www.airroc.org Vol. 12 No. 2 Summer 2016

# AIRROC matters

LEVERAGING LEGACY LIABILITY

## Clearing The Smoke

### Legal Marijuana: an Insurable Risk

**POT LUCK • DISTRESSED DEBT DREAMS • MIGHTY MURRAY**
**FRANK KNOWLEDGE WITH BOSTON BEANS • CLAIMS AND COUNSEL: IN OR OUT?**

# Up in Smoke

Peter A. Scarpato

If I prophesized four years ago the course of the 2015-16 presidential nominations process, you would have had me committed. Similarly, if I told you that the summer 2016 AIRROC Matters cover would feature a marijuana plant, you would have had a similar, though more muted, reaction. Yet, here we are, extolling the medicinal properties of a plant whose sale and use are criminalized across the land. And because these medicines result from the essence of an illegal substance, their production, marketing, distribution and use create nightmarish conundrums for insurers, with all prior wordings and legal opinions going … up in smoke.

Welcome to AIRROC Matters Summer 2016! To start off: In *Clearing the Smoke: Legal Marijuana: an Insurable Risk*, Lisa Simon explains how the legalization of marijuana by several states creates unique challenges for insurers across GL, property, auto, crop, workers comp, employers' liability, and cyber lines of business. As requests for coverage of this once maligned substance increase, carriers must carefully analyze unique exposures if they wish to ride the potentially profitable wave created in the "new" marijuana market. Next, Shayne Caple submits *Trash or Treasure: Are Insolvencies and Reinsurance Asset Sales Inevitable?* This "how to" on the various trends and factors used to value financial upsides and downsides of distressed asset sales is a must read for all legacy organizations.

Our value is in our people, an axiom truly proven in the case of Barbara Murray. Our Spotlight feature, *Barb Murray Revealed: Multi-disciplined, Multi-Skilled*, reveals the many elements of Barb's character, professionalism, motivation to succeed, view of industry trends, and more. We are happy to honor this former AIRROC Person of the Year.

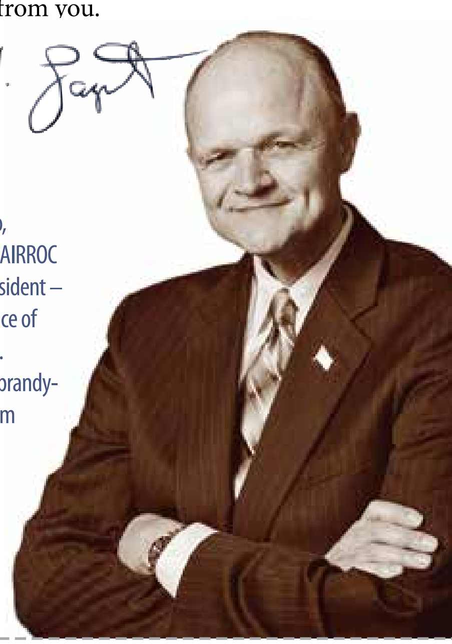
Education lies at the heart and soul of this organization. *Spring "Cleaning" at AIRROC's March and April Meetings* cover the many topics presented which include: Audits, audits and more audits, issues in life reinsurance, Bellefonte, Garlock, Obamacare, sports and CTE, law enforcement liability…the list is endless, and its value to run off people, priceless. We like to pat ourselves on the back occasionally so here we present *AIRROC Goes to Boston's Back Bay …* containing glowing comments from our May 6, 2016 Boston regional event, a partnership with members Ernst & Young and Stroock & Stroock & Lavan.

Carolyn Fahey's column, *AIRROC Goes Up, Up and Away with a New Vision Statement* is more than a shout out to The 5th Dimension (for those 1970's rockers among us). Feeling like the beautiful Monarch butterfly, Carolyn recounts her flights from event to event, AND announces exciting news from the board: an all-day strategy session in March, resulting in a new strategic plan for AIRROC's future. There is more to come in 2016 as Carolyn and the board put "flesh on the bones" of these new initiatives.

We return to the land of Legalese. First, if you formally pursue a "really old" claim in arbitration, you may face a motion to dismiss, based upon a state statute of limitations. The ol' time bar defense. Ben Gonson provides guidance for us in Lessons of *ROM v. Continental: Who decides whether claims are timely and under what circumstances?* Also, Michael Goldstein and Dan Endick present Part 2 in a series, *Lifting the Veil on Arbitration Proceedings: Whose Your Counsel? Disqualification of Counsel by Courts.* This time, they address the less encountered tug of war between panels and courts over who may disqualify arbitration counsel.

Close with Present Value and now we're smokin'!

Let us hear from you.



Peter A. Scarpato, Editor & Chair of AIRROC Matters, Vice President – Ceded Reinsurance of ACE Brandywine. peter.scarpato@brandywineholdings.com

AIRROC matters

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Illustrations / R. Edwards

# Clearing the Smoke

## Legal Marijuana: an Insurable Risk

*George Washington reportedly grew it. Bill Clinton and Barack Obama have admitted to smoking it (although only one admitted to inhaling). A 2015 Gallup poll revealed that 44% of American adults have tried it. Twenty-three states have legalized it for medical use, and four have done so for recreational use.*

"It," of course, is marijuana, also known as cannabis, weed, or pot. No matter what it is called, marijuana has gone mainstream. Legal market sales were $5.4 billion in 2015, and they are expected to hit $21.8 billion by 2020 as more states legalize marijuana both medically and recreationally. Yet marijuana remains illegal on the federal level. This dichotomy is creating huge conflicts and keeping insurers from tapping into this tremendous market.

Until the mid-1970s, marijuana was mostly used in the U.S. for recreational purposes. Around that time, it became known for having anti-nauseant qualities and for stimulating appetite, and consequently it became popular with people undergoing chemotherapy or suffering from AIDS. Over the past few decades, marijuana has been shown to be effective in providing pain relief, relieving spasticity and controlling muscle spasms, preventing seizures, decreasing anxiety, and lowering eye pressure.

In 1996, California legalized marijuana for medical use. Since then, twenty-two other states have followed suit, with five, including New York and Illinois, doing so in the past three years. Several other states are expected to vote on medical marijuana in 2016. Laws vary from state to state, but all set forth conditions for which use is approved. The most common conditions are seizure disorders, HIV/AIDS, glaucoma, and cancer. Some states permit home growth, but in most states medical marijuana is obtained through dispensaries. Most states limit medical marijuana to their own residents, and all require written documentation from a physician.

*Legal market sales were $5.4 billion in 2015, and they are expected to hit $21.8 billion by 2020 as more states legalize marijuana both medically and recreationally.*

Because marijuana is illegal on the federal level, physicians cannot prescribe it. They can only recommend it, or certify that patients are qualified to use it. Many doctors are opposed to medical marijuana for safety reasons. They feel that it has not been tested sufficiently, or are concerned about possible contaminants, such as mold or pesticides. Physicians are also concerned about violating ethical standards and about not being covered by malpractice insurance for any claims because marijuana is not an FDA-approved drug. The FDA has taken the position that marijuana is not safe or effective for the treatment of any disease or condition. In 2014, the DEA requested that the FDA undertake a scientific and medical analysis of the drug. The results of that review have not yet been made public. The FDA previously reviewed marijuana in 2001 and 2006 at the DEA's request, and concluded that marijuana should remain classified as a Schedule I drug under the Controlled Substances Act on both occasions.

States have also started to legalize marijuana for adult recreational use. Colorado and Washington were the first to do so in 2012. Oregon and Alaska followed suit in 2014. Several other states are expected to consider the issue this year, including California, Nevada, Arizona, Vermont, and Maine. What's the driving force behind recreational legalization? Money plays a key role. Colorado took in $135m in taxes and fees from the sale of marijuana in 2015. States also save money on prosecutorial, judicial, correctional, and police resources. Legalized recreational marijuana also attracts tourism, creates thousands of new jobs, and increases the sale of residential and commercial real estate.

The federal government does not share states' enthusiasm for marijuana.

Lisa Simon

Marijuana remains classified as a Schedule I drug under the Controlled Substances Act, meaning that it is illegal to possess, distribute, or use it under federal law. Drugs classified as Schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment, and a lack of accepted safety for use of the drug under medical supervision. Numerous attempts to reclassify marijuana to Schedule II have been unsuccessful. The most recent attempt occurred in 2015, when the Compassionate Access, Research Expansion and Respect States Act (CARERS) was introduced in the Senate. The Act would reclassify marijuana and permit states to regulate it as they desire, and would also ease financial regulations. The bill has been stalled in the Senate Judiciary Committee and no hearings had been held as of March 2016.

Although Congress appears unlikely to reclassify marijuana in the near future, the federal government has taken several actions over the past few years that indicate it does not intend to aggressively prosecute those who use marijuana in accordance with state law. The Department of Justice issued a memo in 2013 to federal prosecutors stating that, while marijuana remains an illegal drug, prosecutors should focus their efforts on eight priorities, which include preventing the sale of marijuana to children and preventing revenue from the sale of marijuana from going to criminal enterprises. In 2014, Congress approved a budget amendment, known as the Rohrabacher-Farr amendment, which prohibits the Justice Department from using federal funding to interfere with state marijuana laws.

*As a result of the federal government's position, financial institutions are understandably reluctant to work with marijuana-related businesses.*

As a result of the federal government's position, financial institutions are understandably reluctant to work with marijuana-related businesses. Banks, brokerage houses, and credit card companies will not let these businesses open accounts and will not loan them money. In 2014, in an attempt to make it easier for marijuana businesses to obtain financial services, the Treasury and Justice Departments released guidelines stating that prosecution of financial institutions may not be appropriate unless the institution is aware that a marijuana business is involved in any of the eight enforcement priorities. The guidelines set forth stringent rules for institutions that handle marijuana business, including the need to conduct due diligence and file Suspicious Activity Reports. But many banks do not want to undertake such burdensome activities. They are also concerned that property used for collateral can be seized under asset forfeiture laws. Marijuana businesses may also have trouble obtaining professional services. Lawyers and accountants are concerned about violating ethical standards and rules of professional conduct, as these generally prohibit them from knowingly giving advice to clients regarding illegal activities.

Given the uncertainties created by the conflicting federal and state positions, it is not surprising that insurers have shied away from marijuana businesses. Lloyd's of London syndicates had been providing coverage to the marijuana market, but in June of 2015 Lloyd's announced that it intended to exit this business. A memo written by their Director of Performance Management stated that "unless and until the sale of either medicinal or recreational marijuana is formally recognized by the government as legal, as opposed to subject to non-enforcement directives, syndicates at Lloyd's should not insure such operations in any form."

Insurers have other concerns besides illegality. There are few data points for pricing risks. Some carriers may be worried about reputational risk. Others may be scared about the complex regulatory environment. Carriers are also nervous about the potential exposures posed by legalized marijuana. Marijuana does pose health risks. People who smoke it are exposed to respiratory irritants in the smoke. Heavy users can experience symptoms of bronchitis. Marijuana can cause an increase in heart

## Clearing the Smoke (Continued)

rate and a drop in blood pressure. For example, a 72-year-old woman thought she was having a heart attack after inadvertently consuming a cookie that contained marijuana at her beauty parlor and needed treatment at a hospital. The salon settled with her for $25,000.

The cookie is just one example of the many risks posed by edibles, which are foods and drinks that are infused with marijuana. With smoking or vaping, the effects of marijuana are felt almost immediately. However, edibles need to be digested and metabolized before they kick in, and this process can take up to two hours. Many people do not realize this, and when they don't feel an immediate effect, they eat or drink more. Consuming large amounts of marijuana can cause severe anxiety attacks and hallucinations. There have been two instances in which young men ate more than the recommended amounts of edibles and died - one fell to his death from a hotel balcony and one shot himself. Because many edibles are sweet items, they are attractive to children, and there have been several reported cases of children consuming marijuana-infused candies and cakes and needing medical treatment.

In addition to having immediate physical and mental effects, marijuana may also pose some long-term risks. Use has been linked to memory loss and cognitive decline. Marijuana can increase the risk of psychosis and paranoia when used heavily. Approximately 9% of people who use it become dependent upon it. While most studies have not found significant long term risks from marijuana use, many of these were conducted years ago, when marijuana was less potent. The average percentage of tetrahydrocannabinol (THC), which is the psychoactive component, has increased from 3% to 12% as a result of new growing/production methods and selective breeding. In addition, prior studies may have only considered the health effects of smoking marijuana. There may be additional health risks posed by newer methods of ingestion, such as vaping and edibles.

Marijuana growers and retailers also face potential exposure to product liability claims stemming from exposure to pesticides. Because marijuana is illegal, the federal government has not issued any regulations governing pesticide use. The lack of oversight has allowed many growers to use products that may not be safe. Colorado issued numerous recalls of marijuana after tests revealed the presence of pesticides not approved by the state.

> *In addition to the potential for bodily injuries, insurers are wary of the property damage risks posed by marijuana grow operations … fire, explosions, water damage, mold, and pollution.*

Insurers are also nervous about the possible harm to others caused by an individual's use of marijuana. In Colorado, a woman was killed by her husband, who was hallucinating after consuming marijuana-infused candy. Some studies have found that people who drive after consuming pot are slightly more likely to be involved in accidents. Because marijuana can impair judgment and affect reaction time, operating heavy machinery after use can be very risky. In addition to the potential for bodily injuries, insurers are wary of the property damage risks posed by marijuana grow operations, which include fire, explosions, water damage, mold, and pollution.

While many insurers do not wish to provide coverage for marijuana risks for the reasons stated above, there are carriers who have entered this business. Marijuana Business Daily lists more than 50 insurance providers on its website, mjbizdaily.com. Those who do provide coverage have reported tremendous growth and interest.

What coverage exists for marijuana risks under existing policies? Most current policies do not contain specific exclusions relating to marijuana. However, insurers' attempts to use other exclusions have generally met with success. For example, in *Huynh v. Safeco Insurance Co. et al.*, No. C 12-01574, 2012 U.S. Dist. LEXIS 167389 (N.D. Cal., San Jose Div. Nov. 23, 2012) the court held that there was no coverage for property damage caused by the illegal growing of marijuana because the policy contained exclusions for loss from the illegal growing of plants and loss resulting from the illegal manufacture and production of plant materials. In *Nationwide Mut. Fire Ins. Co. v. McDermott*, No. 14-1623, 2015 U.S. App. LEXIS 3012 (6th Cir. Feb. 24, 2015), the court found that the insured's failure to notify the insurer that her husband had set up a marijuana lab in her house barred coverage because it constituted a change in use of the premises. Insurers lacking potentially applicable exclusions have frequently argued that it would be against public policy to force them to provide coverage. The court in *Tracy v. USAA Casualty Ins. Co.,* No. 11-00487 LEK-KSC, 2012 U.S. Dist. LEXIS 35913 (D. Haw. Mar. 16, 2012) agreed with the insured in a case involving the theft of medical marijuana plants. The court held that even though the plants were legal under Hawaii law, requiring the insurer to pay insurance proceeds for their replacement would be contrary to federal law and public policy.

However, a recent case may signify a turning of the tide. *Green Earth Wellness Center v. Atain Specialty Ins. Co.,* No. 13-CV-03452-MSK, (D. Colo. Feb. 17, 2016) is one of the first cases to address coverage under a commercial policy for marijuana. Green Earth, a grower, sought coverage for damage caused by a nearby wildfire to mother plants as well as buds and flowers that had been harvested. The court held that the "growing crops" exclusion in the commercial property and general liability policy precluded coverage for the mother plants, but that there was coverage for the harvested plants because they fell within the definition of "stock." Atain argued that the exclusion in the policy for contraband precluded coverage, but the court held that "the Policy's 'Contraband' exclusion is rendered ambiguous by the difference between the federal government's de jure and de facto public policies regarding state-regulated medical marijuana." Since the exclusion was ambiguous, the court looked to the parties' intent, and noted that the evidence suggested the parties mutually intended to include coverage for harvested plants, pointing out that Atain knew Green Earth was operating a medical marijuana business. Therefore, Atain was not entitled to summary judgment on the insured's breach of contract claim. The court specifically noted the *Tracy* case, but refused to follow it, noting that the case had been decided several years ago and that since that time there was a continued erosion of any clear and consistent federal policy in this area.

These cases demonstrate that insurers should be carefully reviewing policy language, as policies may be interpreted to provide coverage for marijuana-related losses. Choice of law plays a key role. The *Green Earth* case was decided under Colorado law, and Colorado is clearly a marijuana friendly state. As more states legalize marijuana, and the federal government continues its "hands-off" approach, courts may be increasingly likely to find in favor of coverage. If marijuana is reclassified, then many exclusions may no longer be applicable.

Because legalized marijuana is still relatively new, many businesses and insurers have not yet been presented with situations in which they have had to take action. However, employers and workers' compensation insurers are already being confronted with marijuana-related issues. Can employers take disciplinary action against employees who use medical marijuana on their own time and are not impaired at work? Courts have generally sided with employers in suits brought by employees who tested positive for marijuana and were consequently disciplined or terminated. Judges have held that states' medical marijuana laws only protect against criminal sanctions and do not create civil remedies, and that the Americans with Disabilities Act does not protect the employee because it excludes from protection those engaged in the illegal use of drugs.

> *...the court held that "the Policy's 'Contraband' exclusion is rendered ambiguous by the difference between the federal government's de jure and de facto public policies regarding state-regulated medical marijuana."*

A recent Colorado Supreme Court decision upheld the termination of an employee for failing a drug test in spite of the fact that Colorado has a statute which prohibits employers from firing employees based upon their lawful activities when they are off-premises and not working. The court held that the term "lawful" in the statute refers only to those activities that are lawful under both state and federal law.

Some state laws do prohibit discrimination against employees based upon their status as medical marijuana users. These include Rhode Island, Connecticut, Maine, and Illinois. Other states have even stronger protections, which prohibit discriminatory actions against employees not only if they are medical marijuana cardholders, but also if they test positive for marijuana. However, employers are free to adopt zero tolerance policies if the policies are applied in a non-discriminatory manner.

Workers' compensation carriers are being asked to pay for medical marijuana by employees who use it for pain relief. No carrier has voluntarily agreed to pay for it. Its illegality under federal law is not the only reason. Carriers note that there is limited medical research, a lack of standardized reimbursement rates, no pricing guidelines, no FDA approval, and no formal billings codes. Several states have laws that specifically prohibit workers' comp insurers from paying for medical marijuana. New Mexico is the only state to date that has ordered employers to pay for medical marijuana.

Can an employee who has used marijuana get workers' compensation benefits? There have not been any cases to date addressing the use of medical marijuana. Cases that have addressed recreational marijuana use have generally found that a court will not bar coverage unless the use was the sole cause of the injury. It can be difficult to prove this, especially since THC can remain in a person's system for days or weeks after use. As a result, a positive drug test does not mean that the person was impaired at the time of the injury.

It is clear that the legalization of marijuana by states presents numerous issues and challenges for insurers. Many lines of business are potentially impacted, including GL, property, auto, crop, workers comp, employers' liability, and cyber. Insurers will increasingly be faced with requests for coverage. It is essential that they carefully review and analyze their potential exposures while they investigate the huge opportunities presented by this new marijuana market. ●

Lisa Simon, J.D., ARe, CPCU, RPLU is a Claims Expert/Vice President at P&C Americas Business Management, Swiss Re and can be reached at lisa_simon@swissre.com.

# Trash or Treasure

## Are Insolvencies and Reinsurance Asset Sales Inevitable?

*The purchase of distressed debts is not a new thing. Losses generated in the 1990's by rocketing APH exposures and the dawn of a new era of litigation saw billions of dollars of additional liability flood the market, and the run-off industry as we know it was born. Today, it is estimated that the value of non-life European run-off stands at around €247bn and this is anticipated to rise to €300bn by 2019. (Source: PWC Survey of Discontinued Insurance Business in Europe 2015).*

Since the mid-1990's distressed debt traders and private equity firms have been quick to buy direct creditor class and general (reinsurer) creditor class claims due from established well-known insolvencies. With access to annual statements and a degree of patience, buyers have enjoyed sizeable returns through higher value, "sit and wait" transactions. In the last five years, competition in the field has increased as consistently low interest rates have seen private equity firms considering the more technically specialized world of reinsurance distressed debts as a way to boost yields.

Investors were quick to see the long-term potential offered through buying debts due from insolvent estates, while creditors were happy to relinquish their claims for the comfort of extinguishing administration costs and receiving an immediate cash benefit.

In the London Market, as the insolvencies developed, more sought finality. Not content with just existing as an insolvent run off, there was a tidal strategic shift toward physically closing companies. The situation in the UK was helped at a regulatory level by Schemes of Arrangement providing a court approved process for administering and finalising an insurance company's insolvency. As of January 1st 2015 over seventy-five Solvent Schemes of Arrangement and a further 50-plus insolvent companies had entered into some form of closure process, whether Scheme of Arrangement or provisional liquidation.

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Schemes of Arrangement, however, only dealt with assumed liabilities. Some reinsurance balances were settled via offset into a creditor's claim and, though many Scheme Managers employed extensive commutation strategies for both assumed and ceded business, nearly all found that, following a bar date, there was still a block of uncollected, uncommuted reinsurance assets remaining – known commonly as a residual reinsurance book. In order for the company to close, these residual reinsurance debts had to be dealt with and only two solutions were available – write off or sell. Most decided to sell.

This provided debt traders with an additional opportunity beyond just buying debts due from an insolvent company's dividend stream. The sale of residual reinsurance books became big news with up to fourteen separate debt traders bidding within a single tender process.

Typically, the companies that sold their residual reinsurance books were working toward closure, with assumed cessions being finalised through the claim determination and dividend distribution processes. The insolvency managers were also looking for a solution to finalise the asset due against their ceded book that would facilitate cost savings, accelerate cash-flow and, from a strategic perspective, provide finality toward closure.

From a debt acquirer's perspective, the opportunity to buy residual debts within the London Market has peaked and all but a few of the most well-known solvent and insolvent schemes have been completed. While Solvency II will undoubtedly provide opportunities to buy reinsurance assets from ongoing run-offs, the decline in insurance failures and the market's current approach to solvent Schemes of Arrangement means that it is unlikely we will see this form of closure process used to the same extent witnessed over the past decade.

So while we all await the advent of Solvency II and the requirement to deal with troublesome debt and the fresh opportunities for debt purchase that its introduction will bring, distressed debt traders will have to turn their attention elsewhere. In terms of the scale of opportunity, there is surely no better than the U.S. run-off market.

## The U.S. Insolvent Market

What is tantalising for debt traders and run-off practitioners alike is that the U.S. run-off industry is considerably larger than the UK run-off industry, yet in terms of a market-wide, proactive approach to descaling and closure of Insolvencies, the U.S. market has not quite taken off compared to the London Market.

A U.S. based equivalent of a Scheme of Arrangement, solvent or otherwise, so far does not exist. The successful Accelerated Closure Plan of GTE in Rhode Island was expected to have heralded the dawn of a new wave of managed closures, but to date GTE remains the only solvent company to have successfully closed through such a plan. The advent of the LIMA legislation in Vermont and favourable amendments to Regulation 68 in Rhode Island could see changes in how solvent run-offs are managed.

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There are in the region of 220 active insurance insolvencies within the United States. It is difficult to estimate the full technical reinsurance value as the varying reporting requirements from state to state mean that it is almost impossible to calculate a definitive value. But as a guide, of the 220 insolvent companies, around 150 have published their accounts with combined reinsurance assets of over \$1bn and liabilities of over \$35bn. Factor in the unpublished element and the potential for descale of liabilities and monetization of reinsurance assets is clearly significant.

While to date the number of transactions to buy blocks of debt from insolvent reinsurers has been relatively low, this could be due to the strategy of the debt buyers themselves. Many prefer larger transactions presented with buying direct creditor class claims, and the "sit and wait" approach that these offer. They often lack the infrastructure to chase and deal with the myriad of technical and geographical issues presented by buying large blocks of high-volume, low-value reinsurance assets.

## Pricing Methodology

The sale of reinsurance assets due to an insolvent reinsurer usually occurs towards the end of the insolvency process, when the liquidator's strategy switches from a run-off scenario to closing the company down in its entirety. It is commonplace that the reinsurance book has been descaled considerably by that point leaving only the more difficult or low-value debts remaining to be collected.

With closure in mind, when pricing reinsurance debts due to insolvent estates, we are mindful that our client wants finality - with no ongoing "profit share" scenarios and little or no ongoing administration of the ceded reinsurance book. We also consider the impact that due diligence information requests for data and documentation could have on the liquidator's resources.

## Price Calculated for Paids

Each reinsurer balance is reviewed on the basis of a perceived capability to collect / commute the balances due, the cost of the collection efforts, and the time it would take to collect. Factors that need to be considered include the credit risk of the debtor company, the age of balances, volume of policies and claims, nature of underlying losses, time since reserves were last updated, and ongoing litigation. Issues could include geographical location, attitude toward commutation, and the approach to settlements and information requirements.

## What Value is given for Case Reserves?

The timing and stage of an estates insolvency, along with the run-off strategy of the liquidator, will also have a significant bearing. Typically there are

## Trash or Treasure (Continued)

several options employed to purchase debts due against case reserves:

### 1. Value at a Point in Time

The case reserves are valued on a discounted basis. That discount will consider the risk for current and future reserve redundancy and the inability to commute with certain reinsurers.

There is no recourse back to the seller and the debts in case reserves are bought on an as-is basis.

In this scenario there is no further work required to update the incurred position, and certainty of value is created for the ceded reinsurance book. The benefits include finality, with no recourse or further work required.

### 2. Final Account

This is a more likely scenario, and nearer to the closure of an estate, when the majority of assumed claims have matured and creditors have received notices of determination. At this point, assumed liabilities would be finite and all applicable reinsurance calculated. There are several benefits to a Final Account including certainty of reinsurance value position and a higher chance of a larger, more accurate purchase price. Potential downsides are to restrict the ability to commute/collect due to accelerated claims; it could be difficult to collect value for IBNR (assuming IBNR given any values within claim determination process) and the Final Account eliminates the ability to cede through additional unforeseen claims.

*The timing and stage of an estates insolvency, along with the run-off strategy of the liquidator, will also have a significant bearing.*

### 3. Continuous Reporting

This might occur where the insurance company is not ready to close, i.e. it is a year or more from closing its books. A consideration is paid for the case reserves as at a point in time and then the buyer will try and commute the contracts - including the case reserves or collect unpaids as and when they fall due. Usually the selling party provides an updated position every six months (normally at the buyers cost) until the company closes. This is particularly useful where a profit share scenario exists, as it allows maximum recovery from unpaid balances and the up-to-date reserve position. It is possible that a larger value would be paid for the case reserves at the time of purchase, as there is more confidence that value can be achieved from commutation and claims development.

This option is especially beneficial if a profit share scenario is included. It also becomes a benefit in the wider scheme of future insolvents estates. Ongoing claims development also assists in discussions with more problematic reinsurers. The downside is that there is a longer lead time from purchase to finality, with potential for deterioration of the claim position.

## Summary

Experience has shown that within the insolvency process the early sale of reinsurance assets can help with untangling the complexity of closure. The process is straightforward as buyers try to keep the cost and disruption to a minimum; the amount of data needed for the due diligence process is driven by the seller. Even in auction situations the use of internet-based "cloud" storage means a multitude of bidders can access the same data without setting foot in the seller's office.

If the reinsurance asset is significant enough, it can also have a beneficial impact upon creditors, through the liquidity provided, cash flow, and an enhanced cash asset. Releasing provisions from the balance sheet can inevitably lead to an enhanced dividend distribution to creditors. ●

Shayne Caple is a Senior Consultant – Legacy Solutions - at Pro-Global Insurance Solutions with experience in reinsurance asset management and particular expertise in ceded and assumed commutations. shayne.caple@pro-global.com

# Barb Murray Revealed

## Multi-disciplined, Multi-skilled

*When Barbara Murray sends you her "long form" resume, it depicts a career ranging from claims professional, to consultant, to claims executive, to consultant again with milestones and accomplishments to which we can't begin to do justice in our Spotlight article. We can give you some flavor of what propels her enthusiasm for her work in the industry and in support of AIRROC.*

***What key lessons have you learned over your career?***

Read the contract, know the contract, and pay attention to what people say. I worked for someone who required anyone entering his office to discuss a claim to have fully read the policy and to understand its application. He in turn would listen to your presentation and raise relevant issues for discussion. This protocol ultimately became part of my management strategy. I find that it promotes learning and drives the right decisions.

***If you could have a second career, what would it be?***

I find teaching to be particularly rewarding. Throughout my career, I have been drawn to opportunities to develop educational programs and generate thought leadership. The prospect of developing talent, leaving a legacy, and influencing the industry is very exciting.

***What do you like best/worst about your current position?***

I love the diverse issues and wide-ranging client base that I deal with; I enjoy having the opportunity to assist organizations in enhancing operations across a variety of functions from claims management to reinsurance collections and transactions, while achieving desired outcomes. The challenges for me are relatively minor and revolve around carrying out various internal administrative processes that are necessary, but not as much fun as identifying where a bordereaux reconciliation went wrong.

***What industry publications do you read on a regular basis and what educational sessions or conferences do you attend and why?***

I have a news application on my phone that allows me to follow specific industry publications as well as specific topics of interest across a variety of sources. I find that to be more efficient than simply following any one publication. As to educational sessions, I prioritize attending both ARIAS and AIRROC programs. They are designed and facilitated by industry experts and provide high-quality education at reasonable fees. More importantly, they offer opportunities for dialogue and negotiating transactions with other companies.

***What is your favorite quote?***

PACE, Positive Attitudes Conquer Everything.

***What is your favorite leadership manual/book?***

*Who Moved My Cheese*. It is a simple depiction of our need to be able to adapt to change in order to be successful.

***What might someone be surprised to know about you?***

That I produced an award-winning music video in the late 80's and toured with a band called "Toy Haus". The video was titled: "Just for Funk".

***What sorts of trends do you see in the industry?***

I am following several areas impacting the industry on a global basis, including: developing carrier corporate risk profiles and assessing the required reinsurance protection; the use of data analytics in claims and insurance; Cyber Risk and associated coverages; insurance protection for terrorist attacks; enhancements in Quality Assurance processes and incorporating end-to-end process assessments; and the impact of the aging workforce on insurance products and insurance operations.

***How did you first become involved in AIRROC?***

I have been involved in AIRROC since its beginning. In 2003, when I was the Executive Vice President of Insurance Run-Off Consultants, Argonaut Insurance Company's run-off unit, I began attending their educational programs. In 2005, as Senior VP at Kemper, I really started taking advantage of the commutation days. I would schedule half-hour meetings back to back from 9 a.m.-5 p.m. Those meetings were instrumental in achieving our goals at Kemper. In 2009, AIRROC honored me as its "Run-off Person of the Year." I now make it a priority to participate in AIRROC and support their mission of dialogue and education in the run-off community.

***If you could change one thing about AIRROC, what would it be?***

I would like to see continued initiatives around attracting younger people and encouraging more current topics.

***The interest in AIRROC seems to be growing. Why do you think that is?***

Run-off is an important part of nearly every large insurer's operations. Long-tail claims are NOT going away and require specific skill sets to manage effectively. AIRROC tailors its education programs to serve the industry and enhance the skills of insurance professionals. ●

Connie D. O'Mara, connie@cdomaraconsulting.com and Bina Dagar, bdagar@ameyaconsulting.com


## AIRROC
## Mobile App Guide

**What is the AIRROC Mobile App?**
It's an easy and convenient way to navigate AIRROC's Membership Meetings on your Apple (iOS) and Android smartphones and tablets. It contains all of the event information that you'll need to make the most out of your experience.

1. **Download the native apps** from iTunes and Google Play stores. **Search "AIRROC"** in your app store or scan a QR code below. For an HTML5 web version (to use on a laptop), direct your browser to https://confpal.com/m/airroc

| New to downloading apps? Look for these store icons on your mobile device: | IOS | Android |
|---|---|---|
| | App Store | Play Store |

IOS Android HTML5

2. **Log In**
   Username: Your email address
   Password: **airroc**

3. **Key Features**
   - View **Schedule** (select 'Event Schedule' from the home screen or click on the 'Program' tab on the bottom menu)
   - On the **Tracks** screen, click "Complete Program Schedule" at the top to see all the activities on each day
   - View **Attendees** and **Speakers**
   - To **connect** with another attendee and exchange contact information, click on the card icon to send your business card electronically – make sure your profile is completed. (Update your profile at 'Settings' in the top right corner of the home screen).
   - Get info on all the **Corporate Partners**
   - Read the latest **AIRROC MATTERS** Magazine
   - Promote your **participation at AIRROC** tweeting via Twitter or post a Facebook message directly from within the app
   - For previous AIRROC conferences, tap **Switch Conferences**

AIRROC

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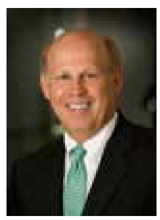
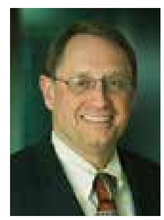
404.504.7762
lhassett@mmmlaw.com



**Chris Petersen**

202.408.5147
cpetersen@mmmlaw.com



**Robert "Skip" Myers Jr.**
Co-Chair

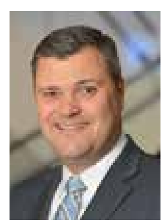
202.898.0011
rmyers@mmmlaw.com

**Jessica Pardi**

404.504.7662
jpardi@mmmlaw.com

**Joe Holahan**

202.408.0705
jholahan@mmmlaw.com



**Tony Roehl**

404.495.8477
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Jay Votta
+1 212 773 3000
jay.votta@ey.com
Rich Guidi
+1 212 773 2826
richard.guidi@ey.com
Luann Petrellis
+1 212 773 0723
luann.petrellis@ey.com
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CONTINUING ED

# Spring "Cleaning" at AIRROC's March Meeting

## Audits, Audits, Audits: What Do YOU Need to Know?

*The March Membership Meeting education session, held at the offices of Chadbourne & Parke in New York, presented a comprehensive tutorial on everything you wanted to know about audits but were afraid to ask.*

### The Contractual Right to Audit

The first panel was comprised of Carey Child, Senior Counsel of Chadbourne & Parke; Chris Hollender, Vice President of Argonaut Insurance Company; and Susan Aldridge, Counsel, also from Chadbourne, who stepped in at the last moment for her U.K. partner, Michelle George, due to a travel glitch. The focus of this panel was on the source of the contractual right, the drafting of wording, the enforcement of existing wording, and the logistical and practical issues that arise. Despite differing labels which may be attached, the right to audit can be found in most reinsurance contracts because it addresses a fundamental characteristic of the relationship: the reinsurers' dependency on the cedent. Where to look? The source of the right may be found in the "Access to Records" or "Inspection of Records" clause, as part of a claims control or cooperation provision, or as part of the Notice or Bordereaux Reporting provisions. Even in the absence of an express contractual provision, the right may be implied due to industry custom and practice.

The panel reviewed a number of different audit provisions, pointing out the pitfalls and consequences of key language that impacts the rights of both parties. The takeaway was that although you may be struck with existing language, when drafting audit provisions in the future, make sure that the wording fits the purpose of your audit whether the intent is to focus on underwriting, financial reporting, and/or claims. Language dealing with the current status of the relationship between the cedent and reinsurer was also explored. Some of the critical issues discussed were: whether exercising audit rights is viewed as affirming the contract; the impact on privilege issues on open underlying claims as against third parties; the linking of audit rights to payment of disputed or unpaid balances; and the relationship status (trading vs. runoff) in an adversarial context. Some of the logistics and real-world issues that are raised by an audit include whether to require a confidentiality agreement, who actually conducts the audit – outside auditors or the company itself – the hours of access, whether copies are permitted and who foots the bill, and whether copies are made by staff or offsite vendors. Access to electronic records and the segregation of privileged material are additional considerations. All of these logistical issues draw on the resources of both sides and thus are ripe for disagreement or friction.

### Audits and Information: Just What is Privileged?

The second panel of the day took a closer look at privileged information from the perspective of the reinsurance industry. Frank DeMento of Crowell & Moring moderated the panel, which included Frederick Gindraux, Senior Claims Manager and Senior Vice President of Swiss Re, Louis Ricciuti, Vice President and Associate General Counsel of Global Claims at XL Catlin, and Nicholas Scott, Vice President and Assistant General Counsel of QBE North America.

Many would agree that access to records is considered the bedrock of the duty of utmost good faith, which in turn obligates cedents to disclose all information material to the business reinsured. Views on just how broad the access rights are have changed over time and are more frequently debated in the audit context. The increase in direct coverage litigation gives rise to the tension between the cedent's interest in disclosure to reinsurers in order to obtain reimbursement for ceded claims and the concern that such disclosure may result in the waiver of privilege, particularly with respect to coverage opinions. Even if the underlying coverage case is concluded, waiver concerns remain, especially if the coverage issue is a recurring one.

The panel provided an overview of the most frequently asserted privileges, attorney-client communication and attorney work product, and addressed

photos / Jean-Marc Grambert

Summarized by Maryann Taylor

some of the more common myths about these privileges. Whether advice of the in-house attorney is legal or business is one area that is rife with misconceptions. The substance and the circumstances of the communication, as well as the identity of the participants, are the key factors that will determine whether the communication is covered by the privilege. The importance of establishing and protecting the work product privilege was also stressed by, inter alia, memorializing the "anticipation of litigation" factor and labeling the material as work product. Whether privilege protection is afforded to underlying coverage opinions and reserve/IBNR information are recurring areas of dispute. In sum, privileges are just that - a privilege or special right that is not guaranteed or absolute and in which care should be taken to maintaining the privilege by understanding the contours and how to keep them.

## Key Components of an Audit and M&A Due Diligence

The final session on audits delve into the practical aspects of managing an audit, crafting a properly constructed audit request, what to include in a pre-audit review, how to conduct an effective M&A due diligence, and how to avoid common pitfalls. The esteemed panel consisted of: Stacy Hunt, Director of Alvarez & Marsal; Paul Roach, President of Alan Gray LLC; Jason Verdone, Director of Reinsurance Asset Management of The Hartford; and Rudy Dimmling, Senior Director of Alvarez & Marsal, as moderator.

Knowing the objective of an audit is critical in understanding what the other side is trying to accomplish in order to manage expectations. There are many reasons to perform an audit and defining the objective is key. Participants should gain an understanding of the specific issues, the time frame for the audit that is subject to review, the book of business and any other areas of concerns that should be hashed out in advance.

*Knowing the objective of an audit is critical in understanding what the other side is trying to accomplish in order to manage expectations.*

From the auditor's perspective, preparation in advance includes the review of relevant data such as the contracts at issue and loss data, establishing the audit sample criteria, and preparing a detailed audit request letter. Select a sample size so that a statistical profile can be developed and design a flexible audit database that allows the auditor to aggregate the data and attain quantitative information. The report of findings should identify the who, what, when and where of the audit, as well as the methodology and findings of the audit. An opinion and recommendations may also be addressed depending on the nature of the assignment.

From the cedent's perspective, an audit is resource intensive. Scheduling facilities and personnel, obtaining the files, reviewing for privilege, and honoring the auditor's request to meet with staff takes time to plan and execute. Clear expectations as to the format of the date available and any limitations should be addressed up front. A smooth audit enables the reinsurer to agree to pay claims in a timely and efficient manner, hastens the collection cycle, and maintains the relationship.

In the M&A context, due diligence is an integrated approach that combines financial/accounting, operational, tax, human, capital, information technology, commercial, and valuation diligence to generate combined insights and guide professionals in their investment evaluation and underwriting process. Although no two transactions are the same, there are some key areas to focus on in all transactions in order to understand the portfolio. Deal fatigue is real and sellers must do their own due diligence to know and understand as well as explain the abnormalities prior to going to market. Due diligence should be proactive – a reactive approach leads to unprepared sellers and buyers that often leave value on the table. ●

Maryann Taylor, D'Amato & Lynch, LLP, mtaylor@damato-lynch.com


# NY Regional Education Day Features Diverse Topics

## AIRROC Back in the Big Apple for Spring Regional

*The topics covered at the Crowell & Moring-sponsored Education Day on April 21, 2016 provided substantive presentations and key insights into a diverse range of insurance markets. Some are fertile ground for future full-length articles. For instance, we have an article on the Connecticut Sponsored Captive Insurance Vehicle in the works. Other topics, such as "Current Issues in Life Reinsurance," lend themselves to further reading from sources in addition to the excellent materials provided in the panel discussion. All of the presentation materials are available to members and attendees via the AIRROC App (see page 15 for information).*

## Current Issues in Life Reinsurance

The long-term pricing and administration issues of Life Reinsurance endemic to this business have generated complex solutions, regulations, and disputes that impact both the direct market and reinsurers. The panel members opined that the 10K filings of RGA (Reinsurance Group of America) or Transamerica (as well as listening to earnings calls for those companies) provide excellent background material to supplement the discussion points developed in the panel's presentation. For those who want to revert to textbook background reading, they suggested *Live Insurance*, by Jr. Kenneth Black and Harold D. Skipper, and *Life Health & Annuity Reinsurance,* by John E. Tiller.

For an overview on how key issues in reserving, pricing, and sales will develop in the short term, please see http://www.pfeiferadvisory.com

## Legal Quick Hit Updates

### Bellefonte – Watch Your Language

The recent case law evolution dealing with variations in Facultative Certificate language and the use of extrinsic evidence of custom and practice and underwriting intent is set out in detail in the outline prepared by Harry Cohen of Crowell & Moring.

### Affordable Care Act and Its Implications for Personal Injury Claims

In addition to the presentation materials, Sean Jackson's New York Law Journal article from November 2015 provides a review of the practical considerations to take into account when a personal injury plaintiff is covered by the Affordable Care Act (as indeed, he or she must be) [http://tinyurl.com/henqgs7]. Early diligence in understanding the impact of the ACA on a recovery by a personal injury plaintiff can help educate the Court and the parties so as to have a positive impact on settlements.

### Garlock Decision/Transparency Issues

Leslie Davis's materials provide a thorough review of asbestos backruptcy trust "transparency" issues as well as the *Garlock* decision itself. The Furthering Asbestos Claim Transparency (FACT) Act to amend § 524(g), which passed the House, is currently pending in the Senate Judiciary Committee.




Summarized by Connie D. O'Mara

## The Sharing Economy

### Liability, Insurance, Reinsurance Issues

Auto Sharing, (Getaround, Flexdrive, Relayrides), and accommodation sharing (Airbnb, HomeAway) are growing exponentially (the sharing economy was worth an estimated $15B in 2013 and is projected to be worth $335B in 2015). This presents unique challenges and opportunities to existing insurance markets. The marketing of insurance coverage to Gen Y consumers also presents opportunities for a new generation of insurance market "disrupters" — entities that utilize technology and "sharing" to service a need for insurance, like "NEXT" insurance or "Lemonade" (aka Friendsurance).

In addition to the changing marketplace for transportation and accommodation, the workforce is changing. A 2014 study found that one in three workers was free-lancing and projected that half of American workers will find themselves turned into "so-called independent workers."

What does all this mean for the insurance industry and legislation dealing with the market disrupters? Kelly Superczynski, Head of Strategic Consulting at Aon Benfield, Pete Thomas, Chief Risk Officer at Willis Re, and Marco-Leyte-Vidal of Assurant Inc. provided thought-provoking presentations moderated by William Popalisky of Crowell & Moring. For any antediluvian readers, the materials provide an overview that will get you through a conversation with an entrepreneur in this market space.

> *A 2014 study found that one in three workers was freelancing and projected that half of American workers will find themselves turned into "so-called independent workers."*

## Sports and CTE

### A Real Headache for Insurers?

Robin Dusek of Freeborn & Peters updated the audience on the most recent developments relating to head injuries arising out of participation in sports. The recent approval of the NFL's settlement and what it might mean going forward was discussed. She also discussed how the science is developing and what we're learning about the potential magnitude of the problem of CTE in the general population arising out of youth participation in sports. Her materials bring the reader up-to-date on the science and litigation.

## Law Enforcement Liability

### Legacy Issues and the Long View

Michael Delonay, VP at Swiss Re, gave an overview of legacy issues related to law enforcement liability, including those involving wrongful convictions. He reviewed the possible causes of action, the damages and the potential exposures that may arise out of such wrongful convictions. Delonay further discussed the insurance coverage issues concerning wrongful conviction claims, including trigger/occurrence issues and the expected/intended exclusions. David Beke of Crowell & Moring, described other law enforcement liability claims including those arising from the use of force, police pursuit, the care, custody and control of prisoners, and the coverage issues that arise out of these claims. Wayne Melnick of Freeman, Mathis, & Gary discussed how current law enforcement activities may give rise to future claims, including claims arising from the use of drones, the use of repetitive non-lethal force, the use of microwave technology, the use of body cameras, and the use of nanotechnology. ●

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

photos / Jean-Marc Grambert


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# AIRROC Goes to Boston's Back Bay...

*On May 3, 2016, AIRROC hosted its Boston Regional Education Day. The partnership between AIRROC, Ernst & Young, and Stroock & Stroock & Lavan proved to be a great success with over 65 AIRROC members in attendance and a diverse set of relevant presentations to the industry. From the 22nd floor of the Boston landmark formerly known as the John Hancock Tower (now 200 Clarendon), we spoke with attendees and sponsors for opinions and perspectives on the day.*

"EY appreciated the opportunity to host this event. We had a very engaged audience and some great topics. We started the day with an explosive presentation regarding the Insurance Digital Workplace and ended the day with an interactive session on the soon to be launched EY/AIRROC U.S. Runoff Survey. All in all, a great day! A special thank you to RI Superintendent of Banking and Insurance, Elizabeth Dwyer, for taking the time to participate in the discussion regarding the Rhode Island Insurance Business Transfer and to Paul Brockman, our keynote speaker, for an interesting overview of Enstar."

***Luann Petrellis, E&Y***

"All at Stroock express sincere appreciation to both AIRROC and EY for allowing us the opportunity to co-sponsor this fantastic event. The AIRROC Boston Education Day was not only informative and engaging, but the diversity of topics and active audience involvement made for a truly enjoyable event. We look forward to working with AIRROC on future programming and to continuing what has already proven to be a great partnership."

***Andrew Lewner, Stroock & Stroock & Lavan***

"The AIRROC Boston Regional was great. The presentations on Late Notice and Privilege were presented in a way that was easy to understand and I will be able to retain. I have heard these topics before, however these presentations were the best that I have heard so far."

***Brenda Craven, The Hartford***

"AIRROC's Boston Regional Education Day offered content that was rich and engaging. Covered topics ranged from recently trending digital implications on the industry to updates on more traditional reinsurance subjects, such as privilege/common interest doctrine and "late notice." We also got an informative "101" on the recently enacted Rhode Island Insurance Regulation 68 and its benefits vis-à-vis corporate transfers for the runoff markets. Most importantly, the event brought together industry peers and provided a venue for quality interaction."

***Vanya Rajic, RiverStone Resources LLC***

"Once again, AIRROC has demonstrated that they can provide a dynamic, evolving agenda which is timely and topical. For me, listening to and engaging with a panel composed of the architects and implementers of the Rhode Island Regulations was a great opportunity. Further, the presentation of Enstar in the U.S. was very interesting and gave me a great perspective of their presence and practice."

***John West, Cascade Rock LLC***

## Message from the Executive Director

Carolyn Fahey

# AIRROC Goes Up, Up and Away with a New Vision Statement

Did you know that Monarch Butterflies are one of nature's creatures that is credited with traveling the furthest in their annual migration? Brilliant orange and black monarchs are among the most easily recognizable of the butterfly species that call the Americas home. Their migration takes them as far north as Canada and, during the winter months, as far south as Mexico City. A single monarch can travel hundreds to thousands of miles!

I have felt a bit like a Monarch during the past few months, "migrating" to and from Virginia for AIRROC events, as well as attending programs hosted by others in our industry. From New York to Orlando, back to New York, and on to Boston and Chicago – our sponsors and members who support our programs come out to greet AIRROC (and me!) warmly. More on our Spring features can be found in the preceding pages.

There has been much activity as the AIRROC Board and I work on developing a new strategic plan for AIRROC. We had an intensive strategic planning session in March with the help of an outside facilitation team and developed ideas around the future direction of AIRROC.

The first action of the board was to develop a new Mission and Vision for AIRROC:

> *To be the most valued (re)insurance industry educator and network provider for issue resolution and creation of optimal exit strategies.*
>
> *AIRROC's mission is to promote and represent the interests of entities with legacy business by improving industry standards and enhancing knowledge and communications within and outside of the (re)insurance industry.*

The board has formed task forces to look further at initiatives related to our new VISION, as well as EDUCATION, MARKETING and MEMBERSHIP, and GOVERNANCE. More to come as each of these groups sets their plans and objectives.

AIRROC will continue its commitment to providing top-notch education and networking opportunities and we still have a great schedule in place for the rest of 2016. Mark your calendar for these upcoming AIRROC events:

- **July 19-20, 2016**

  AIRROC Summer Membership Meeting and Education Day, New York, NY

- **September 20, 2016**

  A Comparative Arbitration Workshop, New York, NY

- **October 4, 2016**

  AIRROC / IRLA Munich Regional Education Day, Munich, Germany

- **October 16-19, 2016**

  AIRROC NJ 2016 Commutations & Networking Forum, New Brunswick, NJ

I hope to see you at these events…. ●

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

## Thanks to Our Corporate Partners

I am pleased to acknowledge AIRROC's 2016 Corporate Partners – Alvarez & Marsal, Butler Rubin Saltarelli & Boyd LLP, Carroll McNulty & Kull LLC, Ernst & Young, Foley & Lardner LLP, Freeborn & Peters LLP, Locke Lord LLP, Mayer Brown LLP, Morris Manning & Martin LLP, Mound Cotton Wollan & Greengrass LLP, Stroock & Stroock & Lavan LLP, and White and Williams LLP. AIRROC Partners have committed their support to the organization and our initiatives. Watch for their speakers and attendees at our events all year!

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# Lessons of ROM v. Continental

Benjamin N. Gonson

## Who Decides Whether Claims are Timely and Under What Circumstances?

*Assume you are a reinsurer and you receive a number of arbitration demands. At least one of the demands pertains to a claim ("OLD CLAIM") where you denied reinsurance coverage nearly 10 years ago. You agree to consolidate the arbitrations.*

You also name your arbitrator as a precaution because the treaties require that an arbitrator be named quickly and you still have to address other disputes raised in the arbitration demands. Before an umpire is selected, you apply to stay the arbitration under New York law for just the OLD CLAIM. You make this application because the arbitration clause of your treaty provides that the "the arbitration laws of New York State shall govern such arbitration" and New York Arbitration Law (Article 75 of the CPLR) explicitly provides that a court (and not an arbitration panel) is to decide whether claims should be time-barred.

ROM Re v. Continental involved this exact scenario and our office was involved in two separate appeals decided by the New York Appellate Division, First Department, before the matter eventually went back to the arbitration panel to decide whether the OLD CLAIM was time-barred.

The lower court initially held that an arbitration panel was to decide the issue of timeliness because the court misread the relevant phrase in the arbitration clause and thought it merely stated that New York law, and not New York arbitration law, would govern the arbitration. The lower court relied on the decision of New York's highest state court in Diamond Waterproofing Systems, Inc. v. Liberty Owners Corp., 826 N.E. 2d 802 (N.Y. 2005). In Diamond Waterproofing, the New York Court of Appeals held that an agreement that merely provided that it "shall be governed by the law of [New York]" did not express an intent to have New York law govern enforcement. The Court reasoned that "[i]n the absence of more critical [2] language concerning enforcement . . . all controversies, including issues of timeliness, are subjects for arbitration." 4 N.Y.3d at 253.

We filed an appeal on behalf of ROM Re. We noted that, in contrast to Diamond Waterproofing, here the parties explicitly contracted for New York arbitration law to apply to the enforcement of any dispute between the parties by agreeing to have "the arbitration laws of New York State" govern the arbitration. The appellate court agreed and reversed the lower court. Thus, the case was remanded back to the lower court so the court could determine whether the OLD CLAIM was time-barred. ROM Reinsurance Mgmt. Co. v. Cont'l Ins. Co., 115 A.D.3d 480 (1st Dept. 2014).

*The Court reasoned that "[i]n the absence of more critical language concerning enforcement . . . all controversies, including issues of timeliness, are subjects for arbitration."*

On remand, however, the lower court now found that ROM Re had "participated" in the arbitration by naming its arbitrator before applying to stay the arbitration, even though the parties had not yet appointed an umpire. Thus, ROM Re lost its right to apply to stay arbitration - New York Arbitration Law only permits a party to apply to stay arbitration if it has not "participated" in the arbitration. We filed another appeal on behalf of ROM Re.

The appellate court affirmed the lower court because ROM Re had "participated in the arbitrator selection process, even though they were undoubtedly aware of their statute of limitations claim." ROM Reinsurance Mgmt. Co. v. Cont'l Ins. Co., 128 A.D.3d 570 (1st Dept. 2015).

The ultimate result of these two appeals was that an arbitration panel now decided whether the OLD CLAIM was time-barred. Because arbitration rulings are confidential, the ultimate outcome of the dispute concerning the OLD CLAIM may not be divulged.

A lesson can be learned from each of the appeals in ROM Re v. Continental. The first lesson is to make sure that your reinsurance contract provides that New York arbitration law shall govern any arbitration in order to have a court decide whether a claim is time-barred. Simply inserting a New York choice of law provision in the arbitration clause is not enough, although there are potentially other ways to explicitly state that the parties agree to have timeliness issues decided by a court instead of an arbitration panel. However, the parties need to express very clearly the intent to have timeliness issues resolved by a court when their contracts contain arbitration clauses, based on current New York law and the Federal Arbitration Act ("FAA"). Many reinsurance agreements involve parties from different states, and thus interstate commerce is involved and the FAA applies. Under the FAA, resolution of statute of limitation issues are presumptively reserved for the arbitrator.

The second lesson applies when a party to a reinsurance contract seeks to stay arbitration in favor of litigation under New York arbitration law. That party must be extremely careful not to take any action or inaction which could be construed as "participating" in the

## Lessons of ROM v. Continental (Continued)

arbitration. We believe the appellate court went too far in ROM Re v. Continental in ruling that the reinsurer "participated" in the arbitration by the single act of naming its own arbitrator in a tripartite arbitration. In fact, New York had no previous precedent for such a ruling in a tripartite arbitration.

Nevertheless, in a situation where a party believes it must name its arbitrator before moving to stay arbitration because of a short deadline to name an arbitrator, the party should explicitly object to arbitration when naming its arbitrator and note that it is not "participating" in the arbitration but merely naming an arbitrator to the extent necessary to protect its rights.

The issue of whether a court or arbitration panel shall address whether a claim is time-barred is important because the law is divided across the country as to whether statutes of limitations should apply to arbitration matters. In "Disregarding Honored Traditions: Attempts to Invoke State Statutes of Limitations in Reinsurance Arbitration" published in the Third Quarter 2014 Edition of ARIAS-U.S. Quarterly, the author states that "a body of law has emerged from courts across the country finding that statutes of limitations do not apply to disputes in a private arbitration. However, not all courts have agreed on this point and the issue remains hotly contested or is largely unresolved in many jurisdictions." See also "The Arbitrability of Statutes of Limitations in Reinsurance Disputes" published in the Fourth Quarter 2015 Edition of ARIAS-U.S. Quarterly (noting that state statutes such as New York Arbitration Law differ "from the general view that timeliness issues are to be resolved in arbitration, assuming of course that the relevant contract contains a binding arbitration agreement").

*The question of whether statutes of limitations should apply to arbitration is likely to remain unresolved for the time being, as there are good arguments on both sides of this issue.*

The question of whether statutes of limitations should apply to arbitration is likely to remain unresolved for the time being, as there are good arguments on both sides of this issue. On the one hand, statute of limitations should apply because the same arguments for requiring them in court proceedings apply equally in arbitration, as noted in Raymond James Fin. Servs. v. Phillips, 126 So. 3d 186, 193 (Fla. 2013). In that case, Florida's highest state court explained that statutes of limitation "afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely [18] unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court."

On the other hand, others argue that statute of limitations should not apply to arbitration because arbitration is a private contractual resolution process in which parties are free to arbitrate even old disputes. In addition, "honorable engagement" clauses free arbitrators from following strict legal rules and the doctrine of utmost good faith mandates that the parties treat each other with a heightened duty.

As the issue of whether statutes of limitations should apply to arbitration is unresolved, the parties to reinsurance contracts should try to address this issue openly when the terms of the reinsurance contract are being negotiated. They should also consider the lessons of ROM Re v. Continental, so as to avoid incurring substantial time and expense to determine who decides the timeliness issue. ●

Benjamin N. Gonson is a Partner at Nicoletti Gonson Spinner LLP where he is primarily responsible for the firm's reinsurance practice. bgonson@nicolettilaw.com

# Lifting the Veil on Arbitration Proceedings

## Who's Your Counsel: Disqualification of Counsel by Courts

*In the Spring 2016 issue of AIRROC Matters, we featured Part 1 of a multipart arbitration series by Michael Goldstein and Dan Endick titled, "When Courts Peek Under the Arbitral Veil: the Role of the Courts in Managing Your Reinsurance Arbitration". The following article is Part 2, "Who's Your Counsel." The final article in the series – Part 3 – will appear in a subsequent issue of AM, titled, "Who's Your Arbitrator."*

Much less common, but noteworthy nonetheless, are decisions resulting in disqualification of arbitration counsel mid-arbitration. Similar to disqualification motions for arbitrators, the typical motion concerns possible conflicts of interest or inappropriate communications with the panel. Different from arbitrator disqualification, however, is the fact that courts have expressly stated that arbitration panels are not empowered to decide issues concerning attorney disqualification.

For instance, in *Munich Reinsurance Am., Inc. v. ACE Prop. & Cas. Ins. Co.*, the court was presented with the issue of whether disqualification of an attorney was a matter for the arbitration panel or the court. *Munich Reinsurance Am., Inc. v. ACE Prop. & Cas. Ins. Co.*, 500 F. Supp. 2d 272, 274 (S.D.N.Y. 2007). There, a formal demand for arbitration was issued in January 2006. The respective party-arbitrators were selected in September 2006, but the parties were unable to agree on an umpire. *Id.* at 273. During a dispute as to how to select the umpire, ACE demanded that Saul Ewing, counsel for Munich, withdraw as counsel. *Id.* ACE argued that Saul Ewing had represented ACE in a prior matter and had potentially prejudicial information. *Id.* ACE filed a motion to disqualify Saul Ewing as counsel for Munich in the Pennsylvania Court of Common Pleas and Munich filed a petition for the appointment of an umpire pursuant to the agreement in the Southern District of New York. *Id.*

The Southern District of New York denied the petition for appointment of an umpire, holding that it would not appoint an umpire while a disqualification motion was pending before the Pennsylvania Court of Common Pleas. Id. at 275. Critical to the Southern District's analysis was the question of whether the disqualification could simply be decided in the arbitration once an umpire had been appointed, as Munich contended. The Southern District disagreed, reasoning that, while arbitration is a favored form of dispute resolution, the scope of review that is permitted to arbitrators is limited to matters that the parties intended to arbitrate. Id. at 274. The court thus concluded that: "disqualification of an attorney for an alleged conflict of interest, is a substantive matter for the courts and not arbitrators." Id. at 275. Therefore, the court held that the disqualification motion was properly before the Pennsylvania Court of Common Pleas, meaning that appointment of an umpire by the court while such motion was pending would not be appropriate. Accordingly, the Southern District denied Munich's petition and dismissed the action.

The facts of *Munich* were very straightforward. There was simply a claim that the attorney representing an adverse party had confidential information by virtue of having previously represented the moving party, and therefore should be disqualified under ordinary conflict of interest rules. While the ruling in *Munich* seems straightforward, another case arose in the Southern District of New York where a court was asked to review actions by a law firm that did not trigger conflict of interest rules. Instead, the claim was that a law firm should be disqualified for violating arbitration and legal ethics rules.

In *Northwestern National Insurance Co. v. Insco, Ltd.*, a unique dispute arose as to the ethical behavior of counsel representing Insco, as well as the ethical behavior of a party arbitrator. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, No. 11 CIV. 1124 SAS, 2011 WL 4552997, at *1 (S.D.N.Y. Oct. 3, 2011). This decision provided one of the more explicit, if not salacious, peeks behind the curtain of confidential arbitration proceedings ever published in public court filings and decisions. Northwestern commenced arbitration against Insco for amounts owed under a reinsurance agreement. *Id.*

***This decision provided one of the more explicit, if not salacious, peeks behind the curtain of confidential arbitration proceedings ever published…***

Pursuant to the agreement, both parties selected an arbitrator and a neutral umpire was selected by a lottery. *Id.* In addition to party-arbitrators, both parties were represented by law firms for all arbitration and litigation related matters.

In Fall 2010, a year after the arbitration began, Insco's party-arbitrator, Arbitrator A, informed Insco's counsel that he was concerned about the close relationship between Northwestern's party-arbitrator, Arbitrator B, and its counsel. *Id.* These expressed concerns continued through February 2011 when Arbitrator A finally shared private e-mail communications between the panel members with Insco's counsel. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, 2011 WL 4552997, at *2. A large portion of the e-mails concerned Arbitrator B's frustration with Insco's questioning of her impartiality. *Id.* Upon receipt of the emails, Insco sent a letter to Northwestern demanding that the entire arbitration panel resign because of "evident partiality," and Arbitrator A immediately resigned. *Id.*

Upon request from Insco's attorney, Arbitrator A produced 182 pages of internal panel e-mails, claiming the emails "demonstrate that [Arbitrator B] was under the control of [Northwestern] and its counsel." *Id.* After receipt and review of the emails, Insco and Northwestern engaged in numerous, rather heated communications, most of which centered on the partiality of Arbitrator B. During these communications, Northwestern was unaware that Insco had in its possession any intra-panel communications.

Northwestern finally learned that Arbitrator A had shared internal panel e-mails with Insco's counsel when Northwestern filed a petition with the court to appoint an arbitrator in Arbitrator A's place. In Insco's response to the petition, it submitted a declaration that referenced and attached intra-panel e-mails. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, 2011 WL 4552997, at *2. Northwestern asserted that the possession of these e-mails constituted misconduct by Insco, but a motion was not immediately made.

After Northwestern's petition to appoint a replacement for Arbitrator A was denied, Insco appointed a new arbitrator, and the arbitration continued. *Id.* at *3. At the first organizational meeting following the denial of the petition, concerns were again raised regarding one party's possession of the intra-panel e-mails. When the umpire expressed concern that Insco's possession of private e-mails was a "massive violation," Insco agreed to produce the e-mails to the arbitration panel and Northwestern. *Id.*

The panel reviewed their e-mails and found that the "release by [Arbitrator A] of intra-panel communications was highly inappropriate." *Id.* Despite this finding, the panel issued an interim order on June 10, 2011, stating that

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## Who's Your Counsel (Continued)

it would continue to decide the issues presented in the arbitration. *Id.*

The panel ordered all parties to destroy all documents surrounding the private communications, and the arbitration continued. *Id.* at *4. After Northwestern's summary judgment motion was denied by the panel on July 19, 2011, Northwestern filed a motion to reopen its case and disqualify Insco's counsel from representing Insco.

The Southern District of New York first found that matters of attorney discipline and disqualification were outside of the jurisdiction of arbitration panels. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, 2011 WL 4552997, at *4. Although the court found that the FAA represented "a liberal federal policy favoring arbitration," it determined that there were compelling reasons for the court to entertain a motion for attorney disqualification. *Id.* at *5 (internal quotation marks omitted). The court concluded that attorney disqualification required application of substantive state law and insurance arbitrators are selected merely for their expertise within the industry. *Id.* A panel, the court reasoned, should not be expected to have a thorough understanding of the standards of conduct within the legal profession. *Id.* Additionally, the court found that even if the arbitrators were qualified to resolve attorney disqualification, they had expressly refused to do so in this matter, further warranting judicial intervention. *Id.* at *6.

After determining that there was an issue to be decided by the court, the district court found that the actions taken by Insco's counsel were a serious breach of both arbitral guidelines and ethics rules. *Id.* The court found that, although not binding on the parties, the ARIAS Code of Conduct expressly prohibited arbitrators from informing the parties of the contents of panel deliberations. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, 2011 WL 4552997, at *6. The court agreed that the actions taken by Insco's counsel were in violation of both the arbitral guidelines and the New York State Rules of Professional Conduct. The court further found Insco's argument that its actions were justified because of Arbitrator B's alleged partiality to be unavailing. *Id.* at *7-8.

The court then granted Northwestern's motion to disqualify Insco's counsel, finding that the disclosure of the e-mails "tended to taint the proceedings." *Id.* at *10. Although disqualification of counsel is a "drastic measure," the court found that the integral role that electronic communications play in arbitration proceedings warranted disqualification in this case. *Id.* at *8, *10. "Allowing parties to obtain confidential panel deliberations would provide an unfair advantage in the legal proceedings and have a chilling effect on the ability of arbitrators to communicate freely." *Id.* at *10.

*The fact that counsel took actions that cut against the ARIAS guidelines, coupled with the clear violation of professional ethics rules, allowed the court to step in to "preserve the integrity of the adversary process."*

After the October 3, 2011 order from the district court disqualifying Insco's counsel, Insco attempted to overturn the order by filing multiple motions with the court. First, Insco filed a motion for reconsideration, claiming that the court overlooked key facts and that the court's conclusions about the relationship between Arbitrator A and Insco's counsel were factually incorrect. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, No. 11 CIV. 1124 SAS, 2011 WL 5574953, at *1 (S.D.N.Y. Nov. 15, 2011). The court denied reconsideration, finding that Insco could not show that the court had overlooked any evidence. *Id.* at *2. Acknowledging that the facts of this case were *sui generis*, the court stated, as it did in its October 3, 2011 order disqualifying Insco's counsel, that there was no precedent holding that a court cannot sanction attorneys for unethical behavior in an arbitration proceeding. *Id.*

The district court further concluded that reconsideration was not warranted to prevent manifest injustice. *Id.* at *3. Although Insco argued that the ARIAS Code of Ethics arbitral guidelines applied only to arbitrators and the parties, and not the party's counsel, the court concluded that the guidelines helped establish what actions were off-limits. *Id.* The fact that counsel took actions that cut against the ARIAS guidelines, coupled with the clear violation of professional ethics rules, allowed the court to step in to "preserve the integrity of the adversary process." *Id.* (citing *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005)). Accordingly, the district court denied Insco's motion for reconsideration.

Denial of reconsideration, however, did not prevent Insco from again attempting to have Insco's counsel reappointed as counsel. Insco promptly filed a motion to stay the arbitration, claiming that the order disqualifying Insco's counsel would likely be overturned on appeal, and the disqualification of counsel imposed a severe hardship on Insco. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, 866 F. Supp. 2d 214, 215 (S.D.N.Y. 2011). While admitting "Insco will suffer some harm in the event that it is required to proceed with the arbitration during the pendency of appeal without its lawyer of choice," the court found that balancing the factors necessary to grant a stay weighed against Insco. *Id.* at 217.

The district court first found that there was no likelihood of success on the merits. Insco argued that this question was novel and could have a chilling effect on private arbitrations. *Id.* at 219. The court disagreed with the premise that a novel issue was enough to show likelihood of success on the merits. Finding that other cases, although dealing with conflicts of interest, have disqualified counsel in the Southern District, the court stated that it was within its "inherent authority to disqualify attorneys for unethical

## Who's Your Counsel (Continued)

behavior that tends to taint a court proceeding." *Id.* at 220.

Turning to the second factor in granting a stay, whether there would be irreparable harm, the court agreed with Insco that disqualification of an attorney has "immediate adverse effect on the client by separating him from counsel of his choice." *Id.* at 221 (citing *Bd. of Ed. of City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)). Insco's relationship with its counsel spanned two decades, and although Insco had signed a retainer for new representation, the court agreed that Insco would face harm with the disqualification. Even in light of this finding, however, the court found that the prejudice to Northwestern, the third factor in consideration of granting a stay, was high. *Nw. Nat. Ins. Co. v. Insco, Ltd.*, 866 F. Supp. 2d at 221. The court reasoned that granting a stay would prevent Northwestern from continuing arbitration proceedings that it initiated, and forcing Northwestern to participate in the arbitration with Insco's counsel would undermine the relief sought by Northwestern in the first place. *Id.*

Finally, the court found that the fourth prong, public interest, did not weigh in favor of granting the stay. *Id.* at 222. Insco argued that the opinion by the court would have a "chilling effect" on arbitrations; the court, however, found that the "holding of the opinion is narrower than Insco argue[d]." *Id.* Instead, the court found that similar factual scenarios would not arise with frequency, and instead, the opinion would cause parties to exercise caution in future arbitrations before they disclose intra-panel e-mails. *Id.* at 223. With the court's denial of the stay of arbitration, Insco lost its last attempt to reappoint its counsel, and precedent was set that could change arbitration proceedings going forward.

*Northwestern National Insurance Co. v. Insco, Ltd.* presented highly unusual facts that forced the Southern District of New York to exercise its "inherent authority." *Nw. Nat. Ins. Co. v. Insco, Ltd.*, 866 F. Supp. 2d at 220. It is difficult to determine how arbitrations going forward will react to this precedent: will the court's prediction that parties will now exercise caution before disclosing intra-panel e-mails be proven correct, or will this opinion result in situations where "arbitrators can no longer speak out and reveal corruption" as Insco argued? *Id.* at 222-23. While there is uncertainty as to future arbitrations, one thing is certain: the Southern District of New York increased its role in arbitrations by setting a precedent that attorneys representing parties in arbitrations are held to the same ethical standards as if they were before the court. The decision made clear that if there is a claim that legal ethics were violated, the court has the inherent power to intervene in the arbitration and sanction or disqualify the law firm.

*...the Southern District of New York increased its role in arbitrations by setting a precedent...*

### Conclusion

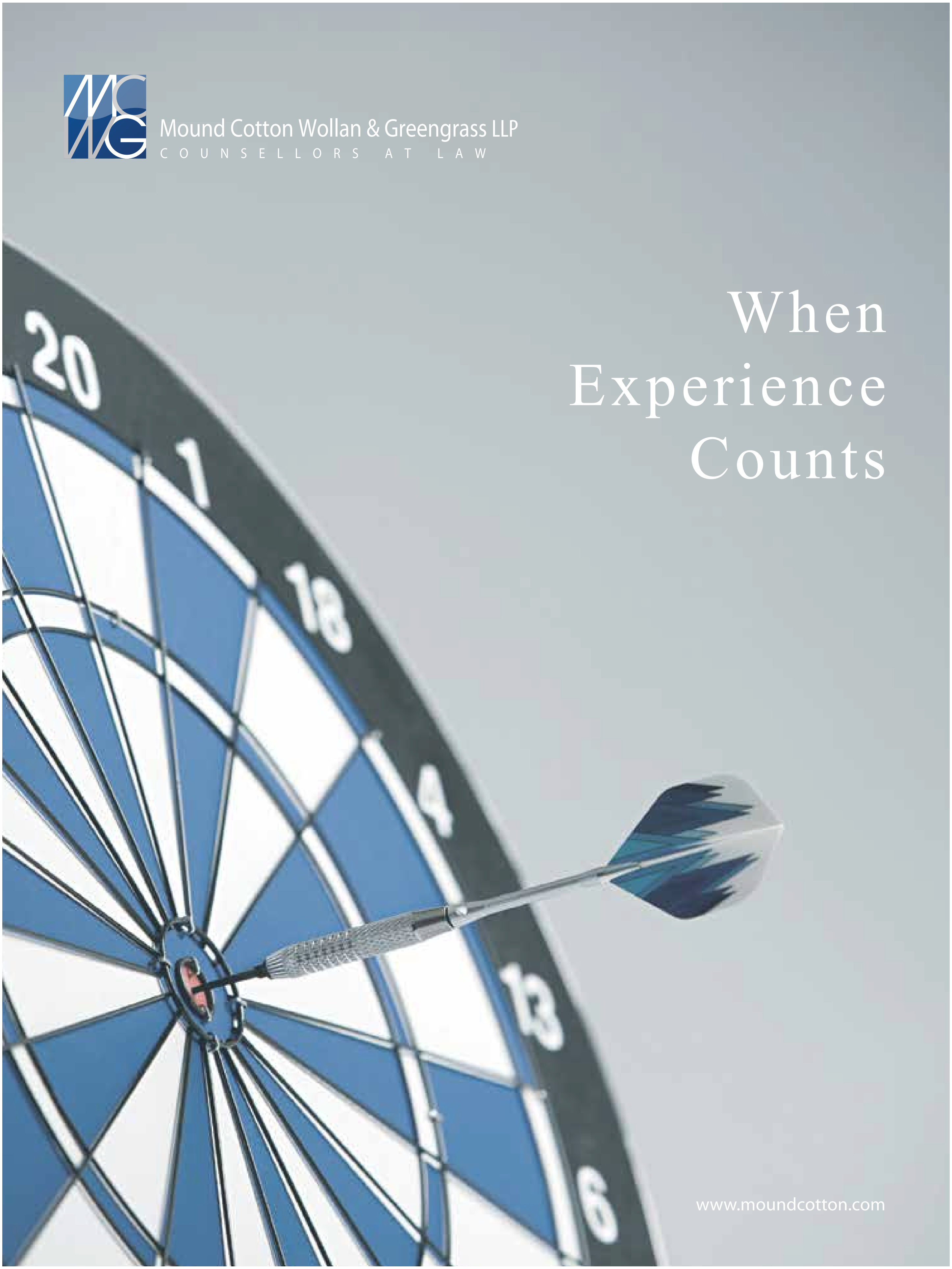
Courts have recently taken on litigation concerning matters that begin in arbitration. Most of the litigation surrounds the appointment of an arbitrator. Jurisdictions differ as to the courts' authority when exercising their discretion. Some jurisdictions follow a strict rule that forces the arbitration to start anew, while others will simply appoint a new arbitrator in the middle of the hearing and expect the arbitrator to catch up.

A growing concern is whether courts, in exercising their authority under Section 5 of the FAA, are inevitably creating more litigation through their interventionist rulings. These decisions, while sound and in accordance with the court's authority, may be missing issues that could result in motion practice in subsequent arbitrations. Although the goal of arbitration is to avoid litigation, and reach amicable agreements in a less formal setting, there is still uncertainty as to precisely what role the court should be taking in the arbitration process. While courts seem to respect the contractual rights of the parties, the broad discretion given under Section 5 of the FAA, and the various applications of the "general rule," could be expanding the courts' role, even if their final determination is that they have no authority to intervene in a matter.

An additional consideration concerning the courts' role in arbitration is the Southern District of New York's decision to disqualify counsel for actions taken during the arbitration. The court's decision to intervene to disqualify counsel indicates that, although issues as to the construction of the panel may be unclear, issues as to legal ethics will trigger a court's "inherent authority" to assert control over the legal profession.

The *Northwestern National* decision also unveiled the inner machinations of a confidential arbitration where the conduct of counsel and some arbitrators can mar what is intended to a less expensive business-like dispute resolution forum; not an undignified free-for-all ethics-challenged melee. One would hope that the publication of the sordid details of this one arbitration constitutes an object lesson, albeit rare, in avoiding all that can go wrong in an arbitration, and not a stain on the integrity of the entire process. To date the authors are unaware of any similarly unseemly blights on the arbitration process. ●

Michael Goldstein is a Partner at Mound Cotton Wollan & Greengrass LLP. mgoldstein@moundcotton.com. Daniel Endick is Special Counsel to the firm. dendick@moundcotton.com.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# News & Events

Francine L. Semaya & Peter H. Bickford

## Regulatory News

### NAIC

The NAIC held its Spring National meeting in New Orleans in April, 2016. Some of the highlights include:

#### NAIC 2015 Annual Report

On April 3, 2015 the NAIC released its 2015 Annual Report entitled "To Serve and Protect in the Digital Age." The Report focused on how "regulators are working together in the ever-evolving high-tech landscape to ensure the success and security of state-based regulation and provide consumer protections." The Report provides an in-depth review of regulatory activity in government relations; international insurance supervision, financial regulation, market regulation, operations, data and technology and consumer education.

#### Principle-Based Reserving

In a follow-up call held on May 2nd, it was reported that 43 states have enacted PBR legislation representing in excess of 76% of relevant premium with bills pending in five more states. The Standard Valuation Law requires 42 states representing 75% of the premiums written must adopt the Model Law or "legislation including substantially similar terms and provisions" by July 1, 2016, in order for PBR to become effective on January 1, 2017. The big issue remaining is whether the legislation adopted by the states is "substantially similar" to the Model law, a determination to be made by the states.

#### Accreditation Standards

The Financial Regulations Standards and Accreditation (F) Committee, adopted amendments to the accreditation standards to require the "certified reinsurer provisions" of the Credit for Reinsurance Model Law and Regulation mandatory, to become effective January 1, 2019.

#### Cybersecurity

In a standing-room only session, the Cybersecurity Task Force heard comments on the first draft of the Insurance Data Security Model Law. The industry's main concern was the provision that each insurance department would be able to require its own rules regarding compliance. The industry expressed the need for uniformity among the states in the standards required of each insurer to be in compliance.

#### Covered Agreement Update

As previously reported, in November 2015, the US Treasury through the Federal Insurance Office (FIO) announced plans to negotiate a "Covered Agreement" on insurance with the European Union, in order to " level the regulatory playing field for US-based insurers and reinsurers." To date, there has not been any positive movement in the negotiations. Currently U.S.-based insurers and especially reinsurers are facing increased requirements in order to do business in EU countries, particularly with the failure of the EU to grant equivalency to the U.S. under Solvency II, which became effective January 1, 2016. The NAIC continues to take the position that a covered agreement is not necessary based on the progress by the NAIC and the individual states to "modernize credit for reinsurance laws and regulations." As of the most recent report, the NAIC has reported that 32 states have adopted the amended Credit for Reinsurance Model Law and Regulation or a law substantially similar, encompassing 66% of direct U.S. premium. Legislation is pending in another five states and once these states adopt the law there will be 93% of the direct written premium covered. The debate continues whether the Covered Agreement will solve the problems being faced by U.S. reinsurers in the EU or will the NAIC efforts enable the U.S. to reach equivalency under Solvency II standards.

## Industry News

Like last year's hurricane season, insurance company merger and acquisition activity has continued to be relatively subdued into the second quarter of 2016. The same cannot be said for the agency arena where agent-broker M&A advisory firm OPTIS Partners reports that Insurance agency mergers and acquisitions hit an all-time high for the first quarter of a year, with 109 reported transactions in the first three months of 2016.

Of course, things can change in a hurry, particularly if you believe the expert expectations for continued high volume of insurance company M&A activity. Although company M&A activity has been relatively quiet, there have been a couple of interesting transactions in the legacy business arena.

Following the acquisition in 2014 of subsidiaries of **GLOBALE Rückversicherungs-AG (GLOBAL Re)** in Australia, Canada, Switzerland and the United States, **AXA Liabilities Managers (AXA LM)** purchased the remaining part of the German run-off company. The transaction will be made through **AXA LM's** investment vehicle **AXA DBIO**, which invests in run-off acquisitions. **AXA LM** was founded in 2001 to manage AXA's run-off business.

Also, **Compre**, the London-based insurance and reinsurance legacy specialist, has agreed to acquire **QBE's** share of the **Ridgwell Fox & Partners' (RFP)** pool legacy reinsurance business. The transaction is structured as a loss portfolio transfer, to be followed by an insurance business transfer in accordance with Part VII of the U.K. Financial Services and

**Present Value (Continued)**

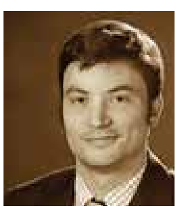
Markets Act 2000, subject to all relevant approvals. The deal is intended to provide QBE with finality for its direct and indirect involvement with RFP.

## People on the Move

In April, New York's acting, but not yet confirmed, Superintendent of Financial

Services, **Maria Vullo,** appointed **Scott Fischer** Executive Deputy Superintendent for Insurance and **Laura E. Evangelista** as Deputy Superintendent for Insurance at the New York State Department of Financial Services (DFS).

The Insurance Division of DFS supervises 1,700 insurers with assets exceeding $4.2 trillion. A litigator and corporate attorney, **Mr. Fischer** has been the Special Deputy Superintendent at the New York Liquidation Bureau. **Ms. Evangelista** has over 20 years of diverse legal experience in the insurance industry, most recently at Nausch, Hogan & Murray Inc., where she served as Vice-President and Assistant General Counsel.



After a lengthy stalemate, the Florida Cabinet has selected **David Altmaier** to be the state's new insurance commissioner replacing **Kevin McCarty,** who is stepping down after 13 years on the job. Altmaier has been with the Florida Office of Insurance Regulation since rising through its ranks to become chief analyst in 2012, director in 2014 and its deputy commissioner for P/C since last March. He has served on various committees of the National Association of Insurance Commissioners, including chairing the P/C Risk-Capital Working Group and the Capital Adequacy Task Force.

**Kay E. Wilde**, formerly of the law firm Foley & Lardner LLP, has joined Allstate Insurance Company as Reinsurance Senior Claims Manager – Specialty Operations. Kay can be reached at kay.wilde@allstate.com.

**John West,** a frequent and valued contributor to AIRROC Matters, has started a new consulting firm, **Cascade Rock Consulting**. In addition to providing TPA, claims audit and reinsurance collections services, Cascade Rock is also created to "bring underwriting management and legacy acquisition and management tools to the Central and North American markets." John can be reached at jwest@cascaderockllc.com.

**Keith Kaplan,** formerly with Reliance Insurance Company (In Liquidation), established **Anselma Capital, LLC,** a boutique advisory and management services firm. Keith can be reached at kkaplan1998@comcast.net.

**Marcus Doran** was recently appointed Chief Operating Officer of **Armour Risk Management, Inc.** with responsibility for the run-off of a number of insurance companies, utilizing his more than 20 years of insurance and reinsurance experience, the majority of which has been in the run-off space. Prior to the Armour Group, Marcus was Assistant Vice President in the Reinsurance Asset Management group of The Hartford. Marcus can be reached at mdoran@armourrisk.com. ●

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

## SUMMER 2016 MARK YOUR CALENDAR

**JULY 19 – 20, 2016**
AIRROC Summer Membership Meeting and Education Day
New York, NY
www.airroc.org

**AUGUST 4 -7, 2016**
American Bar Association Annual Meeting
San Francisco, CA
www.americanbar.org

**AUGUST 26-29, 2016**
National Association of Insurance Commissioners (NAIC) Summer National Meeting
San Diego, CA
www.naic.org

**SEPTEMBER 10, 2016**
National Association of Insurance Commissioners/CSIS Managing Cyber Risk and the Role of Insurance
Washington, DC
www.naic.org

**SEPTEMBER 20, 2016**
A Comparative Arbitration Workshop,
New York, NY
www.airroc.org

**OCTOBER 4 –**
AIRROC / IRLA Munich Regional Education Day, Munich, Germany
www.airroc.org

**OCTOBER 16-19**
AIRROC NJ 2016 Commutations & Networking Forum,
New Brunswick, NJ
www.airroc.org