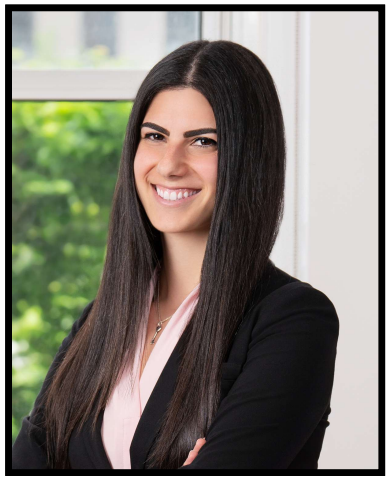
ARIAS Legal Update 2024

A Discussion of Significant Insurance and Reinsurance Cases from 2022 and 2023

Presenters



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Topics We Will Cover Today

- Legacy Claims
- Personal Jurisdiction for Reinsurance Declaratory Judgment Action
- Follow the Fortunes
- Insurer's Liability to Premium Finance Lenders
- Reinsurer's Liability to Insured
- Collateral Estoppel
- Confidentiality of Arbitration Materials
- Arbitrability
- Vacating an Arbitration Award
- Ability to Compel Arbitration
- Waiver of the Right to Arbitrate

Legacy Claims

Sparta Insurance Co. v. Pennsylvania General Insurance Co., No. 21-11205-FDS (D. Mass. Aug. 9, 2022)

- Holding: Denied defendant-reinsurer's motion to dismiss plaintiff's claims seeking declaratory judgment that defendant-reinsurer must pay all legacy claims pursuant to stock-purchase agreement and reinsurance agreement.
- Defendant-reinsurer had agreed to reinsure 100% of the insurance policies and to indemnify plaintiff as it relates to those policies.
- According to the complaint, plaintiff learned that claims made pursuant to the policies were no longer being administered or paid. When contacted, defendant did not agree to indemnify plaintiff or to continue paying claims.

Personal Jurisdiction For Reinsurance Declaratory Judgment Action

TIG Insurance Co. v. National Indemnity Co., No. 22-CV-165-SE, 2023 WL 2647023 (D.N.H. Mar. 27, 2023)

- NICO argued that the court lacked personal jurisdiction over it because it had insufficient "contacts with New Hampshire to support general personal jurisdiction and its contacts with TIG in New Hampshire related to this case do not support specific personal jurisdiction."
- TIG argued "that specific personal jurisdiction exists based on the parties' communications and NICO's other contacts with New Hampshire."
- Holding: The court did not have jurisdiction.

Personal Jurisdiction For Reinsurance Declaratory Judgment Action

- In a breach of contract action, the court will examine the defendant's contacts with the forum “during prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing.”
  - In this case, “TIG's predecessor, a Sweden-based company with a New York branch, issued the reinsurance contract through a Chicago broker to NICO, a Nebraska company,” “neither TIG nor NICO had breached the reinsurance contract at the time TIG initiated this action,” and NICO had not yet billed TIG for coverage.
  - TIG did not seek a declaration as to the meaning or legal effect of any document sent to New Hampshire; rather, it sought a declaration of its rights and obligations under two agreements that were negotiated and formed outside of New Hampshire.

Follow the Fortunes

Utica Mutual Insurance Co. v. Abeille General Insurance Co., 206 A.D.3d 1666 (N.Y. App. Div. 4th Dep't 2022)

- Holding: The unambiguous terms of the umbrella policies establish that the reinsured was not entitled to recover the disputed defense costs from the reinsurer.
- The umbrella policies provide that: "With respect to *any occurrence not covered by* the policies listed in the schedule of underlying insurance…"
  - The primary policies covered the defense costs.
  - The policies do not "suggest that an occurrence is no longer a covered risk after exhaustion."
- "[T]he follow-the-settlements doctrine does not alter the analysis" because the reimbursement sought was beyond the scope of coverage.

Insurer's Liability to Premium Finance Lenders

CEBV, LLC (as assignee of Ameris Bank) v. ABC HoldCo, Inc., Docket No. GLO-L-000856-22 (N.J. Super. 2023)

- Holding: Granted the insurers' motions to dismiss the breach-of-contract claim. The insurers were not parties to – and therefore did not breach - premium finance loan contracts entered into by the insurers' agents and the insurers' policyholders.
- According to the plaintiff, the agents submitted fake insurance policies to obtain $21 million in premium finance loans to spend on their lavish lifestyles.
- The agents' alleged "apparent and implied authority to write policies of insurance for the insurers" did not extend to executing premium finance contracts for the insurers.

Reinsurer's Liability to Insured

Vantage Commodities Financial Services I, LLC v. Assured Risk Transfer PCC LLC, 31 F.4th 800 (D.C. Cir. 2022)

- Holding: Insured failed to show a contractual relationship directly with the reinsurers.
  - Insurer (ART) and insurer's managing entity (Willis Vermont) had provided credit insurance binders to the insured (Vantage) containing disclosures of a reinsurance policy and description of that policy. The court found that these disclosures did not create a direct contractual relationship between Vantage and the Reinsurers.
  - Court also found that the reinsurance agreements created no contractual relationship with the insured where the agreements explicitly stated they were solely between the insurer and reinsurer.
- Court also distinguished circumstances where a reinsurer can become directly liable to the insured. The court found there were no allegations that the reinsurers dealt directly with Vantage or otherwise treated Vantage as if it were directly insured by them.

Collateral Estoppel

- A valid and final judgment binds the parties and their privies in a subsequent action between them (or their privies) as to any identical issues actually "raised, necessarily decided and material in the first action, and the [party] had a full and fair opportunity to litigate the issue in the earlier action."
- Collateral estoppel does not apply "where the prior determination was based upon different facts."
- A decision concerning an insurer's policies that were issued to a different insured does not have preclusive effect.
  - Utica Mutual Insurance Co. v. American Re-Insurance Co., 218 A.D.3d 1283 (N.Y. App. Div. 4th Dep't 2023)

Confidentiality of Arbitration Materials

Washington Schools Risk Management Pool v. American Re-Insurance Co., No. C21-0874-LK, 2022 WL 1171385 (W.D. Wash. Apr. 20, 2022)

- Holding: Sealing was warranted.
- The court noted that the ARIAS-US Form Confidentiality Agreement and Protective Order, which would apply in the subject arbitration proceedings, requires "the parties to seal and/or redact any court filings that disclose arbitration information."
- "If the Court denies Sompo's Motion at this juncture, Sompo (who presumably will no longer be a party to this action) will be required to return to this Court at a later date to move to seal the Arbitration Information."

Arbitrability

American Graphics Institute v. Noble Desktop NYC, No. 22-cv-11404-ADB, 2023 WL 4826936 (D. Mass. Jul. 27, 2023)

- Holding: Parties must arbitrate the issue of arbitrability.
- In this case, the arbitration provision of the contract at issue provided for binding arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association.
  - Rule 7(a) of the AAA's Commercial Arbitration Rules states that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or the arbitrability of any claim . . ."
- The Court found that the incorporation of AAA Commercial Arbitration Rules is "clear and unmistakable evidence of intent to delegate arbitrability."

Arbitrability

Alliance Health & Life Insurance Co. v. American National Insurance Co., No. 21-2995, 2022 WL 2903440 (6th Cir. Jul. 22, 2022)

- Emphasized that substantive questions, such as whether parties are bound by an arbitration clause or whether an arbitration clause covers a dispute, are for a judge to decide. Procedural questions of arbitrability, however, are for an arbitrator to decide.
- The only question considered by the court was whether it should apply the contractual time limit at issue. Specifically, whether a dispute that arose under a contract, after the time period applicable to its arbitration provision, was required to be arbitrated or could proceed in federal court.
- The Sixth Circuit deemed this to be a question of procedural arbitrability and for an arbitrator to decide.

Arbitrability

Darag Deutschland AG v. Logo, LLC, No. 654800/2021 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 3, 2022)

- Holding: Denied Logo's stay petition and ordered arbitration to proceed, despite petitioner's assertion of ineffective service.
- Respondent attempted service by registered mail on petitioner's lawyer, who had relocated. Respondent also attempted personal service on Petitioner, which was located outside the country.
- The court cited prior precedent to emphasize that New York courts "encourage and favor" arbitration.
- The court also quoted the arbitration agreement, providing that any dispute "shall be submitted to three arbitrators."

Vacating An Arbitration Award

Grounds to Vacate – 9 U.S.C. §10

- The award was procured by corruption, fraud, or undue means;
- There was evident partiality or corruption in the arbitrator(s);
- The arbitrators were guilty of misconduct in refusing to postpone the hearing or hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Vacating An Arbitration Award: Evident Partiality

Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama, 78 F.4th 1252 (11th Cir. 2023)

- The Eleventh Circuit determined whether a party could "obtain a vacatur of the award because the arbitrators failed to disclose their involvement in unrelated arbitrations."
- Holding: Affirmed the denial of vacatur because Grupo Unidos "presented nothing that comes near the high threshold required for vacatur."
  - To vacate entire arbitral awards "simply because the arbitrators worked with each other and with related parties elsewhere, Grupo Unidos finds itself on much shakier footing. To rule for Grupo Unidos, we would need to hold, in essence, that mere indications of professional familiarity are reasonably indicative of possible bias."
- The Eleventh Circuit acknowledged that "arbitrators should err on the side of greater, not lesser, disclosure."

Vacating An Arbitration Award: Evident Partiality

- The Eleventh Circuit's holding on each potential conflict:
  - "the act of an appointment of one arbitrator by another in a separate case standing alone [is not] enough evidence to justify vacatur."
  - "the relationship between co-arbitrators is fundamentally different than the relationship between two counsel representing co-defendants."
  - "standing alone, the fact that an arbitrator ... had previous contacts with counsel for one of the parties does not suggest evident partiality"
  - "Repeated appearances establish only familiarity, and familiarity does not indicate bias."

Vacating An Arbitration Award: Arbitrators Exceeded Their Powers

RSM Production Corp. v. Gaz du Cameroun, S.A., No. 4:22-CV-03611, 2023 WL 7305061 (S.D. Tx. Nov. 6, 2023)

- This case concerned plaintiff's request to vacate the modification of an arbitration award issued in its favor.
- Holding: The Tribunal exceeded its authority in issuing the addendum award because the modifications were beyond clerical or computational errors.
- "a careful review of RSM's claims and the Tribunal's Partial Final Award reveals that the Tribunal has committed a textbook case of reversing course on a substantive legal issue it previously decided. The Tribunal explicitly determined that RSM should prevail as to the second and third components of the full $10,578,123.20 sum, and then un-did that determination under the guise of a computational error."

Ability to Compel Arbitration: Third-Party Beneficiary Doctrine

Insurers v. General Electric International, Inc., No. 1:21-cv-04751, 2023 U.S. Dist. LEXIS 68521 (N.D. Ga. Mar. 17, 2023)

- Plaintiffs were insurers, reinsurers, and retrocessionaires seeking reimbursement for losses caused by a power plant's equipment malfunctioning. Defendants were General Electric companies who serviced and provided supplies to the insured power plant.
- Holding: The services contract conferred a benefit on plaintiffs' insured, and therefore enforcement of the arbitration agreement under a third-party beneficiary doctrine was warranted, even though there was no contract between the parties.
- The court also held that the Insurance Entities were estopped from denying enforcement of the arbitration provision in that contract because they benefited from the warranty in the same contract.

Ability to Compel Arbitration: Direct Benefits Estoppel

Travelers Indemnity Co. v. Alto Independent School District, No. 3:21-CV-00909(SALM) (D. Conn. Jul. 28, 2022)

- School districts brought claims against insurer and reinsurer for violations of the Texas Insurance Code, fraud, and related torts.
- Holding: Non-signatory school districts cannot be compelled to arbitrate under the theory of direct benefits estoppel.
- "[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, direct-benefits estoppel is not implicated *even if the claim refers to or relates to the contract or would not have arisen 'but for' the contract's existence*." (emphasis added).

Waiver of the Right to Arbitrate

- In 2022, the Supreme Court resolved a circuit split concerning the test to be applied in determining whether a party waives its right to arbitrate.
- Waiver "is the intentional relinquishment or abandonment of a known right."
- "To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right" and not on the effect on the opposing party.

Morgan v. Sundance, Inc., 142 S.Ct. 1708 (2022)

Waiver of the Right to Arbitrate

- Before Morgan, the following circuits required a showing of prejudice to find waiver:
  - First Circuit
  - Second Circuit
  - Third Circuit
  - Fourth Circuit
  - Fifth Circuit
  - Sixth Circuit
  - Eighth Circuit
  - Ninth Circuit
  - Eleventh Circuit

Waiver of the Right to Arbitrate

- In the Second Circuit, the waiver analysis considers (1) the time elapsed between the start of the lawsuit and the motion to compel arbitration; and (2) the amount of litigation that occurred before the motion.
- Since Morgan, New York District Courts continue to find against waiver.

Waiver of the Right to Arbitrate

- The Third Circuit has also applied Morgan which effectively abrogated the Hoxworth factors.

White v. Samsung Electronics America, Inc., 61 F.4th 334 (3d Cir. 2023)

Waiver of the Right to Arbitrate

- In the Ninth Circuit, "the party asserting waiver must demonstrate: (1) knowledge of an existing right to compel arbitration and (2) intentional acts inconsistent with that existing right."
- Inconsistent acts exist when the movant "(1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court."

Armstrong v. Michael Stores, Inc., 59 F.4th 1011 (9th Cir. 2023)

Waiver of the Right to Arbitrate

- In the Eleventh Circuit, the key factor "is whether a party has substantially invoked the litigation machinery prior to demanding arbitration."
- Courts focus on "fair notice to the opposing party and the [d]istrict [c]ourt of a party's arbitration rights and its intent to exercise them."

Warrington v. Rocky Patel Premium Cigars, Inc., No. 22-12575, 2023 WL 1818920 (11th Cir. Feb. 8, 2023)

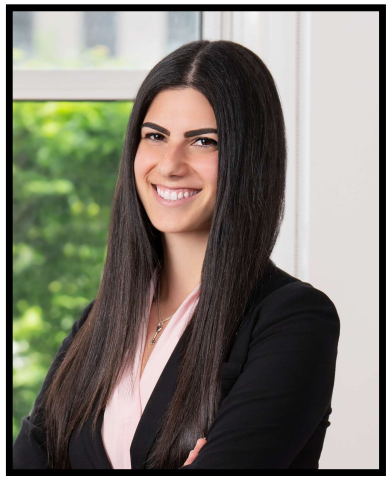
Waiver of the Right to Arbitrate

- State Courts may still require a showing of prejudice to find waiver.
- The Northern District of Illinois has noted that "fourteen Texas appellate courts have discussed Morgan's applicability in state-court cases" and all "have continued to apply a prejudice standard despite Morgan or have declined to address the issue."

Swanson v. Southwest Airlines Co., No. 21-CV-05595, 2023 WL 5509357 (N.D. Ill. Aug. 26, 2023)


Q&A

For more information, please contact:



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