MReBA Cover Notes --

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In This Issue:

Welcome!

Dear MReBA Members and Newsletter Readers:

The Newsletter Committee is proud to bring you the latest newsletter of the Massachusetts Reinsurance Bar Association. This month, our authors explore whether solvent schemes of arrangement will become a part of the insurance and reinsurance landscape in the United States; profile Elisabeth Ditomassi in her new role as head of US Compliance and Regulatory Affairs for Beazley Group; and offer a preview of MReBA's upcoming symposium. As always, we offer some notes of particular interest to legal practitioners, including summaries of recent cases and some practical considerations that arise as a result of the US Supreme Court's recent decision in *AT&T v. Concepcion*.

We hope you enjoy reading this newsletter, and that we will see you at one of our upcoming events.

Alexander Henlin

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Don't Miss Out! Register Now for the Third Annual Symposium!

MReBA
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MReBA Calendar

MReBA's Third Annual Symposium:

Improving Insurer-Cedent-Regulator Relationships
October 6, 2011
Back Bay Harvard Club

MReBA Meetings:

October 12, 12:30 pm
Morrison Mahoney

November 8, 12:30 pm
Robins Kaplan

December 14, 12:30 pm
Mintz Levin

General Interest:

CPCU General Society Meeting
September 24-27
Las Vegas, NV

MLB World Series
October 19-27
Boston, MA

Fall ARIAS Meeting
November 3-4
New York Hilton

Fall NAIC Meetings
November 3-6
Washington, D.C.

FDCC Insurance Industry

As Chair of the Symposium Committee, I invite you to our program: Improving Reinsurer-Cedent-Regulator Relationships, on October 6, 2011, at the Harvard Club in Back Bay. Our keynote speaker will be **Tracey Laws**, Senior Vice President and General Counsel of the Reinsurance Association of America. She will focus her remarks on the current regulatory climate in which all of us conduct business.

Drawing from leaders among reinsurers, cedants, and outside counsel, this year's panelists will engage you in topics that often create tension within the industry and demonstrate ways to enhance the working relationships among all of us. Coming back to regulatory issues, we are pleased to have **David Brummond**, the U.S. Treasury Department's Senior Sanctions Advisor on OFAC, as our final speaker.

To view the complete list of program topics and for additional information on this year's symposium, please click here. I hope you will join us for an informative and interactive program and reconnect with your colleagues throughout the industries.

John N. Love

Chair, MReBA Symposium Committee
Partner, Robins, Kaplan, Miller & Ciresi L.L.P.
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Industry Profile: The Beazley Group's Elisabeth Ditomassi - A Global Perspective On Insurance

By Kristin Suga Heres,
Zelle Hofmann Voelbel & Mason LLP

Elisabeth Ditomassi is not the type to shy away from a challenge. In her former role as General Counsel and Deputy Commissioner of the Massachusetts Division of Insurance, Elisabeth tackled head-on some of the most pressing regulatory issues to face the industry in the Commonwealth for decades, including the introduction of competition into the Massachusetts personal auto insurance market. These days, however, Elisabeth is taking on new challenges, this time at the helm of U.S. Compliance and Regulatory Affairs for Beazley Group, an emerging presence in the U. S. property and casualty market.

I recently had the pleasure of sitting down with Elisabeth to discuss her unique perspectives on the insurance industry and her transition from the halls of state government to her new, in-house role. Given Elisabeth's energy and tireless enthusiasm for her work, as well as her disarming and affable nature, it is not at all surprising that she has risen so far so quickly.

An Introduction to Insurance

Like so many who find themselves working in insurance, Elisabeth ended up in the industry by pure chance. After graduating from Boston University School of Law, Elisabeth worked as an attorney in both private practice and state government. Her roles included working as a litigation associate at a small Wall Street law firm, and later, the law firm formerly known as Kirkpatrick & Lockhart; serving as a prosecutor of public corruption for the Massachusetts Attorney General; and working as Chief of Litigation at the Massachusetts Department of Revenue. In 2003, when Elisabeth was seeking a general counsel position, an opportunity opened up - by chance - at the Massachusetts DOI, where she went on to serve as General Counsel and Deputy Commissioner for seven years. Elisabeth's position at the DOI was her first, but certainly not her last, position in the insurance industry.

At the DOI, Elisabeth wore many hats. A few of her many roles included monitoring

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and participating in all litigation involving the Division, presiding over administrative hearings, reviewing and analyzing all insurance-related legislation that had any likelihood of becoming law, advising the commissioner on numerous matters, working with the Governor's counsel to carry out certain objectives affecting the insurance market, and drafting regulations. However, Elisabeth's favorite role was that of policymaker. "It was a blast creating policy," Elisabeth observed; politics, however, sometimes dampened some of the fun involved in that endeavor.

Reflecting on her time at the DOI, Elisabeth noted that one of her most formidable tasks was working to move the personal auto insurance market from a price-setting regime to managed competition. In doing so, Elisabeth and the DOI faced substantial resistance from domestic companies working to retain the existing system. Creative thinking was critical, as the DOI had to work substantial change within the existing (archaic) legal framework. On a few occasions, Elisabeth and the DOI were faced with the task of convincing the Supreme Judicial Court that the Commissioner had the legal authority to take these monumental steps. The DOI prevailed.

"The early years on this project taught me how to think strategically and creatively," Elisabeth reflected. "You often cannot get to where you need to be with the current laws, so you have to figure out how to build what you want with only the tools you already have in your tool box."

To read this Industry Profile in full, please click here.

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Does Rhode Island Hold the Key to the Future of Schemes of Arrangement?

By Michael F. Aylward,
Morrison Mahoney LLP

A scheme of arrangement is a mechanism by which an insurer or reinsurer in run off can go to court to commute its liabilities with the approval of a statutory majority of its insureds or other creditors. Whereas such schemes were originally used primarily for insolvent companies, they are now principally used by solvent insurers and reinsurers to dramatically shorten the amount of time for a company to complete the run off process.

Despite their ubiquity in the UK and certain former Commonwealth countries, schemes of arrangement have never been permitted in the United States. Rather, U. S. companies are typically wound down or liquidated pursuant to receivership and liquidation procedures approved by state insurance departments and local legislatures.

As various states look for ways to attract insurers to their borders, however, attitudes to schemes of arrangement may be changing. Whether other states follow may depend on an appeal now pending in the Rhode Island Supreme Court.

In 2002, the Rhode Island legislature enacted the Voluntary Restructuring of Solvent Insurers Act, R.I. Gen. Laws §14.5-1, *et seq*. which, as amended in 2007, created a scheme by which a solvent insurance or reinsurance company in runoff may propose a commutation plan extinguishing its liabilities for past and future claims of its creditors and then terminate its business. Such insurers must be domiciled in Rhode Island, have liabilities under policies for property and casualty lines of business, have ceased underwriting new business and only be renewing ongoing business to the extent required by law or by contract.

An insurer seeking commutation under the Act must first submit a detailed plan to

state insurance regulators for review. Only after an applicant has addressed the comments of regulators or the 60-day period for review has expired may the insurer seek court approval and implementation of its proposed commutation plan. Within 90 days of the submission of a commutation plan for court approval, a meeting of creditors shall be held to consider the proposed commutation plan.

To obtain approval of the proposed commutation plan, the runoff insurer must obtain the consent of 50% of each class of creditors and 75% in value of the liabilities owed to each class of creditors. Upon approval by the creditors, the runoff insurer must petition the court to enter an order confirming the approval, which may only be granted by the court if it determines that the implementation of the commutation plan will not materially adversely affect either the interests of the objecting creditors or the interests of assumption policyholders.

The constitutionality of the Restructuring Act is now being tested in a case that has recently been accepted for review by the Rhode Island Supreme Court. At issue in *In Re GTE Reinsurance*, Case No. 11-197-A, are the claims of several cedents of GTE Re-Hudson Insurance, Odyssey Re and Skandia-American (collectively "the Odyssey Insureds")-that the plan proposed by GTE Re unconstitutionally impaired their contractual rights by proposing to pay them a sum certain based on actuarial estimates as a substitute for the open-ended indemnity obligations called for by the insurance contracts.

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Practice Note: *AT&T Mobility v. Concepcion*

By John Matosky,
Prince Lobel Tye LLP

In a series of decisions beginning in early 2010, the United States Supreme Court has emphasized the consensual nature of arbitration, not only with respect to whether parties have agreed to arbitrate certain disputes but also with respect to the manner in which they have agreed to conduct their arbitration. In the Court's latest such decision, *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), it held that the Federal Arbitration Act (FAA) preempted a California rule that deemed class-action waivers in consumer contracts to be unenforceable. As in its earlier decision in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. ___ (2010), the Court concluded that the FAA requires express consent in order to require a party to participate in collective arbitration proceedings.

Massachusetts practitioners, many of whom are accustomed to invoking the First Circuit's 1988 decision in *New England Energy v. Keystone Shipping*, 855 F.2d 1 (1st Cir. 1988), to argue that the FAA does not preempt the consolidation-friendly Section 2A of the Massachusetts Arbitration Act (MAA), are justified in wondering whether, in light of *Stolt-Nielsen* and *Concepcion*, consolidation remains available under the Massachusetts state rule in the absence of an express agreement between the parties to use it.

In *Keystone*, the First Circuit held that the FAA did not preempt Section 2A of the MAA, which allows the court to consolidate arbitrations consistent with the principles set forth in the rules of civil procedure, because the FAA, itself, did not address the issue of consolidation. The court further concluded that consent was unnecessary under Section 2A and, therefore, silence in an arbitration agreement with respect to consolidation was not an obstacle to ordering consolidated proceedings.

In its decision in *Stolt-Nielsen*, however, the U.S. Supreme Court held that class-action arbitration was unjustified where the agreement was silent on the issue. The parties' consent to class arbitration, the court determined, must be express in order

to satisfy the federal policy that arbitration agreements are enforced according to their terms.

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Case Note: Massachusetts Superior Court Rules That, Absent Bad Faith Or Fraud, Reinsurer May Not Challenge Cedent's Allocation Methodology Simply Because It Is Inconsistent With The Cedent's Pre-Settlement Analysis

By Susan A. Hartnett,
Sugarman, Rogers, Barshak & Cohen, P.C.

Lexington Ins. Co. v. Clearwater Ins. Co.
No. 09-0234C (Mass. Super. Jul. 26, 2011) (Sanders, J.)

In what appears to be the first ruling on the subject by a Massachusetts state court in over a decade, a judge in the Business Litigation Session of the Massachusetts Superior Court has recently addressed the meaning and scope of the "follow the fortunes" doctrine and the extent to which a reinsurer can challenge how its cedent allocated its share of loss among its policies. Noting the absence of any appellate decision on point in Massachusetts, the trial court followed federal precedent and declared that, absent evidence of bad faith or gross negligence, a cedent's allocation decisions cannot be challenged by a reinsurer, even where they are inconsistent with the cedent's pre-settlement analyses.

The dispute in this case was between Lexington Insurance Company, one of the AIG companies providing coverage to Dresser Industries for asbestos personal liability claims, and Lexington's reinsurer, Clearwater Insurance Company, who, as Skandia, reinsured two policies issued by Lexington to Dresser under two facultative certificates. After being named as a defendant in hundreds of thousands of complaints alleging personal injury or death from asbestos or silica, Dresser brought coverage litigation against all of its insurers, including the AIG insurers. In connection with that coverage litigation, AIG concluded that Dresser's liabilities exposed the full limits of coverage of the policies issued by the AIG companies, including Lexington. AIG then joined with a number of other insurers and negotiated a global settlement with Dresser.

The court found that, as part of the settlement process, a joint defense group of insurers, including AIG, retained the services of a consultant, NERA Economics, to aid negotiations among the different insurers over their respective contributions to a joint settlement with Dresser. NERA prepared various spreadsheets that attributed dollar amounts to specific insurers and policies, including the two Lexington policies at issue. AIG settled with Dresser and then proceeded to allocate the settlement among its various companies' policies, not as analyzed by NERA but by using a "bathtub methodology." Under that methodology, Lexington's two policies were fully exhausted. Lexington sought recovery from Clearwater on that basis. Clearwater contended, however, that AIG should have allocated the loss according to the spreadsheets prepared by NERA and that if that were done, the Lexington Policies would not have been exhausted.

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Case Note: Massachusetts Federal District Court Grants Summary Judgment to Reinsurer on Question of Policy Renewal

By Susan A. Hartnett,
Sugarman, Rogers, Barshak & Cohen, P.C.

One Beacon Am. Ins. Co. v. Commercial Union Assur. Co. of Canada
No. 10-10164-JLT (D. Mass. Aug. 18, 2011) (Tauro, J.)

A recent decision issued by the federal district court in Massachusetts illustrates the potential for evidentiary problems when issues in dispute are not ones with which any current company witness was personally involved but, rather, concern business decisions made decades earlier. Given the extended life of long-tail claims, this is not an uncommon scenario for cedents and reinsurers alike.

At the heart of this dispute was whether two policies that OneBeacon America Insurance Company ("OneBeacon") issued to its insured in 1981 and 1982 were "renewals" of a 1980 OneBeacon policy that the parties agreed was covered by a 1980 facultative certificate issued to OneBeacon by Commercial Union Assurance Company of Canada ("Aviva"). While it was undisputed that Aviva had agreed to reinsure 100% of OneBeacon's 1980 policy and "any renewal thereof," the parties disagreed on whether the later two policies were, in fact, "renewals" of the 1980 OneBeacon policy. This issue arose in 2007, almost 30 years after the policies were issued, after OneBeacon sought full indemnity under Aviva's 1980 facultative certificate for sums it had paid under all three policies for personal injury asbestos claims against its insured.

Both parties moved for summary judgment. The only contract between the parties was the 1980 facultative certificate, which specifically referenced only the 1980 OneBeacon policy. While the 1981 and 1982 OneBeacon policies chronologically followed the 1980 OneBeacon policy period, the later two policies were not identified as "renewals" of the 1980 on their face, bore a different policy number sequence and producer code, and contained different premium information. Thus, the underwriting intent was a key issue in dispute. The court made no reference to testimony of employees or brokers who had been personally involved in the 1980 transactions, and procuring such testimony may have been difficult given the length of time since the policies were issued.

In moving for summary judgment and arguing that the two later policies were clearly "renewals" of the 1980 Policy, OneBeacon relied on the affidavit of one of its current senior reinsurance analysts who unequivocally stated that the 1981 and 1982 policies issued by OneBeacon to its policyholder were renewals of the 1980 policy. However, this same senior reinsurance analyst had testified as OneBeacon's Rule 30(b)(6) deposition witness on issues relating to the negotiation, underwriting and issuance of the 1980 policy. At his deposition, he stated that he had not contacted current or former OneBeacon employees or any broker who had been involved in the underwriting of the OneBeacon policies, had not reviewed the underwriting files, and had no personal knowledge about the payment of a premium to Aviva related to the 1981 and 1982 policies.

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