ARIAS U.S.

QUARTERLY

Is the Use of Artificial Intelligence in Arbitration Inevitable?

ALSO IN THIS ISSUE

What ADR Professionals Should Know About the Regulation of AI in Insurance Underwriting

English Law Update on Arbitrator Impartiality and the Duty of Disclosure

Public Nuisance: Will It Sink Insurers or Is There a Life Raft?

Judicial Appointment of Umpires for Arbitrations

Third Party Litigation Funding

CASE SUMMARIES

FUTURE LEADERS

RECENTLY CERTIFIED

Q2 • 2025

TABLE OF CONTENTS

FEATURES

4 **Is the Use of Artificial Intelligence in Arbitration Inevitable?**
By John R. Cashin

10 **What ADR Professionals Should Know About the Regulation of AI in Insurance Underwriting**
By Margarita Echevarria

15 **English Law Update on Arbitrator Impartiality and the Duty of Disclosure**
By Jonathan Sacher and Caroline Cwiertnia

18 **Public Nuisance: Will It Sink Insurers or Is There a Life Raft?**
By Adam Fleischer

24 **Judicial Appointment of Umpires for Arbitrations**
By Robert M. Hall

28 **Third Party Litigation Funding**
By Frank DeMento and Howard Freeman

ALSO IN THIS ISSUE

3 EDITOR'S LETTER

36 CASE SUMMARIES

37 FUTURE LEADERS

38 RECENTLY CERTIFIED

BACK COVER
BOARD OF DIRECTORS

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.

This issue of the Quarterly arrives as the 2025 Spring Conference is about to start at The Biltmore -Miami-Coral Gables, Florida. More than 205 registrants will enjoy a dynamic program organized by co-chairs, Jeanne Kohler (Carlton Fields), Erika Lopes-McLeman (Dentons), Seema Misra (Arch), and Stacey Schwartz (Swiss Re). Special thanks to those who offered panel suggestions and agreed to speak. If you are presenting at the Spring Conference, turn your presentation into an article for a future Quarterly.

This issue of the Quarterly features articles on a number of timely and important topics.

It starts with a look at AI, which is a big deal today, even in the world of insurance and reinsurance disputes. Following up from a presentation made at the Fall Conference, Certified Arbitrator John Cashin, from The Law Office of John R. Cashin, discusses AI in the context of arbitration in this Quarterly's feature article: "Is the Use of Artificial Intelligence in Arbitration Inevitable?" John is a member of the new ARIAS AI Task Force and this subject is not going away.

In fact, following John's article is an article from Certified Arbitrator Margarita Echevarria of M. ECHEVARRIA, ADR LLC, titled "What ADR Professionals Should Know About the Regulation of AI in Insurance Underwriting." In this article, we learn about the burgeoning focus on regulating AI in the insurance context and what arbitrators need to know about this as disputes arise.

Next, in another article taken from a conference presentation, Adam Fleischer of BatesCarey LLP, discusses

the impact of public nuisance lawsuits on the insurance industry. His article, "Public Nuisance: Will It Sink Insurers or Is There a Life Raft?," provides critical analysis of these very complex and costly cases, which ultimately reach the reinsurance market.

ARIAS·U.S., as you know, has many non-US members and our presentations often address caselaw outside the US. In "English Law Update on Arbitrator Impartiality and the Duty of Disclosure," Jonathan Sacher and Caroline Cwiertnia of BCLP London discuss recent English cases on the important subjects of arbitrator impartiality and the duty to disclose. This update is critical to our members who sit on UK panels.

Our Editorial Committee member Robert Hall of Hall Arbitrations gives us yet another article, this time on cases where judges appoint the middle seat. In "Judicial Appointment of Umpires for Arbitrations," Bob takes us through the trials and tribulations of court appointed umpires. Having had this fun experience myself in a Florida reinsurance arbitration some years ago, I can tell you that you really want to agree to the umpire yourselves.

Litigation funding has been around for some time now, but how is it affecting insurance and reinsurance claims? Well, TransRe's Frank DeMento and Editorial Committee member Howard Freeman, give us excellent information about litigation funding in an article titled: "Third Party Litigation Funding."

Finally, we have a new ARIAS Law Committee report, a new Certified Arbitrator to congratulate, and an update from the new Future Leaders Committee after a highly successful kickoff reception in New York in March. As the update says, if you are a newer or younger industry member and are interested in getting involved in ARIAS, participating in the Future Leaders Committee is a great way to achieve your goal.

We hope you enjoy this issue of the Quarterly. We continue to need your contributions to future issues. The deadlines and requirements are on the ARIAS website under Publications. We welcome ARIAS committee reports, letters to the editor, original articles and repurposed articles from ARIAS CLE programs. If you are on a panel at the Spring Conference or have made a proposal for the Spring Conference that was not accepted, please turn your presentation or proposal into an article. Leverage your thought leadership and publish an article in the Quarterly. Your thought leadership should be recognized.

Larry P. Schiffer
Editor

Is the Use of Artificial Intelligence in Arbitration Inevitable?

If so, is the ARIAS Community Prepared for it?

By John R. Cashin, Law Office of John R. Cashin

The use of Artificial Intelligence ("AI") in arbitration is rapidly emerging as an essential component of modern dispute resolution, reflecting a significant shift in legal practices and processes. Given its capacity to streamline workflows and analyze vast amounts of data, the adoption of AI in arbitration is not only advantageous but also increasingly viewed as inevitable by legal professionals worldwide.[1]

In the early 2000s, the advent of digital technologies began to reshape the legal landscape. The proliferation of electronic communication, data storage, and management systems can significantly impact arbitration proceedings, leading to a more streamlined approach to case management and evidence handling.[2] These developments set the stage for the introduction of AI technologies that could further enhance the efficiency and efficacy of arbitration. Tools such as Technology Assisted Review (TAR) emerged, facilitating the analysis of large volumes of documentation in eDiscovery, thus making the review process less labor-intensive and more reliable[3].

The historical context also reveals a notable shift in the perception of AI within the legal field. Initially met with skepticism regarding its capability to replicate human judgment, the legal community has gradually recognized the potential of AI to perform various

tasks traditionally carried out by legal professionals. Recent discussions highlight the ability of AI to complement, rather than replace, human arbitrators, particularly in roles that require extensive data analysis and pattern recognition or timeline development.[4,5] This transition reflects a broader trend in the legal sector towards embracing technology as a means to enhance decision-making processes while ensuring the integrity of arbitration proceedings[6]. Most recently, Case Western Reserve University School of Law became the first in the nation to require all first-year law students to earn a certification in legal artificial intelligence (AI). "Launching in February of this year, the "Introduction to AI and the Law" program—developed in partnership with Wickard.ai—will immerse students in the fundamentals of AI and its impact on the legal world."[7]

> "AI's potential to provide real-time insights and predictive analytics can significantly improve the arbitration process by facilitating informed decision-making and enhancing the overall user experience."

As AI technologies have advanced, their applications in arbitration have expanded beyond documentation review and data analysis. AI's potential to provide real-time insights and predictive analytics can significantly improve the arbitration process by facilitating informed decision-making and enhancing the overall user experience. The 2020s have witnessed a surge in AI-driven platforms specifically designed for the legal profession, including automated systems for legal research, document drafting and analysis, which further underscores the inevitability of AI's role in arbitration.[8]

As AI technology continues to advance, its potential applications within arbitration are likely to expand even further. The scalability of AI tools means they can adapt to a growing number of cases and increasingly complex legal questions, making them invaluable assets in the evolving landscape of dispute resolution.[9] Firms that adopt AI solutions now may gain a competitive advantage in the future arbitration market.[10]

Challenges and Concerns

The integration of AI into arbitration presents numerous challenges and concerns that must be addressed to ensure its effective and ethical application. These challenges span technical, ethical, and legal dimensions, each raising critical questions about the reliability and fairness of AI-driven processes.

The Black Box Problem

One of the primary concerns surrounding AI in arbitration relates to ethical implications, particularly regarding bias and decision-making transparency. AI systems often operate as "black boxes," meaning their decision-making processes are not readily understandable, which can lead to a lack of accountability.[11] This lack of transparency raises significant ethical questions, such as whether it is appropriate for algorithms to make decisions without human oversight. The potential for AI to perpetuate historical biases—stemming from the data used to train these systems—poses a risk of unfair outcomes, especially in disputes involving diverse individuals. Establishing robust ethical guidelines for the development and use of AI in arbitration is crucial to mitigate these risks.[12]

Privacy and Confidentiality

The use of AI tools in arbitration also raises concerns about privacy and confidentiality. Guidelines emphasize the importance of exercising caution when

submitting privileged or confidential information to third-party AI tools because mishandling this data could lead to significant breaches of trust and confidentiality. A recent rule from a judge on the U.S. Court of International Trade mandates that attorneys certify that their use of generative AI does not disclose confidential information, highlighting the necessity of stringent data protection protocols in the context of AI use in legal settings.[13]

AI Hallucination

Retrieval Augmented Generation ("RAG") is a technique for enhancing the accuracy and reliability of generative AI models with information fetched from specific and relevant data sources. RAG is seen and promoted as the solution for reducing hallucinations in the context of legal research. Relying on RAG, leading legal research services including Lexis-AI and Case-Text have released AI-powered legal research products that they claim avoid hallucinations and guarantee hallucination-free legal citations.

Lexis+AI, for example, is built on the content curated by LexisNexis experts and its outputs have linked legal citations to the sources used. This means attorneys can verify and validate the research output it provides. Offerings from CaseText, Harvey.AI, and Practical Law perform in a similar fashion. While citation references are available from these legally-focused AI offerings, attorneys must verify the accuracy of all submissions to a court or arbitration panel. A recent study by Stanford University cautions that AI providers continue to "hallucinate."[14] Given the risk of hallucinations, lawyers will find themselves having to verify every proposition and citation provided by these tools, undercutting the stated efficiency gains that legal AI tools are supposed to provide.

Resistance to Change

Additionally, there exists a significant resistance to adopting AI technologies within the traditional arbitration community. Many practitioners are accustomed to conventional dispute resolution methods and may be hesitant to embrace AI tools due to upfront implementation costs and concerns about undermining essential legal principles such as due process and impartiality.[15] Overcoming this skepticism is crucial for the successful integration of AI into arbitration, as the potential benefits of improved efficiency and reduced costs must be weighed against the risks of compromising ethical standards.

Case Studies

AI-Enabled Legal Data Integration (LDI)

One significant case study highlighting the effectiveness of AI in legal contexts is the implementation of an AI-enabled Legal Data Integration ("LDI") system at a regional cloud arbitration court. This system was evaluated against traditional manual LDI methods, revealing that while the AI approach had higher error rates due to limited semantic understanding, it excelled in accuracy and time efficiency. The integration involved two teams: a Manual LDI team composed of legal and administrative experts, and an AI team tasked with training the model and processing outputs. The results indicated that the AI-enabled LDI achieved favorable outcomes in terms of both accuracy and labor costs, despite the challenges of error resolution.[16]

Enhancement of Case Management

AI technologies are also enhancing traditional Case Management Systems ("CMS"), which are essential tools for legal professionals. These systems leverage AI for document classification and analysis, allowing lawyers to automatically identify key information from case-related documents, thereby streamlining workflows and reducing the potential for errors.[17] Furthermore, predictive analytics powered by AI can analyze historical case data to forecast outcomes, equipping legal practitioners with valuable insights for case preparation and strategy development.[18]

AI in Predictive Analysis and Evidence Generation

In addition to LDI and CMS enhancements, AI's role in predictive analysis signifies a pivotal shift in arbitration practices. For instance, AI tools can analyze previous case outcomes to anticipate the results of current cases, which can guide legal strategies effectively. A significant application of AI in arbitration involves predictive analytics, which leverages historical data and legal precedents to forecast case outcomes. This capability can assist in arbitrator selection by analyzing how potential nominees might rule based on their past decisions. As such, AI tools are becoming instrumental in evaluating the likely success of claims and defenses in arbitration. This predictive capability not only increases efficiency but also adds a layer of strategic insight to arbitration proceedings.

This predictive capability extends to generating evidence, as some AI systems are being developed to create legal arguments based on large datasets, which might include simulating potential judicial decisions.[19] These advance-

ments raise questions regarding the acceptance of AI-generated evidence within traditional arbitration frameworks.

Regulatory Considerations

Despite the promising applications of AI in arbitration, its integration poses complex legal and regulatory challenges. The current legal infrastructure is primarily designed for human arbitrators, creating hurdles in the recognition of AI-generated evidence and decision-making processes. The absence of well-defined legal standards for AI in arbitration necessitates careful consideration to ensure that the integrity and efficacy of the arbitration process are maintained.[20] As legal professionals navigate these complexities, ongoing discussions about AI's implications for arbitration will likely shape future practices.

Future of AI in Arbitration

The integration of artificial intelligence (AI) in international arbitration is becoming increasingly prominent, heralding a transformative shift in the legal landscape. As AI technology evolves, its role in arbitration is expected to expand significantly, suggesting that its use is not only beneficial but also inevitable.

"As AI technology evolves, its role in arbitration is expected to expand significantly, suggesting that its use is not only beneficial but also inevitable."

AI is currently utilized in various facets of arbitration, particularly in managing large volumes of documents and streamlining the preparation of case materials. The rise of generative AI ("GenAI") and large language models ("LLMs") has opened new avenues for enhancing efficiency within the arbitration process. According to the 2023 Wolters Kluwer Future Ready Lawyer Survey, approximately 73% of legal professionals anticipate incorporating GenAI into their legal practices by 2024, indicating a robust trend toward AI integration across legal services.[21]

Opportunities and Risks of AI in Arbitration

While the advantages of AI in arbitration are manifold, the potential risks cannot be overlooked. AI systems, when functioning properly, can enhance accuracy and reduce the time required for document review and evidence analysis. However, the risks associated with AI, including algorithmic bias and inaccuracies in data processing, highlight the need for careful implementation and oversight. The reliance on AI for critical decisions in arbitration raises ethical concerns, particularly as improperly functioning AI could lead to unjust outcomes. Furthermore, the use of AI tools for selecting arbitrators demands a thorough review process to prevent bias and ensure fairness in the selection.

The landscape of international arbitration is likely to evolve further as advancements in AI continue to accelerate. As AI becomes more sophisticated, the possibility of AI-driven arbitration systems may become a reality, although challenges such as procedural complexities and the risk of disputes surrounding AI-decided awards remain.[22] As AI tools develop, their integration into arbitration practices will likely become more routine, potentially leading to a future where AI plays a crucial role in adjudicating disputes.

Ethical Frameworks and Guidelines

The integration of AI into arbitration proceedings necessitates a robust ethical framework to ensure the preservation of due process, justice, and impartiality. As AI tools become more prevalent, various guidelines have emerged to navigate the ethical implications of their use. Notably, the Silicon Valley Arbitration and Mediation Center ("SVAMC") has introduced draft guidelines for the use of AI in arbitration, which aim to establish a comprehensive ethical landscape for practitioners in this evolving field.[23]

> "The rapid advancement of AI technology poses significant ethical challenges that must be addressed proactively."

SVAMC Guidelines for Participants
The SVAMC Guidelines categorize ethical principles into three distinct areas: guidelines for all participants, guidelines for parties and their representatives, and guidelines for arbitrators. Guideline 1 emphasizes the importance of understanding how AI tools function, including their data training, potential biases, and the propensity to generate fabricated information or "hallucinate" outputs.[24] This understanding is critical for participants to make informed decisions regarding the application of AI in their cases.

SVAMC Guidelines for Parties and their Representatives
For parties and their representatives, Guideline 4 outlines the ethical obligations that parallel those found in established codes of conduct, such as the ABA Model Rules of Professional Conduct. It stresses the duty of competence and diligence, reminding participants that their responsibilities are not diminished by the involvement of AI technologies. Moreover, the Guidelines propose a model clause to incorporate these ethical principles into procedural orders or arbitration agreements, provided all parties and the tribunal consent.

Regulatory Compliance
The ethical discourse surrounding AI in arbitration is also informed by broader regulatory efforts. The European Commission has taken steps toward establishing a comprehensive legal framework for AI, reflecting a commitment to human rights, non-discrimination, and transparency. The EU Ethics Guidelines for Trustworthy AI further stipulate that AI systems must be explainable to stakeholders, reinforcing the principle of accountability in AI-assisted decision-making.[25]

> "The use of AI in the arbitration process is indeed inevitable."

The rapid advancement of AI technology poses significant ethical challenges that must be addressed proactively. The application of AI in arbitration raises concerns over potential asymmetries in disclosure requirements, particularly in international contexts where varying legal obligations may apply. Thus, it is essential to foster collaboration across jurisdictions to refine and adapt ethical guidelines in light of these challenges. The SVAMC Guidelines serve as a preliminary framework, but ongoing dialogue and adjustment will be necessary to keep pace with technological evolution and its implications for ethical practice in arbitration.

Conclusion
The use of AI in the arbitration process is indeed inevitable. The ARIAS Community must both recognize and address this coming transformation by developing guidelines, ethical frameworks and training for the arbitrator community. A working group or taskforce should immediately be formed to address this reality.

John Cashin had a 45-year career in the global insurance industry with twenty years as a reinsurance broker. He served as Deputy Superintendent of Insurance for the New York State Department of Financial Services and in private practice at the Stroock Firm. At the Zurich Group in Switzerland, he served as General Counsel - Reinsurance, and General Counsel - General Insurance. He has been a member of ARIAS for over 25 years and served on numerous arbitration panels as arbitrator, umpire and expert witness.

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What ADR Professionals Should Know About the Regulation of AI in Insurance Underwriting[1]

By Margarita Echevarria

As artificial intelligence (AI) continues to draw our attention, imagination and concern, this article focuses on the laws and regulations that have been adopted to begin to regulate the use of this technology in the insurance industry.[2] These initiatives identify the current concerns of regulators about AI and insurance. This article offers ADR practitioners a framework for understanding some of the is- sues likely to arise in insurance disputes when the use of AI is a material element.

The View from the Top

The impact that AI can have on insurance has been broadly considered by both national and international supervisors in the financial services industry.1 Given the global importance of the sector and the quickly evolving use of AI within it, regulators are naturally interested in its impact on solvency risks, insurance products, data security, and consumers. In the US, despite the existence of federal oversight of insurance through the Federal Insurance Office,[3] the insurance industry is directly regulated at the state level. Accordingly, the National Association of Insurance Commissioners (the "NAIC"), established in 1871, is the body created by state regulators to set standards and

regulatory best practices for the industry. Following its publication of AI Principles in 2020,[4] the NAIC finalized its guidance with "The Use of AI Systems by Insurers" in 2023 and soon thereafter 19 states adopted state bulletins or specific guidance like New York.[5]

The model adopted by the states generally applies to *all* insurers – from title insurers to health insurers and across all stages of the insurance lifecycle from product development to claims management.[6] Executing its role to serve the public interest, the NAIC's model guidance is centered on protecting consumers against inaccurate processes, unfair discrimination, data vulnerability, and other potential uncontrolled risks. In establishing its risk control framework, the model starts by setting out some basic definitions. Significant among its definitions are "Artificial Intelligence" ("AI") and "Predictive Models." AI is defined by the NAIC model as a "branch of computer science that uses data processing systems" to perform functions "normally associated with human intelligence such as reasoning, learning and self-improvement" and includes "machine learning . . . that focuses on the ability of computers to learn from provided data without being programmed." The model goes on to include in its definitions predictive models that are based on the "mining of historic data using algorithms/and or machine learning to identify patterns or predict outcomes that can be used to sup- port or make decisions." Interestingly, the model does not make any reference or draw any distinction to the predictive models the industry has used for decades, a concern raised in an industry response to a federal survey on the use of AI by insurers.[7]

"The definition of AI within the AI system is an important starting point because it is the capability of the system to 'train' itself based on large datasets that raises concerns."

Regulatory Focus on AI in Insurance

The definition of AI within the AI system is an important starting point because it is the capability of the system to "train" itself based on large datasets that raises concerns. The self-learning capability of AI warrants oversight. Most of the states regulating AI address these concerns by imposing guardrails to minimize potential inaccuracies, unfair discrimination, data vulnerability, lack of transparency and the risk of reliance on third party vendors. New York's Circular Letter No. 7 expresses similar concerns focusing directly on underwriting and pricing and the potential for perpetuating historic or systemic biases arising from the use of external consumer data and information sources ("ECDIS").[8] New York's Circular Letter No. 7 builds on earlier pronouncements concerning the use by insurers of external data sources ("geographical data, educational attainment, homeownership data, licensures, civil judgments and court records which have the potential to reflect disguised and illegal race-based underwriting that violate" existing statutory protections) that are not supported by valid actuarial standards.[9] Valid actuarial standards, for example, distinguish between individuals in underwriting and rating based on factors related to expected costs associated with the transfer of risk. Insurers have long relied upon these standards of practice because they demonstrate a clear relationship between the variables used and the insured risk.

A related concern is that this data may be collected by external vendors that are not regulated by the New York Department of Financial Services ("DFS"). The guardrails articulated by the NAIC model allow adopting states to tailor consumer protections to the AI systems used. In summary, the guardrails prescribe the adoption of (1) governance and risk management controls

that include oversight by senior management, an independent or enterprise integrated risk management program[10] and the adoption of documented policies and procedures; (2) oversight of third-party vendors for compliance with existing insurance laws, adoption of policies and procedures respecting the acquisition of data, auditing of data, and remediation of incorrect data and cooperation with regulatory investigations and (3) preparation for regulatory exams entailing maintenance of records respecting the source of data, the testing of data, bias analysis, model drift, including notice and disclosure of adverse underwriting decisions.

The Potential for Insurance Disputes Triggered by AI

It is still too early to identify specific policy changes resulting from the integration of AI technology in the insurance industry. Considering the limited body of insurance litigation, litigators must at times extend their focus beyond traditional insurance law when pursuing insurer liability. With this in mind, we should examine existing cases to anticipate how the evolving use of AI may shape future litigation. The first class actions involved the AI technology "nH Predict." The technology is an AI predictive model used by the defendant carriers in coverage determinations for medically necessary care. In both the *Lokken* and *Humana* cases, plaintiffs relied on established insurance law protections to assert that the carriers' claims personnel over relied on this "faulty technology" and disregarded human judgment to the detriment of Medicare Advantage policyholders.[11] The *Huskey* class action, meanwhile, highlights the concerns relating to algorithms that can disparately impact policyholders based on their protected class status.[12] In Huskey, plaintiffs allege that profiling algorithm models used for fraud screening and claims automation delayed or denied homeowners' insurance claims based on race discrimination in violation of the Fair Housing Act. ("FHA"), 42 U.S.C. §§ 3604(a) and (b), and § 3605. The plaintiffs survived State Farm's motion to dismiss under 3604(b) based on showing (1) a statistical disparity, (2) a specific policy, i.e. the insurer's "decision to use algorithmic decision-making tools to auto- mate claims processing" and (3) a causal connection between the policy and the statistical disparity. These early cases, filed in most instances prior to the adoption of state guidance for the use of AI by insurers, forecast the very issues – bias, data inaccuracy, oversight of third-party vendors – that are now reflected in the regulatory guardrails being imposed on the industry.

"Considering the limited body of insurance litigation, litigators must at times extend their focus beyond traditional insurance law when pursuing insurer liability."

Identifying Specific Legal Risks

What can ADR professionals anticipate in a world where arbitration clauses and protecting trade secrets are industry norms? Anything can happen, but there are several key factors that point to a potential for complex disputes. These factors include: (1) reliance on third-party vendors for the large datasets needed to train AI systems, (2) the likelihood of dependency on third-party vendors for the development of AI systems, especially by smaller insurers, (3) the inherent need to share sensitive information across platforms in these processes and (4) the fact that insurers are ultimately liable under the control regime articulated by the NAIC for AI.

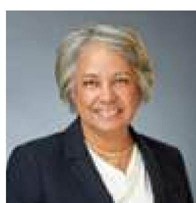
Therefore, contractual obligations and due diligence are needed for privacy protections and data security including consideration of technical capa-

bilities, system reliability and system explainability. These concerns will also warrant related representations, warranties and indemnifications regarding the respective parties ongoing need to monitor and assess the AI system to assure regulatory compliance, including oversight of bias and incident reporting. These terms may serve as fertile ground for disputes. And, as the *Huskey* case demonstrates, determining liability may not be confined to insurance law. Claims may also arise out of state privacy, data protection, bias and other enacted AI protection laws.[13]

Insurers must remain aware that AI creates a new realm of potential claims both in B2B and B2C transactions as the highlights here make clear. At this early stage, the most prominent exposures seem to be data security and bias concerns. Even just the issues around cybersecurity of databases holding personal financial information made richer by external consumer data raise enormous risks. In fact, as I was finalizing this article New York enhanced its previously mandated cybersecurity regulation, 23 N.Y.C.R.R. Part 500 (Mar.1, 2017), by providing further guidance on cybersecurity concerning the use of AI.[14] The guidance pointedly reflects a concern for the "vast amounts of non-public information" that will be at risk and create a greater incentive for bad actors to target.

In addition, depending on the use of ECDIS or the AI system, the potential for disparate outcomes the regulators prefer the industry avoids may nevertheless result from model drift,[15] the use of "problematic" proxy variables, defective bias analysis techniques or any other number of inadvertent glitches.[16] The NAIC model, while guiding the development and deployment of AI technology, also impose upon insurers the duty to disclose the basis for their recommendations to all stakeholders, including consumers.[17] This transparency requirement acknowledges that the technology may outpace human understanding of its mechanics, the so called "black box."[18] Consequently, insurers may be challenged in providing clear and adequate explanations to insureds regarding their automated decisions.

These are early days in the use of AI by insurers in an increasingly regulated environment. Currently, only one-third of the states have adopted the NAIC model. Staying abreast of these technological advancements and their evolution is crucial to our role as ADR professionals. This emerging technology will undoubtedly become a focal point of disputes in an industry that is central to both national and global economies.



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Endnotes

1 This article was originally published in the NYSBA New York Dispute Resolution Lawyer | 2025 | Vol. 18 | No. 1, and is republished here with permission.

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17 *See* endnote 3, specifically "Transparent" and "Safe, Secure, & Robust Systems" sections; and endnote 13.

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English Law Update on Arbitrator Impartiality and the Duty of Disclosure

By Jonathan Sacher and Caroline Cwiertnia, BCLP London

Introduction

The first duty of an arbitrator under English law is to act fairly and impartially as between the parties. This core duty is enshrined in section 33 of the English Arbitration Act 1996 ("**AA**") and a party may apply to the court to remove an arbitrator (section 24) if circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality. The relevant test for an application is whether a fair-minded and informed observer, having considered the facts, would consider that there is a real possibility that the arbitrator is biased.

Repeat appointments give rise to particular issues. The fact that an arbitrator is repeatedly appointed by the same party may be relevant when assessing whether there is a real possibility of bias as it means the arbitrator is receiving regular financial remuneration from a party. However, in some sectors, including insurance and reinsurance, shipping and commodities disputes, where there is a limited pool of recognised and experienced arbitrators, repeat appointments in England are not uncommon.

The UK Supreme Court decision in Halliburton v Chubb ("**Halliburton**") clarified the English common law position on an arbitrator's duty of disclosure and the Halliburton principles

were applied in the recent case of [H1 and another v W, D and F] (“**H1 v W**”).

Halliburton

Halliburton provided services to BP, the lessee of the Deepwater Horizon drilling rig in the Gulf of Mexico. Halliburton settled claims with the US government and corporate and individual claimants. Following settlement, Halliburton claimed under their policy with Chubb. When Chubb declined cover, Haliburton brought arbitration proceedings. As the neutral party-nominated arbitrators were unable to agree the chairman of the Tribunal, the High Court appointed the chairman who had been Chubb's preferred candidate. Before appointment, the chairman disclosed that he had previously acted as an arbitrator in a number of arbitrations in which he was appointed by Chubb, and that at the time he was instructed in two references in which Chubb was involved. After his appointment, the chairman was also appointed as an arbitrator in two further references involving claims against insurers concerning with Deepwater Horizon. The later appointments were not disclosed to Halliburton. When Halliburton discovered these appointments, it applied to the court to remove him as an arbitrator but when it reached appeal to the Supreme Court they rejected this application.

The Supreme Court recognised that there are high expectations on disclosure and concluded that the chairman had a duty to disclose to Halliburton his previous and current appointments. The Supreme Court held that the test for apparent bias is to ask whether at a hearing to remove, the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias. This test is an objective one. The Supreme Court concluded that the failure to disclose the appointments, whilst a relevant factor, was not sufficient on its own to amount to an apparent bias and justify removal of the chairman. In relation to repeated appointments, the Supreme Court stated that the fact that an arbitrator is regularly appointed or nominated by the same party might give rise to a real possibility of apparent bias. However, it recognised that in specialist fields, such as insurance, re-appointments are common and do not demonstrate impartiality or lack of independence on their own. As such, when deciding whether to remove an arbitrator for bias, the court's focus will be on the arbitrator's duty to disclose previous/current appointments rather than the arbitrator's re-appointment by a party.

H1 v W

The 2024 case of H1 v W concerned arbitration proceedings brought by a film company and film guarantor (the “Insured”) and their insurers. Following a stunt-related incident on set, the Insured claimed against the insurers under the Policy, for additional costs relating to delays caused by the incident. Following the declinature, the Insured brought arbitration proceedings against the insurers. The sole arbitrator (who had expertise in the film and television production but had no previous arbitration experience and was not a lawyer) made a number of comments on witness evidence and his views about the evidence submitted in relation to responsibility for safety on set during filming. The arbitrator stated that he did not need to hear any of the experts as he “[knew] what they [were] saying” and “[knew] them all personally extremely well.” In light of these and other comments, the insurers applied to the court to remove the arbitrator on the grounds of apparent bias. It should be noted that the insurers did not argue that the arbitrator was in fact biased, but rather that his remarks made in relation to expert evidence gave rise to the appearance of bias.

Applying the Halliburton test, the court concluded that the remarks made by the arbitrator gave rise to the appearance of bias. The court indicated that the suggestion that it was not necessary to call any expert witnesses was not an expression of a “balanced and impartial view.”

> “An impartial arbitrator ought to keep an open mind and hear all evidence before making a decision...”

An impartial arbitrator ought to keep an open mind and hear all evidence before making a decision rather than prejudge merits as the arbitrator appeared to do in this case. The court was of the view that the arbitrator showed a "firm impression of having already allowed extraneous, illegitimate factors to influence his assessment of evidence which he has not yet heard…." It should be highlighted that it was the comments that indicated an appearance of a bias on the basis that the arbitrator made a decision about the evidence without hearing it out, and not the nature and extent of the arbitrator's relationship with the experts.

This is a rare case of a successful arbitrator challenge as courts generally take a cautious approach to interfering with the appointment of an arbitrator who will be afforded a degree of autonomy.

Where Are We Now

The Halliburton case of few years ago set the scene for the steps now being taken by parties and nominated English arbitrators to disclose existing and previous appointments at least for the previous three years.

The 2024 International Bar Association rules are now regularly used as a guide and ARIAS UK will shortly launch its template for disclosure in ARIAS·UK Arbitrations.

The Arbitration Act 2025

The Arbitration Act 2025 introduces a new statutory duty that reflects the common law rule set out in Halliburton, requiring arbitrators to disclose circumstances that give or may give rise to doubts as to their impartiality.

It is worth mentioning that when reviewing the AA, the Law Commission considered whether arbitrators should be subject to a statutory duty of independence but ultimately decided against it. The Law Commission concluded that what matters is not whether the arbitrator has a connection with the parties before him but rather the effect such connection has on the arbitrator's impartiality and apparent bias.

Conclusion

The above emphasises that the English Court's focus is not on the arbitrator's relationship (prior or current) with one of the parties or re-appointment, but rather on the arbitrator's duty of disclosure and apparent pre-judgement. In light of these developments, arbitrators should ensure that they: (i) disclose all previous related appointments (at least for past three years) and current appointments; and (ii) of course, keep an open mind and not make any pre-judgements in order to prevent any potential appearance of bias.

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Public Nuisance: Will It Sink Insurers or Is There a Life Raft?

By Adam Fleischer, BatesCarey LLP

Public nuisance claims are almost literally "legal lottery." Because public nuisance claims seek to hold a policyholder liable for a share of an entire industry's harm to society, they are indeed the prototypical "bet the company" claims both for insureds and insurers.

I. A few billion dollars of public nuisance liability to date

In the early days of tobacco litigation, public entity plaintiffs such as states and local governments, sought to use public nuisance theories to hold every company in the tobacco industry responsible for paying a share of the societal economic harm suffered by the governmental plaintiffs. While tobacco claims settled without legally testing whether public nuisance theories could substitute for product liability, the playbook has now been resurrected as states, counties, schools, and hospital systems sue entire industries to recover economic social costs of opioids, climate change, social media addiction and more.

Public nuisance theories are attractive to plaintiffs because they not only justify large awards, but they also provide an easy evidentiary path to establish liability. In pleading public nuisance, plaintiffs seek relief for generalized public harm rather than damages for injury sustained by a specific person. Plaintiffs must prove only that the defendant policyholders, as a group, engaged in a fraudulent scheme or common negligence that harmed society. For example, plaintiffs have alleged that a wide range of pharmaceutical defendants acted to create a market for long-

> "In a public nuisance claim, there is no need to prove that any specific defendant caused the particular injury to any specific individual."

term use of prescription opioids and to flood the market with such large quantities of prescription opioids that harm and misuse would surely have been the expected result.

In a public nuisance claim, there is no need to prove that any specific defendant caused the particular injury to any specific individual. The individuals are not part of the suit, will not be compensated from the government plaintiffs' recovery of economic losses, and the policyholders' liability to the harmed individuals will not be litigated or resolved. And this approach is working.

The public nuisance theories aimed at the opioid industry have resulted in three opioid distributors, Amerisource, Cardinal Health, and McKesson, agreeing to pay $19.5 billion for global resolution of opioid public nuisance claims pending against them. Opioid retailers have also succumbed to public nuisance settlements with CVS paying $4.9 billion, Walgreens paying $4.79 billion and Kroger paying $1.2 billion. As other opioid industry defendants line up to settle similar claims, the plaintiffs' bar has targeted new industries with this lucrative approach.

II. Public nuisance: The Copycats Are Coming

State and local governments are using public nuisance to address the impact of climate change in their communities. More than two-dozen cases have used public nuisance theories to hold fossil fuel producers responsible for the impact of climate change. These suits allege that the defendant companies have long promoted fossil fuel consumption despite their knowledge of resulting harm to the environment. Questions of causation feature prominently in these cases, and courts are being asked to consider whether it is possible to link defendants' emissions to climate harms. These plaintiffs generally seek the creation of an abatement fund to pay for climate adaptation projects.

In another new public nuisance arena, nearly 200 school districts have brought claims against social media companies, including Facebook, TikTok, Snapchat, and YouTube, alleging that their apps are addictive and damaging to students' mental health, and are causing adverse impacts on schools and other government resources that constitute a public nuisance. The lawsuits have been consolidated in Oakland, California federal court, along with hundreds of suits by families alleging harms to their children from social media.

Many school districts recently pursued a similar tactic in public nuisance lawsuits against Juul Labs and other vaping companies. Juul agreed to pay $1.7 billion in a broad legal settlement covering more than 5,000 lawsuits, including those from school districts, after being accused of marketing addictive products to children and teens.

Another public nuisance dam that may be waiting to break is glimpsed through the recently filed case *Martinez v. Kraft*.[1] The plaintiff alleges that food producers such as Kraft, Coca-Cola, General Mills, Nestle USA, and Conagra Brands sold "ultra-processed foods" or UPFs, which are alleged to contain little or no whole foods at all, and which have been proven to be "intrinsically unhealthy." The suit alleges "predatory profiteering," which resulted in "immense harm to American children" and which "ushered in a multitude of epidemics." While the UPF litigation at this stage is brought by a single individual in the form of a traditional bodily injury claim (<u>not</u> public nuisance), the allegations of societal harm in the complaint do not make a future evolution into public nuisance litigation difficult to divine.

III. Will Recent Rulings Curtail the Momentum of Public Nuisance Theories?

As billions of dollars in opioid settlements have unfolded, so too have court rulings begun to accumulate that call into question the viability of public nuisance as a theory for government plaintiffs to essentially circumvent the product liability construct of mass tort law.

In an early commentary on public nuisance, the Superior Court of Connecticut dismissed public nuisance claims brought by thirty-seven municipalities against twenty-five drug companies, finding that they failed to show how the opioid defendants caused the opioid addiction-related costs that the cities sought to recoup.[2] The ruling noted that if courts are to safeguard a rational legal system, then courts cannot endorse a "wildly complex and ultimately bogus system that pretends to measure the indirect cause of harm to each individual (municipality) and fakes that it can mete out proportional money awards for it."

While the Supreme Courts of Alaska and Ohio have also rejected public nuisance as a substitute theory for mass torts,[3] and the Supreme Court of West Virginia has recently heard argument on the issue and the Supreme Court of Maine is the most recent high court to weigh in.[4] The Supreme Court of Maine dismissed public nuisance opioid claims against Walgreens and a host of opioid defendants that had been sued by nine Maine hospitals. The court explained that hospitals, which treat injured individuals, if they obtain subrogation rights from the injured people, could then have a derivative claim that attaches to the bodily injury liability

> "...the nature of a public nuisance risk is decidedly incompatible with even the basic terms, conditions and obligations of a liability policy."

owed by the policyholder to the injured person. However, without a derivative claim, a hospital may not use public nuisance as theory to try to obtain economic recovery for generic categories of bodily injury that the hospital itself did not suffer or obtain the right to litigate.

Of course, public nuisance theories have not been erased altogether. In the national opioid MDL, the court recently *allowed* a public nuisance claim against Albertsons to move forward.[5] In allowing the public nuisance claim to proceed, the court explained that the Texas county that brought the public nuisance claim "is not seeking relief for injuries to its citizens" and that the county's harms are unique and "of a different kind and degree than those suffered by Texas and the Tarrant County citizens at large." The court concluded that, because the public nuisance claim is seeking recourse to actual governmental harms and does not seek compensation for any bodily injuries, the public nuisance claim may therefore proceed in its own right.

IV. What Is an Insurer To Do? The Public Nuisance Coverage Wars

A. A public nuisance risk is not the same as a mass tort bodily injury risk

It bears mention that, from an insurance underwriting perspective, a public nuisance risk lacks the fundamental characteristics of an insurable risk. Chiefly, an insurable risk is one that is determinable and that can be spread across an entire population of policyholders, anticipating that, at any given time, there will be enough *unharmed* policyholders paying premium to cover the cost of the injuries of those *harmed* policyholders. However, for public nuisance, these insurance concepts simply don't work. When the entire population of "the public" is generally said to be harmed, the risk itself is characteristi-

cally indeterminable and impossible to model relative to deciphering individuals harmed versus those not harmed within the "public's injury."

Furthermore, the nature of a public nuisance risk is decidedly incompatible with even the basic terms, conditions and obligations of a liability policy. It is an impossibility for a policyholder sued for public nuisance to comply with a notice provision's requirement of reporting the name, time, location and circumstances of the injured individuals. A public nuisance claim presents no realistic way to measure which individual injuries began before or after the policy period. The typical claims handling obligations of examining medical records and striving to compensate probable liability for an injury within the policy limit are not possible to employ when faced with an alleged injury to an entire segment of society.

It should be very evident that the risk that a policyholder is liable for participating in an industry, which collectively caused societal economic losses, is an entirely different risk than the intended liability coverage for a policyholder alleged to have caused specific bodily injury to a specific person. The question then for insurers is, where in the policy language can this distinction be found and how might it be presented in the courts?

B. Courts have begun to differentiate public nuisance and bodily injury risk

Liability policies are not blank checks to insure every conceivable economic loss that can be ultimately traced back to a bodily injury or property damage. Instead, liability policies typically specify that they only insure the policyholder's "legal obligation to pay sums as damages because of bodily injury." Legal precedent abounds demonstrating that, when the policyholder is not sued for allegedly causing a specific bodily injury or property damage, then claims by third parties involving downstream economic losses from bodily injury or property damage are simply not covered.

> "...liability policies typically specify that they only insure the policyholder's 'legal obligation to pay sums as damages because of bodily injury.'"

For example, a restaurant sued a policyholder for having caused an E.coli outbreak that sickened customers and caused the restaurant to temporarily close. The restaurant sought its lost profits from the policyholder. A court determined that claim was not insured under the liability policy because it was not a bodily injury risk.[6] In another case, an employer sued the policyholder HVAC company after air conditioning failed and caused the plaintiff's employees to become sick and unable to work. The claim sought costs of lost productivity, and was found not to be insured because it was not a claim seeking to establish liability or compensation for the policyholder having caused any bodily injury.[7] In another matter, when petroleum had damaged a tenant's property, the resulting economic costs to the policyholder for a claim for having breached its lease and disclosure obligations was not a covered "property damage" claim because there was no liability at issue for the causation or compensation of the property damage itself.[8] There are many more cases from courts across the country that have consistently applied these same concepts.

It has not been and should not be a far leap for courts to apply the line of cases referenced above to the realm of public nuisance. For example, this application is just what was spelled out by the Delaware Supreme Court in *ACE American Insurance Co. v. Rite Aid Corp.*[9]

The *Rite Aid* decision explained that, in order for a claim to fall within the bodily injury coverage of a liability policy, the claim must be brought either by (1) the person injured; (2) those who have

the legal right to recover on behalf of the person injured, such as the parent of minor; or (3) people or organizations that directly cared for or treated the person injured, such as a hospital with a derivative subrogation claim obtained from the injured party. In other words, the underlying suit must seek to prove the policyholder's liability to pay compensation for a person's injury and the costs of treating the specific bodily injury. Because the opioid public nuisance lawsuits in *Rite Aid* did not bring claims to prove that Rite Aid caused, or must compensate, the injury of any individual, but instead sought to recoup the aggregate economic costs incurred to abate the opioid crisis, the court held that those suits were not covered.

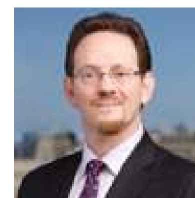
Since *Rite Aid*, other reviewing courts have echoed the sentiment that if there are no claims in a suit seeking to prove the policyholder's liability for causing or compensating a specific bodily injury, then there are no triggering claims for any "legal obligation to pay sums as damages because of bodily injury." For example, in *Acuity v. Masters Pharmaceutical, Inc.*, the Ohio Supreme Court held that underlying opioid lawsuits did not come within the scope of coverage, reasoning that "damages because of 'bodily injury'" "requires more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought."[10] Likewise, in *Westfield National Insurance Co. v. Quest Pharmaceuticals, Inc.*, the Sixth Circuit Court of Appeals, applying Kentucky law, held that underlying opioid lawsuits (including those brought by hospitals) were not covered, because the underlying claims did not "predicate[] recovery on a particular person's bodily injury."[11]

Policyholders have countered with arguments that: 1) the public nuisance claims would not exist "but for" bodily injuries at the root of all governmental claims; 2) some insurance policies have excluded governmental claims or opioid claims altogether, therefore there must be coverage under those that did not, and; 3) public nuisance settlements specifically earmark dollars to pay to abate or address bodily injury claims, and therefore are evidence of the allegedly insured bodily injury risk that is being settled.

By in large, these policyholder arguments to find public nuisance coverage have been rejected. Courts have recognized that, just because an economic recovery claim would not exist "but for" the existence of injured individuals, this does not make every economic recovery claim a bodily injury claim. Courts have also recognized that when a claim is not capable of being reported pursuant to the "who, when, where" of a notice provision, it is likely not the type of claim intended to be covered. Similarly, the fact that insurers were ultimately forced to employ opioid exclusions to clarify these points does not mean that policies in place without those exclusions were meant to cover public nuisance claims.[12]

CONCLUSION

With federal governmental programs being reduced, and the increasing pressures on state and local municipalities to find new financing for budgetary and social costs, it will not be surprising if public nuisance suits remain a main tool within the recovery arsenal of these plaintiffs. While the narrative surrounding such claims of societal harm tend to be sympathetic and often gut-wrenching, the claims themselves are simply an entirely different risk than the bodily injury and property damage risks covered by liability insurance. By capitalizing on both the historic precedent and developing caselaw, insureds, insurers and the courts should come to the uniform conclusion that, if a claim does not present alleged liability against the policyholder for causing or compensating a specific injury, then the claim is not within the insurance of a liability policy.



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12 insurer coverage counsel in the United States, and Fleischer has similarly been recognized by his peers through selection to the London-based Who's Who Legal for Insurance and Reinsurance.

Endnotes

1. Case No. 241201154, (Ct. Com. Pleas Phila. Cnty.) (Dec. 10, 2024).
2. *City of New Haven v. Purdue Pharma, L.P. et al.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019).
3. *State of Alaska v. Walgreen Co., et al.*, No. 3AN-22-06675 CI, 2024 WL 1178352 (Alaska Super. Mar. 01, 2024))(rejecting public nuisance as viable substitute theory for mass tort claims); *In Re National Prescription Opiate Litigation, Trumbull County v. Purdue*, 2024 WL 5049302 (Ohio 2024)(on a certified question from United States Court of Appeals for the Sixth Circuit, the Ohio Supreme Court found that Ohio's Product Liability Act should be the sole means of recovery for opioid injury claims in Ohio.)
4. *Eastern Maine Medical Center v. Walgreen Co.*, 2025 ME 10, 2025 WL 410303. Of note, this opioid decision was submitted as authority in the national social media MDL as precedent demonstrating the lack of viability of economic recovery claims in the absence of the injured parties themselves. *In Re: Social Media Adolescent Addiction*, MDL No. 3047, Case No. 22-md-3027, U.S. District Court, Northern District of CA, Dkt. No. 1667 (Feb. 10, 2025).
5. *In Re: National Prescription Opiate Litigation*, MDL 2804, Case No. 1:17-md-2804 (Dkt. No. 5921 Jan. 28, 2025).
6. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Ready Pac Foods, Inc.*, 782 F. Supp. 2d 1047 (C.D. Cal. 2011)
7. *Diamond State Ins. Co. v. Chester-Jensen Co., Inc.*, 243 Ill. App. 3d 471, 477-78 (Ill. App. Ct. 1993)
8. *Unigard Security Ins. Co. v. Murphy Oil*, 331 Ark. 211, 962 S.W.2d 735 (Ark. 1998)
9. *ACE American Insurance Co. v. Rite Aid Corp.*. 270 A.3d 239 (Del. 2022).
10. 205 N.E.3d 460, 472 (2022).
11. 57 F.4th 558, 567 (6th Cir. 2023). *But see, Walmart Inc. v. ACE Am. Ins. Co.*, 2023 WL 9067386 (Cir. Ct. Ark. Dec. 29, 2023)(pending appeal)(finding that governmental opioid claims fall within coverage for damages "because of bodily injury), and *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016)(Same).
12. *See, Publix Super Markets v. ACE Property, et al.*, 2024 WL 4605991(M.D. Fla. Oct. 29, 2024). *See also Allied Prop. & Cas. Ins. Co. et al. v. Bloodworth Wholesale Drugs, Inc.*, 727 F.Supp.3d 1404, 1414 (M.D. Ga. 2024).

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Judicial Appointment of Umpires for Arbitrations

By Robert M. Hall

I. Introduction

Perhaps the most significant single problem with insurance/reinsurance arbitrations in the US is selection of a neutral umpire. Although many efforts have been made to facilitate this process, it continues to be a problem in a number of arbitrations. Sometimes it is the result of parties or their counsel trying to game the system. Other times it is the result of one party trying to put off finalizing the result of the dispute as long as humanly possible, sometimes over a year. On occasion, as will be seen below, the number and disparate contract wordings involved make agreement on an umpire very difficult.

Two remedies for this situation are contained in Section 5 of the Federal Arbitration Act (the "FAA"),[1] which provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire or in filing a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein . . .

Judicial appointment of an umpire is not without peril as courts have been known to reject the individuals recommended by the parties and appoint an individual of unknown skills and experience.[2]

"Judicial appointment of an umpire is not without peril as courts have been known to reject the individuals recommended by the parties and appoint an individual of unknown skills and experience.[2]"

The purpose of this article is to examine the evolution of case law under Section 5 and to examine he fact situations in which the court has chosen to apply one statutory remedy (follow the contract) or the other (appointing an umpire).

II. Following the Contractual Procedure on Umpire Appointment

One case firmly in this category is *RLI Insurance Co. v. Kansa Reinsurance Co. Ltd.*, No. 91 Civ. 4193 (MBM), 1991 WL 243425 (S.D.N.Y. Nov. 14 1991), in which the reinsurer challenged the manner in which the cedent and its MGA underwrote the business. The arbitration clause called for each party to appoint its party arbitrator and for the party arbitrators select an umpire. The reinsurance incorporated by reference the commercial arbitration rules of the American Arbitration Association and Kansa argued that those rules (specifically Rule 16) required that the umpire be neither Finnish nor an American. RLI disagreed and the parties could not reach a compromise and asked the court to appoint an umpire. The court declined to do so but found that Rule 16 applied and ordered the parties to proceed with the contractual umpire selection process without Finnish or American candidates.

Northwestern National Insurance Co., v. Kansa General Insurance Co. Ltd., No. 92 civ. 7433 (LJF), 1992 WL 367085 (S.D.N.Y. Nov. 25, 1992), involved the same argument by *Kansa* as in the above case about Rule 16 and the nationality of umpire candidates. Northwestern petitioned the court to appoint an American arbitrator off of its list of umpire candidates. The court found that Kansa had waived its rights under Rule 16 and ordered the parties to proceed with umpire selection pursuant to the contract:

> Pursuant to 9 U.S.C. Sec. 5, this Court has the authority to designate an umpire when any party fails to implement the methods proscribed by an arbitration agreement. Of three potential candidates, the Court declines to exercise its authority to select from those lists and designate an umpire at this time. Instead, Northwestern and Kansa shall have two weeks from the date of this Order to select an umpire in accordance with the procedure set forth in the Agreement.[3]

Global Reinsurance Corp. v. Certain Underwriters at Lloyd's of London, 465 F. Supp. 308 (S.D. N.Y. 2006), involved extended negotiations over the umpire selection. After umpire questionnaires were completed, Global objected to the Lloyd's candidate as conflicted and inexperienced. Lloyd's declined to withdraw the candidate and proposed to proceed with the selection of the umpire by drawing lots. Instead, six days after it objected, Global petitioned the court to appoint its candidate as umpire

based on "lapse." The court declined to do so:

> The mere six days between the time Global notified [Lloyd's] of its objections to [Global's candidate] and the time it filed the instant Petition cannot be characterized properly as a "lapse" that justified judicial intervention. Although Global attempts to characterize the entire period [of umpire selection] as a lapse within the meaning of 9 U.S.C Sec. 5, during this period, the umpire selection process was moving forward, albeit slowly, in accordance with [the arbitration provision] of the Treaties.[4]

The *Global* court ordered the parties to proceed with choosing the umpire by lots: "Because the next step in the umpire selection process is clear under the Treaties, there has been no lapse in the process and the Court is without authority to appoint an umpire."[5]

The sale of a defective motor home provided the backdrop for *Ex Parte Cappaert Manufacture Homes*, 822 So. 2d 385 (S.C. Ala. 2001). The relevant arbitration clause called for the manufacturer to appoint an umpire to be approved by the purchaser. The first candidate nominated by the manufacturer was declined promptly by the purchaser. The manufacturer then petitioned the court to appoint an umpire under the FAA. The court declined to do so ordering the parties to continue with the umpire selection process as there had been no "lapse" in the umpire appointment. *See also In re The Travelers Indemnity Co.*, No. 3:04-mc-196 (TPS), 2004 WL 2297860 (D. Conn. Oct. 8, 2004).

III. Following the Contractual Procedure, and if it Fails, Court Appoints the Umpire

There are several cases in which the court agreed to appoint an umpire only after the parties attempted to implement the contractual procedure but it failed. *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 814 F. 2d 1324 (9th Cir. 1987), is a case in which both remedial techniques were ultimately necessary. Pacific Re managed a reinsurance pool for a number of reinsurers who became profoundly insolvent. In all, twelve treaties with pool members were involved, only seven of which contained a procedure for selecting an umpire. After the pool members petitioned the district court for rescission, the court ordered the parties to arbitrate their differences in accordance with the terms of the relevant contracts. Due to the complicated contractual fact situation (to say nothing about the intransigence of the parties), the parties were unable to agree on a method for selecting an umpire. So after five months the parties went back to the district court, which appointed an umpire. The pool members appealed, arguing that the district court had exceeded its powers.

The appellate court observed that:

> [T]he contractual selection method seemed doomed from the start. . . . After five months of stalemate, appellees presented the situation to the district court for solution. Under the statute, the district judge was required to follow the agreement of the parties regarding the selection of the umpire. It was clear, however, that this was impossible. . . . . Thus, when the district judge stepped in and named the umpire, he was entirely within the power granted to him by the statute.[6]

The holding in *Pacific Reinsurance* was followed in *National Casualty Co. v. American Bankers Insurance Co.*, 2005 WL 2291003 (E.D. Mich.), which involved two treaties with slightly different methods for selecting an umpire between the same parties. The cedent asked the court to consolidate the arbitrations and appoint an umpire. The court declined to consolidate and declined to appoint an umpire, ordering the parties to use the umpire selection procedures in the treaties.

IV. Go Straight to Court for Selection of the Umpire

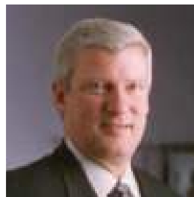
In *National Union Fire Insurance Co. of Pittsburgh Pennsylvania. v. Personnel Plus, Inc*, 934 F. Supp.2d 239 (S.D.N.Y. 2013), the arbitration clause allowed the parties to petition the court to appoint an umpire if the party arbitrators were unable to do so with an allotted time span. The party arbitrators were unable to do so, and National Union petitioned the court four months later. The court granted that petition, without referring the parties back to the contractual procedure, stating "[t]hus, where the parties' agreement is clear as to what action the Court should take upon receiving a petition to appoint an arbitrator, the Court must do as the contract requires."[7] The court went on to appoint as umpire an individual with no insurance arbitration experience.

In several other cases, the court went directly to umpire appointment with little or no discussion about requiring the parties to use their own procedure or consideration of the lapse of time. For

instance, in *Glacier Reinsurance A.G. v. Odyssey America Reinsurance Corp.*, 2007 WL 1875685 (D. Conn. 2007), the court mentioned that time for umpire selection had expired, did not discuss any lapse in negotiations but launched directly into an evaluation of umpire candidates. In *Continental Casualty Co. v. QBE Insurance*, 2003 WL 22295377 (N.D. Ill. 2003), the court barely mentions the FAA and alludes only in passing to a delay in umpire appointment. The focus of the decision is the proper country of domicile of the umpire candidates and which candidate is the least conflicted.

V. COMMENTARY

While it may be difficult to reconcile these decisions on a technical basis, the message from the courts seems clear. Courts will appoint an umpire when: (a) the parties have made a meaningful and extended effort to comply with the contractual procedure; or (b) the number of contracts and the variations make umpire selection within the bounds of those contracts functionally impossible. But the caveat remains: be careful what you ask for because the court's notion of a proper umpire may not be that of the parties.



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Endnotes

1 9 U.S.C. § 5.

2 *In the Matter of the Arbitration between Cravens Dargen v. Gen. Ins. Co. of Trieste & Venice*, 1996 WL 41825 (S.D. N.Y. 1996)

3 1992 WL 367085 at*3.

4 465 F. Supp. 2d at 311.

5 *Id.* at 312.

6 814 F.2d at 1328.

7 954 F. Supp. 2d at 249.

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Third Party Litigation Funding

A Significant Contributor to Nuclear Verdicts and Social Inflation

By Frank DeMento and Howard Freeman

The use of third-party litigation funding ("TPLF") by plaintiffs has become ubiquitous. It is causing a significant rise in litigation costs, settlement values, and nuclear verdicts. However, legislatures, insurance companies, and defense counsel are starting to address the impact that third-party litigation loans are having on the US judicial system and insurance industry.

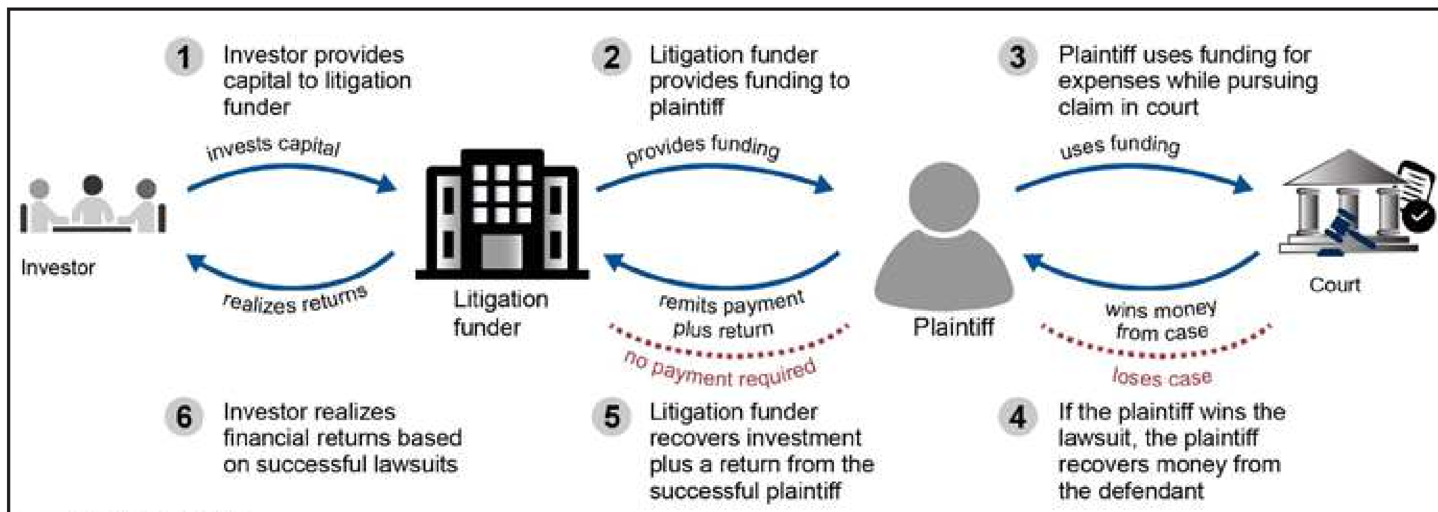
What is Third Party Litigation Funding?
Third-party litigation funding is a financial agreement in which the funder, who is not a party to a lawsuit, provides money to either the plaintiff or the plaintiff's law firm, in exchange for a portion of any recovery eventually obtained. If there is no recovery, then the borrower does not have to repay the funding.[1]

Consumer vs. Commercial Litigation Funding

Consumer Litigation Funding.
A funding company provides money to the plaintiff in a personal injury action such as a car accident or New York labor law action.[2] The money is used to finance living expenses while the case is proceeding.[3] Often, litigation funders calculate the amount loaned as a percentage of the estimated value of the case. Usually, no more than 10% of that value.[4]

If the plaintiff wins the case, they will owe the funding company the original amount funded plus a return on the investment. The amount is outlined in the TPLF agreement and can include an interest rate, a multiple of the original investment by the funder, or a pre-negotiated share of the recovery.[5]

Example of Third-Party Litigation Financing for Plantiffs[6]



Commercial Litigation Funding.
A funding company provides money to a corporate plaintiff or to a law firm and the litigation pertains to commercial actions.[7] Commercial funding agreements are typically used to fund legal expenses or to supplement general operating budgets and involve funding of millions of dollars.[8] Commercial funding arrangements may involve a single case, in which funding is in exchange for part of the value of the subject case,[9] or may involve portfolio arrangements, in which a law firm or business obtains funding in exchange for a share of the value of several cases.[10] The demand by law firms for legal funding is driven by increased attorney advertising, increased investments in data and analytics, and increased investment in mock trials.[11] The receiver of funds may use the money to cover any costs while pursuing the litigation.[12]

Litigation Funders

- Traditional litigation funders are companies that may obtain capital from endowments or pensions and invest almost exclusively in legal claims.
- Another capital source for funders is traditional multi strategy hedge funds with a dedicated litigation finance desk that operates in other markets and assets as well.
- Alternative sources of capital are high net worth individuals, family offices, and hedge funds without a dedicated litigation finance desk.[13]

Benefits of Third-Party Litigation Funding
Proponents of third-party litigation funding argue that the financial assistance allows an injured plaintiff to use the money to pay for living expenses during the litigation and avoid settling for lowball offers,[14] or that litigation financing allows small companies to fund lawsuits and/or higher more experienced lawyers and/or experts against well-funded bigger corporations.[15] TPLF also allows plaintiffs and their counsel to hedge their risk of a negative outcome since they will not have to pay anything if they lose their case.

Concerns of Third-Party Litigation Funding

Third-party litigation funding increases litigation costs.
There are many ways that TPLF can lead to increased litigation costs. For example, TPLF may encourage the filing of frivolous lawsuits leading to defense expenses that would not normally be encountered.[16] Additionally, cases involving TPLF agreements may involve discovery fights and motions pertaining to accessing the TPLF agreement themselves, thereby driving up the costs of litigation.[17] Finally, cases involving third-party litigation funding result in longer case timelines.[18] The more time and money spent in discovery and pushing the case through litigation, increases the expenses of litigation and the likelihood of larger awards.[19]

Third-party litigation funding increases settlement values.
One of the biggest concerns of TPLF is the interest expense associated with it. The interest rates on consumer TPLF agreements may vary from as low as 15% to as high as 124%.[20]

A direct result of these sizable interest rates is that it forces plaintiffs to reject reasonable settlements in order to make up for the significant amount owed after accounting for the interest due. If the case settles, the funder will be paid first out of those proceeds sometimes leaving little left for the plaintiff, the injured party in the lawsuit.[21]

Consumers for Fair Legal Funding highlights several cases in which a nominal amount of money was provided to plaintiffs as part of a litigation loan but after years of litigation the amount owed to the litigation loan company multiplied due to the large interest rate. For example, in one case a litigant was provided an advance of $18,000. Six months later the litigant owed $33,000 to the funding company, representing an 83% return in less than a year. In another case, a plaintiff borrowed $4,000 while his lawsuit was proceeding. The matter settled five years later, and the funding company demanded $116,000. In another case, a plaintiff borrowed $27,000 to pursue a slip and fall case. After the case settled for $150,000 the plaintiff realized he owed the funder almost $100,000 in interest and principal payments in addition to the fees he had to pay his attorney. At the end of the day, the plaintiff was left with $111.[22]

According to a 2021 report by the Swiss Re Institute, it was estimated that TPLF reduces plaintiff's share of awards. For example, it is estimated that in 2016, plaintiffs received 55% of compensation paid in the commercial liability tort system. However, when TPLF was involved, that estimate dropped to 43%.[23] The same report estimated that TPLF agreements in commercial and personal liability claims reduces plaintiff's compensation by over 20%.[24] In order for a plaintiff to receive the same payment in a case with TPLF as opposed to one without, the plaintiff would need an award that is 27% higher.[25] When plaintiffs consider settlement, they must consider the effect of the funding agreement on their award. Also, some TPLF agreements allow funding companies to control plaintiff's ability to settle. As a result, plaintiffs and their attorneys are choosing to pursue nuclear verdicts.[26]

"It is difficult to calculate the exact monetary amount that TPLF contributes to nuclear verdicts, however it is plainly evident that TPLF is fueling them."

Third-party litigation funding drives nuclear verdicts.

It is difficult to calculate the exact monetary amount that TPLF contributes to nuclear verdicts, however it is plainly evident that TPLF is fueling them.[27] The frequency of reported nuclear verdicts during the 2013 to 2022 years (excluding the pandemic years) has seen an upward trend.[28] TPLF's effects on nuclear verdicts is evidenced by the rise and size of verdicts in medical malpractice actions. From 2012-2014, 28% of verdicts exceeded $10M, but by the end of 2023 more than 50% of verdicts were $10M or more.[29]

One-way TPLF drives nuclear verdicts is by providing money for law firms to undertake mass advertising. TPLF has played a "key role in bombarding the public with lawsuit ads that can mislead and desensitize viewers about nuclear verdicts."[30] These advertisements suggest it is normal for plaintiffs to receive nuclear verdicts, when in fact, some of these verdicts are either unconstitutional, significantly reduced after post-trial proceedings, or confidentially settled post-verdict for a much lower amount.[31]

Portfolio funding agreements are another tool used to drive nuclear verdicts. When a funder uses portfolio funding, they bankroll all or a portion of a firm's cases in exchange for a share of the proceeds.[32] By spreading the risk, funders secure their investments, spread the cost of litigation, and "reduce the downside risks of pursuing

questionable claims in a particular case for a chance at a financial windfall."[33]

TPLF's goal of maximizing profits is another factor that contributes to nuclear verdicts. The TPLF's objective of profit maximization may conflict with the funding recipient's objective, who may be willing to accept a reasonable settlement. TPLF pressures plaintiffs to reject a reasonable settlement and take a case to trial in hopes of obtaining a nuclear verdict and maximizing the funder's return on investment. The funding company is willing to risk a plaintiff receiving nothing in exchange for a potentially high return.[34]

Disclosure of Third-Party Litigation Funding Agreements

It is extremely rare that the details of TPLF funding agreements are disclosed during litigation since plaintiffs typically oppose the disclosure and courts generally do not compel production.[35] Additionally, if the disclosure is ordered, courts differ as to as to when disclosure is mandated, who is entitled to disclosure, who must disclose a financial interest, and what information must be disclosed.[36]

There is an effort by some federal district courts, individual judges, and states to make TPLF agreements more transparent. While some states require disclosure, the majority do not. Below is a table depicting federal and state rules/laws that address TPLF.

Jurisdiction	Benefits Plaintiff	Benefits Defendants	Requirement
U.S.D.C., New Jersey		✓	Certain litigants must name the funder and describe its interest, whether its approval is needed for litigation/settlement decisions and conditions of approval.[37]
Chief Judge for U.S.D.C., Delaware		✓	A standing order for cases on his docket 'largely mirrors' New Jersey's approach.[38]
U.S.D.C., Northern California		✓	All parties in class/collective/representative actions must disclose the funding person/entity to the court.[39]
Arkansas	✓	✓	Caps annual interest rates at 17%.[40]
Colorado	✓		Treats TPLF as traditional loans subject to state Uniform Consumer Credit Code.[41]
Indiana	✓	✓	Agreements subject to discovery.[42] Funders can't influence litigation/settlement.[43] No commercial funding by foreign entity of concern.[44]
Maine	✓		Lenders must register.[45] Consumer funders must disclose total amount to repay.[46]
Montana	✓	✓	Must disclose TPLF agreement.[47] Lenders must register. Prohibits usurious rates. Limits funder's share of plaintiff's recovery.[48]
Nebraska	✓		TPFL agreements to be written in clear language.[49] Lenders must register.[50] Consumer funders must disclose total amount to repay.[51]
Nevada	✓		Lenders need a license.[52] Contract void if funder willfully violates the statute.[53]
Ohio	✓		TPLF agreements must be written in clear language.[54]
Oklahoma	✓		TPLF agreements must be written in clear language.[55]
Tennessee	✓	✓	Lenders must register.[56] Annual fees may not exceed 10% of the original amount funded.[57] Contract void if funder willfully violates the statute.[58]
West Virginia	✓	✓	Provide TPLF agreement to other parties.[59] Lenders must register.[60] Consumer annual fee capped (18% of original amount).[61] Contract void if funder willfully violates statute.[62]
Wisconsin		✓	Automatic disclosure of TPLF agreements.[63]
Vermont	✓		Lenders must disclose alternative options to TPLF.[64] Funders must register.[65]

66

What Should Be Done

There are many concerns about TPLF funding, including, but not limited to, delaying/discouraging reasonable settlements, creating conflicts of interest, contributing to nuclear verdicts, and allowing foreign entities to control US litigation in a way that harms US companies.

The initial step for insurers is to understand and educate the courts about TPLF.[67] Defense counsel should explain to the courts that the disclosure of TPLF agreements is material and necessary because it would facilitate settlements and allow defendants to see who is controlling the litigation and settlement discussions on the other side.[68] TPLF agreements should be discoverable for the same reason that a defendant's insurance coverage is discoverable. Both insurance companies and TPLF companies are interested non-parties who have a direct financial interest in the litigation. Additionally, as the litigation continues, the TPLF company's interest accrues. Defense lawyers can argue that the production of TPLF information would facilitate settlement and allow defendants to adjust their litigation strategy, if necessary.[69]

New York defense counsel can "[a]rgue that TPLF agreements executed after liability has been determined against the defendant (or where the risk of non-recovery is miniscule) are not contingencies but loans subject to New York's usury statutes and the unconscionability strictures of the UCC."[70] The theory being that the TPLF agreement is a loan since the contingency aspect is not applicable as liability has already been determined.[71] Counsel should argue that the court and defendant need to know if the TPLF agreement is unenforceable and potentially criminal which may hinder settlement. Even if liability has not yet been determined, defense counsel can seek discovery of the TPLF agreement in order to confirm it is a contingent agreement.[72]

> "Defense counsel should push to have third-party litigation funders appear for court-ordered settlement conferences."

Defense counsel should push to have third-party litigation funders appear for court-ordered settlement conferences. Not only would this allow the defense to negotiate directly with those who may be exerting control of the litigation and settlement of a case, but it would also change the optics for the court by showing that the true adversary is a hedge fund or other financial firm, rather than the injured plaintiff.[73] Defense counsel can also argue that disclosure of TPLF agreements would reveal any conflicts of interest that may exist between the funding company, plaintiff, and/or judge.[74]

Insurers can lobby for legislative changes that would require the disclosure of TPLF agreements. On June 12, 2024, the U.S. Chamber of Commerce Institute for Legal Reform called on Congress for a uniform federal statutory disclosure requirement.[75] The argument was made that a uniform federal statutory disclosure requirement is needed in order to make TPLF arrangements more transparent and calls for legislation that would disclose "the existence of funding, the identity of the funders, the identity of any foreign funding sources, as well as the production of the underlying TPLF agreements."[76]The call for disclosure is based on the premise that disclosure would: facilitate settlements, allow defendants to see who is bringing the legal and financial claim against them and who is controlling the litigation and settlement discussions;[77] allow the court and parties to see if the agreements create conflicts of interest and whether judges need to recuse or disqualify themselves from a case;[78] allow courts to see if the agreements violate state champerty laws (laws that prevent a non-party from funding a litigation); and allow the court and parties to see if foreign actors are involved, as disclosure would allow the parties to see who is really pursuing the litigation and whether they have any ulterior motives.[79]

Underwriters should be aware of the TPLF agreements lurking in the background and their financial impact on claims, whether due to increased defense costs due to longer drawn-out cases, higher settlement values, or the nuclear verdicts being seen across the country. Third-party funding allows for plaintiffs to continue to prosecute their case if they think it will garner a larger settlement or verdict, irrespective of the parties usual practice of litigating the matter as efficiently as possible and settling for the true value of the case. TPLF leads to longer case timelines, an increase in defense fees, claim costs, and expert costs. It also leads to a higher propensity and lower risk for a plaintiff to take a case to trial, resulting in greater risk to insurance companies. Since these agreements are typically not disclosed, insurers may not anticipate spending as much to defend, settle, try, or pay verdicts on cases with TPLF. The outcomes generated by the use of TPLF funding leads to increased premiums for insureds.

The Future of Litigation Funding

It is critical that insurance carriers be aware of the rise of TPLF and the effects it has on the market. TPLF is a multi-billion- dollar industry. There were $15.2B of assets under management (June 30, 2023) of third party litigation funders who finance US commercial lawsuits.[80]

As a result of TPLF, a secondary market has emerged in which the litigation funder sells some of its portfolio to free up liquidity or because the original deal is taking longer than anticipated to resolve. This secondary market is expected to continue to expand in the future.[81]

"It is critical that insurance carriers be aware of the rise of TPLF and the effects it has on the market."

The secondary market may cause an influx of capital for funders, increased competition amongst funders, and better prices for borrowers.[82]

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DeMento served on the board of ROM Reinsurance Management Company for six years, including as Chairman, and is a previous board member of the Association of Insurance and Reinsurance Runoff Companies, serving as chairman of the education committee.

A member of ARIAS since 2001, Frank is co-chair of its technology committee, and has been an ARIAS certified arbitrator since 2014.

Prior to joining TransRe, DeMento was Senior Counsel in Crowell and Moring LLP's re/insurance practice, managed XL Reinsurance America, Inc.'s run-off and retroceded claims units and was in-house claims counsel. He was also a partner in Mendes and Mount, LLP's insurance

and reinsurance litigation group. Frank Also was elected and served as Mayor of the Incorporated Village of Munsey Park from 2013-2019.

DeMento holds the following designations: Associate in Reinsurance; Chartered Property Casualty Underwriter; and Certified Legacy Insurance Professional. DeMento graduated from Washington and Lee University and has a Juris Doctor degree from St. John's University School of Law.

Howard Freeman is a senior complex claims examiner at TranSRe. He is a member of the U.S. Custom Claim Team in New York. Previously, Freeman worked for a commercial insurance carrier in claims adjusting roles since 2011. He has experience in adjusting complex direct claim and reinsurance claim matters throughout the United States, including matters with disputed coverage, high exposure excess casualty claims, opioid claims, construction defect claims, commercial auto claims, and environmental claims. Freeman earned a J.D. from Benjamin N. Cardozo School of Law and a B.S. in Business Management and Marketing from Cornell University.

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UPCOMING WORKSHOPS

Intensive Arbitrator Workshop
April 29, 2025
The Biltmore Miami-Coral Gables, FL

Umpire Masterclass
November 12, 2025
Marriott Marquis, New York

Case Looks at Whether Funding and Fee Agreements are Discoverable in a Class Action

In response to document requests, plaintiffs produced copies of contingent fee agreements ("Contingent Fee Agreements") with everything redacted except the heading "Legal Fees and Expenses". Depositions followed at which the defendants learned of the existence of a litigation funding agreement (the "Funding Agreement") with certain unidentified litigation funders (the "Funders"). Plaintiffs then refused to produce a copy of the Funding Agreement or to disclose the Funders' identities.

Thereafter, plaintiffs moved for class certification. In its motion, plaintiffs stated that there were no conflicts between the named plaintiffs and members of the proposed class. Plaintiffs also produced another, less redacted, copy of its Contingent Fee Agreements. This less redacted copy disclosed verbiage setting forth conditions in the event of a class action.

Plaintiffs then moved to compel production of both the Funding Agreement and *unredacted* copies of the Contingent Fee Agreements. The Court heard oral arguments and held an in camera review of the documents.

Defendants argued that the presence of Funders created potential conflicts of interest that may incentivize counsel to prioritize the interest of the Funders over the class. In response, plaintiffs argued that the Funding Agreement is not relevant and that it is protected by the work product doctrine.

In its analysis, the Court looked at three decisions that mandated production of funding agreements containing limited redactions based on work product grounds. The Court distinguished these cases pointing out that none pertained to class actions. The Court found the Funding Agreement to be relevant because (1) the Funders could conceivably exercise control over the litigation and because, (2) the language of the Funding Agreement demonstrated an expectation it would be produced and therefore an acknowledgement of relevance. In addition, during its in camera review, the Court applied the "because of litigation" test (which plaintiffs failed to address) and found that nothing in the Funding Agreement reflected any opinion, work product, risk analysis or other meaningful reference to strategy, mental impressions, or the lawsuit's merits.

The Court went on to state that "Plaintiffs' half-sentence argument for not producing fully unredacted Contingent Fee Agreements piggybacks entirely off their arguments as to the Funding Agreements."

Based on the foregoing, the Court ordered that plaintiffs produce unredacted copies of both the Funding Agreements and the Contingent Fee Agreements.

Case: *Richard F. Burkhart, et. al. v Genworth Financial, Inc., et. al*, C.A. No. 2018-0691-NAC

Issue Discussed: Privilege and Work Product

Court: In the Court of Chancery of the State of Delaware

Dated Decided: August 21, 2024

Issue Decided: Whether funding agreements and/or unredacted fee agreements are discoverable in the context of a class action

Submitted By: Polly Schiavone, Vice President, Swiss Reinsurance America Holding Corp.

Future Leaders

On March 6, 2025, ARIAS·U.S. formally kicked off its new Future Leaders Committee. This is an exciting initiative aimed at engaging early and mid-career insurance and reinsurance professionals by providing opportunities for professional development, networking, and leadership development within the framework of ARIAS·U.S.:

1. **Professional development:** The Committee will identify and cultivate opportunities for learning and skill building through events and programs.
2. **Networking:** The Committee will hold periodic networking events to support the development of long-term professional relationships among early and mid-career professionals.
3. **Leadership:** The Committee will assist the current leadership of ARIAS·US by driving change and innovation while also cultivating a pipeline of future leaders who will help the organization progress and thrive into the future.

The Committee is co-chaired by **Kyley Davoodi** (Clyde & Co) and **Shermineh "Shi" Jones** (Troutman Pepper Locke, LLP). Kyley and Shi are actively seeking members and encourage anyone who is in their early/mid-career or new to the industry – whether in age or years of experience – to consider joining or contact them to learn more. The ARIAS·U.S. Board's goal is that company and law firm members will encourage their young professionals to become more involved in ARIAS·U.S. going forward, and we hope that the Future Leaders Committee can serve as a platform for that engagement.

Newly Certified Arbitrator

Stephen McCarthy

Since December 2019, Steve McCarthy has served as Senior Vice President, Litigation for AmTrust Financial, where he helped build a nationwide team of attorneys and paralegals to support US Claims operations, Underwriting and the Reinsurance Ceded and runoff organizations.

Prior to AmTrust, McCarthy was Vice President of Contract Binding Operations at Arch Insurance where he led a team of attorneys and adjusters handling E&S claims across the country.

McCarthy also had Claims and Legal leadership positions at ProSight Specialty (Vice President of program, E&S and runoff books), NYMAGIC (Senior Vice President, Counsel and Secretary of Specialty and Complex), and The Home Insurance Company/Risk Enterprise Management (TPA Director, D&O Runoff).

Before his "industry-related" positions, McCarthy was a Senior Attorney at Rivkin Radler where he handled mass tort coverage litigation and insurance defense work. Prior to his legal and insurance/reinsurance career, McCarthy was a System Safety Engineer for the Navy's F-14 Fighter program and a project engineer at Grumman Aerospace.

McCarthy was originally certified as an ARIAS arbitrator in 2007. He earned his JD cum laude from Touro Law and his Bachelors in Engineering from Manhattan College.

Calling All Authors

The *Quarterly* is seeking article submissions for upcoming issues. Don't let your thought leadership languish. Leverage your blogs, client alerts and internal memos into an article for the *Quarterly*. ARIAS Committee articles and updates are needed as well. Don't delay. See your name in print in 2025.

Visit www.arias-us.org/publications/ to find information on submitting for the 2025 issues.

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