



REINSURANCE, EXCESS AND SURPLUS LINES SECTION

JUNE 2016 NEWSLETTER



With the countdown now underway for July's action packed meeting at the gorgeous Fairmont Le Manoir Richelieu in La Malbaie in Quebec, I want to give you a preview of the terrific section meeting we have planned for Wednesday, July 27, and invite your ideas and involvement in planning our upcoming programs in Charleston and Montreux Switzerland. I also want to highlight the contributions made by several of our section members to the informative and well-received programs we presented during the 2015 winter and annual meetings and the 2016 winter meeting at the Del Coronado.

**Preview of Coming Attractions:
"A Recipe for Controversy: Evaluating the
Availability of Coverage for Atypical Claims."**

The topic for our July 27, 2016 Annual Meeting program grew out of discussions with attendees at last year's Insurance Industry Institute about the challenges insurers face when confronted by unusual and emerging claims that do not fit neatly into existing policy provisions and/or existing case law. With an initial list of "atypical" claims provided by **Alan Rutkin** of Rivkin Radler in New York, **Kate Browne** of SwissRe and **Mike Aylward** of Morrison Mahoney in Boston, I reviewed the roster of our growing section with an eye toward enlisting the assistance of one of our Canadian members and set my sights on **Marcus Snowden** to draw on his experience in resolving thorny coverage issues for clients of his Toronto firm, Snowden LLP. Drawing upon several enjoyable discussions with **Sean Griffin**, a relatively new member from D.C. who recently moved to the national Dykema firm, our panel of coverage gurus was assembled and ready to go.

In what will no doubt prove to be an informative and entertaining roundtable discussion, Alan, Sean and Marcus will examine the challenges that insurers on both sides of the border need to navigate when policyholders seek defense and/or indemnification coverage for potentially high exposure lawsuits involving atypical claims that do not fit neatly into traditional categories of property damage, bodily injury, crime theft, and/or personal and advertising injury coverage. Some of the examples of the "atypical" coverage disputes our panel will address include the following:

- Expanding trends and developments involving the criminalization of torts in the context of workplace disasters, massive product recalls, and corporate financial misconduct;

- Evolving cyber threats, including law firm exposures most recently exemplified by the widely publicized hack of the Panamanian firm Mossack Fonseca, and challenges presented by the intersection between data breaches and cyber crime; and
- Class actions against companies such as Starbucks, Star-Kist and other product manufacturers and distributors regarding misleading product packaging and/or advertisements.

Given the program's focus on "atypical" coverage disputes, we encourage Section members to share their experiences with unusual and emerging claims with our panelists prior to our and during what will no doubt prove a interactive and informative section meeting. Also be sure to take a look at the eye opening scenarios examined in our program paper.

2017 Program Planning

To aid in zeroing in on topics well suited for an interactive and informative look at emerging developments and challenges encountered in resolving excess, surplus and/or reinsurance disputes, I encourage you to join in our Section business call on July 7 at 1 pm ET. Clark Hudson, program chair for the 2017 winter meeting in Charleston, has asked the Sections to submit their program proposals in the near term so that he wrap up the program schedule soon after the Annual meeting. We also need to start planning a program well suited to our Montreux Switzerland venue for the 2017 annual meeting. Topics currently under discussion for both of these meetings include the following but additional suggestions and volunteers are needed:

- The current landscape of agent, producer and underwriters liability;
- an exploration of the ramifications of the newly announced Brexit departure on the reinsurance industry; and
- A review of the ways in which E&S carriers use specialized endorsements to materially alter standard coverages.

Member Contributions to Section Programs and Events

As many of you know, by the time we kick off one of our section programs, the participants have devoted many hours to preparing the program proposal, writing the paper, and fine tuning discussion points for the presentation. In every instance when I have reached out to a relatively new or long time member of our growing section for assistance in presenting one of our programs or joining in the effort to track down and post hot cases during one of our two assigned weeks each year, I've received a favorable response with consistently excellent end results. Given this, it should come as no surprise to learn that the most enjoyable aspect of my role as section chair is the opportunity to get to know talented FDCC members from around the globe during the process of organizing and presenting section meetings at our winter and annual meetings. While my favorable experience perhaps should not come as a surprise given

the caliber of our membership and the FDCC's commitment to the hallmarks of professionalism, fellowship and knowledge, it nonetheless stands out as I reflect on my term as Chair. Given this, I wanted to extend my thanks to the following section members for their enthusiastic and valued readiness to contribute to our Section over the past two years.

Early last year, **Brad Box**, an accomplished trial lawyer with the Tennessee firm of Rainey Kizer Reviere & Bell PLC and I were putting the final touches on the paper for the Section's program at the winter meeting in Amelia Island addressing "**Industry Efforts Now Underway to Manage Climate Change Exposures**." Joined by **Kate Browne** of SwissRe and **Lindene Patton**, Corelogic's newly appointed Global Head of Hazard Product Development, our program led attendees through a fast past, informative, and sometimes humorous examination of the evolving landscape for climate change litigation and the steps leading insurers are undertaking to project and manage their exposure to climate related risks. Given their existing involvement in this area, I enlisted the assistance of Kate Browne and Lindene Patton (who previously headed Zurich's climate change office) during the latter part of 2014 and then looped in Brad Box when Ned Currie alerted me to Brad's interest, as a relatively new member of the FDCC, in getting involved with a section program. In exchanging information about emerging developments relating to our topic over the next several months, our group learned an impressive amount and formed new FDCC friendships. In recognition of his hard work and leadership on our section's climate change program, Steve Farrar appointed Brad a vice chair of this section effective August 2015.

In a second section program presented at the 2015 winter meeting, vice chair **Mike Aylward** and our immediate section past chair (and current chair of the International Section) **Stephen Carter**, presided over an informal and informative roundtable discussion regarding an array of developments of interest to reinsurance, surplus and excess lines practitioners including the latest word on the American Law Institute's Restatement of the Law of Liability Insurance, the pros and cons of the "follow the leader" approach that requires participating underwriters in a syndicate to abide by the leading underwriter's settlement decisions, and the ramifications of the First Circuit's January 2015 decision (*Old Republic Ins. Co. v. Stratford Ins. Co.*) concerning an excess insurer's asserted obligation to participate in an insured's defense prior to the exhaustion of the primary policy limit when claims appear likely to expose the excess limit.

During one of the many enjoyable networking events at the 2015 winter meeting, Deb Varner introduced me to **Lee Murray Hall**, a new member with the West Virginia firm of Jenkins Fenstermaker, PLLC whose practice focuses in the areas of insurance coverage, bad faith litigation and insurance defense. Upon learning of Lee's practice areas, I did not hesitate to recruit her to assist when our section was next up in the hot cases rotation. With that role capably handled, I next asked Lee to take the lead in organizing our section's rescission program at the 2016 winter meeting at the Del Coronado. In addition to preparing the program proposal, Lee did all of the heavy lifting

in preparing the program paper, a 50 state survey of the legal framework applied to rescission remedies.

With the 2015 annual meeting located in spectacular Banff, British Columbia, I asked program chair **Andy Downs** for suggestions regarding Canadian members who might be interested in speaking on our planned section program entitled "*Nanotechnology: The Challenge of Insuring Against a Multi-Faceted and Poorly Understood Latent Exposure.*" Via Andy's introduction, I was very pleased to enlist the assistance of **Sandra Corbett**, an FDCC member with considerable experience litigating coverage disputes in Canada. My first FDCC acquaintance with the impressive title of "Queens Counsel," Sandra is a partner with Edmonton, Canada firm of Field Law. Prior to enlisting Sandra's assistance, I had already confirmed the availability of our immediate past section chair **Stephen Carter**, who monitors nano developments for some of his clients, and **Angela Brandt**, a commercial litigator with product liability experience who works with the Minneapolis firm of Larsen King. I reached out to Angela at the suggestion of John Mitchell, who chaired the co-sponsoring toxics and environmental section. Demonstrating the benefits of partnering with other sections, Angela alerted us to some eye opening studies regarding nano hazards linked to artificial turf made from some types of recycled tires, as well as other product liability risks linked to nano exposures. In preparing the paper for our section's presentation, we were also able to draw upon information furnished by FDCC members **Jack Delany** and **David Governo**, both of whom monitor nano exposures for their clients.

In keeping with the lead time required to plan FDCC meetings, we had not even returned from the 2015 annual meeting in Banff before our section proposal was due for the 2016 winter meeting in San Diego. After confirming Ned Currie's endorsement of our proposed topic - "**Rescind, Defend or Deny: Misrepresentation Remedies,**" **Lee Murray Hall** volunteered to prepare our informative program paper aided by input from our other speakers, **Lee Wright of QBE North America**, **Lola Hogan of Riverport Insurance Company**, and **Mike Johnson**, chair of our co-sponsoring Insurance Coverage Section. As hoped for, our March 2 presentation regarding pivotal strategic choices and lessons learned in the pursuit of rescission remedies received rave reviews.

Hot Cases

Check out our Section's contributions to the FDCC's Hot Cases link on the home page (and twitter feed) this week. As in the past, section members Brad Box, Lee Murray Hall, and Mike Aylward have contributed their time and energies to spotting and summarizing noteworthy decisions from around the country during our two assigned weeks this year.

In 2017, our first assigned week will likely be in early February followed by another week in June or July 2017. Participating as a hot cases contributor is not difficult or time consuming, and is a great way to learn about significant decisions outside of your

customary practice area, so please let me know if you would like to participate in this Section endeavor.

Insights

Brad Box and I were thrilled to learn that "*Efforts to Shape the Climate Change Litigation Landscape*" was published in the March 2016 edition of FDCC Insights. With each Section encouraged to submit at least one article for Insights each year, this is a great opportunity for Section members to author a new publication and/or update and expand upon an existing article or program presentation.

Membership Recommendations

Each Section is required to propose two new members for admission each year. So that we can track recommendations by Section members, please keep me updated regarding your nominations and keep an eye out for strong candidates from your firms and legal communities.

Honors, Awards & Victories

Please send news about your recent honors, awards and victories to David Fuqua, the FDCC's website editor, to include on the website's **Federation Triumphs** space.

See you at the Fairmont Le Manoir Richelieu!

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Immediate Past Chair: Stephen Carter



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