

## A Concern of Confidence

by George M. Gottheimer Jr., Ph.D., CPCU, CLU, ARe



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**T**he past year has seen a number of reinsurer downgrades by the rating agencies, including A.M. Best, Standard & Poor's, Moody's, Fitch, etc. In addition, as reported by *Business Insurance*, tensions between insurers and reinsurers will escalate in 2004 as more ceding companies grapple with bad insurance debts and as reinsurers fail to keep pace with ceding company reserve increases for asbestos and other liabilities. Highlighting the reinsurance recoverable problem, Standard & Poor's noted that Liberty Mutual last year established a bad debt provision for 55 percent, or \$158 million, of its asbestos reinsurance recoverable, after reviewing its exposures.

Compounding these problems, during the past year pressures on capital have led reinsurers to reorganize their books of business aiming to reduce risk exposure. Reinsurers have ceased writing specific lines of business, placed subsidiaries in runoff, and in some cases withdrawn from the reinsurance business entirely, in order to preserve adequate risk-based capital. Much of these actions were caused by capital needs to fund past liabilities and cover equity losses in their investment portfolios.

Despite the attractive pricing environment, the cost of maintaining sufficient capital has led a number of markets to either sell or close their U.S. reinsurance business including:

- Gerling Re—the seventh largest reinsurer in the world
- Trenwick Re
- Axa Corporate Solutions Re (U.S. operation)
- PMA Re
- CNA—treaty reinsurance business purchased by Folksameric

- Hartford—sold HartRe business to Endurance
- St. Paul—spun off reinsurance business to Platinum Underwriters
- Overseas Partners

Concurrently, several new reinsurers made their presence felt in 2003, by joining the top 35 global reinsurers including:

- Platinum Underwriting Group—spin off from St. Paul
- Allied Worlds Assurance
- Arch Re
- Endurance Specialty Insurance
- Axa Specialty Insurance

The escalation of downgrades by the rating agencies is a cause of concern to many ceding companies and reinsurers as well. A.M. Best's rating downgrades outpaced upgrades for the third consecutive year. (See Table 1.)

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# A Concern of Confidence

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Table 1

Year	Downgrades	Percent	Upgrades	Percent
1999	59	4%	91	6%
2000	77	5	80	6
2001	148	10	77	5
2002	151	11	76	5
2003	188	10	57	3
5-Year Total	623	8%	381	5%

Of perhaps greater concern, according to an S&P survey of the 20 major global reinsurers, is that 14 have been downgraded since mid-2001, and eight of these have had their ratings lowered more than once. Of the five reinsurers that held S&P's AAA ratings in mid-2001, only one—Berkshire Hathaway Group—still retains that rating. There are presently only two reinsurers rated A++ by A.M. Best Company. Couple this with a large increase in reinsurance recoverables (45.5 percent) in 2002, and the growing number of insolvencies (38 in 2002 compared to 30 in 2001), that year generated the largest increase since Hurricane Andrew hit in 1992, causing 63 property and casualty insurers to become insolvent in 1993. Obviously, we have a serious pattern. Over the past 10 years, insufficient loss reserves caused 51 percent of the insolvencies, according to a recent Conning & Co. survey. This factor increased to 61 percent in 2002. The two lines of business primarily responsible were workers compensation and auto liability, which accounts for more than one-half of the property and casualty business written in the United States. Of the 38 companies that became insolvent in 2002, just seven had net premiums exceeding \$100 million in any of the three years before they became insolvent.

The primary cause of insolvencies, according to A.M. Best, is underreserving. Best estimates that the current industry shortfall could be as high as \$40 billion. Conning's study of nine lines of business indicated a \$38.5 billion shortfall. A later

study reflected a \$25 billion deficiency. That study found that industry loss reserves increased by \$8 billion in 2002, but this increase was insufficient to strengthen the overall reserve deficiency. Over the past 10 years, more than 50 percent of the companies that failed were the result of underreserving and/or inadequate pricing. This pattern has become even more pronounced in the past three years, as 61 percent of the insolvencies were linked to insufficient loss reserves. In 2000, the percentage increased to 70 percent, and in 2001 it was 77 percent.

The underreserving problem has not gone unnoticed by the regulators. Their subsequent requirement, adopted by the NAIC in 1990, established guidelines for a certification by a qualified actuary, and will be expanded with the filing of the 2004 Annual Statement. While no doubt affected by the difficulty in establishing reserves, given the continuing asbestos problem, the actuarial profession has been under assault by many analysts. Hopefully, this will alleviate the lowered confidence in actuarial opinions, given the past history of reserve inadequacies.

## Determination of Reasonableness

**Provision.** When reserves are within the actuary's range of reasonable reserve estimates, the actuary should issue a statement of actuarial opinion that the stated reserve amount makes a reasonable provision for the liabilities associated with the specific reserves.

- Determination of Redundant or Excessive Provision.** When the stated reserve amount is greater than the maximum amount the actuary believes is reasonable, the actuary should issue a statement of actuarial opinion that the stated reserve amount does not make a reasonable provision for the liabilities associated with the specified reserves.

- Qualified Opinion.** When, in the actuary's opinion, the reserves are in question because they cannot be reasonably estimated or the actuary is unable to render an opinion on those items, the actuary should issue a qualified statement of actuarial opinion.

The large increase in reinsurance recoverables has caused some to believe that reinsurers are beginning to balk at paying claims. The stress caused by the events of September 11, poor underwriting results, investment losses, and weak capital markets are straining relationships between insurers and reinsurers, according to A.M. Best. S&P states that the property and casualty industry as a whole is carrying almost \$200 billion in reinsurance recoverables as of year-end 2002. The industry generally assumes that only 10 percent of that total will become bad debt, which will trigger disputes between ceding companies and reinsurers, the rating agency predicts.

All of this comes at a time when 2002 had the fourth lowest amount of catastrophe losses in the last 10 years, but at a time when the industry still faces an underreserving problem and a severe capital shortage. According to an Ernst & Young study, it believes there is a capital shortage of \$120 billion in the financial services industry, which includes life insurers as well as P&C insurers. Of the \$20 billion in new capital raised since September 11, \$10.7 came from Bermuda, compared to \$1.7 in the U.K. market, \$3.7 from Europe, and \$4.3 from the U.S. market. For an industry with this kind of capital shortage, \$20 billion isn't enough. In order to attract capital, the industry must show better results.

The soft market of the 1990s, with its inadequate pricing, coupled with the need to increase loss reserves to fund past liabilities, and a weak investment market has exacerbated the industry's capital inadequacy. Investment income for the industry in 2002 was \$40.1 billion, while up from 2001 (\$38.9 billion), it was down considerably from its 2000 level of \$42 billion. This decrease may not seem significant by itself, but when we consider that 2001 produced an underwriting loss of \$52.5 billion, the importance of the decrease in investment income is magnified. The need for sufficient capital to support existing ratings has crossed all industry markets and segments.

Companies raising capital over the past two years include:

- Travelers—\$4.9 billion IPO
- Hartford
- St. Paul
- Chubb
- Allstate
- W.R. Berkley
- Nationwide

The rating agencies' concerns, previously discussed, have also caused downgrades, as the increase in financial leverage, given the vagaries of capital markets, coupled with the concern over the financial strength of insurers, has exacerbated the problem. The debt-to-capital ratio of holding companies reflects a constant upward trend.

What does all this mean? It means we can't rely exclusively on rating agencies. Of the recent major insurer insolvencies, all were A-rated three years or less prior to the insolvency. Rating agencies have a difficult task. If they downgrade the insurer too soon, their failure may be a self-fulfilling prophecy. On the other hand, if they don't take action, their subscribers may feel that "dragging their feet" is not in the best interest of those that rely on the ratings. Likewise, buyers cannot rely exclusively on their intermediary. While some brokers have security departments, the personnel sometimes need greater skills necessary to provide a proper analysis, or they will be

reluctant to "pull the plug" in fear of losing the business or admitting they placed the reinsurance with a reinsurer that turned out not to be financially viable. As both reinsurance buyers and sellers, we need to be more careful in selecting our "partners."

The requirement that reinsurance intermediaries monitor the financial condition of those reinsures with whom they place business originally applied only to "unauthorized" companies, under Regulation 98 adopted by the State of New York in 1984, and later codified under the Reinsurance Intermediaries Model Act, adopted by the NAIC in 1990. Perhaps it is time to impose some obligation on reinsurance intermediaries to better monitor the financial condition of licensed reinsurers with whom they place business. It is unacceptable for brokers to fall back upon the fact that they have no responsibility as long as the reinsurer is licensed by the state(s). It is especially disheartening to a ceding company when its reinsurer either becomes insolvent or disappears from the scene. Few, if any, insolvencies occurred overnight. The signs were there for a considerable period of time, often many years.

## **As both reinsurance buyers and sellers, we need to be more careful in selecting our "partners."**

Recently, Best's expressed its concerns about insurers' dependency on reinsurance:

In an attempt to resolve strained capacity and take better advantage of hard-market conditions, companies increasingly have resorted to reinsurance solutions to help alleviate rating agency concerns about the recent spike in underwriting leverage. However, in an age when reinsurers disappear as quickly as new ones are formed, companies have faced not only tighter reinsurance contract terms and higher costs for



quality security, but also A.M. Best's negative view of excessive dependency on reinsurance. Collectively, these issues have made utilization of reinsurance a less-attractive capital-management tool.

Our industry needs to maintain underwriting and pricing discipline—not just as a momentary target—but as a business philosophy. We need to attract new capital to the property and casualty reinsurance business. In order to do so, the industry has to demonstrate that it can consistently earn a return in our core business—underwriting. We need to restore confidence to the reinsurance marketplace. Otherwise, the financial and capital markets, with substantially more capacity than the reinsurance industry, will seize the opportunity to capitalize on our failures. ■

# Looking Ahead to 2004 and Beyond for the Reinsurance Business and the Reinsurance Section

by R. Michael Cass, J.D., CPCU



■ **R. Michael Cass, J.D., CPCU**, is president and principal consultant for R.M. Cass Associates, an independent consulting firm located in Chicago. Formed in 1987, the practice emphasizes reinsurance and related matters. A graduate of Penn State University and Temple University School of Law, Cass is a member of the New York Bar; the American Arbitration Association's Panel of Neutrals; and a certified arbitrator for ARIAS—U.S. He is past chairman of the CPCU Society's Risk Management Section Committee; a former member of the Excess/Surplus/Specialty Lines Section Committee; and recently began a three-year term as chairman of the Reinsurance Section Committee.

**A**s we read the press reports about the improved earnings for virtually all segments of the insurance and reinsurance industry, it is easy to fall back into a comfort zone and believe "the worst is behind us." Some would believe that all we need to do as professionals is

follow the yellow brick road and live happily ever after (or until retirement, whichever occurs sooner!). However, for anyone who has been active in the industry for more than five years, there is an acute awareness that our chosen profession has consistently ignored the lessons of the past and slipped back into bad habits with negative consequences.

Consistent with this year's Annual Meeting theme for the Society, "Reach for the Stars!", your section committee is striving to present programs and information that will assist all reinsurance professionals in developing their full potential. Further, we believe the road to the stars is paved in sound fundamentals. To this end, the Reinsurance Section is this year directing its focus to "Back to Basics" as our emphasis for the continued pursuit of excellence in an evolving industry.

Our annual Reinsurance Section Symposium has been rescheduled to again be held in Philadelphia on May 13 and 14, 2004. A summary of the program is discussed on page 7 of this newsletter. However, I can advise that the program does indeed include something for everyone. These presentations relate to underwriting tools, reinsurance security, issues on claims presentations, reserving practices, and the latest coverage issues that are working their way through the insurance and reinsurance industry.

In January of this year, your section committee held its regular winter meeting at the American Institute's Malvern, (PA) offices. In addition to its regular agenda, the committee met with the IIA staff to discuss the evolving ARe program. Because of the recent changes in the content of the CPCU curriculum, the ARe material must also be revised. The IIA has primary responsibility for the ARe program and your Reinsurance Section Committee is continuing its dialogue with the IIA and ARe Advisory Committee to ensure the continued high professional level of content in the program.

Your committee is also in the initial stages of our research project focusing on the subject of derivatives and their use as a product in insurance and reinsurance. With every extraordinary event, whether it be a class 5 hurricane or terrorist act, derivatives gain increased interest as a product to fill any immediate or long-term voids in capacity. Reinsurance Section Committee member **Diane Houghton, CPCU**, is heading up this project.

This year, the CPCU Society's Annual Meeting and Seminars will be held in Los Angeles from October 23-26, 2004. The Reinsurance Section will again be presenting its program "State of the Market in Reinsurance." This program will feature key industry executives from the reinsurance and primary side.

Finally, I ask all members for their comments and suggestions in connection with our section's programs and articles. It is only by serving the needs of our members that the Reinsurance Section can be most effective. Please consider an article of current interest. **Bruce Evans, CPCU**, our *RISE* newsletter editor, would like to hear from you. We also would be grateful for any ideas for program topics that would meet the needs of professionals in our industry. ■



■ *Attending the Reinsurance Section Committee meeting held in January were left to right, front row: Bruce Evans, CPCU; Kevin Brawley, CPCU; and Rob Lauterbach Jr., CPCU, CLU; left to right, second row: George Gottheimer Jr., Ph.D., CPCU, CLU; Connor Harrison, CPCU; Rick Blaum, CPCU; and Mike Holm, CPCU; left to right, back row: Mike Cass, J.D., CPCU; David Stewart, CPCU; and John Kelly, CPCU.*

# The Continuing Saga of a Reinsurer's Obligation to Pay Its Reinsured's Declaratory Judgment Expenses

by Andrew S. Boris, Esq.

**■ Andrew S. Boris, Esq.**, is a partner in the Chicago office of Tressler, Soderstrom, Maloney & Priess. His practice is focused on litigation of complex insurance coverage matters throughout the country, including general coverage, reinsurance, and bad-faith cases.

Before attending law school, Boris worked for a major insurance company. He remains licensed as an insurance provider and has extensive experience in interpreting insurance policies and the coverage they provide. In addition, he has authored and spoken on a variety of topics including general insurance coverage, reinsurance, bad faith, and general litigation issues. Boris has served as an adjunct professor at the DePaul University College of Law having taught both litigation and legal writing classes.

Boris received his undergraduate degree from Boston College and his law degree, with honors, from DePaul University College of Law where he served on the law review and was a member of the Order of the Coif.

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**A**s long-tail claims continue to ravage insurers' loss and expense reserves, the issue of a reinsurer's obligation to pay its reinsured's declaratory judgment expenses (DJ expenses) continues to pervade the insurance industry. This issue was relatively unheard of until the coverage world saw an explosion of complex declaratory judgment actions in the 1970s



and 1980s between insurers and insureds concerning the question of available coverage for a variety of long-tail claims such as asbestos, toxic exposure, and environmental property damage claims. With the proliferation of the complex declaratory judgment action, insurers and reinsurers were presented with the question of whether the reinsurer was obligated to reimburse the reinsured's declaratory judgment expenses incurred in defending or prosecuting such actions.

Historically, certain reinsurers consistently reimburse DJ expenses while others have resisted their cedent's requests to do so. Reinsurers refusing to reimburse such expenses rely upon variations of the same general objections to payment. Focusing upon the language of the reinsurance contract, reinsurers often maintain that DJ expenses cannot be properly characterized as allocated loss expenses. In turn, reinsurers argue that costs incurred in connection with

declaratory judgment actions are beyond the agreement between the parties to the reinsurance contract and must be solely borne by the reinsured. Correspondingly, reinsurers also contend that DJ expenses are part of an insurer's general business expenses and should not be included in the billings forwarded to a reinsurer. In addition, some commentators have historically taken the position that a reinsurer should not be required to reimburse an insurer for costs associated with litigating with its insured when the issue ultimately involves a question of ambiguity in the underlying contract (i.e. the reinsured should not be entitled to recover money it expends to address what might be a question of a poorly drafted policy).

Most insurers have strongly disagreed with any reinsurer's failure to reimburse DJ expenses. Principally, the insurer maintains that such costs are allocated claim expenses and the "Follow the Fortunes" doctrine mandates that a reinsurer pay such expenses. In addition, many insurers argue that it would be unfair to allow a reinsurer the opportunity to escape payment of litigation costs for an action that was designed to test whether the claims were covered under the reinsured's policy.

Like many issues in reinsurance, the questions involving declaratory judgment expenses have commonly been the subject of private arbitration and rather limited judicial decision-making. However, an examination of the decisions addressing this topic reveals a strong judicial preference to closely analyze the language of the reinsurance contracts at issue. Briefly, one of the seminal cases in this area is a decision from the Massachusetts state court system. *Affiliated FM Insurance Company v Constitution Reinsurance Corporation*, 626 N.E.2d 878 (Mass. 1994). In *Affiliated FM*, the question

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# The Continuing Saga of a Reinsurer's Obligation to Pay Its Reinsured's Declaratory Judgment Expenses

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presented was whether the reinsurer was obligated to reimburse Affiliated FM for its share of expenses related to Affiliated FM's defense of a declaratory judgment action brought by one of its insureds. Maintaining that it had no obligation to pay declaratory judgment expenses under the facultative certificate at issue, Constitution Reinsurance was the only reinsurer to challenge Affiliated FM's billings. After the case worked its way through the Massachusetts court system, the Supreme Court of Massachusetts determined that the language of the Constitution Reinsurance certificate was ambiguous and remanded the case to the trial court for a consideration of industry custom and practice on the issue. At trial, a jury ruled that Affiliated FM was entitled to declaratory judgment expenses, finding that the custom and practice of the industry required reimbursement of DJ expenses.

**As part of extensive and protracted litigation, the district court ruled that the follow-the-fortunes doctrine could not be extended to require a reinsurer to pay the reinsured's expenses in litigation concerning the underlying insurance coverage.**

A recent case from the Second Circuit Court of Appeals highlights that the arguments initially addressed in the Affiliated FM case continue to be relied upon by parties presented with the DJ expense issue. See *British International Insurance Company Ltd. v Seguros La Republica, S.A.*, 342 F.3d 78 (2d Cir. 2003). In Seguros, the reinsured sued its reinsurer for pro-rata reimbursement of sums paid on behalf of underlying insureds and for declaratory judgment expenses incurred in coverage disputes

concerning the underlying contracts of insurance. As part of extensive and protracted litigation, the district court ruled that the follow-the-fortunes doctrine could not be extended to require a reinsurer to pay the reinsured's expenses in litigation concerning the underlying insurance coverage. The reinsured appealed and maintained: (1) the language of the facultative certificates at issue was ambiguous; (2) the prevailing custom in the industry required that the reinsurer pay a pro-rata share of the cedent's expenses in resisting coverage; and (3) that the follow-the-fortunes doctrine required the reinsurer to pay its proportional share of such expenses.

With respect to the reinsured's argument concerning the ambiguity issue, the court found that the language was so broad as to be impossible to interpret without resorting to industry custom did not sufficiently establish an ambiguity useful to the reinsured. Distinguishing the facts of the Affiliated FM case, the court found that the reinsured had failed to articulate any ambiguity in the terms of the reinsurance contracts. With respect to the custom and practice issue, the reinsured submitted the affidavits of William Edwards and William Gilmartin to support its contention that it was the custom and practice of reinsurers to pay DJ expenses during the relevant time period. The court rejected the reinsured's argument because no evidence was submitted to support a presumption that both contracting parties to the reinsurance contract were aware of the custom and practice of the industry and contracted in reference thereto. Finally, the court denied the argument premised on the follow-the-fortunes doctrine. Finding that the DJ expenses were not an aspect of coverage owed to the policyholder or a claim against the reinsurer, the court rejected the contention that the payment of the DJ expenses were controlled by the follow-the-fortunes doctrine. Instead, the court categorized DJ expenses as claim-handling expenses that an insurance company incurs in the conduct of its own operations.

Where this saga goes remains a question. For many reinsurers, the reimbursement of DJ expenses is an accepted practice. However, the recent decision by the Second Circuit may raise some question as to whether certain reinsurers may continue to aggressively object to payment of DJ expenses and seek to litigate or arbitrate the issue. ■

## Erratum

In our December 2003 RISE issue, the first sentence of the final paragraph of Andrew Boris' article "A New Curve on the Road for 'Follow the Settlements'" should read: "Undoubtedly, reinsurers will rely on this case in their attempts to apply the follow-the-fortunes clause."

# From the Chairman . . . Mark Your Calendar!

by R. Michael Cass, J.D., CPCU

## CPCU Society Reinsurance Section Symposium

### "Back to Basics"

Marriott Philadelphia Downtown

May 13 and 14, 2004

**B**ack to Basics" is a term that is being heard with increasing frequency in the reinsurance industry. It has become increasingly difficult to meet the expectations of both shareholders and rating agencies. To do this, it is absolutely essential for insurance and reinsurance companies to not only achieve an underwriting profit, but to do so on an ongoing and consistent basis.

Accomplishment of these objectives requires disciplined underwriting, sound actuarial analysis, and high-quality claims handling.

This year's Reinsurance Section symposium will feature a diverse group of industry professionals who will discuss issues and challenges that the industry faces in each of these key areas. The program will also include a "View from the Top" panel representing the perspectives of the reinsurer, ceding company, and reinsurance intermediary. A few of the highlighted program segments are:

- Catastrophe Modeling for the Reinsurance Process
- Coverage Issues in Insurance and Reinsurance—Asbestos and Beyond
- Reinsurance Security Issues—Rating Agency Perspective
- Presentation of Claims to Reinsurers—"It's Not Your Father's Allocation"
- Reserving Practices of Reinsurers—"The Devil is in the Details"

At this time, a brochure containing all details and a registration form is being drafted. The following information is current as of March 1, and will hopefully assist you in planning to attend this important and popular event.

### Thursday, May 13, 2004

8:30 – 9 a.m.

#### Continental Breakfast

9 – 9:10 a.m.

#### Greeting and Introduction of Program

R. Michael Cass, J.D., CPCU, and Gordon J. Lahti, CPCU

9:15 – 10:30 a.m.

#### View from the Top

Moderator, Gordon J. Lahti, CPCU

Patrick Mailloux, President & CEO, Swiss Re America

Senior Executive, Broker Market Reinsurer

Rupert Hall, President & CEO, Golden Bear Ins. Company

Senior Executive, Reinsurance Broker

10:30 – 10:45 a.m.

#### Break

10:45 a.m. – Noon

#### Catastrophe Modeling for the Reinsurance Process

RMS, Scott Quiana

Noon – 1:30 p.m.

#### Lunch and ARe Designation Ceremony



1:30 – 2:45 p.m.

#### Coverage Issues in Insurance and Reinsurance—"Asbestos and Beyond"

##### • Insurance Coverage Developments

Randy Maniloff

##### • Recent Reinsurance Coverage Issues

Bruce Engel

2:45 – 3 p.m.

#### Break

3 – 4:30 p.m.

#### Reinsurance Security Issues

##### Standard & Poor's Viewpoint— Laline Carvalho

5 – 6:30 p.m.

#### Reception



### Friday, May 14, 2004

8:30 – 9 a.m.

#### Continental Breakfast

9 – 9:10 a.m.

#### Second Day Welcome and Introduction

Gordon J. Lahti, CPCU

9:15 – 10:30 a.m.

#### Presenting Claims to Reinsurers

##### "It's Not Your Father's Allocation"

Rick Blaum, Swiss Re America

- Discontinued Operations (Liquidations and Run Offs)

- Claims Counsel

10:30 – 10:45 a.m.

#### Break

10:45 a.m. – Noon

#### Reserving Practices of Reinsurers—"The Devil is in the Details"

- Considering Schedule F

John J. Swanick, Smart and Associates

- Key Actuarial Issues in the Current Reinsurance Environment

Sheldon Rosenberg, Converium

John J. Swanick, Smart and Associates

Noon

#### Adjournment

**Plan to attend the 2004 Reinsurance Section symposium on May 13 and 14 in Philadelphia, PA.**

**At a registration fee of \$325 to \$399, it's a great value in reinsurance education and networking!**

**Call John Kelly, CPCU, at (800) 932-2728, ext. 2773 for details.**



## Save the Dates!

Plan now to attend the 60th Annual Meeting and Seminars **October 23-26, 2004**, in Los Angeles, CA.

Look for future issues of *RISE* for more information about the Reinsurance Section-sponsored seminar.



### *Reinsurance Section Encounter*

is published four times a year by and for the members of the Reinsurance Section of the CPCU Society.

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Statements of fact and opinion are the responsibility of the authors alone and do not imply an opinion on the part of officers, individual members, or staff of the CPCU Society.

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Printed on Recycled Paper



# Reinsurance Section Encounter

# RISE

Volume 22

Number 1

April 2004

CPCU Society  
720 Providence Road  
Malvern, PA 19355-0709  
www.cpcusociety.org

PRESORTED FIRST CLASS

U.S. POSTAGE

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