ARIAS U.S.

QUARTERLY

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Q4 • 2020

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As I write this letter, we are now eight months into the COVID-19 pandemic, with cases surging across the United States and the world. Most of us are still working from home, although I understand that some offices have seen life on a periodic basis. I hope all of you and your families are safe and healthy.

We are at an inflection point in this country, with a divided election and democratic institutions under attack. The sacred right to vote and the integrity of our election process are being challenged by unsubstantiated hearsay. Having spent nearly 30 hours on November 3–4 volunteering in the Davis Polk New York call center (remotely, of course) with the Election Protection Coalition, a nonpartisan group organized by The Lawyers' Committee on Civil Rights Under Law to protect the right of every eligible voter to cast their ballot, I can tell you that there was no widespread voter fraud or effort to steal the election. Most of the issues we addressed were about how to vote, where to vote, and whether ballots would be counted (along with machine failures and long lines). I hope that, by the time you read this, rational behavior will have prevailed and our democracy will be standing unscathed by those who want to burn the house down on the way out.

That brings us to this issue of the *Quarterly*. This is a bit of a thin issue, especially compared to the rather large third quarter issue. I hope you can find the time to author an article or two for the *Quarterly* in 2021. Articles are being accepted now.

There are two very useful articles in this issue. The first, by editorial board member Robert M. Hall of Hall Arbitrations, is titled "Reinsurers and Tort Liability." In this article, Bob discusses the interesting issue of tort liability in reinsurance disputes. Most reinsurance disputes involve contract claims, but occasionally tort-like claims are asserted. Bob gives us a fine analysis of whether there may be tort liability arising out of reinsurance disputes.

The second article, by David W. Ichel of X-Dispute LLC, covers a topic close to my heart as a mediator for the Southern District of New York for 28 years. David's important article, "The New Age of Virtual Mediations," discusses his experiences mediating high-level commercial disputes on virtual platforms like Zoom. David's insights are noteworthy and fit in well with the new reality in which we now all live. The article certainly gave me some good ideas to use in my mediations. I encourage all of you to read the article carefully, especially if you are a mediator or are counsel or a party to a mediation. (David's comments apply equally to virtual arbitrations.)

As usual, there are some great case notes from the Law Committee as well as other member notes. There is also a recap of the ARIAS Virtual Fall Conference. I don't know about you, but I thought the conference went extremely well. Co-chairs Beth Levene, Eileen Sorabella and Robert DiUbaldo did a fantastic job pulling off this virtual conference. We had around 200 attendees, and I know that the Social Inflation panel I moderated had more than 175 attendees (I checked the participant count). I enjoyed the virtual networking session and thought the small group format of 6–8 people worked very well. It was great to see people and talk to them during the networking sessions.

Congratulations to all of the presenters and participants. I hope we do not have to meet virtually again in the spring, but I recommend polishing your Zoom skills just in case (virtual backgrounds are a thing).

As for me, you saw in the last issue that my circumstances have changed. Well, my information has changed a bit again—I am now Schiffer Law & Consulting PLLC, with a new email address: *larry.schiffer@schifferlc.com.*

Finally, let me reiterate the need for articles for 2021. Please do not wait to share your thought leadership. If you are a committee chair, draft a report about what your committee is doing. If you spoke on a panel or in a break-out session, turn it into an article. If you have experienced virtual arbitrations and depositions, write an article about it. We look forward to your submissions.

Stay safe.

Larry P. Schiffer
Editor

The New Age of Virtual Mediations

By David W. Ichel

It is true, as the saying goes, that necessity is the mother of invention. Among the few silver linings of the COVID-19 pandemic has been the introduction of full remote video mediation via Zoom, Webex and other similar platforms as a terrific way to resolve cases with significantly less burden and expense for the parties.

As a regular mediator of large commercial cases of every variety, including insurance, I have been accustomed to traveling for my mediations. Whether to New York, Minneapolis, North Carolina, or California, I would travel to get the case settled. The same was true of counsel for the parties (usually from large law firms), the client representatives and, if the case was an underlying commercial case with insurance at stake, the insurer representatives as well.

Lately I have been conducting many of these same sorts of mediations using Zoom, and no one needs to leave their city or even their home.

> "Zoom and related video technologies also increase the ability to improvise toward settlement."

It is true that there is a benefit to face-to-face interaction, but I still have that interaction with counsel and their clients through Zoom. Let me explain just how easy and effective it is by describing my typical mediation approach and how I have made it even better with Zoom.

Pre-Mediation Conferences

I begin mediations by emailing and then speaking with both parties' counsel about the nature of the dispute. I then ask them to send me mediation statements describing their positions and including copies of any relevant documents. Sometimes counsel will want me to review whole summary judgment motions that are pending; sometimes I receive the relevant contracts and key documents.

In the pre-COVID world, I held the initial conferences by telephone. Now I often do it by Zoom, beginning a full face-to-face interaction that continues throughout the mediation process. Additionally, prior to the pandemic, I almost always held a separate pre-mediation call about a week or 10 days before the main mediation session with each side's counsel (and sometimes their clients) to see if I could make some progress before the main mediation session or at least gain everyone's understanding of how we would try to get to "yes" in the main mediation to follow. Now I am conducting these sessions with each party through Zoom. This has allowed us to build rapport and accomplish more, as everyone is, in essence, face to face, and I can show them documents by "sharing my screen" while we talk. By the time we get to the main mediation session, I know the lawyers and their clients pretty well.

In one recent mediation involving the claims of a government-appointed liquidator of an insolvent firm against a major accounting firm, we actually used Zoom to perform a month's worth of separate-side Zoom sessions. Through those sessions I secured continuing offers and counteroffers from each side, enabling us to go into the main mediation day with some progress having already been made. The mediation day was difficult enough, but the pre-mediation sessions made it possible to negotiate a full settlement in the course of a (long) mediation day.

The Practice Session

A day or two before the main mediation session, I conduct a 30-minute practice session for all counsel and parties who wish to attend. The purpose is to explain how Zoom will work, how I will move them (and myself) from "room" to "room" within our session, how they can speak privately without me in their rooms, how I can speak privately with just counsel, and so on. I also show them how they will be able to post documents for all to see, either in the joint session or in breakout sessions as the mediation goes forward. This session is also an opportunity to break some ice, with the two sides meeting together for a few minutes with me.

The Main Event

The main mediation day proceeds just like a traditional in-person mediation, except that none of the lawyers or clients must travel to attend it—not even across town, much less across the country.

I begin with a joint session in which both sides make presentations (including showing PowerPoint slides or other documents, if they wish) to all assembled. The length of these presentations is agreed upon in advance at the pre-sessions. I give everyone a "road map" showing how the day will go, then place each party into its own "breakout room," reserving one such room for myself in case I want to meet with some sub-set of participants alone.

From that point onward, I move from breakout room to breakout room discussing the issues and getting offers and counteroffers from each party. If there is an issue that would benefit from bringing all the parties together to discuss, I can move everyone back into our main mediation room for that mini-session.

If there is an issue that would benefit from a back-channel discussion with just a couple of counsel, I can "beam" them out of their respective breakout rooms into my mediator's room for the discussion, then "beam" them back á la Star Trek.

I have settled a number of cases—and, even better, pre-litigation/arbitration disputes—using this method. As with an in-person mediation, sometimes a Zoom mediation goes late into the night before we get to "yes." However, unlike an in-person mediation, there are no planes to catch or cancel or artificial deadlines to meet.

Better Able to Improvise

Zoom and related video technologies also increase the ability to improvise toward settlement. Here are some recent examples from my experience:

1. How do you get multiple towers of insurers to a mediation of an underlying case? Rather than having to first find one date that works for everyone and then having insurer representatives/counsel travel from all over to the mediation, everyone can meet on their computer via Zoom.
2. How do you get parties from disparate time zones together? I am about to complete a large mediation between a set of Chinese companies on one side and a U.S company on the other. Before the pandemic, we spent weeks trying to arrive at a date when the Chinese could come to New York, and even then we knew that it would take more than one session. The time zones are 12 hours apart, and the travel costs (dollar and personal) are huge. Instead, we used Zoom, with me conducting separate

> "Even after we tackle the COVID-19 pandemic, these technologies will be here to stay."

breakout sessions (in real business time) for each side. It was a little inconvenient for me to meet at 8:00 or 10:00 p.m. with the Chinese, but I am being paid, and it made a complicated mediation possible and much less expensive for everyone.

3. How do you work with financial institutions that have security concerns with Zoom? While I understand that Zoom has addressed the early security concerns raised about its platform, I have encountered some financial institutions that prohibit their employees and counsel, inside and outside, from using Zoom for business matters. I solved this in one case by holding the separate pre-mediation and mediation-day breakout sessions for that party on Webex, and holding the pre-mediation and mediation-day breakout sessions with the other party on Zoom. We held the joint session that began the mediation day on Webex. Unlike Zoom, Webex does not offer breakout rooms, but the combination of separate sessions on Zoom and Webex accomplished the same goal.

4. What if you have a multiple-party case to settle, but the mediator won't get to some of the parties until well after the start of the mediation? Some of my cases involve multiple parties, and sometimes I really need to get important movement from certain parties before I deal with others. If everyone has to travel to one location for the traditional in-person mediation, a number of lawyers and clients are left "cooling their heels" for hours or even most of a day without much attention. With Zoom, these parties can go about their work in their own offices until I need to meet substantively with them. I will check in from time to time, but otherwise they are free to do their own business.

Virtual Mediation Is Here to Stay

It should be pretty clear by now that, as a mediator, I am a big fan of Zoom and related technologies for mediation. I can offer parties the same experience as an in-person mediation, with less cost and aggravation and more time spent getting the case settled—which is why I am hired in the first place.

For this reason, I am convinced that even after we tackle the COVID-19 pandemic, these technologies will be here to stay. Insurers and reinsurers would be well advised to give virtual mediation a shot at resolving their next dispute before it gets arbitrated or before the final hearing. A virtual mediation is the easiest and least expensive way to do it.

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CAUSES OF LEGAL ACTION

Reinsurers And Tort Liability

By Robert M. Hall

The most common causes of action against a reinsurer are contractual, i.e., by a cedent, a retrocessionaire or an insured pursuant to a contractual or de facto cut-through agreement. But are other causes of action available to those who believe they have been wronged by a reinsurer? The purpose of this article is to review selected caselaw on point.

Tort Causes of Action

California cases. In the recent case of *California Capital Insurance Co. v. Maiden Reinsurance North America,*[1] the cedent brought a tort action for breach of the implied covenant of good faith and fair dealing due to failure to indemnify the cedent for losses. The court noted that under California law, the covenant of good faith and fair dealing had almost always been a contractual rather than tort remedy. Exceptions to this rule are based on elements of adhesion, unequal bargaining power, high level of public interest in the transaction, and the presence of elements of fiduciary relationships. The court found that these considerations were not present in the cedent-reinsurer relationship and denied a tort cause of action.

This same line of reasoning appears in *California Joint Powers Insurance Authority v. Munich Reinsurance America,*[2] which involved a suit under California law by a self-insurance pool against its reinsurer for tortious breach of the implied contract of good faith and fair dealing. In reviewing California law, the court noted that the covenant of good faith and fair dealing is intended to effectuate the contractual intentions of the parties. For this reason, breach of the covenant traditionally has been limited to contract rather than tort remedies.

The *California Joint Powers* court observed that under California law, a departure from this tradition is justified when the breach of the covenant violated strong public policy, such as the obligations of an insurer to its insured. In such a situation, insureds possess unequal bargaining power and are purchasing insurance not for commercial advantage but to avoid personal calamity. Cedents, on the other hand, possess substantial bargaining power and purchase reinsurance to increase their ability to write business and attain other commercial advantages. As a result, the court concluded that the California Supreme Court would find that there is insufficient justification for granting tort remedies for what is essentially a claim of breach of contract.

In *Stonewall Insurance Co. v. Argonaut Insurance Co.*,[3] the cedent settled a complex environmental claim and sought indemnity from its reinsurer. When the reinsurer contested allocation, litigation ensued and the cedent alleged breach of contract and the torts of breach of the duty of good faith and utmost good faith. The court reviewed California law on the tort claims and concluded that California law is clear: tort damages are generally not available for a breach of contract.

The California Supreme Court has identified the following reasons for denying tort recovery in breach of contract cases: (1) the different objectives underlying tort and contract breach; (2) the importance of predictability in assuring commercial stability in contractual dealings; (3) the potential for converting every contract breach into a tort, with accompanying punitive damage recovery; and (4) the preference for legislation in affording appropriate remedies. Further, the court has noted that restrictions on contract remedies serve to protect the freedom to bargain over special risks and to promote contract formation by limiting liability to the value of the promise.[4]

After reviewing the rationale for the exception to this rule for insureds, the *Stonewall* court stated why a similar exception is not necessary for cedents' claims against reinsurers:

A reinsurer's breach of a reinsurance contract is more comparable to this "ordinary" breach of a commercial contract. A reinsured has the ability to diversify its risks, and a reinsurance contract may cover only a specified portion of a potential loss. . . Moreover, the breach does not directly affect the original insured, for the reinsured is still liable as an original insurer and the reinsurer has no contact with the original insured. This court acknowledges that a reinsurer's breach of the duty of good faith ultimately may seriously affect the reinsured's ability to provide coverage to its other original insureds . . . Nonetheless, this court does not believe that recognizing the ripple effects of such a breach warrants a finding of public interest comparable to when an original insurer does the same against its original insured.[5]

The court went on to find that there is no fiduciary obligation owed by a reinsurer to its cedent and that, under California law, a cedent cannot recover tort damages for the reinsurer's breach of good faith.[6]

Central National Insurance Co. of Omaha v. Prudential Reinsurance Co.[7] involved a jury award of tort damages for a reinsurer's bad-faith refusal to pay a claim. The court ruled that those damages were not available in California and, in the process . . .

. . . enumerated [the] characteristics that must be present in contracts for purposes of serving as predicates of tort

> "The most common causes of action against a reinsurer are contractual, i.e., by a cedent, a retrocessionaire or an insured pursuant to a contractual or de facto cut-through agreement."

> "Reinsurers are safe from tort liability, at least when they stay within their traditional roles."

liability: (1) the contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a nonprofit motivation, i.e., to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party 'whole'; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability.[8]

Caselaw from other jurisdictions. A dispute over the date of termination of reinsurance coverage under Connecticut law was involved in *Security Insurance Co. v. Trustmark Insurance Co.*[9] Among other causes of action, the cedent sought recovery for a tortious breach of the duty of good faith and fair dealing. After a review of Connecticut law, the court denied the claim: "Connecticut has not, and would not, establish a cause of action in tort for an implied breach of the covenant of good faith and fair dealing separable from the contact claim [also alleged].[10]

A questionable disability claim under Connecticut law was at issue in *McCulloch v. Hartford Life & Accident Insurance Co.*[11] The cedent had ceded to the reinsurer 100% of the outstanding liability of a block of policies, including the policy at issue. The reinsurer also agreed to administer the runoff of the claims. When a dispute occurred over a disability claim, the insured sued the cedent and reinsurer for bad faith, tortious interference with contract, and other causes of action. The court ruled that the reinsurer was not liable in bad faith pursuant to the following standard:

To prove bad faith, a plaintiff must show that the defendant engaged in conduct designed to mislead or deceive, or that it was negligent or refused to fulfill some duty or contractual obligation not prompted by an honest mistake. Bad faith is not simply bad judgement or negligence, but rather it implies a conscious wrongdoing because of a dishonest purpose. Allegations of a mere coverage dispute or a negligent investigation by an insurer will not state a claim for bad faith.[12]

Likewise, the court denied the tortious interference claim against the reinsurer:

Under Connecticut law, a claim for tortious interference with business expectations requires a showing that a third party adversely affected the contractual relations of two other parties and that such interference was motivated by some improper means or motive, such as maliciousness, fraud or ill will… [T]there is no evidence in the record to support a finding that [the reinsurer's] alleged interference with [the claimant's] contractual relationship with [the cedent] was tortious.[13]

Bernstein v. Centaur Insurance Co.[14] was a suit by two receivers under New York law against a reinsurer in which the receivers sought damages for the reinsurer's alleged bad faith. The reinsurer moved to strike the bad faith damages request on the basis that it was merely a request for punitive damages, which are not available in a contract action absent fraud. The court granted the motion, ruling as follows:

Punitive damages are not permitted in a breach of contract action in New York absent fraud aimed at the public generally, evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations. . . Plaintiffs have not alleged any fraud and can suggest no greater public wrong than their own inability to pay the claims of their insured as a result of defendant's breach. This is not the kind of wrong to the public that requires exemplary damages.[15]

Unfair and Deceptive Practices Statutes

The National Association of Insurance Commissioners developed a model Unfair Insurance Trade Practices Act and a model Unfair

Claims Practices Act that focus on the insurer–insured relationship and do not create a private right of action. These models, however, are open to alteration by states to create causes of action. Moreover, some states have enacted broader and more general Unfair Trade Practices Acts that include the insurance industry. Thus, practitioners are urged to examine the law of the particular state involved in their disputes. Selected examples of caselaw under these statutes are included below.

Massachusetts. C*ommercial Union Insurance Co. v. Seven Provinces Insurance Co.*[16] was a claim by a cedent against its reinsurer for unfair trade practices under Massachusetts General Laws ch. 93A §§ 2 and 11, which allow for triple damages for unfair or deceptive acts or practices in the conduct of any trade or commerce. The fact pattern in this case was extreme, involving 2½ years of reinsurer obstructionism and evasiveness without ever denying or paying the claim. The court ruled that this was sufficient to find a breach of 93A:

"We emphasize that this case did not involve a good faith dispute over billing or a simple breach of contract, each of which is an insufficient basis for 93A liability." Arthur D. Little, 147 F.3d at 55. We emphasize too, that this case did not involve a party whose only miscue was to decide (incorrectly, as matters turned out) to let the courts resolve a good faith disagreement or to rely mistakenly on faulty legal argumentation. Instead, Seven Province's conduct—raising multiple shifting defenses (many of them insubstantial) in a lengthy pattern of foot-dragging and stringing Commercial Union along, with the intent (as its own witnesses admitted) of pressuring Commercial Union to compromise its claim—had the extortionate quality that marks a 93A violation.[17]

Trenwick American Reinsurance Corp. v. IRC, Inc.[18] was a case in which the retrocessionaire denied the existence of a contract with the retrocedent after the retrocessionaire was billed for more than $4 million in reinsurance recoverables. The court awarded double damages plus attorneys' fees and expenses under Ch. 93A:

Defendant IRC Re plainly lacked a good faith basis to dispute the existence of the [Retrocessional] Contract that is each repeatedly acknowledged through its own document, in dealings with all of the participants in the …program, outside auditors and governmental agencies, and significantly, in receipt of millions of dollars in premiums. Indeed, IRC Re's position that there was merely an agreement to agree was nothing short of a sham, contrived at the eleventh hour to avoid paying. This is more than the ordinary breach of contract. . . As such, I find that IRC Re violated Chapter 93A.[19]

Connecticut. The Connecticut Unfair Insurance Practices Act (CUIPA), § 38a-816 (6), makes certain claim handling actions and inaction unfair claim settlement practices when performed "with such frequency as to indicate a general business practice." In *Security Insurance Co. v. Trustmark Insurance Co.*,[20] the cedent alleged that the reinsurer engaged in prohibited claim practices as a general practice, thus falling within the ambit of CUIPA. The reinsurer argued that this was a consumer protection statute and, as such, did not apply to reinsurers. Nonetheless, the court found that the cedent pleaded a cause of action sufficient to survive a motion to dismiss.

In *McCulloch v. Hartford Life & Accident Insurance Co.*,[21] the insured alleged violation of CUIPA as well as the Connecticut Unfair Trade Practices Act (CUTPA), Chapter 296 § 42-110g. The court questioned whether CUIPA applied to reinsurers, but noted that the state supreme court[22] had allowed a plaintiff to use CUPTA as a means of bringing a private right of action under CUIPA. Nonetheless, the court found that the actions of the reinsurer were not the proximate cause of the insured's injury. In addition, the court observed that "reinsurance agreements are not the type of practice the CUIPA was intended to prohibit."[23]

In *Travelers Indemnity Co. v. Excalibur Reinsurance Corp.*,[24] the cedent alleged that the reinsurer engaged in a general practice of delaying consideration of cedent claims, contesting claims without basis and delaying payment of covered claims in violation of reinsurance agreements, thus violating CUPTA. These allegations survived a motion to dismiss. The court observed that a simple breach of contract without aggravating circumstances does not create a cause of action under CUPTA, but that "the finders of fact at a trial [could] conclude that such practices, if proven, were cynical, self-serving and constitute substantial aggravating circumstances of a magnitude sufficient to constitute a violation of CUPTA."[25]

Pennsylvania. 42 Pa. C.S. § 8371 authorizes a court to award interest, punitive damages, court costs and attorneys' fees against an insurer that acts in bad faith toward its insured. The insured requested a bad faith award against the reinsurer from the court in *Three Rivers Hydroponics, LLC v. Florists' Mutual Insurance Co.*[26] In this case, the reinsurer maintained the right to investigate claims on behalf of the cedent. The court found, however, that the insured could not maintain an action against the reinsurer because the reinsurer did not collect premiums from the insured, make payments to the insured, or assume risk or enter into any contractual relations with the insured.

Comments

Based on the above caselaw, it appears that reinsurers are safe from tort liability, at least when they stay within their traditional roles (i.e., not underwriting the policies, collecting premiums from insureds, or adjusting and paying claims by or against insureds). Some state unfair practices statutes, however, may create, or leverage the creation of, a cause of action against reinsurers by cedents or insureds. This exposure is reduced when reinsurers stay within their traditional roles.

NOTES

1 No. 20-cv-01264-ODW, 2020 U.S. Dist. LEXIS 127526 (C.D. Cal. Jul. 16, 2020).

2 No. 08-cv-00956-DSF, 2008 U.S. Dist. LEXIS 56654 (C.D. Cal. Apr. 21, 2008)

3 75 F. Supp.2d 893 (N.D. Ill. 1999)

4 75 F. Supp.2d 893 at 907 (internal citations and quotation marks omitted).

5 *Id*. at 910 (internal citations and quotation marks omitted).

6 *Id*. at 910-1.

7 241 Cal. Rptr. 773 (Ct. App. 1987)

8 *Id*. at 784.

9 No. 3:01cv2198-PCD, 2002 U.S. LEXIS 27340 (D. Ct.)

10 *Id* at *15 (D. Ct.)

11 363 F.Supp. 2d 169 (D. Ct.).

12 *Id*. at 177 (internal citations omitted).

13 *Id*. at 180.

14 606 F. Supp. 98 (S.D.N.Y. 1984).

15 *Id*. at 100.

16 217 F.3d 33 (1st Cir. 2000) cert. denied 531 U.S. 531 (2001)

17 *Id*. at 43.

18 764 F. Supp. 2d 274 (D. Mass.2001).

19 *Id*. at 278.

20 No. 3:01cv2198-PCD, 2002 U.S. LEXIS 27340 (D.Ct.)

21 363 F. Supp. 2d 169 (D. Ct.)

22 *McComber v. Travelers Prop. & Cas. Corp.*, 804 A.2d 180 n. 14 (2002).

23 363 F. Supp. 2nd 169 at 182.

24 No. 3:11-cv-1209-CSH 2103 U.S. Dist. LEXIS 13716 (D. Ct.)

25 *Id* at *18.

26 No. 2:15-cv-99809, 2018 U.S. Dist. LEXIS 20699(W.D. Pa).

Robert M. Hall is an attorney and former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator of insurance and reinsurance disputes and as an expert witness.

> "Nothing can substitute for in-person, but the conference was very well handled virtually."

Fall Conference Recap

Following the success of the ARIAS·U.S. Virtual Spring Seminar, and with the COVID-19 pandemic continuing to affect our ability to hold in-person events, the ARIAS·U.S. team put together the first Virtual Fall Conference. The Fall Conference co-chairs—Robert DiUbaldo, Beth Levene, and Eileen Sorabella—brought together 30 talented speakers for this first-time event. Attended by more than 200 professionals from the reinsurance and insurance industries in the United States and around the world, this Fall Conference was sure to be one to remember.

> "I have been attending ARIAS conferences since 2005. This set a new standard. Best ever for content and style."

Keynote Presentation

Kenneth R. Feinberg, one of the leading U.S. experts in alternative dispute resolution, served as this year's opening keynote speaker. Having served as special master of the 9/11 Victim Compensation Fund, the Department of Justice Victims of State-Sponsored Terrorism Fund, the Treasury Department's TARP (Troubled Asset Relief Program) Executive Compensation Program, and the Treasury's Private Multiemployer Pension Reform program, Feinberg brought a wealth of specialized experience to his presentation on the impact of the pandemic on the insurance industry. While focusing on legislative and regulatory initiatives being considered by policymakers regarding business interruption insurance and potential liability issues confronting insureds, he also discussed other COVID-19 issues, such as the development and disbursement of a vaccine.

General Session

One of the general sessions on the first day of the conference was about the latest buzzword in claims: social inflation. In "Social Inflation: What Does It Mean to Cedents and Reinsurers?", presenters Larry Schiffer, Paul Braithwaite, Elizabeth Geary, and Cynthia Koehler discussed the meaning and origin of the social inflation concept, why it is an important issue for insurance companies, and what it means for reinsurers. Attendees took a deep dive into COVID-19 and its impact on social inflation, learning that it could drive litigation costs higher. The presenters also provided recommendations on how to address the effects of social inflation, including informed underwriting, deploying higher-priced defense attorneys, advocating for tort reform, and more.

Breakout Session

"COVID-19 Pandemic Reinsurance Issues from the Arbitrator's Perspective: What Companies and Counsel Should Know to Prepare for Potential Disputes" was the best-attended breakout session at the Fall Conference. The panelists—John Cole, Paul Dassenko, Mark Gurevitz, and Jonathan Rosen—discussed the need for reinsurers and insurers to have an open dialogue on the various issues that may arise from the COVID-19 pandemic, including aggregation, number of occurrences, man-made versus natural event, cause, peril and occurrence, and hours clauses.

> "Ivy was an amazingly impressive speaker—one of the best I can recall at an ARIAS presentation. And fantastic that ARIAS tackled this subject."

The panelists suggested that the industry not turn this into a new

asbestos-type matter with diverse positions, but rather consider it a plea to work together to arrive at a business remedy. Otherwise, disputes will end up in arbitration, and the general rules that have applied to aggregation—number of occurrences, FTF and FTS—will likely apply on COVID-19 claims. One tip they left the audience with was for arbitrators to become familiar with property policies and coverages, whether for policyholder or reinsurer/insurer.

ARI-Talk: The Art and Science of Inclusion

A new addition to ARIAS·U.S. programming in 2020 was the ARI-Talk. Akin to a TED-Talk, the ARI-Talk at the 2020 Fall Conference focused on issues pertaining to diversity, equity and inclusion.

Ivy Kusinga, chief culture officer at Chubb, addressed the organizational design required to drive meaningful outcomes for workforce diversity to remain competitive. Delving into issues of diversity in the corporate world as a whole, she described the best ways to promote diversity in organizations (and in our own lives) and why diversity is increasingly important as companies deal with increasing business complexity during the global pandemic.

Ethics Session

Richard Painter, professor of corporate law at the University of Minnesota Law School, served as the speaker for the closing ethics session. He discussed the principles of conflicts of interest for lawyers, judges, and government officials, drawing from the ABA Model Rules of Professional Conduct, rules of judicial conduct, and government ethics rule.

Despite not being from the reinsurance or insurance industries, Richard provided valuable insights into the ethics of arbitrations. He examined the unique ethics rules for arbitrators and how those rules fit within a broader framework, the specific roles assigned to decision makers, and the reasonable expectations of persons affected by their decisions. Attendees were interested in the enforcement of those rules when violations take place—how to know where the line is, and when those in violation need to be held accountable.

> “It was great to be able to attend high-level, informative sessions while interacting with this group of people I have come to know well and view as the leaders of our business.”

Arbitration Act Sets 'Low Bar' for Application of Convention

Since March 2006, the Law Committee has published summaries of recent U.S. cases addressing arbitration- and insurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases.

On June 2, 2020, the U.S. District Court for the Southern District of Texas issued an order denying a motion to remand a dispute removed pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") of the Federal Arbitration Act. 9 U.S.C. §§ 202–03, 205.

Plaintiff Nueces County, Texas (the "County") had filed an action in the County Court of Nueces County, Texas, to recover for property damage caused by Hurricane Harvey, along with extracontractual damages for claims handling. The defendants removed the action to the U.S. District Court on the basis that the relevant policy contained an arbitration agreement that falls under the Convention and that they sought to enforce the Convention and compel arbitration of the claims.

Case: *Nueces County, Tex. v. Certain Underwriters at Lloyd's of London,* No. Civil Action No. 2:20-CV-065, WL 2849944 (S.D. Tex. June 2, 2020).

Court: U.S. District Court for the Southern District of Texas

Date decided: June 2, 2020

Issue decided: A removal petition that makes a non-frivolous allegation that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies to the dispute is sufficient to invoke federal question jurisdiction, regardless of whether the arbitration agreement is ultimately held to be applicable.

Submitted by: Amy S. Kline

The Convention's removal provision states, in relevant part, the following:

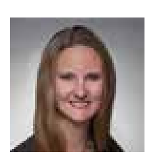
Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. 9 U.S.C. § 205.

According to the County, the defendants did not, and would not be able to, establish that the dispute "relates to" the arbitration agreement or that the arbitration agreement "falls under" the Convention, and that their contention otherwise was "frivolous."

The court rejected the County's argument, finding that its position "conflat[ed] the jurisdictional inquiry with the merits of the case." Under Fifth Circuit law, Section 205 of the Federal Arbitration Act alters the ordinary removal practice and makes cases removable under this defense. *Beiser v. Weyler*, 284 F.3d 665, 671 (5th Cir. 2002). As such, "[a]s long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of 'relates to.'" (quoting *Beiser,* 284 F.3d at 669).

Here, defendants' removal petition alleged that an arbitration agreement that purports to fall under the Convention Act is contained in an insurance policy that was issued by at least one insurance company that is a citizen of a foreign country. The court held that these allegations were not frivolous and that removal was, therefore, appropriate.

The court also rejected the County's argument that the forum selection clause in the underlying agreement constituted a waiver of the right to remove. The agreement, however, also included a specific non-waiver provision that specifically reserved the right to remove an action to federal court.



Amy S. Kline is a partner and vice-chair of the Insurance Industry Group at Saul Ewing Arnstein & Lehr, LLP.

Words Must Be Given Their Plain Meaning

Case: *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, 957 F.3d 337 (2d Cir. 2020)

Court: U.S. Court of Appeals for the Second Circuit

Date decided: April 28, 2020

Issue decided: Reinsurance contract interpretation/follow-the-settlements

Submitted by: Michele L. Jacobson and TaLona H. Holbert

In *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, the U.S. Court of Appeals for the Second Circuit held that, based on the express, unambiguous language of the parties' reinsurance contracts, Fireman's Fund Insurance Company ("Fireman's Fund") was not obligated to reimburse Utica Mutual Insurance Company ("Utica Mutual") for claims paid on underlying umbrella policies.

Fireman's Fund appealed from a $64 million judgment (representing damages and interest) awarded by the U.S. District Court of the Northern District of New York following a jury verdict in Utica Mutual's favor. The jury found that Fireman's Fund breached its obligations under reinsurance contracts with Utica Mutual.

Fireman's Fund argued on appeal that under the terms of the relevant reinsurance contracts, it did not owe the obligations at issue to Utica Mutual as a matter of law. The Second Circuit agreed and reversed the judgment, holding that (1) the underlying umbrella policies did not provide coverage for claims that did not exceed the per-person occurrence limits enumerated in the policies and (2) the "follow-the-settlements" clauses in the reinsurance contracts did not require Fireman's Fund to pay claims in excess of aggregate limits agreed upon by Utica Mutual and its insured.

Utica Mutual insured Goulds Pump, Inc. ("Goulds") under both primary and umbrella policies. Under the umbrella policies, Utica Mutual was liable "only for the ultimate net loss resulting from any one occurrence in excess of . . . the amounts of the applicable limits of liability of the underlying insurance as stated in the Schedule of Underlying Insurance Policies, less the amount, if any, by which any aggregate limit of such insurance has been reduced by payment of loss." *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 957 F.3d at 344 (quoting from the umbrella policies).

Schedules of Underlying Insurance Policies (the "Schedules") were included in each of the seven umbrella policies that Utica Mutual issued to Goulds. Each umbrella policy had a $10 million coverage limit. The Schedules in the umbrella policies listed separate limits for bodily injury and property damage claims, including per-person limits, per-occurrence limits, and aggregate limits. Although the seven umbrella policy Schedules provided aggregate limits for property damage claims, none of the umbrella policy Schedules listed an aggregate limit for bodily injury claims.

Fireman's Fund issued seven reinsurance contracts to Utica Mutual reinsuring the upper $5 million of the Goulds umbrella policies. The seven reinsurance certificates contained "follow form" and "follow-the-settlements" clauses.

In 2007, Utica Mutual and Goulds settled a dispute as to whether thousands of asbestos bodily injury claims arising from exposure to Goulds' products were covered under the Utica Mutual primary policies. Utica Mutual and Goulds agreed that primary policies dating from 1966 to 1972, which were missing, contained aggregate limits and that the umbrella policies would cover losses that exceeded the aggregate limits of the primary policies for bodily injury claims. Since Utica Mutual had defended and indemnified Goulds' asbestos bodily injury claims since the 1980s, Utica Mutual and Goulds agreed under the settlement that the

1966 to 1972 primary policies had been exhausted, thus triggering coverage under the umbrella policies.

In 2008, Utica Mutual sought reimbursement from Fireman's Fund for claims paid under the umbrella policies, pursuant to the parties' reinsurance agreements. The next year, after Fireman's Fund had not made any payments, Utica Mutual brought suit against Fireman's Fund. Utica Mutual claimed that Fireman's Fund was bound by Utica Mutual's settlement with Goulds under the "follow form" and "follow-the-settlements" clauses in the reinsurance agreements. Under those clauses, Utica Mutual argued that Fireman's Fund was required to reimburse Utica Mutual for claims paid under the umbrella policies.

Utica Mutual sought a total of $35 million, which represented $5 million for each year from 1966 to 1972 (the dates of the primary policies that Utica Mutual and Goulds agreed contained aggregate limits that had been exhausted), plus interest. Fireman's Fund argued that the umbrella policies only provided coverage for losses that exceeded the limits stated in the Schedules. According to Fireman's Fund, the Schedules did not contain aggregate limits for bodily injury claims. As many of the asbestos bodily injury claims that Utica Mutual paid were small, those claims did not exceed the per-person or per-occurrence limits in the umbrella policies' Schedules. Therefore, Fireman's Fund argued that its obligations under the reinsurance contracts had not been triggered.

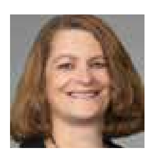
The dispute was tried to a jury. The jury returned a verdict for Utica Mutual on its breach of contract claim. Judgment was entered in favor of Utica Mutual, awarding $35 million plus pre-judgment interest in excess of $29 million. An appeal to the Second Circuit ensued.

Applying New York law, the Second Circuit agreed with Fireman's Fund that the umbrella policies only applied in excess of limits stated in the umbrella policies' Schedules. The court read the umbrella policies' language to mean that Fireman's Fund was only liable to Utica Mutual if the losses at issue exceeded the limits enumerated in the Schedules of the umbrella policies. The parties did not dispute that the limits of liability for bodily injury as contained in the Schedules do not include aggregate limits. Rather, Utica Mutual argued that the aggregate limits for bodily injury claims were not required to be stated in the Schedules because the umbrella policies solely called for the underlying occurrence limits to be scheduled.

According to Utica Mutual, the policies' discussion of "applicable limits of liability" after making specific reference to liability "resulting from any one occurrence" showed that "applicable limits of liability" (as set forth in the Schedules) referred only to occurrence limits. The Second Circuit rejected Utica Mutual's argument in this regard, finding that Utica Mutual's reading would render the aggregate limits for property damage contained within the Schedules to be superfluous, along with any other non-occurrence limits provided in the Schedules. Moreover, the repeated inclusion of aggregate limits for property damage in the Schedules without a corresponding aggregate limit for bodily injury claims supported the notion that the parties were capable of including an aggregate limit for bodily injury claims, but intended not to do so.

Since the court found the language of the umbrella policies to be unambiguous, the court ruled that it must give the words their plain meaning. Thus, Fireman's Fund had no obligation to pay for bodily injury claims that did not exceed bodily injury limits identified in the policies' Schedules.

The court also rejected Utica Mutual's alternative argument that, even if Fireman's Fund was not actually liable for the losses, Fireman's Fund was nonetheless bound to Utica Mutual's interpretation of the umbrella policies in its settlement with Goulds as a result of the "follow-the-settlements" clauses in the reinsurance contracts. While reaffirming follow-the-settlements authority, the Second Circuit held that, because Utica Mutual's position "directly contradicts the relevant language in the reinsurance contracts and umbrella policies," the "follow-the-settlements" clause and principle were inapplicable. *Utica Mut. Ins. Co.*, 957 F.3d at 347. The Second Circuit concluded that "where, as here, the relevant policy terms are unambiguous, a reinsured cannot insulate itself from the application of those terms under 'follow-the-settlements.'" *Id.* at 348. Accordingly, the Second Circuit reversed the judgment in favor of Utica Mutual.



Michele L. Jacobson is a partner, and TaLona H. Holbert is an associate, in the Insurance Industry Practice Group of Stroock & Stroock & Lavan LLP.

Does a Three-Year Policy Cover a 44-Year Claim?

Equitas Insurance Limited (EIL), as successor to certain reinsurance contracts issued by syndicates at Lloyd's of London (collectively, "Reinsurers"), reinsured the Insurance Company of the State of Pennsylvania (ICSOP) under two facultative reinsurance contracts purchased by ICSOP's parent company, AIG. The reinsurance contracts stated that the "[p]erils and interests reinsured hereunder" would be "[a]s original." They also contained a "follow-the settlements" provision. ICSOP's reinsured policy was an umbrella liability policy issued to a Dole Food Company predecessor ("Dole") for a three- year period from 1968–1971.

Dole was sued by various homeowners in Carson, California, over pollution from hazardous levels of petroleum hydrocarbons in the soil and groundwater at a housing tract site developed by Dole. Dole sought insurance coverage for the homeowners' claims and eventually settled with its insurers for $30 million, $20 million of which was paid under the ICSOP umbrella policy that did not contain a pollution exclusion. The umbrella policy provided that disputes between Dole and ICSOP would be governed by Hawaii law. Hawaii follows the all sums doctrine for allocation of progressive environmental damage, which permits allocation of the entire amount of damage to any policy period where damage occurred.

ICSOP billed EIL under the two facultative reinsurance contracts for the reinsured portion of the entire $20 million settlement payment attributable to the ICSOP umbrella policy, which was approximately $7.2 million. ICSOP contended that the billing was appropriate under Hawaiian all sums allocation principles and that EIL was obligated to "follow the settlements" and reimburse ICSOP under the facultative contracts for any settlement made within the terms of the umbrella policy. ICSOP also argued that the reinsurance provided co-extensive coverage to its umbrella policy, requiring EIL to reimburse it in full for the settlement under the applicable Hawaii law.

EIL disputed the billing, claiming it was being asked to pay for 44 years' worth of pollution coverage even though it only issued three years' worth of reinsurance. EIL argued that temporal terms are "fundamental under English law" interpreting insurance policies. EIL also argued that ICSOP provided late notice of the claim and that it should not have to pay ICSOP on that basis.

ICSOP sued EIL in the U.S. District Court for the Southern District of New York seeking to recover the $7.2 million it billed to EIL. The parties agreed that English law governed the reinsurance contracts at issue. Both parties moved for summary judgment.

Case: *The Insurance Company of the State of Pennsylvania v. Equitas Insurance Limited, No. 17-CV-6850-LTS-SLC (S.D.N.Y. July 16. 2020)*

Court: U.S. District Court for the Southern District of New York

Date decided:July 16, 2020

Issue decided: Whether a follow-the-settlements provision required Equitas Insurance Limited to indemnify the Insurance Company of the State of Pennsylvania for the reinsured portion of a $30 million settlement of an environmental claim that spanned 44-plus years, "notwithstanding the three –year stated policy period of each of the Reinsurance Policies" issued by Equitas.

Submitted by: Charles E. Leasure III

The court noted that English law contains a strong presumption of "back to back" coverage in reinsurance cases, holding that liability under proportional facultative reinsurance is co-extensive with the underlying insurance. The court agreed with ICSOP that EIL was obligated to follow the settlement of ICSOP for the full amount of the reinsured portion of the settlement paid by ICSOP to Dole under Hawaii law—that is, payment for the entire 44 years of pollution damage, not just for a pro rata portion of the three reinsured years.

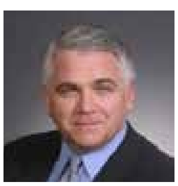
The court distinguished a factually similar English case argued by EIL which held that an exception to the back to back presumption exists because of the temporal element contained in the insurance contracts under English law and because English law does not recognize the all sums allocation method. The court reasoned that since the parties were aware that Hawaii law governed the underlying ICSOP policy (under the umbrella policy's terms), the all sums allocation applied to the reinsurance contracts because the parties were aware, and could predict, that Hawaii law would govern treatment of the umbrella policy. The court did not accept EIL's argument that the exception to the back to back presumption should apply under the theory that the parties could not have predicted what law would govern the underlying polices that were at issue in that case.

The court ruled that the "back to back" presumption under English law, together with the follow-the-settlements principle, required EIL to pay ICSOP the full $7.2 million portion of the $20 million payment made under the ICSOP policy to Dole (plus interest from the date payment was due). The court denied EIL's late notice motion.

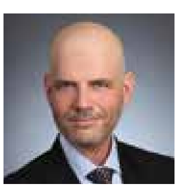
Charles Leasure III is a partner at Porter Wright Morris & Arthur, LLP.

Newly Certified Arbitrators

Alan W. ("Willie") Borst, Jr. worked 20-plus years with AIG, XL Re, and Allianz, serving as a complex claims examiner and vice president; in private law practice, he handled trials and appeals of ceding carriers in life and disability rescission cases, and of reinsurers disputing coverage of extra contractual and excess-of-policy-limits matters. A Chartered Property Casualty Underwriter (CPCU), Alan's alternative dispute resolution appointments have included FINRA, New York and Westchester County Commercial Divisions.



James E. Fitzgerald has been a trial lawyer and litigator in insurance and reinsurance for 40 years and has first-chaired more than 40 federal and state trials for insurers and arbitrated dozens of cases in various tribunals. Licensed in New York, where he started his practice at Mendes & Mount, Jim has practiced in California since 1983 and has been a Los Angeles partner with Stroock & Stroock & Lavan, Akin Gump Strauss Hauer & Feld, and Drinker Biddle & Reath (now Faegre Drinker Biddle & Reath). Jim has also been involved in education as a NITA trial instructor for 30 years, an in-house CLE program provider for insurers, and a speaker on insurance and trial procedure issues for APCIA, PLI, the ABA, and the L.A. Bar Association.



Ben Miclette's role as a reinsurance arbitrator and expert witness is supported by 25-plus years of experience as an actuary in the life and health reinsurance industry, working in the individual and group insurance markets. During his career, he has held positions in the Canadian, U.S. and international markets, with roles ranging from head of business lines, chief pricing actuary, risk management officer, and global product expert. His experience includes business development, product creation, risk management, reinsurance transactions (quota-share, excess-of-loss, stop-loss, coinsurance/YRT, etc.), claim management and profitability management. His current professional activities center around providing expert witness, reinsurance arbitration and actuarial consulting services. Ben is a Fellow of the Society of Actuaries and a Fellow and board member of the Canadian Institute of Actuaries.

Newly Certified Mediators

John Chaplin has 43 years of broad-based reinsurance industry experience and has served in virtually every capacity related to the reinsurance transaction: intermediary, underwriter, consultant, buyer, seller, expert witness, arbitrator and umpire.

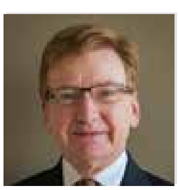
As reinsurance intermediary, he served for 23 years with the leading global reinsurance intermediary (Guy Carpenter) where, as a property and casualty treaty account executive and manager, he was actively involved in the critical changes wrought by broad business and societal movements regarding asbestos, pollution and products liability. He also served as the intermediary's project leader in analyzing, exploring, and advising on industry solutions to Workers' Compensation reinsurance claims reporting issues and industry agreements that ultimately preserved reinsurance support for such long-term, periodic payment claims.

After years as an intermediary, he served as an underwriting and producing executive at North American Re (now Swiss Re America) with an equally heavy emphasis on National Insurance Company property reinsurances. This led to a deep dive into the Florida property insurance market with involvement in the state-supported risk mechanisms such as the Florida Residential Property and Casualty Joint Underwriting Association, the Florida Hurricane Catastrophe Fund and the burgeoning market for property insurer start-ups in the 1990s and 2000s.

In the last 17 years, he has been an arbitrator member of ARIAS•U.S. where he has been involved in numerous cases (80) as expert witness, arbitrator, panel umpire and solo arbitrator/umpire. It is with great hope that he looks forward to a role in insurance and reinsurance mediation.

Kim Dean Hogrefe Since retiring from Chubb Insurance more than four years ago, Kim Dean Hogrefe has been the mediator in commercial disputes and in more than 125 litigated cases in a New Jersey court program (resolving over 70% of the cases mediated). During his 29-year career at Chubb, Kim handled and supervised the mediation and arbitration of both direct and reinsurance matters. He has been appointed in arbitrations as party arbitrator as well as umpire and provides services as a consultant in direct insurance, reinsurance and the underlying disputes in the fields of cyber liability, directors and officers, errors and omissions, general liability, employment practices and product liability. Prior to joining Chubb, Kim was a trial attorney, supervisor and administrator in the Manhattan District Attorney's Office.

Newly Certified Arbitrator & Mediator



James F. ("Jim") Hughes III has 40-plus years of risk management and insurance industry experience, ranging from insurance and reinsurance underwriting to working as the risk manager for a global Fortune 50 energy company in London and Houston to retail and wholesale insurance brokering to serving on and chairing several insurance company boards. He is an executive professor at the University of Houston's Bauer School of Business (teaching risk management and insurance) and has lectured at five other universities as a Spencer Foundation Risk Manager in Residence. He is an active arbitrator, mediator, and expert witness, focusing on insurance matters. He holds the Chartered Property and Casualty Underwriter and Registered Professional Liability Underwriter designations as well as a Texas Surplus Lines Insurance Agent license.

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PORTER WRIGHT ATTORNEY TERESA SNIDER NAMED A NOTABLE WOMAN IN LAW 2020

Porter Wright is proud to announce that attorney Teresa Snider was named to the 2020 list of Notable Women in Law by Crain's Chicago Business. Snider is the co-chair of the firm's Reinsurance Litigation and Arbitration Practice Group.

Snider truly is a pioneer for women in the insurance and reinsurance industry. She began her legal career more than 25 years ago when the industry was male-dominated. Despite being one of the few female practitioners at the time, she quickly positioned herself as a "go-to attorney" for understanding and investigating reinsurance issues.

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