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ALSO IN THIS ISSUE

- *Reinsurer's Late-Notice Defense*
- *English Lawyers Do Qualify as Arbitrators*
- *Should Arbitrators Follow Legal Decisions?*

ARIAS·U.S. 2018 Fall Conference
November 8–9, 2018

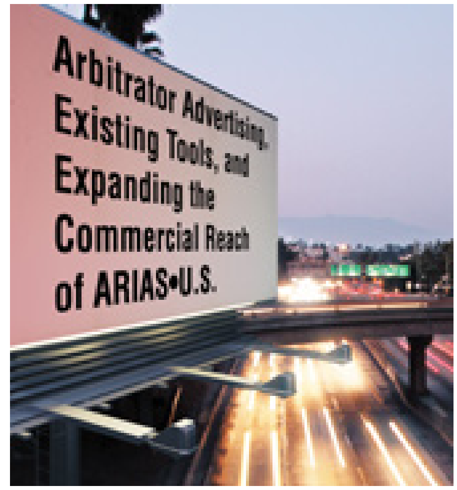
Breakout Sessions Include:

- Efficient Data Security - The Use of "Deal Rooms" in Arbitration
- Response: Issuance & Enforcement of Arbitral Subpoenas
- Third Party Litigation Funding and Its Impact on Insurers
- Emergency First Aid: How to Quickly Resolve Hearing "Burns"
- Cheaper? Faster? Really? Getting Arbitration Back on Track
- When Preclusion is in Play

See page 28 for an insider's guide to sightseeing in Brooklyn.

ARIAS·U.S. has secured a block of rooms at a reduced rate of $264.00 USD at the New York Marriott at the Brooklyn Bridge. To make your room reservation, visit bit.ly/ARIAS2018Fall or call 1-877-303-0104.

FEATURES



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 a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the *Quarterly* may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the *Quarterly* may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

The insurance and reinsurance arbitration community has long been accused of being a closed society. This is an issue that the ARIAS Board of Directors has been addressing for years and that prompted the advent of the newer arbitrator's program.

Would arbitrator advertising make a difference? Does advertising make sense as ARIAS seeks to expand into insurance arbitrations?

In a thought-provoking article, Susan Grondine-Dauwer of SEG-D Consulting, LLC explores these questions and related issues with a panel of company executives, lawyers and arbitrators. The roundtable included Bill Bouvier of Riverstone, Patricia Taylor Fox of AIG, Amy Kallal of Mound, Cotton, Wollan & Greengrass, Rob DiUbaldo of Carlton Fields, and arbitrators Chuck Ehrlich, Sylvia Kaminsky, and Jonathan Rosen. Without giving away too much—you need to read the article—the roundtable made some very interesting suggestions for expanding the ARIAS arbitrator profile form on the website to include information about arbitration experience, not just work experience.

The late-notice defense in reinsurance disputes has had its ups and downs for decades. Tancred Schiavoni and Vincent Weisband from O'Melveny & Myers LLP provide some interesting commentary on a recent jury trial that included the late-notice defense.

You may recall there was an interesting case in the English courts late last year about whether lawyers specializing in insurance and reinsurance qualified under arbitration clauses requiring experience in the industry. Jonathan Sacher wrote about the case in the Q3/Q4 2017 issue of the *Quarterly*. Now Jonathan and his colleague David Parker, both from Bryan Cave Leighton Paisner LLP reprise that article with an update of the decision. The gist of it is that if you have 10 years of experience of insurance and reinsurance, that experience can be gained by legal practice in insurance and reinsurance. So, if you are in London and want to qualify as an arbitrator under that kind of clause, you don't have to run in-house as we do in the United States.

At the spring ARIAS conference, there was a presentation on whether arbitration panels have to follow case law and the ramifications of not following case law. In this issue, Bruce Friedman, from Rubin, Fiorella & Friedman LLP, has turned his conference paper into an article examining a number of cases that, in his view, affect custom and practice in the industry. Unsurprisingly, Bruce has some strong opinions. I invite you to write your own article if you disagree.

The latest *Quarterly* contained a highly technical but important article on nanotechnology and mesothelioma. The article scared me a bit, so I asked Keith Bradley, a partner of mine who used to work in the nanotechnology industry as a scientist, to take a look and give me his thoughts. While he agrees that this is an important topic for insurers and reinsurers to watch as an emerging risk, his response indicates that he doesn't think the sky is falling.

This issue also includes an interesting article from Jack Damico, an ARIAS-certified arbitrator, but with a twist. Those of you who know Jack know that he is a CPA and a forensic accountant, having founded Matson Driscoll & Damico LLP, his former firm. In his article, Jack walks us through the decision-making thought processes of forensic accountants and how they use their skills to resolve insurance and reinsurance disputes. Those of us who are not mathematically inclined can learn something from this unique perspective.

This issue also contains our regular "Tech Corner" column from the ARIAS Technology Committee. Royce Cohen and Jennifer Zaluski of Tressler LLP have pulled together some of the materials from the technology breakout session at the 2018 Spring Conference into an article on how to keep your data secure. If you missed the technology breakout session, you can now catch up on password vaults and how to remove metadata from documents.

Speaking of the spring conference—please also take time to find yourself in the pictures on pages 22-23. If you couldn't make it to The Breakers, some of the conference highlights have been summarized for you.

Finally, Suman Chakraborty of Squire Patton Boggs (U.S.) LLP is back with his second take on Brooklyn, the site of the 2018 Fall Conference. In this installment, Suman takes us to all the hot places to eat and see in downtown Brooklyn and the surrounding areas. If you have adventure in your heart and $2.75 in your pocket, you can jump on the subway and head to Coney Island and visit the New York City Aquarium, which has been renovated after being devastated by Hurricane Sandy, or the original Nathan's Famous near Luna Park, where you can eat a hot dog and go on some of the new amusement rides. Either way, I look forward to seeing you in Brooklyn in November.

— Larry P. Schiffer

Roundtable Symposium: Arbitrator Advertising, Existing Tools, and Expanding the Commercial Reach of ARIAS•U.S.

Moderated by Susan Grondine-Dauwer

Tucked away toward the end of the ARIAS•U.S. Code of Conduct is a seldom-discussed canon relating to arbitrator advertising. This has rarely been a topic at ARIAS conferences, perhaps because, historically, ARIAS-certified arbitrators have tended not to engage in traditional direct advertising.

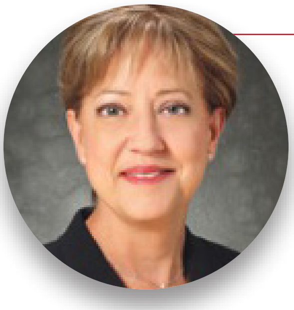
Canon IX (Advertising) requires that arbitrators be truthful in advertising their services and availability to accept appointments. While precluded from soliciting specific case appointments and from promising results, arbitrators are free to market themselves in a general and open manner provided they accurately describe their skills and/or qualifications.

A number of ARIAS-certified arbitrators indirectly advertise themselves on their own websites by publishing articles and sharing their knowledge and experience through participation in ARIAS and other industry events. Most ARIAS-certified arbitrators, however, rely on having their services and qualifications promoted by ARIAS through their inclusion in the certified arbitrator listing on the ARIAS website and within the bio and profile section of the Online Arbitrator Search System.[1]

This approach to promoting arbitrators is in stark contrast to law firms and other service providers that have mastered the art of marketing and advertising, using everything from print ads and brochures to the pronouncement of case involvement and victories. It is accepted practice for firms to highlight the talents and accomplishments of their lawyers and make representations as to their specific areas and levels of expertise. The marketplace relies, in part, on these efforts to help gain information and insights into the qualifications and experience of individual lawyers and the capacity of firms to represent purchasers of legal services.

For myriad reasons, this has not been the practice within the ARIAS arbitrator community.

A group of arbitrators, lawyers and company executives came together recently to discuss the current norms of arbitrator advertising and whether they should change in light of the steady certification of new arbitrators as well as the potential expansion of ARIAS' reach into other commercial sectors



Susan Grondine-Dauwer has 30 years of professional and executive experience within the insurance and reinsurance industry, including roles as general counsel, chief claims officer, board member, officer, treasurer, and corporate secretary. She is an ARIAS•U.S. certified arbitrator and serves on the ARIAS Arbitrators Committee and the Publications Committee. She has presented at domestic and international conferences and academic meetings concerning insurance, reinsurance, arbitration and litigation, and run-off management issues.

(such as direct insurance disputes). Participating from the company side were Bill Bouvier of RiverStone and Patricia Taylor Fox of AIG; Amy Kallal of Mound, Cotton, Wollan & Greengrass LLP and Rob DiUbaldo of Carlton Fields represented the legal services side; and Chuck Ehrlich, Sylvia Kaminsky, and Jonathan Rosen provided perspectives as arbitrators.

First up was the topic of present-day advertising and marketing by ARIAS-certified arbitrators.[2] Most within the group were quick to articulate that direct marketing by arbitrators is viewed as unseemly and therefore is simply not done. Whether because of the perceived indecorous nature of the activity or the discomfort of arbitrators with self-promotion, advertising has not developed into an accepted practice.

Bill Bouvier and Patricia Taylor Fox dismissed the effectiveness of direct approaches, preferring to rely on their own research into the expertise and qualifications of individual arbitrators and noting the role that ARIAS and other industry organizations play in allowing for personal interaction with, and assessment of, arbitrators. In other words, companies have their own processes for evaluating and retaining arbitrators and thus have little interest in arbitrators presenting themselves directly. Rob DiUbaldo and Amy Kallal, although more open to receiving direct advertising or marketing communications from arbitrators, acknowledged that arbitrator retention is driven more by clients than by lawyers.

The arbitrators (Chuck Ehrlich, Sylvia Kaminsky and Jonathan Rosen) felt advertising to be unnecessary, but they were completely comfortable with arbitrators relying on "reputational" advertising. There was a consensus among them that knowledge about any given arbitrator was best obtained from observation, interaction, and market reputation. This, they felt, was the main process for identifying and selecting arbitrators (as well as for arbitrators to recommend others for service). Any direct advertising of an arbitrator's industry reputation and personal brand was considered superfluous to the community and unconnected to the number of appointments an arbitrator receives.

Because most in the group believed that marketing and advertising would generally be a waste of each other's time, we then focused on the ARIAS Online Arbitrator Search System, which all agreed was a key resource for finding qualified arbitrators with specific areas of expertise, line of business experience, or other subject specialty. The profiles are considered valuable, but by no means as robust or helpful as they might otherwise be. There was general agreement that the profile system has technical limitations that preclude arbitrators from fully setting forth not only their employment experience but also the experience gained from their service in arbitration cases (the latter category being completely absent from the current form).

For example, the number of characters is limited in some sections, as are the options for subject matter experience. The lawyers within the group were quick to note that some arbitration clauses are very specific as to the subject matter qualifications of the arbitrators and felt that the profile form could certainly be enhanced to allow arbitrators to list more areas of exposure and experience as applicable rather than a few predominant areas as it currently does (i.e., subject matter experience described within a preset listing and percentage chart).

Most striking, however, is that the current profile system is designed to lay out the details of an arbitrator's work history, but not the experience and education acquired in the actual service of arbitration. It shows searchers the number of cases in which an arbitrator has been involved, but this number is only partially helpful when looking for the right arbitrator for your case. It allows arbitrators to list the number of cases in which they served over the years within various categories of procedural completeness, but has no designated space to describe the subject matter knowledge and specific skills obtained from those cases.

All roundtable participants agreed that building out this section of the profile system to enable arbitrators to track and promote their "in-service" experience would be immensely informative and helpful to companies and lawyers in their research and evaluation of potential candidates.

In the end, an arbitrator's personal brand is dictated by reputation and industry profile and historically has not been shaped through advertising and marketing campaigns. But with ARIAS being a key resource for identifying arbitrators with particular qualifications and experience, both the association and its members would do well to consider updating the arbitrator search system along with implementing any other enhancements or growth initiatives ARIAS can support.

As ARIAS works to extend its reach to the resolution of direct insurance cases, arbitrators will need assistance in raising awareness of their individual and collective qualifications and creating new

opportunities for observation, interaction, and self-promotion before a larger audience.[3] This new marketplace most surely will not have the same level of reputational awareness of the ARIAS-certified arbitrator community. While many within the ARIAS community also have experience in, or currently work within, the world of direct insurance litigation, many arbitrators won't have this broader connection.

ARIAS will need to assist arbitrators in these efforts. This may even include encouraging arbitrators to get more comfortable with traditional direct advertising and marketing, tactics previously considered unnecessary or taboo.

NOTES

1. ARIAS has a little-known policy of prohibiting arbitrator advertising in its print materials, on its website, or through event sponsorships. Any arbitrator advertising and marketing would need to be through direct or other third-party channels. There was no impetus from the group to seek changes to the current policy.
2. As diverse as the current pool of ARIAS-certified arbitrators is, so, too, are the styles, abilities and comfort levels of the arbitrators with self-promotion and marketing.
3. Arbitration and mediation organizations such as the American Arbitration Association, JAMS, FedArb, and the International Institute for Conflict Prevention & Resolution advertise the services of their members to the commercial marketplace. They promote their administrative services as well as their lineup of qualified and vetted professionals. ARIAS doesn't offer the same arbitrator administration or management or advertise itself as a service provider in the same way these organizations do. This may need to change if ARIAS decides to expand into other commercial sectors.

No Harm, No Foul: Jury Rejects Reinsurer's Late-Notice Defense

By Tancred V. Schiavoni III and Vincent Weisband

Rarely, if ever, does a reinsurer's late-notice defense reach a jury; when one does, the lessons that flow from trial can be valuable. This is especially so when the jury rejects that defense—leaving the reinsurer on the hook for tens of millions of dollars—and a federal judge then denies the reinsurer's motion for a new trial. A New York federal court's recent decision offers an unusual, up-close glimpse of the bar that a late-notice defense may have to clear in a jury trial.

In *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, No. 6:09-cv-853 (N.D.N.Y. Feb. 28, 2018), Utica sought reimbursement from its reinsurer, Fireman's Fund, for a 2007 settlement involving asbestos-related claims from the 1960s and 1970s. But Utica waited until mid-2008—more than a decade after it was aware of the asbestos claims—before notifying Fireman's Fund. Among the many points of contention in the long-running dispute, Fireman's Fund argued that Utica's claims were barred due to untimely notice. U.S. District Court Judge David Hurd ordered a jury trial, deeming late notice to be an issue of fact requiring a fact-finder to make credibility determinations.

So it was that for 2½ weeks last fall, a federal jury heard evidence on a defense that, in the reinsurance context, is rarely litigated. Four experts, a dozen fact witnesses, and three hours of deliberations later, the jury delivered a $64.1 million win for Utica. When Fireman's Fund moved for a new trial, Judge Hurd sustained the jury's verdict. His rationale was telling.

In analyzing the viability of Fireman's Fund's late-notice defense, Judge Hurd held that lateness alone is an insufficient basis for avoiding liability. Rather, the reinsurer must prove "both late notice and either material breach or demonstrable prejudice."[1] Judge Hurd concluded that a reasonable jury could have found that Fireman's Fund failed to satisfy either component of the second prong—demonstrable prejudice or material breach.

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Vince Weisband is of counsel in the New York office of O'Melveny & Myers. He has represented and counseled companies in a variety of complex civil matters, including insurance coverage disputes, reinsurance disputes, general commercial disputes, and personal injury and products liability actions.

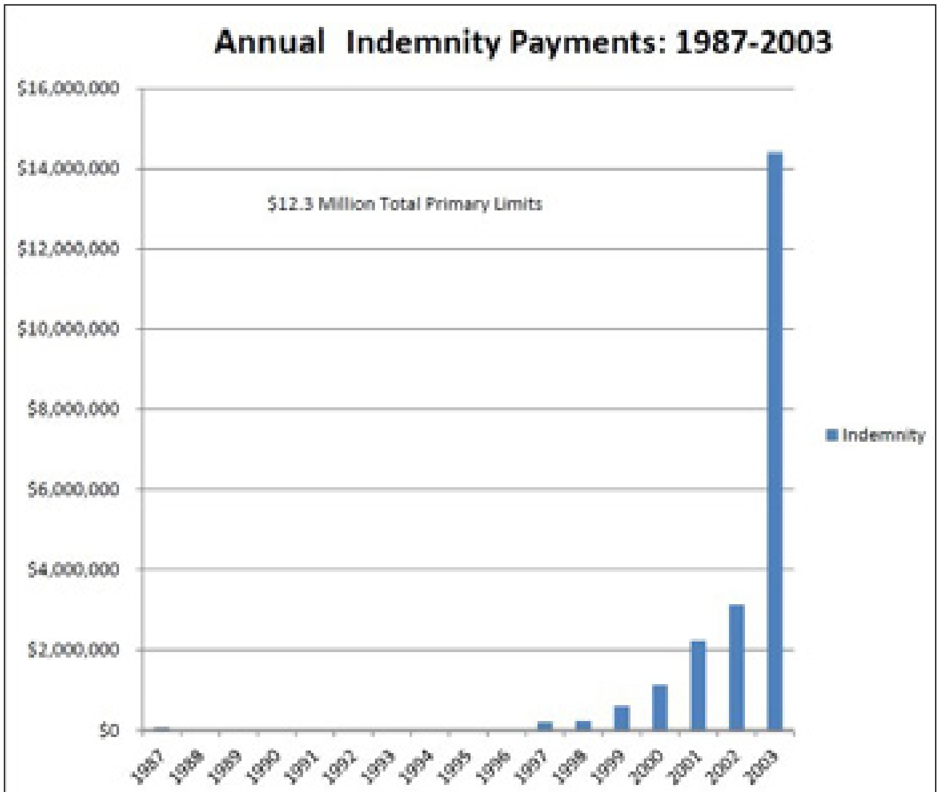
Demonstrable Prejudice

With respect to demonstrable prejudice, the court held that "[p]rejudice is tangible economic injury and demonstrable prejudice means that specific, tangible economic injury is shown to have resulted from the late notice, as opposed to a claim of speculative or hypothetical injury."[2] Fireman's Fund contended it was prejudiced by having entered into commutations with its own reinsurers prior to Utica's having given notice and, as a result, Fireman's Fund collected less money from them than it would have if Utica had given timely notice. Utica disputed that Fireman's Fund would have acted any differently or collected any more had it received earlier notice.

Fireman's Fund offered testimony from a finance employee to explain the commutations and why Fireman's Fund believes it received less than it would have had notice been given sooner. Utica challenged this testimony through cross-examination. No one involved in the commutation of Fireman's Fund's own reinsurance was called to testify, nor was anyone involved in the underwriting of Fireman's Fund's reinsurance to Utica called to testify. Both sides offered expert testimony on late notice.

Judge Hurd held that the jury did not act unreasonably in concluding that Fireman's Fund failed to satisfy the demonstrable prejudice standard, for several reasons. First, he found it noteworthy that Fireman's Fund "presented no witness involved in any of [its] actual negotiations with its commuting reinsurers."[3] The implication was that the evidence offered of prejudice was more speculative or hypothetical because no witness from the period in question testified.

Second, Judge Hurd found that a reasonable jury could have accorded little



Spending by cedent before notice.

to no weight to the Fireman's Fund fact witness on the basis that he did not take into account the following: (1) that even if Fireman's Fund had notice, it may have asserted an affirmative defense and refused to pay Utica; (2) any objections to payment that Fireman's Fund's retrocessionaires may have asserted; (3) that other reinsurers were insolvent at the time of their commutations; and (4) that when notice was allegedly due, the cedent had paid only about $100,000 over the previous 10 years. At the rate that Utica had incurred costs before giving notice, the court observed, "it would have taken over 10,000 years to reach Fireman's Fund's reinsurance layer."[4] On the other hand, Utica had paid indemnity in excess of the primary limits by 2003 and did not provide Fireman's Fund with notice until 2008.

Third, Judge Hurd observed that a reasonable jury could have rejected Fireman's Fund's position that it would have factored Utica's claims into its commutation negotiations since the reinsurer attributed zero dollars in liability for commutation of the $90 million in limits that Fireman's Fund had written as a direct insurer of the underlying policyholder. Judge Hurd thus concluded that a reasonable jury could have found no reason to believe Fireman's Fund would have treated the reinsurance claim differently than it did when it acted as a direct insurer.[5] And, even after Fireman's Fund received formal notice of Utica's claim, it did not take the claim into account in the two subsequent commutations.[6]

Material Breach

To show a material breach, Judge Hurd reasoned that the reinsurer needed to demonstrate that Utica was grossly negligent or reckless in providing notice.[7] Thus, Fireman's Fund "had to show more than an inadvertent lapse in routine notification procedures or even mere negligence. Instead it had to show a failure to implement procedures such that Utica willfully disregarded the risk to reinsurers and is guilty of gross negligence."[8]

Fireman's Fund sought to satisfy this standard by contending that Utica had no written or oral procedures for providing notice, that it failed to conduct even a basic search for applicable reinsurance as the claim grew, and that it had shoddy document retention policies. Utica offered testimony from its former director of financial reporting, general counsel, and expert witnesses that Utica had policies and procedures in place for providing notice that met the then-industry standard.

Judge Hurd concluded a jury could have sided with Utica based on evidence showing that "Utica used a daily report and monthly report to inform a search for applicable reinsurance and to report such claims to reinsurers."[9] Judge Hurd cited the testimony of Utica employees on the supposed effectiveness and implementation of this policy.[10] Judge Hurd contrasted Utica's evidence with that of Fireman's Fund, which included criticism of Utica's document retention policy and its failure to locate the primary policies. Judge Hurd found Utica effectively rebutted this evidence by showing that an 11-year document retention policy was industry standard and that "missing or incomplete contract files from the 1960s and 1970s was not out of the ordinary for insurers dealing with these types of liability claims in the 1990s and 2000s."[11]

Utica also demonstrated that three of the five direct insurers to the policyholder lacked complete contract files when coverage was litigated, and that it provided early notice to over a dozen facultative reinsurers before notice was due. The court concluded: "This evidence, considered together, formed a sufficient basis for a jury to conclude that Utica had implemented routine practices and controls to ensure notification to reinsurers which worked in the majority of cases, and to the extent those practices did not work in the Fireman's Fund matter, such failure did not constitute bad faith, gross negligence, or recklessness."[12]

Lessons for Litigating Late Notice

The most compelling fact driving Fireman's Fund's late-notice defense was that the cedent had given it notice 10 years after notice was given to all other reinsurers. However, the cedent introduced evidence at trial that Fireman's Fund itself wrote insurance directly to the cedent's insured and, hence, was aware of the underlying asbestos claims as its direct insured. While Fireman's Fund argued that this was legally irrelevant to whether notice was late, the trial judge declined to give a curative instruction that Fireman's Fund sought. The trial judge also allowed the cedent to tout its ties to the local community and refer to Fireman's Fund as a "foreign" company due to its affiliation with German-based Allianz. No doubt, this will add grist to the appeal that Fireman's Fund has noticed.

Although it is impossible to know what ultimately caused the jury to reject Fireman's Fund's late-notice defense, Judge Hurd's post-trial opinion provides several guideposts for parties to consider when litigating the issue. With respect to demonstrable prejudice, the more concrete the harm, the more likely the reinsurer's success. Judge Hurd concluded a jury may have rejected Fireman's Fund's evidence as speculative because it offered no witness with direct knowledge of the commutations that formed the basis for its alleged prejudice. Furthermore, Judge Hurd concluded Fireman's Fund's fact witness failed to account for several variables, which rendered his conclusions speculative. As for material breach, Judge Hurd suggested a reinsurer must show a near-complete breakdown in the cedent's reporting procedures. Because Utica had a reporting process (however flawed), Judge Hurd was unwilling to disturb the jury's verdict.

Equally important was Judge Hurd's decision to allow Fireman's Fund's late-notice defense to go before a jury in the first place. It is impossible to know whether Judge Hurd would have sustained a verdict in Fireman's Fund's favor on late notice, but because Fireman's Fund in fact presented evidence that it suffered prejudice and that serious failures marred Utica's reporting procedures, there is reason to believe that he may have.

NOTES

1. *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, No. 6:09-cv-853, Dkt. 452, at 10 (N.D.N.Y. Feb. 28, 2018).
2. *Id*. at 11.
3. *Id*.
4. *Id*.
5. *Id*. at 12.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*. at 12–13.
11. *Id*. at 13.
12. *Id*.

English Lawyers Do Qualify as Arbitrators!

By Jonathan Sacher and David Parker

It is said that Albert Einstein believed that "the only source of knowledge is experience."

We wrote in a previous issue of the *ARIAS Quarterly* about the unfortunate (in our view) decision of the first instance court in *TonicStar Ltd. v Allianz Insurance plc and Sirius International Corp.,*[1] in which the court decided that not all experience was made equal.

The case arose out of a reinsurance dispute regarding World Trade Center liabilities of the Port of New York, particularly a settlement reached with individuals involved in the clean-up operation for respiratory illnesses allegedly caused by negligent failures to provide adequate safety equipment. Reinsurers Allianz (previously Cornhill Insurance plc) and Sirius appointed Mr. Alistair Schaff QC, who has been advising insurers and reinsurers for many years, as arbitrator. The Lloyd's Syndicate reinsured, Tonicstar, challenged his appointment on the grounds that he was not qualified according to the relevant arbitration clause incorporated into the reinsurance contract.

In the first instance decision in the Commercial Court in November 2017, the English court interpreted a standard London market reinsurance arbitration clause (produced by the Joint Excess Loss Committee, or JELC) in such a way that lawyers specializing in insurance/reinsurance matters (as well as auditors or other advisers to the insurance and reinsurance industry) do not qualify in situations where arbitrators require "experience of insurance or reinsurance."

The clause in question provided as follows:[2] "Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance."

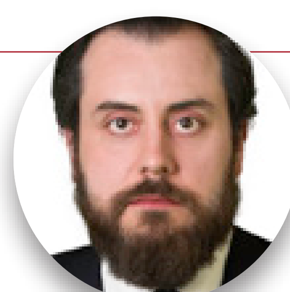
The first instance decision (now successfully appealed) significantly narrowed the potential pool of arbitrators available to parties to a reinsurance contract with a similarly worded qualification. Regrettably, the effect was that many reinsureds/reinsurers in the London market would be unable to appoint lawyers (perhaps with many years' experience of precisely the issues on which a dispute might arise) as arbitrators. This unfortunate result was exacerbated in England, as, unless otherwise agreed, parties can appeal an arbitration award on a point of law.[3]

The first instance judgment in Tonicstar followed an earlier English decision on a materially identical clause.[4] The judge did not feel there were sufficiently powerful reasons to depart from the earlier authority, and he hinted that he might have adopted a wider interpretation of the clause but for its existence:

"… uninhibited by that decision [i.e., *X v Y*] I might well have decided that

Jonathan Sacher is co-leader of the insurance practice of Bryan Cave Leighton Paisner and is rated one of the top three insurance and reinsurance lawyers in Europe by Who's Who Legal. He is a former chairman of the British Insurance Law Association and currently co-chairs the ARIAS•U.S. International Committee and is an Arbitration Panel member of ARIAS UK.

David Parker is of counsel at Bryan Cave Leighton Paisner. He regularly provides coverage advice to insurers/reinsurers and acts in arbitrations concerning disputed claims.



the ordinary and natural construction of the phrase in question did not limit the fields in which experience of insurance or reinsurance could be acquired."

Court of Appeal Ruling

The decision has now been overturned by the English Court of Appeal, an action likely to be welcomed by the London reinsurance market.[5] The Appeal Court was not constrained in the same way as the first instance court—it took the view that the court's previous interpretation of the words at issue in *X v Y* could not be supported. This was primarily because of the following:

- The actual language of the clause does not impose any restriction on the way relevant experience is gained (and the meaning is "tolerably clear"); and
- Given that the arbitrators are to apply English law, express words of exclusion (rather than inclusion) would be needed to disqualify lawyer arbitrators.

The Court of Appeal grappled with whether experience of insurance/reinsurance "itself" was, somehow, different from experience of insurance or reinsurance law, and decided that no distinction can be drawn between the two. The court felt that, owing to the practical and legal aspects of insurance/reinsurance being "so intertwined," market professionals and specialist lawyers are commonly appointed to hear disputes.

In doing so, the court observed the following:

- Insurance/reinsurance contracts create legal rights and obligations, and those who negotiate them, whether as underwriters or brokers, need to have an understanding of insurance/reinsurance law.
- Insurance/reinsurance encompasses not only the placing and underwriting of risks, but the handling of claims. Whether or not a claims manager is legally qualified, he or she cannot assess whether a claim is properly payable without having some knowledge of the applicable law.
- Lawyers who practice in the field of insurance and reinsurance need to understand practical aspects of the business. It is a "safe inference" that a lawyer who has specialized in insurance and reinsurance cases for at least 10 years will have acquired considerable practical knowledge of how insurance and reinsurance business is conducted.

Bryan Cave Leighton Paisner Comment

We think the London insurance/reinsurance market, especially those subscribing to reinsurance contracts that incorporate the JELC clauses, is likely to welcome the Appeal Court's decision.

As the court touched upon, the nature of insurance/reinsurance disputes in general instinctively lend themselves to determination by someone with legal experience, be it gleaned from underwriting contracts or settling claims or by advising underwriters/claims managers on those same matters. This is, perhaps, even more so where an arbitrator's duty is to apply the law (as it is under the JELC clauses). The restrictive interpretation adopted by the English court before the most recent Appeal Court decision did not sit comfortably against this backdrop—not to mention being inconsistent with the ordinary meaning of the words actually used in the clause in question.

It benefits dispute resolution in the reinsurance market for reinsureds/reinsurers to have the widest possible pool of people who are qualified to hear disputes, especially where the pool is determined before a dispute is even contemplated (let alone with any knowledge of the issues that actually become contentious). In many instances, legal expertise will be beneficial and even desirable to have on an arbitration panel. It also might breed confidence that an arbitration panel will consider the proper legal questions in reaching a decision, which can have material consequences for all concerned.

In fact, it seems that the JELC thought similarly. A revised clause (effective 1 January 2018) expressly includes lawyers/advisors as being qualified to act as arbitrators:[6]

"The Arbitrators shall be persons (including those who have retired) with not less than 10 years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry."

If reinsureds/reinsurers really do not want to have the option in the future to appoint arbitrators with many years' experience gained in an advisory capacity in the reinsurance market, they are free to expressly exclude these individuals in the clause they adopt. We doubt that many will be quick to do so, however.

NOTES

1. [2017] EWHC 2753 (Comm).
2. Joint Excess Loss Committee 1997, clause 15.5.
3. Section 69(3) of the English Arbitration Act 1996.
4. X v Y [2000], unreported.
5. [2018] EWCA Civ 434.
6. Joint Excess Loss Committee 2018, clause 27.4

Should Arbitrators Follow Legal Decisions? Cases in Point

By Bruce M. Friedman

A critical question facing companies, counsel, and arbitrators is the weight arbitrators will (or should) give to case law in deciding reinsurance disputes. The clearest argument in favor of relatively strict adherence, at least to court decisions that would affect the outcome on the merits, is that when insurers and reinsurers must make the business decisions that can ultimately lead to arbitration, court decisions provide a reference body against which they can evaluate how to proceed. In contrast, arbitration decisions are confidential and thus do not provide guidance beyond whatever a party may have experienced in previous cases or heard about through industry talk.

Yet it is frequently the case that the arbitration agreement itself frees the panel from strict adherence to law and instead directs it to the somewhat open-ended concepts of "custom and practice" and/or "an honorable engagement." What constitutes "custom and practice" is likely to be vigorously disputed between the parties, while defining "honorable" conduct can be an even more variable test.

So, what are internal decision makers to do? Should they rely upon seemingly on-point or closely on-point judicial decisions, or should they endeavor to predict what an arbitration panel will find to be "custom and practice" and/or "honorable?" What should arbitrators do? The important New York Court of Appeals decision in *United States Fidelity & Guaranty Co. v. American Re-Insurance Co.* gives us food for thought.

In 2013, the New York Court of Appeals, the state's highest court, decreed that reinsurers are bound to follow settlements (and allocations) that are "objectively reasonable." According to the court, a settlement is "objectively reasonable" if it is one "that the parties to the settlement would have agreed to in the absence of reinsurance."[1] In its discussion, the court observed the practical reality that a cedent is likely to adopt an allocation that is financially rewarding. The court also stated that a cedent is not required to adopt an allocation that is least favorable to it. In fact, the court stated that "the cedent's motive should generally be unimportant."[2]

All of this begs us to inquire, "Where did these rules come from?" Were they advocated by counsel in the briefing or during the argument? Was the court relying upon expert witness testimony? Was there anything in prior follow-the-settlements cases suggesting that courts were trending in the direction of "objective reasonableness?" Or, was the court simply attempting to fashion

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Contrary to USF&G, motive is singularly important and a focal point in virtually every arbitration in which the application of follow-the-settlements is being challenged.

a standard that would make it easier for courts to summarily adjudicate reinsurance disputes? After all, if motive is generally "unimportant," does this render irrelevant a cedent's desire to create or maximize a reinsurance recovery?

Litigants will live with the *USF&G* rules for the foreseeable future (and probably beyond). As we have learned from the *Bellefonte* debate, which has lasted for almost 30 years, once an appellate court establishes relevant precedent, subsequent courts are bound by the rule of stare decisis to follow it. The recent decision in *Global Reinsurance Corp. of America v. Century Indemnity Co.*—in which the New York Court of Appeals was asked by the Second Circuit by certified question to clarify whether, in deciding *Excess Insurance Co. Ltd. v. Factory Mutual Insurance Co.*, it intended to establish a rule of contract construction or a presumption that a facultative certificate's limit of liability includes expenses—reveals just how powerful the rule of stare decisis is. Even with the *Global Re* court all but admitting that *Bellefonte* was decided incorrectly, it was reluctant to address *Bellefonte* directly or those decisions that had followed its premise. Time will tell whether the Second Circuit, which recently remanded the case to the district court for determination, elects to overturn those decisions.

How Does *USF&G* Align with Industry Custom and Practice?

As a general proposition, various prerequisites to application of follow-the-settlements have been expressed, both in the context of the back-and-forth between insurers and reinsurers in respect of particular cessions and in the context of litigated disputes. These include arguable coverage, reasonableness, good faith, absence of collusion between insurer and insured, and acting in a businesslike manner. As a matter of custom and practice in the reinsurance industry, reasonableness and good faith appear to be the two most widely recognized and universally accepted elements to be established (or refuted, depending on whether a tribunal places the burden of proof on the party seeking to avoid application of follow-the-settlements).

Historically, and to this date, reinsurers have contended that (1) settlements must be reinsurance-blind, (2) a cedent must make its settlement decisions on the basis that it has 100% net responsibility for payment of the settlement, and (3) cedents must treat the interests of reinsurers as their own. To the extent these arguments find their basis in accepted industry custom and practice, they are effectively gutted by *USF&G*. Specifically, *USF&G* invites cedents not to treat the interests of reinsurers as their own. *USF&G* essentially portrays reinsurers as naïve to believe that cedents will not consider reinsurance implications when making their settlement and allocation decisions.[3] Indeed, if literally applied, *USF&G* arguably validates the targeting of reinsurers in allocating settlements, particularly if a court finds that motive is irrelevant and excludes evidence of bad faith. There is little doubt that *USF&G* does not comport completely with accepted industry practice.

What does *USF&G* instruct on a cedent's duty to act in good faith? Given that the court did not question prior judicial decisions (which it cited with seeming approval) finding that application of follow-the-settlements required both reasonableness and good faith, it is fair to assume that evidence of bad faith is still a relevant consideration.[4]

To what extent, however, remains to be seen.

The Potential Impact of *USF&G* Upon Accepted Industry Practice

Will the industry adopt the *USF&G* standard of objective reasonableness as the new test for application of follow-the-settlements? The answer to that question is, probably not. As the duty of good faith is so ingrained in the reinsurance relationship, the expectation continues to be that the cedent will act in good faith.

Contrary to *USF&G*, motive is singularly important and a focal point in virtually every arbitration in which the application of follow-the-settlements is being challenged. The quid pro quo for accepting the obligation to follow settlements and granting deference to a reinsured's coverage determinations is the expectation that the cedent will act—and has acted—in good faith. While cedents will cite the "objective reasonableness" test in reinsurance arbitrations, arbitrators are as likely to cut off an inquiry into a cedent's motivation as a cedent is likely to concede that it did consider the reinsurance implications of its decisions when making them. In other words, it is highly unlikely.

Things get a bit dicey when the issue is allocation. When it comes to allocation, the interests of cedents and reinsurers are not necessarily aligned. In some circumstances, the allocation decision determines whether the cedent or the reinsurer will bear the loss. And because of scenarios such as these, it is fair to ask whether follow-the-settlements should apply to allocation decisions at all.

This leads us to the seminal judicial decision in *Commercial Union v. Seven Provinces*. In *Seven Provinces*, a Massachusetts federal district court found, after a trial, that follow-the-settlements applies to the allocation of the settlement.[5] Prior to *Seven Provinces*, there were no industry publications espousing that follow-the-settlements applies—or should apply—to the allocation process. Nor had we ever heard of anyone articulating that concept.

In *Seven Provinces*, Commercial Union's allocation was consistent with both the settlement and Commercial Union's assessment of the exposure that damages at the various environmental sites presented to its policies. It argued that because the allocation was consistent with the settlement and the exposures that drove it, the allocation should be judged by the same standards of reasonableness and good faith.

Courts define custom and practice as the universally accepted way that things are done in the industry.[6] With such a high threshold—i.e., universal acceptance—very few things in reinsurance would qualify. But those who have spent a lifetime in the business have an innate appreciation for acceptable market conduct.[7] In the 20 years since Seven Provinces, the reinsurance industry still has not come to complete accord as to whether follow-the-settlements applies to the allocation process. While the industry understands that the courts will apply follow-the-settlements to allocation, the industry also recognizes that reinsurers are likely to push back on reinsurance presentations that deviate from the settlement or where there is a sense that the cedent and the insured negotiated an unfair or self-serving allocation in the settlement agreement.[8]

Seven Provinces and *USF&G* both involved challenges to allocation. Also common to both cases is that each appears to have expanded the application of follow-the-settlements. The *Seven Provinces* expansion of the concept was arguably inadvertent, because Commercial Union did not advocate that follow-the-settlements applied to the allocation process; rather, Commercial Union argued only that because the settlement drove a consistent allocation, the propriety of the allocation should be assessed on the same basis. The reinsurance industry would universally accept application of follow-the-settlements to an allocation that is

In the 20 years since Seven Provinces, the reinsurance industry still has not come to complete accord as to whether follow-the-settlements applies to the allocation process.

consistent with a settlement that itself is driven by the reinsured's assessment of the loss exposure to its policies. To the extent the allocation deviates from the settlement and is driven by other commercial considerations, there would be less acceptance. The follow-the-settlements cases decided since *Seven Provinces* make it clear that the *Seven Provinces* scenario—an allocation consistent with the settlement driven by the insurer's perception of exposure to its policies—is not the only reasonable allocation that can be sustained. It is only the most reasonable, and the one selected need not be the most reasonable.

It is too early to know whether *USF&G* will take root in accepted industry custom and practice. To the extent *USF&G* is read to eliminate the requirement of good faith in assessing the propriety of an allocation, it is not likely to generate much traction. The creation or maximization of reinsurance recoveries is not objectionable if it is the by-product of an otherwise reasonable allocation and performed in good faith. On the other hand, if the allocation is motivated by the desire to create or maximize a reinsurance recovery, it will not be accepted by the assuming reinsurance marketplace.

The closer question is where the desire to create or maximize a reinsurance recovery is only a factor, but not the primary motivation, in a cedent deciding how to allocate the settlement. At the present time, *USF&G* has only been cited in a handful of cases.[9] None have expressly interpreted *USF&G* to eliminate good faith from the follow-the-settlements equation. As stated at the outset of this discussion, any standard that eliminates the duty to act in good faith is not likely to find support in the industry.

While the industry has come to accept *Seven Provinces*, it continues to struggle with cases that have gone beyond *Seven Provinces* and have (1) sustained allocations that do not comport with the cedent's pre-settlement assessment of its exposure or (2) suggested that allocations which are inconsistent with the settlement may nonetheless be entitled to deference. The reason the industry accepts *Seven Provinces* is because "follow the allocation," as applied in that case, was consistent with accepted application of follow-the-settlements. As far as *USF&G* is concerned, the industry may never be willing to remove good faith from the playing field.

Ignoring the Law

Industry arbitrators are sensitive to claims that their decisions ignore the law. Do any of us have experience in industry arbitrations where arbitrators based their ruling on the belief that they were bound to follow the law, even if it was inconsistent with their own understanding of how things are generally done in the industry? If so, that is unfortunate.[10]

Manifest disregard of the law is one of the limited grounds recognized to vacate an arbitration award. There is, however, little to no likelihood of an arbitration award being vacated because the arbitrators did not follow the letter and spirit of *USF&G* by failing to require the reinsurer to establish that the allocation was not objectively reasonable. At least three factors are responsible for this:

- Case law has developed to the point where courts question whether there is a basis to vacate an award based on a claim that the arbitrators did not follow the law.[11]
- Some arbitration clauses contain express language relieving arbitrators of the obligation to "follow the strict rules of law" and/or suggesting that they reach their decision based on industry practice or by treating the contract evidencing the reinsurance relationship as an "honorable undertaking."
- Arbitration awards, even if reasoned, are not likely to announce that the arbitrators have considered but disregarded applicable law.[12]

Consequently, even if the arbitration clause required that the arbitrators apply the law of a particular state, it would be impossible for a court to find that they did not do so.[13] As long as there is any basis at all in the record upon which the award can be sustained, a court will not disturb the award.

Conclusion

Today's disputes, in many instances, involve contracts written in the 1960s and 1970s. When follow-the-settlements evolved, the industry was dealing with occurrences or accidents with definitive dates of loss and was not confronting asbestos, environmental and other toxic tort claims spanning multiple policy periods.

Has the industry evolved to meet unanticipated challenges? When allocation became part of the insurance and reinsurance landscape, the industry found a way to deal with allocation. There were a number of arbitral disputes in which allocation was challenged. These disputes were resolved without it being necessary to state, one way or the other, whether the concept of follow-the-settlements required the reinsurer to defer to the cedent's allocation decisions. Despite the labeling provided by *Seven Provinces*, the industry continues to assess the propriety of allocations as it did before Seven Provinces.

It is probable that *USF&G* will play out in industry arbitrations the same way. Arbitrators will continue to focus on evidence of bad faith. And while *USF&G* stated that motive is generally unimportant, it also told us that an allocation is not objectively reasonable if it would not have been the result of arms-length negotiation in the absence of reinsurance. If the cedent has selected an allocation that would not have been selected in the absence of reinsurance, can it truly be said that *USF&G* instructs not to examine intent?

Reinsurance arbitration offers little in terms of its utility as a dispute resolution mechanism if arbitrators are expected or required to follow legal decisions. This is particularly true if the decisions to which they are referred were incorrectly decided or out of line with accepted industry custom and practice. While the law offers certainty and, in many cases, uniformity, do we really want our arbitrators to tell us what the law is? Are we not better off in court, where the courts are the messengers and can deliver the message directly? Reinsurance arbitrations can only offer a meaningful service to the industry if arbitrators are free to bring their sense of accepted—and, indeed, acceptable—industry practice into the hearing room in reaching a fair and equitable result.

NOTES

1. *U.S. Fidelity & Guaranty Co. v. American Re-Insurance Co.*, 20 N.Y.3d 407, 420 (2013) ("USF&G").
2. *Id.* at 421.
3. That said, a recent district court decision, denying summary judgment to a cedent on follow-the-settlements, found that the reinsurer submitted ample evidence of the cedent's "extreme efforts to ensure an allocation of the settlement to its umbrella policy reinsurers, proving it was impermissible and in bad faith. Drawing all inferences in [reinsurer's] favor, a rational trier of fact could conclude that [the cedent] included the stipulations in the Settlement Agreement … solely to ensure access to its reinsurance … Under this version of the facts, [the cedent's] allocation was improper and in bad faith and would not have resulted from arm's length negotiations if reinsurance did not exist, and [the reinsurer] would therefore not be required to follow the terms of the Settlement Agreement." *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, 238 F.Supp.3d 314, 346 (N.D.N.Y. Feb. 24, 2017).
4. There is, however, at least one reported arbitration decision of which I am aware, chaired by a retired federal judge, in which the panel declined to grant discovery on the issue of intent based upon the *USF&G* rationale regarding motive.
5. 9 F. Supp.2d 49 (D.Mass. 1998), aff'd, 217 F.3d 33 (1st Cir. 2000).
6. See, e.g., *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010) (stating "custom must be established, and not casual, uniform and not varying, general and not personal, and known to the parties"); SR *International Business Co. v. World Trade Center Properties, LLC*, 467 F.3d 107, 135 (2d Cir. 2006) (The "party seeking to establish [the] custom and usage must establish, by competent evidence, that the practice is fixed and invariable.")
7. In a very real sense, market participants set the boundaries for such conduct.
8. *USF&G* recognized this possibility and stated that just because the insured and insurer agreed on an allocation does not make it binding on reinsurers. The court stated that, "far from being indifferent, [insureds] will enthusiastically support insurers' efforts to fund a settlement at reinsurers' expense."
9. See, e.g., *Utica v. Fireman's; Travelers Indemnity Co. v. Excalibur Reinsurance Corp.*, 2013 U.S. Dist. LEXIS 50134 (D. Conn. Apr. 8, 2013) ("[Reinsurer] is entitled under the New York Court of Appeals cases to challenge the reasonableness of [cedent's] post-settlement allocation decision, and to argue that the economic consequence of that allocation violates or disregards provisions in the reinsurance contract"); *New Hampshire Insurance Co. v. Clearwater Insurance Co.*, 129 A.D.3d 99 (1st Dep't 2015); *Lexington Insurance Co. v. Sirius America Insurance. Co.*, 2014 N.Y. Misc. LEXIS 4138 (NY. Sup. Ct. Sept. 15, 2014).
10. I have been involved in an arbitration in which the arbitrators excused misrepresentations and concealment of information from the reinsurers at the time the reinsurance was placed as "common industry deceit" and declined to grant rescission.
11. As a practical matter, it is an uphill battle to vacate an arbitration award, even if the challenge is based on one of the grounds stated in the federal statute as a basis to vacate. Manifest disregard of the law is not among the statutory grounds and is the least likely basis upon which to prevail. See Federal Arbitration Act, 9 U.S.C.A. § 10(a)(1)-(3). The Second Circuit has emphasized that awards are vacated on the judicially created grounds of manifest disregard "only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent." *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010).
12. There are a number of decisions standing for the proposition that an arbitration award will not be vacated merely because the law would have mandated a different outcome had the matter been litigated. An example of this is where a panel supports a reinsurance billing even though the arbitration was commenced after expiration of an applicable statute of limitations.
13. Misapplication of the law is not a ground to vacate an arbitration award.

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New Evidence that Carbon Nanotubes Have Potential to Cause Mesothelioma: A Response

By Keith Bradley

The article by Thomas Bernier and Brendan Fitzpatrick in the Q2 2018 issue of the *ARIAS • U.S. Quarterly*[1] does readers a valuable service by bringing to our attention the potential health risks posed by certain types of carbon nanotubes. Insurers and reinsurers would certainly do well to heed their advice to keep up to date with developments in this area so as to stay one step ahead of any emerging risks under their insurance and reinsurance contracts.

At the same time, I want to temper the message of concern. Nanomaterials come in an enormous variety of physical structures and chemical compositions and have a broad range of uses with different profiles regarding the method of manufacture, the location of the material, and its availability for human exposure. Even carbon nanotubes are diverse. The fact that some types of nanotubes present health hazards does not mean all nanomaterials are suspect.

I have been following nanotechnology for more than 20 years. I was a physicist myself, and I worked with some of the pioneers in the early days after nanotubes were first discovered. In my own research, I fabricated new nanostructures, both carbon-based and using other substances, and I developed electronic devices based on carbon nanotube transistors.[2,3,4,5] So my perspective on this area is both that of a scientist, reading the research literature with a careful eye, and that of a lawyer, aware of how risks can blow up.

A huge amount of work has been done, and research continues, on evaluating the effects of nanotube exposures on animal and human health. The results are mixed. As Bernier and Fitzpatrick point out, some studies have found that carbon nanotubes can induce mesothelioma, and researchers are now elucidating pathways and finding them to be similar to asbestos-induced me-

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sothelioma.[6] But, as an August 2016 review discussed, some of the very many experiments on biological effects of carbon nanotubes have found harmful effects, but some have not.[7]

The diversity of results is not surprising, because carbon nanotubes come in so many forms.[8] Some are single-walled and some are multi-walled, with varying diameters and degrees of stiffness. Some are short and some are long. They aggregate into bundles, larger or smaller. They may be chemically functionalized with various constituents, and they may be relatively pure and crystalline or more amorphous.

These characteristics matter a lot for the biological effects of a nanotube material.[9,10,11,12] For example, Nagai and colleagues observed that thin but still rigid, and unfunctionalized, multiwalled nanotubes caused mesothelial injury, while nanotubes did not cause injury if they were too thick or were, on the other hand, thin enough to be flexible.[13] These researchers hypothesized that nanotubes cause damage if they are of the right size and rigidity to penetrate cells without fully entering them. Carrero-Sanchez and coworkers found that nitrogen-doped multiwalled nanotubes produce less toxicity than pure nanotubes,[14] and other researchers have found that carboxylation of nanotubes makes them significantly less biopersistent.[15]

The mode and amount of exposure matter, too. For example, in the study that Bernier and Fitzpatrick described, the scientists injected nanotubes directly into the intrapleural cavity of mice. As Oberdörster and co-workers have observed, for some types of nanotubes, an injection of even a relatively low dose can result in more severe effects than inhalation of a high dose.[16] These differences can also, surely, depend on the characteristics of the nanotube, because the mechanical properties of a nanotube will affect how it moves through and interacts with tissue.

I mean none of this as an apology for carbon nanotubes. Some nanotubes are truly harmful if inhaled. The International Agency for Research on Cancer concluded that a particular type of nanotube—MWCNT-7—is possibly carcinogenic, as Bernier and Fitzpatrick noted.[17] For other types, the IARC found the data to be inconclusive as yet, in part "[d]ue to the heterogeneity of CNT."[18] We should take these conclusions seriously—both that MWCNT-7, a particular company's product of long, stiff bundles, is possibly carcinogenic, and that for other types we do not fully know. Research continues, and scientists are genuinely debating these topics.

As diverse as carbon nanotubes are, the variety of nanomaterials in general is dizzying. There are nanotubes made from other materials, multi- and single-walled, of different lengths and diameters; nanorods made from pure metals, semiconductors, and ceramics; nanoparticles from the same range of materials, but with different shapes (such as cubical or tetrahedral or amorphous and blobby), and with different sizes (from one or two nanometers to a hundred); nanoribbons from graphene and other van der Waals materials; heterostructures made from those; nanocapsules; DNA origami, and supermolecular assemblies of DNA with nanorods or nanoparticles; and more. Some of these materials may be harmful in some types of exposure, but it is impossible to draw much inference

The fear that Bernier and Fitzpatrick express—that major toxic mass torts are coming—may be excessive. The real likelihood of a mass tort depends not only on how harmful a material is in isolation, but also on how it is handled and used.

about that from the research on carbon nanotubes.

This extraordinary range of nanomaterials corresponds to a diversity in uses. In different modes of use, the risk to health and safety will vary even for materials with similar toxicological profiles. Many nanomaterials are used in minuscule quantities, such as in electronics. Some will be used in biomedical applications like drug delivery, for which the potential hazards are high, but the testing before use will be higher. Others can be used in bulk, and that is one feature that distinguishes multiwalled carbon nanotubes.

Even so, the practical hazards will depend on the use. For example, one of the earliest commercial applications of nanotubes was to strengthen composite materials for use in tires. That type of usage may involve workplace hazards related to making the nanotubes and incorporating them into the tires. It seems much less likely to present risks to users of the tires and the broader public, or to the environment after disposal of the tires.[19] Even if nanotubes by themselves are comparable to asbestos fibers, nanotubes embedded in rubber are not necessarily as risky as asbestos mats.

Thus, the fear that Bernier and Fitzpatrick express—that major toxic mass torts are coming—may be excessive. The real likelihood of a mass tort depends not only on how harmful a material is in isolation, but also on how it is handled and used.[20]

More broadly, the concern that commercial applications of nanotechnology are outpacing our understanding of potential health risks may be misplaced. The evolving research on nanotube toxicology is actually an example to the contrary. I remember that in the early 2000s, nanotube researchers assumed that nanotubes might have biological effects analogous to asbestos. And as early as 2006, scientists were investigating ways to mitigate the health risks.[21]

Research in this area has been valuable for refining our understanding of which nanotubes are hazardous and in what circumstances, and for elaborating some of the mechanisms for toxicity. But it has not produced surprises. The health effects of nanotubes are, so far as I have seen in the literature, consistent with what researchers in the field expected 20 years ago.[22]

I wholly agree with Bernier and Fitzpatrick that more research and debate will be needed as the use of various nanomaterials expands. The open, extensive investigations about the toxicology of carbon nanotubes are an encouraging and healthy sign of how science can inform the discussion. These are important issues for insurers and reinsurers to watch.

NOTES

1. Bernier, T., and B. Fitzpatrick. 2018. "New Evidence That Carbon Nanotubes Have Potential to Cause Mesothelioma." *ARIAS•U.S. Quarterly*, 2nd Quarter, p. 26.
2. Bradley, K., A. Davis, J-C. Gabriel, and G. Grüner. 2005. "Integration of Cell Membranes and Nanotube Transistors." *Nano Letters*, 5(5): 841-845.
3. Bradley, K., J-C. Gabriel, and G. Grüner. 2003. "Flexible Nanotube Electronics." *Nano Letters*, 3(10): 1353-1355.
4. Bradley, K., S-H. Jhi, P. Collins, J. Hone, M. Cohen, S. Louie, and A. Zettl. 2000. "Is the intrinsic thermopower of nanotubes positive?" *Physical Review Letters*, 85(20): 4361-4364.
5. Nanomix. "Boron oxide and related compounds for hydrogen storage." U.S. Patent No. 7,479,240. Granted Jan. 20, 2009.
6. Chernova, T., F. Murphy, S. Galavotti, X. Sun, I. Powley, S. Grosso, A. Schinwald, J. Zacarias-Cabeza, K. Dudek, D. Dinsdale, J. Le Quesne, J. Bennett, A. Nakas, P. Greaves, C. Poland, K. Donaldson, M. Bushell, A. Willis, and M. MacFarlane. 2017. "Long-Fiber Carbon Nanotubes Replicate Asbestos-Induced Mesothelioma with Disruption of the Tumor Suppressor Gene Cdkn2a." *Current Biology*, 27(21): 3302-3314.
7. Kuempel, E., M. Jaurand, P. Moller, Y. Morimoto, N. Kobayashi, K. Pinkerton, L. Sargent, R. Vermeulen, B. Fubini, and A. Kane. 2017. "Evaluating the mechanistic evidence and key data gaps in assessing the potential carcinogenicity of carbon nanotubes and nanofibers in humans." *Critical Reviews in Toxicology*, 47(1): 1-58.
8. Lehman, J., M. Terrones, E. Mansfield, K. Hurst, and V. Meunier. 2011. "Evaluating the characteristics of multiwall carbon nanotubes." *Carbon* 49: 2581-2602.
9. Allegri, M., D. Perivoliotis, M. Bianchi, M. Chiu, A. Pagliaro, M. Koklioti, A-F. Trompeta, E. Bergamaschi, O. Bussolati, and C. Charitidis. 2016. "Toxicity determinants of multi-walled carbon nanotubes: the relationship between functionalization and agglomeration." *Toxicology Reports*, 3: 230-243.
10. Kagan, V., Y. Tyurina, V. Tyurin, N. Konduru, A. Potapovich, A. Osipov, E. Kisin, D. Schwegler-Berry, R. Mercer, V. Castranova, and A. Shvedova. 2006. "Direct and indirect effects of single walled carbon nanotubes on RAW 264.7 macrophages: role of iron." *Toxicology Letters*, 165(1): 88-100.
11. Wick, P., P. Manser, L. Limbach, U. Dettlaff-Weglikowska, F. Krumeich, S. Roth, W. Stark, and A. Bruinink. 2007. "The degree ad kind of agglomeration affect carbon nanotube cytotoxicity," *Toxicology Letters*, 168(2): 121-131.
12. Zhang, T., M. Tang, L. Kong, H. Li, T. Zhang, Y. Xue, and Y. Pu. 2015. "Surface modification of multiwall carbon nanotubes determines the inflammatory outcome in macrophage." *Journal of Hazardous Materials*, 284: 73-82.
13. Nagai, H., Y. Okazaki, S. Chew, N. Misawa, Y. Yamashita, S. Akatsuka, T. Ishihara, K. Yamashita, Y. Yoshikawa, H. Yasui, L. Jiang, H. Ohara, T. Takahashi, G. Ichihara, K. Kostarelos, Y. Miyata, H. Shinohara, and S. Toyokuni. 2011. "Diameter and rigidity of multiwalled carbon nanotubes are critical factors in mesothelial injury and carcinogenesis." *Proceedings of the National Academy of Sciences*, 108(49): 19467-19468.
14. Carrero-Sánchez, J., A. Elías, R. Mancilla, G. Arrellín, H. Terrones, J. Laclette, and M. Terrones. 2006. "Biocompatibility and Toxicological Studies of Carbon Nanotubes Doped with Nitrogen." *Nano Letters*, 6(8): 1609–1616.
15. Kotchey, G., Y. Zhao, V. Kagan, and A. Star. 2013. "Peroxidase-mediated biodegradation of carbon nanotubes in vitro and in vivo." *Advanced Drug Delivery Reviews*, 65(15): 1921–1932.
16. Oberdörster, G., V. Castranova, B. Asgharian, and P. Sayre. 2015. "Inhalation Exposure to Carbon Nanotubes (CNT) and Carbon Nanofibers (CNF): Methodology and Dosimetry." *Journal of Toxicology and Environmental Health: B Critical Reviews*, 18(3-4): 121-212.
17. International Agency for Research on Cancer. 2017. "IARC Monograph: Some Nanomaterials and Some Fibres." 111: 192. Geneva, Switzerland: World Health Organization.
18. *Id*.
19. I suspect that nanotubes are difficult to extract from a rubber matrix. And to the extent tires are disposed by burning, nanotubes will also burn.
20. To be clear, I do not know whether manufacturers are taking due care about workplace exposure to multi-walled carbon nanotubes.
21. Chen, X., U.C. Tam, J. Czlapinski, G.S. Lee, D. Rabuka, A. Zettl, and C. Bertozzi. 2006. "Interfacing Carbon Nanotubes with Living Cells." *Journal of the American Chemical Society*, 128(19): 6292-6293.
22. Silver nanoparticles are another good illustration. The biocidal effects of these materials are roughly the same as that of bulk silver. Silver nanoparticles are good biocides, not because of any quantum effects, but simply because dosing bacteria with nanoparticles is much more effective. The health and environmental effects of silver nanoparticles are a predictable result of distributing larger quantities of nanostructured silver into the environment. See R. Senjen and I. Illuminato, "Nano & Biocidal Silver: Extreme Germ Killers Present a Growing Threat to Public Health," Friends of the Earth, 2009.

The Unique Perspective of a Certified 'Forensic CPA' Arbitrator

By John A. Damico

Alternate dispute resolution (ADR) is any procedure that is used in matters that would otherwise be settled in a court of law. Examples of ADR include arbitration, mediation, appraisal, and mini-trial. ADR is a dispute resolution strategy with applications to insurance, reinsurance, commercial contract and/or labor disputes, estate and divorce actions, and personal injury claims.

ADR procedures generally offer a less emotional, more cooperative approach and allow each side to better understand the other's position without legal wrangling. When used effectively, ADR is more efficient, takes less time, and is less costly. Experienced arbitrators and mediators can often guide a more creative process tailored to the specifics of the dispute in question.

Role of the Forensic CPA

Historically, forensic CPAs (FAs) participate as experts alongside attorneys, other subject-matter experts, and claim handlers representing either the claimant or respondent in insurance and reinsurance disputes. For the moment, consider how resolving these disputes through ADR might benefit from the experience of a seasoned FA as an arbitrator or mediator.

First, it is not uncommon for FAs, in their role as experts, to represent both claimants and respondents. Having participated on both sides of the table provides FAs with a valuable perspective when discharging their arbitrator or mediator responsibilities.

In addition, FAs bring many other advantages to the dispute resolution process:

- Because they are also certified public accountants (CPAs), FAs have extensive audit experience analyzing financial statements, operating systems, manufacturing processes, and business operations in general as they delve into the damages, claimed and disputed amounts ('the quantum'), and supporting accounting details. They are comfortable working with the numbers.
- As CPAs, FAs practice under the Professional Code of Conduct of the American Institute of Certified Public Accountants (AICPA). The code's standards of objectivity, independence and due care are ingrained

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into the DNA of FAs. The AICPA code parallels the ethical codes applicable to arbitrators and mediators in its emphasis on integrity, honesty, fairness and competence.

- While technically not viewed as "policy experts on insurance matters," seasoned FAs nonetheless have considerable experience reviewing and applying the various types of coverage to claim disputes as they categorize and quantify the loss components into appropriate "coverage buckets." They understand how coverage works in real-life terms.

FAs are no strangers to coverage; in fact, they often have a better appreciation of the real-life impact because of their ability to quantify the financial loss by varying the coverage equation.

- FAs are accustomed to analyzing the deep quantum details, reconciling the claim differences on a line-by-line basis, and presenting their findings to the parties. This can be especially helpful in highly complex claims, such as the case of overlapping covered and excluded physical damage and resulting business income and extra expense losses where a seemingly minor change in one of the variables has an unexpected ripple effect, magnifying the amount of loss.
- As a mediator, an FA is well equipped to help the parties identify and prioritize the dollars associated with issues most important to each side as they attempt to reach a settlement. Similarly, as an arbitrator, the FA is well-positioned to help other panel members evaluate and reach agreement on how a dispute should be resolved.
- FAs who have represented both claimants and respondents bring a level of impartiality and a unique perspective to the mediation or decision-making process.
- Forensic accounting may be generally defined as "the art and science of investigating people and money." As such, the FA's investigative skill set includes a keen sense of what's fact versus fiction as well as what's reasonable as opposed to speculative.

By Way of Example

What follows is a hypothetical first-party property insurance dispute that illustrates how an FA's experience and skill set might be used effectively to address some of the challenges that an arbitrator or mediator might face in an ADR proceeding.

Assume that a policyholder incurs a total physical damage loss at its Alabama plant. The plant provides important parts to another of its up-stream assembly plants in Michigan. As the insured scrambles to find an alternate source of supply parts to mitigate its loss exposure, it quickly decides to seize the opportunity to expand and modernize the Alabama plant during the downtime. These decisions trigger policy coverage and quantum measurement issues for both the property damage and time element (business income and extra expense) losses.

Setting aside "like kind" replacement cost issues affecting the amount of property loss, the policyholder's decision to expand and modify the Alabama plant creates a mix of other coverage and loss measurement issues. One obvious issue is the need to determine a theoretical versus actual period of indemnity (POI) to repair and replace the property as it was at the date of loss. A related issue is what and how much are the business income and extra expense components of the losses sustained during the applicable POI.

Faced with these issues, an FA arbitrator or mediator can easily reconcile the major components of the loss in dispute that lead to a more informed resolution. Rather than using some arbitrary approaches such as splitting the difference, the baseball high/low, or another similar "compromise" approach, reconciling the damages with the coverage issues is a pragmatic way to focus on the real dollar differences and provide a framework in which each side's position can be prioritized or ranked from strongest to weakest. The FA mediator can facilitate the parties in their attempt to reach and agree upon a settlement; likewise, an FA arbitrator

Exhibit A - Business Income (BI) Reconciliation ($ thousands)

		Projected Sales Revenue				Business Income			
Description	POI Months	Per Month	Total	Actual Sales Revenue	Lost	Percent	Amount	Extra Expenses	Total Loss
As Claimed	**18**	**$20**	**$360**	**$40**	**$320**	**30.00%**	**$96**	**$185**	**$281**
Adjustments									
#1: Period of Indemnity	(7)	20	(140)			30.00%	(42)	(65)	(107)
Revised amount	11	20	220	40	180	30.00%	54	120	174
#2: Sales Projection/Month		(4)	(44)			30.00%	(13)		(13)
Revised amount	11	16	176	40	136	30.00%	41	120	161
#3: Business Income %					135	-6.00%	(8)		(8)
Revised amount				40	(40)	24.00%	(10)	120	110
#4: Coverage matters								(56)	(56)
As Calculated	**11**	**$16**	**$176**	**$40**	**$136**	**24.00%**	**$33**	**$64**	**$97**

is well-positioned to reach an informed and principle-based decision.

Refer to Exhibit A above to see what a reconciliation in the case of the above time element loss hypothetical might look like. The analysis begins by identifying all the major as-claimed categories across the top of a spreadsheet. The next steps are designed to allow only one adjustment at a time to account for each major difference until one reaches the as-calculated amount detailed at the bottom of the spreadsheet.

Now let's walk through Exhibit A above and further discuss how a basic time element/business income reconciliation works. For purposes of this hypothetical, assume the policyholder has made a business income (BI) claim based on an 18-month period of indemnity (POI) and has claimed $96,000 in BI and another $185,000 in extra expenses (EE) for a total claimed amount of $281,000. Major differences between the parties are illustrated as adjustments 1 through 4 below:

#1: Period of Indemnity. There is a difference of seven months between the time it took for the insured to expand and modernize the Alabama plant as opposed to the theoretical period of indemnity it should have taken to repair and replace the plant as it was at the time of loss with due diligence and dispatch. Therefore, the amount of BI/EE loss solely attributable to this time factor is a $107,000 difference.

#2 Projected monthly sales revenue. Based on some differences in trending methods and an error in calculation, the insurer's position is that expected monthly sales revenues had no loss occurred would have been $16,000. This adjustment results in a $13,000 difference on a stand-alone basis.

#3 Business income (BI) percentage. The parties could not agree on the appropriate BI gross-earnings-less-non-continuing-expenses percentage to be applied to the amount of lost sales revenue. This adjustment creates an $8,000 difference, again on a stand-alone basis.

#4 Coverage matters. Due to some differences in coverage, the parties could not resolve this area. This adjustment results in a straightforward difference of $56,000.

The FA and the parties can now identify how many dollars are associated with each of the major differences in the dispute. The panel can then prioritize based on the perceived strengths and weaknesses of each party's position as they move toward a more informed resolution of the dispute.

No Strangers to Coverage

Matching the right mediator or arbitrator to the specific facts and issues in dispute is crucial to a successful ADR outcome. Adding an FA to the potential pool of candidates introduces a different perspective and set of skills that should not be overlooked. FAs are no strangers to coverage; in fact, they often have a better appreciation of the real-life impact because of their ability to quantify the financial loss by varying the coverage equation. They are comfortable working with financial concepts and numbers and are accustomed to devising reconciliation tools that can be used to simplify complex disputes, thus leading to a fair ADR resolution.

Back to the Breakers: The 2018 Spring Conference

This year, the ARIAS•U.S. Spring Conference returned to the Breakers Hotel in Palm Beach, Florida. The conference featured interactive breakout sessions, thought-provoking rapid-fire presentations, and relevant general sessions.

Registration for the Spring Conference increased by 14% from 2017, and one in six attendees were first-time attendees. If you were unable to participate in the 2018 Spring Conference, we hope you will join us in 2019!

David Attisani, Mike Frantz, Jonathan Sacher and Aimee Hoban enjoy cocktails at the reception

Women's Networking Seminar

Ann Field, the ARIAS Women's Networking Committee Chair, moderated this session, which featured a fantastic panel composed of Susan Claflin (ARIAS-certified arbitrator), Cindy Koehler (XL Catlin), Teresa Snider (Butler Rubin), and Sarah Gordon (Steptoe & Johnson LLP). Panel members spoke about the importance of personal branding, self-promotion, and professional relationships. The session also featured mentoring circle activities led by Sarah Gordon. The mentoring circles allowed attendees to network and share ideas on improving their personal branding. The circles will continue to meet throughout the year.

Conference Kickoff

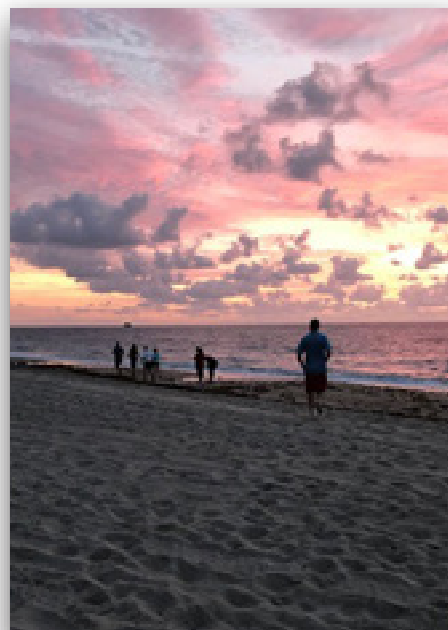
Deirdre Johnson, ARIAS•U.S. chairwoman and one of the conference co-chairs, kicked off the conference with a captivating welcome address. She then introduced the opening keynote speaker, William O'Farrell (Premia Holdings Ltd.).

General Sessions

Category 5 Hurricanes, Devastating Wildfires and Destructive Mudslides: Is this Extreme Weather the New Normal?

Mark Bove of Munich Re and Eric Blake of the National Hurricane Center addressed the question of whether

The ARIAS-U.S. Women's Networking Group kicked off Wednesday morning with a great panel and mentoring circles



Sunrise Fun Run, sponsored by Crowell & Moring LLP

recent Category 5 hurricanes, devastating wildfires, and destructive mudslides represent the "new normal" and shared insights into how such a new normal might affect coverage under existing insurance policies (and what, if any, reinsurance issues we can expect to follow).

"Two great speakers and a very interesting topic. I really enjoyed this session and found it to be of use to my practice."
—Conference attendee

Insurtech: What Does It Mean for the Future of the Re/insurance Industry?

Vikram Sidhu of Clyde & Co. and Scott Whitehead of Markel Digital explored the intersection between Insurtech, traditional models of insurance, and the reinsurance market.

"Another very relevant topic, and an interesting panel."
—Conference attendee

ALI Restatement of Insurance

The final panel updated attendees on the American Law Institute's proposed Restatement of the Law, Liability Insurance. The panelists covered the important and pressing question of whether the draft Restatement represents a restatement or a misstatement of the law as well as the implications of this project on insurers and, ultimately, reinsurers.

Mark Bove from Munich Re and Eric Blake from the National Hurricane Center talk extreme weather at the Spring Conference

"An alarming but very worthwhile session."
—Conference attendee

Breakout Sessions

Breakout sessions at the Spring Conference covered many hot-button topics, such as opioids, the #MeToo movement, public nuisance claims (in light of the recent California appeals court ruling on lead paint), and information security in arbitrations. The breakouts were a favorite of attendees, who enjoyed the interactive sessions.

Recreational Activities

Thank you again to our activity sponsors: XL Catlin (golf clinic), WillisRe (tennis tournament), Crowell & Moring (fun run), FTI Consulting, and Allstate (beachside activities)!

Panelists Paul E. Dassenko, Chuck Ehrlich, Bruce M. Friedman and Eve Rosen debate what role court decisions play in reinsurance arbitrations

Harry Cohen and Steve Schwartz at the evening reception

Data Security: Tips on Keeping Your Data Secure

By Royce F. Cohen and Jennifer Zaluski

Data security is a primary concern in confidential reinsurance (and insurance) arbitrations. At the ARIAS•U.S. Spring Conference, Technology Committee members David Winters and Royce Cohen presented two readily accessible methods that arbitrators can employ to ensure that information exchanged in reinsurance/insurance arbitrations are more secure. These methods not only decrease risk, they make life easier for the arbitrator presented with confidential information.

First, the presentation addressed "password vaults," which are software programs that manage and keep secure the countless passwords used in both personal and professional life. This part of the presentation focused on safekeeping your data from hackers. Second, the presentation addressed "metadata scrubbing" and how to ensure that you are not inadvertently sharing confidential or privileged information. This part of the presentation focused on the unintentional distribution of data to colleagues, clients, and arbitrators. This Tech Corner article is a complement to that presentation.

Password Vaults

A password vault is an application or computer software that stores and generates passwords for secured websites, emails, and files. Password vaults serve two main purposes: first, they help you keep track of your passwords by storing them all in one place; second (and most importantly), they keep your passwords secure. Password vaults are universally recommended by security experts as one of the most convenient ways to restrict inadvertent access to secure information. They are also convenient because they require you to remember only one password.

Moreover, your email, web accounts and files are only as secure as the strength of your password. Are all of your passwords a variation of "Reinsurance2018"? If so, you are not alone. But these types of passwords are weak because they are reused over multiple accounts, use familiar terms, and rely on similar variations of a non-random number (such as a birthdate).

Reputable password vaults use software that creates random (and thus stronger) passwords. These randomized passwords are much more secure than the passwords that we generally create. Password vaults are also more

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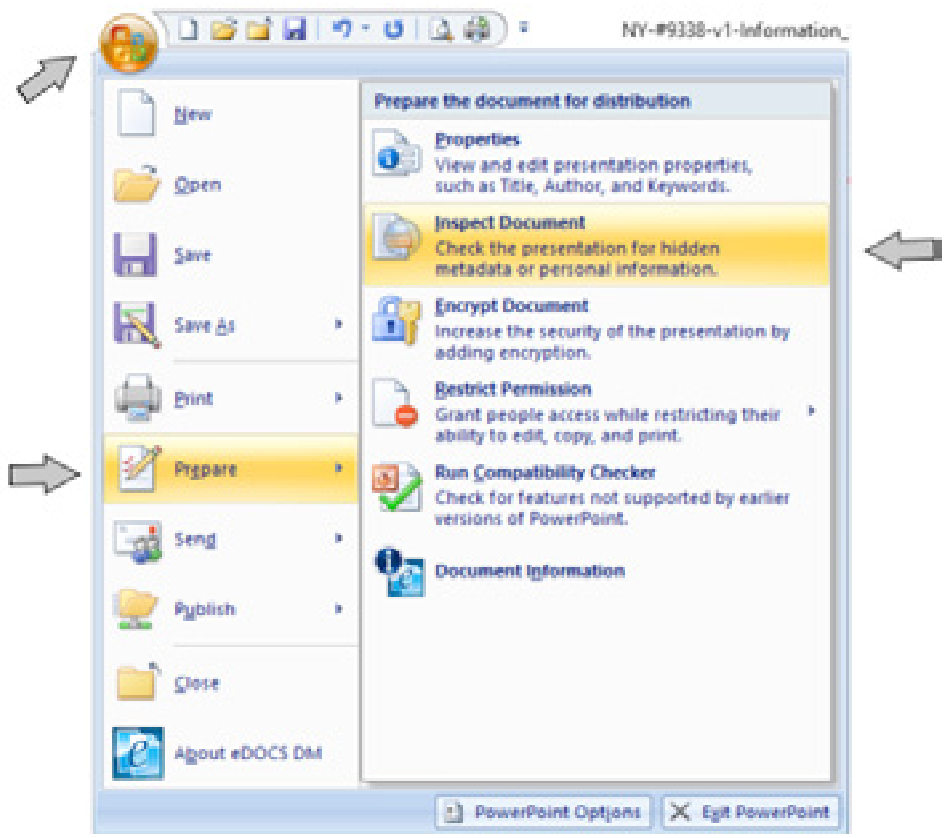
Jennifer Zaluski is of counsel in Tressler's New York Office. She has an extensive background in insurance and reinsurance arbitration and litigation and focuses her practice on eDiscovery issues.

Figure 1: **Removing Metadata Using Microsoft 2007 Document Inspector**



secure, because the technology is heavily encrypted. This means that even when hackers attempt to steal information from these applications, they are usually unable to crack the passwords.

Metadata Scrubbing

Metadata (also known as embedded data) literally means "data about data."[1] It is hidden information stored on your computer that provides historical information about almost any type of file, including a Word document, PowerPoint presentation, Excel spreadsheet, PDF, or email message.[2] It usually describes how, when, and by whom an electronic document was created, modified, and transmitted.[3]

Examples of metadata include the names of the authors and editors of a file, the dates the file was edited, personal comments and tracked changes made to the file, revisions to and previous versions of the file, the name of the computer, network server, drive, or folder where the file was saved, and formulas used in Excel spreadsheets. For example, if we sent you a Word file with this article, you might be able to see which of us originally wrote the article, the changes each of us made (and when), and other information. With respect to emails, metadata could include the identities of all recipients (including those who received a copy or blind copy), the attachment history and links to those attachments, and information about whether the email was forwarded to additional recipients.

Metadata is contained in every electronic document and may include information that you do not want to share with others. For example, confidential internal comments or language from prior drafts of the document may be "invisibly" retained in metadata.[4] To that end, most software programs provide you with tools to identify metadata and, more importantly, remove it.

While it is unusual (but not unheard of) to see metadata used directly as evidence, metadata may be sought as part of a litigation strategy to support other evidence (or data). In some instances, metadata can play a role in a legal strategy. With proper forensic analysis, metadata can be (and has been) used to emphasize patterns, determine timelines, and verify gaps in the data.[5] Most importantly, metadata can connect data to a particular user, opening the door to proving knowledge or intent.

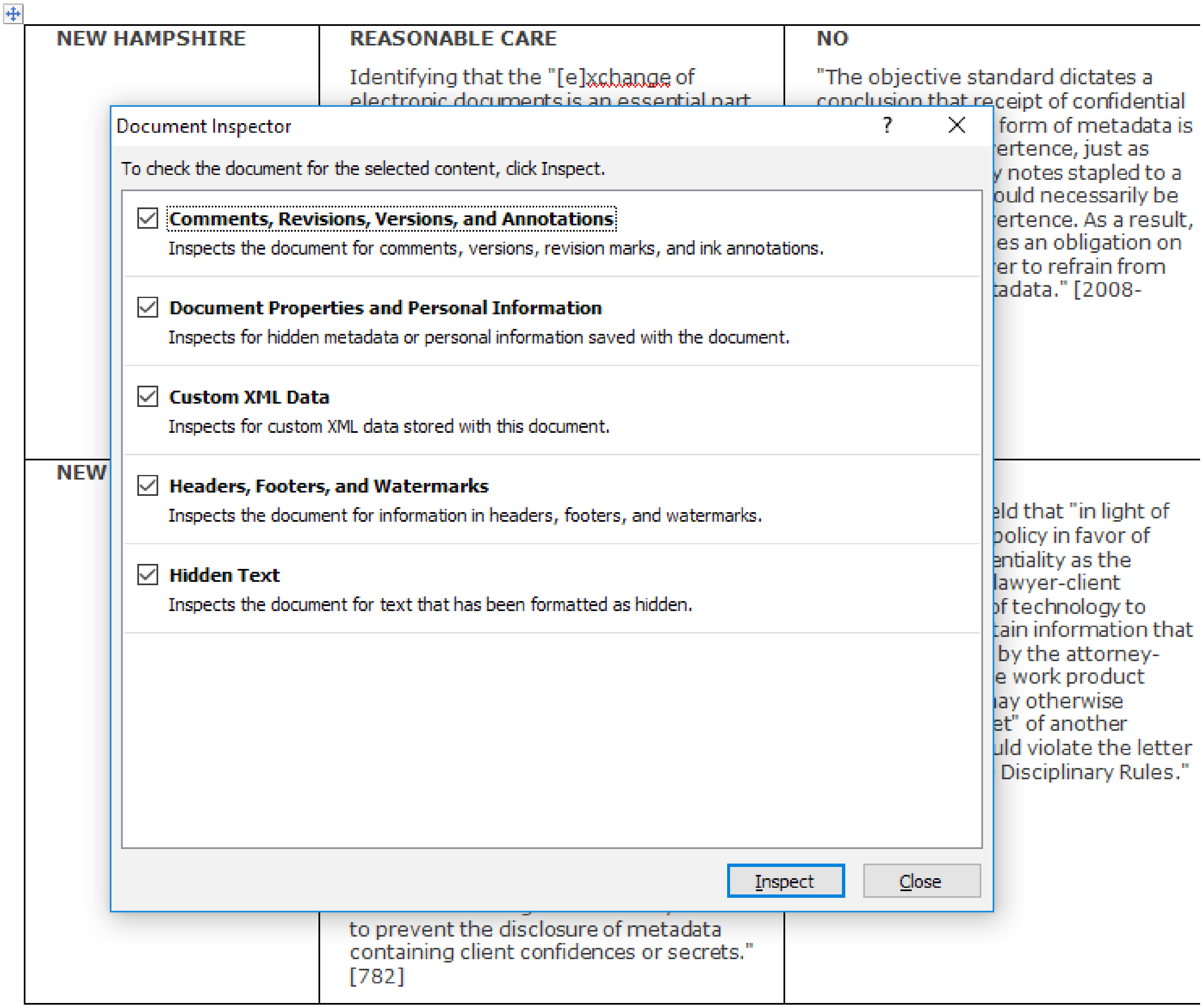
In litigation, metadata has been used to settle factual disputes about a document's history. For example, imagine a scenario in which a terminated employee fabricates an email to suggest that she was terminated in retaliation for a sexual harassment complaint. Metadata can show that the plaintiff employee was the document's author, thus obviating her claim.[6]

Metadata may be used to show when a witness had knowledge of information, (e.g., when the witness received and opened a document or email).[7] Metadata may also reveal whether an adversary has properly preserved documents by providing the date that missing documents were deleted.[8] Finally, metadata may be used to reveal whether an attorney-client privilege was broken by providing the names of all recipients of an email, including blind-copied individuals who might fall outside the scope of the privilege.[9]

Removing Metadata from Documents

Since metadata may contain privileged, confidential, or trade-secret informa-

Figure 2: **Removing Metadata Using Microsoft 2007 Document Inspector**



tion, it is generally a best practice to remove it. Following are some how-to instructions on how to remove metadata.

Using Microsoft's Document Inspector 2013 (included with Word, Excel and PowerPoint). If you are using Microsoft 2013 or later, take the following steps:

1. Click the *File* tab, then click *Info*.

2. Click *Check* for Issues.

3. Click *Inspect Document*.

Use the Document Inspector dialog box to select the type or types of data to find in the document. After the modules complete the inspection, the Document Inspector displays the results for each module in a dialog box. If a given module finds data, the dialog box includes a *Remove All* button that you can click to remove that data. If the module does not find data, the dialog box displays a message to that effect.

Using Microsoft's Document Inspector (Microsoft 2007).[10] Follow the steps outlined in Figure 1 and Figure 2.

Print to PDF/save as a PDF. When you print to PDF, documents are "flattened."[11] Flattening is a tool that hides any content that is not visible when the flattening operation is executed.[12] Flattening also consolidates all layers in a document.[13] Therefore, it acts as a metadata scrubber.[14] (Keep in mind that flattening cannot be undone.[15])

To print to PDF in Word, PowerPoint, Excel or WordPerfect:

1. Click the *File* tab, then click *Print*.
2. Select your PDF printer.
3. Click *OK*.

To save as a PDF:

1. Click the *File* tab, then click *Save As*.
2. Change the "Save As Type" drop-down to PDF.
3. Click *OK*.

Remove metadata from a PDF using Adobe Acrobat Reader. To remove metadata from a PDF using Adobe Acrobat Reader, click the *File* tab, then click *Properties*. This will show you the most important metadata fields you can delete manually.

Ethical Obligations

Attorneys may have ethical obligations when it comes to metadata. Many states have issued ethics opinions to guide attorneys on their obligations to protect confidential metadata when sending or receiving legal documents. Generally, state ethics committees have found that attorneys have a duty to use "reasonable care" when sending sensitive documents that may contain metadata, meaning they are expected to know what metadata is hidden in the document and take steps to prevent disclosure of confidential client information.[16]

Some states also impose obligations on the recipients of inadvertently produced metadata. For example, in New York, the ABCNY's Committee on Professional and Judicial Ethics concluded that an attorney who receives a communication and is exposed to its contents "prior to knowing or having reason to know that the communication was misdirected ... is not barred, at least as an ethical matter, from using the information." However, the committee also stated that "it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure."[17]

As discussed above, while metadata can be used as an offensive litigation tool, it is generally a best practice to remove metadata from all documents prior to sharing with anyone outside the attorney-client relationship.

Attorneys may have ethical obligations when it comes to metadata. Many states have issued ethics opinions to guide attorneys on their obligations to protect confidential metadata when sending or receiving legal documents.

NOTES

1. Embedded Information in Electronic Documents: Why Metadata Matters. 2007. White paper. New York: LexisNexis.
2. Id.
3. Id.
4. Himmelrich, N. 2010. "Metadata: Data about Data." Baltimore: Gordon Feinblatt LLC.
5. Spore, A. 2014. "Using Metadata in Litigation." *Forensic Magazine*, online article, Sept. 23.
6. Embedded Information in Electronic Documents: Why Metadata Matters. Lexis Nexis
7. Id.
8. Id.
9. Id.
10. There are many different ways to remove metadata. Please consult your technology department to confirm the best method for the application that you are using, or see the following tutorial to get a sense of additional ways to remove metadata: "Simple questions: What is a file's metadata and how to edit it in Windows?" *Digital Citizen*, Sept. 21, 2016. Ciprian Adrian Rusen.
11. Michaelis, B. 2013. "How to Strip Metadata in Two Easy Steps." Oregon Law Practice Management, online article, Nov. 25.
12. Id.
13. Id.
14. Id.
15. Id.
16. Strickler, A. 2017. "Mind Your Metadata: Ethics Rules on Hidden Data." Law 360, online article, Jan. 11.
17. "Metadata Ethics Opinions around the U.S." Online chart. American Bar Association.

ARIAS Goes to Brooklyn! Part 2

"I can't believe we're going to be in Brooklyn." –*Numerous ARIAS members*

I will confess that before I moved to Brooklyn five years ago, I had been to New York's largest borough only a handful of times. The East River seemed like a daunting barrier. Besides, I thought, I have everything I need in Manhattan.

Now that I am firmly entrenched on the better side of the river, going back into Manhattan seems like a burden. I now have everything I need in Brooklyn.


Tom Fruins' Stained Glass House, installed at Brooklyn Bridge Park.

In the last issue of the *Quarterly*, I gave you a high-level overview of where we will be staying for the 2018 Fall Conference. In this issue, I will share a bit more about what there is to do near the hotel, including some of my favorite bars and restaurants in the surrounding area. As a reminder, "surrounding area" means quite a few neighborhoods: DUMBO, Brooklyn Heights, Boerum Hill, and Cobble Hill are all less than one mile from the Marriott Downtown Brooklyn location.

Downtown Brooklyn. The area immediately surrounding the hotel is the one with the fewest bars and restaurants, though that is starting to change. The center of Downtown Brooklyn is the Fulton Street Mall, which begins just a few steps down from the Marriott. Dozens of stores line the street, and it is almost always filled with pedestrians. For a bit of neighborhood dining, the Kimoto on Duffield Street serves Asian fare and has a rooftop lounge that (weather permitting) is a perfect place for a drink. Grand Army on State Street is a popular post-work oysters and cocktail bar. If you are into food halls—the latest craze in eating—the DeKalb Market Hall is just west of Flatbush Avenue. The Hall has 40 food vendors ranging from the famous Arepa Lady to Katz's Deli.

Brooklyn Heights. The Brooklyn Heights Promenade is 0.7 miles from the hotel and, as I mentioned last time, a must-visit during your stay. The sunsets over the Manhattan skyline are stunning. If you want a drink with your views, the Brooklyn Heights Social Club in the new 1 Hotel Brooklyn Bridge has panoramic views of the city. Jack the Horse Tavern is a neighborhood favorite that is tucked away in a residential part of the area, just steps from the Promenade.

Cobble Hill. Brooklyn Heights and Cobble Hill are separated by Atlantic Avenue, home to some of the best restaurants in the area. Colonie and Beasts & Bottles are two of the most popular. Cobble Hill is also home to restaurants along Court Street, one of the main thoroughfares in the area. Watty & Meg is a personal favorite there.

Boerum Hill. Boerum Hill's Smith Street is dotted with bars and restaurants that cater to every genre. Clover Club is a trendy cocktail bar that serves as the perfect post-conference place for a drink. Rucola on Dean Street has

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great food and great ambience in a cozy setting.

DUMBO (aka "Down Under the Manhattan Bridge Overpass"). The Osprey is a new addition to the DUMBO scene, and its location at the edge of Brooklyn Bridge Park puts you right in the middle of the action. Gran Electrica adds a fancy twist to Mexican street food, and its tequila cocktails are legendary.

I guess it's possible that some of you want to do more than eat and drink (and talk reinsurance) while in Brooklyn, so here are a few more suggestions for activities in the area.

If you want to go for a run, Brooklyn Bridge Park is clearly the best option. You can enter on the Atlantic Avenue side, cross the park while taking in the city views, and emerge on the DUMBO end before looping back up to the hotel through Cadman Plaza. If that sounds too ambitious, Fort Greene Park is just a half-mile from the hotel.

If you want to be artsy, the Brooklyn Academy of Music ("BAM" to everyone) has three locations in Fort Greene and Downtown Brooklyn. Its calendar is filled with dance, art, music, films, and theater. Check out www.BAM.org to see what is scheduled for November. If you want to venture a little farther, the Brooklyn Museum is a stunning space that attracts premier exhibits to the area. See what is going on at www.brooklynmuseum.org/exhibitions.

If you want to lose yourself in your thoughts, check out Prospect Park. You may get lost in the park's many winding paths, but at least you'll have pretty scenery as you do. While November will be a bit chilly, the fall colors will make it worthwhile. The park is also a popular running spot.

If you just want to feel like a tourist, one of my favorite things to do is ride the NYC Ferry Service (formerly known as the East River Ferry). You can get on and off at the DUMBO stop and take a ride along the river up past Williamsburg and Long Island City, across to Midtown East, and then back down toward Brooklyn and Wall Street. The journey takes you under three bridges (the Brooklyn, Manhattan and Williamsburg bridges) and gives you a front row seat to much of the city's skyline. A one-way fare is only $2.75. You can get more information on routes and schedules at www.ferry.nyc.

There is a lot to do in Brooklyn. Granted, it is not as packed in as Manhattan, and you might have to walk a bit farther to get where you're going. But that walk will show you why so many of us have chosen to make Brooklyn our home.

So, if you have free time, take a walk. Walk through Brooklyn Heights and marvel at the architecture. Walk down Smith Street and stop in at the neighborhood stores. Walk into DUMBO and see the famous cobblestone streets. And if you still need more ideas, walk over to me at the conference and ask me. I'll happily point you in the right direction.

Members on the Move

ARIAS•U.S. Chairwoman **Deirdre Johnson** and ARIAS member **Paul Kalish** have joined Squire Patton Boggs as part of the firm's effort to beef up its insurance and reinsurance disputes expertise. Johnson previously led Crowell & Moring's Professional Liability/Financial Lines Practice, while Kalish was co-chair of Crowell & Moring's Insurance and Reinsurance Group.

Johnson and Kalish have decades of experience handling lawsuits and arbitration proceedings arising out of a broad range of claims and all types of insurance and reinsurance agreements. In recent years, they have represented clients in major insurance and reinsurance arbitrations, given strategic advice to captives and their managers, provided insurance counseling and dispute resolution guidance in warranty coverage and professional liability matters, and represented clients in underlying litigation, including amicus briefs for a key insurance industry trade group.

Troutman Sanders LLP is increasing its commercial and class action litigation capabilities by hiring **William C. O'Neill**, **Leslie Davis**, **Michael T. Carolan**, **Jack Thomas**, and **Steven D. Allison**. The five new partners previously practiced at Crowell & Moring, with O'Neill and Davis serving as co-chairs of the firm's Insurance & Reinsurance Practice Group and Thomas and Allison serving as the managing partners of Crowell's London and Orange County (Calif.) offices.

The five have represented clients in all major insurance segments (life, health, and property-casualty) as well as all lines of business—insurance, reinsurance, captives, runoffs, and SPVs. Their insurance experience spans litigation, regulatory and legislative matters, and bankruptcies.

Follow the Fortunes

Since March 2006, in a section of the ARIAS•U.S. website titled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration- and reinsurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases. Legislation, statutes, or regulations for potential publication by the committee. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions.

American Employers' Insurance Co. v. Swiss Reinsurance Am. Corp., 413 F.3d 129 (1st Cir. 2005)

Court: United States Court of Appeals for the First Circuit

Date Promulgated: June 27, 2005

Issues Decided: (1) Whether, under a multi-year facultative certificate with a follow-the-fortunes clause, a reinsurer is bound by its cedent's settlement based on annualization of the underlying policy limits, when the certificate is silent as to annualization. (2) Whether a settlement of claims relating to hazardous waste at multiple sites is inherently made "in bad faith" (thus relieving the reinsurer from its obligations under the follow-the-fortunes doctrine) if the cedent did not make individualized remediation-cost assessments for each site in determining its settlement value.

Submitted by: Cecilia Froelich Moss and David Byowitz

American Employers' Insurance Company ("American") provided excess insurance coverage to the predecessor of Elf Atochem North America ("Elf") pursuant to three multiple-year umbrella policies. The American policies provided coverage for "each occurrence" and defined "occurrence" to include:

[A]ll personal injury and property damage . . . arising out of one event or continuous or repeated exposure to substantially the same general conditions existing or emanating from one premises location shall be deemed to be one occurrence.

Swiss Re reinsured American under three multi-year facultative certificates. Each certificate provided limits for "each occurrence and in the aggregate," and each contained both follow-the-form and follow-the-fortunes clauses.

When Elf notified American of potential hazardous waste losses at 37 sites and demanded indemnification, American sued for declaratory judgment in New Jersey state court. Elf made several settlement demands that assumed (1) high remediation costs and (2) that each per-occurrence limit in the American policies applied once per policy period (i.e., no annualization of American's policy limits).

American's coverage counsel also prepared an exposure analysis that was based on its lower estimates of remediation costs of the top 10 hazardous waste sites but that assumed annualization of limits. That analysis estimated American's exposure for the top 10 sites at $44.8 million and valued the remaining 27 sites (for which American had no detailed information) at an additional $2.8 million by applying an 80 percent reduction to the estimated liability proposed by Elf for the secondary sites.

Eventually, the parties settled for $44 million pursuant to an agreement that did not mention annualization and explicitly stated that neither party made any admissions regarding the interpretation or application of the policies. American billed Swiss Re for its share of the settlement, based on American's allocation that was premised on annualized per-occurrence limits.

Swiss Re challenged American's use of annualization and also claimed that it was not liable for any portion of the payments made on the 27 secondary sites. American sued Swiss Re to recover the full amount of its reinsurance billings. The district court granted Swiss Re's motion for summary judgment, finding that the certificates' per-occurrence language precluded annualization and that a settlement made without investigating the secondary sites was not in good faith. American appealed.

Key Holdings

Follow the fortunes. The First Circuit vacated and remanded, finding against Swiss Re on both counts. With regard to annualization, American argued that it made a good faith reasonable settlement based on annualization of its limits and that Swiss Re was bound by the follow-the-settlement provisions of the certificates. The First Circuit held that, while the definition of "occurrence" in the American policies may have seemed to weigh against annualization, American was entitled to consider the risk that annualization would apply.

Further, the court noted that the settlement amount paid by American was based on American's calculation of liability assuming annualization and therefore held that American had supported its characterization of the settlement. However, the court left open the possibility for Swiss Re to argue on remand that the settlement was unreasonable because the risk of annualization was small, or that the settlement based on annualization was not made in good faith because American had additional liability to Elf under other, higher-layer excess policies.

The First Circuit also held that there was no clear anti-annualization language in the reinsurance certificates that would serve to overcome the follow-the-settlements clause. The certificates simply used the term "per occurrence," which neither adopts nor refutes annualization.

Lack of individual site assessment. Regarding the 27 secondary sites, the First Circuit found that American provided a colorable explanation for its decision to settle those sites based on an across-the-board 80 percent discount as opposed to conducting a site-by-site investigation. The court noted that "settling numerous claims based on detailed information about only a subset of those claims is consistent with modern practice . . . ." and held that it was not unreasonable for American to use the top 10 sites as a crude proxy for the remaining 27 sites.

Key Takeaways

Absent specific language in a multi-year reinsurance certificate precluding annualization of policy limits, the follow-the-fortunes doctrine will bind a reinsurer to its cedent's settlement based on annualization so long as the settlement was reasonable, made in good faith, and not clearly excluded by the underlying policy. A cedent's settlement of multiple claims based on a detailed analysis of a subset of those claims is not per se "bad faith" and will not excuse a reinsurer from its liability under follow-the-fortunes, as long as the cedent provides a colorable explanation for its settlement decision.

Absent specific language in a multi-year reinsurance certificate precluding annualization of policy limits, the follow-the-fortunes doctrine will bind a reinsurer to its cedent's settlement based on annualization so long as the settlement was reasonable, made in good faith, and not clearly excluded by the underlying policy.

Newly Certified

Certified Arbitrator

Michael Marick is a partner of Hinshaw & Culbertson LLP, a Chicago-based national law firm. His 35-year legal career has been devoted exclusively to representing insurers and reinsurers in counseling, litigation and arbitration arising from long-tail liabilities (mass tort and environmental matters), professional liabilities, and a broad range of other high-exposure matters.

He has served as a professor of insurance law, an expert witness, and a reinsurance arbitrator/umpire. Recently, he was acknowledged as one of the top 30 insurance and reinsurance attorneys in the United States in Euromoney Media Group's *The Best of the Best US*. He has been an editor of the *Reinsurance Professional's Deskbook—A Practical Guide* since its inception.

Certified Umpire

Lawrence Pollack is a full-time arbitrator and mediator affiliated with JAMS, the international dispute resolution provider. He specializes in the arbitration and mediation of insurance and reinsurance matters in a variety of disciplines, including errors and omissions liability, directors and officers coverage, toxic tort and pollution coverage, marine liability, and property damage coverage.

Before joining JAMS, he spent 28 years in private practice at Dewey & LeBoeuf and its predecessor firms compiling an extensive litigation résumé, particularly in insurance and reinsurance matters. His experience includes settlement of insurance claims concerning alleged respiratory injury following clean-up of the September 11, 2001, disaster as well as litigation and eventual settlement of a high-profile insurance recovery action arising out of a massive explosion on an oil platform off the coast of Brazil.

Certified Mediator

W. Mark Wigmore is managing director of Avalon Consulting, LLC, an insurance and reinsurance claims consultancy and dispute resolution firm. He has more than 25 years of experience in the property/casualty insurance and reinsurance industries, including serving as president and CEO of St. Paul Re, Inc., from 2002-2004. In that role, he managed all the assumed reinsurance run-off operations of the St. Paul Travelers Companies.

In addition to his role with Avalon, he is a member of the board of directors of the Electric Insurance Company of Beverly, Massachusetts. He was elected chairman of the board's Audit Committee in March 2014.

In the United Kingdom, he was chairman of St. Paul Reinsurance Company, Ltd., and also headed St. Paul Specialist Services, Ltd., the run-off manager for St. Paul Re (U.K.), Unionamerica Insurance Company, Ltd., and St. Katherine's Insurance Company.

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