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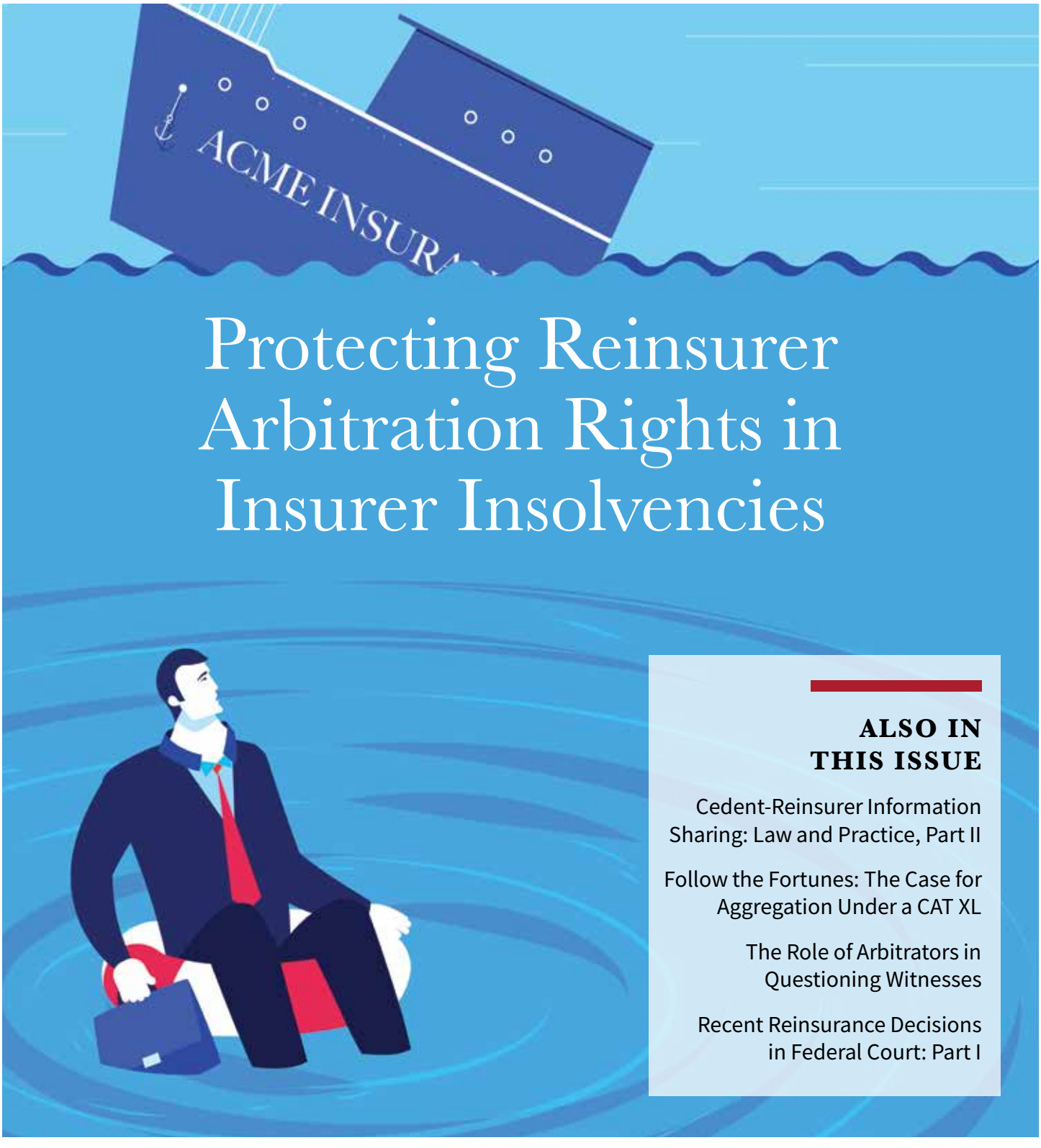

Protecting Reinsurer Arbitration Rights in Insurer Insolvencies

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By Robert M. Hall

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EDITORIAL POLICY — ARIAS • U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include 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.

COVER ARTWORK: KROLONE /ADOBE STOCK

We kick off the first ARIAS *Quarterly* of 2022 with belated wishes for a happy New Year and a request for article submissions. If you have been reading these pages, you know we have been blessed with terrific articles from across the ARIAS universe. But we need more of them, and from more of you.

We need ARIAS committee articles and reports. We need those of you who have presented or will be presenting sessions at fall and spring meetings or educational programs to turn your presentations into articles (see below). If you are new to ARIAS or have not been published, let the *Quarterly* help you out and enhance your resumé. Don't let your thought leadership lie dormant. Submit an article today.

We have several excellent articles in this issue of the *Quarterly*. We start off with another thoughtful article from *Quarterly* Editorial Committee member Robert M. Hall of Hall Arbitrations. Bob has put together an interesting piece on insurance insolvency, arbitration rights, and jurisdiction. Titled "Protecting Reinsurer Arbitration Rights in Insurer Insolvencies," the article addresses how the type of jurisdiction matters when addressing arbitration rights in insurance insolvencies. For those lawyers among you who forgot your civil procedure from law school, this article will refresh your memory.

Following Bob's article, we have Part II of "Cedent-Reinsurer Information Sharing: Law and Practice." Authored by Richard L. Mason of MasonADR, Part II addresses the less-well-understood law governing inspection of books and records under access-to-records clauses. Richard explains the po-

tential for waiver of the attorney-client privilege during a records inspection and discusses best practices for audits and the effect of non-payment and rescission claims on the right to audit. This is an important article for anyone involved in reinsurance audits.

COVID-19 has generated thousands of claims under all forms of insurance policies, from life and health to travel and event cancellation to property and liability. Cedents with large numbers of these claims have been considering whether some form of aggregation under existing excess-of-loss treaties is possible. Curtis Leitner, counsel at Morvillo Abramowitz Grand Iason & Anello PC, looked at aggregation (with some help from me) through the prism of the follow-the-fortunes doctrine. The resulting article, "Follow the Fortunes: The Case for Aggregation Under a CAT XL," provides an interesting perspective. We hope you find it informative.

Taking a cue from prior pleadings in this column, Charles E. Leasure, III of Stevens and Lee and Daryn E. Rush of O'Melveny & Myers LLP took their Fall 2021 panel and turned it into an article titled "The Role of Arbitrators in Questioning Witnesses." In this article, Charlie and Daryn explore the limits to arbitrator questioning and expand on the audience polling at the Fall 2021 Conference to provide a sense of how the community feels about this issue.

Our final article comes from James F. Jorden of Faegre Drinker Biddle & Reath LLP, who also got the hint and prepared what will be a two-part article based on his "Hot Topics in the Life Insurance Industry" panel from the Fall 2021 Conference. Titled "Recent Reinsurance Decisions in Federal Court: Part I," the article discusses several important decisions in the life realm that may have gone unnoticed by those who practice in the property and casualty world.

We hope that seeing two articles based on ARIAS conference panels prompts some of you to join in the fun and write your own article based on your presentation. We look forward to (hopefully) seeing everyone on Amelia Island in May for the ARIAS Spring Conference.

Larry P. Schiffer
Editor

Protecting Reinsurer Arbitration Rights in Insurer Insolvencies

By Robert M. Hall

When insurer insolvencies occur, reinsurance is often the largest asset of the estate, making reinsurance recoverables a top priority for state insurance company receivers. This became a major issue for reinsurers following the 1983–1992 time period, during which 385 insurers became insolvent [1], partly as a result of a prolonged soft market plus unanticipated pollution and asbestos-related claims. Fortunately, insurer insolvencies decreased substantially after that time period, but some lessons learned from that saga remain valuable today when a reinsurer's client becomes insolvent.

One such lesson relates to the forum for resolving disputes between the receivers of primary insurers and the insurer's reinsurers. Receivers generally prefer the friendly confines of receivership courts [2], while reinsurers generally prefer arbitration before insurance industry professionals. (Interestingly, the arbitration versus receivership court conflict applies to other parties as well, such as claimants [3], cedents [4], agents [5], sellers of stock [6], securities brokers [7], and even other receivers [8].)

The outcome of this forum conflict between arbitration and the receivership court, as well as the key in rem v. in personam issue, is highlighted by recent litigation in Puerto Rico concerning an insurer rendered insolvent from a series of hurricanes. The

decisions in this case will be used as a jumping-off point to a broader examination of whether and under what circumstances a reinsurance dispute will be handled in an arbitration rather than a receivership court. Finally, there will be recommendations on tactics to maximize the use of arbitration in disputes with receivers.

Initial Decision: *Integrand Assurance Co. v. Everest Re*, No. 19-1111 (DRD) (DPR)

The initial decision in this matter was unreported. The fact situation involved two successive hurricanes that struck Puerto Rico, with a reinstatement of the cedent's reinsurance limits in between. Reinsurers sought to enforce their contractual rights of inspection to sort out the damages related to each hurricane. The cedent, however, refused, and the reinsurers withheld payment of losses. The cedent initially filed an arbitration demand against the reinsurers, but as it moved through rehabilitation to liquidation and disputes over arbitrators arose, the receiver's approach changed to litigation.

The reinsurers removed the receiver's state court action to federal court and moved the district court to compel arbitration. Among other things, the receiver asked the court to declare the arbitration clause null and void due to ambiguity and other defects [9]. The arbitration clause contained standard language, unusual only in that it contained an abbreviated time period for a hearing and award.

The receiver argued to the court that the arbitration clause was ambiguous in that it did not contain a mechanism to resolve disputes over the qualifications of arbitrators. The court rejected this argument on the following bases: (a) given the strong federal policy in favor of arbitration, this was insufficient to find the clause unenforceable; and (b) Section 5 of the Federal Arbitration Act (FAA) allows a court to appoint an arbitrator when there is a "lapse in the naming of an arbitrator" [10].

The receiver also argued that the "honorable engagement" language and freeing the arbitrators from "strictly following the rules of law" in the arbitration clause were in contravention of Puerto Rico law. Citing cases from the U.S. Supreme Court, the district court rejected this argument, stating, "[T]he Court understands that the FAA trumps any state law that undermines the liberal federal policy favoring arbitration, such as is the case with Article 1207 of Puerto Rico Civil Code" [11].

Additionally, the receiver argued *rebus sic stantibus*—freely translated, that a fundamental change in circumstances should free the cedent from the terms of its reinsurance contracts. The district court stated that there is a seven-part test to the application of this extraordinary remedy, the first being that the change in circumstances be unforeseeable. The court observed that hurricanes in Puerto Rico are hardly unforeseeable, particularly since the cedent reinsured its hurricane exposure [12].

Finally, the receiver argued that the arbitration would interfere with a comprehensive scheme for liquidating insurers. The court rejected this argument, ruling as follows:

[T]he Court understands that the arbitration of Integrand's claims against Defendants will not interfere with the state's insolvency scheme. Nonetheless, if there was an existing state law, which the Court found no such law exists, that prohibits arbitration of disputes involving an insolvent insurer, then the FAA would preempt such law [13].

Receiver's Motion for Reconsideration

On the receiver's motion to reconsider, the district court confirmed but broadened and deepened its prior ruling. *Integrand Assurance Co. v. Everest Reinsurance Co.*, No. 19–1111 (DRD), 2020 U.S. Dist. LEXIS 77407 (D.P.R. May 1, 2020). The court first ruled that the receiver had met none of the tests for reconsideration, then went on to consider the receiver's substantive arguments.

The receiver cited both extensive provisions in the insurance code related to receivership of insurers and the insurance commissioner's powers in an attempt to prove that the receiver, and the receivership court, had exclusive jurisdiction over matters pertaining to the cedent's estate. The district court rejected these arguments pursuant to the Supremacy Clause of the U.S. Constitution:

The court finds that the receivership/liquidation provisions of Puerto Rico's Insurance Code do not afford the Receivership Court with "exclusive jurisdiction" to dispose of the causes of action in this case nor the arbitration procedures to be held as the result of the judgment entered by the Court [14].

Even if this were not the case, the court ruled, state law could not divest the federal courts of jurisdiction:

The Supreme Court has indisputably stated that "state courts are completely without power to restrain federal court proceedings in in personam actions like the one here." . . . [As a matter of law, the Liquidation Order cannot divest the Court of jurisdiction to entertain the issues in the instant case. Plaintiff's argument as to this matter is thus dismissed [15].

Finally, the receiver claimed that the Puerto Rico Insurance Code reverse pre-empted the McCarran-Ferguson Act, which was the lever used by the reinsurers to seek an order to compel arbitration under the FAA. In support of this claim, the receiver cited to *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998) cert denied 525 U.S. 1016 (1998). In this case, the court found that (a) the state receivership code did give the receiver exclusive control over the estate, (b) the receivership code reverse pre-empted McCarran-Ferguson, and (c) the reinsurer's attempt to collect salvage from the estate was an in rem action against funds in the estate [16]. The *Integrand* court rejected the *Munich American* precedent, as the Puerto Rico Insurance Code did not grant exclusive jurisdiction and did not apply to in personam claims by the estate against a reinsurer [17]. The district court supported this ruling with caselaw resulting from an earlier era of insurance insolvencies, which will be examined below.

The In Rem versus In Personam Distinction

The distinction between in rem and in personam jurisdiction is explained in *Fuhrman v. United America Insurers*, 269 N.W. 2d 842, 846 (Minn. 1978):

When a corporation is placed in receivership, the court which grants the remedy and appoints the receiver also receives, by operation of law, constructive possession of the corporate assets. The corpus of the property is the receivership res. It is well settled that once the res comes into possession of the court, no action of any kind may be maintained which would interfere with this possession.

The crucial factor, however, is that not every suit brought against a receivership defendant is deemed to interfere with the res. The distinction is commonly made between the liquidation of a claim and the enforcement of the claim after it has been reduced to judgment. Thus, an action in personam to establish the extent of an insolvent's liability on a claim is held not to interfere with the receivership res. By the same token, any attempted attachment or levy against the res made in connection with a judgment is normally in rem and directly opposed to the court's dominion over the res.

In essence, an action to establish liability is in personam, but an action that is a direct effort to collect assets from the estate is in rem.

In Rem versus In Personam Caselaw

In addition to *Munich American*, several other cases demonstrate in rem jurisdiction. One is *Davister Corp. v. United Republic Life Insurance Co.*, 152 F. 3d 1277 (10th Cir. 1998). The plaintiff sold certain real estate to the insurer, but the domiciliary regulator ordered that the transaction be reversed. Before this was accomplished, the insurer was placed in receivership and the receiver took control of the real estate. The seller of the real estate filed suit to compel arbitration over the ownership of the real estate. The court declined to do so, as the action dealt with an asset of the estate (i.e., an in rem proceeding).

Another in rem decision is *Professional Construction Consultants, Inc. v. Grimes*, 552 F. Supp. 539 (W.D. Ok. 1982), which was an effort to collect on a performance bond issued by the insolvent insurer. The court ruled that only the receivership court could rule on an action to collect from the assets of the estate, citing to a similar result in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936).

An early case finding in personam jurisdiction is *Ackerman v. Tobin*, 22 F. 2d 541 (8th Cir. 1927). The court found that an action to determine liability on a policy, as distinct from collecting on the liability, was an in personam action.

Bernstein v. Centaur Insurance Co., 606 F. Supp. 98 (S.D. N.Y. 1984), represents the typical case in which the receiver sues for reinsurance proceeds and the reinsurer removes to federal court and moves to compel arbitration. The court distinguished an earlier case in which the plaintiff was seeking to recover insurance proceeds [the res] from an insolvent insurer. The *Bernstein* court granted the motion, stating, "In the

instant case . . . the plaintiff [receiver], not defendant, is the holder of the res under the supervision by the state insurance department of insurance and independent federal diversity jurisdiction is present" [18].

A Ninth Circuit case distinguishing in personam jurisdiction is *Hawthorne Savings F.S.B. v. Reliance Insurance Co.*, 421 F. 3d 835 (9th Cir. 2005), which involved a suit by a bank against the insurer on a loan default and defense of the claim by a directors and officers liability insurer. During the course of the suit, the insurer became insolvent, but the district court declined to defer to the receivership court and tried the case to a verdict. The court ruled that determination of liability under the D&O policy was an in personam action that the state court was without power to enjoin. However, the court observed that should the insured receive a favorable ruling, the insured would still have to present its claim to the insurer's receiver in order to recover.

American Alternative Insurance Corp. v. American Protection Insurance Co., No. 11-cv-01865-AWI-SKO 2013 U.S. Dist. LEXIS 41992 (E.D. Cal. Mar. 25, 2013), was an action for contribution for legal fees for a mutual insured. While the action was pending, the defendant was placed in receivership. Citing extensively to *Hawthorne Savings*, the court ruled that the action for contribution was in personam:

Thus, a judgment in favor of Plaintiff AAIC would also not be in the nature of an attachment, garnishment or execution, or any other action that could conceivably interfere with the Rehabilitation Order issued against Defendant APC in Illinois. As in Hawthorne, *Plaintiff here seeks contribution and declaratory relief, but does not seek attachment or levy against any res made in connection with a judgment. As an in personam action, it would be a claim reduced to judgment, which would not interfere with the receivership res or with the liquidation proceeding as contemplated by . . . the California Insurance Code [19].*

> "In essence, an action to establish liability is in personam, but an action that is a direct effort to collect assets from the estate is in rem."

The receiver of a ceding insurer attempted to arbitrate disputes over 43 reinsurance contracts that did not contain arbitration clauses in *Midwest Employers Casualty Co. v. Legion Insurance Co. (In Liquidation)*, No. 4:07-CV-870 CDP, 2007 U.S. Dist. LEXIS 82857 (E.D. Mo. Nov. 7, 2007). The reinsurer sought an injunction under the FAA barring the receiver from pursuing arbitration and for declaratory relief as to its liability under the contracts. The court found that this was an in personam action:

The object of this case is not to determine ownership rights to the reinsurance contracts. There is no question that [the insolvent cedent] has contract rights (assets) in the contracts. The goal here is to determine what [the cedent's] and [the reinsurer's] rights are under the contracts. Therefore, the case is an in personam proceeding.

While it is true that [the reinsurer's] desired outcome in this case could cause the cedent's estate to be smaller than if [the reinsurer's] rights under the contract are resolved in [the cedent's] favor, that does not mean that this is an action in rem. The mere fact that [cedent's] claimants may receive less money does not make this case in rem. [The cedent's] ownership of the contracts will not be affected by the determination of the issue in this case [20].

In Re Rehabilitation of Manhattan Re-Insurance Co., No. 2844-VCP, 2011 Del Ch. LEXIS 146 (Ch.Ct. Oct. 4, 2011), involved an action by the reinsurer against the receiver to prevent the receiver from using the proceeds of a credit for reinsurance letter of credit that was prematurely drawn down by the receiver and to refer the matter to

an arbitration panel. The court found that the receiver had exclusive jurisdiction over in rem claims against the assets of the estate, but that this was an in personam action and that the receiver stepped into the shoes of the insurer in receivership in terms of being subject to the arbitration agreement.

Other Caselaw Supporting the *Integrand* Result

The receiver of Glacier General was attempting to collect reinsurance proceeds in *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992). The receiver sued the reinsurers in state court, and the reinsurers removed the action to federal court and moved to compel arbitration. The receiver asked the court to remand the action to state court on the basis that an arbitration would interfere with her control of the estate. The court disagreed:

Because this dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce Glacier's contractual rights, she is bound by Glacier's pre-insolvency agreements....

Application of the FAA does not impair the liquidator's substantive remedy under Montana law. Instead, it simply required the liquidator to seek relief through arbitration. The liquidator has presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer [21].

Also within the Ninth Circuit was the long-running saga of *Quackenbush v. Allstate*, which was an attempt by the receiver of the Mission Group to prevent Allstate from arbitrating various disputes with the receiver, particularly the right of a reinsurer to set off premium receivables against loss payables. The receiver argued for Burford abstention, which is a deferral by a federal court due to interference with a complex state scheme of regulation. The receiver took this argument to the U.S. Supreme Court and lost by a unanimous vote [22].

> "Application of the FAA does not impair the liquidator's substantive remedy under Montana law."

Eventually, the arbitration issue was resolved in *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372 (9th Cir. 1997). The receiver argued that it was inappropriate for arbitrators to consider issues of state law such as setoff of premiums against losses, but the court found no such limitation in the FAA. The receiver again argued interference with the state statutory scheme of liquidation, but the court rejected that as well:

Quackenbush points to the California statutory scheme for resolving claims against insolvent insurers and argues that arbitration would interfere with that scheme. But this statutory scheme applies only to Allstate's claims against Mission; it does not apply to this case. Thus, while the FAA might not mandate arbitration of Allstate's claims against Mission, it continues to apply with full force to Mission's claims against Allstate [23].

Atkins v. CGI Technologies & Solutions, Inc. 724 Fed. Appx. 383 (6th Cir. 2018), was an action by a receiver of a health insurer against a vendor that supplied administrative services to the insurer. The vendor removed the state court action to federal court and moved to compel arbitration. The receiver sought a remand, claiming "exclusive jurisdiction." The court denied the remand, ruling that enforcing the arbitration clause, consistent with the FAA, would not invalidate or supersede

a superior state interest and therefore does not reverse pre-empt the FAA.

Arbitrations Tactics Based on the In Rem versus In Personam Distinction

Defensive use of arbitration. The easy lesson from the above caselaw is that, given a choice, it is better for a reinsurer that allegedly owes money to the estate to await a suit by the receiver and then remove it to federal court and move to compel arbitration. Once the matter is in arbitration, the panel is free to consider what setoffs and counterclaims the reinsurer wishes to assert.

Offensive use of arbitration. The more subtle lesson is that in personam (rather than in rem) jurisdiction will be applied to actions against receivers by reinsurers, cedents and others as long as the actions are not a direct effort to obtain assets of the estate. For instance, a reinsurer that is contesting coverage could file an arbitration for a declaratory judgment. If the receiver refuses to engage, based on a state anti-suit (and anti-arbitration) injunction, the reinsurer can move a federal court to compel arbitration. If the receiver declines to appoint an arbitrator and there is no power in the reinsurance contract for the reinsurer to appoint a second arbitrator, the reinsurer can petition the federal court to appoint a second arbitrator and umpire under section 5 of the FAA.

A similar procedure could be followed even if the reinsurer is owed premiums. The liability can be established in the arbitration. The reinsurer could then take the liquidated claim to the receivership court, where it would be subject to the state priority-of-distribution statute. The key is to get all of the disputes, other than collection from the res of the estate, before an arbitration panel.

Subrogation and salvage recoveries. Subrogation and salvage offer another opportunity for recovery based on a closer examination of in rem versus in personam jurisdiction. In the *Munich American* case, the reinsurer could have tried to establish that a ceding insurer (and its receiver) holds subrogation and salvage recoveries in trust for the reinsurer [24], which is not part of the res of the estate and therefore is not subject to state priority-of-distribution statutes.

NOTES

1 Best's Special Report. 2016. *Best's Impairment Rate and Rating Transition Study: 1977–2015*. A.M. Best.

2 The author was a leading reinsurer spokesman on receivership issues in the 1980s and 1990s. Two of the largest insolvencies of that period, Mission Group and Transit Casualty, were famous for the advocacy of their receivership courts.

3 *Fragoso v. Lopez*, 991 F. 2d 878 (1st Cir. 1993); *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996).

4 *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995).

5 *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885 (N.Y. 1958).

6 *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998).

7 *Garamendi v. Caldwell*, 1992 WL 203827 (C.D. Cal.)

8 *Washburn v. Corcoran*, 643 F. Supp. 2d 554 (S.D.N.Y. 1986).

9 Slip op. at 4.

10 *Id.* at 14.

11 *Id.* at 17.

12 *Id.* at 19-20.

13 *Id.* at 26.

14 2020 U.S. Dist. LEXIS 77407 at *24.

15 *Id.* at * 9 – 10 (internal citations omitted).

16 141 F.3d 595 at n. 6.

17 2020 U.S. Dist. LEXIS 77407 at *24.

18 606 F. Supp. 98 at 103.

19 2013 U.S. Dist. LEXIS 41992 at *12 – 13 (emphasis in the original).

20 2007 U.S. Dist. LEXIS 82857 at*7.

21 968 F.2d 969 at 972.

22 *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). The author attended the oral argument, and Justice Scalia was at his acerbic best in questioning the attorney for the receiver, who chose to argue the case himself rather than retaining experienced Supreme Court counsel. The receiver's attorney claimed that the 9-0 loss was actually a victory in that it "cleared away the underbrush."

23 121 F. 3d 1372 at 1381.

24 Hall, Robert M. 2000. "Reinsurer Claims to Subrogation and Salvage Recoveries in a Receivership Context." *Mealey's Insolvency Report*, No. 11 at 21.

Robert M. Hall is a member of the Quarterly Editorial Committee, a former senior vice president and general counsel of a major reinsurer, a former partner of a leading law firm, and an ARIAS-certified arbitrator and umpire.

Cedent-Reinsurer Information Sharing: Law and Practice, Part II

By Richard C. Mason, Esq.

Part I of this article, published in the Q4 2021 issue of the ARIAS *Quarterly*, discussed situations in which waiver of privilege or confidentiality may occur when the cedent and reinsurer communicate concerning a ceded claim. In Part II, I discuss the less-well-understood law governing inspection of books and records under access-to-records clauses.

Inspection of Books and Records

Waiver of privilege or confidentiality may occur in the course of an inspection of books and records pursuant to an "access-to-records clause" in the reinsurance contract. An access-to-records clause in a reinsurance contract may require the cedent to disclose proprietary or privileged information. The party asserting waiver in these circumstances may be the reinsurer itself, which may contend that if a privileged document falls within the scope of information it has a contractual right to view, the cedent is precluded from asserting privilege.

The leading case concerning waiver in these circumstances has held that, absent explicit language to the contrary,

a cedent does not give up its right to preserve the confidentiality of communications with its counsel regarding the underlying claims (including coverage determinations) and in disclosing facts or producing documents in its possession relevant to the underlying claim [37]. "Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges" [38]. Likewise, a reinsurer is not entitled under a cooperation clause to learn of any and all legal advice that may have been obtained by the cedent with a "reasonable expectation of confidentiality" [39].

The Audit and Confidentiality Agreement

A large, "drains up" audit may be fraught with risk of inadvertent production of privileged material. For example, I once received folders containing attorney-client communications that were provided because the attorney author in question had departed several years before, and a new employee charged with producing the documents did not realize they had been prepared by counsel.

A well-drafted confidentiality agreement is essential and may afford important protection. The following wording has been found under New York law to preclude waiver of privilege by a cedent that discloses information to its reinsurer during an audit:

Reinsurer agrees that any disclosure of such information to Reinsurer [during the audit] is not intended to ... constitute a waiver of any applicable privilege, including attorney client privilege ... [40].

The New York Appellate Division rejected the argument that the foregoing wording was intended only to protect against waiver vis-à-vis third parties and held that the reinsurer that received privileged material could not claim waiver.

An example of a (relatively restrictive) audit conduct and confidentiality agreement is posted on the ARIAS website at www.arias-us.org/mason/.

The Access-to-Records Clause: Law and Practice

The principal features of a modern access-to-records clause are as follows:

- It applies to all books and documents relating to business ceded;
- It survives termination of the treaty;
- It vests inspection rights in a designated representative;
- It sets a time frame for the inspection;
- It addresses the right to photocopy or otherwise reproduce; and
- It requires confidentiality.

Access-to-records clauses in certain reinsurance contracts have contained wording the same as, or similar to, the following:

Except as otherwise provided in this Article, the Reinsurer, or its duly authorized representative, may upon reasonable prior written notice to the Company, at Reinsurer's own expense, examine at the offices of the Company, during normal office hours, the Company's records and files as they exist in the Company's possession or reasonable control, in respect of business ceded under the Contract ("Records"). The Reinsurer's notice shall reasonably describe the nature of the inspection that it wishes to conduct, the persons conducting the inspection, the files that it wishes to review (after notice of available files from the Company (if applicable). Subject to the limitations expressed in this Article, this right of inspection shall survive termination of this Contract and shall continue as long as either party has any rights or obligations under this Contract.

There are five issues that commonly arise concerning inspections and audits. Each of these issues is addressed in turn below.

- May a reinsurer that is not current in payments inspect?
- Whom may the reinsurer designate to inspect?
- Can the cedent insist upon the reinsurer's agreement that information will remain confidential?
- What may the reinsurer inspect?
- May the reinsurer make and retain copies?

May a reinsurer that is not current in its payments inspect records? One of the most common grounds of contention has never been resolved by a U.S. court. A single decision, by an English court, has addressed this question; it reportedly held that "The [cedent] is not ... entitled in breach of contract to deny the debtor access to the only material which would show whether or not the debt is owing and then claim that he has no material problem on which to contradict the bare assertion that it is due" [41]. Thus, the commonly asserted position that a reinsurer that is "not current" cannot inspect records has never been endorsed by a legal decision, although it can be a plausible

stance depending upon the materiality of the non-payment.

An arbitration panel may, of course, seek to require a reinsurer to post security before commencing discovery in arbitration [42]. Thus, a cedent that believes it should not be required to permit inspection until receivables are brought current may force an arbitration if it believes it will be able to obtain an order requiring the insurer to post security based on its doubt that the reinsurer will otherwise satisfy its obligation.

> "The freedom, or strictness, with which access to records is granted may have an unexpected consequence."

If the information the reinsurer seeks is relevant to its obligation to pay (or to the amount), then a reinsurer's refusal to pay may be deemed to be justified until it receives the required information. It has been said that "the audit right is so important that ... when it is denied or delayed, there should be no question of the right of the reinsurer to withhold payments until the audit or inspection is granted" [43]. There is legal authority that refusal to honor an access-to-records obligation may be a material breach of the treaty and relieve a reinsurer or retrocessionaire of its duty to further indemnify [44]. A cedent's "failure to provide relevant information" concerning the reinsurer's obligation to pay a claim has been held to have "violated the duty ... owed to [r]etrocessionaires to act in good faith" [45].

In practice, then, a cedent that does not wish to freely permit inspection may simply force arbitration. "In arbitration, the breaching party can produce documents at the panel's direction, and then simply rely on the playground maxim 'no harm, no foul'" [46].

Foot dragging, taken to extremes where an inspection right existed, has been found to give rise to a breach of contract. In one non-reinsurance case, a trust agreement required a union to promptly furnish to a trustee all records, including employment and payroll records [47]. From February 23 through May 12, the trustee's auditor left at least six phone messages and faxed at least one request for documents. On June 12, the auditor finally was able to meet with the company, but was told that the payroll records were "not available at all." The auditor decided it could not complete the examination and took no further action. The court held that the union had breached the terms of the collective bargaining agreement [48].

Practically speaking, if a cedent demonstrates that a reinsurer did not genuinely need the inspection to determine its obligation to pay and the reinsurer's refusal to pay was otherwise unjustified, then the cedent's refusal to permit the audit likely will not subject the cedent to any liability or adverse inference.

Who may inspect? It is very rare for an agent, even an attorney, to be deemed ineligible to act for the party for purposes of conducting an onsite audit. Under a uniform stockholder's agreement, for example, the stockholder may use any duly constituted agent, including a consultant or attorney [49]. One audit firm was banned where (1) the parties already were in litigation, (2) the cedent had commenced suit against the audit firm on the ground it had taken a year to complete a two-week audit in order to delay the reinsurer's payments, and (3) the audit firm sued the cedent alleging tortious interference with business relationships. The court agreed with the cedent that it was not obligated to permit that particular audit firm to inspect [50]. Certainly, a designee whose activities on behalf of clients give rise to a genuine risk of bad faith or

confidentiality risks may be rejected by a cedent.

Does the cedent have the right to insist on confidentiality? Although the answer to this question seems plain, this is another issue that surfaces repeatedly yet has never been the subject of a reported decision. It has been common for an inspection clause to fail to mandate confidentiality. Invariably, however, a cedent will insist on the reinsurer's execution of a confidentiality agreement (at least), and reinsurers customarily accede.

There is opinion to the contrary. Requiring confidentiality as a condition to inspection arguably rewrites the reinsurance contract [51]. An audit or access-to-records provision that omits mention of confidentiality arguably waives the right to insist on it.

Nevertheless, in other contexts, agreement to confidentiality has been deemed an incident of the right to inspect. A confidentiality agreement "is a virtually sine qua non of a books and records inspection conducted of a Delaware entity" [52]. In reinsurance, the confidentiality of the inspection process long ago became a well-entrenched custom [53]. Accordingly, while the particulars of confidentiality are sometimes debated in reinsurance arbitration, it would be a rare tribunal that would order inspection where the reinsurer refused to agree to any confidentiality.

What may the reinsurer inspect? "Books and records" relating to the business is generally understood to mean those records that relate to the reinsurer's underwriting risk or its obligation to pay claims. In other contexts, the phrase has been broadly construed. According to Fletcher on Corporations §2214, p. 755, for example:

The common law rights obtains as to the books and records not specified or included within the statutory provision, and … the specific mention of certain books and records does not in itself limit the right of inspection to such books and records, or curtail the stockholder's right as to other books and records, or authorize the corporation to prevent examination of such other books and records at proper times and for proper purposes.

In this author's experience, "books and records," absent a clear showing of relevance, may not be deemed to include the following:

- operational manuals;
- underwriting strategy;
- financial data not maintained as part of the file for the account;
- historical books and records no longer used on a current basis; or
- attorney-client privileged documents.

An auditor who specializes in the class of business being inspected can be invaluable to a reinsurer in establishing a predicate for a broad inspection. For example, an auditor experienced in first-party property office risks may be able to present a strong case for inspection of underwriting files regarding such matters as geographical aggregations of risks.

Auditing of financial documents may be permitted in special circumstances. A reinsurer subject to the records clause quoted above would need to demonstrate that the records are "in respect of business ceded under the contract." Circumstances in which financial records would meet this requirement are limited, but might include financial records shedding light on adequacy of reserves, particularly when reserves have been significantly strengthened or have proved deficient.

Is there an implicit right to receive copies of records? Reinsurers often express a need for their auditors to make and retain (at least temporarily) copies of documents. Cedents have frequently sought to restrict or preclude copying, and no court has resolved this fairly common point of dispute. Outside the reinsurance context, a number of courts have held that copying may be a necessary incident to inspection, depending upon the circumstances:

- Where stockholders were permitted to inspect records, the right to copies was deemed implicit [54].
- A New York City municipal statute permitted public disclosure of papers and records on request [55].
- A law giving union members the right "to examine any books, records, and accounts necessary to verify" financial reports implicitly permitted copying [56].

Nevertheless, in reinsurance disputes, a reinsurer, preferably through its auditors, may be required to make a plausible showing why it needs copies. Practically speaking, of course, a reinsurer dissatisfied with the scope of copying in an audit may commence arbitration. In this author's experience, arbitrators will frequently authorize, as "disclosure," access to copies which the reinsurer would be unable to secure based solely upon the terms of the access-to-records clause.

Potential Effect on Subsequent Rescission Claims of Permission or Refusal of Access to Records

The freedom, or strictness, with which access to records is granted may have an unexpected consequence. Freely permitted access can preclude a reinsurer from claiming down the road that it is a victim of concealment by the cedent, while a refusal of access may make it easier for a reinsurer to rescind based on concealment.

One court observed that the retrocessionaire's exercise of its inspection right four years into the run-off of the treaty evidenced a lack of due diligence and, thus, its claimed reasons for rescission were deemed insufficient [57]. The reinsurer claimed that the cedent had concealed that a significant portion of the ceded life insurance business was composed of multiple employer trust ("MET") accounts. The court observed that the syndicates had retained an auditor to audit the file, "an event which would surely have disclosed" that the cedent was writing multiple employer trust business. Accordingly, the reinsurer's right to inspect became the basis on which the rescission claim failed.

The strength or weakness of a rescission claim, therefore, may depend in part upon the freedom and scope of access to records which the cedent had historically permitted. This is important for cedents to keep in mind when managing audit response.

NOTES

37 *North River Ins. Co. v. Philadelphia Re*, 797 F. Supp. at 368-69.

38 *Gulf Insurance Co. v. Transatlantic Reinsurance Co.*, 788 N.Y.S.2d 44, 45-46 (N.Y. App. Div. 2004).

39 *North River Ins. Co. v. Philadelphia Re*, 797 F. Supp. at 369.

40 *AIU Ins. Co.*, 2008 WL 5062030.

41 *In re a Company* (ex parte Pritchard) [1992] B.C.L.C. 633.

42 See *Pacific Reinsurance Management Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir. 1991).

43 Staring, *Reinsurance Law and Practice* § 15:8, n. 3.

44 *Michigan Mutual Ins. Co. v. Unigard Security Ins. Co.*, 44 F.3d 826, 829 (9th Cir. 1995) (after reinsurer refused to honor panel's demand that it disclose records, panel relieved reinsurer of current and future obligations); *Manhattan Life Ins. Co. v. Prussian Life Ins. Co.*, 296 F. 39 (2d Cir. 1924).

45 *Michigan Mutual*, 44 F.3d at 829 (S.D.N.Y. 1994); see also *Philadelphia Reins. Corp. v. Universale Ruckversichernogs AG*, 1994 WL 4437 (S.D.N.Y. 1994) (arbitrator has power to enforce audit rights).

46 Veach, James, "Access to Records: Good Faith Meets Hard Ball Tactics," 900 PLI/Comm. 7.

47 *Roca v. Guardian Transport Co., Inc.*, 2002 WL 31082959 (S.D.N.Y. 2002).

48 *Id.*

49 *Nama Holdings, LLC v. World Market Center Venture, LLC*, 948 A.2d 411, 421 (Del. Ct. Ch. 2007).

50 *Mant v. ITT Management Co.*, Mealey's Litig. Rep. Reinsurance (11/20/96).

51 Barlow, Lyde & Gilbert, "Reinsurance Practice and the Law," 18:5-3.

52 *Nama Holdings, LLC v. World Market Center Venture, LLC*, 948 A.2d 411 (Ch. Ct. 2007) (disclosure is deemed "contingent upon the shareholder first consenting to a reasonable confidentiality agreement"); *Stroud v. Grace*, 606 A.2d 75, 89 (Del. 1992); *Freund v. Lucent Tech*, 2003 WL 139766, *7 (Del. Ch. 2003) (conditioning inspection of books and records on the execution of a confidentiality agreement).

53 Wollan, Eugene. 2003. *Handbook on Reinsurance Law,* §8.07c, at 831. 2003 Supplement.

54 *Jones v. Ralston Purina Co.*, 343 So. 2d 631, 639-42 (Mo. App. 1961)

55 *Becker v. Lunn,* 192 N.Y.S.2d 754 (3d Dept. 1922).

56 "Verification of these reports requires a detailed, painstaking analysis which, due to space and time constriction, can only be partially completed on the premises of the union. Without the right to copy, the members would necessarily be unable to adequately complete their analyses away from the union's premises and their right to examine the records in order to verify the LM-2 reports would be nullified." *Conley v. United Steelworkers of America Local Union No. 1014*, 549 F.2d 11122 (7th Cir. 1977).

57 *Manhattan Life Ins. Co. v. A.J. Stratton Syndicate*, 132 F.R.D. 139, 142 (S.D.N.Y. 1990).

Richard C. Mason is a mediator, arbitrator, and legal consultant with Mason ADR, LLC, with more than 30 years of experience.

Follow the Fortunes: The Case for Aggregation Under a CAT XL

By Curtis B. Leitner and Larry P. Schiffer

Across global reinsurance markets, reinsurers and cedents are negotiating—and, in some cases, litigating or arbitrating—the cession of substantial COVID losses under catastrophe excess-of-loss reinsurance treaties ("CAT XLs"). Anecdotally, a substantial number of these losses fall under event and travel cancellation and business interruption policies. The disputes are largely about aggregation—pooling individual losses into a single "loss occurrence" for purposes of retention and indemnity limits. A significant fault line in these debates is whether cedents can aggregate losses across jurisdictional lines (for example, business interruption resulting from March 2020 closure orders in New York, New Jersey, and Connecticut).

Although much has been written on COVID-related aggregation disputes, an important aspect of these disputes has not received adequate attention: the follow-the-fortunes doctrine. Depending (as always) on the specific contract language at issue, the follow-the-fortunes doctrine can provide a powerful argument in support of multi-jurisdictional aggregation. This article describes the state of play in the aggregation debate, unpacks the follow-the-fortunes doctrine, and then suggests how cedents can take advantage of it in aggregation disputes.

Aggregating COVID Losses Under a CAT XL

The loss occurrence definition of a CAT XL typically permits the aggregation of a series of losses arising from one "event" or "catastrophe" during a fixed period of time (e.g., 168 hours). For most cedents, COVID losses likely fall within the high limit for a loss

occurrence under a CAT XL. Thus, cedents generally want to aggregate as many COVID losses as possible into one loss occurrence to exceed the retention and maximize their reinsurance recovery. To that end, cedents have proposed broadly defined "events" that span multiple jurisdictions, such as the outbreak of COVID across countries, continents, or even the entire world. Meanwhile, to reduce claim payouts, reinsurers have tried to confine COVD-related "events" to a single jurisdiction, such as losses caused by a closure order in one state or country.

The argument usually runs something like the following: Reinsurers invoke a well-known U.K. court precedent stating that an "event" is "something which happens at a particular time, at a particular place and in a particular way" [1]. Cedents respond that other jurisdictions have broader definitions of an "event" and, in any case, U.K. precedents also state that the meaning of *event* "must take colour from the contractual context, including the perils insured against" [2]. In the CAT XL context, where hurricanes, wildfires, and earthquakes are the paradigmatic "events," cedents insist that an "event" must be construed broadly.

Reinsurers reply that, in the U.K. Financial Authority's test case on business interruption policies, the U.K. Supreme Court held that an "outbreak" of COVID is not an "event" [3]. Cedents counter that the test case was decided in the context of retail business interruption policies that insure entirely different risks than a CAT XL—for example, vermin or clogged drains at one restaurant. The thrusts and parries over the "loss occurrence" definition go on and on.

Lost in this debate are the background interpretive principles that govern how to construe and apply a reinsurance contract. For example, it has been suggested that cedents should invoke "honorable engagement" provisions in CAT XLs, which allow arbitrators to decide disputes based on commercial reasonableness rather than a strict reading of contract language [4]. The follow-the-fortunes doctrine is another interpretive principle that has been under-utilized in the debate.

Unpacking the Follow-the-Fortunes Doctrine

A follow-the-fortunes clause of a reinsurance contract reads something like, "It is the intention of this contract that the fortunes of the reinsurer shall follow the fortunes of the [cedent]." This provision memorializes the general principle that the "insurer and reinsurer should have a shared destiny; the reinsurer must live with the calamities and fortuities that give rise to claims under the original risk insured" [5]. Although (again) the particular contract language always controls, it is helpful to analyze the follow-the-fortunes doctrine as an umbrella concept that includes two overlapping principles: (1) the original risk principle and (2) the follow-the-settlements principle. Each principle may be memorialized in more specific contract language.

Under the original risk principle, the reinsurer is bound by the underwriting fortunes of the cedent. The "doctrine burdens the reinsurer with those risks which the direct insurer bears under the direct insurer's policy covering the original insured" [6]. These original "risks" include both the risk of claims predicated on insured perils and the risks involved in the underwriting process—e.g., the number of policies written, the premium collected, and the credit risk associated

> "Lost in this debate are the background interpretive principles that govern how to construe and apply a reinsurance contract."

with those premiums. Reinsurance contracts often memorialize the original risk principle, at least for specific contract language, in a follow-form clause, which "incorporates by reference all the terms and conditions of the reinsured policy" [7].

Several examples illustrate the application of the original risk principle. If an insurance policy requires payment in a particular currency, and the price of the currency spikes when payment is due, the reinsurer, like the cedent, must live with the increased cost. If the local law governing an underlying casualty policy unexpectedly changes to allow punitive damages, and thereby increases the cedent's exposure, the reinsurer must share in that exposure [8]. To take a COVID example, if a cedent litigates with its policyholder over whether COVID caused "physical damage" under a property policy, the reinsurer is bound by the court's construction of the policy.

Under the follow-the-settlements principle, the reinsurer is bound by the settlements (or, as they sometimes are called, the actions) of the cedent regarding claims on underlying policies. The follow-the-settlements principle is typically memorialized in specific contractual language stating that the reinsurer is bound by the settlements of the cedent so long as they are within the scope of the reinsurance contract. This principle "binds a reinsurer to accept the cedent's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured: coverage, tactics, lawsuits, compromise, resistance or capitulation" [9].

> "Under the original risk principle, the reinsurer is bound by the underwriting fortunes of the cedent."

To bind the reinsurer, the cedent's interpretation of the underlying policy must be reasonable and businesslike. The follow-the-settlements principle facilitates settlements and promotes coverage. Without it, a cedent could not settle a policy without risking that the reinsurer would relitigate all the defenses the cedent raised, or could have raised, in litigation with the policyholder.

Limits of the Follow-the-Fortunes Doctrine

The follow-the-fortunes doctrine is subject to the express limitations of a reinsurance contract. For example, the New York Court of Appeals holds that a follow-the-fortunes clause "does not alter the terms or override the language of reinsurance policies" [10]. From a European perspective, the Principles of Reinsurance Contract law similarly state that the "follow-the-fortunes rule will not expand coverage under the contract of reinsurance" and that "the reinsurer is only required to follow the reinsured's fortunes, insofar as a claim is covered under the contract of reinsurance" [11].

Suppose an insurance policy expressly states that it does not cover punitive damages. The cedent is subject to a judgment in a wrongful death suit of $1 million of compensatory damages and $100 million of punitive damages. The cedent settles with the victim's estate for $10 million while the judgment is on appeal. Because the settlement obviously includes mostly punitive damages, the reinsurer is not bound by the settlement to the extent that it includes punitive damages that are expressly excluded by the reinsurance contract [12].

Yet to say that the follow-the-fortunes doctrine does not override the language of a reinsurance contract is not to say that the doctrine is irrelevant to the interpretation of a reinsurance contract. The First Circuit got it right when it explained that "[o]f course, if sufficiently clear, specific limits in the [reinsurance] certificate control over the general aim of concurrence and ordinary 'follow' clauses" [13]. But that is a very big "if," especially in the context of the current unprecedented pandemic. When the language of a reinsurance contract is vague or ambiguous and thus not

sufficiently clear to resolve a dispute, the follow-the-fortunes doctrine may be relevant to the interpretation of the disputed provision.

Follow-the-Fortunes Doctrine in Action

A prominent First Circuit decision demonstrates how the follow-the-fortunes doctrine can be determinative of an ambiguous provision in a reinsurance contract. In *Commercial Union Insurance Co. v. Swiss Reinsurance America Corp.* [14], the court construed the term "occurrence" in several three-year facultative certificates. The certificates reinsured the cedent's liability under several three-year excess-of-loss property policies. The certificates required the reinsurer to pay a portion of the cedent's liability under the excess policy for "each occurrence"—i.e., "50 percent of [the cedent's] first $1 million in loss for 'each occurrence'" [15]. The reinsurance certificates had typical follow-form and follow-the-settlement clauses. The question was whether the liability limit for an "occurrence" applied separately to each year during the three-year period covered by a certificate or applied to the entire three-year period.

The policyholder sustained serious property damage losses relating to hazardous waste pollution (including leaking chemicals) at various sites. The reinsurer took the position that continuing leakage at each site during a certificate's three-year duration was one "occurrence." In this view, if a certificate provided that the reinsurer was liable for 50 percent of the first $1 million loss per occurrence, the reinsurer's liability would be capped at $500,000 per site. The cedent took the position that the liability cap applied anew each year. On this view, the reinsurer would be liable for $500,000 for each year of a three-year policy period, or $1.5 million per site.

The First Circuit found that the pertinent language in the reinsurance certificates—namely, "each occurrence"— was "simply cryptic as applied to continuing leaks over a multi-year period under a multi-year policy" [16]. Neither party pointed to relevant extrinsic evidence. In the end, the court ruled that what "ma[de] the difference" was the follow-form and follow-the-settlement clauses [17].

Unlike the reinsurance certificates, the excess-of-loss policies defined an "occurrence," but they were ambiguous as to whether the limit for an "occurrence" applied annually or for the duration of a policy. On the one hand, the excess policies defined "occurrence" as "repeated exposure to substantially the same general conditions existing at or emanating from one premises location," which could easily encompass ongoing leakage over three years [18]. On the other hand, the excess policies had follow-form clauses incorporating the terms of the underlying insurance policies, which "explicitly provided for their per occurrence limits to apply on an annual basis" [19].

The cedent reached a settlement with the policyholder that assumed "that the $5 million per-occurrence limit in each policy should be viewed as applying separately to each policy year, i.e., $15 million for a three-year policy" [20]. Because the meaning of "occurrence" was ambiguous in the excess-of-loss policy, the court found that the cedent's settlement was reasonable.

> "There is no precedent for a once-in-a-lifetime pandemic."

The First Circuit applied the follow-the-fortunes doctrine to ascertain the meaning of "occurrence" under the certificates:

Under Swiss Re's follow-the-settlements clause it is bound to accept [the] pro-annualization reading of the Commercial Union policy for purposes of establishing Commercial Union's liability to Grace. In our view, Swiss Re's follow-the-form clause should be deemed to extend this reading into the parallel language in

Swiss Re's own certificates, subject only to any clear limitation to the contrary in the Swiss Re documents [21].

The "general aim of concurrence" between the reinsurance contract and the reinsured policy, based on the original risk principle, "tipped [the balance] in favor of making [the reinsurer] share liability on a basis that conforms its liability to that of the cedent where the cedent has settled reasonably and in good faith" [22].

> "Background interpretive principles like the follow-the-fortunes doctrine are a vital part of the context of a reinsurance contract."

The Aggregation of COVID Losses Revisited

The key provision in the "loss occurrence" definition of a CAT XL—i.e., a series of losses arising from an "event," a "catastrophe," or the like—does not clearly state whether and how it applies to government closure orders or an outbreak of COVID. There is no precedent for a once-in-a-lifetime pandemic, and there is unlikely to be extrinsic evidence that directly bears on this issue. CAT XL treaties, however, often contain language that memorializes (in some form) the follow-the-fortunes doctrine. As in *Commercial Union*, that doctrine can tip the balance in favor of the cedent's position.

Begin with an example that is precisely analogous to *Commercial Union*. Suppose an excess-of-loss policy has an aggregation clause that applies to a series of travel or event cancellations that arise from one "event," "catastrophe," or the like. Suppose further that the cedent reasonably settles the policyholder's claims based on the assumption that the same "event" caused losses in at least three countries. If a reinsurer refuses cover and argues that the term "event" in the reinsurance contract is limited to a government closure order or outbreak of COVID in a single jurisdiction, the cedent could respond with a *Commercial Union* argument. Specifically, the follow-the-settlements principle binds the reinsurer to the cedent's interpretation of "event" in the excess-of-loss policy, and the original risk principle extends that interpretation to the parallel language in the reinsurance contract.

A similar argument holds when the reinsured policy does not have a parallel aggregation clause. Suppose a CAT XL covers numerous retail business interruption policies similar to those addressed in the UK Financial Authority's test case (i.e., policies that cover business interruption caused by a disease within a certain radius of the business). Many CAT XLs provide an open-ended definition of "loss occurrence" that applies to all perils that are not specifically excluded. If the CAT XL does not include a disease exclusion (which was less common before COVID), then it covers COVID-related risk. Thus, the original risk principle burdens the reinsurer with the COVID-related risks in the underlying policies, subject to clear limitations in the reinsurance contract.

Again, a CAT XL loss occurrence provision does not clearly limit the reinsurer's exposure to losses in one jurisdiction. In fact, two of the five judges in the U.K. test case would have held that an "occurrence" in a narrow retail business interruption policy includes "the pandemic disease as a whole" [23]. Of course, the majority disagreed (and viewed the "occurrence" as an individual infection). But surely the three-two split on the U.K. Supreme Court demonstrates that it is at least reasonable to interpret an "event" as the "disease as a whole," which includes a multi-jurisdictional outbreak.

Among competing reasonable interpretations of a loss occurrence provision, the original risk principle favors the interpretation that promotes the "general aim of concurrence" between a CAT XL and the risks covered by the underlying policies [24]. An interpretation that encompasses

a multi-jurisdictional COVID outbreak does just that. Unlike a certificate of facultative reinsurance that reinsures one underlying policy, a CAT XL treaty reinsures numerous underlying policies that often provide cover in numerous different jurisdictions. If the business reinsured by a CAT XL treaty includes, for example, business interruption policies throughout various states in the Northeastern United States, a reinsurer cannot be "liable on a basis that conforms its liability to that of the cedent" if aggregation were limited to one jurisdiction [25]. Thus, the follow-the-fortunes doctrine tips the balance in favor of multi-jurisdictional aggregation.

Remember Background Principles and Contractual Context

When cedents analyze their loss occurrence provisions and the case law construing an "event" or "catastrophe," they should not lose sight of the forest for the trees. Background interpretive principles like the follow-the-fortunes doctrine are a vital part of the context of a reinsurance contract. Depending on the specific language at issue, they can provide a strong argument in support of a cedent's aggregation position.

NOTES

1 *Axa Re v Field* [1996] 1 W.L.R. 1026 at p.1035, per Lord Mustill.

2 *Kuwait Airways Corp. v. Kuwait Ins. Co. SAK* [1996] 1 Lloyd's Rep 664, 684-85, per Justice Rix.

3 *Financial Conduct Authority v. Arch et al.* (2021), para 69.

4 "GC urges clients to use 'honourable engagement' principles to counter reinsurers' Covid aggregation objections." 2021. *The Insurer*, June 15.

5 Ostrager, B., and M.K. Vyskocil. 2000. *Modern Reinsurance Law and Practice.* Little Falls, N.J.:Glasser LegalWorks.

6 *Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co.*, 903 F.2d 910, 912 (2d Cir. 1990).

7 *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1345 (S.D.N.Y. 1995).

8 These two examples are drawn from "Principles of Reinsurance Contract Law (PRICL) 2019," Article 2.4.3, Comments C7-C8. Published by the Project Group on Principles of Reinsurance Contract Law in cooperation with the International Institute for the Unification of Private Law. H. Heiss, M. Schauer, and M. Wandt, eds.

9 *N. River Ins. Co. v. Ace Am. Reinsurance Co.*, 139–40 (2d Cir. 2004).

10 *Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583, 596, 760 N.E.2d 319, 328 (2001).

11 PRICL, Article 2.4.3, Comment C9.

12 *Am. Ins. Co. v. N. Am. Co. for Prop. & Cas. Inc.*, 697 F.2d 79, 80 (2d Cir. 1982).

13 *Commercial Union Insurance Company v. Swiss Reinsurance America Corp.*, 413 F.2d 121, 128 (1st Cir. 2005).

14 413 F.2d 121 (1st Cir. 2005).

15 *Id.* at 123.

16 *Id.* at 128.

17 *Id.*

18 *Id.* at 123

19 *Id.* at 126 (emphasis in original).

20 *Id.* at 124.

21 *Id.* at 128 (emphasis added).

22 *Id.* at 128 (emphasis added).

23 *Financial Conduct Authority v. Arch et al.* (2021), para 323.

24 *Commercial Union Insurance Company*, 413 F.2d at 128.

25 *Id.*

Curtis Leitner is counsel at Morvillo Abramowitz Grand Iason & Anello PC.

Larry Schiffer is the editor of the ARIAS·U.S. *Quarterly*, a past chair and current member of the ARIAS·U.S. Technology Committee, a member of the ARIAS·U.S. Ethics Discussion Committee, and a recipient of the ARIAS·U.S. Dick Kennedy Award.

The Role of Arbitrators in Questioning Witnesses

By Charles E. Leasure, III and Daryn E. Rush

How and when is it appropriate for an arbitrator to ask a witness a "clarifying" question? When does an arbitrator cross the line into litigating the case? What should counsel or other panel members do if an arbitrator's questions cross the line?

These and other questions were posed to attendees at the 2021 ARIAS·U.S. Fall Conference as part of an interactive session addressing the role of arbitrators in questioning witnesses. Through online polling, audience members expressed their views on various examples of arbitrator questioning. The polling results and the panel's discussion of the vignettes provided helpful insights into this issue.

A good starting point for any discussion of arbitrator questioning is the ARIAS Code of Conduct. Canon VII of the code, titled "Advancing the Arbitral Process," provides guidance concerning arbitrator participation in the process:

4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.

5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time.

Those who have not reviewed the Code of Conduct recently might be surprised to find that it provides

such detailed guidance regarding arbitrators' questioning of witnesses. Paragraph 5 sets forth three key points:

- First, it expressly acknowledges that arbitrators may ask questions for "explanation and clarification to help them understand and assess the testimony." It does not authorize questioning for other reasons.
- Second, it specifically directs that arbitrators should not ask questions to advocate a position.
- Third, it instructs arbitrators not to interrupt counsel's examination to ask questions unless it is essential to do so to obtain clarification.

We suspect most practitioners have participated in hearings where the code's guidance has been tested, if not outright flaunted. There is similar guidance for arbitrators in the AAA Code of Ethics and for federal judges in the Code of Conduct for United States Judges.

Crossing the Line?

But how does one determine when an arbitrator has crossed the line, and what should be done when that happens? Again, the discussion from the 2021 Fall Conference provides insights. For example, when asked whether it is appropriate for an arbitrator to inject statements about their own personal experiences into a question purportedly seeking clarification, an overwhelming majority (84%) of attendees answered "No." While it is understood that arbitrators bring their personal experiences to the process, it is also widely agreed that interjecting specific examples of those experiences into the presentation of evidence potentially turns the arbitrator into a witness—one not subject to cross examination.

Arbitrators should be careful not to turn their questions into unsworn testimony. Likewise, they should consider whether their questions really seek clarification or whether they are instead designed to argue a point. If the latter, Canon VII dictates that the arbitrator should refrain from such questioning.

The audience was also asked about the situation where an arbitrator ventures into privileged territory and insists on getting an answer to questions that would reveal privileged information. This can create an especially tricky situation for the attorney. Does the attorney object on privilege grounds to the arbitrator's line of questioning and thereby risk alienating the arbitrator? If the attorney does not object, is there a risk of waiver? Can the company representative assert the privilege? Is it the umpire's duty to shut down the questioning?

Results from the audience on this issue show that there could be more than one acceptable way to proceed. Roughly half (almost 51%) of the respondents felt that the umpire should take a break and address the issue with her co-panelists. Nearly 44% thought that the lawyer whose client owned the privilege should object and instruct the witness not to answer. What is clear is that the attorney must raise the issue and try to do so in a way that causes the least friction with the arbitrator who wants answers.

What about an arbitrator who seeks to conduct a lengthy examination that veers into topics that were not addressed in direct or cross examination? To the extent that an arbitrator's questions address entirely new topics, it seems unlikely those questions could be for clarification or explanation only. Extensive questioning (e.g., questioning that goes longer than cross examination) likewise suggests that the arbitrator's intent leans more toward advocacy than clarification. Such questioning almost certainly violates the spirit, if not the letter, of Canon VII and should be avoided.

Even when it is clear that an arbitrator's questions cross the line, the question still remains: What, if anything, can or should counsel or other

> "Arbitrators should be careful not to turn their questions into unsworn testimony."

> “In most cases, the attorney should object to the (arguably) offending behavior by the arbitrator as it is happening.”

panel members do? Not wanting to “p**s off the judge,” counsel may be reluctant to object to an arbitrator’s questions—particularly if it’s the umpire asking those questions. And, on occasion, it might be counsel’s own party arbitrator that has gone off track, in which case counsel may hesitate to object so as not to jeopardize the arbitrator’s credibility with the rest of the panel. Notwithstanding any such reservations, counsel is entitled to (and should) object when an arbitrators’ questions cross the line.

When these scenarios were posed to the Fall Conference audience, the near-unanimous response was that counsel should object and/or the umpire should take a break to discuss the questioning with the other panelists. When asked specifically about the “over-questioning” arbitrator, 51% voted that the umpire should take a break, while 44% responded that counsel should object. Those two options, of course, are not mutually exclusive.

A Breakdown in Civility

The takeaway here is that both counsel and arbitrators should not hesitate to intercede—by objection or otherwise—if they believe that an arbitrator’s questions have crossed the line. And both counsel and arbitrators can cite to Canon VII to support a ruling limiting the scope of questioning.

Intervention by counsel and/or the other arbitrators is particularly important in the rare instances where an arbitrator’s questions lead to a breakdown in civility. Regardless of whether the breakdown results from an arbitrator’s improper questioning or an uncooperative or even combative witness, counsel and the arbitrators should take action. The audience was unanimous on this point—action should be taken to stop a belligerent arbitrator.

As discussed above, improper questioning can be addressed by the arbitrators sua sponte or in response to an objection. Where the witness is causing the friction, the umpire should provide clear instruction to the witness. In either scenario, a well-timed break to cool the temperature in the room is always advisable.

What is the lesson? In most cases, the attorney should object to the (arguably) offending behavior by the arbitrator as it is happening. Canon VII provides the authority to object, but does not offer any help with the practical realities of potentially losing one or more of the panelists.

Charles Leasure is a shareholder at Stevens & Lee, where his practice focuses on complex commercial insurance and reinsurance issues.

Daryn Rush is senior counsel at O’Melveny & Myers LLP, where he focuses on insurance coverage litigation.

Recent Reinsurance Decisions in Federal Court: Part I

By James F. Jorden

This article is based on the ARIAS 2021 Fall Conference panel on "hot topics" in the life insurance industry. One objective of the panel was to cover recent case law involving reinsurance disputes that ultimately might have relevance in a reinsurance arbitration setting. Given the time limits, our comments were brief. This article, which is being published in two parts, expands on the review of those cases and incorporates both the observations from the panel and a more extensive analysis of the potential implication of these decisions.

Standards of Review of Arbitration Panel Decisions

One recent decision thoroughly addresses existing standards of review by federal courts of reinsurance arbitration panel rulings. Suffice it to say, the decision confirms (and may expand) the high bar to, and generally futile nature of, a challenge to an arbitration panel's order.

In *PB Life Insurance Co. v. Universal Life Insurance Co.*, No. 20-cv-2284 (LJL), 2020 WL 4369443 (SDNY Jul. 30, 2020), the reinsurer was obligated to post collateral, subject to both state law and standards set under the contract. The reinsurance agreement required a separate trust to hold the collateral assets. The reinsurance agreement contained an arbitration clause, but the trust agreement did not.

When the cedent determined that the reinsurer's collateral was substantially in violation of the standards under the reinsurance agreement (thus posing a potential rating downgrade for the cedent), it initiated a reinsurance proceeding. The reinsurer opposed and filed for a temporary restraining order

in federal court, arguing that the trust agreement controlled. The district court denied the restraining order and the arbitration proceeded, with the reinsurer choosing to have little or no participation. The cedent was awarded relief by the arbitration panel in an order requiring the reinsurer to deposit $500 million into the trust.

The reinsurer challenged the award in federal court. The court, in its decision, confirmed that the panel's award did not meet any of the three standards for vacating an award: (1) failure to provide due process, (2) manifest disregard of the law, and (3) contrary to public policy.

Failure to provide due process. The "fundamental fairness" standard to achieve due process requires giving a party an opportunity to provide its "evidence and argument" but "not necessarily all of its evidence." (*PB Life* at 12)

Manifest disregard of the law. The standard is met only if there is "egregious impropriety." The court held that a "federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." (*PB Life* at 17)

Contrary to public policy. The reinsurer argued that a North Carolina court (acting to enforce an Insurance Department order) had issued a restraining order prohibiting the reinsurer and its affiliates from transferring any assets. The reinsurer argued that the prior order caused the enforcement of the panel's order to be in violation of public policy. The court, after a lengthy discussion, concluded that there was "nothing to preclude issuing its order, even if an earlier order makes it difficult or impossible to comply." (*PB Life* at 27)

For a more succinct summary of federal court attitudes toward review of reinsurance arbitration panel decisions, see the Seventh Circuit's recent decision in *Continental Casualty Co. v. Certain Underwriters of Lloyd's of London*, 10 F.4th 814, 815 (7th Cir. 2021), noting that (1) "it would be difficult to overstate the strength of the Supreme Court's support for arbitration when the parties have elected to resolve their disputes using that mechanism" and (2) "[w]hereas a decision by a court of first instance is usually subject to de novo review for questions of law and more deferential, but still meaningful, review for questions of fact, *arbitration awards are largely immune from such scrutiny in court*." (Emphasis supplied).

Intervention by Reinsurers in Insurer Litigation

In *Barnes v. Security Life of Denver*, 945 F.3d 1112 (10th Cir. 2019), the court dealt with the issue of when/whether a reinsurer can intervene in litigation brought against the cedent. Security Life of Denver and its various subsidiaries issued life insurance policies that contained common provisions for setting the administrative and mortality costs under the policies. For one block of policies, it entered into a reinsurance agreement with Jackson National Life Insurance Company that gave Jackson authority to administer the policies and set expense and general administrative costs, including the "cost of insurance charges."

The Barnes complaint asserted that the administrative and mortality charges had been improperly calculated and were excessive. Jackson National moved to intervene, arguing that the conduct complained of included Jackson's own administrative processes and that the potential result in the matter could adversely affect Jackson. Both Security Life and Barnes argued that Jackson, as a reinsurer, should be denied intervention.

The court, with one dissent, ruled in favor of permitting intervention, noting that the Barnes policy was in fact one of the Jackson reinsured policies and that the Barnes complaint "effectively alleges" that Jackson acted improperly. As to the argument that Security Life would provide "adequate" representation, the court noted that (1) Jackson and Security Life do not have identical interests, (2) different administrative practices may require different defenses, and (3) Security Life had admitted it refused to allow Jackson to intervene because "its own unique interests are at stake." (Note that there was a vigorous and lengthy dissent in which Circuit Judge Hartz suggested that the "motive for intervention is simply to enable the two insurers to tag team the plaintiffs.")

Reinsurers should consider intervention in cases where the outcome could be costly and damaging to their own interests, absent some agreement between the cedent and reinsurer eliminating that potential at the outset. Moreover, in situations where a reinsurer has discretionary administrative responsibilities and chooses not to intervene, will it later be estopped from bringing arbitration claims against the ceding company in the event of an

adverse court decision that has an impact on the costs or administration by the reinsurer?

Non-Party Trustees of Reinsurance Trusts: Fiduciary Duties?

A recent New York appellate decision addressing the duties of a non-party trustee of a reinsurance trust provides a window into exposures that seem potentially problematic in determining the boundaries for trust companies. *Bankers Conseco Life Insurance Co. v. Wilmington Trust NA*, 195 A.D. 3d 109 (1st Dep't 2021), involves an issuer of long-term care policies (Bankers Conseco) that entered into a reinsurance agreement with Beechwood Re Ltd. to be supported by four trusts. The trusts were to be invested and managed by B Asset Manager, an affiliate of Beechwood. The trust agreement contained specific criteria for the purchase of the assets for the trust.

> "Reinsurers should consider intervention in cases where the outcome could be costly and damaging to its own interests."

Under applicable New York insurance law provisions, the parties were required to retain an independent trustee to administer the trusts. Wilmington Trust, N.A., was retained. Wilmington's role was largely ministerial, involving accepting assets and maintaining appropriate records. The trust agreement specified that Wilmington would not be responsible for determining whether the assets purchased or placed into the trust would be "eligible" under the criteria. However, the trust agreement also contained a provision that no assets should be accepted into the trust that were not "negotiable," which was specified as being capable of immediate liquidation. The trust also specified that Wilmington would only be liable for its own negligence and "in no event responsible for incidental damages."

Bankers Conseco contributed more than $550 million in premiums to the trust. Beechwood turned out to be the alter ego of Platinum Partners LP, a hedge fund that apparently, as noted by the court, "concocted a scheme to defraud insurance companies." Beechwood made investments in affiliates and distressed properties. The trust suffered substantial losses in liquid assets, requiring Bankers Conseco to terminate the reinsurance agreement and recapture the business, resulting in a diminution in value of its reserves and assets due to the illiquidity of the trust's assets.

Bankers Conseco sued Wilmington for breach of contract and breach of fiduciary duty. Wilmington filed a motion to dismiss, which was granted on the basis that it was hired only to perform ministerial functions and that the alleged damages were "not direct, but rather consequential." The appellate court reversed, holding that maintaining value was an obligation "inherent in the services" that Wilmington agreed to provide and that the case should proceed in order to develop the evidence necessary to determine what constitutes "direct" rather than "consequential" in situations "when the gatekeeper is negligent."

Perhaps more important is the court's final ruling, which reversed the motion court's determination that Wilmington did not owe a "fiduciary" duty. The court stated that "this was a breach of a non-contractual duty relating to the trustee's independent duty to perform nondiscretionary ministerial duties with respect to the negotiation of assets." Moreover, the court added, "Even though the breach of contract and breach of fiduciary claims involved the same conduct, the fiduciary duty claim alleges a breach of a noncontractual duty relating to the trustee's independent duty to perform nondiscretionary ministerial duties." *Bankers Conseco* at 6. Accordingly, the court concluded further analysis and evidence would

be necessary to assess whether that duty, in these circumstances, would rise to the level of creating a fiduciary status for the trust company.

The court's analysis seems inconsistent with the general understanding that to establish a fiduciary relationship, the beneficiary must grant discretionary decision-making power to the alleged fiduciary (and presumably do so in a manner that enables the alleged fiduciary to understand it has that power). That grant of discretion did not appear to occur in this matter.

'Good Faith' Tort Claims: Insure Versus Reinsurer

The decision in *Special District Risk Management Authority v. Munich Reinsurance America, Inc.*, No. 20-cv-02404-TLN-CKD, 2021 WL 4443391 (E.D. Cal. Sep. 28, 2021), addressed whether a cedent may bring a claim for the tortious breach of the implied covenant of good faith against its reinsurer in California. The cedent, a joint power authority composed of more than 400 special districts, provided insurance coverage for the development of the Millennium Towers in San Francisco. After the Towers had sunk more than 16 inches, the cedent was sued and entered settlement negotiations.

The cedent sought a commitment in advance from its reinsurer to indemnify; the reinsurer demurred. After settlement was reached, the cedent sought reimbursement from the reinsurer under the terms of the reinsurance agreement. The reinsurer refused and litigation ensued, with the cedent seeking, inter alia, judgment on the tortious breach of the implied covenant of good faith (rather than, as the court noted, seeking judgment on punitive damages).

The issue before the court was whether a reinsurer may be sued for tort liability by its reinsured. The cedent claimed its role was more like that of an insured, but the court quickly dismissed that argument given that the cedent's relationship in the transaction was clearly "that of an insurer and the relationship more akin to one of reinsurance." Noting that California courts had yet to rule on the issue of whether a reinsurer may be sued for tort liability by its reinsured, the court noted that federal courts in similar cases had "uniformly held that such claims cannot proceed" and that "[s]pecifically those courts have uniformly found elements of adhesion and unequal bargaining power absent in reinsurance contracts because they are negotiated 'at arms-length.' *Stonewall Ins. Co. v. Argonaut*, 75 F. Supp. 2nd 893 (N.D. Ill. 1999).

In addition to dismissing its constructive fraud claim, the court went on to dismiss the cedent's claim for punitive damages and attorney fees, noting that "[p]arties to reinsurance contracts are not bound by fiduciary duties as a matter of law because the reinsurance contract is entered into at arms-length." Presumably, this overall analysis applies to virtually any form of tortious claim by an insurer with its reinsured to the extent it involves issues strictly of coverage. Would this "arms-length" analysis, which results from a recognition of the expected duties and powers of each of the parties, have altered the approach and conclusions in the *Bankers Conseco* decision noted above? Probably not, given the more specific articulation of responsibilities in the agreements between the parties.

James Jorden retired as Chairman of the Insurance Industry Group at Faegre Drinker in 2021 and now operates out of The Jorden Group. He has argued before the U.S. Supreme Court and eight of the federal circuits.

Reimbursing Defense Costs in Excess of a Policy Limit

Case: *Utica Mutual Ins. Co. v. Munich Reins. Amer. Inc. and Utica Mutual Ins. Co. v. Century Indem. Co.,* 2021 U.S. App. LEXIS 22476 (2d Cir. July 29, 2021)

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

Date decided: July 29, 2021

Issues decided: Whether facultative reinsurance contracts issued by the reinsurers of an umbrella insurance policy were obligated to cover defense expenses in addition to the limits of the umbrella policy

Submitted by: Charles E. Leasure, III

Munich Reinsurance Company of America and Century Indemnity Company reinsured Utica Mutual Insurance Company under two facultative reinsurance contracts purchased by Utica to reinsure an umbrella policy issued by Utica to Goulds Pumps, Inc. Utica's reinsured policy was an umbrella liability policy issued to Goulds in 1973 for $25 million. The facultative contracts issued by Munich Re and Century each contained a $5 million limit.

Utica defended and indemnified Goulds for several years against asbestos claims and litigation from various claimants alleging injury from asbestos. During the course of the asbestos litigation, coverage issues arose between Goulds and Utica, including whether certain primary policies issued by Goulds contained aggregate limits. Eventually, Goulds and Utica agreed to settle their coverage disputes relating to the asbestos claims. Important to this decision, Goulds and Utica entered into a settlement agreement that incorporated an aggregate limit of $300,000 in the primary policy issued in 1973 and stated that the 1973 umbrella policy provided coverage for defense expenses within limits.

Utica billed its reinsurers for a portion of the settlement it reached with Goulds, billing each reinsurer its limit of $5 million in indemnity and billing both reinsurers an additional $2.7 million each for defense costs that Utica paid and allocated to its 1973 umbrella policy under the settlement agreement. Utica contended that its billing was appropriate and that Munich Re and Century were obligated to "follow the settlements" and reimburse Utica under the facultative contracts for payments that Utica allocated to the umbrella policy, including the reimbursement of defense payments made in addition to the limits of the umbrella policy. The reinsurers disagreed, arguing that the facultative contracts did not require reimbursement of the defense costs allocated to the umbrella policy that were in excess of the umbrella policy limit.

Utica sued Munich Re and Century in separate actions in the U.S. District Court for the Northern District of New York seeking to recover the $5 million in indemnity and the $2.7 in defense expenses it billed to the reinsurers. The trials yielded different results: Utica won in a jury trial against Century and lost its case against Munich Re in a bench trial. Both cases were appealed to the Second Circuit, which decided the conflicting decisions in a single opinion.

Utica argued that the reinsurers were liable for the full amount billed, including defense expenses. Utica argued the following:
(1) the language in the umbrella policy that claims "not covered by" the primary policy triggered the umbrella policy's coverage of the

defense expenses because the primary policy was exhausted;
(2) reinsurers were obligated to "follow the fortunes/settlements" and therefore obligated to pay the defense expenses; and
(3) there was an independent obligation on the reinsurers to pay defense expenses as they were incurred under the facultative contract language.

The Second Circuit ruled in favor of the reinsurers on all three issues. First, the court rejected Utica's contention that an occurrence is "not covered" under the primary policy once that policy limit is exhausted. Second, the court held that the allocation of defense costs to the umbrella policy was outside the scope of the policy and contradicted Utica's own agreement with Goulds, and that "follow the settlements" cannot be invoked to make a reinsurer liable for payments outside the scope of the terms of the reinsurance contract. Finally, the court held that the reinsurers' obligations "follow the form" of the umbrella policy and that there is no independent obligation to pay expenses under the language of the reinsurance contracts.

Charles Leasure is a shareholder at Stevens & Lee, where his practice focuses on complex commercial insurance and reinsurance issues.

Newly Certified Arbitrators

Darwin K. Johnson is a claims professional with 40-plus years in dispute resolution, claims adjudication, asset recovery/claims subrogation, litigation management, fraud detection and prevention, mediations/arbitrations, insurance insolvencies/receiverships for insurance carriers, self-insureds, reinsurers, governmental entities, and state regulatory agencies.

Darwin founded his professional management consulting company, DKJ Group, Inc., a licensed third-party administrator, 32 years ago. His extensive insurance background and expertise includes evaluating, negotiating, and settling thousands of complex casualty claims loss matters, with settlements totaling in the millions of dollars.

Darwin's insurance experience includes appointments as court-appointed special deputy receiver, market conduct examiner, and financial/fraud examiner.

His professional insurance designations include ARIAS Certified Arbitrator, Alternative Dispute Resolution Graduate Certificate (SMU), Certified Insurance Receiver (CIR), Certified Fraud Examiner (CFE), and Licensed Adjuster All-Lines.

Jeffrey Rubin is senior vice president and senior counsel of Odyssey Reinsurance, where he previously served as director of global claims, with ultimate responsibility for claims within the group and assumed and ceded reinsurance claims-related arbitrations and litigation.

Before joining Odyssey, Jeff served as general counsel, director of litigation, and reinsurance work-out specialist for RiverStone Resources, providing counsel to insurance companies including North River, United States Fire, International, and Sphere Drake. Previously, he was a partner in a Chicago litigation firm, where he handled reinsurance treaty litigation regarding directors and officers insurance policies issued to failed savings and loan institutions and insurance coverage actions involving toxic torts and environmental pollution.

Jeff is a member of the ARIAS Strategic Planning Committee and Finance Committee and previously served as president, vice president, and chairman of the ARIAS Board of Directors. He has been co-chair of the Arbitration Task Force and co-authored the ARIAS Neutral Panel Rules.

Newly Certified Mediator

Sylvia Kaminsky has been in the insurance/reinsurance industry for more than 40 years, the first 15 in private legal practice focusing on coverage, defense, insurance and reinsurance arbitration/mediation, and litigation matters. She then joined Constitution Reinsurance as senior vice president, general counsel, and corporate secretary and served on the board of directors. She also served in the same capacity for Sirius Reinsurance Corporation, which later became Sirius America Insurance Company.

When Constitution Reinsurance was acquired by the Gerling Group, she was deputy general counsel and senior vice president of claims for U.S. branch operations. Since 2002, she has served as a consultant and arbitrator/meditator to the industry, having participated in well over 200 arbitrations and many mediations involving insurance and reinsurance disputes.

Sylvia has served as an umpire and as a party-appointed arbitrator on behalf of insureds and insurers in policyholder disputes and for both cedents and reinsurers. She is a certified umpire/arbitrator of ARIAS and is on the ARIAS Board of Directors. She was the first co-chair of the ARIAS Arbitrators Committee when it was formed and is co-chair of the ARIAS Law Committee.

In Memoriam

William D. "Bill" Hager, age 74, died on October 13 in Fargo, North Dakota.

Bill earned a bachelor's degree in math from the University of Northern Iowa, a master's in educational psychology from the University of Hawaii, and a law degree from the University of Illinois. He was president of Insurance Metrics Corporation, providing expert insurance witness and reinsurance arbitration services and practicing law. During his career, he worked as Iowa assistant attorney general, first deputy commissioner for the Iowa Insurance Department, and Iowa insurance commissioner and was a member of the National Association of Insurance Commissioners.

Bill was elected to the Florida House of Representatives in 2010 and served eight years. In the 1990s, he was appointed president and chief executive officer of the National Council on Compensation Insurance.

Earl John "Buz" Imhoff died on February 1 of natural causes at his home in Cincinnati at the age of 71.

Buz graduated from the University of Notre Dame in 1972, then served five years in the U.S. Navy as a surface warfare officer on the carrier USS Ranger and later as a lieutenant in intelligence in London, England. He earned a master's degree in international relations from the University of Southern California in 1977 and then a law degree from the University of Wisconsin in 1979.

After law school, Earl struck out for California with the goal of becoming a maritime lawyer in San Francisco. He developed a wide-ranging law practice in San Francisco and Los Angeles, with emphasis on maritime law, international law, and civil and insurance litigation that took him all over the world. After 25 years of law practice, Earl accepted a position as senior vice president at American Financial Group, Great American Insurance, in Cincinnati. After retiring, he served as a magistrate, expert witness, and trial consultant to a variety of law firms and corporations.

BOARD OF DIRECTORS

ARIAS•U.S.
7918 Jones Branch Drive, Suite 300
McLean, VA 22102
Phone: 703-574-4087
Fax: 703-506-3266
info@arias-us.org
www.arias-us.org

The ARIAS•U.S. Quarterly (ISSN 7132-698X) is published 4 times a year by ARIAS•U.S.

7918 Jones Branch Drive,
Suite 300, McLean, VA 22102.

AIDA Reinsurance & Insurance Arbitration Society
7918 Jones Branch Dr.
Suite 300 • McLean, VA 22102
Phone: 703-506-3260 • Fax: 703-506-3266
Email: info@arias-us.org