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"Everything Exciting Is Happening at the State Level"

Maine Insurance Superintendent Mila Kofman discusses health-care reform and what roles state and federal government should play in it

Mila Kofman has served as Superintendent of Insurance in Maine since March 2008. She also chairs the Consumer Protection and Innovations Working Group (D Committee) of the National Association of Insurance Commissioners (NAIC). Prior to her appointment in Maine, she was an Associate Research Professor and Project Director at the Georgetown University Health Policy Institute, where she studied state private health insurance market reforms, regulation, products, and financing strategies. As a federal regulator at the U.S. Department of Labor (1997–2001), she implemented HIPAA and related laws and also worked on legislative and regulatory initiatives—the Patient's Bill of Rights, long-term-care insurance, nursing home reform, and ERISA reform. She will speak at NOLHGA's 25th Annual Meeting in October.

Superintendent Kofman was interviewed in early August 2008.

When did you join the Bureau, and what made you decide to join state government?

I was nominated early this year by Governor Baldacci. I went through the confirmation process in February and then was sworn-in in early March of this year. I was a federal regulator with the U.S. Department of Labor for four years. I left the administration and joined the faculty at Georgetown, and most of what I did at the university was focused on researching the private health-coverage marketplace—products and companies. While that was fun, I really missed public service and missed being a regulator.

Quite frankly, everything that's exciting and innovative and real is happening at the state level in terms of health-coverage reform—not at the federal level. That's a long-winded way of saying why I wanted to come back to public service and why I went to the state instead of the federal government.

You mentioned the action is on the state level. Is that because the states can act more quickly?

I don't know all the reasons, but certainly when you take a look at what the states have done in the last decade, it's been quite remarkable compared to what the federal government has or has not been able to do. I don't know why that is. Maybe it's the political will. Maybe it's creative ways to finance coverage expansion efforts. I don't know.

Certainly each state is different, and the conditions are different. You have a state like Maine, where several years ago there was a huge reform effort with Dirigo

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Preserving the Confidence

Alexis de Tocqueville once observed that there is hardly a political question in the United States that does not sooner or later turn into a legal question. He should have been here during a presidential election year.

We are now deep into a national political campaign in which one principal area of contention is what to do to strengthen the national economy. The resolution of virtually every political debate over economic issues turns into a set of legal considerations, both in general and in the narrower worlds of insurance regulation, insolvency law, and the operations of American consumer safety net systems like our national system of state-based insurance guaranty associations. The 16th Annual NOLHGA Legal Seminar (reported upon separately in this issue) included a number of interesting discussions about the economic, public policy, and legal considerations attending the current state of the economy. With the legal questions from our Boston seminar being addressed elsewhere in this issue, I will focus here on some of the political and public policy concerns from those discussions.

Even before the events of July 2008, one might fairly have said that the second quarter or so of this year was the most turbulent brief period in U.S. financial history since the Great Depression. The ride only got wilder in July, and it shows no signs of abating soon. On the evening of July 11, federal authorities closed IndyMac, a Pasadena thrift institution, and it was taken over by the FDIC in the second or third largest depository institution failure in American history. The failure of a $32 billion savings bank was startling enough, but only two nights later Treasury Secretary Henry Paulson announced that the Treasury and Federal Reserve were proposing to provide funding and take other steps to rescue Fannie Mae and Freddie Mac, by far the largest mortgage lending institutions in the country, with liabilities measured in *trillions* of dollars. As I write these words in the third week of August, the national press carries daily stories about the possibly imminent nationalization of Freddie and Fannie, and prominent economic commentators suggest that hundreds of banks may fail in the next year or two.

Those are the latest in a set of recent significant developments, including the general economic slowdown, the subprime mortgage crisis, strains on investment and commercial banks and other financial institutions, the collapse of Bear Stearns and the shotgun marriage of that firm to J.P. Morgan (with a substantial dowry from the federal treasury), the opening of the Federal Reserve's discount window to investment banking firms, and the release of Secretary Paulson's "blueprint" for the reform of financial services regulation.

What we haven't seen *yet* in this crisis atmosphere is the failure of a large insurance company, but insurer financial problems tend to be trailing economic indicators. We shouldn't assume that the insurance industry will go unscathed. In the meantime, the financial market breakdowns and aspirations to protect consumers against the worst effects of firm failures are now prominent elements of our political and public policy debates.

The guaranty system and its principal constituencies wouldn't be able to sit out this debate if they wanted to. In the current climate, there's simply too much focus on solvency threats to financial services providers and the consequences of their failure. That focus is both specific and general.

The guaranty system becomes the subject of specific focus in each case where our work to protect consumers today is perceived as improving (or possibly *not* improving) the lot of a consumer regarding a particular failed insurer. As I now write, one of our task forces is working to respond to the receivership of an entity that issued many burial insurance policies affecting consumers across the country, and that receivership—along with the guaranty associations' plan to respond—is receiving considerable scrutiny from media observers and government officials around the country. Another task force is working to develop a plan to respond to an asset shortfall in the receivership of a company that issued large structured settlement annuities protecting tort victims in every U.S. state.

In both cases, our task forces have developed creative, sophisticated, expansive plans that promise to do the best job possible—within the scope of guaranty association powers—protecting the people intended to be protected by the policies issued by the failed insurers. Nonetheless, our efforts in these specific cases are being closely scrutinized and will become part of the broader debate about how well financial services consumers are protected.

We have also become the subject of more general focus—as has the entire financial services industry—due to public concern over the subprime crisis and its widespread fallout. As every guaranty association administrator knows from the consumer calls received, people are more worried now than they have been in years about the safety and security of their personal assets.

The safety net we provide for insurance consumers is also an increasingly important concern to regulators, legislators, journalists, and commentators. Many *Journal* readers know that the NAIC is currently reviewing its Model Act for guaranty associations, and a number of regulators sitting on the NAIC committee conducting that review have expressed concerns about whether the models provide appropriate levels of consumer protection.

Similarly, the guaranty association safety net has been a major concern of members of Congress involved in the debate over legislation that would provide an optional federal charter (OFC) for insurance companies. To date, sponsors of the

OFC legislation that has been introduced and a number of other members of Congress have concluded that the current state-based system is the appropriate vehicle for protecting all insurance consumers, but that conclusion is likely to be tested before any OFC legislation is enacted.

The current economy has also caused journalists and academics to scrutinize more closely the insurance safety net. The noted personal finance writer Jane Bryant Quinn recently wrote a column for Bloomberg.com examining life insurance companies and the effect of the subprime crisis on insurers. She devoted a lengthy discussion in the column to the life guaranty system. Although, like many sophisticated people, her initial understanding of the guaranty system was sketchy and in some ways inaccurate, she ultimately came to appreciate that the system does provide significant (though not unlimited) protections for consumers.[1] If a personal finance writer as sophisticated as Ms. Quinn does not have a clear and accurate picture of our system, it is safe to assume that other, less sophisticated writers (and those less likely to check the facts before publishing) may have even less knowledge.

Even more troubling is the fact that some leading academics studying the field of financial services also hold some fundamental misunderstandings about the current insurance guaranty system. Their interest in the guaranty system appears to have been attracted by recent congressional efforts toward insurance regulatory reform and by the OFC bills recently introduced in the House and Senate. At "The Future of Insurance Regulation,"[2] a conference sponsored by the American Enterprise Institute (AEI) in Washington, D.C., this July, several panelists from the academic world focused on OFC bill provisions that would rely on the current state-based system to provide a safety net for all consumers. The academics were critical of that approach, but their remarks made it clear that their factual premises about the state system were seriously flawed, substantially undermining the logic leading to their conclusions.

It might seem easy to dismiss the concerns of academics, but the papers they publish for think tanks like AEI are widely read and relied upon by Congress, executive branch officials, and other opinion leaders. Once misconceptions about the guaranty system begin to flow into the "information stream," it becomes a substantial challenge to correct their effects.

Historically, the guaranty system has not engaged in many proactive outreach efforts beyond working with the NAIC to provide technical input on receivership and guaranty association matters. Several years ago, however, both NOLHGA and the National Conference of Insurance Guaranty Funds (NCIGF), our property/casualty counterpart, determined that a proactive approach was necessary when Congress began seriously to consider proposals like OFC that could expand the federal role in insurance regulation, possibly directly affecting the protections now provided consumers through the state-based guaranty system. It was at that time that NCIGF and NOLHGA commenced a tightly focused project to educate members of Congress, congressional staff, and executive branch officials regarding the nature, track record, and financial and operational capacities of the current guaranty system. To date, that education project has borne considerable fruit.

In light of the recently heightened scrutiny being given to financial services safety nets, including our guaranty system, the NOLHGA Board and its Financial Services Modernization Committee have recently concluded that NOLHGA should work with NCIGF to extend that education project beyond governmental officials. The objective is to reach out to select members of the media and the academic world and help them to understand—as many key people in Congress and the executive branch now do—that our system is capable of protecting American insurance consumers under any conceivable evolution of the present insurance regulatory regime.

In the meantime, it falls upon all of us who believe in the current system to continue to strive in each particular case that confronts us to deliver fully and decisively on the promises embodied by our guaranty associations. In our relations with all external constituencies—including regulators, legislators, the media, the think tanks, academia, and the rest—we are likely to be perceived as being only as good as our performance in the major insolvencies of the day. Eternal vigilance is the price of our continuing viability.

Financial commentator Karen Shaw Petrou, who spoke so brilliantly at the July Legal Seminar, noted recently about the recent, sharp market declines of Fannie Mae and Freddie Mac stock that "these things become self-fulfilling prophecies because market confidence is so fragile."[3] A similar point might be made about the insurance guaranty system: The current esteem in which our system is held depends entirely on public confidence in our system, and public confidence in financial matters is now generally fragile. In today's risky financial and political environment, we must make every effort to show that continued confidence is warranted. ✯

Peter G. Gallanis is President of NOLHGA.

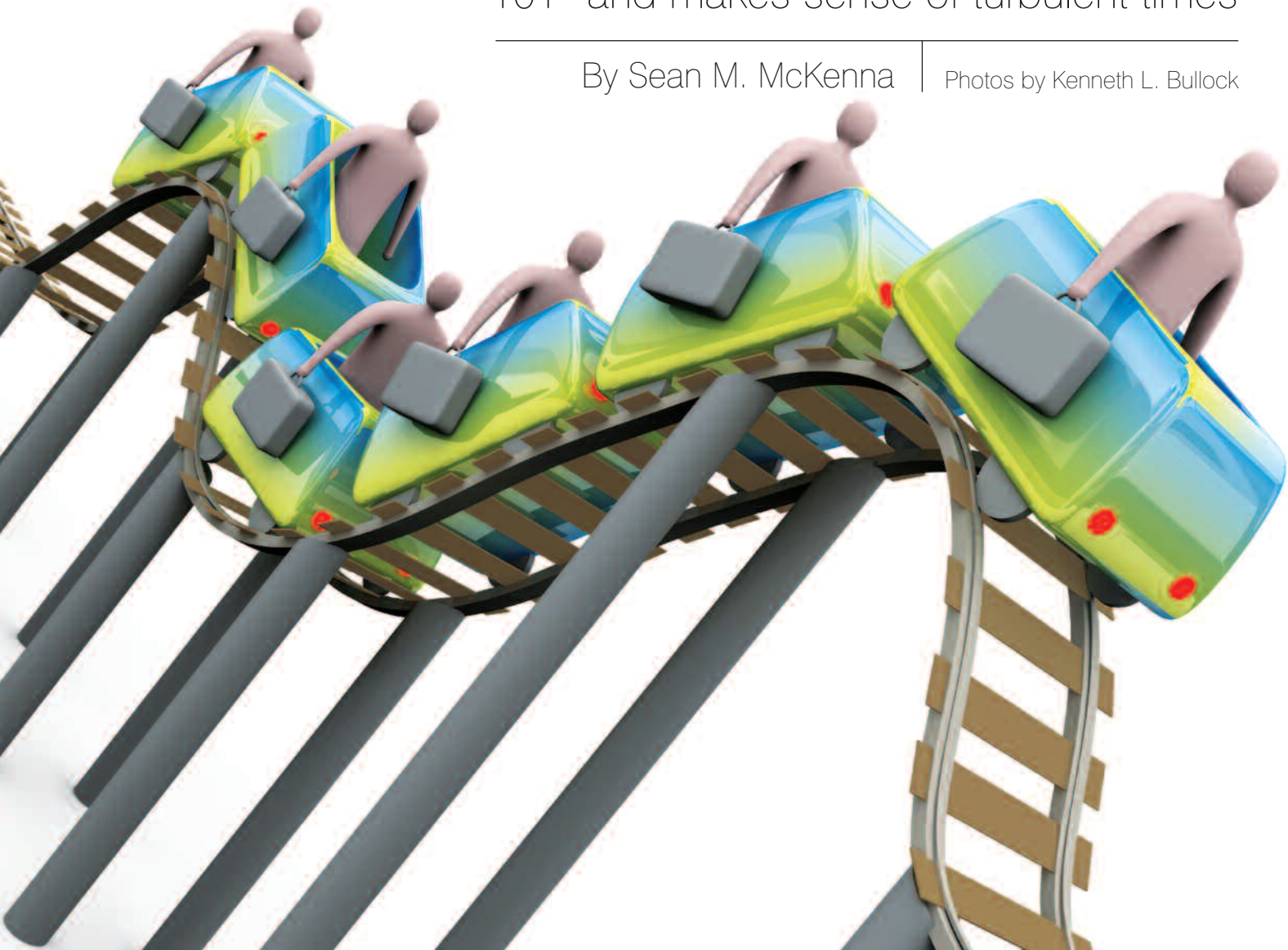
End Notes

1. Ms. Quinn's August 13, 2008, column, "Insurers Steer Clear of the Subprime Sludge," can be found at http://www.bloomberg.com/apps/news?pid=20601212&sid=ajfRpHRYgDSs&refer=home.
2. The program for the conference can be found at http://www.aei.org/events/eventID.1719,filter.all/event_detail.asp.
3. "Fannie, Freddie Fall on Renewed Bailout Fears," AP Online via Newsedge, August 19, 2008.

WILD RIDE

NOLHGA's 16th Annual Legal Seminar offers attendees "Insurance Insolvency 101" and makes sense of turbulent times

By Sean M. McKenna | Photos by Kenneth L. Bullock



In the midst of a tumultuous summer—with a troubled economy, a possible federal bailout of Freddie Mac and Fannie Mae, talk of federal regulation of insurance on the rise, and the Tampa Bay Rays challenging the Red Sox for supremacy in the American League East—more than 150 members of the guaranty community gathered in Boston to discuss these and other issues and try to chart a course for the guaranty system and the insurance industry.

The two-day meeting offered a dual focus, with the first day centered on outside factors affecting the guaranty system—such as the economy, the scene on Capitol Hill, and the uninsured—and the second on the "nuts and bolts" basics of guaranty association operations. Lively discussions, role playing, a visit to a presidential library, and even a few sing-alongs made for an entertaining and enlightening meeting. Some of the highlights appear below.

"Rating agency integrity has to be restored before investors will return to the market." Michael Braun (McKee Nelson) [right], speaking with Robert Armour (Huron Consulting) on the subprime mortgage crisis.

(From left to right) Sparks flew as Bart Boles, Jackie Rixen, Bill O'Sullivan, and Frank O'Loughlin participated in a mock courtroom drama to illustrate the ins and outs of receivership law.

Nothing Gets Done in an Election Year

Speakers addressing both tax reform and the question of how to provide health insurance to more Americans both agreed that nothing will be done about either issue in 2008, since it's an election year. Stephen Northrup of WellPoint called 2008 "a year of positioning" in the health-care debate. He added that "the Obama and McCain visions are two very different visions of health-care reform," with McCain advocating individual insurance and Obama proposing a combination of public and private insurance—what Northrup called "a side door to a single-payer system."

While Congress and the American people have turned their attention to health-care reform, he said, "nothing can happen in Congress without presidential engagement these days." If Sen. Obama becomes president, Northrup added, "I would be shocked if health-care reform isn't part of his agenda." The same is not true, in his opinion, if Sen. McCain wins. "He's got other priorities."

Heath-care reform has become such a hot-button issue for a number of reasons, according to Northrup. Premiums have increased 85% since 2000, and the number of uninsured Americans is estimated to be approximately 45 to 46 million. Costs are the greatest concern for many. "Health-care costs are a big threat to global competitiveness," he said, and they're eating up a larger share of state and federal budgets.

More troubling, perhaps, is that "we're spending a lot more per capita than any country in the world, and we're getting a lot less than we should be," Northrup said, adding that a recent study reported that nearly half of physician care is not based on best practices. As a result, the health insurance industry is embracing what he called "an affordability agenda" based on electronic prescriptions, wellness incentives, medical liability reform, and other factors. Electronic prescribing—essentially a paperless process—"creates tremendous opportunities for savings," Northrup said. "It's such a 'no brainer,' it's amazing it took Congress so long to get there." WellPoint is encouraging its doctors to go the paperless route, but Northrup did say that HIPAA concerns and varying state privacy laws might present impediments to widespread use.

While Northrup pointed to 2010 as the year when significant reform might be accomplished, Ann Cammack (MassMutual Financial Group) thinks changes to the tax code might come a bit sooner. She believes "2009 and ➤

2010 will be pivotal tax years for the country" because large budget deficits will put taxes in play in Congress.

There are a number of key issues facing Congress in what Cammack called "the kabuki theater of federal tax policy," including the question of whether to make the Bush tax cuts permanent; how to pay for Medicare and Medicaid, which will take up almost 22% of America's gross domestic product by 2050; the outlook for Social Security; possible repeal of the estate tax; and whether to repeal or index the Alternative Minimum Tax.

The insurance industry faces tax issues of its own, chief among them whether investment income from life insurance and annuities could be considered taxable income under a new tax code—what Cammack called "the quarter trillion dollar question." The Congressional Budget Office's 2007 "Budget Options" report included this change as an option, as did the 2005 report of the President's Tax Reform Panel. "This report is going to be part of the upcoming debate," Cammack said.

The debate on tax reform will also focus on competitiveness. Cammack pointed out that the United States has the second-highest corporate tax rate in the world. "You'll hear a lot of talk about lowering the rate but broadening the base" by extending taxes to more industries, she said. The insurance industry will have to weigh any proposals that do away with some of the tax code preferences the industry currently enjoys but balance that with a lower tax rate. "That's one of the things we're going to have to wrestle with," Cammack said.

The Feds Might Be Coming

In a panel discussion moderated by Charlie Richardson (Baker & Daniels), representatives from the ACLI, NAIC, NOLHGA, and the financial services consulting arena wrestled with another federal question—what role will the federal government play in insurance regulation, long the domain of the states? Richardson outlined the major issues currently in play, including the recent blueprint for regulatory modernization released by the Treasury Department, the possibility of the industry's McCarran-Ferguson antitrust exemption being repealed, and new legislation for a federal Office of Insurance Information. Amidst all this, he asked, where is insurance regulation heading?

Karen Shaw Petrou (Federal Financial Analytics) began by noting that "we've had three systemic risk incidents in the financial sector this year that took us to the brink"—the difficulties experienced by the monoline insurers, the Bear Stearns bailout, and the troubles with Fannie Mae and Freddie Mac. In her mind, the three make it very likely that we'll see significant changes in financial services regulation. "The rulebook isn't ready" for crises like the ones mentioned above, Petrou said, and so a new rulebook is on its way.

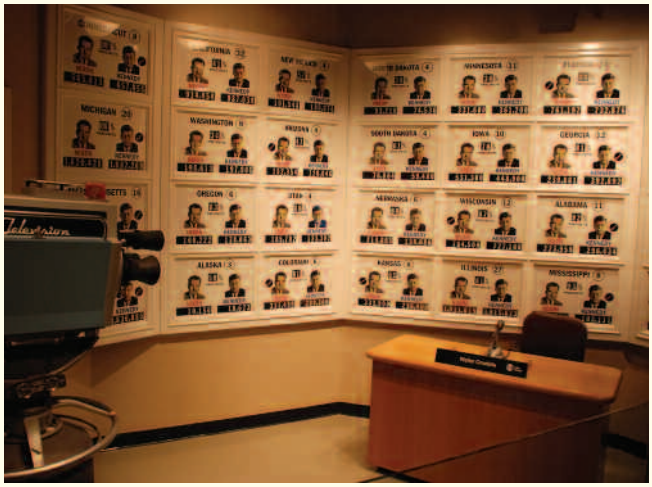
In this new rulebook, she added, "we will have federal regulation of insurance." The reason, she said, is a growing perception that financial services markets are too interrelated for insurance to be regulated solely by the states. "We've gone from the old view of 'too big to fail' to 'too interconnected to fail'," Petrou said, adding that the new regulatory structure will

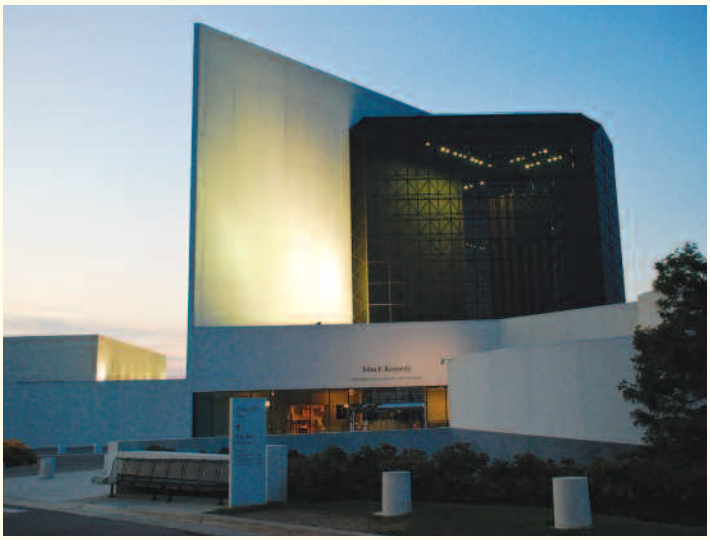
"In my lifetime—and I plan to live a long time—McCarran-Ferguson will still be the law of the land." Craig Berrington (Wiley Rein) on possible repeal of the McCarran-Ferguson Act.

Legal Seminar Planning Committee Chair Charles Gullickson introduces the panelists of the roundtable discussion on the role of the federal government in insurance regulation: (From left to right) Charlie Richardson, Karen Shaw Petrou, Director Michael McRaith, Gov. Frank Keating, and Peter Gallanis.

A Visit to the Library

The welcome reception at the John F. Kennedy Presidential Library and Museum was one of the highlights of NOLHGA's 16th Annual Legal Seminar.





have a greater emphasis on prudential regulation rather than solely on efficiency or cost. "We'll see a more heavy-handed federal role," she said. "Where does that leave the state guaranty funds? I'm not sure."

Michael McRaith (Director of the Illinois Division of Insurance) offered a different take on the situation, noting that the root causes of the major financial problems in the United States are in federally regulated financial sectors. This being the case, he asked, why would we rush to have the federal government take over insurance regulation, especially when state regulators continue to take significant steps to improve their performance?

In McRaith's opinion, there is no real push for federal regulation outside the industry itself. "The optional federal charter exists in a bubble," he said, and no one, outside of the industry, is pushing for less regulation. In fact, consumers are calling for more. The best way for Congress to help insurance consumers, he said, is by "imposing standards that give us the regulatory efficiency we need."

Not surprisingly, Gov. Frank Keating (President and CEO of the ACLI) disagreed. "We really are in a swirling time with respect to financial services regulation," he said. The ACLI, which supports the optional federal charter (OFC), has three main priorities: regulatory improvement (including the charter), principles-based reserving, and tax incentives for the industry.

Keating said that the OFC would help the industry overcome delays in product approval that hamper its competitiveness with banks and other financial services entities. In addition, it would help establish a presence for the industry on Capitol Hill. "There is nobody at the table to represent a $5 trillion industry in Washington," Keating said. The proposed Office of Insurance Information, he added later, would be a start, but a poor substitute for more complete reform. "It's merely a repository of information. It can't do anything."

John Forster had attendees laughing and singing during lunch.

NOLHGA President Peter Gallanis noted that the one thing almost everyone agrees on is that the state guaranty association system is doing its job extremely well. While NOLHGA and its members have no position on the OFC, they do believe that the system is ready to provide a safety net for federally chartered insurers if needed. In this, they're not alone—both the Senate and House versions of OFC legislation advocate retaining the system, as does the Treasury modernization blueprint.

The reasons for this reliance on the current system are many—a proven system, experienced staff, and ample capacity are just a few—but they all rely on continued excellence. "We have to do our job," Gallanis said. "If there is the slightest ebb in confidence in our ability to do our job, we can't hope to keep the confidence of decision makers on the Hill."

The first day also featured an historical, legal, and political look at the insurance industry's limited antitrust exemption under the McCarran-Ferguson Act. Craig Berrington (Wiley Rein) laid out what the industry faces on the antitrust front, both under an OFC regime and as part of the continuing scrutiny of the industry post-Katrina. Thomas Workman (LICONY) tackled principles-based regulation, first proposed in New York but increasingly mentioned in other jurisdictions. And Michael Braun (McKee Nelson) and Robert Armour (Huron Consulting) conducted a tutorial on mortgage securitization assets and the impact of mortgage defaults on the value of those assets—and on the portfolios of the insurance industry.

Insurance Insolvency ABCs

The second day of the seminar began with a presentation on rehabilitation and liquidation basics—although it quickly became apparent that there's little basic about the issues raised by a receivership. Using a role-playing format and facts based on a hypothetical insolvency case, the presentation outlined the issues that a judge (played by Special Master Tom Collins, who oversees receiverships in Texas) faces when an insurance company is placed in rehabilitation or liquidation.

Other actors in the mock courtroom drama included Joel Glover (Rothgerber Johnson and Lyons) as attorney for the receiver, David Wilson (California Conservation and Liquidation Office) as the receiver, Bart Boles (Texas guaranty association) as a beleaguered policyholder, Jackie Rixen (Law Office of Jacqueline Rixen) as his attorney, and Bill O'Sullivan (NOLHGA) and Frank O'Loughlin (Rothgerber Johnson and Lyons) representing NOLHGA and the affected guaranty associations.

The presentation addressed five major issues: standing (for NOLHGA and policyholders), work done by the receiver before the request for a liquidation order, treatment of affiliate companies, uncovered policyholder objections, and disposal of company assets. The ground rules for the presentation noted that the actors would be taking positions on these issues that they didn't necessarily espouse in the real world, for the purpose of promoting a lively discussion and exploration of the issues.

Collins, who holds quarterly status conferences for all the receiverships he oversees, outlined his goals for the receiverships under his watch. "I'm always asking, from the outset of each status conference, 'what is your closing date?'" he said. He stresses two things in his courtroom—making the receiver accountable for moving toward estate closure and making the entire process transparent for guaranty associations, policyholders, and other interested parties.

On the question of standing, two issues were addressed: whether individual policyholders should be allowed to participate in the court hearing on the receiver's liquidation plan and whether NOLHGA could participate. While NOLHGA's standing was quickly agreed upon by all parties, there was considerable debate over the rights of the policyholder. Rixen,

the policyholder's attorney, argued that he has standing because "he's going to be injured by the defendant's actions" and that the receiver cannot "adequately represent" policyholders because of the many roles receivers must perform.

Glover, on behalf of the receiver, pointed out that receivership law establishes the claims process to meet the needs of policyholders. O'Loughlin argued that "once the guaranty associations are activated, we are subrogated to the rights of the policyholders" and added that the Ninth Circuit Court had ruled that policyholders lack standing.

Discussion of the receiver's pre-liquidation work on the estate revealed how delicate such work can be, especially when the estate is in rehabilitation or supervision and is still a going concern. Wilson pointed out that "all it takes is one person in authority to make a statement to cause a run on the bank," noting that this scenario had just played out in the IndyMac bank failure. The move from rehabilitation to liquidation, he added, is "a very important decision point" because it ends the ability of the company to work its way out of difficulty. In fact, the "owner" of the company later stormed into the proceedings to complain that the receiver was ruining his business—not an unheard of occurrence in liquidation hearings.

In this scenario, the receiver's liquidation plan proposed to consolidate the parent company and a marginally solvent affiliate that shared offices and employees with its parent. Glover stated that this would be the best result for all policyholders, but this drew objections from NOLHGA's attorney, as O'Loughlin argued that the affiliate company was still solvent and so should not be liquidated. If liquidation was necessary, he added, it should be a separate liquidation, since the dual liquidation could open guaranty associations up to additional costs.

Speaking of costs, the receiver's explanation of the disposal of estate assets raised quite a few objections. Glover explained that under the plan, the estate would keep some assets in an effort to increase their value, and that the guaranty associations would have to pay benefits and wait for a possible return from these assets in the future. O'Loughlin argued that the estate can only hold on to enough assets to cover expenses and asked to see a breakdown of these expenses. After a brief scuffle, the two were separated.

In their closing arguments, the attorneys stated the main priorities of each party. For the receiver, Glover said, "it's critical to protect policyholders and consumers. Those are our marching orders." The liquidation plan is entirely in keeping with state law, he added, and any parties who object to it need to work on changing the law, not this plan.

Rixen argued that "my client still meets the elements for standing—he's injured, they caused it, and the court has the ability to remedy it." She also threw cold water on NOLHGA's argument on subrogation rights, noting that under the plan, the guaranty associations will "haircut" her client's benefits, making the contention that the associations represent him dubious at best.

What's a Board Member to Do?

The next presentation dealt with the responsibilities of a state guaranty association board member. Moderator John Colpean (Michigan guaranty association) described the challenges board members face when making decisions that will affect people with competing interests differently. "Board decisions on 'gray area' coverage questions are particularly perplexing," he said. "If coverage is denied, disgruntled policyholders might contest the action. If coverage is provided, the board might encounter assessment protests from dissatisfied member companies."

Kevin Griffith (Baker & Daniels) then walked attendees through his efforts to determine if board members have a fiduciary duty and, if so, to whom—policyholders or the companies the board members represent. A quick reading of the Model Act, he said, reveals no mention of such a duty. However, "it's not enough to say it's not in the Act—you have to dig a little deeper."

The very concept of a fiduciary duty—acting in the sole interests of another party—is somewhat troublesome for state board members, Griffith said, since they have multiple duties. Which raises the question of who sits on a guaranty association board—is it a person or a member company? Under the law, Griffith said, the company is the board member, not the individual actually attending a board meeting. As such, a divided loyalty or "straddled duty" is possible, since the guaranty association has a duty to policyholders while the individual board member quite reasonably has a duty to his or her company as well.

In the end, Griffith said, "the board operates for the guaranty association itself. I think it's dangerous for associations to go beyond that and assume a fiduciary duty."

This concept of straddled duties was illustrated quite effectively by Michael James (Life Insurance Company of North America), who sits on the boards of the Delaware and Pennsylvania guaranty associations. Shortly after he began serving on the Pennsylvania board, he said, "I learned that my company was suing the guaranty association over an ELIC assessment." In that environment, he said, "I had to walk a fine line" in determining what guaranty association information he could share with his company.

One key to being an effective board member is realizing that your role on the board does not mirror your role in your company. "I came to understand that I wasn't a lawyer for the guaranty association," James said. "I was a business person" As such, "you need to rely on experts to make good business decisions." He added that he often advocates bringing in outside consultants—even attorneys—to give expert advice on issues facing the guaranty association.

James admitted that making these decisions can sometimes be "daunting," especially with the complex issues that guaranty associations often face. In making them, he said, "throughout the whole process, we are guided by one thing—what is the purpose of the guaranty association? To act in the best interests of our residents." ✯

Sean M. McKenna is NOLHGA's Director of Communications.

["Mila Kofman" continues from page 1]
and Dirigo Choice [a state initiative to provide all citizens with new options for affordable private health-care coverage]. That was under a Democratic governor, Governor Baldacci, with the support of the mostly Democratic legislature. But then you look at a state like Massachusetts that more recently has initiated quite significant reforms, and that was done under the leadership of a Republican governor. So I don't necessarily think it breaks down by who's in power. It does vary, but certainly the states have a more successful reform record currently than the federal government does.

The most significant federal reform legislation, I would say, was first Medicare and Medicaid in the 1960s, and more recently in the late 1990s there was SCHIP, the State Children's Health Insurance Program. In the earlier 1990s there was HIPAA, which established a federal floor for certain health standards. But that was based on the National Association of Insurance Commissioners Model Law, and many states had already done those pieces of reform.

What are your priorities as Maine's Superintendent of Insurance, and how is the Bureau going to achieve them?

My big priority is to position the Bureau for the future of insurance regulation and the market. Products are changing very quickly, and we as regulators need to be in a good position to protect the marketplace as well as the consumers who rely on the private marketplace for their insurance needs. One of the things I am trying to do here internally is for us to become more efficient and to better serve our clients. And when I say clients, I mean the regulated community, the consumers of insurance, and the public. I've initiated an internal self-assessment of what we do, how we do it, and if there are ways we can do it better. I've also reached out to stakeholders—the regulated community, consumers, and others—to get their feedback on what they believe we do well for them and what they would like us to think about improving.

How far are you into that process, and what sort of feedback have you received?

I've been surprised that, for the most part, the companies are very quick to highlight the things we do well. We have a reputation for being quick and responsive. When filings are made, whether they're form or rate filings, we do our best to turn around the approval or our feedback to the companies very quickly. And that helps them get their product out to the market quickly. Not many companies have given feedback that I can say "oh, we need to improve this or that."

Before you were an insurance regulator, you were a recognized national expert on the U.S. health system. Based on your research work and your experience, what would you describe as the three or four major flaws in our health system?

I think we have a very inefficient system. We certainly spend more than any other industrialized nation, and we get less. We have worse health outcomes when you take a look at some of the data produced country by country. We have more access problems—accessing needed medical care. We're just very inefficient in how we do things.

I'll give you a specific example. This was in the news in Maryland a few years ago. There was a boy covered, I believe, through the Medicaid program, and he didn't have dental coverage. He died from a tooth infection. Penicillin would have been $5, but his parents couldn't afford to take him to the dentist, and by the time they took him to the emergency room it was too late. Certainly the hospital did everything they could, to the tune of $30,000 to $35,000 that Medicaid paid for, but the boy died. So that's just an example of how we spend a whole lot, but we can't save a boy's life. That case demonstrates how inefficient our system is.

You and me, people with insurance coverage, we pay for the uninsured and the underinsured through cost shifting, and that's pretty inefficient. And while we do all that, under our watch we have 20,000 people who die each year—preventable deaths, according to the Institutes of Medicine study from a few years ago. That's a pretty disturbing fact about the way we do it. It just shows that we do not have the best system in the world. We certainly have the potential to be the best, but we are not quite there yet.

The inefficiency you're speaking of is in private as well as public health care, right?

Absolutely. On the private side, even people with health coverage can end up in bankruptcy. In fact, when you look at the studies done by Harvard researchers on personal bankruptcy filings, they found that the leading cause of personal bankruptcy is a medical condition—an illness—and most of those filers had health insurance. So the inefficiencies and the problems with the way we do things are certainly system-wide.

To what extent can systemic problems like inefficiency be characterized as "insurance" problems, and how much can be done to improve the system purely from a regulatory perspective? In other words, is the problem bigger than just insurance?

It's not just insurance. It's the underlying cost. It's the cost of medical care that drives prices. Looking at, for example, General Motors, they'll tell you that they have to add $1,500 to the price of each of their cars just to pay for health care. The big three automakers have said that they spend more on health care than on steel, and I can tell you that the cars are still made of steel because I can see the rust holes in my car. So we know it's broader than just insurance. We have an aging population, more and more people with chronic conditions needing services, and we don't always get those services to people in time so that it's cost-effective.

That being said, I also think insurance is at times part of the problem. Look at the excessive CEO or executive compensation. What comes to mind is the former CEO of United getting a $1 billion bonus, then you have to wonder what's wrong with our system. The bottom line is, we're all part of the problem, but the exciting news is that we're all part of the solution. You can't just plug one hole because the pres-

sure will be too much somewhere else. We have to really take a comprehensive look at how we do things—how we finance medical care, how we deliver from start to finish—to really tackle some of these issues.

Is defensive medicine part of this problem?

I haven't had time to go back though the research, but my recollection is that the research is mixed as to how much defensive medicine is actually going on. Certainly, unneeded tests and fraud, for example, are all part of the problem that needs to be tackled. I'm just not convinced tackling one area will actually help us tackle the larger problem.

So fraud is a large problem as well?

Yes. These are phony entities—phony insurance companies selling phony coverage, collecting premiums, not paying bills, and then leaving consumers high and dry. There are different types of fraud—that's one type, and it's cyclical. At its height, during the most recent cycle, I think there were hundreds of millions in unpaid bills, and certainly that is a big problem because in some cases providers had to close their doors, in the more rural areas. But in other cases where it was possible to do a little bit of cost shifting, everyone else ended up picking up the tab.

How much of the current cost of health care is being paid now by the private insurance market, compared to government programs like Medicare and Medicaid?

I can't answer the question because it's just so complicated. Even the private cost gets subsidized through tax dollars. For example, part of what private carriers pay for are prescription drugs. Well, some of the development of those drugs has been paid for by taxpayers, so the real cost may not be reflected in what the payers pay.

Of course, the biggest, what I would call federal subsidy for private coverage, is the tax treatment of job-based health insurance. We're not taxed on those benefits, so in a way the taxpayers are subsidizing that. In my view, we either pay from the left pocket or the right pocket and we call it different things, but it all comes from our pockets.

I was able to pull some 2006 data on how many people are covered through various programs—this is from the Kaiser Family Foundation. In the United States, about half the population gets coverage through their job. So employer-based insurance is about 158 million people. The individual markets are about 14.5 million people. Medicaid is about 38 million, and Medicare about 35 million. And then there are other public programs which are close to 3 million—that may be some of the SCHIP programs and other things.

Given the federal "entanglement" in health-care cost funding, how much can states do to improve the system, and how much of the reform burden must ultimately be borne by the federal government?

There definitely needs to be a partnership with the federal government. Even if states can do a lot, there still is the money problem, and that's a very appropriate role for the federal government—to infuse money into the system. The delivery of medical care and health-care services is very local. Each state, in fact each community, is very different, and so I'm not convinced there's much of a role for the federal government there.

I do think there's a role for the federal government in setting some standards about what private health insurance ought to look like and some rules about the people to whom it should be available. In 1996, the federal government passed HIPAA, which had a lot of different sections in it, but the one on the private market focused on access and portability and on some new standards to protect small businesses and allow them to purchase private coverage. That was a federal floor approach, where the federal government recognized that many states can and have done more. So it didn't preempt the state efforts—it just created a federal floor so it didn't matter if you lived in Alaska, Hawaii, Maine, or Florida. Everyone gets the same level of basic protection.

Now, HIPAA certainly didn't do everything, and there is still much needed work to address, but it's a model that has worked very well. It recognizes that many states want to do more than just what the basic standards are, and it allows for that kind of flexibility. But it also recognizes the fact that all Americans should have a basic set of protections. So it raised the bar in many states that weren't able to pass the kind of consumer protection standards that are needed.

The Massachusetts Plan has received a great deal of press. Are other states pursuing these reforms but perhaps not getting the same level of attention?

Massachusetts certainly got a lot of attention, but prior to Massachusetts, Maine did a host of things, including enacting Dirigo and Dirigo Choice, which I would say many aspects of the Massachusetts connector initiative are based on. The state recognized the fact that some people make too much money to qualify for public insurance but not enough money to buy private coverage—and when I say people, I mean not only individuals but also small businesses. So the legislature and the governor passed a program that recognizes this and co-mingles public dollars with private dollars.

If you don't qualify for the public insurance and can't afford the private insurance, you can enroll in Dirigo Choice, and you're given some help with your premiums. So you pay what you can, and then public dollars are used to pay the rest. It's almost like a bridge program; it fills the gap. What's very innovative about it is that those private dollars that would have stayed out of the system are now coming in to help finance coverage. Before, if you couldn't afford your premiums, you were just uninsured. Now, you pay what you can and you get a little bit of help from the government, and the dollars you pay are part of the health-care financing system.

Does it make sense for states to go it alone in health-care reform, or should they try to work in a coordinated fashion?

I think sharing information and learning from each other are really important, but the bottom line is money and having the

["Mila Kofman" continues from page 11]
resources to fund coverage expansion programs. And on the delivery side, it's very localized. Coordinating and sharing information and lessons are important, but what works in Massachusetts or Maine may not work in Oklahoma, for example. We all have a different starting point, even when you look at basic consumer protections and market reform.

In Maine we have guaranteed access and adjusted community rating in the individual market. That means you cannot be turned down for coverage if you're sick and you cannot be charged more if you're sick. We're one of five states that have that. So what we're looking at as the next level of reform is very different than what states without it are looking at.

What is your view on the burgeoning "Medicare Advantage" part of the private market? How much of a problem do you see in the division of regulatory authority/responsibility between state insurance regulators and federal Medicare regulators?

I would turn that into a more general issue. When the federal government does something that restricts state authority or has any kind of preemption impact on the states, that's not a good model. It makes it very hard for states to protect consumers, and when there are questions or ambiguities about preemption, it's the consumers who end up being stuck in the middle of a legal fight. If I was convinced, for example, that the federal government had the resources and the authority and the will to protect consumers, I wouldn't have the concerns. But they don't have a good track record of protecting consumers, so it's just very dangerous whenever they step into health insurance regulation and impede the states' abilities to protect consumers and the marketplace.

What are your views on the private market for long-term-care insurance?

First of all, I don't think that government can take responsibility for providing long-term-care coverage for all people. The government cannot provide, and I don't think would even consider providing, long-term care for all Americans. With that said, I feel very strongly that we need a stable and viable private long-term-care insurance market with price stability and good standards for these products. I guess I would describe it as a smartly regulated marketplace that works.

Are we inching toward that, or is there still a long way to go?

I think there are many unknowns. The product is not an easy one to price, with such a long tail. Certainly things change so rapidly—20 or 30 years ago, we really didn't have opportunities for people to receive help at home. It was only nursing homes. So there are challenges inherent in this type of product.

Now, we see some problems with a small number of companies—this certainly doesn't describe the whole marketplace—in intentional under-pricing or aggressively writing products and not having good underwriting standards. These have forced some companies to raise their rates tremendously, which has a very significant impact on people with those policies, especially seniors on fixed incomes who can't afford the higher premiums—in some cases 300, 400, or even 500% increases.

You've been Superintendent since March. Have you had enough time to form an opinion of the guaranty system?

Absolutely. In my earlier research at Georgetown, I focused a lot on health insurance scams, and in talking to consumers affected by the scams, the idea they were stuck with the medical bills after they paid their premiums was pretty tremendous and horrifying. I just wish the guaranty funds covered everyone. For instance, I wish that we didn't have self-insured and ERISA employers that go into bankruptcy with no one covering the medical bills of their employees. I just wish the guaranty funds were able to cover everyone. I wish there was that security blanket for everyone, but I recognize why the system developed the way it did. ✯

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NOLHGA Calendar of Events

2008

October 6	**MPC Meeting** **Jackson Hole, Wyoming**
October 7–8	**NOLHGA's 25th Annual Meeting** **Jackson Hole, Wyoming**
October 19–21	ACLI Annual Conference Boston, Massachusetts
November 6–7	NCIGF/IAIR Joint Seminar Scottsdale, Arizona
December 5–7	NAIC Winter National Meeting Grapevine, Texas
December 6–8	IAIR Winter Quarterly Meetings Grapevine, Texas

2009

January 19–21	**MPC Meeting** **Tampa, Florida**
March 14–16	NAIC Spring National Meeting San Diego, California
April 15–17	**MPC Meeting** **Oklahoma City, Oklahoma**
May 6-7	NCIGF Annual Meeting Oklahoma City, Oklahoma