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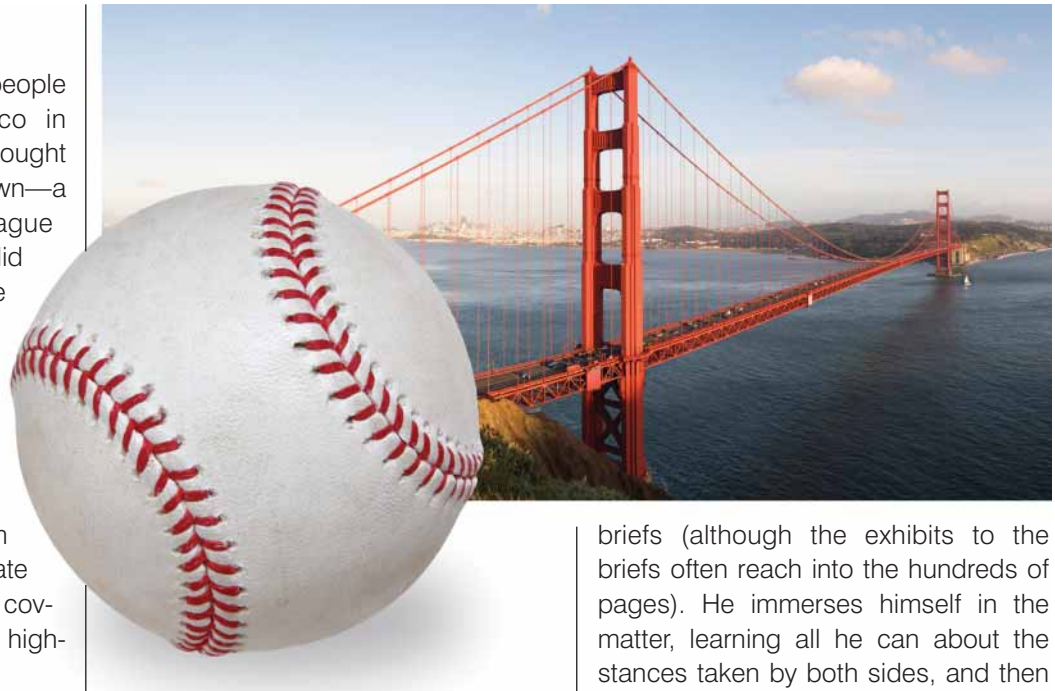
Legal All-Stars

San Francisco plays host to the biggest names in baseball and insolvency law

By Sean M. McKenna



In July 2007, thousands of people converged on San Francisco in hopes of landing what they thought was the toughest ticket in town—a chance to see Major League Baseball's All-Star Game. Little did they know that an even more exclusive gathering was taking place atop the city on Nob Hill, where almost 150 gathered at the Stanford Court Hotel for NOLHGA's 15th Annual Legal Seminar. The seminar program, which addressed topics from media to mediation and interstate compacts to global safety nets, covered all the bases. Some of the highlights appear below.

Leading Off

The seminar began with a presentation on mediation led by professional mediator Antonio Piazza (Gregorio, Haldeman, Piazza, Rotman & Matityahu). Attendees experienced firsthand one of the qualities that makes Piazza so effective when he began the presentation by asking for questions and then simply waited, silently and calmly, until people raised their hands and gave him what he wanted. In mediation, as in baseball, patience is a virtue.

In response to a question about conducting a mediation in which one side isn't interested in settling, Piazza said that it becomes clear fairly quickly if this is the case, and if it is, the mediation ends there. However, he added that "even when people come in the door, by my definition, not in good faith, it's surprising how often you can reach a settlement." The mediation process, he said, sometimes leads them to change their minds and participate openly, although he admitted that "it's certainly not a panacea."

There's no perfect time for parties to enter into a mediation, Piazza said—he's seen settlements reached after years of acrimonious litigation and between parties that haven't yet set foot in a courtroom—but for a successful outcome to be reached, "people need to be sure in their own minds that they have enough data to resolve the dispute."

In Piazza's mediations, both sides present this data to him in 10-page briefs (although the exhibits to the briefs often reach into the hundreds of pages). He immerses himself in the matter, learning all he can about the stances taken by both sides, and then does his best to reach no conclusions until the mediation begins. "Preconceptions are the death of creativity," he said. "When you don't have preconceptions, communication really can occur."

This communication occurs both in confidence (when he meets with each party separately in caucus) and in face-to-face conversations, which Piazza believes are vital to the mediation. The caucuses allow both sides to explain to him what they're willing to settle for, but

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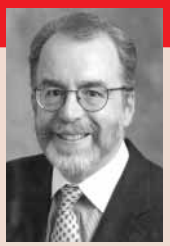


Harry Potter, Popular Culture, and Real Heroes

I come honestly by my affinity for popular culture. Growing up as I did in the original TV generation, my family was nearly mesmerized by television's early and wonderful programming. We watched nearly everything that was broadcast, from Ernie Pyle to *The Honeymooners,* and my life was enriched immeasurably when the networks began regular broadcasts of old movies: I have a very long list of "guilty pleasure" films. My college roommate, Mike Klingensmith, went on to become the founding publisher of *Entertainment Weekly*, a periodical that to this day is regularly devoured cover to cover before it hits a flat surface in my home. And I must confess a greater fondness for Broadway musicals and Top 40 ballads than is supposed to be expected of someone in my jury-pool classification.

So it should be no surprise that, on the very, very early morning of July 21, my wife Kitty and I were waiting in a long and happy line at a Borders book store outside Seattle, preparing to hand over some plastic money in exchange for the seventh and final installment in the *Harry Potter* series of novels. In the book world, *Harry Potter* is probably the ultimate in popular entertainment. More copies have been sold than of nearly any other books ever published, and many more of those were purchased for adult consumption than the *New York Times* cares to acknowledge.

Why the popularity of *Harry Potter*? One answer, of course, is that author J.K. Rowling is superb at what she does. She is not a literary writer, and I suspect she would not stake a claim to be one. However, she is a magnificent storyteller, and Kitty and I cannot be the only adults who lost a great deal of sleep that weekend plowing our ways through to the glorious denouement of the protagonist's long adventures.

Still, there are many great storytellers. What really sets Rowling's *Potter* series apart? Why are the *Potter* stories, and even the films, so much more richly satisfying than, say, the *Pirates of the Caribbean* film series? If I may propose a possibly unorthodox thesis, it is that the success of these novels follows from the fact that they are, in essential ways, realistic, and the essential realism of the novels resonates remarkably well with most people's deeply felt moral sentiments.

A claim of realism regarding the *Potter* books at first blush seems silly. After all, the entire setting for the series is replete with storybook magic, fantasy, and legend. And yet, perhaps the stories aren't really about magic at all. Rather, they may really be about the challenges posed to the characters in making difficult moral choices—the kinds of choices we all face in our personal and professional lives.[1]

In this sense, the fantastic elements of the story—the magic, spells, and the like—are really just ornaments. Every important plot crisis in the story depends upon, and ultimately is resolved, not by a mystical gimmick but rather by a character's difficult and personal choice regarding eminently recognizable, real-life dilemmas of right and wrong, good and evil. The protagonist's mentor, Headmaster Dumbledore, thus sets the thesis for the entire series in the second novel when he explains to young Harry that, "It is our *choices* that show what we truly are, far more than our abilities."[2]

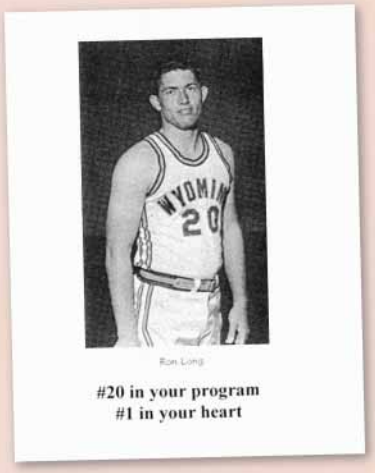
Thus viewed, the real themes of the *Potter* novels involve the value of love, friendship, loyalty, diligence, courage, and modesty, together with the dangers posed by ego, ambition, envy, pride, and prejudice.

The *Potter* series, like popular culture in general, appears not to get much respect from the *New York Times*: witness at least the long-standing policy of the *Times's* book review editors of excluding Rowling's novels categorically from the *Times* best-seller lists. Perhaps that policy reflects an assessment that the *Potter* novels, or perhaps popular culture more broadly, amounts to little more than escapism. However, I would submit that at least the best of popular culture appeals to most of us for the same reasons underlying the broad appeal of the *Harry Potter* novels: resonance with our own experience of how difficult it is to lead a good life in a hard world.

While all entertainment by definition has an escapist element, good entertainment—that which genuinely captivates our spirits—is linked directly to the experience of real life, and particularly to the interplay of logic and compassion.

For that reason, I can't listen to a song like, "What I Did for Love" (from the musical *A Chorus Line*) without thinking of the everyday, real instances of compassion routinely engaged in by people I respect. The song (and others like it) often causes me to think about the love that a husband showed for his seriously ill wife by including her fully in his life, notwithstanding the attendant difficulties. I recall also an instance when one of the burliest, most rugged men I know—a guaranty association administrator—was moved literally to tears by the plight of an individual threatened with personal bankruptcy by the failure of a health insurance company, and how those tears were followed by an action plan that saved that policyholder.

At a more personal level, I recall our friend Bob Ewald volunteering to tutor my father, a man Bob had never met, on how to use a personal computer and the Internet. Bob patiently explained to me that, just as teenagers would rather learn to drive from their peers than from parents, my father probably would prefer to learn the computer from a peer rather than a child. (If only my father had lived long enough! I think he would have liked Bob.) And I can't hear the movie sentence, "You're getting



on that plane!" without thinking of the many examples of dear friends who have had to commit to impossibly difficult personal choices, opting for the right over what might have seemed more desirable.

As I write this column, I am returning from a trip in which I attended the funeral Mass celebrated for Ron Long, who had served as Chair of the Wyoming Life & Health Insurance Guaranty Association since about 1992. Although the Mass was said in Cheyenne's large and beautiful St. Mary's Cathedral, the huge space was filled beyond capacity, and some people stood in the doorways and halls outside, unwilling to walk away from the commemoration of a wonderful human spirit.

Ron was almost like a character from popular boys' fiction himself—Clair Bee, the author of the *Chip Hilton* series, could have written Ron's early life story. He was a basketball star at the University of Wyoming, where he earned roughly a dozen varsity letters in four sports. Though he went on to a very successful business career, Ron's adult life was marked even more by his dedication to countless charitable causes in his beloved, adopted state of Wyoming (Ron was born in Iowa); and most of all by his utter commitment to his family and his beautiful wife, Katie. Ron's friends all tell stories about how one could not simply go out for a cup of coffee with him in Cheyenne; every such outing was repeatedly interrupted by those who would approach and greet him, ranging from taxi drivers to the Vice President of the United States.

Ron accepted the Chairmanship of the Wyoming association at a dark and troubled moment in its history, and under his guidance it became a model institution. What his friends recall most was Ron's conviction that the motivations for forming the association involved both logic and compassion, with the ultimate, overriding purpose of protecting consumers who might otherwise face personal financial devastation.

Ron faced situations, as we all do, where choices confronting his association raised a potential conflict between logic and compassion. Ron might have leaned toward compassion in resolving those conflicts, if that was what was needed to protect the consumer.

One such instance, well known to his friends, involved an individual who (arguably) had moved away from Wyoming shortly before the failure of the insurance company that had sold him an annuity amounting to his family's life savings. For technical reasons, the other state where the consumer arguably might have resided (he and his wife had sold their Wyoming house and lived in a motor home) could not then have covered the annuity. Ron urged his lawyers to dig deep to find any information linking the individual to Wyoming. The lawyers could find no links. He sent them out to do more digging. They still came up with nothing. Finally, the lawyers returned from a third investigative effort to report to Ron that the consumer and his wife had long held Wyoming fishing licenses that were still valid. Ron concluded, "As far as I'm concerned, any man who holds a Wyoming fishing license is a resident of my state." The family's life savings were protected by the Wyoming guaranty association.

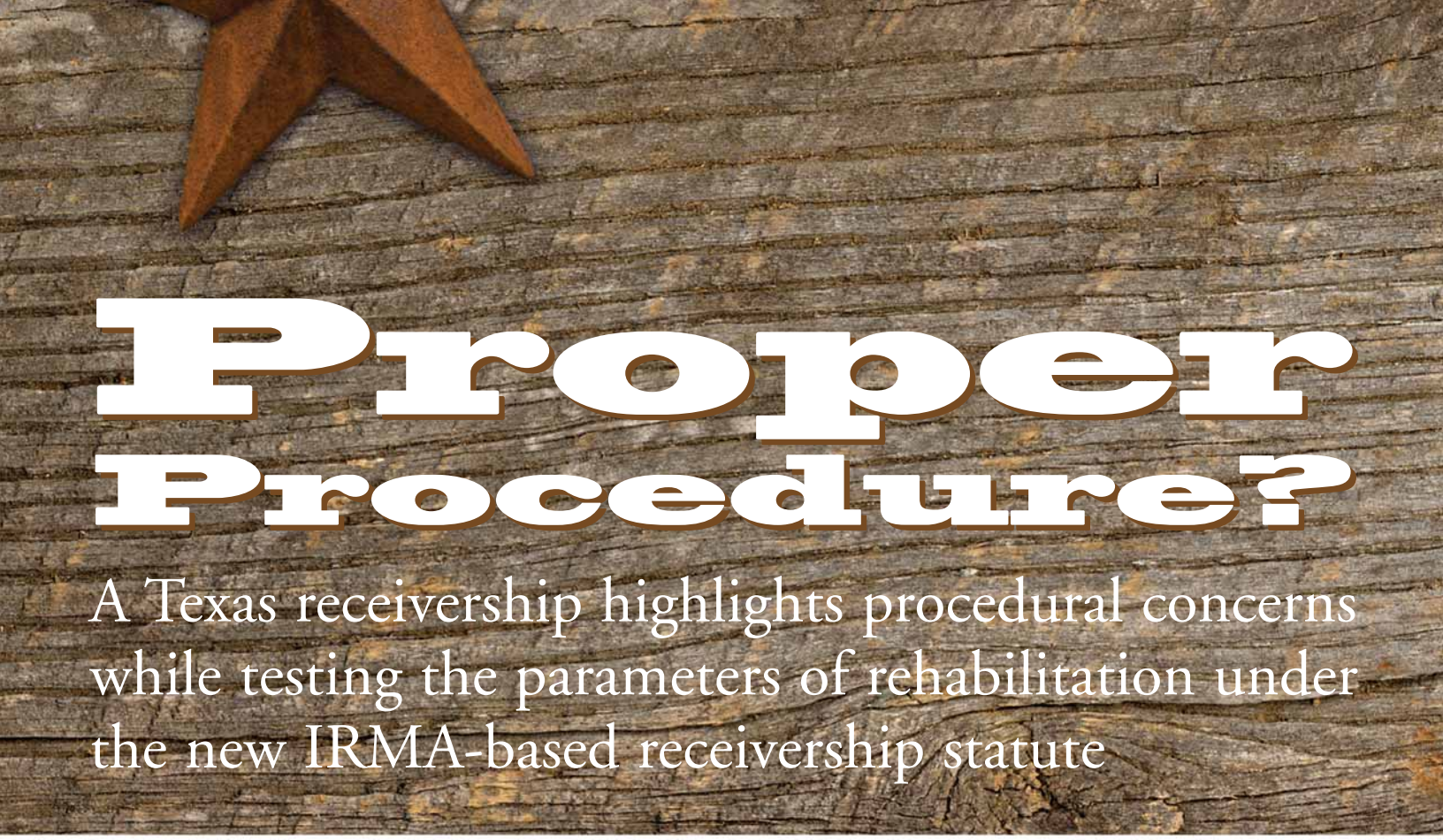
That sort of real-life moral courage may not have the dramatic flair of an adventure novel, but it is of the same basic, heroic stuff, considering that we exercise our actual choices in real time in the real world. In the real world, our mettle often is measured not by how good a "gunner" we can be, but by how well, as Ron's priest put it, "We can play without the ball." Ron didn't need to hog the ball to help his team, whether he was captaining the Wyoming Cowboys on the hardcourt, organizing Cheyenne's famous Frontier Days, or leading the guaranty association to achieve the overriding goal of protecting consumers.

As more than five hundred people filed out of the cathedral that day, the PA system played a recording (perhaps by Celine Dion) of the song, "Wind Beneath my Wings." When I heard the singer ask, "Did you ever know that you're my hero?", I couldn't help thinking—not only in memory of Ron but of all the real heroes I've had the honor to know—about the closing scene in the movie *It's a Wonderful Life*. That's the moment when, speaking of anything but money, the war-hero brother of the protagonist (played by Jimmy Stewart) raises a glass to propose, "A toast: To my big brother George, the richest man in town!" ✯

Peter G. Gallanis is president of NOLHGA.

End Notes

1. Anyone searching for the inspiration for the setting and (at least in my estimation) the core thesis of the *Potter* series would do well to read the mostly forgotten but marvelous novels of Thomas Hughes, starting with *Tom Brown's Schooldays* (1857). Although they contain neither magic nor even girls, the books center, like Rowling's, on the moral crises of children in an English boarding school setting strikingly similar to that of the *Potter* novels. Hughes's books were the best-selling novels written for boys and young adults of the nineteenth century, and they are still well worth reading. To add a further detour to this detour, *Tom Brown's Schooldays* was, more than a century later, the jumping-off point for George MacDonald Fraser's darkly satiric series of historical novels involving the central character Harry Flashman (beginning in 1969 with *Flashman*), who started literary life as a minor character in *Tom Brown's Schooldays*. The moral thesis of the *Flashman* series will be explained in a future *Journal* article to be written by Tad Rhodes.
2. *Harry Potter and the Chamber of Secrets* (Scholastic Press 1998), p. 333.



Proper Procedure?

A Texas receivership highlights procedural concerns while testing the parameters of rehabilitation under the new IRMA-based receivership statute

By Jan Funk

Highlands Insurance Company, a Texas-domiciled insurance company, is placed in rehabilitation in 2003. In 2005, Texas adopts an early version of the NAIC's Insurer Receivership Model Act (IRMA), making it applicable to all pending and subsequently filed receivership proceedings. The Special Deputy Receiver for Highlands then seeks approval of a managed runoff of the estate's liabilities under the umbrella of a rehabilitation plan. Following months of hearings and much expert testimony, the Receivership Court Special Master recommends rejection of the proposed plan, finding that it fails to meet the statutory requirements set forth in the new receivership statute. The receiver challenges the Special Master's findings and seeks a new hearing before the Travis County District Court.

Jan Funk

Why do we care? Why should we be interested in a matter that may not trigger any guaranty associations…especially since it involves a property and casualty insurance company?

We care for a lot of reasons. Perhaps most importantly, this case represents a significant departure from traditional receivership proceedings because it involves efforts to implement a long-term managed runoff and commutation scheme under the umbrella of receivership and through the use of a rehabilitation plan. This approach could very well be attempted in the life and health arena in the future, making the *Highlands* case of particular importance to NOLHGA and its member guaranty associations.

This case is also important because it addresses key issues of first impression under Texas's new IRMA-based receivership statute and highlights serious concerns about procedural and due process issues raised by language in the statute governing burden of proof in receivership matters. It also provides some clarification and guidance concerning the role of the court and the standards that must be met by the receiver to obtain approval for a rehabilitation plan.

Shifting the Burden?

To facilitate approval of his rehabilitation/runoff plan for Highlands over a multitude of objections filed in this case, the receiver sought to invoke special procedural rules to shift the burden of proof away from the receiver, as plan proponent, and place that burden on the objecting parties. Specifically, the receiver argued that special procedural rules built into the new receivership law place the burden of proof on the party objecting to an application filed by the receiver.

The Special Master noted that the burden of proof generally lies with the moving party; i.e., the party seeking to change the present state of affairs. However, special procedural rules in the new IRMA-based receivership statute purport

to shift the burden of proof away from the receiver where the receiver is the moving party. The section of the statute at issue provides in pertinent part that, in matters submitted by the receiver for receivership court approval, the objecting party has the burden of showing why the receivership court should not authorize the proposed action, except as otherwise provided in the statute.[1]

Objecting creditors argued that, by specifying statutory requirements that must be met before the plan can be approved, the statute "otherwise provides" for the burden of proof to rest with the plan proponent. The Special Master agreed, and went on to discuss a number of policy reasons why the burden of proof should not rest on an interested party objecting to a proposed rehabilitation plan, as well as specific statutory requirements that must be met by the receiver before a plan can be approved.

In particular, the Special Master explained that the receivership court has an independent duty to protect the interests of all concerned. The court cannot simply rely on objecting creditors to defend the rights and interests of all parties. Many policyholders and creditors do not have the experience in insurance receivership matters or the financial ability to mount an objection and must depend on the court and the Special Master to ensure that their interests are protected, consistent with the statute. Parties that do appear and file objections to a proposed plan do so based on their own interests, which may vary widely among interested parties. They do not represent other creditors and are not in a position to assert or defend the rights and interests of absentee parties.

The Special Master also recognized that there may be situations in which no objections are filed, and that the burden of proof rules cannot shift or differ depending on whether an objection is filed. Moreover, as is made clear in the memorandum opinion, the absence of an objection does not relieve the receiver from his obligation to prove that the statutory requirements are satisfied, nor does it obviate the need for the court to determine that the plan is fair and equitable to all parties. To make this determination, the court must look to the receiver to prove that all requirements of the statute have been met.

Additionally, the Special Master noted that the decision as to whether the insurer should continue in receivership or be placed in liquidation requires a thorough financial analysis of the books and records of the insurer. These documents are in the possession of the receiver, and the receiver has the staff that can perform the financial analysis needed. Accordingly, as the Special Master stated, the receiver controls the information and must prove, using that information, that the plan meets all statutory requirements.

The Special Master next discussed the five statutory elements that the receiver must prove, by a preponderance of evi-

dence, to obtain approval of the plan. The plan must:

1) Be fair and equitable to all parties concerned (which the Special Master construed to mean following the absolute priority rule, with all claims in a class receiving the same percentage and no subclasses)
2) Provide no less favorable treatment of a claim or class of claims than would occur in liquidation
3) Reflect adequate means for implementation
4) Contain adequate financial information
5) Provide for the disposition of books, records, and other information relevant to duties and obligations under the plan

The Special Master's Ruling

In his memorandum opinion, the Special Master acknowledged that the receiver faced substantial challenges in trying to design a workable plan given the varied nature of the Highlands business, which included both workers' compensation policies and long-tail environmental mass tort policies. Those considerations notwithstanding, the Special Master held that the receiver must establish compliance with each of the statutory requirements for the plan to be approved, and that the receiver's burden of proof on these issues was not met in this case.

The plan appears to have failed the first two tests for two reasons. First, payment of all allowed Class 2 claims in full, as promised in the plan, was in fact contingent upon the ability to obtain future settlements and "credit risk adjustments" (we call them discounts) up to 50% on a significant portion of the long-tail policy claims (to reach the "allowed" value). In addition, there was no mechanism in the plan for equalizing future payments on long-tail policy claims with workers' compensation payments being made today in the event the somewhat aggressive financial projections proved to be wrong and the estate were to run out of money.

With respect to the first test, the receiver seemed to challenge the Special Master's interpretation of the "fair and equitable" standard by arguing, albeit unsuccessfully (so far), that the distribution priority requirements are set forth in the liquidation chapter of the statute and hence would not apply to distributions made under a rehabilitation plan. The Special Master rejected the argument as academic since the statutory requirement that the plan provide no less favorable treatment than would occur in liquidation necessarily includes the distribution priority rules set forth in the liquidation chapter.

Because the receiver was unable to prove the necessary statutory elements, the Special Master recommended rejection of the plan, setting forth his findings of fact and conclusions of law in a 37-page memorandum and recommendation to the District Court. The receiver filed objections to the Special Master's findings and has requested a new hearing before the District Court of Travis County. As of this writing, the hearing had not yet been scheduled.

Issues for the Future

The transition of troubled insurance companies into the hands of liquidators and the guaranty associations is usually filled with regulatory action taken by the domiciliary department of insurance, including confidential orders to correct financial, management, or other problems. If these actions do not return the company to financial stability and compliance with state law requirements, then liquidators/receivers and the

The receiver argued that special procedural rules built into the new receivership law place the burden of proof on the party objecting to an application filed by the receiver.

The strategy for planned runoff in rehabilitation pursued in the Highlands case is one that we will likely see again, and there may be efforts to extend the concept to other lines of business in future insolvencies.

guaranty associations have historically become "triggered."

As the *Highlands* case illustrates, there is an emerging trend for licensed property and casualty insurance companies to undergo more visible regulatory control, including receivership proceedings that may not soon, if ever, trigger guaranty association responsibilities. Such regulatory controls are often referred to as "planned runoffs" and can look very different from receivership to receivership, state to state. The strategy for planned runoff in rehabilitation pursued in the *Highlands* case is one that we will likely see again, and there may be efforts to extend the concept to other lines of business in future insolvencies. The resolution of the case could thus have significant implications for property and casualty *and* life and health guaranty associations.

The *Highlands* case also highlights some of the troubling aspects of the NAIC's IRMA statute, particularly in regard to the burden of proof issue. During development of the IRMA model, the issue of burden of proof, and other special procedural rules set forth in Section 107, received much concern and attention from industry and trade representatives. Nevertheless, that provision was included in the NAIC model. To the extent this provision is adopted in the states, receivership courts will very likely continue to wrestle with these issues.

In February 2007, Utah adopted an IRMA-based receivership statute, making it the second state to do so. Although the Utah statute, as adopted, includes the same burden of proof language at issue in the *Highlands* case, this provision was referred to Interim Committee for further consideration at the close of Utah's regular legislative session in light of the procedural due process concerns that were raised. Those same issues are underscored by the ruling in the *Highlands* case, which was issued just weeks later in April.

IRMA legislation was introduced in Delaware in 2006 but did not pass through the legislature before the end of the session. The Delaware statute did not include the burden of proof language from IRMA, but instead provided for hearings in accordance with existing court rules and established jurisprudence. That legislation is expected to be reintroduced in substantially the same form in the 2008 session.

Regardless of the ultimate disposition of the *Highlands* case, the issues it raises will likely be the subject of further testing and litigation in Texas and in other jurisdictions that adopt the burden of proof provision from the NAIC model. ✯

I would like to thank Steve Durish of the Texas Property and Casualty Insurance Guaranty Association and Mark Steckbeck of the National Conference of Insurance Guaranty Funds for their expertise and assistance on the Highlands matters. The comments expressed herein are those of the author and not those of the Indiana Life & Health Insurance Guaranty Association.

Jan Funk is the executive director of the Indiana Life & Health Insurance Guaranty Association and the Indiana Insurance Guaranty Association. She also manages the Indiana Automobile Insurance Association and the Indiana Basic Property Insurance Underwriting Association.

End Note

1. *See*, Tex. Ins. Code §21A.007. Although not addressed in the *Highlands* case, this section also includes a provision for sanctions that can be imposed against any party objecting to actions by the receiver. These provisions in the Texas statute are drawn from the long-controversial language in IRMA Section 107 regarding Notice and Hearing on Matters Submitted by the Receiver for Receivership Court Approval.

Coming Together to Find Common Ground

IAIR resurrects its committee for receivers and guaranty funds


Kim H. Finley


Douglas L. Hertlein


Edward B. Wallis

Before the dust started settling from the battles over the drafting of the NAIC's Insurer Receivership Model Act (IRMA), and even as skirmishes continued on payouts on large-deductible policies, receivers and members of the property and casualty guaranty fund communities recognized that the two groups were in desperate need of their own détente.

"Over the past five years there's been a tremendous amount of activity related to insolvent property and casualty companies," said Edward B. Wallis, National Conference of Insurance Guaranty Funds (NCIGF) consultant and International Association of Insurance Receivers (IAIR) board member. "Some of these insolvencies have resulted in larger claims payments on behalf of guaranty associations than in the past. Receivers and guaranties were looking at different products that were raising new questions about how they should be handled." He cited the insolvencies of Reliance, Legion, and Credit General as examples of companies with large-deductible workers' compensation policies that brought many of these issues to the forefront.

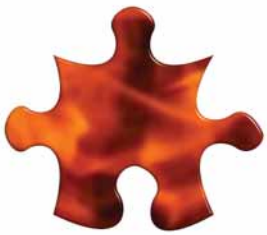
To get wary receivers and property and casualty guaranty funds back on the road of cooperation and trust, Wallis suggested that the IAIR board resurrect its guaranty fund liaison committee to meet this need. According to Douglas L. Hertlein, chief deputy liquidator of the Office of the Ohio Insurance Liquidator and IAIR board member, the Guaranty Fund Liaison Ad Hoc Committee existed early in IAIR's history, at a time when representatives of guaranty associations were not members of IAIR.

"Once guaranty funds became members of IAIR, the committee went by the wayside," Hertlein explained. "However, when Ed suggested that the committee be reformed as a venue for discussion and possible resolution of issues that were contentious or of continuing interest between the guaranty funds

By Kim H. Finley

and receivers, the IAIR board saw the value in creating such a forum and readily approved a motion reinstating it as a standing committee."

After obtaining approval, Wallis and Hertlein were appointed to co-chair the newly reformed committee, which was renamed the Guaranty Fund/Receiver Liaison Committee. The first formal committee meeting was held in March 2007 in conjunction with the NAIC meeting in New York. Thirty-two people attended, and the discussion "more than filled the hour allotted," Hertlein said. At that meeting, the discussion centered on why there is an underlying tension between the property and casualty funds and receivers, what could be done to avoid it, and how it could be worked through, rather than an issue-by-issue discussion.



NOLHGA and its member guaranty associations do a tremendous job of coordinating their efforts so that in most cases, one unified voice speaks for all the life and health guaranty associations affected by a particular liquidation.

Life and Health Participation

The guaranty fund/receiver tensions seem to be much less prevalent on the life and health insolvency side of the house. There are several reasons for this. Certainly, the life and health guaranty associations have not faced the kinds of challenges in the last few years that have been present in some of the large property and casualty liquidations. Additionally, because of the significant difference in the way coverage is handled by guaranty associations in a life insolvency versus a property and casualty insolvency, there are fewer opportunities for disputes to arise between the receiver and the guaranty associations. Finally, NOLHGA and its member guaranty associations do a tremendous job of coordinating their efforts so that in most cases, one unified voice speaks for all the life and health guaranty associations affected by a particular liquidation. Having, in effect, just two parties at the table instead of many improves the clarity of the communication and decreases the risks of misunderstanding or argument.

Nonetheless, there is always room for improvement in important relationships, and life and health guaranty associations and receivers can also benefit from having a forum, like the Guaranty Fund/Receiver Liaison Committee, to address and discuss issues on a regular basis. To date, NOLHGA and life and health guaranty association representatives have been active participants in the committee's meetings.

Initial Experiences

Both sides expressed some negative perceptions of the other at the first committee meeting, according to Wallis, who added that he thought those perceptions were mostly incorrect and the consequence of misunderstanding each other's purposes.

"In my experience with NCIGF and the liquidations of Reliance and Home…I found when sitting across the table from receivers that you can develop a good relationship," he said. "Even if we did have to resort to litigation on some important issues, usually the receivers and guaranty funds involved worked for ways to streamline and simplify the litigation."

From the receivers' perspective, that tension has been heightened over recent years as some positions taken by property and casualty guaranty funds have made it appear to receivers that the guaranty funds are no longer in partnership with them in pursuing the common objective of protecting policyholders. Instead, Hertlein said, there was an impression that the property and casualty funds were acting like "just another creditor trying to get a larger share of the liquidation estate."

Wallis agreed, but also offered an explanation. "Doug raises a good point, and I've heard it from others in the receiver community—that guaranty funds are attempting to reduce coverage," he explained. "But from the guaranty fund perspective, it is really about maintaining the limited safety net aspect of coverage in the way the legislation intended, in contrast to those who want to expand it."

Wallis added that the guaranty funds believe that guaranty laws strike a balance between providing a level of protection for the average individual insurance consumer whose insurance company failed and the other policyholders in the state whose premiums are assessed by guaranty funds to provide this protection. Each state legislature determined that balance when it adopted guaranty statutes fixing who in the state is entitled to protection and the level of such protection. Guaranty funds, he said, believe that those policy

decisions should be left to elected representatives within the state.

A Less Confrontational Forum

Obviously, Hertlein and Wallis present a compelling case for why the type of communication facilitated by the committee is important. But Hertlein admitted he was skeptical of Wallis's idea in the beginning because he felt there were adequate fora for open discussions, such as IAIR's "Think Tank" meetings (part of the regular IAIR agenda in conjunction with quarterly NAIC meetings), that have no agenda and allow for a broad range of subjects to be aired.

"I just wasn't sure what he saw being added through the liaison committee," Hertlein said. But the successful hour-long meeting in March, followed by another two-hour session in June, has Hertlein convinced that the idea has merit. The meetings were well attended, with a number of representatives from the receivership and guaranty fund (both property and casualty and life and health) communities.

"The meetings were good because the participants were candid," he said. "The jury is still out on whether it will effect significant change in guaranty fund/receiver relationships. But the discussion was frank on topics that both sides feel strongly about. Hopefully these meetings will provide for the discussion of many of the issues in a less confrontational forum than when the guaranty funds and receivers are drawing up battle lines as the issues arise in specific liquidations."

Wallis agreed: "These meetings will help enhance our relationships. If we can sit down together, we'll realize reasonable people can work through issues in a more effective manner."

Hertlein believes a venue like the committee allows both sides to discuss and, more importantly, "listen and think about" all of the issues without being in a situation where they must choose "A" or "B," which is what they faced in the debates on the model act and in several recent liquidations. He is hopeful that such discussion will build common understanding and agreements in a public yet non-confrontational manner. By making the positions public, perhaps both groups can let their more dissident members know where the majority stands and thus create more consistency among the populations, "making it harder for the rest to assert contrary positions."

That is the kind of agreement Wallis is looking for as well. "It is much better if we work out solutions by agreement and compromise," he said, noting that the property and casualty guaranty funds don't like litigating these issues any more than the receivers because it "burns up estate assets and guaranty association resources."

Outlook for the Future

Wallis is hopeful that the reborn committee continues for the foreseeable future—not because the groups have continued animosity, but rather to work together for the betterment of the insolvency process. One topic high on his discussion list is addressing the implementation of recommendations from the NAIC receivership and insolvency task force whitepaper on communication and coordination among regulators, receivers, and guaranty associations.

"A number of topics recommended in the report deserve attention and implementation in how receivers and guaranty funds can better work together," Wallis explained. "Because the relationship between the two goes on for so long, sometimes as many as 10 to 15 years or more per liquidation, maybe longer in workers' compensation cases," there is plenty of reason for the committee to stay active.

The recommendations in the whitepaper touch on communication and coordination issues that are important for all guaranty funds—property and casualty as well as life and health. Additionally, the committee has and will continue to discuss other areas that are relevant to all guaranty associations, such as early access, claim valuation and allowance, guaranty fund administrative expenses, handling of uncovered and over-cap policy claims, handling of statutory deposits, the guaranty funds' role in rehabilitations, etc. The committee is always open for suggestions for discussion topics, so anyone who would like to see a particular topic addressed should forward those suggestions to Wallis or Hertlein: "Our e-mail is always open."

Although there is a current list of committee members, Hertlein said all are welcome at meetings and anyone can ask to be placed on the committee as a member. The next meeting is slated for September 30 from 1:00 to 3:00 p.m. in conjunction with the NAIC Fall Quarterly Meeting in Washington, D.C. As provided in June, IAIR will establish a telephone participation option. Check the IAIR Web site (www.iair.org) for more information as the September meeting date approaches. ✯

Kim H. Finley is the associate general counsel for the Ohio Insurance Liquidation Office.

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"there's something critical in letting people speak across the table." The entire process, which he said should take no more than a day, often brings people to the realization that litigation, even if they have the law on their side, might not be the most practical way to handle a dispute. "I'm the architect of the possible," Piazza said, and he achieves a settlement in 80% to 90% of the cases he mediates.

New Manager

Mark Peters, special deputy superintendent in charge of the New York Liquidation Bureau, came to the bureau in April 2007 with a daunting mission. "I was asked to come in and clean house," he said, adding that in the bureau, "mismanagement had gone on for years and years." As an example, he pointed to a 23-year-old estate that had made no distributions and for which no court report had ever been filed.

Peters's efforts have focused on creating a new culture and new processes for the bureau. He instituted a new ethics code, "considerably stricter than New York state law requires," and engaged an outside accounting firm to perform a top-down audit of the bureau. The final report from the firm, which he expects to be "scathing" in parts, will be posted on the bureau's Web site. "Transparency is one of the most important things when you're doing this," Peters said, adding that the report will serve as a baseline so that the bureau can gauge improvement.

Peters noted that the bureau, as spelled out in the 1909 New York statute that created it, operates as both liquidator and security fund, which has resulted in efficiencies but also challenges in handling estates. The bureau's claims division can evaluate claims and decide whether they should be paid by the security fund or the estate. However, because of the "firm division between us and the insurance department," Peters said, "we don't hear about a troubled company until it's in receivership." This obviously makes any early intervention by the bureau difficult. While Peters admitted that there's "an interesting tension" between the need to allow a troubled company to gets its house in order and the need for early intervention by regulators, he stressed that "you need to make a smart and early assessment" of a company's prospect for rehabilitation, and he added that the bureau and the insurance department need to make that assessment together.

On the subject of early access distributions, Peters said that the bureau has made two large distributions in the last few months, with the goal of making such distributions a priority going forward. "The biggest creditors we have are the guaranty associations," he said, "and they

Seventh Inning Stretch

All meeting photographs by Kenneth L. Bullock

deserve to be treated better than they have been by the Liquidation Bureau."

Pitching the Press

As he began a presentation on dealing with the media in high-profile litigation, Harold Haddon (Haddon, Morgan, Mueller, Jordan, Mackey & Foreman) announced, "I consider the press to be a soulless, career-crushing machine." Having represented Kobe Bryant and John and Patsy Ramsey (the parents of JonBenét Ramsey), it's safe to say that he speaks from experience.

The key in a high-profile case, Haddon said, is getting your story out as quickly as possible. "The media always want to define, maybe within 30 seconds, who's the hero and who's the villain," he said. "First impressions are indelible." The difficulty facing any legal team is that it's impossible to know all the facts so quickly. "You've got to do a very hardball investigation at the beginning of the case—I think within 72 hours," he added.

Media consultant Michael Heenan (Heenan Communications) agreed with Haddon to some extent. "Often, the villain and hero are cast, not within 30 seconds of the reporter arriving at the scene, but as the reporter drives to the scene," he said. While it's vital to make it as difficult as possible for the media to cast your client as the villain, conflicting viewpoints—the legal department advising one course of action and the public relations department advising the opposite—can complicate things. "The art is how senior management unravels this clash of priorities," he said. It's also important to take a "big picture" view of the situation and determine how this case and your response to it fit into a company's overall communications strategy: "Litigation is one piece of your overall corporate identity."

In response to a question about who should do the talking to the media, Haddon stressed that "it's important to put as sympathetic a face as you can on your client, and that face is never a lawyer." However, he also advised against using a media consultant, since the press are apt to feel you're trying to "spin" them.

Heenan agreed that lawyers aren't the best spokespeople, but his key point was that "the question of 'who does the interview' needs to take a backseat to 'what the hell are they going to say?'" Every communication must fit in with the client's public identity, or it can be very damaging. "Incongruity kills," Heenan said, adding that there are a number of third-party outlets—such as trade associations—that can be tapped to make statements that wouldn't sound right coming from the mouth of the client or lawyer.

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Battery Mates

While some might think that jokes don't sound right coming from the mouths of lawyers, Daniel Reilly and Larry Pozner (Reilly Pozner & Connelly LLP) proved them wrong in their presentation on cross-examination and using your opponent's witnesses to build your case. Doing so, Reilly said, "is the surest way to victory," since it's more powerful than developing your case with your own witnesses. "The jury understands that a point conceded by a hostile witness must be true," Pozner said. "Admissions are better than assertions."

The key to this strategy, Reilly stressed, is preparation, which involves poring over depositions before trial. "Cross-examination is not a night at the improv," he said. "It's not a discovery device." Instead, meticulous planning is necessary to identify the key points—what Pozner called "facts beyond change"—that can be made using hostile witnesses and the most effective and dramatic way of making them. The facts that lead to a favorable jury verdict, Pozner said, "are the facts that make juries angry."

The strategy only works, however, if you let the jury in on it. This begins in the opening statement. "Use the opening to set up the cross-examinations," Pozner said, by identifying the key facts in your argument and then laying them out for the jury and judge. "We're going to promise those in the opening statement," he explained. "If you deliver, it strengthens your credibility and convinces the jury that you've proved your case." Announcing your theory rather than attacking your opponents' theory also puts the opponent on the defensive, since you've promised to make your case with his or her witnesses.

A sound strategy can always be helped with a little theatricality. Reilly noted their love of visual aids (such as posters and Velcro stick-ons), and Pozner emphasized the power of naming a document (as an example, he pointed to what they called "The No Memo" in the Dain-Bosworth cases they tried). "When you give a document a name, you make it a witness," he said.

Once the case has been laid out and made with the opponent's witnesses, the closing argument serves as a summation—and a victory speech. "We are announcing our victory," Reilly said. "We're not trying to persuade anybody at that point. We're arming our supporters on the jury with the facts they need."

Team Speed

Frances Arricale of the Interstate Insurance Product Regulation Commission (www.insurancecompact.org) was on hand to update attendees on the progress made on the Interstate Compact, part of the NAIC's regulatory modernization initiative. Having been ratified by 30 states (representing half the premium volume in the country), the compact is up and running. By providing uniform standards and a central product-approval system for asset-based products, the compact is designed to enhance efficiency while "maintaining the consumer protections that are the hallmark of the state-based regulatory system."

Arricale outlined the workings of the commission, which to date has approved 22 product standards and received its first product filing in June 2007. She noted that states can opt out of any regulation by legislation or regulation (there is a time limit on the latter course), adding that "at this point, we do not have any opt outs."

Some of the larger states have yet to join the commission, and Arricale admitted that some states "are looking to see how we're going to operate before they participate in this process." The appeal of the commission, she said, is that the heightened efficiency it offers allows states to reallocate insurance department resources to areas such as market conduct examinations. These efficiencies also benefit insurance companies and consumers by lowering the cost of bringing new products to market. "Those cost efficiencies would be passed on" to consumers, she said. "Also, you have new, competitive products reaching the market more quickly."

Overseas Talent

Much like baseball, safety nets around the world have evolved along slightly different tracks than the American version. Gordon Dunning (Assuris) called the Canadian protection system "somewhat of a hybrid between the U.K. and U.S. versions." Like the U.S. safety net, Assuris is a not-

Different Playing Fields

A look at the market composition in the countries represented on the Legal Seminar "Safety Nets around the World" panel:

- Canada: 3 "mega" companies, 100 others
- U.K.: 200 authorized life companies in 80 groups
- Japan: 38 life insurance companies
- U.S.: 763 life insurance companies (on the group level)

for-profit organization with industry members, and its first priority in an insolvency (Canada has had only 3 in the last 15 years) is to transfer policies to a healthy insurer. Also, its coverage is usually limited to individuals and small businesses (although all parties are covered for life insurance).

Unlike the U.S. system, Assuris has "soft caps" for life insurance coverage; the organization pays 85% of all policies over $200,000, with no limit on the payments, and it pays 100% of policies below that threshold. Assuris also pays $60,000 for cash value for life insurance, $60,000 for health insurance, and $2,000 per month for annuities.

Assuris has "an independent detection function," and Dunning said the organization spends most of its time evaluating companies and consulting with federal and provincial regulators on potentially troubled insurers. While he's a big believer in early intervention, Dunning stressed that "we don't have any direct contact with the companies. We believe very strongly that there should only be one regulator."

Ted Boucher of the U.K.'s Financial Services Compensation Scheme (FSCS) explained that for his organization, "our first obligation is continuity of coverage." Like Assuris, the FSCS has a soft cap on benefits. "Our primary objective will be to maintain at least 90% of policy benefits," Boucher said, with no limit on these benefits. The organization first looks to transfer policies or offer substitute policies from another insurer. When all else fails, he added, "cash compensation is the final resort."

The FSCS was established by the U.K.'s Financial Services Authority (FSA) but is an independent organization. It is a post-funded system that protects insurance policyholders as well as other groups, including customers of investment and mortgage firms. Boucher noted that there has been only 1 small life insolvency in the last 20 years.

While America has been able to lure a number of Japan's top baseball players to its shores, NOLHGA was unable to do the same with the head of Japan's Policyholders Protection Corporation. As a result, NOLHGA's Dick Klipstein, who visited the country last year to discuss the U.S. and Japanese safety nets, was called on to give his insights into a system that differs markedly from the one employed in the United States. The Japanese system, which was formed in response to a number of large company failures in the 1990s, was designed to be a pre-funded system, and coverage is based on reserves rather than cash or account values.

The two systems do share what Klipstein called "a core principle—fund the shortfall and transfer the covered obligations to a healthy company." Much like the Canadian and U.K. systems, Japan's system has no caps, funding 90% of policy reserves with no maximum. The Japanese system, like the U.S. system, covers all traditional life, health, and annuity products, but it also covers variable and market value–adjusted annuities. In assessing companies, Japan uses what Klipstein called "net premium"—gross premium minus withdrawals—to determine half the assessment; the other half "is allocated among member companies based on their relative share of reserves," he said.

While the system was initially designed to be pre-funded, the high cost of paying for earlier company failures (approximately $4.5 billion U.S.) has prompted the corporation to delay funding until 2010. Klipstein noted that "the industry has recommended a post-funding alternative as a way to promote financial prudence and cooperation among regulators, the industry, and the guaranty system in developing plans to address future life company failures."

Rain Delay

The focus stayed global with a presentation by Mark Brownstein (Environmental Defense) on climate change and its impact on public health. Citing a 2007 report by the Intergovernmental Panel on Climate Change (established by the World Meteorological Organization and the United Nations Environment Program), Brownstein said, "the science is ever more clear that this is a challenge for us." That challenge—the warming of the Earth and the role that human-produced greenhouse gases play in it—is now something to be managed rather than prevented. "What we're really trying to do is avoid the worst consequences of climate change," he said. "There will be some effects."

These effects include a projected temperature increase of 2 to 11 degrees Fahrenheit over the next 100 years, as well as more-frequent heat waves and pest-related diseases. Brownstein also pointed to the "increasing vulnerability of coastal populations," which is exacerbated by a lack of readiness for rising tides and catastrophic storms.

The good news, Brownstein added, is that the technology exists to deal with the problem. The

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same "cap and trade" strategy that helped reduce sulfur dioxide emissions in the 1990s can be used with greenhouses gases. "We capped the pollutant, not the economy," he said. "And we unleashed innovation." The same could be true of efforts to reduce greenhouse gases, according to Brownstein, and industry is increasingly supportive of such efforts. "There is a consensus in the business community to take action," he said, adding that companies as diverse as DuPont, McDonald's, and Wal-Mart have all embraced the cause.

America's Pastime

With apologies to baseball, politics can be considered America's true pastime, especially when the political scene is described in the unique style of Charlie Richardson (Baker & Daniels). Addressing the ongoing debate over federal regulation of insurance, Richardson predicted that the Treasury Department would stake out a position on the issue within two years; he also cited the positive comments of Treasury's David Nason at last year's Legal Seminar about the state-based guaranty system.

Richardson made it clear that, despite that affirmation and the fact that the current guaranty system is included in the most recent versions of the optional federal chartering bills in Congress, the guaranty system cannot afford to rest on its laurels. The current congressional oversight plan's list of 23 insurance-related topics is "breathtaking in its scope," he said, and guaranty associations are indeed on the list: "Prepare to be monitored, ladies and gentlemen."

Richardson predicted that Congress would take its time in acting on the optional federal charter bills ("it will be several years of turtles and snails," in his words) unless a major catastrophe makes insurance reform a top priority. This extended timeframe, however, does not guarantee a quiet period for the system. "Sometime in the next few years, some of you in this room will be testifying before Congress" on the strength of the state-based system, he said, and a few might even be advocating an FDIC-style system for a federal safety net. If the state-based system is to be the consumer-protection mechanism of choice, Richardson said, "this whole debate will require constant diligence and attention on the part of NOLHGA and the entire industry." ✯

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NOLHGA Calendar of Events

2007

September 28–30	IAIR Fall Quarterly Meetings Washington, D.C.
September 28- October 1	NAIC Fall National Meeting Washington, D.C.
October 8	**MPC Meeting** **Amelia Island, Fla.**
October 9–10	**NOLHGA's 24th Annual Meeting** **Amelia Island, Fla.**
October 21–23	ACLI Annual Conference Washington, D.C.
November 30– December 2	IAIR Winter Quarterly Meetings Houston, Tex.
November 30– December 3	NAIC Winter National Meeting Houston, Tex.

2008

January 28–30	**MPC Meeting** **Phoenix, Ariz.**
March 28–April 1	NAIC Spring National Meeting Orlando, Fla.
April 30–31	**MPC Meeting** **Raleigh, N.C.**
May 31–June 3	NAIC Summer National Meeting San Francisco, Calif.
July 15–16	**MPC Meeting** **Boston, Mass.**
July 17–18	**NOLHGA's 16th Annual Legal Seminar** **Boston, Mass.**
September 20–23	NAIC Fall National Meeting Washington, D.C.