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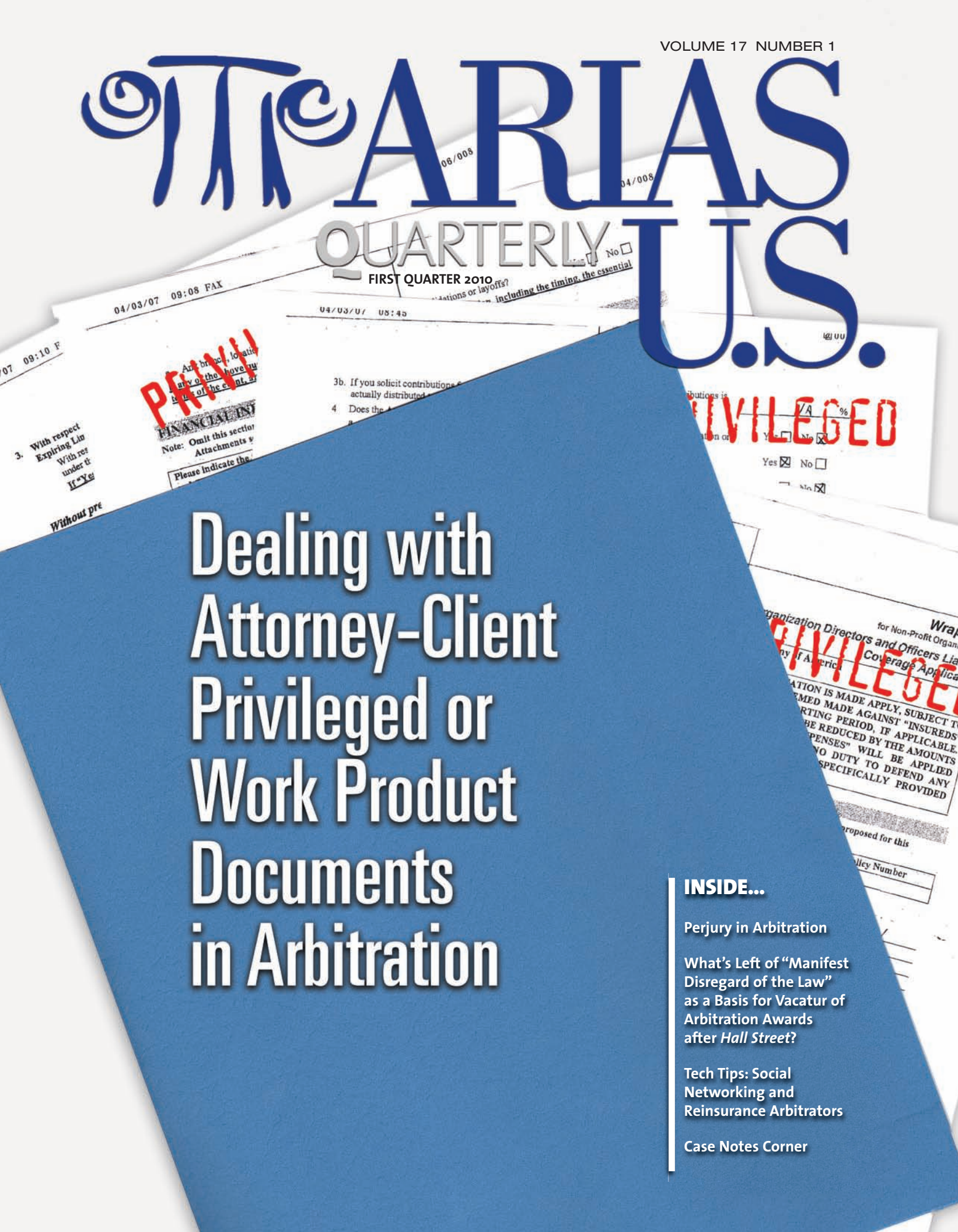

Dealing with Attorney-Client Privileged or Work Product Documents in Arbitration

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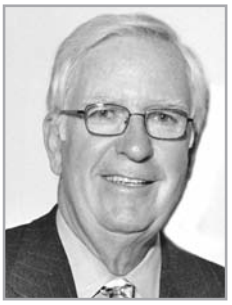

T. Richard Kennedy

Frequently arising in reinsurance and insurance arbitrations is the question of whether a party withholding documents said to be attorney-client privileged or attorney work product must produce those documents to an opposing party. Our cover article, *Dealing with Attorney-Client Privileged or Work Product Documents in Arbitration*, by Constance O'Mara, examines the principles underlying the privileges and issues likely to arise in applying those principles to the cedent – reinsurer relationship. The author offers helpful advice to arbitrators in dealing with the question and cautions against possibly waiving the protection of the attorney-client privilege or work product doctrine as against third parties.

An interesting topic that has not been separately treated in previous issues of the Quarterly may be found in *Perjury in Arbitration*, by Richard Mason and Stephanie Gantman. The article discusses the legal bases for finding of perjury in arbitration and analyses the circumstances in which alleged testimony may result in a court vacating an arbitration award. The authors suggest ways in which arbitrators and parties may minimize chances of such vacatur.

The effect of the U.S. Supreme Court's recent landmark decision regarding judicial review of arbitration awards is again examined in this issue, this time with respect to possible vacatur of awards based on "manifest disregard of the law." Louis Aurichio and Joseph Noonan, in *What's Left of "Manifest Disregard of the Law" as a Basis for Vacatur of Arbitration Awards after Hall Street*, discuss the development of the "manifest disregard" doctrine and the differing views of the federal jurisdictions as to its continued viability following the Hall Street ruling.

For those arbitrators who enjoy social networking – or even those who don't but seek more business – Larry Schiffer offers some timely technology tips in *Social Networking and Reinsurance Arbitrators*.

Ron Gass in *Case Notes Corner* reports on novel theories recently advanced in a federal court as part of what seems to be a growing volume of petitions to the courts to disqualify arbitrators appointed by another party even before an award is issued.

With this issue, I am retiring as Editor in Chief of the Quarterly. Having served a number of years in that position, I have decided it is time to pass the baton to someone else. Much has been achieved since the early years of ARIAS•US when we would piece together a publication consisting chiefly of reprints from other periodicals for mailing to the few dozen members. The Quarterly now is distinctive in that it is both a quality educational journal, consisting of original, scholarly works, and a report to members on the many continuing activities of the Society. I am very grateful to all our authors who have contributed excellent pieces for publication, as well as to the members of our Board of Editors and CINN staff who continue to work to make the Quarterly a first-rate journal. Lastly, I want to thank our Society's Board of Directors for their unfailing interest and support over the years as we have sought to improve service to members through the Quarterly publication.

I am most happy to report that the Board of Directors has appointed Associate Editor Eugene Wollan to replace me as Editor in Chief. Gene has been active in ARIAS•US for many years, including as a former member of the Board of Directors and most recently, as a frequent contributor and Editor of the Quarterly. I have no doubt that the Quarterly will continue to improve as a quality publication under Gene's leadership.

Thank you for allowing me to serve as your Editor in Chief. I look forward to seeing each of you in future meetings and activities of ARIAS•U.S.

T. Richard Kennedy

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Editorial Policy

ARIAS•U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution.

All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to ewollan@moundcotton.com .

Manuscripts are submitted at the sender's risk, and no responsibility is assumed for the return of the material. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles.

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feature

Dealing with Attorney-Client Privileged or Work Product Documents in Arbitration


Constance O'Mara

Constance O'Mara

Given the liability, coverage, and reinsurance contract issues arising from complex claims such as asbestos, pollution and other health hazards, it is not uncommon to find that the legal opinions of a carrier's coverage counsel and the insured's defense counsel are critical to an understanding of the issues that faced the ceding company in handling the underlying claims and are therefore important support for a billing to reinsurers. These opinions support the rationale of the payments or settlements as well as how those losses were allocated to the policies and ceded to the reinsurers. For the most part, reinsurers consider this information highly relevant to their own exposure under the reinsurance contracts.[1] However, sharing documents generated by or in consultation with counsel concerning the issues in the underlying litigation or coverage litigation raises the prospect that doing so waives the attorney-client privilege or work product confidentiality those documents should have.[2] To avoid such risks of waiver, parties often refuse to disclose attorney-client and work product information. If the dispute evolves to arbitration, the question of access to protected information lands squarely in the lap of the arbitration panel with a threshold demand for documents noted as privileged on a document production log.

In the context of arbitration, the contract defines the parameters of the arbitration and may define the scope of permissible discovery. More commonly, however, the reinsurance contract will provide that the arbitration panel is not "bound by the strict rules of law" and is free to tailor discovery as it sees fit. The panel's decision as to the production of documents may be subject to review in the context of an action to overturn its ultimate decision on the merits, but in addition its action may also subject the ceding company and the reinsurer to further disclosure of that material if a third party (such as a policyholder, a claimant, or another reinsurer) asserts that the production waived any applicable privilege. Case law is mixed on the issue of whether a cedent's disclosure of protected materials to its reinsurers waives the attorney-client privilege or work product doctrine protection. Whether an order of an arbitration panel compelling such a production completely eliminates the risk is not a certainty, although a ceding company would be able to argue that it did not *voluntarily* produce the material and thus did not waive any privilege. Networking among plaintiffs' counsel and policyholders' coverage pursuit counsel fuels nightmares of discovery battles in which a court finds discovery of such information relevant and discoverable, laying open a policyholder's defense strategy or an insurance company's coverage analysis to similarly situated plaintiffs or policyholders with similar policy language. Since the nature of such a demand by third parties, the parties, the jurisdiction, and the procedural context, is difficult, if not impossible, to predict, it is impossible to predict the outcome with complete confidence (and costs will be incurred in resisting such production). A ceding company might consider delaying the billing of a particular account's claims until they have been fully resolved, in order to avoid putting attorney - client privilege documents at risk, but both the proliferation of similar claims and interim funding arrangements for large losses (defense and indemnity) over a long period of time often make that impossible. Thus, a panel may be confronted with the dilemma of a party refusing to produce information that the other party asserts is necessary to resolve the reinsurance dispute. How to balance the needs of the parties and reach an expeditious decision depends on an understanding of the risks and the areas of dispute over what is and is not attorney-client privileged or work product.[3]

More commonly, however, the reinsurance contract will provide that the arbitration panel is not "bound by the strict rules of law" and is free to tailor discovery as it sees fit.

Constance O'Mara is an ARIAS•U.S. Certified Arbitrator. She was formerly President and Chief Legal Officer of Brandywine Holdings, one of the ACE Group of Companies. Her current practice includes arbitrations, mediation, and expert witness work.

The Panel's First Step: Determining What Is and Is Not Attorney-Client Privileged or Work Product

A. Key Criteria:

Entire treatises have been written on the nuances and issues surrounding "Attorney-Client Privilege" and "Work Product."[4] There are considerable variations from jurisdiction to jurisdiction in the standards applied, and individual cases turn on the specific facts of who is asserting the privilege and in what context. But, at its most fundamental level, there is considerable agreement on the following definitions and intent:

Attorney-Client Privilege:

As a general matter, the privilege protects:

(A) A communication,

(B) made between privileged persons (i.e., an attorney, client, or agent),

(C) in confidence,

(D) for the purpose of obtaining legal assistance for the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass.1950). Attorney-client privilege developed at common law to encourage free and open communication between attorney and client. But, because the privilege obstructs the search for truth, it is narrowly construed. See e.g. *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Haines v. Liggett Group, Inc.*, 975 F. 2d 81, 84 (3rd Cir. 1992).

Work Product

The work product doctrine was established in *Hickman v. Taylor*, 329 U.S. 495 (1947). It is not a "privilege" but instead affords a qualified protection from discovery to a lawyer's analysis and preparation as a concession to the necessities of the adversarial system. As one court explained: "Our adversarial system of justice cannot function properly unless an attorney is given a zone of privacy within which to prepare the client's case and plan strategy, without undue interference." *Davis v. Emery Air Freight Corp.*, 212 F.R.D. 432, 434 (D. Maine 2003) (quoting *In re San Juan Dupont Plaza Hotel Fire Litig.* 859 F.2d 1007, 1014 (1st Cir. 1988)); see also *United States v. ChevronTexaco Corp.*, 241 F. SUPP. 2d 1065, 1081 (N.D. Cal. 2002) ("At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.") (Citations omitted.) Courts have generally distilled the rule into this test: to qualify for the protection items must be prepared by or for a party (*i.e.*, by or for a party or a party's representative) in anticipation of litigation or for trial.

Also, a party can overcome an assertion of work product by those seeking to prevent disclosure by demonstrating a compelling need and an inability to obtain the information by other means. See Federal Rule of Civil Procedure 26(b)(3) for a codification of the work product protection. (This rule governs all cases in Federal Courts, whereas a Federal Court will look to applicable state law in applying attorney-client privilege.)[5]

B. Applying the Criteria in Reinsurance Disputes:

In applying these definitions to a series of documents, there is considerable latitude and room for debate. In the context of reinsurance disputes, debate often circles around those issues:

1. Is the document subject to the attorney-client privilege because it involves a communication between an attorney giving legal advice and a client seeking such advice? Or was the document prepared as part of a normal claims handling activity?

2. Is the document subject to the work product doctrine because it was prepared in "anticipation of litigation"?

1. Legal or business advice?

This issue is often debated in the context of communications by and to in-house counsel. Since there is a perception that in-house counsel provides business advice as well as legal advice, it can be difficult to distinguish the two in the context of claims handling. Claims management is a business function to which industry and state regulatory standards apply, and claim professionals generally maintain a claim file that contains documentation of various claims handling activities[6]. If a document looks more like one generated as a standard business practice, even if it is sent to, copied to, or authored by an attorney, it is more likely to be outside the attorney-client privilege or work product zone. In *OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, the Court found that OneBeacon's *outside* counsel had served as a member of an "Adjustment/Settlement Team" and the inclusion of counsel in what the court perceived to be "the ordinary course of [an] insurer's business (which by its nature, involves claim investigation and analysis)..." did not render the information protected by privilege. *OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, 04 Civ. 2271, 2006 WL 3771010 at *5 (S.D.N.Y. Dec. 15, 2006) (citing cases).

In *AIU Insurance Company v. TIG Insurance Company*, 07-CV-7052 (S.D.N.Y. Aug. 28, 2008), a federal magistrate reviewed documents that "contain updates of TIG's investigation of AIU's claim" that were sent to in-house counsel. He determined that the documents reflected only business communications. TIG had taken the position that the communications concerned investigation done "at the direction of counsel." The magistrate concluded that the communications were business documents generated by counsel "clearly acting in his capacity as Vice President by giving business advice and not providing legal advice in his role as in-house counsel." (at 26)[7] While we do not know the text of those documents, presumably it supports the Court's conclusion.

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In some respects the work product doctrine is narrower than attorney-client privilege: it applies only to materials prepared in anticipation of litigation. But in some respects it is broader: it extends to materials prepared by an attorney's agents and consultants.

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By way of juxtaposition, one can view the decision of the Second Appellate District in California in *Zurich American Insurance Co. v. Superior Court*, No. B194793 (Cal. Ct. App. Oct. 11, 2007), as providing points of contrast. Here, the court was "asked to decide whether the corporate attorney-client privilege extends to confidential communications between *agents* of the client regarding legal advice and strategy, in which the corporation's attorneys are not directly involved or which do not include excerpts of direct communications from the attorneys" (at 6) (emphasis supplied)[8]. Even though they were not authored by or sent to an attorney, the Court found that 230 "reserve or reinsurance documents" contained "internal litigation plans and strategy with respect to the cases in dispute" and were, in fact, entitled to protection as work product. While the decision turns on an interpretation of Section 952 of the California Evidence Code and essentially concerns who is the "client"[10] as opposed to who is an "attorney", the Court held that the *subject* of the communication controlled, that is, legal advice and strategy, rather than the parties to the communication.

The difficulty with this discussion is that the range of debate yields potential disparities in treatment; the perception depends on the beholder. While some courts have struggled to find a bright line rule such as holding that documents generated pre-coverage determination are "business" while post-coverage determination documents are not, cases such as those cited clearly look to the substance of the communication itself. Without reviewing the documents in question in these cases, it is difficult to discern whether they qualify as "legal" versus "business" documents. For instance, if an insurance company secures a legal opinion regarding the potential outcome of underlying or coverage litigation and uses that opinion in its evaluation of the case's loss potential for reserve or financial reporting purposes, is that opinion attorney-client privileged? Clearly, the opinion serves more than one purpose. It directs and informs the client's legal strategy in the case itself, and it serves a core business function of the insurance company: evaluating exposures. A panel reviewing the matter should draw a distinction between the advice of counsel and the action(s) taken by the insurance company based on that advice. However, the precise characterization of any given document may depend on the view of the person reviewing the documents and considering the context of the communication.

2. Does the document satisfy the "Work Product" requirement of being prepared in anticipation of litigation?

In some respects the work product doctrine is narrower than attorney-client privilege:[11] it applies only to materials prepared in anticipation of litigation. But in some respects it is broader: it extends to materials prepared by an attorney's agents and consultants. As in the case of determining whether materials are prepared when seeking legal advice, there is no bright line rule that divides normal course-of-business claims handling from a shift to preparation for litigation. The analysis involves a subjective intent to litigate as well as particularized immediacy. In the context of asbestos and other long-tail claims, an omnipresent litigation environment may exist but is not necessarily sufficient to shield claim file material from production.

In another episode of the 2008 document battle between AIU and TIG with regard to Foster-Wheeler asbestos losses (in which AIU seeks reinsurance coverage from TIG, TIG asserts a late-notice defense to such coverage, and both sides seek to withhold documents on the basis of attorney-client privilege or work product), the Court noted:

> Application of the work-product doctrine to an insurance company's claims files has been particularly troublesome because it is the routine business of insurance companies to investigate and evaluate claims. *Tudor Ins. Co. v. McKenna Assocs.*, 01 CIV.115, 2003 WL 21488058 at *3 (S.D.N.Y. June 25, 2003); m. Nat'l Fire Ins. Co. v. Mirasco, Inc., 99 Civ. 12405 (RWS), 00 Civ. 5098 (RWS), 2001 WL 876816 at*1(S.D.N.Y.Aug. 2, 2001). Thus, courts have held that documents in a claims file created by or for an insurance company as part of its ordinary course of business are not

> afforded work- product protection. See e.g., *OneBeacon Ins. Co. v. Forman Int'l, Ltd*., 04 Civ. 2271, 2006 WL 3771010 at *5 (S.D.N.Y. Dec. 15, 2006) (citing cases).

AIU Insurance Co. v. TIG Insurance Co., Case No. 07-7052 (USDC S.D.N.Y. Aug. 28, 2008) at 29.

The court went on to hold that TIG's assertion that it intended to litigate almost from the first notice of these claims by AIU was not acceptable because it would shield most of TIG's claim file, even though TIG retained outside counsel immediately to prepare for battle with AIU.. TIG's subsequent audit of AIU's files and its failure to disclaim were seen as persuasive factors in determining that TIG had no immediate intent to litigate as of the date of its retention of counsel. A seasoned insurance professional or another court might conclude otherwise on the same facts; however, in this case, the court conducted a review of the documents and made a document by document determination of which documents were prepared in anticipation of litigation. Since some were prepared in anticipation of litigation and AIU had not demonstrated a "substantial need" for the documents, such documents were withheld from discovery. On July 8, 2009, U.S. Magistrate Henry Pitman reversed himself with regard to his rulings on some of those documents. His re-examination essentially determined that certain documents and certain portions of documents reflected counsel's analysis of legal issues, including choice of law, potential damages, witness preparation, and document reviews, and were generated to provide TIG with legal advice or in preparation for litigation.

See also *Minnesota Sch. Bds. Assoc. Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627 (N.D. Ill. 1999). In response to CNA's motion to quash subpoenas duces tecum that the insured had served on Wausau's reinsurers, the court agreed with Wausau's assertion of work product because the three documents at issue contained "attorney Feinberg's opinions and mental impressions on the status of the litigation and Wausau's position." The court went on to hold that the work product "privilege" of the documents was not waived when these documents were communicated to CNA, a reinsurer, and Aon, a broker, because the disclosures were not "inconsistent with the maintenance of secrecy from the disclosing party's adversary" citing *United States v. American Tel.* & Tel., 642 F. 2d 1285, 1299 (D.C. Cir. 1980), id at 631.[12]

Thus, both content and timing are critical in implementing the rationale that a party is entitled to a zone of privacy in which to prepare for litigation, but distinguishing routine claims handling from preparation for litigation is a fact specific determination that may also depend on the point of view of the reviewer.

Step 2: If The Material Is Potentially Privileged, Should a Panel Order Production?

The power to deal with discovery disputes is, of course, a necessary adjunct to the arbitration panel's power to resolve the dispute. To the extent that the arbitration clause defines that power, it governs. But since that clause is unlikely to contain specific direction on the scope of access to attorney-client privileged or work product documents, how should a panel deal with such a demand for attorney-client privileged material? First of all, are there other potential provisions of a given reinsurance contract that answer the question?

1. Access to records or claims cooperation clauses

Case law supports the principle that a typical "access to records" or inspection clause that likely provides the reinsurer with the right to review "all records" in connection with the business ceded does not give the reinsurer the right to obtain attorney-client or work product documents. See for instance *North River Ins. Co. v. Philadelphia Rein. Corp*:[13]

> ...Although a reinsured may contractually be bound to provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination, absent more explicit language, it does not through a cooperation clause give up wholesale its right to preserve the confidentiality of any consultation it may have with its attorney concerning the underlying claim and its coverage determination. Provided that the reinsured has been forthright in making available to its reinsurer all factual knowledge or documentation in its possession relevant to the underlying claim or the handling of that claim, it has satisfied its obligations under the cooperation clause. The reinsurer is not entitled under a cooperation clause to learn of any and all legal advice obtained by a reinsured with a "reasonable expectation of confidentiality." *Carey-Canada*, 118 F.R.D. at 251.

See also *Gulf Ins. Co. v. Transatlantic Reins. Co.*, 788 N.Y.S.2d 44, 45-46 (N.Y.App. Div. 2004):

> Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges. To hold otherwise would render these privileges meaningless [Citing *North Riv. Ins. Co v. Philadelphia Reins. Corp*., 797 F. Supp. 363 (D NJ 1992).

However, in a given case if a party can effectively argue 1) an "access to records" clause that says "all records" means *all* such records, or 2) there is additional

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language concerning a party's access and specifically including confidential or privileged material, or 3) the resisting party did not have a reasonable expectation of confidentiality because of the underwriting relationship or because of facts surrounding the claims, a panel could be persuaded to compel production.[14]

2. Do the parties share a common interest that can be used to affirmatively compel production?

Over and above the "access to records" contract right, reinsurers have taken the position that they are entitled to those attorney-client privileged or work product documents that are in a claim file because at the time the documents were generated, they shared a common interest with the ceding company (in minimizing the exposure to the insured and in defending any coverage dispute over the policy provisions). This has been referred to as using the "common interest doctrine" as a sword rather than a shield. Stripped of its attractiveness as an adjunct to the business interests held in common by cedent and reinsurer, the simple point made by case law on the issue is that the parties cannot share a "common interest" if they are in arbitration. So courts have held the common interest doctrine inapplicable between them, as opposed to vis-à-vis third parties. As stated in *North River Insurance Co. v. Columbia Casualty*:

> ...What is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal.
>
> This rationale applies with even greater force in the reinsurance context. While a direct insurer may have a duty to defend its insured, thus implying some level of cooperation in litigation, no such duty is imposed on a reinsurer. *Cf. North River* I, 797 F.Supp. at 367. And, as in the direct insurance context, the interests of the ceding insurer and the reinsurer may be antagonistic in some respects and compatible in others. Thus, a common interest cannot be assumed merely on the basis of the status of the parties.

3. Has the document been put "at issue" by the party seeking protection from disclosure?

Parties seeking documents alleged to be attorney-client privileged or work product often take the position that the party seeking to assert the protections has waived them by putting the documents "at issue" in the litigation. In the cedent versus reinsurer context, a reinsurer may assert that by seeking payment under a reinsurance contract, a cedent puts the reasonableness of the payment, or its allocation of the loss, at issue; if the loss or its allocation is based on advice from counsel, then any such opinion's privilege is waived. Similarly, by asserting an "affirmative defense" to the billing, a reinsurer may be asserted to have put legal advice at issue and waived similar protections.

The core requirements of the "at issue" doctrine were articulated in *Hearn v. Rhay*, 68 F.D.R. 574 (E.D. Wash. 1975). The *Hearn* three-factor test is "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." *Hearn*, 68 F.R.D. at 581. As the Court in *OneBeacon v. Forman* recognized, "the exact boundaries of the "at issue" doctrine have been the subject of significant conflict and debate". Op cit., 2006 WL 3771010 (S.D.N.Y) at 9. In OneBeacon, the court went on to cite *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp.363 (D.N.J. 1992), for its conclusion that merely placing the reasonableness of a settlement at issue by pursuing recovery under a reinsurance contract is not enough to put the attorney advice supporting that settlement "at issue" so as to waive an asserted privilege. In *North River*, the court limited the doctrine to situations where a party actually puts the contents of attorney advice at issue by intending to use the advice to prove its case. This most frequently happens when a party seeks to use "advice of counsel" as a defense or in an action to recover the costs of attorney fees and expenses. The court in *OneBeacon* stated, "the content of any legal advice would therefore not necessarily be at issue in determining the reasonableness of any settlement."

In the AIU versus TIG discovery battle, the court used the quote from *OneBeacon* to support its conclusion that AIU had not placed its coverage counsel documents "at issue" by seeking recovery of their Foster-Wheeler settlement from TIG. It does not answer the question so much as it delineates the summary treatment the court gave the argument in that case. Bringing an action to recover under a reinsurance contract for a loss that a reinsurer believes is *ex gratia* or outside the reinsurance contract should not waive a ceding company's attorney-client privilege as to its counsel's opinion. However, if a party seeks to affirmatively use the attorney opinion to prove its case, a court would hold that to be a "waiver" of all communication bearing on that subject matter, so it might extend to other materials as well. Consistent with such views, an arbitration panel should take such steps as it deems necessary to understand the rationale behind the settlement and its allocation which, in the normal course of business, is a *claim* function. This may or may not necessitate reviewing a legal opinion supporting the loss and its allocation, but it should not be done as a routine exercise. To a certain extent with respect to this issue, the parties can control how the panel handles the issue by how they frame the proofs necessary for their case or their defenses.

Step 3: How to Proceed?

Given the issues posed by battles over the production of attorney-client or work product documents, how should a panel proceed to address such issues? Who resolves the dispute as to what is privileged and what is not?

First of all, arbitrators are generally expected to be experts in the subject matter of the case and to have the background knowledge to manage the discovery so as to achieve the twin goals of arbitration: expedition and economy. In litigation, courts are generally using a broad standard for discovery that covers a range of evidence including all evidence reasonably calculated to lead to the discovery of admissible evidence. While there is necessarily some judgment involved, arbitrators should first consider the key disputes and tailor the discovery, quoting the ARIAS•U.S. Practical Guide, "to give each party a fair and reasonable opportunity to develop and present its case without imposing undue burden, expense or delay on the other party(ies)." This will include avoiding the dissemination of attorney-client or work product material if possible.

Various methods for reviewing the documents are currently being used by parties facing this issue. These include:

1) The party arbitrators review the documents to determine what should be produced. This method seeks to preserve the neutrality of the umpire and prevents the contamination of the umpire's view by exposure to documents that the parties are attempting to shield. The danger with this method is that production may become a bargaining chip between party arbitrators. Further, once party arbitrators have seen the documents, they cannot "un-see" them and a subsequent decision may be affected by the documents even if they are not referred to . [Also, to the extent that the parties are paying two arbitrators to review documents, this may be less cost-effective and more time consuming than allowing one person to do so.]

2) The Umpire reviews the documents and decides what is attorney-client privileged or work product. This has the benefit of centralizing the control in one person who can, presumably, work faster and more decisively through the documents. It has the inherent danger of leaving the decision up to one person who may draw the line as to what is protected conservatively or liberally depending on his/her experience and knowledge of the issues. This method also could affect the arbitration itself by influencing the view of the umpire.

3) The parties may agree (or be ordered by the panel) to retain an "expert" or a "special master" to review the documents. While this may be an added expense, it prevents the disclosure to the panel of those documents ultimately determined to be protected. It also prevents the panel from being sidetracked or otherwise influenced by discovery issues. The additional layer of formality, particularly if a law firm or an individual lawyer is hired to do the review, will probably aid in later arguments that no waiver of privilege should attach to providing the documents to an expert for review. Who is hired to perform this review, his or her view of the issues, and any choice of law the parties agree to apply to such a review, may yield different results. This process could become a subject of debate in and of itself.

Of course the method chosen will be highly dependent on the parties, the issues in a given arbitration, and the volume of documents sought.

In the event that a party refuses to comply with an order to produce certain documents, the panel may consider drawing an inference from such a failure to produce. Depending on the particular case, this may or may not affect the ultimate decision. In *National Casualty v.*

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The parties may agree (or be ordered by the panel) to retain an "expert" or a "special master" to review the documents. While this may be an added expense, it prevents the disclosure to the panel of those documents ultimately determined to be protected.

Debate over the production of attorney-client privilege or work product material poses danger to both the cedent and the reinsurer vis-à-vis third parties. While a Confidentiality Agreement may govern the arbitration proceedings, it may not be completely effective in preventing the disclosure of what documents were exchanged in the proceeding.

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First State Ins. Group, 430 F. 3d 492 (1st Cir. 2005), First State had settled asbestos non-products claims and submitted them to its reinsurer, National Casualty, as having been settled on a "single occurrence basis". National Casualty contested that point, filed an arbitration, and demanded First State's coverage counsel's assessments which, they contended, would "reveal the basis on which First State had settled the underlying claims" (at 495). The panel ordered the documents to be produced "warning that if it [First State] did not, the panel would draw whatever negative inferences it deemed appropriate" (at 495). National Casualty then attempted to enjoin the arbitration proceedings, but in the meantime the panel ruled in favor of First State and issued an award. In the subsequent action by National Casualty to vacate the award, the District Court and the Court of Appeals decided that there was no misconduct under FAA Section 10(a)(3) in "refusing to hear evidence pertinent and material to the controversy". In doing so the Court of Appeals specifically stated:

> ... The arbitrators ruled that as a result of First State's refusal to produce the requested documents, they would draw inferences against First State as to what those documents would show. This is a routine remedy, well within the arbitrator's powers. The drawing of an inference against First State in this case offset any unfairness to National Casualty that resulted from holding a hearing without giving National Casualty access to the actual documents it sought. (at 498).

In a more recent reported decision, *Howard University v. Metropolitan Campus Police Officer's Union*, No. 07-7055, 2008 WL 160932 (D.C. Cir. Jan. 18, 2008), the court determined that the question was not whether the arbitrator had correctly applied federal law on the issue of privilege but whether the exclusion of the evidence amounted to misconduct. It determined that it was not, on the facts of that case. The arbitrator in question (proceeding under a collective bargaining agreement between the Metropolitan Campus Police and Howard University) had refused to hear testimony by one of the Union's chief negotiators on the basis of attorney-client privilege; while the Court of Appeals disagreed with the arbitrator's conclusion that such testimony would have violated the privilege (it involved recollection of statements made in negotiations),the court held it did not constitute "misconduct" and that it was immaterial to the decision.

Of course, whether a panel's exclusion of a communication or document based on attorney-client privilege or work product might serve as a basis to set aside an award depends on the individual case

Conclusion and Wider Implications

Debate over the production of attorney-client privilege or work product material poses danger to both the cedent and the reinsurer vis-à-vis third parties. While a Confidentiality Agreement may govern the arbitration proceedings, it may not be completely effective in preventing the disclosure of what documents were exchanged in the proceeding. A party seeking to maintain the privilege may be able to demonstrate that it did **not** "waive" any privilege or protection by complying with an "order to produce" issued by an arbitration panel; such an order, however, will not protect documents that are not found (either by the panel or by a subsequent court reviewing the documents) to be attorney-client privileged or work product in the first place. If a third party seeking documents is able to argue that a panel (composed of industry professionals) conducting a review of purported confidential material found certain documents to be outside the scope of either work product or attorney-client privilege, it could gain support for its in own assertion that such documents are not attorney-client privileged or work product.

Therefore, it is critical that counsel and arbitrators understand and address the sensitivities beyond those at issue in any given arbitration dispute and work together to minimize the risk of "waiving" the protection of the attorney-client privilege or work product doctrine vis-à-vis third parties. These elements should be considered:

- The extent to which such documents are critical to resolving the dispute(s) between the parties;
- The nature of any common interests, how such common interests are distinct from those in dispute in the arbitration, and whether and how such common interests should be documented;
- Whether the parties have agreed to and engaged in joint defense (*e.g.*, does the reinsurance contract(s) contain a provision giving the reinsurer the right to associate in the defense of underlying claims);
- The history of the documents in question and whether they have been shared in the past with other reinsurers.

Any production ordered by the panel should seek to minimize the parties' exposure by documenting both parties' intent that their actions do not waive any applicable privileges and protections.▼

1 Asbestos claims, in particular, have yielded a range of document disputes between cedents and reinsurers owing to the sheer volume of claims, range of exposure, and complexity of issues. Various estimates have predicted 200,000 claims ("claim" meaning one individual allegedly injured by exposure to asbestos), and an average of 20 defendants named in each underlying asbestos case. Even without hazarding a guess as to the number of insurers involved in each defendant's claims, the sheer weight of claim documentation is enormous. Direct insurers pass the losses on to their reinsurers who, in turn, need their own documentation of how such losses affected the underlying policies and their reinsurance covers, and, in turn, pass those on to any relevant retrocessional coverage. Counsel opinions are often the best summary and source of relevant claim and coverage analysis.

2 Two cases, in particular, cause concern in regard to the ability of third parties to have access to documents that have been provided to a reinsurer. In *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 152 F.R.D.132 (N.D.Ill 1993) the court determined that none of the documents met the criteria for being protected by the work product doctrine. (The court went on to opine about the lack of common interest between the cedant and reinsurer, an oft cited aspect of the opinion that was, in fact, dictum). In *Reliance v. American Lintex Corp.*, No. 00 CIV 5568 WHP KNF, 2001 WL 604080 (SDNY June 1, 2001) the court ordered Reliance to produce its attorney's legal opinion to its policyholder because it had been shared with Reliance's reinsurer, which constituted a waiver of the privilege.

3 If a party is ordered by a panel to produce documents, it can use that order as evidence that it did not voluntarily waive any privilege, particularly if a confidentiality agreement governs the arbitration. See discussion of the elements of maintaining attorney-client privilege or work product doctrine protections as described here. See also "*It is a Privilege to Reinsure You – Now May I See Your Documents?*" Robert Hermes and Jason Dubner, Butler Rubin Saltarelli & Boyd, LLP, Mealey's 15th Annual Insurance Insolvency and Reinsurance Roundtable, April 9-12, 2008. , pp 274-275.

4 For an authoritative and thorough resource on these issues, please see "*Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine*" Jenner & Block LLP, 2009 Practice Series.

5 The Federal Rules of Evidence were amended in December, 2008 to provide that when a federal court orders production "the privilege or protection is not waived by disclosure connected with the litigation pending before the court."

6 The contents of any given insurance company's "claim file" can vary greatly, particularly when it comes to the segregation of attorney-client or work product documents. Some companies maintain such material in separate folders, some in separate files, and some in separate departments altogether.

7 The AIU/TIG dispute over Foster-Wheeler asbestos losses has generated three rulings and orders, each of which is discussed here, but the cumulative impact of the rulings is that a detailed review of documents may lead to changes in opinion as to what is privileged.

8 The Court of Appeals focused on the language of California's Evidence Code, section 952, which specifically extends the privilege to confidential communications shared with "those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted..."

9 The Court of Appeals granted extraordinary review of the discovery order because of the potential for immediate harm if such material was produced, and overturned the decision of the trial court that adopted a report of a special master holding that such documents were not entitled to attorney-client or work product protection.

10 This code section provides an example of how the parameters of attorney-client privilege may vary from one jurisdiction to another. The Court of Appeals interpreted Section 952 thus:

> "Those 'who are present to further the interest of the client in the consultation' include a spouse, parent, business associate, joint client or any other person 'who may meet with the client and his attorney in regard to a matter of joint concern.' (Cal. Law Revision Com. com. to Evid. Code, § 952, 29B West's Ann. Evid. Code (1966 ed.) pp. 528-529.)" (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 346.) California courts have held that "the 'privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, *business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant.*' ([*INA, supra*,] 108 Cal.App.3d 758, 767, quoting *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588.) 'While involvement of an *unnecessary* third person in attorney-client communications destroys confidentiality, *involvement of third persons to whom* "Those 'who are present to further the interest of the client in the consultation' include a spouse, parent, business associate, joint client or any other person 'who may meet with the client and his attorney in regard to a matter of joint concern.' (Cal. Law Revision Com. com. to Evid. Code, § 952, 29B West's Ann. Evid. Code (1966 ed.) pp. 528-529.)" (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 346.)

11 Attorney-client privilege protects communications between a client and a lawyer relating to all kinds of legal services, while the work product doctrine protects only litigation related materials. See *Research Inst. for Med. & Chem., Inc. v. Wis. Alumni Research Found.*, 114 F.R.D. 672 (W.D. Wis. 1987) (work product doctrine inapplicable to patent application process which involves ex party non-adversarial proceedings); REST. 3D § 87 cmt. h; *Jordan v. U.S. Dep't. of Justice*, 591 F.2d 753,755 (D.C. Cir. 1978).591 F.2d 753,755 (D.C. Cir. 1978).

12 In reaching its conclusion as to whether Wausau had waived the work product protection, the District Court distinguished *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132 (N. D. Ill.1993). *Allendale* is often cited by parties arguing that transmitting allegedly work product protected documents to a reinsurer waives the protection. However, in that case, the Northern District of Illinois determined that the majority of the documents were not work product in the first place because they were "...simply the private musing of non-lawyer employees of a non-party, which on their face do not appear to be related to preparation for litigation other than in an incidental manner. In other words, these documents are mere insurance business material." Id., at 136-37.

13 *North River Insurance Co. v. Philadelphia Reinsurance Co.* 797 F. Supp.363, 369.

14 For a review of this topic, see Michele Jacobson, Robert Lewin and Royce Cohen, *The Access to Records and Claims Cooperation Clauses Their Impact on Discovery in Arbitration Proceedings*, Volume 13 Number 3 (Third Quarter 2006), *available at* http://www.arias-us.org/mp_files/img_ftp/arias2006-Q3.PDF. See also *North River v. Columbia Casualty Co.*, No. 90 Civ. 2518 1995 WL 5792. While the court held that Columbia Casualty was not entitled to attorney-client privileged documents since there was no "common interest" between the parties, the court did conclude, as to some documents, that North River had waived the privilege by producing them to another reinsurer, CIGNA. While those documents were provided to CIGNA before the parties were in litigation, the Court held that North River and CIGNA had no common legal interest and "were antagonistic". Of course the existence of litigation with CIGNA over the same billings may have influenced the court: *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 393 (D.N.J. 1992).

news and notices

Kennedy Retires as *Quarterly* Editor; Wollan Appointed

In January, **T. Richard Kennedy** announced his retirement as Editor in Chief of the *ARIAS•U.S. Quarterly*. Mr. Kennedy, also the founding Chairman of the Society, said that he felt it was time to give others opportunities to lead the magazine. He recommended, and the Board of Directors approved, **Eugene Wollan**, an Associate Editor, as the next Editor. Mr. Wollan, a former senior partner, now counsel to Mound Cotton Wollan & Greengrass, is a regular contributor to the *Quarterly*. He will assume his new role on April 1.▼

ARIAS Adds Expert Witness Section to Website Profiles

At the Board of Directors' direction, the ARIAS•U.S. website has just been revised to allow Certified Arbitrators to include expert witness services in their profiles. While this is helpful in allowing arbitrators to add another element to their profiles, where appropriate, it is also useful to the industry, since the website search system has been modified, as well, to allow searches by a range of expert witness categories.

As soon as a significant number of arbitrators have entered their expert witness specialties into their profiles, the selection of a list of prospective experts will be a simple process. Just as with an arbitrator search, when the expert specialty is specified on the search page, a results list will be returned that links each name to a complete profile of the arbitrator, which includes extensive background information to assist in selection of the expert.

ARIAS•U.S. Certified Arbitrators are asked to go to the data entry system (yellow button on the home page) to input those areas in which they have sufficient experience to be able to offer expert witness services. The goal is to make this facility a reliable source for locating talented experts to testify in insurance arbitration and litigation matters.

With this search system, parties have the capability to specify experience characteristics in addition to the expert specialty area, so that the experts being considered have the talents that most closely match the nature of the dispute. It may take some weeks to achieve a critical mass of data before robust results lists are returned, so prospective users are asked to keep checking as the data builds.

ARIAS believes this addition will provide an important service in support of dispute resolution proceedings. Of course, everyone is asked to recognize that expert witness services so offered are self-proclaimed. ARIAS•U.S. does not certify this capability.▼

Spring Conference Offers San Diego Tour

During the Thursday afternoon break in the 2010 Spring Conference, ARIAS is offering a tour for those conference attendees and their guests who are not off playing golf or tennis. **Entitled "San Diego by Land and Sea" the tour will begin and end at the Hotel del Coronado, starting at 1:15**.

With so much to see in San Diego, it is hard to select just one or two attractions for the time available. So this tour, in five hours, will visit the Gaslamp Quarter, Balboa Park, and "Old Town." Also, since there are places one can not easily see from land, the group will take a one-hour fully-narrated tour of the Big Bay on a cruise boat, to see locations such as, North Island Naval Air Station, The Embarcadero, and Cabrillo National Park. The cost is only $45 per person. Details and registration are available through the website home page or Calendar. To sign up, print out the registration form for faxing to The Event Team, which will conduct the tour. The reception begins at 7:00 on Thursday, so the 6:15 return leaves plenty of time to refresh.▼

Member Services

Committee Announces Three New Benefits

The ARIAS•U.S. Member Services Committee has announced three new offers for members.

1. **Law Journal Press and Law Journal Newsletters**, a division of ALM, Inc., is offering a 30% discount on their insurance law books and newsletters. These products can be found in the insurance practice area of **www.lawcatalog.com**. Of special interest are books from two ARIAS•U.S. members who are Law Journal Press authors.
   - **Frank Lattal's** book is entitled "New Jersey Insurance Law - Second Edition." There is also a 2008/2009 Supplement.
   - **Steve Schwartz's** book, "Reinsurance Law: An Analytic Approach" was just published in December.

   To receive your discount on these or any other insurance publications shown there, use promo code **ALL22782** at checkout.
2. **The Intermediaries and Reinsurance Underwriters Association** is offering a 25% discount on their publication, the ***Journal of Reinsurance***. You can find the Association's website at **www.irua.com**.

   To receive your discount on a subscription to the *Journal*, contact the Journal of Reinsurance Subscription Services at 908-203-0211 or by email at **jor@irua.com** and let them know you are an ARIAS member.
3. **Winter Reporting** is, again, offering a free **LiveNotes** basic tutorial session on **April 9, 2010** at 60 East 42nd Street in New York City. Details are on the ARIAS•U.S. website. There is a cap on class size, so be sure to sign up soon if you are interested. Contact Per Hoffman at **212-953-1414** or **per.hoffman@winterreporting.com**.

For future reference, this information is also listed in the Member Services Committee Offers area of the ARIAS•U.S. website.▼

Biographies of Attending Arbitrators to Be Distributed at Spring Conference

In an effort to increase arbitrator visibility and reinforce personal contacts at the 2010 Spring Conference, Certified Arbitrators will have the opportunity for their biographies to be readily available to all who attend the conference. All ARIAS•U.S. Certified Arbitrators were asked to email up-to-date text biographies by March 1. During March and April, these biographies will be prepared and combined with photographs. After the final registration deadline for the Spring Conference on April 23, the biographies and photographs of those who have registered for the conference will be compiled and duplicated into a spiral-bound book. *The ARIAS•U.S. 2010 Spring Conference Certified Arbitrator Biography Book* will be given to every conference attendee at check-in.

This reference source facilitates quick follow up, so that attorneys and company representatives can gain a more complete picture of the capabilities of newer arbitrators with whom they come in contact during the conference.▼

Board Certifies Eleven Previous Arbitrators under New Requirements

At its meeting on January 11, the Board of Directors approved certification of the following arbitrators under the new certification requirements:

- **David Appel**
- **Linda Martin Barber**
- **Franklin D. Haftl**
- **Robert Edwin Kenyon III (Pete)**
- **Barbara K. Murray**
- **Thomas A. Player**
- **Kevin T. Riley**
- **Michael H. Studley**
- **Richard G. Waterman**
- **Michael S. Wilder**
- **Barry Leigh Weissman**

All had been previously certified.

Board Certifies Turi as New Arbitrator

Also, at its meeting on January 11, the ARIAS-U.S. Board of Directors approved certification of **Bernard J. Turi**. His sponsors were Walter Andrews, John Dattner, and Jeffrey Morris.▼

Four ARIAS•U.S. Umpires Are Certified

In addition, at the January 11 meeting, the Board approved certification of four more umpires.

The following arbitrators are now also ARIAS-U.S. Certified Umpires:

- **Franklin D. Haftl**
- **Thomas A. Player**
- **Jonathan Rosen**
- **Richard G. Waterman**

The complete list of Certified Umpires can be seen on the website in the Selecting an Umpire area.▼

Reservations Are Open for ARIAS 2010 Spring Training Triple-Header

Reservations for the Hotel del Coronado may be made now online through the "Welcome ARIAS" page of the hotel's online reservation system, accessed through the home page of the website. Dark boxes show dates of ARIAS-blocked rooms, however two days before and three days after may be reserved at group rates, if available.

Guest rooms are available at the following special ARIAS•U.S. group rates.

- $270 Victorian Queen
- $307 Resort King
- $307 Resort Queen Queen
- $349 Run of Ocean View

A resort charge of $22 per day is additional, providing Internet access, newspaper, in-room coffee and tea, fitness center access and classes, and local, 800 and credit card phone calls. If you prefer to make reservations by telephone, the number is 1-800-468-3533. Be sure to mention that you are attending the ARIAS Conference to receive the group rate.

The conference runs from noon on Wednesday, May 5, until noon on Friday. Plan to stay, at least, Wednesday and Thursday nights. A limited number of rooms are being offered at the ARIAS rates for nights before and after the conference. If you plan to attend the intensive workshop (before) and/or seminar (after), be sure to reflect that in making your reservation. **The deadline for reservations is April 10**.

Preliminary information about the three ARIAS spring training events is on the website calendar. The announcement brochure with complete information was sent to members in February and is available on the home page.▼

Quarterly Sent to Members Electronically

For the first time, in mid-December, the *ARIAS•U.S. Quarterly* was sent to all members by email. It was also sent by postal mail. With the time required for printing and distribution, the printed version lags the emailed version by several weeks.

After this dual distribution is implemented for several issues, members will be asked about their preferences. The results will be one factor in considering future distribution methods▼.

Members Asked to Confirm Email Addresses

With the *Quarterly* and other critical documents being sent now by email, it is more important than ever that members' email addresses be correct. Anyone who did not receive the recent distribution of, now, two *Quarterlies* probably does not have a correct address in the member database. This email address also provides access to the online Membership Directory.

If you believe your email address to be incorrect or you are not able to check into the directory, send your address to **claudio@cinn.com**. Christina will update your address and, as soon as a new file is uploaded to the website, you will be able to confirm all of your contact information in the directory. Also, you will be assured of receiving all future documents and announcements from ARIAS.▼

feature

Perjury in Arbitration

Richard C. Mason
Stephanie P. Gantman[1]

Richard C. Mason

Stephanie P. Gantman

A determination of perjury requires clear and convincing evidence.

1. Overview of Perjury

In judicial proceedings, false testimony by a witness long has been criminally punishable as perjury when the false testimony is deliberate and relates to a material matter. While similar standards have been applied to the question of perjury in arbitration, the determination that perjury has occurred, and its consequences, differ in the arbitration setting. This article discusses the legal bases for a finding of perjury in arbitration, before analyzing the circumstances in which alleged false testimony may support vacatur of an arbitration award.

1.1 Definition of Perjury

Under the Federal Criminal Code perjury is defined as a "witness testifying under oath or affirmation . . . [giving] false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."[2] This definition has gained general acceptance, and remained unchanged for over a century.[3] States typically have adopted the federal definition.[4]

The concept of a "false statement" is not limited to affirmative misrepresentations, but includes omissions of fact made with intent to deceive or conceal.[5] Thus, for example, a witness's failure to mention an important meeting when directly asked to identify all such meetings may constitute a predicate for perjury.

Even if testimony is knowingly false, it does not constitute perjury unless it is material. "Immaterial testimonial inconsistencies by themselves do not constitute perjury."[6] "The test of materiality is whether the false testimony was capable of influencing the fact finder in deciding the issues before it."[7] The testimony need not directly concern a dispositive issue, and even a false denial of gambling activity by a prosecution witness in a bribery case has been deemed material, since a truthful answer in such a case "could have tended to undermine the credibility" of this prosecution witness.[8]

1.2 Evidentiary Standard of Review

A determination of perjury requires clear and convincing evidence.[9] This is a higher standard than a preponderance, though not as rigorous as the "reasonable doubt" standard. "Easy cases, in which the evidence of perjury is weighty and indisputable, may require less in the way of factual findings, whereas close cases may require more."[10] For example, when the defendant's account of events differed only slightly from that of the arresting officer, the defendant was entitled to "the benefit of the doubt," and perjury could not be found.[11]

2. Perjury in Arbitration as a Ground for Vacating an Award

On its face, the Federal Criminal Code definition of perjury is not limited to testimony in judicial proceedings. Courts interpreting this code in the arbitration context have found that knowing, material, false testimony constitutes perjury so long as the testimony is given under oath.[12]

2.1 Perjury as "Fraud" for Purposes of Vacatur Under the Federal Arbitration Act

Under the Federal Arbitration Act, one ground for vacating an arbitration award is fraud that materially taints the award.[13]

Several federal circuit courts have addressed the circumstances under which perjured testimony in an arbitration proceeding rises to the

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level of fraud within the meaning of the Federal Arbitration Act. The Third, Sixth, Ninth, and Eleventh Circuits have recognized that obtaining an arbitration award by perjured testimony may constitute fraud.[14] The Second Circuit has indicated, without deciding, that perjury at an arbitration hearing can be considered fraud within the meaning of the Federal Arbitration Act.[15]

Vacatur of arbitration decisions is rare, but several decisions have vacated or modified arbitration awards based on perjurious testimony.[16] In a prominent case, the Eleventh Circuit Court of Appeals modified an arbitration award on the basis of false testimony constituting perjury.[17] In *Bonar v. Dean Witter Reynolds*, the Eleventh Circuit amended an arbitration award to vacate the punitive damages award because the alleged breach of fiduciary duty was substantially proved through testimony by an expert who had egregiously falsified his credentials.[18] The court remanded the punitive damages award for a new hearing. Notably, the court ordered that the hearing occur before a different panel of arbitrators.[19]

In reviewing arbitration awards to determine if vacatur for fraud-based on perjury or otherwise, is appropriate, courts have relied on a three-pronged test. The perjured testimony must:

(1) not have been discoverable upon the exercise of due diligence prior to the arbitration;

(2) be materially related to an issue in the arbitration; and

(3) be established by clear and convincing evidence.[20]

If any one element is missing, then vacatur will not be ordered. The "due diligence" and "materiality" prongs of this test are discussed in parts 2.3 and 2.4 of this article.

2.2 State Statutes and Cases

Some states have statutes recognizing fraud as a ground for vacating an arbitration award, including Illinois, Washington State, New Jersey, New York, and Pennsylvania.[21] The Supreme Court of California has stated that an arbitration award cannot be reviewed on the basis of the merits of the controversy, the validity of the arbitrator's reasoning, the sufficiency of the evidence, or an error of fact or law.[22] However, like other states, the California Code of Civil Procedure provides courts with the power to vacate an arbitration award if, among other things, "[t]he award was procured by corruption, fraud or other undue means."[23] A number of states have taken an approach similar to the Federal Arbitration Act and federal court interpretations and have recognized perjury in arbitration as a type of fraud that may result in setting aside or modifying an award.

An older New York Court of Appeals case, *Jacobowitz v. Metselaar*, soundly rejected the proposition that perjury can support vacatur,[24] though the decision rarely has been cited. More recently, a Washington state court interpreted its state statute to include perjury materially related to an issue of consequence in an arbitration as constituting fraud and requiring vacatur if there is substantial prejudice.[25] A Florida statute states that fraud is a ground for vacating an arbitration award, and case law interpreting the statute has recognized perjury as a type of fraud.[26] In addition, a New Mexico court determined that "[p]erjury and concealment of material evidence are justifications for setting aside an arbitration award based on fraud, undue means, and corruption."[27] Likewise, a Texas court found that an expert who testified in an arbitration and lied about his credentials gave rise to fraud in arbitration.[28] Finally, state courts in Utah and Wisconsin have held that fraud includes perjury.[29]

A California court of appeal decision, *Pour Le Bebe, Inc. v. Guess? Inc.*, discussed the definition of fraud at length in dictum and distinguished fraudulent conduct which triggers setting aside a judgment from conduct supporting vacatur of an arbitration award.[30] The court stated that fraudulent conduct that will result in vacating an arbitration award is not subject to the distinction between intrinsic or extrinsic fraud used in the context of a courtroom judgment "[b]ecause parties to an arbitration are not afforded the full panoply of procedural rights available to civil litigations … [so] courts generally take a more lenient approach when examining intrinsic fraud [such as perjury] in the context of a motion to vacate an arbitration award."[31] The court therefore concluded that the federal three-pronged test – requiring (1) clear and convincing evidence of false testimony (2) on a material point (3) that could not have been discovered during the arbitration by due diligence – should be utilized to determine if the perjured testimony rises to the level of fraud resulting in vacating an award.[32]

2.3 The Materiality Requirement

To support vacatur of an arbitration award, it has been held, the alleged fraud must be material to the outcome of the arbitration, rather than merely to resolution of an ancillary issue.[33] Applying this standard, the Seventh Circuit Court of Appeals declined to vacate an award because (i) the arbitration award did not include any reasoning regarding the evidence and factors that were determinative, and (ii) the award referred to claims that could have been upheld independently from the alleged fraudulently concealed evidence. Accordingly, "it was impossible to know whether the single issue Petitioners contested here was material to the outcome of the entire arbitration …"[34]

In an unpublished decision, the party petitioning to vacate an arbitration award under California state law procedures contended that perjury occurred when the prevailing party offered into evidence at the hearing an altered version of a crucial email exchange.[35] The original (printed) version of the email had contained a preceding email and a dealer listing which, Petitioner contended, cast the version submitted at the hearing in a light contrary to its altered appearance. The Petitioner contended it had been unable to discover the alteration because she was given the exhibit "buried under 41 other exhibits" only a

CONTINUED ON PAGE 14

First, parties should of course take every precaution to prevent perjury from tainting an arbitration. A party that realizes its own witness has committed perjury, but conceals it, may not only run afoul of ethical constraints, but also may create the predicate for vacatur if its opponent could not have detected the perjury.

CONTINUED FROM PAGE 13

week before the hearing.[36]

The court concluded that the failure to produce the entire email exchange was not perjury, "which is defined as a willfully false statement under oath, of a material fact." Nor did the circumstances otherwise constitute fraud, given that the altered email did refer to the earlier email and to the dealer listing. Furthermore, the arbitrator found multiple grounds on which to rule against the Petitioner, and thus it was "apparent the arbitrator would not have ruled any differently if the complete email exchange had been submitted at the arbitration hearing."[37]

2.4 The Due Diligence Requirement

Fraud, for purposes of vacatur under Section 10(a)(1) of the FAA, "must prevent the panel from considering a significant issue to which it does not otherwise enjoy access."[38] In order to protect the finality of arbitration awards, courts will not vacate an award because of fraud unless the fraud was not "discoverable upon the exercise of due diligence prior to the arbitration."[39]

Where the evidence relied on for vacatur not only was discoverable prior to arbitration, but was actually presented to the panel, a court likely will presume the panel had the opportunity to consider, and either reject or disregard, the possibility that perjury was committed.[40] As Judge Augustus N. Hand, of the Second Circuit Court of Appeals observed: "[I]f perjury is 'fraud' within the meaning of the statute, then, since it necessarily raises issues of credibility which have already been before the arbitrators once, the party relying on it must first show that he could not have discovered [the perjury] during the arbitration, else he should have invoked it as a defense at that time."[41]

As another court stated:

> If the perjury of defendant's witnesses was as patent as is now claimed, it should have been made apparent to the arbitrator in the proceedings before him. In effect, what plaintiffs are now asking me to do is to substitute my judgment for the arbitrator's as to the credibility of witnesses who appeared before him, and beyond that, to conclude not only that the testimony of defendant's witnesses should not have been accepted as true and accurate, but that it was deliberately false.[42]

In a recent case, the losing party in a securities arbitration sought to vacate the decision on the basis of an audit document discovered after the arbitration that referred to significant errors relating to the securities at issue, and further indicated the errors had been "covered up" by the prevailing party.[43] However, the court determined this document could have been discovered prior to the award through the exercise of due diligence. It had been in the possession of the petitioners' investment advisor, to whom petitioners had failed to issue a subpoena. One who fails to subpoena a witness who is suspected of possessing material information during arbitration "cannot claim that evidence found from that witness is new after the arbitration award issues," according to this court.[44]

In another case, an Oklahoma federal court concluded that perjury could have been raised in the arbitration, even though the petitioner had been denied the right to take the witness's deposition. The court concluded that the alleged perjury could have been adduced during the arbitration hearing, when the witness gave inconsistent testimony. The court held, in language that may be broader than the prevailing rule: "If there was an opportunity to cross-examine a witness, as there was here, then a party may not try to vacate an award for false testimony.[45]

3. Conclusion

Several practical observations should be noted in light of the general recognition that (1) testimony under oath in arbitrations may constitute perjury, and (2) perjury in arbitration may be grounds for vacatur of an arbitration award.

First, parties should of course take every precaution to prevent perjury from tainting an arbitration. A party that realizes its own witness has committed perjury, but conceals it, may not only run afoul of ethical constraints, but also may create the predicate for vacatur if its opponent could not have detected the perjury.

Second, a party that suspects impeaching evidence may be in the possession of a third party, but fails to pursue issuance of a subpoena, may forfeit a ground for vacatur. At least two courts have held that the "due diligence" required to obtain vacatur on the basis of perjury cannot be satisfied where the perjury was demonstrated on the basis of on evidence held by a third party to whom the Petitioner had failed to issue a subpoena during the arbitration proceedings.

Third, when issuing reasoned awards, arbitrators should exercise particular care in identifying the evidence relied upon and the issues deemed material. A court considering a vacatur motion may presume that certain testimony was relied on, unless the reasoned award clearly provides otherwise. Similarly, a court considering a motion to vacate may assume that perjury related to a material issue, requiring vacatur, unless the award either (i) identifies that issue as immaterial, or (ii) states alternative grounds for the award.

Fourth parties may, of course, agree to require issuance of a reasoned award that identifies the facts relied upon by the Panel. Reinsurance arbitration panels in the United Kingdom customarily undertake this as part of providing written opinions in arbitrations involving disputed issues of fact.▼

2 *United States v. Dunnigan*, 507 U.S. 87, 94 (U.S. 1993) (summarizing the elements of 18 U.S.C. § 1621).
3 *Id*; see also *United States v. Smull*, 236 U.S. 405, 408 (1915).
4 *Dunnigan*, 507 U.S. at 94; *See e.g.* 18 Pa. Cons. Stat. § 4902 (defining perjury as when one makes "a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.").
5 *U.S. v. Ellis*, 50 F.3d 41 (7th Cir. 1995).
6 *U.S. v. Libby*, 495 F.Supp.2d 49 (D.D.C. 2007).
7 *U.S. v Fayer*, 573 F.2d 741, 745 (2d Cir. 1978).
8 *U.S. v. Guariglia*, 962 F.2d 160, 164 (2d cir. 1992).
9 *United States v. Montague*, 40 F.3d 1251, 1256 (D.C. Cir. 1994).
10 Id.
11 Id.
12 *See e.g. Karppinen v. Karl Kiefter Machine Co.*, 187 F.2d 32, 34 (2d Cir. 1950); see also, Newark Stereotypers' U. No. 18 v. *Newark Morning Ledger Co.* 397 F.2d 594, 598 (3d Cir. 1968); *Dogherra v. Safeway Stores*, 679 F.2d 1293, 1297 (9th Cir. 1982).
13 9 U.S.C. § 10(a)(1) (2009).
14 See *Newark Stereotypers' U. No. 18 v. Newark Morning Ledger Co.* 397 F.2d 594, 598 (3d Cir. 1968) (assuming "that the obtaining of an award by perjured testimony would constitute fraud"); *Int'l Brotherhood of Teamsters, Local 519 v. United Parcel Serv. Inc.*, 335 F.3d 497, 503 (6th Cir. 2003); *Dogherra v. Safeway Stores,* 679 F.2d 1293, 1297 (9th Cir. 1982); ` 835 F.2d 1378 (11th Cir. 1988).
15 *Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 34-35 (2d Cir. 1951); *Bridgeport Rolling Miller Co. v. Brown*, 314 F.2d 885 (2d Cir. 1963); *see also A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd*, 1989 WL 115941 (S.D. N.Y. 1989) ("It is now apparently settled that obtaining an award through perjured testimony constitutes 'fraud' within the meaning of § 10(a)).
16 *Bonar*, 835 F.2d at 1383 n.7 (expert witness testified to credentials that were false); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982) (witness admitted his statement to union investigators was a lie); *Int'l Brotherhood of Teamsters, Local 519 v. United Parcel Serv. Inc*, 335 F.3d 497, 503 (6th Cir. 2003) (key witness recanted his testimony to the arbitrator that a fellow employee had assaulted him).
17 *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988).
18 *Id*. at 1384 (11th Cir. 1988).
19 *Id*. at 1388.
20 *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986).
21 710 ILCS 5/12; McKinney's CPLR § 7511; RCW 7.04.160; N.J.S.A. 2A:23B-23; 42 Pa.C.S.A. § 7341
22 *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 11 (Cal. 1992).
23 Ca.C.C.P. § 1286.2(a).
24 197 N.E.2d at 170 (N.Y. 1935) ("If perjury were accepted as a ground for relief, litigation might be endless the same issues would have to be tried repeatedly.").
25 *Seattle Packaging Corp. v. Barnard*, 972 P.2d 577, 579 (Wash.App. Div. 1,1999)
26 F.S.A. § 682.13(1)(a); *Davenport v. Dimitrijevic*, 857 So.2d 957 (Fla. Ct. App 2003).
27 *Medina v. Found. Reserve Ins. Co., Inc.*, 940 P.2d 1175, 1179 (N.M.,1997).
28 *Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, (Tex.App. 2008).
29 *Fleming v. Simper*, 158 P.3d 1110, 1112 (Utah App.,2007); *Steichen v. Hensler*, 701 N.W.2d 1, 6 (Wis. Ct. App. 2005).
30 *Pour Le Bebe, Inc. v. Guess? Inc.*, 5 Cal.Rptr.3d 442,458 (Cal. Ct. App. 2003).
31 *Id.* Perjury is "intrinsic" to the judicial proceeding. Fraud in the inducement, by contrast, is referred to as "extrinsic" fraud.
32 *Id.* at 459.
33 *Envtl. Barrier Co., LLC v. Slurry Sys.*, 540 F.3d 598, 608 (7th Cir. 2008)
34 *Id.*
35 *Ray v. Cingular Wireless, LLC*, 2007 WL 4100136, *8-*9 (Cal.Ct. App. 2007).
36 *Id*. at *8.
37 *Id*. at *9.
38 *Plank v. Vision Limited Partnership*, 2003 WL 76864, *2 (N.D. Ill. 2003)
39 *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982).
40 *See id.*
41 *Karpinnen v. Karl Keifer Machine Co.*, 187 F.2d 32, 35 (2d Cir. 1951).
42 *Halcoussis Shipping*, 1989 WL 115941, *4 (S.D.N.Y. 1989).
43 *Gimbel v. UBS Financial Services, Inc.*, 2009 WL 1904554 (N.D. Ill. 2009).
44 Id. at *9 (quoting *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986).
45 *Valentino v. Smith*, 1992 WL 427881, *8 (W.D. Okl. 1992) (citing O.R. *Securities, Inc. v. Progessional Planning Associates, Inc.*, 857 F.2d 742, 749 (11th Cir. 1988)).

members on the move

ARIAS•U.S. Members on the Move

In each issue of the Quarterly, this column lists employment changes, relocations, and address changes, both postal and email, that have come in during the last quarter, so that members can adjust their address directories and PDAs.

Although we will continue to highlight changes and moves, remember that the ARIAS•U.S. Membership Directory on the website is updated frequently; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us.

Do not forget to notify us when *your* address changes. Also, **if we missed your change below**, **please let us know** at director@arias-us.org, so that it can be included in the next *Quarterly*. ▼

Recent Moves and Announcements

Ellen K. Burrows can now be found at White and Williams LLP, 1650 Market Street, One Liberty Place, Suite 1800, Philadelphia, PA 19103-7395, phone 215-864-7028, fax 215-789-7542, email burrowse@whiteandwilliams.com .

Continuing the movement to City Center, **Andrew S. Walsh** has joined Legion Insurance Company (in Liquidation) at One Logan Square, Suite 1500, Philadelphia, PA 19103, phone 215-963-1240, fax 215-963-1927, cell 610-256-0711, email awalsh@legioninsurance.com .

David J. D'Aloia's firm has moved; here is the new address: Saiber LLC, 18 Columbia Turnpike, Suite 200, Florham Park, NJ 07932.

Paul Braithwaite is now a Senior Managing Director at F T I Consulting, 3 Times Square, 11th Floor, New York, NY 10036, phone 212-499-3659, fax 212-841-9350, cell 917-860-2144, email paul.braithwaite@fticonsulting.com .

William Kinney has a new fax number: 732-676-7787.

David P. Behnke's new contact information is Behnke & Associates, LLC, 630 Rosedale Avenue, Roselle, IL 60172, phone 630-309-5650, fax 630-472-7837, cell 630-309-5650, email DBehnke@sbcglobal.net.

Peter Q. Noack recently made a big move...to Lima, Peru, where he serves as Managing Partner of Wacolda Risk Management and Transfer S.A.C. His new address Paseo de la República 3195 Oficina 802, San Isidro Lima, Perú, phone +51 1 421 6257 ext. 776, email peter.noack@wacolda.com and his phone number is +51 1 421 6257 ext. 776, cell 51 1 945 133656. Peter recently completed a Diploma in National and International Arbitration from the Universidad del Pacífico School of Law and the Center for International Arbitration of the American Chamber of Commerce, both in Lima.▼

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feature

What's Left of "Manifest Disregard of the Law" as a Basis for Vacatur of Arbitration Awards after *Hall Street*?

Louis J. Aurichio
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Binding arbitration remains an oft-chosen dispute resolution mechanism for cedents and reinsurers, making the permissible scope of judicial review of arbitral awards a subject of interest to the industry. There is broad agreement among the federal courts that judicial review of arbitration awards is limited and the grounds for vacatur of awards narrow. The precise contours of the bases for vacatur under the Federal Arbitration Act ("FAA"), however, continue to be a subject of disagreement in the federal courts.

Last year, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), the United States Supreme Court resolved a circuit split over whether parties, who are free to contract for arbitration as a method of dispute resolution, are also free to contract for greater judicial review of arbitral awards than expressly provided by the FAA. In *Hall Street*, the Supreme Court addressed the enforceability of so-called "expanded review" clauses, holding that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification of arbitration awards.[1]

Long before *Hall Street*, however, the federal courts recognized a basis for vacatur of arbitration awards that is not expressly enumerated in the FAA, namely, "manifest disregard of the law." Indeed, the Court in Hall Street acknowledged that some Courts of Appeals had treated "manifest disregard of the law" as a further ground for vacatur in addition to those listed in § 10. *Hall Street* makes clear that §10 provides the exclusive grounds for vacatur under the FAA. But the Supreme Court's comments about the "manifest disregard" standard have engendered a further split of authority over whether "manifest disregard" remains a valid basis for vacatur after *Hall Street*.

This article discusses the origin of the "manifest disregard" standard, federal jurisprudence defining and applying the standard in adjudicating motions to vacate under the FAA, and the federal courts' differing conclusions about whether "manifest disregard of the law" survives as a ground for vacatur after *Hall Street*.

I. The "Manifest Disregard of The Law" Standard of Review

The FAA supplies mechanisms for enforcing arbitration awards: a judicial decree confirming the award, an order vacating it, or an order modifying or correcting it. Under § 9, a court "must grant" an order confirming the arbitration award "unless the award is vacated, modified, or corrected as prescribed in §§ 10 and 11 of this title." 9 U.S.C. § 9. Section 10 lists grounds for vacating an award, while § 11 lists those for modifying or correcting one. Among the § 10 grounds for vacatur are that arbitrators were "guilty of misconduct" or "exceeded their powers." 9 U.S.C. §§ 10(a)(3) & 10(a)(4). The grounds specified in §§ 10 and 11 do not expressly include "manifest disregard of the law" as a basis for vacating, modifying or correcting an award. Nonetheless, for many years, the federal courts have reviewed arbitral awards using what has come to be termed the "manifest disregard of the law" standard.

The manifest disregard standard finds its origins in *dictum* from the Supreme Court's decision in *Wilko v. Swan*. There, the Supreme Court stated that "the interpretations of the law by the arbitrators in contrast to manifest

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There is broad agreement among the federal courts that judicial review of arbitration awards is limited and the grounds for vacatur of awards narrow.

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However, the Seventh Circuit parts company with the other Circuits in taking an even more narrow view of what constitutes manifest disregard. In the Seventh Circuit, "manifest disregard of the law" is confined to cases where arbitrators "direct parties to violate the law." This "standard is so high that it 'provides an almost nonexistent standard of review.'"

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disregard are not subject, in the federal courts, to judicial review for error in interpretation."[2] From this statement the federal Courts of Appeals concluded that an arbitral award may be vacated if manifest disregard of the law is plainly evident from the arbitration record.[3]

After *Wilko* and before *Hall*, most federal appellate courts ultimately came to recognize an arbitrator's manifest disregard of the law as a valid extrastatutory basis for vacatur of an arbitral award.[4] While the articulated standards for manifest disregard of the law are not perfectly aligned, federal courts applying the doctrine — in both the pre-*Hall* and post-*Hall* contexts — are generally in accord in their analytical approach with respect to certain fundamental elements of the manifest disregard standard. It is widely agreed that federal courts' review of an arbitrator's decision is extremely narrow and highly deferential.[5] Indeed, it has been described as "one of the narrowest standards of judicial review in all of American jurisprudence."[6] In this light, manifest disregard of the law has been interpreted "to mean more than error or misunderstanding with respect to the law."[7] Generally, the party seeking vacatur bears the burden of proving that the arbitrator(s) were aware that a clearly defined legal principle governed but refused to apply it or simply ignored it.[8]

However, the Seventh Circuit parts company with the other Circuits in taking an even more narrow view of what constitutes manifest disregard. In the Seventh Circuit, "manifest disregard of the law" is confined to cases where arbitrators "direct parties to violate the law."[9] This "standard is so high that it 'provides an almost nonexistent standard of review.'"[10]

As in most circuits, the law in the Second Circuit, a hub of reinsurance-related litigation, is that a federal court cannot vacate an arbitration award simply because it determines that the arbitration panel made the wrong call on the law. On the contrary, the Second Circuit concluded before *Hall Street*, and confirmed after it, that "the award should be enforced, despite a court's disagreement with [the panel] on the merits, if there is a *barely colorable justification* for the outcome reached." The Second Circuit has also stated, however, that proof that the arbitrator refused to apply or ignored governing law is not confined to the unusual case in which the arbitrator explicitly rejects controlling precedent.

> If the arbitrator's decision 'strains credulity' or 'does not rise to the standard of barely colorable,' a court may conclude that the arbitrator 'willfully flouted the governing law by refusing to apply it.'[11]

In the Southern District of New York, this standard is equally applied to the non-reasoned awards that are common in reinsurance arbitrations.[12] "Where arbitrators have failed to document the reasoning behind their decision — a perfectly acceptable practice in arbitration — courts must consider the facts and the law to determine whether the allegedly disregarded law was clearly applicable and ignored."[13]

In *Hall Street*, the Supreme Court rejected the argument that *Wilko* recognized manifest disregard of the law as a further statutory ground for vacatur on top of those listed in § 10 of the FAA. Relying on both the text and the legislative history, the Court in *Hall Street* concluded (and reiterated several times in its opinion) that §§ 10 and 11 provide the "exclusive grounds" for review under the FAA. 14 But the Court did not decide whether the manifest disregard standard that arose from *Wilko* has any place in the analytical lexicon of courts reviewing arbitration awards. Referring to its use of the phrase "manifest disregard" in *Wilko*, the Court stated:

> Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when arbitrators were 'guilty of misconduct' or 'exceeded their powers.'[15]

These comments in *Hall Street* have engendered a debate over the continued validity of the manifest disregard standard as a basis for seeking vacatur under the FAA.

II. The Split in the Circuit Courts

A. Circuits Holding *Hall Street* Abrogates "Manifest Disregard of the Law" as a Basis For Vacatur of Arbitration Awards Under the FAA

The first federal appellate court to address the continued validity of the manifest disregard standard after *Hall Street* was the First Circuit in *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120 (1st Cir. 2008). In that case, an arbitrator granted summary judgment against a UPS employee and in favor of UPS in a dispute submitted to arbitration pursuant to a collective bargaining agreement. The UPS employee challenged the arbitrator's decision in a state court action, which was removed to federal district court on the basis of jurisdiction granted by the Labor Management Relations Act. Finding that the arbitrator had not acted in manifest disregard of the law, the First Circuit affirmed the district court's enforcement of the award and declined to reach the question whether *Hall Street* precludes a manifest disregard inquiry in a non-FAA setting. In its opinion, however, the court described *Hall Street* as holding "that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]." *Id*. at 122-124 fn.3.

The Fifth Circuit, in *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009), squarely considered whether manifest disregard of the law survives as a ground for vacatur in light of Hall Street. There, the plaintiff sought vacatur of an award, citing § 10 of the FAA. The district court granted the motion to vacate, holding that the award was made in manifest disregard of the law. Upon review, the Fifth Circuit held that in light of Hall Street "manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA." *Citigroup*, 562 F.3d at 355-58.

The Fifth Circuit interpreted *Hall Street* as rejecting the notion that *Wilko* created an independent, non-statutory ground for vacatur. *Id*. at 353.

> In light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, non-statutory ground for setting aside an award must be abandoned and rejected. *Indeed, the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards*.

Id. at 358 (emphasis supplied). The court concluded its opinion by observing that, "from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10." *Id*.

B. Circuit Tentatively Holding That "Manifest Disregard of the Law" Survives Hall Street as a Ground for Vacatur Independent of Those Specified in FAA

After reviewing the grounds for vacatur enumerated in § 10, the Sixth Circuit, in *Coffee Beanery, Ltd. v. WW, L.L.C.*, stated that its "ability to vacate an arbitration award is almost exclusively limited to these grounds, although it may also vacate an award found to be in manifest disregard of the law." 300 Fed.Appx. 415, 418 (6th Cir. 2008) (emphasis supplied). The *Coffee Beanery* court interpreted *Hall Street* narrowly, noting that while the Supreme Court "significantly reduced" the federal court's ability to vacate awards for reasons other than those specified in Section 10, "it did not foreclose federal court's review for an arbitrator's manifest disregard of the law." *Coffee Beanery*, 300 Fed.Appx. at 418. The court read *Hall Street* as narrowly limited to its holding prohibiting "private parties" from supplementing by contract the FAA's statutory grounds for vacatur. But, with respect to the "judicially-invoked" ground for an arbitrator's manifest disregard of the law, the court thought that *Hall Street's* discussion of *Wilko* demonstrated a "hesitation to reject the 'manifest disregard' doctrine in all circumstances . . . ." *Id*. at 418-19. With this analysis as backdrop, and after noting the wide acceptance of the manifest disregard standard in other circuits, the court said that it would continue to employ the standard as a basis for vacatur of arbitral awards. *Id*.

In a subsequent decision, however, the Sixth Circuit noted that while it had previously suggested that manifest disregard of the law is a "judicially created supplement" to the FAA's express grounds for vacatur, "*Hall Street's* reference to the 'exclusive' statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory." *Grain v. Trinity Health, Mercy Health Services Inc.*, 551 F.3d 374, 380 (6th Cir. 2008).[16]

C. Circuits Holding That the "Manifest Disregard" Standard Survives as a Judicial Gloss on the Grounds for Vacatur Specified in § 10(a)(4)

The Second Circuit, in *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), addressed the effect of Hall Street on the manifest disregard doctrine. The court acknowledged that *Hall Street's* holding — that the FAA set forth the "exclusive" grounds for vacating an arbitral award — is "undeniably inconsistent" with its own dictum treating the manifest disregard standard as a ground for vacatur entirely separate from those listed in the FAA.

> But the *Hall Street* Court also speculated that 'the term manifest disregard . . . merely referred to the § 10 grounds collectively, rather than adding to them' – or as 'shorthand for § 10(a)(3) or § 10(a)(4).' It did not, we think, abrogate the 'manifest disregard' doctrine altogether.

Id. at 93-95.

After reviewing the relevant post-*Hall Street* case law, the Second Circuit

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agreed with those courts which concluded that manifest disregard is a "judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA," and thus remains a valid ground for vacatur. *Id*. at 94. Having reached this conclusion, the court stated that, even after *Hall Street*, it still had the responsibility to vacate arbitral awards in the "rare instances" in which the arbitrator knew of the legal principle that controlled the outcome of the disputed issue but nonetheless refused to apply it. In those instances, the arbitrators have failed to interpret the contract at all, which is tantamount to arbitrators having "thereby 'exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.'" *Id*. at 95 (*citing* FAA § 10(a)(4)).

Similarly, the Ninth Circuit has held that *Hall Street* did not undermine manifest disregard of the law as a statutory ground for vacatur. In *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1289-90 (9th Cir. 2009), the court noted that it had previously treated the manifest disregard standard as shorthand for those subsections of the FAA authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." The court stated that, because the Supreme Court did not reach the question whether the manifest disregard doctrine fits within §§ 10 or 11 of the FAA, instead listing several possible readings of the doctrine, it was bound by prior Ninth Circuit precedent. Thus, the Ninth Circuit concluded that "after *Hall Street Associates*, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4)." *Id*.

Finally, the Tenth Circuit has questioned, without deciding, whether the manifest disregard standard remains a valid basis for vacatur after *Hall Street*. *See Hicks v. Cadle Company*, 2009 U.S. App. WL 4547803, **8-9 (10th Cir. Dec. 7, 2009).

III. Development Of "Manifest Disregard" Jurisprudence in District Courts in Remaining Circuits

Among the district courts where there has been no definitive ruling by the relevant court of appeals, there is no consensus with respect to the post-*Hall Street* viability of the "manifest disregard of the law" doctrine under the FAA. However, some trends appear to be emerging within a few circuits. District courts within the Eighth and Eleventh Circuits appear to be trending toward the view that manifest disregard is no longer viable at all. District courts within the Third and Seventh Circuits generally appear to hold the view that manifest disregard remains viable as a shorthand for statutory grounds for vacatur.[17] District courts in the remaining circuits have recognized the circuit split but either have not decided the issue or have not arrived at general agreement within the circuit.

A. Circuits Trending Toward View That Hall Street Abrogates "Manifest Disregard of the Law" as a Basis for Vacatur

In the Eighth Circuit, there are two cases in which a district court decided the issue. In both instances, the court held, in light of *Hall Street*, that manifest disregard is no longer a viable ground for vacatur of an arbitration award under the FAA. In *Prime Therapeutics LLC v. Omnicare, Inc*., 555 F. Supp. 2d 993, 999 (D. Minn. 2008), the U.S. District Court for the District of Minnesota held that courts can no longer vacate an arbitration award on judicially-created grounds such as manifest disregard of the law. The court recognized that *Hall Street* concerned contractual expansion of judicial review rather than judicial expansion, but reasoned that "[i]t would be somewhat inconsistent to say that the parties cannot contractually alter the FAA's exclusive grounds for vacating or modifying an arbitration award, but then allow the courts to alter the exclusive grounds by creating extra-statutory bases for vacating or modifying an award." *Id*. Accordingly, the court held that it did not need to address the argument that the arbitrator's decision was in manifest disregard of the law since that is not one of the grounds for vacatur within the FAA. *Id*.

In *Medicine Shoppe International, Inc. v. Simmonds,* No. 4:08CV90 FRB, 2009 WL 367703, *3 (E.D. Mo. 2009), the U.S. District Court for the Eastern District of Missouri held that "manifest disregard of the law" is not a valid basis for vacatur of an arbitration award under the FAA. The court interpreted the Supreme Court's decision in *Hall Street* as providing that manifest disregard "is not a prescribed basis upon which an arbitrator's award may be vacated or modified under §§ 10 or 11," and therefore a reviewing court is not permitted to engage in a review of an arbitral award for manifest disregard of the law. *Id*.

In the Eleventh Circuit there are two cases concerning the survival of non-statutory grounds for vacatur after *Hall Street*, but only one that directly involves manifest disregard. Both cases hold that non-statutory bases for vacatur are unavailable after Hall Street and one explicitly includes manifest disregard among the defunct non-statutory bases. In *Carey Rodriguez Greenberg & Paul, LLP v. Arminak*, 583 F. Supp. 2d 1288, 1290 (S.D. Fla. 2008), the U.S. District Court for the Southern District of Florida held that § 10 of the FAA provides the exclusive grounds for vacating an award pursuant to the FAA. The party arguing in favor of vacatur in that case asserted that the arbitral award violated public policy as the basis for vacatur. *Id*. The court held that, in light of *Hall Street*, it could not consider any non-statutory grounds for vacatur and violations of public policy are not among the exclusive statutory grounds provided in the FAA. *Id*. at 1290-91.

In *Waddell v. Holiday Isle, LLC,* No. 09-0040-WS-M, 2009 WL 2413668, *5 (S.D. Ala. Aug. 4, 2009), the U.S. District Court for the Southern District of Alabama held that manifest disregard of the law is not viable after *Hall Street*. The Court

held that manifest disregard of the law does not fall within § 10 of the FAA, and therefore it is an additional, non-statutory ground for vacatur. *Id*. Because the Supreme Court made clear that §§ 10 and 11 of the FAA provide the exclusive grounds for vacatur and modification, the court, citing the Fifth Circuit's decision in Citigroup, held that manifest disregard can no longer be relied upon as a ground for vacatur under the FAA. *Id*.

B. Circuits Trending Toward View That "Manifest Disregard" Survives as a Judicial Gloss on § 10 of the FAA

In the Third Circuit, there are three district court cases that reach the issue and hold that manifest disregard is shorthand for the FAA's § 10 grounds for vacatur, so the courts continue to perform the analysis. There are others that recognize the circuit split and decline to reach the issue.[18] But there is also one case in the Third Circuit that stated in *dictum* that the Supreme Court, in *Hall Street*, "reject[ed] the widely held judicial view that another ground was implicit in the FAA, namely, where the arbitration award was made in 'manifest disregard of the law.'" *Martik Bros., Inc. v. Kiebler Slippery Rock, LLC*, No. 08cv1756, 2009 WL 1065893, *2 n.2 (W.D. Penn. April 20, 2009).

The first of the three cases holding that manifest disregard survives as a judicial gloss on § 10 grounds is *Vitarroz Corp. v. G. WilliFood Int'l Ltd*., 637 F. Supp. 2d 238 (D.N.J. 2009). In *Vitarroz*, the U.S. District Court for the District of New Jersey held that manifest disregard was not abrogated by *Hall Street* but will continue to be applied as shorthand for §§ 10(a)(3) or 10(a)(4) of the FAA. *Vitarroz*, 637 F. Supp. at 245. The court makes clear that manifest disregard cannot continue as an additional non-statutory basis for vacatur. *Id*. The court held, however, that "in the absence of a Third Circuit directive otherwise," it will continue to apply manifest disregard as a means to enforce § 10 of the FAA. *Id*.

In *Silicon Power Corp. v. General Elec. Zenith Controls, Inc*., No. 08-4331, 2009 WL 3127759, *11 (E.D. Penn. Sept. 29, 2009), the U.S. District Court for the Eastern District of Pennsylvania held that "[t]he 'manifest disregard of the law' doctrine is not an independent, non-statutory ground for vacatur, but is shorthand for the grounds provided for vacatur provided by § 10(a)." As such, the court held, manifest disregard continues to be viable after *Hall Street* as shorthand for the statutory grounds provided by the FAA. Id.

In *Ario v. Cologne Reinsurance (Barbados), Ltd*., No. 1:CV-98-0678, 2009 WL 3818626, *5 (M.D. Penn. Nov. 13, 2009), the U.S. District Court for the Middle District of Pennsylvania held that it agreed with the Second Circuit's analysis in *Stolt-Nielsen* that manifest disregard is a judicial gloss on the specific grounds for vacatur enumerated in § 10 of the FAA and hence may continue to be applied in light of *Hall Street*. The court reasoned that "a claim that arbitrators acted in manifest disregard of the law is just another way of saying that the arbitrators 'exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.'" *Id*.

In the Seventh Circuit, the jurisprudence of the manifest disregard doctrine appears to have been unaffected by *Hall Street*. Even before the Supreme Court decided *Hall Street*, the Seventh Circuit rejected the view of manifest disregard as a non-statutory ground for vacatur but viewed it instead as a narrow doctrine that fits entirely within the first clause of § 10(a)(4), which provides for vacatur "where the arbitrators exceeded their powers." *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 268 (7th Cir. 2006). But it must be recalled that, in the Seventh Circuit, "manifest disregard of the law" is confined to cases where arbitrators "direct parties to violate the law." *Id*. at 269. The district courts in the Seventh Circuit that have reached the issue after *Hall Street* have concluded that the Seventh Circuit's version of manifest disregard survives *Hall Street* because, following *Wise*, it is shorthand for arbitrators exceeding their powers and so fits entirely within § 10(a)(4) of the FAA. *Joseph Stevens & Co., Inc. v. Cikanek*, No. 08 C 706, 2008 WL 2705445, *4 (N.D. Ill. July 9, 2008); *Raymond Prof'l,* 397 B.R. at 430-31; *Doerflein v. Pruco Securities, LLC,* No. 1:07-cv-0738-DFH-JMS, 2009 WL 232134, *2 (S.D. Ind. Jan. 30, 2009); *Williams v/ RI/WFI Acquisition Corp*., No. 06 C 2103, 2009 WL 383420, *2 (N.D. Ill. Feb. 11, 2009).

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The court recognized that *Hall Street* concerned contractual expansion of judicial review rather than judicial expansion, but reasoned that "[i]t would be somewhat inconsistent to say that the parties cannot contractually alter the FAA's exclusive grounds for vacating or modifying an arbitration award, but then allow the courts to alter the exclusive grounds by creating extra-statutory bases for vacating or modifying an award."

In several circuits, the case law has not yet developed to a point where any trend can be discerned with respect to how they will treat the doctrine of manifest disregard in light of the post-*Hall Street* circuit split. Still, a few courts provide some guidance as to how they may view the issue.

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C. Circuits In Which No Discernible Trend Has Yet Appeared

In several circuits, the case law has not yet developed to a point where any trend can be discerned with respect to how they will treat the doctrine of manifest disregard in light of the post-*Hall Street* circuit split. Still, a few courts provide some guidance as to how they may view the issue.

In the Fourth Circuit, there are two cases that discuss but decline to reach the issue. In both cases, while the court states that it is declining to decide whether manifest disregard remains a viable ground for vacatur, the court continues to entertain the argument and concludes that the petitioner failed to meet its burden of proof. In *Regnery Publ'g, Inc. v. Miniter,* 601 F. Supp. 2d 192, 195 (D.D.C. 2009), the U.S. District Court for the District of Columbia notes that some courts have held that manifest disregard is no longer viable after *Hall Street*. While declining to decide whether manifest disregard is still a viable ground for vacatur, the court conducted a manifest disregard inquiry and concluded that the allegations of the party petitioning for vacatur did not rise to the level of a manifest disregard for the law. *Id*. In *MCI Constructors, Inc. v. Hazen and Sawyer, P.C.*, No. 1:99CV2,1:02CV396, 2009 WL 632930, *5 n.8 (M.D.N.C. April 28, 2009), the U.S. District Court for the Middle District of North Carolina observed in a footnote that "[t]he *Hall Street* Court did not … determine whether common law grounds for vacatur, including 'manifest disregard' and 'essence of the agreement,' are permissible bases for vacatur independent of, or as a shorthand for, the grounds for vacating awards that are specified in the FAA." Nonetheless, the court went on, "assuming, without deciding, that [it] could vacate or remand the [arbitration award] for 'failing to draw its essence' from the Agreement," and found that the petitioner failed to carry its burden of proof. *Id*.

In the Tenth Circuit, apart from the previously discussed *Hicks* case in which the Tenth Circuit Court discussed but did not opine on the circuit split, there are three district court cases that also discuss without deciding the issue. In *DMA Int'l, Inc. v. Qwest Communications Int'l*, No. 08-CV-00358-WDM-BNB, 2008 WL 4216261, *4 (D. Colo. September 12, 2008), *aff'd* 585 F.3d 1341 (10th Cir. 2009), the U.S. District Court for the District of Colorado observed that *Hall Street* only addressed private expansion by contract (as opposed to judicial expansion) of the FAA's grounds for vacatur. Opining that it remains an open question whether *Hall Street* eliminates judicially created grounds for vacatur, the court observed that it "need not decide the difficult issue" because the party petitioning for vacatur failed to meet the standards of the judicially-created grounds of manifest disregard of the law and violation of public policy. *Id*. On appeal, the Tenth Circuit also declined to address the "interesting issue" of "[w]hether manifest disregard for the law remains a valid ground for vacatur" because it was "not central to the resolution of [the] case." *DMA Int'l, Inc. v. Qwest Communications Int'l, Inc.*, 585 F.3d 1341, 1344 n.2 (10th Cir. 2009).

In a pair of cases in the U.S. District Court for the District of Utah, the court appears to have suggested differing conclusions. In *Abbott v. Mulligan*, No. 2:06-CV-593, 2009 WL 2497386, *4 (D. Utah Aug. 13, 2009), the court held that neither private parties nor the judiciary can expand the grounds for vacatur beyond those provided in § 10 of the FAA. The court held, however, that the manifest disregard doctrine can be read within the bounds of §10. It proceeded to do just that by interpreting the petitioner's claim for vacatur based on manifest disregard of the law as shorthand for having argued that the arbitration panel violated § 10 of the FAA, so it continued to analyze the case under the manifest disregard standard. *Id*. In *Marketstar Corp. v. Prosper Bus. Dev. Corp.*, No. 2:07-CV-00132-DB, 2009 WL 2929390, *7 n.2 (D. Utah Sept. 8, 2009), by contrast, the court called into question the continued viability of manifest disregard as a ground for vacatur under any conceptual framework. In addressing the post-*Hall Street* circuit split, the court cited the Fifth Circuit's opinion in *Citigroup* calling into question "the utility of retaining the manifest disregard standard as 'shorthand' in light of the difficulty district courts have in deciphering the meaning of that phrase." *Id*. Quoting a 1961 opinion of the Ninth Circuit, the court indicated that it shares that court's reservations:

> The statutory language provided by the FAA itself provides better

> guidance than the judiciary's oft-repeated, after-applied gloss.... The grounds for vacatur should be moored to these words, and not to the lackluster gloss of the manifest disregard standard.

Id. Despite its express doubts about the continuing viability of the manifest disregard doctrine, the court wrote that it need not "enter [the] thicket" of this question because the petitioner had not presented sufficient facts to demonstrate that the arbitrator manifestly disregarded the law. *Id.* at *7.

IV. Conclusion

While the Supreme Court's decision in *Hall Street* significantly curtailed the recognition of the already-narrow doctrine of "manifest disregard of the law" as a ground for vacating an arbitration award under the FAA, the doctrine is not yet dead in several circuits. Though the doctrine has either been eliminated or called into serious doubt in the First, Fifth, Eighth, and Eleventh Circuits by virtue of *Hall Street*, the doctrine remains viable in at least the Second, Third, Seventh (in its unique form), and Ninth Circuits — with the Fourth, Sixth, and Tenth Circuits on the fence. The Supreme Court may have an opportunity to further clarify whether manifest disregard has any place in FAA jurisprudence when it decides the appeal of the Second Circuit's decision in *Stolt-Nielsen*. Until such time as the Supreme Court does settle the question, it will be important for counsel concerned with the viability of the doctrine to continue to monitor the developing landscape in the federal courts.▼

1 For a discussion of the impact of *Hall Street* on the debate over the enforceability of expanded review clauses, *see* Laura Accurso & Rachel W. Petty, *How Final Are Arbitration Awards?: The Enforceability of Expanded Review Clauses, ARIAS•U.S. Quarterly*, Vol. 15, No. 2 (2008).

2 *Wilko v. Swan*, 346 U.S. 427, 437 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

3 *See, e.g., Duferco Int'l Steel Trading v. T. Klaveness Shipping* A/S, 333 F.3d 383, 388 (2d Cir. 2003); *Black Box Corp. v. Markham*, 127 Fed. App'x 22, 25 (3d Cir. 2005); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995); *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150 (10th Cir. 2007); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1459 & n.5 (11th Cir. 1997).

4 *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349, 353-54 n.3 (5th Cir. 2009) (collecting citations); *see* also, *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 419 (6th Cir. 2008) (same). *But see Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 268 (7th Cir. 2006) (holding that manifest disregard doctrine fits entirely within first clause of § 10(a)(4) of FAA, which provides for vacatur where the arbitrators exceeded their powers).

5 *See, e.g., Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 123 (1st Cir. 2008) (citing pre-*Hall* precedent); *Stolt-Nielsen SA, Animalfeeds Int'l Corp.*, 548 F.3d 85, 91 (2d Cir. 2008) (same); *Coffee Beanery, Ltd.*, 400 Fed Appx. at 418 (same); *Hicks v. Cadle Company*, Nos. 08-1306, 08-1307, 08-1429, 08-1435, 2009 U.S. App. WL 4547803 at *7 (10th Cir. Dec. 7, 2009) (same); *Black Box Corp. v. Markham*, 127 Fed. App'x 22, 25 (3d Cir. 2005).

6 *Coffee Beanery*, 400 Fed. Appx. at 418; *accord Ramos-Santiago,* 524 F.3d at 123.

7 *Stolt-Nielsen*, 548 F.3d at 92 (*citing* pre-*Hall* authority); *accord DMA Int'l, Inc. v. Qwest Communications Int'l, Inc.*, 585 F.3d 1341, 1344-45 (10th Cir. 2009) (same); Ramos-Santiago, 524 F.3d at 124 (same); Coffee Beanery, 400 Fed. Appx. at 418 (same).

8 *Duferco Int'l Steel Trading*, 333 F.3d at 389; *Saipem America v. Wellington Underwriting Agencies*, 335 Fed.Appx. 377, 380 n.3 (5th Cir. 2009); *Coffee Beanery*, 400 Fed. Appx. at 418.; *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *DMA Int'l*, 585 F.3d at 1345.

9 *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 269 (7th Cir. 2006).

10 *Raymond Prof'l Group, Inc. v. William A. Pope Co.*, 397 B.R. 414, 428 (N.D. Ill. 2008).

11 *Stolt-Nielsen*, 548 F.3d at 92-93 (quoting pre-*Hall* Second Circuit precedent) (emphasis in original).

12 For a discussion of the effect that honorable engagement clauses have on manifest disregard scrutiny, *see* Natasha C. Lisman, *Honoring the Honorable Engagement Clause in Judicial Review of Arbitral Awards: Should The Honorable Engagement Clause Preclude Any Scrutiny for Manifest Disregard of the Law?*, ARIAS•U.S. Quarterly, Vol. 14, No. 3, pp. 11-16 (2007).

13 *Global Reinsurance Corp. of Am. v. Argonaut Ins. Co.*, 634 F. Supp. 2d 342, 349 (S.D.N.Y. 2009).

14 *Hall Street*, 128 S. Ct. at 1400, 1401, 1403-04, and 1406.

15 *Id.* at 1404 (internal citations omitted).

16 *See also Augusta Capital, LLC v. Reich & Binstock, LLP*, No. 3:09-CV-0103, 2009 WL 2065555, *4 n.4 (M.D. Tenn. July 10, 2009) (citing *Coffee Beanery* and *Grain* for proposition that whether manifest disregard survives *Hall Street* in Sixth Circuit is an open question).

17 It should be remembered, however, that the Seventh Circuit, as discussed above, takes an extraordinarily narrow view of the doctrine that is unlike the narrow view of other circuits.

18 *See, e.g., Franko v. Ameriprise Financial Svcs., Inc.*, No. 09-09, 2009 WL 1636054, *4 (E.D. Pa. June 11, 2009); *Fruehauf Trailer Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 414 B.R. 36, 40-42 (D. Del. 2009).

Though the doctrine has either been eliminated or called into serious doubt in the First, Fifth, Eighth, and Eleventh Circuits by virtue of *Hall Street*, the doctrine remains viable in at least the Second, Third, Seventh (in its unique form), and Ninth Circuits — with the Fourth, Sixth, and Tenth Circuits on the fence.

Tech Tips

Social Networking and Reinsurance Arbitrators

Larry P. Schiffer


Larry P. Schiffer

Among the hottest technologies today is social networking. What is social networking you ask? Facebook, MySpace, LinkedIn, Twitter, Plaxo, and other internet-based portals that allow individuals and businesses to interact with each other and update each other on their activities. But this is for kids, right? Wrong! Nearly every major company has a Facebook page and a Twitter account. CNN uses Twitter regularly to update breaking news. New music, movies, and sporting events often launch on social media and networking outlets.

So what does this have to do with reinsurance arbitration and reinsurance arbitrators? Social networking is yet another tool in the arbitrator's tool box that allows arbitrators (and practitioners) to communicate, collaborate, and stay in contact with each other. If used carefully and thoughtfully, social networking can assist arbitrators in gaining knowledge, sharing experiences (with confidentiality considerations properly addressed), and providing additional exposure to potential parties for future engagements.

Some social networking is meant for business. For example, LinkedIn describes itself as "an interconnected network of experienced professionals from around the world … You can find, be introduced to, and collaborate with qualified professionals that you need to work with to accomplish your goals." Some of you have already figured this out because you have LinkedIn profiles. A search for "arbitrator" comes up with 4,601 results as of January 31, 2010. A search for "arbitrator" and "reinsurance" comes up with 86 entries. By joining LinkedIn (basic account is free) and setting up a profile, your information will be accessible to thousands of other LinkedIn users that may be searching for insurance and reinsurance arbitrators. You can also join groups that have been established by LinkedIn users on topics of interest. There are nineteen groups with the subject of "arbitrators" as a topic, with a few specifically focused on insurance and reinsurance arbitration.

Facebook is a social network originally designed by and for college students to connect with each other. As there are now millions of people on Facebook, including most major corporations and news outlets, Facebook has transformed itself into a much broader platform for connecting and sharing with others. Facebook describes itself as "[g]iving people the power to share and make the world more open and connected." A Facebook profile allows you to list your biographical information and then lets you connect with individuals (as "friends") and with companies or news outlets as fans. When your friends or fan pages update, you receive that update on your news feed on your Facebook home page. While it does not have the business orientation of LinkedIn, there is quite a bit of business going on in Facebook. Nevertheless, there are many fewer hits for "arbitrator" than on LinkedIn, but there are some arbitrators who have set up pages promoting their practice. Facebook also has groups, but most are social groups.

Twitter is something altogether different from Facebook and LinkedIn. Twitter asks its users to tell the world what is happening with them at that moment in a 140 character sound bite. While it sounds almost inane, news is now broadcast over Twitter faster than conventional media outlets. In fact, on Google's search engine, if you type in a topic, you get the live Twitter feed for that topic as it is happening. Twitter also feeds into Facebook and other social networking technologies. There are some arbitration organizations using Twitter, but this service has not been a hotbed of reinsurance arbitration activity. Whether it will develop into a resource for reinsurance disputes only time will tell. A search of Twitter topics, however, does reveal a bunch of users tweeting about reinsurance issues. Unfortunately (or fortunately), not much comes up on reinsurance arbitration.

What arbitrators need to know is that social networking is yet another way to use technology to promote their skills and availability, collaborate and connect with other arbitrators and potential clients, and keep up with issues and topics of interest. Is it for everyone? Probably not, but this technology is not going away and is growing exponentially. There are rules of the road that you should follow and obviously confidentiality and privacy are important issues. Only post what you would be happy to see on the front page of the National Enquirer (including profile pictures). If you are game to expand your outlets, why not explore some of the social networking technology that is out there and see if it is for you?▼

Federal Court Denies Pre-Award Arbitrator Disqualification for Alleged Anticipatory Breach of Confidentiality Agreement

case notes corner

Ronald S. Gass

Ronald S. Gass

Occasionally, the same party-arbitrator is appointed by one side to serve in separate but related reinsurance disputes involving, for example, different layers of a reinsurance program governed by separate treaties. These multiple appointments rarely trigger pre-award disqualification motions based on bias, partiality, or lack of disinterestedness because the federal courts have routinely held that such challenges must await post-award proceedings. However, imaginative pre-award disqualification motions aimed at avoiding this prevailing rule do surface from time-to-time such as the novel breach of contract theories proffered in a recent Illinois federal district court case.

The insurer in that litigation had ceded certain risks to a reinsurer pursuant to a 1998 variable quota share agreement. Although the final treaty wording was not subsequently prepared, the quota share slip did mention the inclusion of an arbitration clause, and the parties agreed to look to and rely on the previous year's treaty for that wording. The arbitration clause was fairly typical, requiring tripartite arbitration before "disinterested" arbitrators. In addition to the 1998 quota share agreement, the insurer was also protected by a 1998 excess of loss ("XOL") treaty.

In 2006, disputes arose, and the insurer demanded arbitration under both of the 1998 reinsurance agreements. The reinsurer counter-demanded arbitration and appointed the same party-arbitrator in both matters. It also requested that the disputes be consolidated, but the insurer rejected this request. Subsequently, the 1998 XOL arbitration panel heard and also rejected the reinsurer's consolidation motion, resulting in two separate arbitrations. The 1998 quota share arbitration was put on hold, and no arbitration panel was convened.

In the XOL arbitration, the parties and the panel executed the standard ARIAS-U.S. Confidentiality Agreement, which provided that "arbitration information," broadly defined, should be kept confidential during and after the conclusion of the arbitration proceeding. About four months after the XOL arbitration ended in March 2009, the reinsurer's arbitrator contacted the insurer's arbitrator for the quota share arbitration about selecting an umpire. The insurer objected, raising concerns about the duties of the reinsurer's arbitrator under the Confidentiality Agreement and whether she was "disinterested" as required by the arbitration clause. When the reinsurer's arbitrator did not withdraw, the insurer filed a pre-award action in federal district court seeking (1) her disqualification in the quota share arbitration; (2) a finding that the reinsurer was in breach of the Confidentiality Agreement for appointing the same arbitrator in the second arbitration; and (3) enjoining the reinsurer from proceeding in the quota share arbitration if its party-arbitrator remained on the panel. The reinsurer cross-moved to dismiss all of the insurer's claims for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) and petitioned the court to appoint an umpire and compel the insurer to resume the arbitration.

First, the Illinois federal district court addressed the insurer's disqualification motion. Citing the prevailing rule that "[t]he time to challenge an arbitration, on whatever

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Occasionally, the same party-arbitrator is appointed by one side to serve in separate but related reinsurance disputes involving, for example, different layers of a reinsurance program governed by separate treaties.

Mr. Gass is an ARIAS•U.S. Certified Umpire and Arbitrator. He may be reached via e-mail at rgass@gassco.com or through his Web site at www.gass-co.com.

Although the insurer's pre-award efforts to disqualify the reinsurer's arbitrator failed in this case, its alleged breach of contract claims grounded in the arbitration clause's "disinterested" requirement and anticipatory breach of the Confidentiality Agreement are novel theories that, under the right circumstances, could succeed in circumventing the prevailing rule that all such challenges must await post-award proceedings.

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grounds, including bias, is when the arbitration is completed and an award rendered," the court agreed that the insurer's motion to disqualify the reinsurer's arbitrator for lack of disinterestedness was tantamount to a challenge for bias or lack of qualification, actions that typically must be brought post-award. The novel twist here was that the insurer argued that its pre-award challenge was timely because it was based on a breach of the contractual "disinterestedness" requirement in the arbitration clause. The court, however, dismissed this prong of the insurer's motion as "premature" concluding that the insurer's breach of contract claim was essentially the same as challenging the arbitrator on the ground of bias or partiality, which is generally not permitted pre-award.

Next, the court considered the insurer's two anticipatory breach of the Confidentiality Agreement theories, repudiation and "inevitability." Because the reinsurer's party-arbitrator had not made any unequivocal statements suggesting that she intended to breach the first arbitration's Confidentiality Agreement, the court found this argument to be factually unsupported. As for the second "inevitability" prong, the insurer sought to persuade the court that the reinsurer's arbitrator must inevitably disclose confidential information regarding the 1998 XOL panel's decision-making process to the 1998 quota share panel. By taking the appointment in the second arbitration, the reinsurer's arbitrator had undertaken a voluntary act that would place her in a position where she must breach the Confidentiality Agreement. The problem with this theory was that the insurer was unable to detail any facts making disclosure "inevitable" such that the arbitrator would be unable to perform her duties as party-arbitrator without breaching the Confidentiality Agreement. The court opined that the reinsurer's arbitrator could present her views to the second panel without necessarily referring to what happened in the prior arbitration, and noted that she had not expressed any concern over her ability to keep that information confidential. "The mere fear of a future breach in this case," according to the court, "is not a cause of action."

Having denied the insurer's disqualification motion, the court addressed the reinsurer's petition that an umpire be appointed and that arbitration be compelled. The arbitration clause required that each party appoint its arbitrator within 30 days, and within 30 days of the party-arbitrators' appointment, they were to agree on an umpire. Failing that, the arbitrators were to exchange slates of three umpire candidates, strike two, and then draw lots. While there was no specific deadline for the slate exchange, the reinsurer did send three names to the insurer, but there was no response. The court, mindful of the 30-day time frames in the arbitration clause, held that the insurer's more than four-month delay amounted to a lapse in naming the umpire. Therefore, pursuant to § 5 of the Federal Arbitration Act, it appointed by lot one of the reinsurer's three umpire candidates, and ordered the parties to proceed with the arbitration.

Although the insurer's pre-award efforts to disqualify the reinsurer's arbitrator failed in this case, its alleged breach of contract claims grounded in the arbitration clause's "disinterested" requirement and anticipatory breach of the Confidentiality Agreement are novel theories that, under the right circumstances, could succeed in circumventing the prevailing rule that all such challenges must await post-award proceedings. For example, under a very similar factual scenario, pre-award disqualification was granted by the same Illinois federal district court (albeit by a different judge) for lack of disinterestedness when it was proven that the arbitrator had actually breached the prior arbitration's Confidentiality Agreement, thereby rebutting the presumption that the arbitrator "could disregard knowledge he already had." Trustmark Insurance Co. v. John Hancock Life Insurance Co., No. 09 C 3959, 2010 U.S. Dist. LEXIS 4698, *12 (N.D. Ill. Jan. 21, 2010) (arbitrator held not "disinterested" in second related arbitration because court found that he breached the first arbitration's Confidentiality Agreement).

Trustmark Insurance Co. v. Clarendon National Insurance Co., Case No. 09 C 6169, 2010 U.S. Dist. LEXIS 8078 (N.D. Ill. Feb. 1, 2010).

Recently Certified Arbitrators

Paul Buxbaum

With more than 30 years of experience in the industry, Paul Buxbaum, President of Buxbaum, Loggia and Associates, Inc., has held positions from multi-line field adjuster to assistant vice president, where his duties included handling reinsurance claims and claims of direct written business of Fortune 500 insureds, before co-founding Buxbaum Loggia in 2000.

Mr. Buxbaum's vast knowledge comes from handling reinsurance claims on Professional Liability (E&O), General Liability (Primary, Excess and Umbrella), Worker's Compensation, Auto, Property, Medical Malpractice, Asbestos, and Hazardous Waste (including Environmental Impairment Liability).

Key experience comes from working at companies such as Devonshire Group, where he served as Assistant Vice President; Trenwick America Reinsurance Company, where Mr. Buxbaum served as Assistant Secretary; and Travelers Insurance Company, where he was Home Office Claims System Coordinator. He also worked for Fireman's Fund and Underwriters Adjusting Company, a subsidiary of Continental Insurance Company.

Over the years, Mr. Buxbaum has worked with a variety of brokers in all aspects of reinsurance, such as placement, on-going programs and discontinued operations, including developing commutation strategies.

Mr. Buxbaum graduated from the University of Hartford, and holds a Certificate of General Insurance (INS); he also holds an Associate in Claims (AIC); and is a Chartered Property and Casualty Underwriter (CPCU).

At Buxbaum Loggia, he is a team leader for professional liability and contract compliance inspections. His additional responsibilities include commutation support, reinsurance litigation management and client contact.▼

Joseph Loggia

Joseph Loggia began his insurance career as a field adjuster. During the past 35 years, he has served in various capacities with companies, brokers and consultants before co-founding Buxbaum, Loggia and Associates, Inc. in 2000.

Mr. Loggia's hands-on experience includes management of ceded and assumed discontinued reinsurance portfolios, audit/review assignments for major domestic and international reinsurers, and settlement of asbestos and environmental claims.

At prior service organizations, as the Senior Vice President, Mr. Loggia supervised professional liability specialists, reported major losses to primary carriers and treaty reinsurers, and led reinsurance audits. He also spent more than 14 years working for companies such Liberty Mutual, Home Insurance, Northwestern National and Armco Group in a number of senior management positions.

After graduating from the University of California, Los Angeles, Mr. Loggia attended the University of LaVerne, College of Law. He also served as a captain in the U.S. Army.

At Buxbaum Loggia, Mr. Loggia is a team leader for casualty and accident/health inspections. His additional responsibilities include settlement strategy, expert testimony and cedent liaison.▼

Paul Buxbaum

Joseph Loggia

Profiles of all certified arbitrators are on the website at www.arias-us.org

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Bernard J. Turi

Bernard J. Turi

Bernard Turi has been in the insurance industry for over 22 years. Prior to entering insurance, Mr. Turi worked as an associate in a litigation firm in Upstate New York, handling a variety of matters including school liability defense, personal injury and medical malpractice cases.

Mr. Turi commenced his insurance career at Utica Mutual Insurance Company (a member of the Utica National Insurance Group) in 1987. After a series of promotions to progressively more responsible roles in the Claim Department, he was promoted to his current position in 2004. As Vice President, Associate General Counsel and Claims Attorney, Mr. Turi is responsible for and has extensive experience in a variety of matters, including:

- Reinsurance Litigation and Arbitration
- Asbestos and Environmental claims
- Fidelity and Surety Bonds (construction, coal reclamation)
- Financial Institution Bonds
- Employment Litigation
- Professional Liability (Printers)
- Political Affairs

Prior to his current role, Mr. Turi was the Utica Mutual's Director of Liability, responsible for the management of high exposure bodily injury liability as well as professional liability claims (School Boards and Agent's and Broker's). He previously served on the Claim Committee for New York's Medical Malpractice Insurance Association.

Mr. Turi is a graduate of Niagara University with a Bachelors Degree in Political Science (1982) and Syracuse University College of Law, where he obtained his Juris Doctor (1985). He is a member in good standing of the New York State Bar and the Federal Court for the Northern District of New York. Mr. Turi is currently the Second Vice Chair of the New York Insurance Association and a member of its Board of Directors.▼

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TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

** Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.*

*** As a benefit of membership, you will receive the ARIAS·U.S. Quarterly, published 4 times a year. Approximately $40 of your dues payment will be allocated to this benefit.*

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $250 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
PO Box 9001, Mt. Vernon, NY 10552

Payment by credit card (fax or mail): Please charge my credit card:
(*NOTE: Credit card charges will have 3% added to cover the processing fee.)*

☐ AmEx ☐ Visa ☐ MasterCard in the amount of $_____

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

By signing below, I agree that I have read the By-Laws of ARIAS•U.S., and agree to abide and be bound by the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org in the About ARIAS section.

_____

Signature of Individual or Corporate Member Applicant

ARIAS U.S.
P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

Administration