with and promote other activities or projects as opportunities present themselves.

The AIRROC Matters Publications Committee welcomes aboard the editors at The Receiver, thanks IAIR's External Affairs Committee (Mary Cannon Veed and Douglas Hertlein) for their efforts drafting the MOU, and looks forward to working with IAIR's members. ●

A Virtual Beehive of Activity



Happy New Year to our members, sponsors, steadfast supporters and all of the volunteer worker "bees" that help make AIRROC such a great organization. I hope that you all had a warm and wonderful holiday season!

AIRROC's first event of 2013 was our Dispute Resolution Procedure (DRP) Workshop, which was held in Chicago on February 7 and hosted by Foley & Lardner. While the weather was cold, the excitement in the sessions generated enough warmth to make it a great day! We had a lively group of attendees from AIRROC members and our partners who participated in a day of interactions to illustrate how our DRP can make settling disputes more streamlined and affordable. Read more about it in Key Coleman's article featured in this edition.

In March we returned to "30 Rock," the offices of Chadbourne & Parke for the Spring Membership Meeting. The education day featured sessions on collections – strategy and management, international issues, an interactive role-play on head injury claims, and an interesting session on outsourcing. Look for more in the next issue of AIRROC Matters.

Mark your calendars and register for our April 17 Regional Education Day in New York hosted by DLA Piper. Then on June 13 PwC and Sidley will host the Chicago Regional. These programs offer timely and diverse agendas so don't miss these two events.

Join me in welcoming AIRROC's inaugural group of Corporate Partners – Butler Rubin, Cozen O'Connor, Freeborn Peters and Locke Lord. Firms that become AIRROC Partners have committed their support to the organization and our initiatives, a terrific new way for firms to get more involved with AIRROC. Watch for their speakers and attendees at our events all year!

What else?

- The forthcoming announcement of the new format and agenda for our October Commutation and Networking Forum…
- Looking ahead to the Regional Education Days for the fall (West Coast and perhaps an international venue)…
- Watch the website for new enhancements and member social media features…s

Back to the hive for me. Much more to do. See you soon! ●

Carolyn Fahey, AIRROC's Executive Director, has been a familiar face for over 20 years at associations representing the insurance and reinsurance industry.
carolyn@airroc.org

Welcome Keith!

The Publications Committee welcomes Keith Kaplan, a new Co-Chair serving with current Chair Leah Spivey. In his ninth year on AIRROC's Board, Keith is a senior executive with 30+ years' insurance and reinsurance experience. He serves as Executive Vice President for Reliance Insurance Company (In Liquidation), and previously worked as risk manager, treaty reinsurance buyer, underwriter and auditor.

Thanks to Our Corporate Partners

AIRROC is pleased to recognize and thank the Corporate Partners who make it possible to serve our membership. Their contributions and continual support underpin the organization's initiatives allowing us to provide education, networking, AIRROC Matters magazine, and a full range of industry-specific services.

We invite each of you to become a new Corporate Partner and contribute to our organization's legacy of success. Partner benefits include complimentary attendance at meetings, speaking opportunities, and significant branding at our events, on our website and in AIRROC Matters.

Want to learn more? Contact Carolyn Fahey at 703.730.2808 or via email to carolyn@airroc.org. ●

BR BUTLER RUBIN

COZEN O'CONNOR

Freeborn ATTORNEYS AT LAW

Locke Lord LLP

photos / Jean-Marc Grambert

Publications Committee Plans for the Future

PC gets down to business at the NYC offices of Boundas Skarzynski Walsh & Black, LLC, – hosted by co-editor Maryann Taylor – for some "out-of-the-box" planning!

News & Events

Change at the Top at the NAIC

In January, former Nebraska Senator Ben Nelson was named Chief Executive Officer of the National Association of Insurance Commissioners (NAIC). In its announcement of his appointment, the NAIC stated that "Nelson will lead the NAIC's efforts to meet the needs of its members and represent their interests as the primary advocate and chief spokesperson in Washington, D.C. His responsibilities will include outreach to federal and international governmental entities, as well as state government associations, consumers and insurance industry representatives." Prior to retiring from the Senate in 2012 after two terms, Nelson served as Governor of Nebraska from 1990-1998. He also served as Executive Vice President and Chief of Staff for the NAIC (1982-1985); Director of the Nebraska Department of Insurance (1975-1976); and Executive Vice President and then President/CEO of the Central National Insurance Group (1977-1981).

Nelson's appointment follows the departure late last year of Dr. Therese M. (Terri) Vaughan as CEO, long time NAIC chief operating officer and chief legal officer. Dr. Vaughan's impressive background included serving as a state insurance commissioner (Iowa), as a past president of the NAIC, and as a Professor of Insurance and Actuarial Science at Drake University, before becoming its CEO in February 2009.

In addition to the change in the CEO, on December 2nd, the NAIC elected new officers, who assumed their duties on January 1, 2013:

President: Jim Donelon, Louisiana Insurance Commissioner

President-Elect: Adam Hamm, North Dakota Insurance Commissioner

Vice President: Monica J. Lindeen, Montana State Auditor and Commissioner of Securities and Insurance

Secretary-Treasurer: Michael F. Consedine, Pennsylvania Insurance Commissioner

NAIC Conducts State Survey of the Nonadmitted and Reinsurance Reform Act (NRRA)

Title V of the *Dodd-Frank Wall Street Reform Act* includes the NRRA, which specifically deals with the financial solvency regulation of reinsurers. States apparently have had difficulty interpreting and applying the definitions of "reinsurer" and related terms within state regulatory schemes. At the 2012 Summer National Meeting the NAIC staff was charged to survey the states with regard to the NRRA and the results of the survey were reviewed at the 2012 Fall National Meeting. The issues covered in the survey and the results from 24 jurisdictions are summarized below:

1. What jurisdictions have considered with respect to the NRRA definition of "reinsurer" and the NRRA's prohibition of the financial solvency regulation of reinsurers by non-domiciliary states:

Survey Response: of the 24 responses received, 16 jurisdictions have considered these issues. The biggest concern deals with the ambiguous nature of the terms in the definition of "reinsurer. It was also strongly recommended that the needed clarification should be on a "uniform" national level and not on a jurisdiction by jurisdiction basis;

2. What are the jurisdictions doing to address the issues emanating from the NRRA "reinsurance" reform provisions:

*Survey Response: Of the 24 jurisdictions responding, only 6 reported that they intend to take some action on NRRA issues, including adopting the NAIC revised **Credit** for Reinsurance Model Act and Credit for Reinsurance Model Regulation;*

3. What action(s) should the NAIC take regarding adoption of a "standard" definition of "reinsurer" or release of guidelines for the jurisdictions in the application of the NRRA:

Survey Response: 17 jurisdictions are in favor of the NAIC to either adopt standard definitions or create "uniform" guidelines in the application of the NRRA.

Industry News

RiverStone acquires Eagle Star run-off

Subject to regulatory review and court approval, Zurich Insurance Group is transferring the run-off portfolio of its Eagle Star subsidiary to RiverStone Insurance (UK). US$ 273 million in undiscounted gross liabilities of Eagle

Star, which has been in run off since 2006, will transfer to RiverStone, predominantly for US asbestos, pollution and health risks written from the mid-1940s to the mid-1980s.

In addition, Zurich and RiverStone have signed a reinsurance agreement that transfers the benefits and risks of Eagle Star's general insurance portfolio as at 1 July 2012 from Zurich to RiverStone until completion of the full transfer.

According to Zurich, this transaction is part of its wider strategy to divest most of its non-core businesses to release and redeploy $ 1.5 billion of capital by 2015.

White Mountains acquires American Fuji from AIG

White Mountains Solutions is acquiring American Fuji Fire and Marine Insurance Co, a small run-off subsidiary of American International Group (AIG). The transaction is expected to close during the first quarter of 2013 subject to customary closing conditions and regulatory approval from the Illinois Department of Insurance.

R&Q completes a series of run-off related acquisitions

Randall & Quilter Investment Holdings ("R&Q") has recently completed a series of acquisitions of captive and other run-off companies. Ken Randall, Chairman and Chief Executive Officer of R&Q, has commented that these acquisitions "continue[] to demonstrate our ability to provide attractive exit solutions for captive owners who have put their captives in run-off or are contemplating ceasing writing new business." The acquisitions include:

LINPAC Insurance Co Ltd (LICL): As of year-end 2012 R&Q completed its acquisition of LICL, a Guernsey domiciled captive insurer, from the owner LINPAC Finance Ltd. R&Q paid £450,000 in cash. LICL had been in run-off since 2006 and wrote business from 1994, including employers' liability, public and products liability, workers comp, US/Canada general liability and motor. Its reserves were about £171,000 as at June 2012. This was R&Q's fifth captive acquisition, and its fourth in Guernsey, in 2012.

Alma Insurance Company Limited ("Alma"): In November 2012 R&Q announced the acquisition of Alma, subject to change of control approval by the Finnish Financial Services Authority ("Fin-FSA"). The acquisition was completed by year-end 2012 following receipt of regulatory approval from the Fin-FSA. Alma has been in run-off since 1989. Its business is comprised of international reinsurance business with net reserves of c. £1.6m as at 30 September, 2012 (the date of the latest available unaudited accounts). According to R&Q, the consideration payable by R&Q in cash from existing resources is c. £4.4m, a discount to the estimated adjusted net asset value.

Hickson Insurance Limited ("HIL"): In January 2013 R&Q completed the acquisition of HIL, an Isle of Man domiciled captive insurer, from the owner Hickson Investments Limited (an affiliate of the Lonza Group). HIL has been in run-off since 2002 and wrote a mixed book of business from 1988. R&Q purchased the shares of HIL for £525,000, its first captive acquisition in the Isle of Man.

SPRING 2013
MARK YOUR CALENDAR

April 6-9
NAIC Spring National Meeting
Houston, Texas
www.naic.org

April 17
AIRROC Regional Education Session
New York, NY
www.airroc.org

April 19
Current Issues in Insurance Regulation
New York, NY
www.nycbar.org

April 21-23
IRU Spring Conference
The Fairmont Southampton, Bermuda
www.irua.com

April 24-25
IRLA Discontinued Business Seminar & Networking Congress
The Grand, Brighton, England
www.irla-international.com

June 13
AIRROC Regional Education Day
Chicago, IL
www.airroc.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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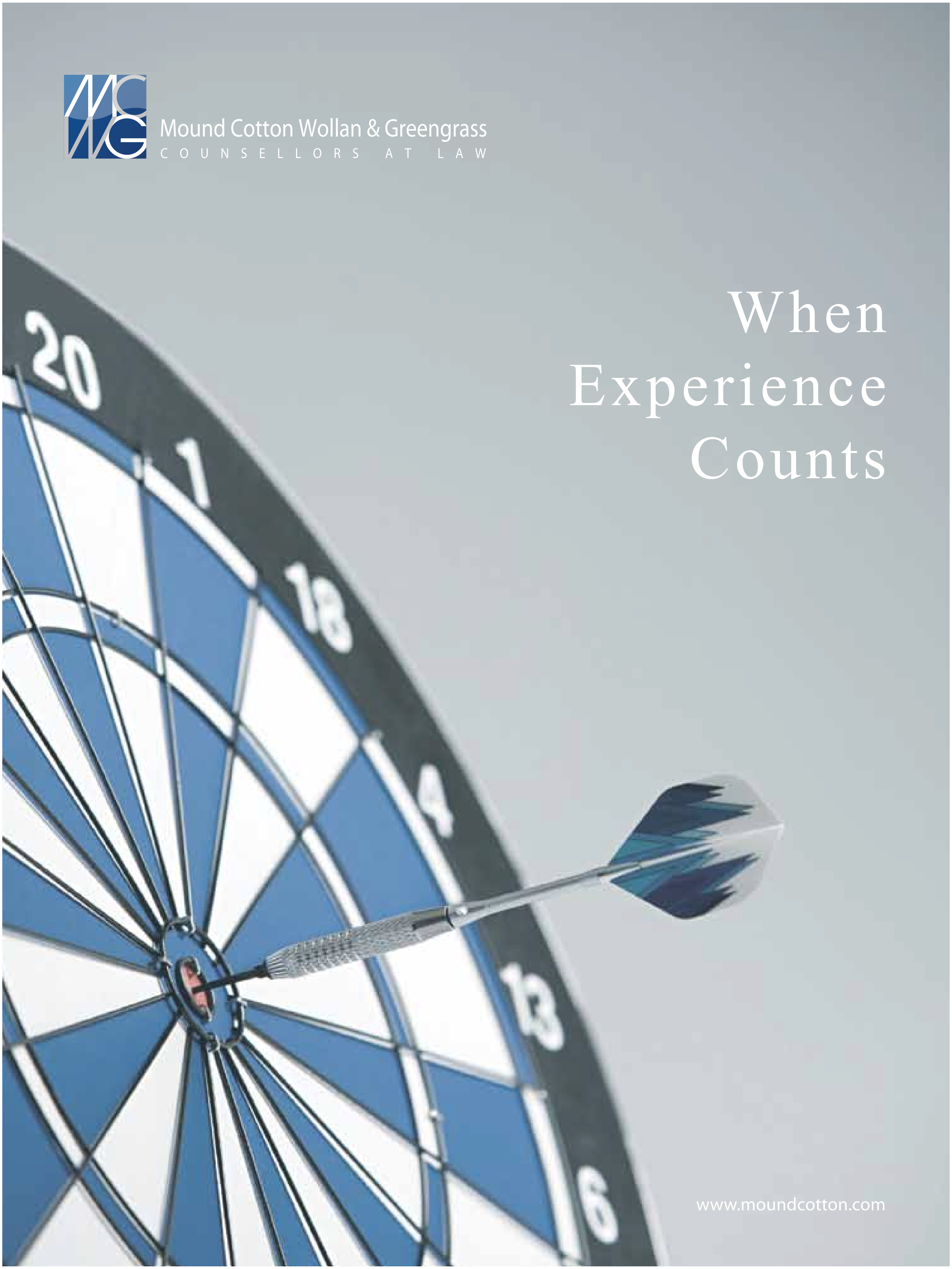

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A dynamic regulatory environment and the constant pressure to deliver shareholder value in these challenging times, is placing increasing demands on the management of discontinued business.

With our deep industry experience and sector expertise, KPMG's Insurance Restructuring teams based across our global network can assist you offering a clear road map for your run-off, advising on implementing best practice and helping you to manage and deploy capital more efficiently within your business.

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