ARIAS U.S.

QUARTERLY

Looking Back & Leading Forward: Views from In House

ALSO IN THIS ISSUE

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EDITORIAL POLICY — ARIAS·U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the *Quarterly* may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the *Quarterly* may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS·U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS·U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

Spring is right around the corner (hard to tell from the snow in the Northeast) and our registration for the 2026 Spring Conference in Nashville is going strong. Online registration closes on April 13th. You don't want to miss this one. The conference co-chairs have a great program for you and exciting events. Check the ARIAS website for the 2026 Spring Conference page for more information. Even better, we are working on an event app for your smartphones that will have the conference agenda, speaker bios, attendees and all sorts of information for you. Stay tuned.

This issue is chocked full of excellent articles and information. As you know, the new Future Leaders Committee (FLC) has been super active with programming and thought leadership. In this issue, the FLC for their second of three articles, has gathered a roundtable of in-house ARIAS members and interviewed them about their experiences in both ARIAS and the insurance/reinsurance industry. Titled: "Looking Back & Leading Forward: Views from In House - ARIAS Veterans Share Memories and Wisdom for the Future Generation." The interviewers from FLC were Michael Phillips (Arent Fox Schiff), Alphonse Muglia (Dentons), and Gilana Keller (Steptoe).

Continuing AI's domination of the conversation, Bryan McCarthy (TransRe), has authored "Social Media Losses: Emerging Coverage and Reinsurance Issues for Social Media Platform Claims." This is a critical topic as insurance and reinsurance companies try to deal with the ramifications of AI and the emergence of AI-related claims.

Not to be outdone, a team of authors from Clyde & Co. (Patrick Hofer, Jared Clapper, Petra Starr and Bret Kabacinski) has put together a comprehensive look at AI titled "Generative AI and Trial Advocacy: Back to Basics?" This article does a deep dive into the use of generative AI in litigation and how the courts and court rules have been reacting.

Next, Frank DeMento and Howard Freeman (TransRe), provide an overview of the recent changes in tort law in Georgia. Entitled: "Georgia Tort Reform," the article highlights the important changes made to the law that insurance and reinsurance companies need to know about.

Editorial Board member and prolific author Robert Hall once again graces us with a case note on the important topic of collateral estoppel in the reinsurance arbitration context. Titled: "Collateral Estoppel Effect of Arbitration Award on a Different Reinsurer," Bob discusses this recent case on the application of collateral estoppel.

You will also find in this issue a Law Committee case summary, a fine recap of the 2025 Fall Conference by Conference Co-Chairs: Paul Dassenko (AzuRe Advisors, Inc.), Sarah Gordon (Steptoe LLP), Shermineh "Shi" Jones (Troutman Pepper Locke LLP), and James Liell (SCOR), and, unfortunately, some sad news about a few of our friends.

We continue to receive requests for CLE certificates well after the deadlines. Please remember that no CLE certificate will be provided unless a CLE Attribution form is submitted. It is important to submit the CLE Attribution form as quickly as possible after each event. Additional requests for Pennsylvania and Illinois CLE cost ARIAS additional funds to make these late filings so your cooperation in timely submitting the CLE Attribution forms is essential.

Please enjoy this issue of the Quarterly. Thank you to our authors. Please keep your articles coming. 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 were on a panel at the Fall Conference or have made a program proposal that was not accepted for the Fall or Spring Conferences, please turn your presentation or proposal into an article for the Quarterly. Your thought leadership is needed as an article in the Quarterly.

Larry P. Schiffer
Editor

Looking Back & Leading Forward: Views from In House

ARIAS·U.S. Veterans Share Memories and Wisdom for the Future Generation

By Michael Phillips, Alphonse Muglia, and Gilana Keller
Panel: Patrick Aul, Andrea Giannetta, and Linsey Routledge

Introduction

The Future Leaders Committee is proud to present its second installment in a three-part series that brings together emerging professionals and long-standing members of the ARIAS community. This Q&A piece features the reflections of three company representatives whose professional journeys, through ARIAS and beyond, remind us that growth is built on the foundation of experience. The Future Leaders Committee would like to thank Patrick Aul, Andrea Giannetta, and Linsey Routledge for their thoughtful contributions.

Patrick Aul has served as VP, Associate General Counsel for SCOR Global Life Americas since November 2019. Prior to that, he was in private practice for ten years, primarily representing direct writers in policyholder disputes and handling other complex commercial litigation matters.

Andrea Giannetta serves as Senior Vice President, Group Litigation Director, at Enstar US, where she is the head of the litigation team that provides litigation services, advice, and counsel to

the Enstar Group Limited organization worldwide.

Linsey Routledge has counseled insurance and reinsurance companies throughout her career. She currently serves as General Counsel for Arch Reinsurance Company.

We would also like to thank Michael Phillips, Alphonse Muglia, and Gilana Keller for serving as interviewers.

— The ARIAS Future Leaders Committee Co-Chairs
Kyley Davoodi & Shermineh ("Shi") Jones

Q: What was your first experience with ARIAS?

Patrick Aul: My first involvement with ARIAS was registering for the 2020 Spring Conference, which was ultimately cancelled because of the pandemic. Next, I attended the 2020 Fall Conference and 2021 Spring Conference, which were both held virtually. While the virtual format was well executed, it made it challenging to network and build new relationships. Fortunately, we returned to an in-person format for the 2021 Fall Conference. After more than a year of virtual meetings, it was particularly nice to travel and connect with people face-to-face.

Andrea Giannetta: My first experience with ARIAS was at the Spring conference in 2007. I had recently joined Castlewood, Enstar's predecessor. I arrived with limited reinsurance experience, and I knew very few people. I remember it was a lot to navigate but, after observing the collegial and friendly interactions among the membership, I thought that this would be a great opportunity to build relationships within the reinsurance community and to learn about the industry.

Linsey Routledge: I joined ARIAS shortly after I began practicing law, encouraged by more senior members of my firm. My first ARIAS event was in New York at the Hilton. As a young professional in the re/insurance space, it was a great opportunity to meet other industry professionals and start building relationships.

Q: Is there any one thing that you did early in your re/insurance career that was most impactful? Anything you didn't do but wish you did?

Patrick Aul: Early in my career, I worked at a law firm primarily representing direct writers in coverage and bad faith litigation, as well as handling other types of commercial litigation matters. I had limited experience with reinsurance, and no experience with reinsurance arbitrations. After moving in-house to SCOR, my colleagues at SCOR and our outside counsel were experienced, and I was able to sit through a substantial portion of an arbitration hearing with them, even though my role in that matter was limited. Observing the skilled advocates for both parties, the panel members, and lay and expert witnesses, and then debriefing with colleagues and counsel in real time, was an invaluable learning experience for me. As far as things I have not done, I have not joined an ARIAS committee. I think joining a committee would be a good first step for anyone that wants to become more involved and grow their network of industry contacts.

Andrea Giannetta: Getting involved in ARIAS accelerated my learning curve and expanded my network. If I could change one thing, I would have engaged sooner and more broadly with industry and regional groups. It is easy to get caught up in everyday work assignments and urgencies, but making time for industry engagement is so important.

Linsey Routledge: Early in my career, I spent long hours in the office reading and absorbing everything I could from more senior attorneys and clients. I studied reinsurance treatises and other published resources, which was critical to my understanding of reinsurance given the limited library of published reinsurance decisions at that time. If I could change anything, I would have focused on developing my network earlier in my career, including taking greater advantage of opportunities to meet people through various industry trade groups. I certainly would have been excited to join a group like the Future Leaders Committee ("FLC").

Q: Sitting here today, what is your most memorable professional relationship that originated through ARIAS?

Patrick Aul: ARIAS is the best venue for me to get to know industry participants on a personal level. This is true for people that I work with and am aligned with positionally, but also for people who are on the opposite side from me on issues. I have played tennis or pickleball, shared meals, and had candid conversations with opposing in-house representatives, outside counsel, and experts at ARIAS conferences. These are direct, personal interactions that I would not otherwise have had. I will not single out any one individual,

but these experiences break down walls and make it easier to have productive conversations about difficult topics.

Andrea Giannetta: It's hard to identify just one, but I especially treasure my relationships with colleagues whose roles and backgrounds differ from mine – arbitrators, umpires, claims leaders, actuaries, and more. I would not have met so many of these individuals had it not been for ARIAS, and they have often provided me with the most valuable insight and guidance. When I think about some defining moments in my career so far, it almost always has a connection to the ARIAS community. I have been inspired by so many people, and I hope that I can do the same for others.

Q: You used to be in private practice. How does your engagement with ARIAS and the value you derive from it differ as an in-house lawyer?

Patrick Aul: In private practice, my primary goal in attending industry conferences was business development. As in-house counsel, I still network but my focus has shifted. First, I represent SCOR as a significant industry participant that wants to maintain its position at the forefront of industry issues. Second, I evaluate potential outside counsel, arbitrators, and experts, and look for people who present well, are trustworthy, and would be good partners in the future. Just as important, I look for people who I respect and will enjoy working with if an opportunity to do so arises. Lastly, attending industry events such as ARIAS provides me with valuable insight into trends and issues, even if they have not had a direct impact on me or SCOR.

Linsey Routledge: I was very engaged with ARIAS during my time in private practice because I was actively arbitrating disputes. I regularly worked with party-appointed arbitrators, umpires, and opposing counsel—many of whom were members of ARIAS—which naturally deepened my connection to the organization. As an in-house attorney, I have been less involved in disputes at the formal arbitration stage. ARIAS nevertheless continues to be an industry resource. I continue to build professional relationships with company representatives and attorneys, and ARIAS remains a valuable forum for exchanging ideas. I also appreciate the affinity groups, educational offerings and opportunities to maintain and develop new relationships through ARIAS.

Q: How would you recommend that newer and/or younger members make the most out of ARIAS?

Patrick Aul: To make the most out of ARIAS I think you must put yourself out there socially. It is worth attending all the formal sessions and events, but it is equally important to make time for the meals and receptions and sit at a table of people you do not know. Be present during the breaks and speak with people with whom you would not normally interact. If you are introverted like me, take advantage of small group activities, especially at the Spring Conference, where it is a bit easier to get out of the classroom and build connections in more manageable, informal settings.

Andrea Giannetta: Make yourself get involved, take advantage of the educational opportunities, and enjoy the journey! The re/insurance industry has so much to offer, and people want to hear from you. The conferences are a great start, and there are so many ways to expand your horizons and, just as importantly, to make meaningful personal connections.

Linsey Routledge: Take advantage of talking to the many seasoned members who are inspired to engage with the newer membership. Listen to their historical narratives and stories they share about the reinsurance industry. Work on building relationships with your cohort—they will be long-lasting!

Newer members should also seek to participate on panels and take leadership roles on committees. Speaking and contributing can raise a person's profile and facilitates valuable skill development. If there is a topic within reinsurance that interests you, seek to become a subject-matter expert on that topic and share your knowledge through speaking and publication!

Q: How can ARIAS continue to engage and support its members, especially the new generation?

Patrick Aul: ARIAS is doing well at engaging and supporting its members. It can continue to lead by staying at the forefront of emerging topics and offering substantive content; whether it be through formal conference sessions, webinars, or articles in the Quarterly. I appreciate the ongoing efforts around Ethics Advisory Opinions, proposed AI rules/guidance, and the promotion of neutral panels. Continuing to provide such guidance, as well as ensuring that the ARIAS Forms and Rules are generally maintained and updated, is very helpful. Some initiatives, such as the promotion of neutral panels, may be aspirational, but setting clear goals and steadily pursuing them is how progress

is made. Lastly, I think the conferences are very important. Continuing to pick desirable destinations and maintaining strong programming is essential and will keep engagement high.

Andrea Giannetta: One thing that ARIAS does really well is fostering in-person meetings at the conferences, and we can continue that momentum year-round by encouraging in-person events. The FLC's events this year are great. Looking to next year, especially for the new members, I think purely social events can be just as beneficial as the organization's conferences and workshops.

Linsey Routledge: With respect to supporting the new generation, ARIAS can be intentional about including, as appropriate, more FLC members on panels and other ARIAS committees. It may be worthwhile, if not already an ARIAS practice, to have liaisons from the FLC regularly engage with the various governance bodies of ARIAS. In addition, allowing FLC members to serve as panel moderators is great way to incorporate newer talent into conference presentations while they develop subject matter expertise. As always, seasoned members sharing their industry knowledge with newer members is invaluable.

Q: Do you have a favorite ARIAS memory?

Patrick Aul: My first ARIAS conference dinner was with Nick DiGiovanni, and his Locke Lord colleagues (now Troutman Pepper Locke). It was a welcoming experience, and I met people I still work with and keep in touch with today. There was also a lighthearted "house rule" that everyone had to tell a joke, which was an excellent icebreaker and a great way to get to know people in a more informal setting. I still clearly remember the stress of trying to think of a joke to tell to people I just met, as well as who was entertaining, who told what joke, and who found what funny.

Andrea Giannetta: I love the Spring Conferences and all the opportunities to interact with colleagues in relaxed settings, whether by the pool, beach, or at dinners. I enjoyed coordinating Enstar's sponsorship of the pickleball tournament at the 2024 conference in Puerto Rico. That was certainly a memorable experience!

Linsey Routledge: One of my favorite sets of ARIAS memories is from the most recent Fall Conference. It was wonderful to reconnect with people I had not seen in a while and meet others whom I had only interacted with on video calls. That in-person connection is a huge benefit of the conference—it can solidify and deepen relationships.

Q: How do you see the future of ARIAS and its role in the industry?

Patrick Aul: The future of ARIAS is strong. The recent Fall Conference showed a healthy mix of established participants and newer, younger members. I see ARIAS as the leading industry group for insurance and reinsurance arbitration participants, both in bringing important industry participants together and in providing practical training and continuing education on the issues that matter most to our industry.

Andrea Giannetta: ARIAS is well-positioned to continue playing a very important role in the industry. Confidence in our arbitration process is crucial, and we need ARIAS—perhaps now more than ever—to keep our community strong, adapt to industry shifts, and continue bringing in new participants.

Gilana Keller focuses her practice at Steptoe on complex litigation matters with a focus on insurance and reinsurance matters and commercial litigation. Gilana represents companies in insurance and reinsurance disputes, pending in state and federal court and before arbitration panels. These disputes have included representation of a leading life insurance carrier in arbitrations against reinsurers involving yearly renewable term (YRT) life reinsurance agreements and environmental insurance coverage.

Alfonse Muglia is a senior managing associate and member of Dentons' Litigation and Dispute Resolution practice. With a robust focus on complex commercial litigation, Alfonse specializes in matters involving insurance, reinsurance, product liability, and complex torts.

Michael Phillips advises clients at Arent Fox Schiff on various insurance-related matters, including complex coverage disputes, litigation strategy, and insurance regulatory compliance.

Social Media Losses: Emerging Coverage and Reinsurance Issues for Social Media Platform Claims

By Bryan McCarthy

I. Introduction

Every day, millions of consumers use social media websites or applications ("apps") provided by platforms like Meta (Facebook, Instagram), ByteDance (TikTok), Snap (Snapchat), and Google (YouTube). As of 2025, 253 million people in the U.S. utilized social media, which equates to four of every five internet users.[1] On average, Americans spend a total of two hours and nine minutes each day on social media. Nine in every ten U.S. teenagers report using YouTube[2] and more than half of all U.S. teens report using TikTok, Snapchat, *and* Instagram.[3]

Social media allows users to create and share content, form communities, and interact—typically enabled by algorithmic curation, feedback mechanisms (likes, comments), notifications, and collaborative tools. Additionally, most social media platforms contain some sort of "feed" where users can continuously scroll through content posted by

both friends and strangers. While social media can help people stay connected, more data is emerging that links excessive use to negative effects. Some of the allegedly detrimental impacts include:

- **Anxiety and depression:** Prolonged social media use may contribute to anxiety and depression.[4]
- **Negative social comparison:** Constant exposure to curated and idealized portrayals of others' lives can undermine self-esteem and well-being.[5]
- **Sleep disruption:** Excessive nighttime use can interfere with sleep, which is vital to mental health.[6]
- **Declining academic performance:** Distraction from learning responsibilities, which has an adverse effect on students' educational performance.[7]
- **Cyberbullying and harassment:** Online abuse can result in lasting emotional consequences.[8]

Because of these alleged negative impacts of social media, especially on pre-adolescents and young adults, social media companies have been sued by consumers and other interested parties. The suits often allege that the social media companies intentionally constructed their platforms in ways that promoted compulsive engagement and ignored the harmful impacts on consumers. Framing their platforms as "products," these companies have turned to their insurers to cover defense and indemnity for these suits. This product framing has key implications for insurance coverage, as well as reinsurance issues such as the occurrence/event definition, aggregation, allocation, and tower selection.[9]

"Because of these alleged negative impacts of social media, especially on pre-adolescents and young adults, social media companies have been sued by consumers and other interested parties."

II. Social Media Lawsuits

One example of suits against social media platforms is the multidistrict litigation pending in the Northern District of California, *In Re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* (the "Social Media Litigation"). Plaintiffs include individuals, local governments, and school districts. Plaintiffs allege that social media companies knowingly designed features to be addictive and that they intentionally targeted adolescents. Characterizing these features as product defects (that vary by the particular social media platform at issue) they focus on the exploitation of minors:

- **Algorithmically generated endless feed to keep users scrolling:** Social media companies made the choice to move to an "infinite scroll" interface, allowing users to just keep swiping down with no extra taps needed. Users don't have the opportunity to slow down and think about their next move. They are constantly being presented with more content.[10]
- **"Intermittent variable rewards" to intensify use:** Social media companies incorporate variable reward systems to increase engagement among users. This system functions like a slot machine or a gaming device, as it establishes a dopamine-driven feedback loop when users are "given" likes, shares, or comments. These incentives increase the probability of users continuing their online activities by encouraging "obsessive checking and habitual interaction."[11] This intermittent reinforcement can have signifi-

cant effects, especially on teenagers.[12]

- **Trophies to reward usage:** Social media users collect followers, views, and engagement metrics to measure their online reach.[13] Much like earning trophies in real life, accumulating social media engagement credentials gives users a sense of accomplishment. However, when the validation stops, users can experience anxiety, frustration, and even depression.[14] Visual depictions of engagement, through likes and comments and views, can also exploit social comparison between users. This can create an environment where users experience feelings of envy and lack of self-esteem.[15]
- **Incessant notifications that encourage repetitive account checking:** Social media platforms use a constant stream of notifications to encourage repetitive account checking. Users are prompted to check their profiles by alerts about new likes, comments or messages. Teenagers in particular find it challenging to resist the impulse to check social media due to this barrage of notifications, creating habitual use.
- **Inadequate age verification protocols:** Age verification protocols have proven to be "problematic," as they are either inadequate or overly invasive.[16] A recent survey from the Center for Democracy and Technology found that parents and teens find ID-based verification and facial recognition as "invasive and unreliable." Many consumers prefer a parent-centered approach where parents declare their child's age and consent to their child's use.[17]
- **Deficient parental control tools:** Parental control software is designed to protect minors from age-inappropriate content,[18] featuring tools for parents to block inappropriate category-based website content, as well as to deem certain websites acceptable (whitelists) and others that are blocked (blacklists), the ability to restrict access to the internet to a certain number of hours per day, or entirely block specific apps, regardless of the time of day, or usage volume.[19] Parental control software is not always effective, and each comes with its own set of limitations.[20] A child may simply use another device without parental controls. The software may not catch every instance of potential risks or inappropriate behavior that a minor may encounter online.

The plaintiffs in the Social Media Litigation generally seek relief in the form of changed behavior by social media companies, including by modifying their practices and warning users of potential harm. Some of the plaintiffs seek damages for bodily injuries suffered by individual users, including suicides due to alleged social media addiction. Some government entities are seeking direct compensation for expenses they have incurred because of social media usage, including costs for mental health services and physical damages to facilities resulting from teen participation in destructive social media "challenges."

"The plaintiffs in the Social Media Litigation generally seek relief in the form of changed behavior by social media companies, including by modifying their practices and warning users of potential harm."

III. Insurance Coverage Considerations

The Social Media Litigation and other lawsuits relating to alleged harms from social media potentially implicate coverage under many standard commercial general liability policies. And where policies contain a duty to defend, that duty is broadly construed and the insurer must generally accept the allegations in a complaint as true for the purposes of determining its obligations.

Coverage A. Bodily Injury or Property Damage

As a threshold issue, to implicate either a duty to defend or a duty to indemnify under a commercial general liability policy, the allegations against a given insured must qualify as "bodily injury" or "property damage" under Coverage A, and there must be an occurrence.

While the Social Media Litigation includes claims arising from suicides allegedly caused by social media addiction, which is a physical harm, most claimants allege emotional distress without specific physical harms. Whether or not emotional distress qualifies as bodily injury requires a specific jurisdictional analysis. The majority rule is that mere emotional distress without a corresponding physical injury does not constitute an occurrence, while a minority of jurisdictions recognize pure emotional distress as bodily injury. However, this analysis can also be policy-language specific, as some CGL policies have definitions of bodily injury that explicitly include emotional distress.

The allegations of the Social Media Litigation generally do not implicate property damage, as CGL policies often limit the definition of property damage to tangible property. To the extent the Social Media Litigation may allege damage to a computer or electronic device, this may qualify as property damage, but not if the allegations assert damage to or loss of use of software or electronic data.

The insurer must determine if the allegations within the complaint qualify as an "occurrence" under the relevant policy. Generally, an occurrence is defined as an "accident" in CGL policies.[21] The way a court interprets "occurrence" under the applicable jurisdictional law is key, since the types of allegations in the Social Media Litigation generally involve intentional acts by social media companies.[22] However, some courts have focused on foreseeability and found, for example, that injuries from cyberbullying may be unforeseeable and therefore may qualify as an occurrence.[23]

Coverage B. Personal and Advertising Injury

The allegations within the Social Media Litigation may implicate coverage under personal and advertising injury within a CGL policy. Personal and advertising injury means injury, including consequential "bodily injury" arising not from an "occurrence" but rather from a specific enumerated "offense." Enumerated offenses include libel, written publication of material that violates a person's right of privacy, the use of another's advertising idea in an advertisement, or infringing on another's copyright, trade dress or slogan in an advertisement. The potential application of personal and advertising injury from the Social Media Litigation is impacted by Section 230 of the Communications Decency Act of 1996. This Act protects online platforms from liability for the publication of third-party content by their users. This may ultimately shield social media companies from liability for allegations related to third-party content within the Social Media Litigation. But immunity under Section 230 likely does not extend to social media companies' liability for platform *features*. Insurers must perform a careful analysis of potential coverage related to such claims, as at a minimum, there may be a duty for carriers to defend claims regardless of the ultimate findings of liability.

Exclusions

If allegations from the Social Media Litigation ultimately qualify as an "occurrence" under coverage A or as an enumerated "offense" under coverage B, the next step of the analysis is to determine if the allegations are subject to an applicable policy exclusion. The most likely exclusions that would apply to the Social Media Litigation are the Expected/Intended exclusion under Coverage A., or the "Knowing Violation of Rights of Another" or "Material Published with Knowledge of Falsity" exclusions under Coverage B. Other exclusions that may need to be examined include "Violation of Statutes" exclusions or professional services exclusions.

Other Insurance Clauses

Another step in the coverage analysis is to determine if there are applicable policies beyond just standard CGL, excess, or umbrella policies. For example, a Cyber Risk policy may provide potential coverage for some of the allegations within the Social Media Litigation. If coverage is triggered on multiple policies, then further analysis would be needed to determine potential allocation of loss or apportionment of de-

fense costs. Cyber policies are generally reimbursement policies, whereas CGL policies generally require the carrier to pay defense and indemnity costs directly. Also, CGL policies may have a broader duty to defend the insured than a cyber risk policy.

The Hartford Cases

Many of these coverage issues are novel in the context of the Social Media Litigation, and more coverage litigation over these issues can be anticipated. Already, Hartford Casualty Insurance Company and Sentinel Insurance Company have filed an affirmative declaratory judgment action in Delaware federal court regarding the Social Media Litigation. Hartford agreed to defend certain lawsuits involved in the Social Media Litigation under a reservation of rights but denied coverage for other lawsuits. Specifically, Hartford denied coverage for lawsuits where alleged bodily injury took place outside of the relevant policy periods of Hartford policies. Hartford additionally denied coverage for certain lawsuits filed by government/school district plaintiffs because the damages sought do not qualify as "damages" as defined by the policy, but are for general, non-derivative economic losses or statutory violations. This litigation is still in the pleadings stage, so the multiple coverage issues in question have not been fully developed yet.

IV. Reinsurance Coverage Issues

Because of how new these claims are, reinsurance layers have not yet been implicated by the Social Media Litigation. But certain analogous situations, such as product-liability aggregation and continuous-injury allocation jurisprudence, provide guideposts that courts and arbitral panels are likely to apply. The issues most likely to influence outcomes include: (i) how treaties define "Loss Occurrence" and whether they require aggregation through a "series arising out of one event"; (ii) allocation provisions providing direction on claims spanning multiple policy periods; (iii) "sole judge" language that gives the cedent discretion to define the event; (iv) notice requirements and their enforcement; (v) the inclusion of declaratory judgment costs as Allocated Loss Adjustment Expenses ("ALAE"). The iterative nature of social media platform design and the continuing nature of the alleged injuries will likely be the focus of the reinsurance analysis.

Occurrence and aggregation: What is the "event"?

Much like in the underlying cases, the key issue for reinsurance coverage is the "occurrence" definition and whether the reinsurance treaty requires aggregation of claims arising out of the same event. This is because many reinsurance treaties include language similar to:

> Loss Occurrence means any one disaster or accident or loss or series of disasters or accidents or losses arising out of or caused by one event.

In these treaties, "event" is often not defined, which leads to the question of what makes up "one event" for purposes of the loss. Depending on the answer, claims may or may not be aggregated, to varying degrees. This exact issue of aggregation has arisen before in relation to asbestos claims.

In analogous product disputes, like asbestos cases, courts and tribunals have sometimes adopted "placement into the stream of commerce" as the controlling event when wording is ambiguous. *Amerisure Mutual Insurance Co. v. Everest Reinsurance Co.* is illustrative: the tribunal treated product placement as the relevant event for cession purposes, thereby permitting aggregation of many claims as a single occurrence per policy year in the face of ambiguity.[24] That logic maps naturally onto social media if cedents define the causative agency as the deployment of core engagement features—e.g., infinite scroll and algorithmic reward structures—rather than the downstream, user-specific manifestations of harm.

Another issue with the definition of "occurrence" is whether the losses are all *traceable* to the same event. Reinsurers may argue that changing features on social media platforms and the development of new algorithms break the causal chain between losses. Inclusion of a "sole judge" clause in a reinsurance contract would give the cedent discretion in defining the event, but arbitral and judicial practice may impose a reasonableness constraint.

Allocation Across Multiple Policy Periods

Another major issue is the allocation of losses and how that allocation impacts the reinsurance cession. Allocation may be complicated in matters like the Social Media Litigation because the occurrence or loss is a cumulative harm over time. In other long-tail contexts, courts have favored pro rata allocation across exposure years for progressive, indivisible injuries. For example, *Owens-Illinois* spread liability for asbestos losses across all years in which exposure occurred rather than concentrating it in a single period.[25] *Rossello* likewise applied time-on-risk pro rata for

continuous injuries caused by exposure to asbestos.[26]

In the Social Media Litigation, where claimants allege extended engagement and gradual harm from a social media platform, a continuous trigger and pro rata allocation across the insured's triggered policy years is a likely judicial response. But how might this affect the reinsurance cession for those losses? Many reinsurance treaties contain a follow-the-settlements or follow-the-fortunes provision that frames how much deference the reinsurer owes to the cedent's coverage decisions and settlement structures, including allocation decisions. *Travelers Cas. & Sur. Co. v. Ins. Co. of N. Am.*, 609 F.3d 143 (3d Cir. 2010). In the absence of one of these provisions, reinsurers may attempt to scrutinize a cedent's loss allocation decision more closely.

The Role of Notice

Notice is another likely flashpoint. Many reinsurance contracts impose prompt-notice obligations, sometimes as a condition precedent, and some jurisdictions excuse reinsurer performance for late notice even without a showing of prejudice. *See Pacific Employers Insurance Co. v. Global Reinsurance Corp. of America*, 693 F.3d 417 (3d. Cir. 2012). Social media claims present a practical challenge here: injuries emerge gradually and the scale of liability can be difficult to discern early.[27] Courts may look to the growth of multi-district litigation ("MDL") filings, reserve development, and settlement posture to evaluate when a cedent reasonably should have foreseen reinsurance involvement. In anticipation, cedents should monitor new loss developments, provide timely substantive updates consistent with treaty requirements, and invite dialogue on exposure modeling as claims mature.

Inclusion of Declaratory Judgment Expenses as Allocated Loss Adjustment Expenses (ALAE)

Given the novelty of many of the coverage issues implicated by the Social Media Litigation, a significant amount of protracted coverage litigation may result over the coming years, such as the Hartford Cases noted above. When considering social media claims, insurers and reinsurers should be aware of treaty provisions regarding the treatment of declaratory judgment expenses. Declaratory judgment expenses may include both affirmative declaratory judgment litigation filed by a carrier as well as the defense of coverage litigation filed against a carrier. Declaratory judgment expenses may be included in the definition of "loss adjustment expense," and certain other provisions may cap exposure to declaratory judgment expenses, so it is important to carefully review the specific treaty terms. There may be scenarios where the declaratory judgment costs for a given claim related to the Social Media Litigation rival losses ultimately paid by an insurer for those claims.

V. Conclusion

Social media claims have the potential to raise novel issues for insurers and reinsurers alike. As these claims develop, courts and arbitrators are likely to take a pragmatic, analogical approach. For reinsurance recovery, aggregation arguments centered on the deployment of core features may succeed, especially under ambiguous wording and with a "sole judge" clause, but the introduction of new features or releases could fracture the causal chain. Pro rata allocation across exposure years is the probable default for bodily injury claims rooted in continuous engagement. The timing of reinsurer notice will draw close scrutiny in jurisdictions with stricter rules. Above all, carefully articulated narratives of causation, losses aligned to specific social media platform versions, and principled allocation across lines and years will position cedents to navigate disputes when social media suits begin to reach the reinsurance layers.

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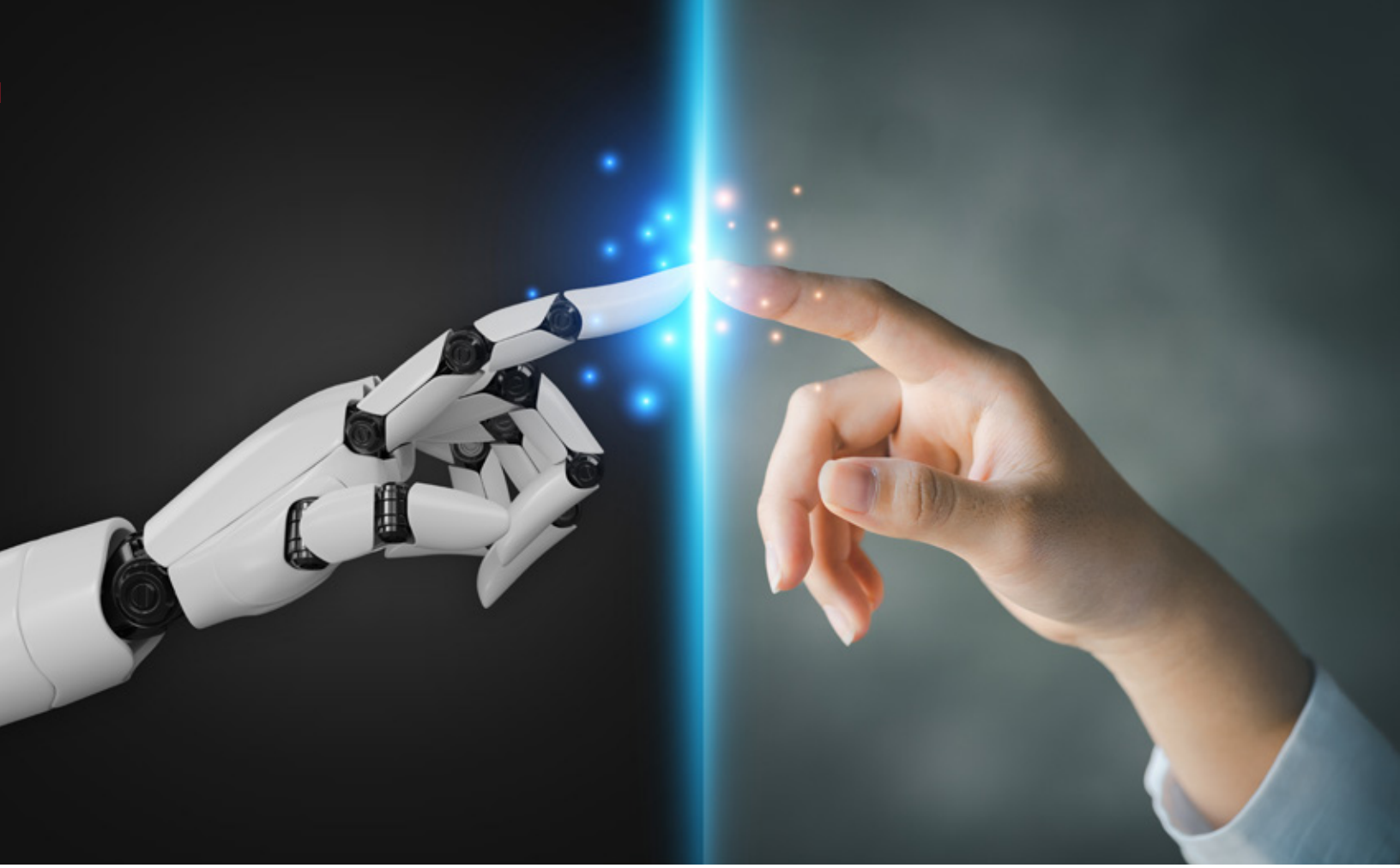

Generative AI and Trial Advocacy: Back to Basics?

By Pat Hofer, Jared Clapper, Bret Kabacinski, and Petra Starr

Technological advances in generative AI may lead to a resurgence in the importance of traditional trial advocacy, as video evidence becomes less trustworthy and judges and juries seek assurances of authenticity that only live humans can provide.

The past several years have seen the proliferation, and later refinement, of web-based tools that can take a user-generated text description and generate a short video that fits that description. OpenAI Sora (now Sora 2), Google Veo (now Veo 3.1), Meta Vibes, and Adobe Firefly are all products that generate video using AI, with other competitors surely to follow as the generative AI space matures. These innovations raise profound evidentiary challenges for courts and arbitrators in all types of cases, including insurance and reinsurance cases.

When these tools were first released in late 2024, the immediate reactions were mixed (as with many generative AI products): amazement, but also skepticism. The videos were good—often good enough to look real at first glance—but flaws could be found upon closer examination. But in the past year, several new iterations of those tools have been released, and the output has only improved, to the point where in a recent *New York Times* quiz that asked readers to identify whether short videos were generated by AI or not, the rate of correct responses hovered around 50% for most videos (with one AI-generated video only being identified as AI by 32% of readers).[1] In other words, for many videos, picking out whether they were generated by AI is no more likely than predicting a coin flip. And, given that these products have been in the

marketplace for less than a year, there is every reason to believe that the videos generated by them will only improve.

The development of generative AI video, accessible to anyone with an OpenAI or Google subscription, has broad implications for how society treats information contained in videos.[2], [3] But perhaps nowhere may be more affected than courts trying to adjudicate factual disputes. For years, video has been seen as the gold standard of evidence—unassailable, even by contradictory live testimony, even for the purpose of granting summary judgment.[4] Indeed, a good story, without video to back it up, was often not seen as good enough by today's jurors, especially when a video would be expected.[5] But what happens when the video itself could be fabricated, and fabricated so well that no expert or computer can detect that it is fake? Video is no longer the gold standard of evidence, and indeed it may be treated as *unreliable*. We therefore may have come full circle: The means of proof predating video technology—effective advocacy by attorneys and coherent testimony by witnesses—may be the only tools available to fill the credibility gap left by the rise of generative AI.

Historically, introducing video evidence at trial has been simple and straightforward. In federal courts, under Federal Rule of Evidence 901(a), the proponent of a piece of evidence must present sufficient proof to support a finding that the item is what they claim it to be, and with video evidence, usually by testifying that the video accurately portrays what they observed or that the video is otherwise authentic so what it shows is true. Rule 901(b) outlines various methods for establishing authenticity, including testimony from a knowledgeable witness, circumstantial evidence, and descriptions of systems or processes that reliably produce accurate results (typically used in the absence of witness testimony corroborating what is seen on the video, such as for a store security camera recording an overnight burglary). These standards are intentionally flexible, designed to accommodate a wide range of electronic evidence formats.

However, as generative AI tools become more sophisticated and widely accessible, the reliability of these traditional methods of authentication should be increasingly called into question. And even if a video is shown by proper means to be authentic for use as evidence, a jury may not buy it, no matter what the judge and lawyers say. The ability to fabricate convincing images undermines the evidentiary weight of digital visuals, even when they meet the formal requirements of Rule 901. This tension sits at the heart of the current debate over how courts should evaluate digital evidence in the age of AI.

Further complicating matters, the Federal Rules of Evidence—specifically Article X, which governs the contents of writings, recordings, and photographs—provide broad definitions and standards that were designed for more traditional digital formats. Federal Rule of Evidence 1001(1) defines writings and recordings to include magnetic, mechanical, or electronic recordings. Federal Rule of Evidence 1001(3) states that data stored in a computer, when printed or displayed in a readable format and shown to accurately reflect the data, qualifies as an "original." Rule 1001(4) further clarifies that a duplicate, whether created through mechanical or electronic reproduction, is admissible if it accurately reproduces the original. Under Rule 1003, such duplicates are generally admissible unless there is a genuine question about the

"The ability to fabricate convincing images undermines the evidentiary weight of digital visuals, even when they meet the formal requirements of Rule 901."

authenticity of the original or if admitting the duplicate would be unfair.

These provisions were crafted to accommodate the digitization of information and use it as evidence, including photographs stored and reproduced electronically. However, now, the underlying assumption that a digital image accurately reflects reality is no longer guaranteed. The legal framework, while flexible, was not built to anticipate the ease with which synthetic images can be created and passed off as authentic. As a result, courts must now grapple with the possibility that even images meeting the formal criteria for admissibility may be fundamentally unreliable, raising urgent questions about how to establish and preserve evidentiary integrity. A proposal to amend these rules is currently under consideration and is discussed in greater detail below.

> "The problem of fake evidence is not new to courts."

The problem of fake evidence is not new to courts. courts have dealt with allegations over fake evidence for centuries (for example, forged documents). In recent decades, those allegations have expanded to include digitally edited photographs or video, using a program such as Adobe Photoshop. When digital photography first emerged as a replacement for traditional film, courts and attorneys were forced to confront new questions about authenticity, manipulation, and evidentiary reliability. Unlike film negatives, which offered a physical and relatively tamper-resistant record, digital images could be altered with relative ease, raising concerns about whether they could be trusted in court. Yet despite these early doubts, digital photography quickly became the norm, and legal standards adapted accordingly. And courts have figured out how to adjudicate the allegation that the evidence was fake, often with the help of forensic experts.[6]

Around the same time that courts were adapting to the rise of digital evidence in the early 2000s, the US faced a parallel issue of eroding public trust of the reliability of digital records in another high-stakes arena: presidential voting. The 2000 presidential election exposed deep concerns about the accuracy and transparency of voting systems, particularly in contrast to traditional paper ballots. This resulted in a rise of public distrust of digital voting mechanisms, which threatened the integrity of the democratic process.

In response, many jurisdictions adopted hybrid systems that paired digital voting machines with paper backups, as physical records can be audited and recounted if disputes arose.[7] Today, many people feel more confident marking and submitting a physical ballot. The security of paper-based systems relies on a verifiable chain of custody, including secure storage, careful transport, and human oversight. Ultimately, it was the paper trail that provided the necessary assurance of integrity, reinforcing the idea that digital systems, while efficient, must be anchored by verifiable originals. Today, most polling places have adopted paper components in part to assure public trust in the security and authenticity of their voting.

The departure from purely paper voting to a hybrid of electronic voting mirrors the legal system's current struggle with AI-generated image evidence. Just as digital voting required a tangible safeguard to maintain public trust, courts today must find ways to validate digital photographs and videos in an era where manipulation is not only possible but increasingly undetectable. For its part, Google has developed an AI "watermark" that is embedded in all of its AI-generated content and is (according to Google) difficult to tamper with.[8] But unless *every* provider of generative AI services employed similar tamper-proof watermarks, the absence of an AI watermark would not be sufficient to prove that an image or video was not generated by AI. The lesson is clear: digital convenience must be balanced with evidentiary rigor. Whether in elections or litigation, the credibility of digital records depends on the ability to trace, verify, and, when necessary, revert to a trusted source.

The Federal Rules of Evidence, including Rule 901 and Article X, were interpreted to accommodate digital formats, recognizing that images stored electronically could still be authenticated through witness testimony, metadata, and system-generated records. *See e.g., State v. Hayden*, 90 Wash. App. 100, 950 P.2d 1024 (1998) (holding that digitally

enhanced images of latent fingerprints and palm prints were admissible under the Frye standard, as there was no substantial disagreement among qualified experts regarding the reliability of the enhancement techniques or the software used by trained professionals). The *Hayden* court found "there does not appear to be a significant dispute among qualified experts as to the validity of enhanced digital imaging performed by qualified experts using appropriate software, we conclude that the process is generally accepted in the relevant scientific community." *Id.* at 1028. Still, where there is a question over whether a piece of evidence is genuine, the task of determining what weight to put on that evidence most often falls to the finder of fact—it is simply one more item in the evidentiary stew that jurors must consider to reach a verdict.

Arbitration forums may face unique challenges when AI-generated evidence is introduced. Unlike courts, arbitral panels often apply more flexible evidentiary standards, which could heighten concerns about reliability and fairness. Parties should anticipate protocols or expert testimony to address these issues in arbitration proceedings. Arbitrators may need to weigh whether to adopt stricter evidentiary rules or rely on expert-driven frameworks similar to those proposed under Rule 707 in litigation. These developments could increase the complexity and cost of arbitration, requiring specialized arbitrators with technical expertise and potentially influencing how insurers and reinsurers structure dispute resolution provisions going forward.

AI-generated media presents a deeper challenge than previous generations of dubious evidence, however, in that commentators fear that as time goes on, experts will not be able to distinguish AI-generated images from genuine images using computer-based tools. With no expert testimony to rely on, courts and jurors are left with little guidance beyond their own eyes (which, as shown above, can deceive them). If a video authentically portrays events that a person can testify to, the admissibility standards for evidence should be sufficient—if a person comes into court and says that the video shows what they saw or that it was recorded using a reliable method, that video should come into evidence (if it is otherwise admissible). But where no one can testify to the authenticity of a video, lawyers could be faced with having to prove facts the old-fashioned way: with eyewitness testimony, and without reliance (or over-reliance) on video evidence, because judges and jurors don't trust video evidence like they used to. The *only* method available to fill the credibility gap, therefore, may be conventional trial advocacy — that is, telling a compelling story and effectively examining witnesses to enhance (or detract from) the credibility of the documentation or pictorial evidence that the jury is also presented with. If a story makes sense, a video backing that story up will effectively support it. But if a story is only held together by dubious reasoning and dodgy witnesses, a video corroborating it may not be enough. The advent of AI generative media is, therefore, a "Back to the Future" moment for trial lawyers, as it may diminish the crutch that video evidence has become, and may place a premium on lawyers that are effective storytellers and advocates, and not play-by-play announcers over a video.

> "Arbitration forums may face unique challenges when AI-generated evidence is introduced."

Recognizing these challenges, the US Judicial Conference's Advisory Committee on Evidence Rules ("Advisory Committee") has proposed two paths for updating the Federal Rules of Evidence. The first proposal was to amend Rule 901 to establish a specialized authentication process for suspected deepfakes (AI-generated video). The second approach, and the Committee's preferred approach, introduces a new rule, Rule 707, which governs machine-generated evidence by applying expert witness standards to assess reliability. Ultimately, the Advisory Committee chose not to amend Rule 901, with several members favoring a "wait-and-see" approach as to amending Rule 901.

Under Rule 707, AI and other machine-learning evidence offered at trial without an expert witness would be subjected to the same reliability standards as expert witnesses. Such evi-

dence could be admitted only if it: (1) assists the trier of fact, (2) is based on sufficient facts or data, (3) is the product of reliable principles and methods, and (4) reflects a reliable application of the principles and methods to the facts. Rule 707 creates a framework for opposing parties to challenge the reliability of AI-generated evidence by assessing how the producing system operated and how its methods were applied to the specific facts of the case. Notably, a Committee Note clarifies the scope of Rule 707 machine learning to mean "an application of artificial intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed."

In May 2025, the Advisory Committee voted 8–1 in favor of seeking public comment on the proposed Rule 707. By August, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States released Rule 707 for public comment, with the period open until February 16, 2026. Critics caution that Rule 707 applies only to evidence that the proponent acknowledges was created by AI, and not to evidence whose authenticity is in dispute. Thus, it does little to help courts avoid deepfakes or other falsified evidence when authenticity is contested. Nevertheless, Rule 707 marks an important first step at the federal level to adapt the rules of evidence to the increasing use in court of AI-generated materials. The adoption of Rule 707 could also influence how insurers evaluate litigation risk and reserve for claims, as increased pretrial motions and expert testimony may drive up defense costs subject to coverage disputes. In addition, insurers and reinsurers may need to revisit underwriting guidelines and policy language to address the heightened uncertainty surrounding evidentiary reliability.

> "As courts and arbitration panels grapple with the evidentiary challenges posed by generative AI, these developments will echo beyond litigation strategy into the insurance and reinsurance markets."

In the event that Rule 707 is ultimately adopted, its practical impact could be significant. Certain cases may see more pretrial motions, expert testimony, and evidentiary challenges, driving up both complexity and cost. Lawyers will need to develop new strategies for authenticating digital evidence and countering AI-related objections, while judges will face the task of applying expert witness standards to technologies that evolve rapidly. In the short term, implementing the rule may drive up both the cost and complexity of introducing AI-generated evidence in court. In short, Rule 707 may not resolve every issue posed by generative AI, but it signals a shift toward a future where courts must balance technological innovation with the fundamental need for reliable evidence.

As courts and arbitration panels grapple with the evidentiary challenges posed by generative AI, these developments will echo beyond litigation strategy into the insurance and reinsurance markets. Questions of authenticity and reliability can drive up defense costs, trigger coverage disputes, and even lead to arbitration between insurers and insureds over allocation of risk. In short, the rise of AI-generated evidence is not only reshaping trial advocacy—it is redefining how stakeholders across the legal and insurance ecosystems assess exposure, resolve disputes, and safeguard integrity in an era of technological uncertainty.

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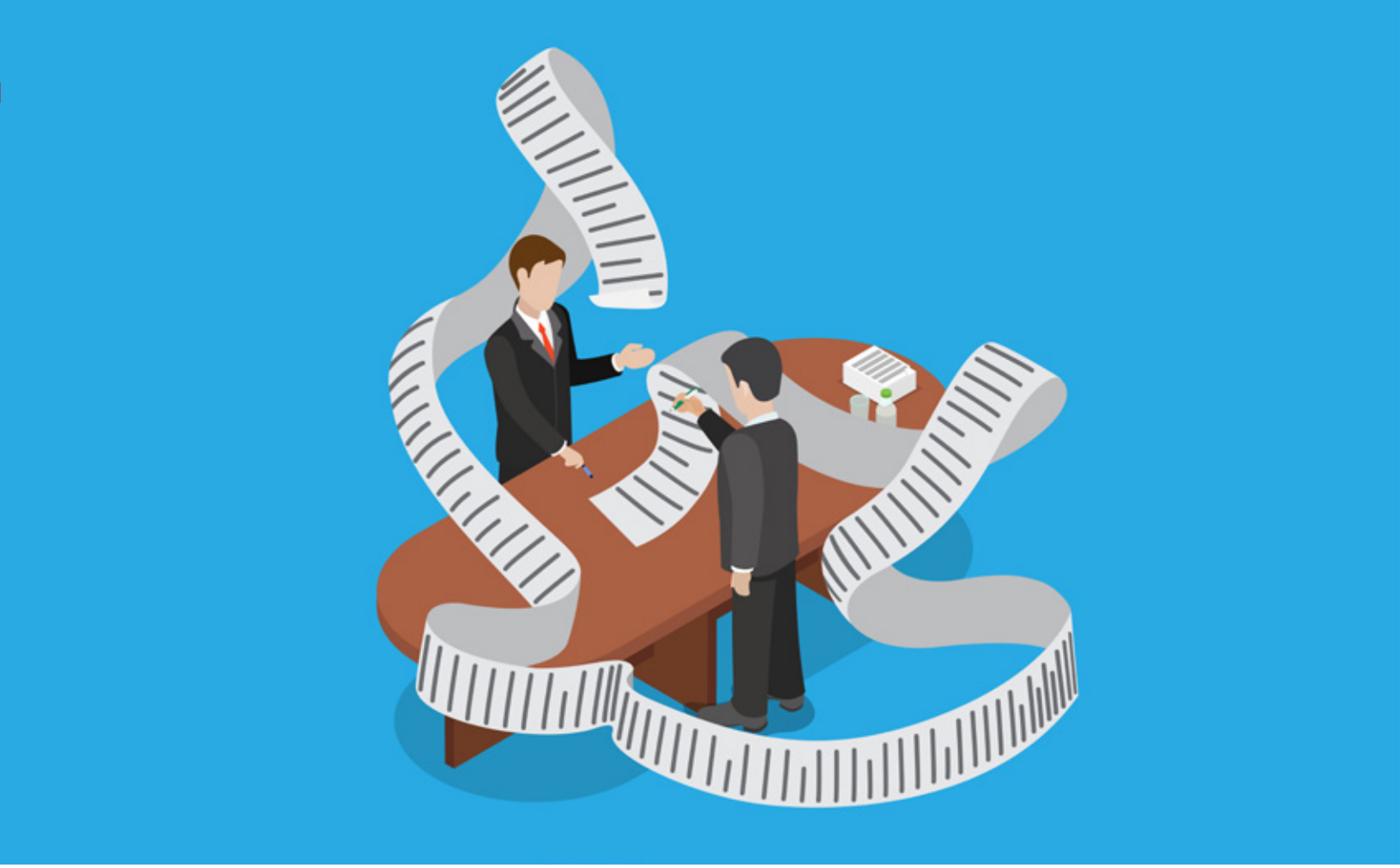

Georgia Tort Reform

By Frank DeMento and Howard Freeman

In an effort to level the playing field in the courtroom, stabilize insurance costs, and increase transparency and fairness, Georgia passed new tort reform legislation in April 2025 (SB68 & SB69). The changes attempt to push back against a wide range of strategies used by the plaintiffs that had turned Georgia into a "judicial hellhole."

Substantive Changes

1. Limits on Anchoring

Problem: Plaintiff attorneys "anchor" the value of their client's non-economic damages (i.e. pain and suffering) to irrelevant comparisons such as the cost of a yacht, plane, or valuable art. After the plaintiff suggests a number, jurors typically accept the number as a reference point causing juries to reach awards that are significantly higher than the amount they would have awarded if left to determine a just and reasonable award on their own.

Reform: The amount of non-economic damages must be rationally related to the evidence.

2. Phantom Damages

Problem: Plaintiffs could recover for all medical services *billed* (regardless of whether or not those bills were ultimately *paid* by the plaintiff or their health insurance). However, defendants were prohibited from introducing evidence of the amount paid and accepted for those medical services.

Reform: Limits medical damages to the reasonable value of medically necessary care and permits evidence of both the amount billed and the amount actually paid.

3. Seatbelt Rule

Problem: Defendants were barred from introducing evidence of plaintiffs' failure to wear a seat belt, hindering the ability to argue comparative negligence and causation.

Reform: Permits evidence of plaintiffs' failure to wear a seat belt.

4. Negligent Security
Problem: Property owners and occupiers were being held liable for injuries to visitors or customers, when a crime was committed against a visitor or customer on their premises.

Reform: A reasonable share of fault must be apportioned to the third-party criminal actor and vague foreseeability standards have been replaced with statutory factors.

Procedural Changes

1. Motion to Dismiss in Lieu of an Answer
Problem: If defendants wished to move to dismiss a suit after service of a complaint, they were required to file both an answer and motion. Discovery would proceed as the motion was pending.

Reform: Allows defendants to move to dismiss, in lieu of filing an answer, allowing the parties to avoid costly discovery in cases that will be dismissed.

2. Plaintiff's Ability to Voluntarily Dismiss
Problem: Plaintiffs could voluntarily dismiss their case without prejudice up until the first witness was sworn in at trial thereby allowing plaintiffs to work up a case, engage in expensive discovery, and drop the case at trial with the ability to refile and get a second bite at the apple.

Reform: Limits the time for plaintiffs to voluntarily dismiss their case without prejudice to 60 days after the answer is filed.

3. Double Recovery of Attorney Fees
Problem: Plaintiffs could recover the same attorneys' fees, court costs, or expenses of litigation under more than one statute for the same case, resulting in what was called "double recovery."

Reform: Prohibits recovery of the same fees, costs, or expenses unless duplicative recovery is specifically authorized by statute.

4. Bifurcation of Trials
Problem: In an effort to garner sympathy and sway jurors, plaintiff attorneys would present evidence of plaintiff's injuries before liability had been established.

Reform: Bifurcates trials – one trial for liability followed by a separate trial for damages, thereby shielding the jury from arguments pertaining to damages before liability is adjudicated.

Third Party Litigation Funding

This is a rising problem, which Georgia has directly addressed.

1. Registration with the Department of Banking and Finance
Problem: TPLF was an opaque unregulated industry used by national and foreign funders to effect Georgia litigation.

Reform: Funders must register with the Georgia Department of Banking and Finance. Funders affiliated with any foreign government, person, or entity that is a federally designated foreign adversary are prohibited from registering. Failure to register constitutes a felony, punishable by one to five years in prison and/or a fine up to $10,000.

2. Discoverability of Funding Agreements
Problem: Defendants were unaware if TPLF was involved in their case, preventing defendants from knowing who was controlling the litigation and settlement decisions.

Reform: The existence and terms of funding agreements providing $25,000 or more are discoverable.

3. Control of the Litigation
Problem: Litigation funders were controlling the litigation, deciding when and whether cases would be settled.

Reform: Litigation funders are prohibited from controlling the litigation. They cannot make decisions as to legal representatives, expert witnesses, litigation strategy, or settlements.

4. Frivolous Lawsuits
Problem: Litigation funding turned lawsuits into speculative investments with limited downside risk to funders.

Reform: Funders that provide $25,000 or more may be held jointly and severally liable for the costs or sanctions from frivolous litigation.

5. Consumer Protection
Problem: Litigation funding involves complex financial agreements that can place consumers at risk of being taken advantage of.

Reform: The TPLF agreement must be memorialized in a written contract that contains all material terms and conditions, including disclosures that explain: the right to cancel the agreement within five business days from execution or the date of receipt of financing; the funder may not receive

an amount greater than the amount received by the plaintiff after attorney fees and costs are paid; the funder has no right to influence or make decisions in the settlement and/or handling of the matter; the consumer may choose its attorney without fear of punishment by the funder; and if the case is lost or the damages awarded to the plaintiff are not enough to pay the money owed to the funder, the consumer shall not owe anything in excess of its recovery.

Analysis

This tort reform legislation should assist in limiting liability, reducing outsized verdicts, and removing Georgia from its place among American "judicial hellholes." Only time will tell how effective the legislation will be.

> "This tort reform legislation should assist in limiting liability, reducing outsized verdicts, and removing Georgia from its place among American 'judicial hellholes.'"

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Collateral Estoppel Effect of Arbitration Award on a Different Reinsurer

***Amerisure Mut. Ins. Co. v. Swiss Reinsurance Am. Corp.*, No. 24-1492, 2025 U.S. App. LEXIS 29098 (6th Cir. Nov. 4, 2025)**

By Robert M. Hall

Amerisure issued primary and umbrella policies to its insured Armstrong and obtained reinsurance on the umbrella policies from several reinsurers. Amerisure paid defense costs in addition to the limits of the umbrella but one of its reinsurers, Allstate, declined to indemnify Amerisure for those costs. Amerisure and Allstate arbitrated a number of issues with mixed results. The Panel declined to order Allstate to reimburse Amerisure for defenses costs in excess of the umbrella limits. Nonetheless, Amerisure sued another similarly situated reinsurer, Swiss Re, for defense costs in addition to the umbrella limits. The Allstate and Swiss Re facultative certificates had identical relevant provisions, but Swiss Re's certificates did not include an arbitration clause.

Swiss Re argued that Amerisure was collaterally stopped from relitigating the defense cost issue by the prior arbitration award. Amerisure countered that the arbitration panel did not consider or rule upon its argument that the

umbrella policy obligated it to "drop down" due to the exhaustion of the underlying policy and to pay additional defense costs. The court, however, found that this issue was presented to the panel, which implicitly rejected it. In any case, Amerisure had the opportunity to fully present its arguments on point to the arbitration panel and "is not entitled to rejigger its arguments" for the court. The court further rejected arguments concerning Amerisure's lack of ability to appeal from the arbitration award and the panel's ability to abstain from judicial formalities.

The court found that Amerisure received a fundamentally fair hearing from the panel and affirmed the underlying court's grant of summary judgment in favor of Swiss Re.

Robert Hall spent twenty years as in-house counsel for various insurers and reinsurers, most recently as senior vice president and general counsel of a major reinsurer. He is a former partner of a leading law firm and currently is an ARIAS-certified arbitrator and umpire, an expert witness and a frequent author whose articles can be found on his website: robertmhalladr.com.

Case Summaries

Court Looks at Notice Provisions When There's Potential for Claims

Unified Life Insurance Company ("Cedent") argued in the Northern District of Texas that U.S. Fire Insurance Company ("Reinsurer") breached the reinsurance treaty at issue by failing to pay its share of a settlement agreement. The Reinsurer argued that the Cedent had, in fact, breached the reinsurance treaty by failing to comply with the notice provision of the treaty and by failing to provide "prompt" notice thereunder.

The underlying claim in question arose out of a Short-Term Medical Policy issued by the Cedent in February 2016 to an individual, Charles Butler, who six months later received a cancer diagnosis. Butler sued the Cedent in April 2017, arguing that the insurer had discounted his medical bills to lower than "reasonable and customary charge[s]." He later amended his complaint in December 2018 to add class allegations. Less than a year later, the district court in Montana granted summary judgment on the individual claims and granted class certification. The Cedent then sought interlocutory review from the Ninth Circuit, which denied review on November 21, 2019. It was not until December 2019, and only after the Ninth Circuit decision, that the Cedent notified its Reinsurer of the Butler claim 2019. The Reinsurer then contributed to the defense after its receipt of notice.

Case: *U.S. Fire Ins. v. Unified Life Ins. Co.*, Case No. 24-10392 (5th Cir. Aug. 14, 2025)

Issue Discussed: Texas law on interpretation of notice provisions in reinsurance contracts

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

Date Decided: August 14, 2025

Issue Decided: Whether a notice provision that required the cedent to give notice to its reinsurer promptly of all claims that "in the opinion of" the cedent may result in a claim under the treaty involved a subjective or an objective standard for purposes of assessing a reinsurer's late notice defense.

Submitted By: Stephen M. Turner, Senior Managing Associate, Dentons US LLP

Notably, to that point, the Cedent had not retained any experts for its prior challenge to class certification. The Reinsurer urged the Cedent to retain experts and file a motion for reconsideration. In March 2021, the district court in Montana denied the motion for reconsideration filed by the Cedent and struck its newly filed expert report. Shortly thereafter, the Cedent settled the class action for $8 million and then sought payment from the Reinsurer, who refused based on late notice grounds.

A declaratory judgment action filed in the Northern District of Texas followed. There, the Court was asked to analyze a notice provision that stated: "The [Cedent] shall also advise the Reinsurer promptly of all Claims which, in the opinion of the [Cedent], may result in a Claim hereunder and of all subsequent developments thereto which, in the opinion of the Cedent, may materially affect the position of the Reinsurer." The Cedent argued this provision required it to provide notice when in its subjective opinion it believed that the Butler claim would result in a reinsurance claim. The Reinsurer argued that the position advanced by the Cedent would effectively read out the notice provision from the treaty and that, therefore, an objective standard should apply. The district court agreed with the Cedent that a subjective standard should apply in view of the subjective language contained in the applicable treaty provision, and that, even if it did not apply, the Reinsurer had failed to demonstrate prejudice from the purportedly late notice. An appeal followed.

The Fifth Circuit reversed. First, the Fifth Circuit found that an objective standard should govern the late notice issue rather than a subjective standard for three reasons:

> First, an objective reading best interprets the Treaty as a whole and in light of background principles of quota share treaty reinsurance. Second, Texas authority, albeit sparse, suggests that Texas courts would agree that an objective standard controls. Third, most other jurisdictions faced with similar provisions apply an objective standard.

In reaching this decision, the Court essentially read out the "in the opinion of" language from the operative clause and concluded that an objective reasonableness standard must govern a cedent's notice obligation to effectuate the intent of the notice provision.

Based on this finding, the Fifth Circuit determined that a reasonable reinsured in the Cedent's shoes should have realized that the Butler claim might implicate the Reinsurer's treaty earlier in time and that the Cedent's notice was, therefore, unreasonably late. The Court also found that the Reinsurer had been prejudiced by the late notice from its Cedent. The Fifth Circuit noted that while the Reinsurer did all they could after receiving notice and the Cedent followed all of the Reinsurer's advice, that advice arrived too late to change the course of the litigation at the motion for reconsideration stage where a heightened standard applied. Thus, the Fifth Circuit held that the Reinsurer was relieved of their obligation to pay the claim on late notice grounds.

Cedent has since filed a request for an extension of time to file a petition with the U.S. Supreme Court for writ of certiorari.

UPCOMING EVENTS

2026 Spring Conference
April 29, 2026 - May 01, 2026
J.W. Marriott, Nashville, TN

2026 Fall Conference
November 12, 2026 - November 13, 2026
Marriott Marquis, New York City

2025 ARIAS·US Fall Conference Recap - November 12-14, 2025

Conference Co-Chairs: Paul Dassenko (AzuRe Advisors, Inc.), Sarah Gordon (Steptoe LLP), Shermineh "Shi" Jones (Troutman Pepper Locke LLP), and James Liell (SCOR)

From November 12 to 14, 2025, ARIAS·U.S. members converged in New York City's Times Square for the 2025 Fall Conference. The conference brought together arbitrators, in-house and outside counsel, and other industry professionals for three days of in-depth educational sessions, engaging discussion, and plenty of networking.

The conference kicked off informally on Wednesday, November 12, 2025, with the Umpire Masterclass and the Women's Resource Committee networking event. After a special luncheon for attendees, the Umpire Masterclass convened for a session focused on the specialized role of the umpire in reinsurance arbitrations, and participants worked through scenarios and challenges that umpires commonly face. Meanwhile, members of the Women's Resource Committee met on a private tour of the famed Guggenheim Museum, creating a space for women practitioners and arbitrators to connect informally while they learned about both the museum's architecture and key pieces from its permanent collection. The program emphasized relationship-building and mentorship, particularly for newer women in the ARIAS community, and underscored ARIAS's commitment to inclusion and professional support.

Day One: Judges, AI, Process Innovation, and Specialized Breakouts

The conference officially began on Thursday, November 13, 2025, with opening remarks from outgoing ARIAS·U.S. Chairperson Joshua R. Shwartz (Premia Holdings) and ARIAS·U.S. Future Leaders Committee Co-Chair Shermineh "Shi" Jones (Troutman Pepper Locke LLP).

In a conference first, ARIAS·U.S. had the privilege of welcoming three distinguished federal judges as keynote speakers for the first general session: Hon. Nancy Gertner (ret.); Hon. Faith S. Hochberg (ret.); and Hon. Brett H. Ludwig, United States District Judge, Eastern District of Wisconsin. The panel shared their candid reflections on the difference between arbitration and federal litigation, what they had learned over time about the arbitral process and fairness, and how practitioners could better position arbitration proceedings to withstand judicial scrutiny.

The focus then shifted to technology for the second general session, which featured Elaine Caprio (Caprio Consulting and Coaching L.L.C.), John R. Cashin (Law Office of John R. Cashin), Michael Carolan (Troutman Pepper Locke LLP), and Taylor Hoffman (Swiss Re). This session presented the newly developed ARIAS Guidelines for using artificial intelligence in ARIAS arbitrations, the result of a Strategic Planning Committee–mandated task force comprising arbitrators, in-house counsel, and outside counsel. The panel walked through how AI tools could be deployed responsibly in case assessment, submissions, and award drafting, and they em-

phasized guardrails for confidentiality, reliability, and transparency. Attendees came away with a structured framework for integrating AI into their practice without compromising the integrity of proceedings.

The third session invited participants to consider new ideas for the arbitral process. The panel, moderated by Teresa Snider (Porter Wright Morris & Arthur LLP), included: Larry Greengrass, (Arbitrator/Umpire), Susan Grondine-Dauwer (SEG-D Consulting LLC), Connie O'Mara (O'Mara Consulting, LLC), and Debra Hall (Hall Arbitrations LLC). The panelists examined the use of Ground Rules in traditional arbitrations and discussed the potential of pre-set panels. They debated how clear front-loaded rules and pre-selected panel structures could reduce gamesmanship, shorten timelines, and enhance predictability, while still preserving flexibility and party autonomy.

Before lunch, Sarah Gordon (Steptoe LLP), incoming Chair of ARIAS, presented the Dick Kennedy Award to Alysa Wakin (Odyssey Re) for her tremendous service to ARIAS over the course of more than 25 years. Wakin served on the Board for seven years, and she was the Chair from November 2023-24. Wakin's year as the Chair was exceptionally difficult, but she handled it with aplomb. Wakin's work ensured that the organization survived and thrived despite significant challenges. Wakin's level of sacrifice and devotion to ARIAS were critical to its long-term health and allowed ARIAS to prosper. Conference attendees were able to enjoy the presentation of this selective award – it has only been given once before – which was coupled with fun artifacts from Wakin's early work with ARIAS in the 1990s.

After lunch, the conference shifted into breakout sessions where attendees were able to choose from among five options. In *"Avoiding Wrong Turns under Consumer Protection Laws: Increased Government Interest in Insurers' Use of Driving Data and Beyond,"* Sarah Phillips (Simpson Thacher LLP) and Michael Menapace (Wiggin and Dana LLP) explored the recent uptick in lawsuits and regulatory investigations by state attorneys general and the FTC into insurers' acquisition and use of consumer driving data. While many proceedings had focused on auto manufacturers, the panel highlighted actions targeting insurers directly for allegedly using such data to set premiums without adequate notice or consent. The discussion traced the evolving legal landscape and practical considerations for insurers leveraging telematics and other data sources.

In *"Preaching to the Choir: Presenting, Attacking, and Evaluating Expert Testimony on Industry Custom and Practice in Reinsurance Arbitrations,"* Neel Lane (Norton Rose Fulbright LLP), Steve Schwartz (Chaffetz Lindsey LLP) and Cindy Koehler (Cindy Koehler Consulting) unpacked what constitutes "custom and practice" evidence, how such testimony is structured and deployed in arbitration, and the challenges that both proponents and opponents face in doing so. Panelists also addressed how arbitrators tend to evaluate industry-custom evidence and how counsel could strengthen or undermine its persuasive force in arbitrations.

In *"Discoverability of Information in Coverage Litigation: Recent Trends Regarding Reinsurance, Reserves, and Privileged Communications,"* Matthew Cardosi (Robins Kaplan LLP), moderated a panel featuring Andrew Maneval (Chesham Consulting, LLC), Erika Lopes-McLeman (Dentons LLP) and Jim Dolan (Enstar US Inc.), as they reviewed recent case law regarding the discoverability of reinsurance information, reserves, and various privileged communications. They examined the downstream implications of court rulings for insurers, reinsurers, and their counsel, and how these developments might play out in future arbitrations.

In *"ASOPs: Real Lessons, Not Fables,"* Lisa Kuklinski (FTI Consulting, Inc.) guided attendees through Actuarial Standards of Practice ("ASOPs") that frequently arise in litigation

and arbitration. The session emphasized how lawyers and actuaries could collaborate more effectively and how ASOPs influence expert testimony and case strategy.

Finally, the Member Services Committee hosted a targeted networking breakout session, led by Leslie Davis (Troutman Pepper Locke LLP) and Michael Robles (Husch Blackwell LLP), to connect newer ARIAS members with established practitioners.

After the breakout sessions, attendees reconvened for the first day's final general session. Thomas Kinney (Troutman Pepper Locke LLP) and Christopher R. Bello (General Re Life Corporation) turned the spotlight on the distinct world of life reinsurance. They explained what sets life reinsurance agreements apart and walked through provisions that frequently appear in arbitration, including rate increase provisions, recapture clauses, termination provisions, and access-to-records and reporting clauses. The speakers also situated these provisions within the broader life insurance and reinsurance ecosystem, helping non-life specialists understand the commercial and regulatory logic behind the contract structures they may confront in disputes.

After the first day's educational programming concluded, members convened for the Annual Meeting and Elections. Attendees then gathered for the Future Leaders Committee's Networking Reception, followed immediately by the conference's main cocktail reception.

Day Two: Committees, Insolvency, Evidence, and Ethics

Friday, November 14, 2025, began bright and early with a special breakfast for newer arbitrators and mediators, as well as ARIAS·U.S. committee meetings. The conference then reopened the plenary programming, and attendees turned their attention to the final set of general sessions.

The first general session of the second day focused on handling evidence and objections in arbitration. Panelists Jonathan Bank, James E. Fitzgerald (Fitzgerald Legal Consult, P.C.), David Ichel (X-Dispute LLC), and Seema Misra (Arch Insurance Group, Inc.) addressed recurring difficulties surrounding evidence and evidentiary objections, including how objections are made, responded to, and ruled upon in arbitration. Attendees walked away with insights on handling evidentiary issues and ideas on how to balance efficiency and fairness while ensuring that arbitrators maintain control of the process and the record.

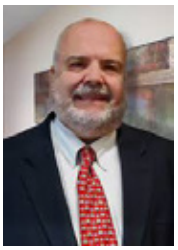
The next general session focused on insurer insolvency. Andrew Meerkins (Foley & Lardner LLP), Dustin Plotkin (Oliver Wyman LLC), and Steven Rosenstein (AIG) examined

how insurer insolvencies affect policyholders, insurers, and reinsurers. They also discussed the processes and nuances associated with insolvency proceedings. The session highlighted trends and recent developments, providing practical insights into navigating the legal, financial, and operational challenges that arise when insurers or reinsurers become impaired or insolvent.

The final general session of the day (and the conference) shifted the focus to ethics. The panel, moderated by Suman Chakraborty (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.), included ethics and compliance leaders from prominent law firms: Allison Miller (Steptoe LLP), Glenn Jones (Simpson Thacher & Bartlett LLP), and Jennifer Kenedy (Troutman Pepper Locke LLP). They discussed how firms structure their ethics and compliance programs, what issues they see most frequently, and how lawyers can integrate ethical thinking into day-to-day practice. The panel then considered what lessons the arbitration community could draw from law firm ethics frameworks to promote a robust culture of ethics in arbitral proceedings.

The conference concluded with closing remarks delivered by current ARIAS·U.S. President Sarah Gordon of Steptoe LLP, who emphasized that ARIAS·U.S. is the sum of its parts and that the membership has and continues to make the organization as great as it is. By the time attendees departed on Friday afternoon, they had not only revisited foundational topics in reinsurance arbitration but also confronted the new technologies, regulatory pressures, and ethical expectations that are reshaping the field. The 2025 ARIAS·U.S. Fall Conference thus closed having fulfilled its agenda: to prepare the arbitration community to navigate a changing landscape with insight, integrity, and practical tools.

Joseph P. Monteleone



Long-time member and former Certified Arbitrator, Joseph Montelone passed away on January 27, 2026. For more than 40 years Monteleone practiced insurance law in New York and New Jersey. He worked as a claims professional and executive at several companies and then as a law firm partner before establishing Catamount Services, where he offered arbitration, mediation and expert witness services.

Nasri Barakat

Nasri Barakat, passed away December 8, 2025. Barakat was a long-time ARIAS member, Certified Arbitrator and Umpire, and an active participant in our committees and at our conferences.

James G. Sporleder

Long-time and one of the original members of ARIAS·U.S., James G. Sporleder, passed away peacefully at his home on January 27, 2026. Jim was born January 20, 1951 in Berwyn, IL to Melvin &; Betty (Ryan) Sporleder.

The majority of Sporleder's law career was spent with Allstate Insurance Company, retiring after 34 years as Vice President of the Specialty Operations Division of the Law & Regulation Department. He oversaw all aspects of protection of the company's assets and collection of recoverables with respect to reinsurance and insolvencies of other insurance and reinsurance companies. He was recognized internationally in the industry for his expertise, honesty and professionalism and was a guest speaker at industry conferences. Sporleder supervised Allstate's litigation against a state insurance department in the U.S. Supreme Court resulting in a unanimous decision overturning a prior Supreme Court precedent. Sporleder was also a highly-respected founding member of ARIAS·U.S. In retirement, he acted as an arbitrator in numerousnational and international reinsurance arbitrations.

Sporleder is survived by his devoted wife of 52 years, Cathy (Podbor) Sporleder, children Ellen (Chad) Wilde and Kevin (Meghan) Sporleder, grandchildren Lila Wilde, Chase Wilde, Sydney Sporleder, Savannah Sporleder, sister, Mary Hoff, sister-in-law and brother-in-law, Judy and Stephen Guy.

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