SQUIRE PATTON BOGGS

Reinsurance Newsletter

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Recent Case Summaries

Third Circuit Upholds Order for New Arbitration Panel to Decide Consolidation Issue

Pa. Nat'l Mut. Cas. Ins. Co. v. New Eng. Reins. Corp., No. 19-1805, 2019 U.S. App. LEXIS 36388 (3rd Cir. Dec. 6, 2019) (Not Precedential).

The cedent had arbitrated a dispute with two other reinsurers and then this arbitration arose with this reinsurer. The parties filed cross-petitions to compel arbitration, with the reinsurer seeking to compel arbitration before the prior arbitration panel. The cedent wanted the consolidation issue heard by a new panel of arbitrators and the reinsurer wanted the previous panel to hear the consolidation issue.

The fundamental question was whether the new dispute was the same as the previously arbitrated dispute. As the court noted, if the two disputes were the same, then under the reinsurance agreement the disputes would be consolidated and heard by the same panel of arbitrators that decided the first arbitration. The district court sent the consolidation question to a new panel of arbitrators and the reinsurer appealed.

The circuit court affirmed the district court's order. The court held that the reinsurance agreement provided for a specific method of choosing arbitrators. Although the treaty provided that "if more than one reinsurer is involved in the same dispute, all such reinsurers shall constitute and act as one party," the court stated that sending the consolidation question to the prior arbitration panel would invite the court to prejudge the consolidation question and ignore the express language of the reinsurance agreement. The court held that it could only compel arbitration of the consolidation issue before a new panel chosen according to the express terms of the agreement. Thus, the two disputes will be consolidated, according to the court, "if and only if" a new panel determines that the current dispute is the same as the prior dispute and that the new panel finds that the prior panel is still available to handle the new dispute.

In a footnote, the court stated that, in this case, the first panel had already issued a final award in a non-consolidated arbitration before the cedent sought to arbitrate with this reinsurer. Here, said the court, the consolidation issue was not before the first panel and, therefore, a new panel was necessary to resolve the consolidation issue.

Puerto Rico Liquidator Compelled to Arbitrate Hurricane Reinsurance Disputes

Integrand Assur. Co. v. Everest Reins. Co., No. 19-1111 (DRD) (D. P.R. Dec. 4, 2019).

An insolvent cedent sought to invalidate the arbitration clause in several reinsurance agreements with several reinsurers and force the reinsurance disputes over Hurricane Irma and Maria claims into the state court governing the cedent's liquidation proceedings. The reinsurers, who all had the same or similar arbitration clauses, moved to dismiss the insolvent cedent's claims and compel arbitration. The district court granted the reinsurers' motions in full and compelled arbitration of all claims, including antitrust and state insurance law claims.

In granting the reinsurers' motions, the court noted that, in several of the cases, the cedent had demanded arbitration and a dispute arose over whether the cedent's arbitrator was qualified under the arbitration clause. In a footnote, the court rebuked the insolvent cedent: "The Court is surprised that [the cedent] questions the validity of the arbitration provision considering [the cedent] acknowledged the applicability of the provision to the instant litigation when the company itself commenced arbitration proceedings against [two reinsurers] to claim payment under the reinsurance agreements. . . The Court will not authorize [the cedent] to play 'fast and loose' with the Court." (citation omitted).

The court rejected the cedent's argument that the arbitration clause was ambiguous because it did not set forth a mechanism to resolve the objections to the designation of the cedent's arbitrator. The court pointed out that the Federal Arbitration Act (FAA), specifically FAA § 5, provides a gap filling provision to resolve an impasse and select an arbitrator.

The court also rejected arguments that the arbitration clause was contrary to morals and public order or should be set aside under the *rebus sic stantibus* doctrine. The decision goes into detail on both of these arguments. The court held that the FAA trumped any state law that undermines the liberal federal policy favoring arbitration and the cedent's objection to the validity of the "honorable engagement provision" in the arbitration clause was unavailing. The court rejected the *rebus sic stantibus* doctrine argument on the basis that the doctrine was an extraordinary remedy to be used only in exceptional circumstances and that because hurricanes may be reasonably anticipated in Puerto Rico the doctrine did not apply. The court concluded that each reinsurance contract contained a valid arbitration clause.

On the antitrust and other claims that the cedent argued were not arbitrable, the court held that nothing in federal law showed a congressional intent to prelude a waiver of judicial remedies. The court also held that the arbitration clause was broad and applied to all claims arising out of the alleged delay in payments by the reinsurers, including antitrust and state law claims.

The court granted the reinsurers' motions to dismiss and to compel arbitration. Additionally, in a separate short ruling, the court directed the parties in specific cases to follow the arbitration selection procedures in the reinsurance agreements one more time and, if the parties failed to agree on the arbitrator, to come back to the court to select the arbitrator.

New York Federal Court Compels Arbitration Over Asbestos Losses From Affiliate's Policies

TIG Ins. Co. v. Am. Home Assur. Co., No. 18-cv-10183 (VSB), 2020 U.S. Dist. LEXIS 22639 (S.D.N.Y. Feb. 7, 2020).

Certain members of an insurance group demanded arbitration against a reinsurer (successor in interest) for the reinsurer's alleged failure to pay its share of asbestos losses arising out of underlying insurance policies issued by another member of the insurance group, one that did not demand arbitration and was not a signatory to the reinsurance treaties. The arbitration demands resulted in the reinsurer suing the demanding cedents and the affiliated policy issuing company in federal court challenging the arbitrability of the losses arising from the policies issued by the non-demanding affiliate. In response, the ceding companies moved to compel arbitration, and the affiliate moved to dismiss the claim against it because it had not demanded arbitration.

The treaties had broad arbitration provisions. They also included in the definition of the "Company" the named ceding companies and all subsidiary corporations of the named companies. Also, one of the ceding companies that demanded arbitration had reinsured its non-demanding subsidiary on a 100% basis. Thus, the ceding companies argued that the reinsurer agreed in the treaties to indemnify covered losses of the signatory ceding companies and their subsidiary companies.

The court granted the ceding companies' motion to compel arbitration, but denied the motion to dismiss the claim against the non-demanding affiliate and stayed the litigation pending the outcome of the arbitration. The decision goes through the standard litany of how courts determine arbitrability and address motions to compel arbitration.

In granting the motion to compel, the court disagreed with the reinsurer that the issue of whether the non-demanding affiliate's losses fell within the treaties was not arbitrable. The court stated that the "arbitration clauses are broad enough to encompass the disputes at issue, and the arguments raised by [reinsurer] relate to the interpretation of the underlying contract and must await arbitration." The arbitration provisions were "quite broad," requiring the parties to submit "[a]ll disputes or differences arising out of" the treaties to arbitration. The court held that, with a broad arbitration clause, there is a presumption that the parties have agreed to submit all disputes to arbitration, "including the present disputes."

As the court put it, the question of whether the cedent's claims made in the arbitration demands are covered by the treaties, "is one of contract interpretation, not of arbitrability." The specific question of whether the claims under the policies issued by the non-demanding affiliate came within the treaties was also "one of contract interpretation for the arbitrator to decide."

The court declined to address whether the affiliate was subject to arbitration. The reinsurer's "concern over whether [the affiliate] would have any right under the Treaties to seek arbitration is misplaced, as [the affiliate] has not made any demand for payment, nor was [the affiliate] a party to any of the demands for arbitration made by [the cedent]." The dispute about whether the affiliate's policies fell outside the scope of the treaties was, according to the court, a contractual one that the reinsurer could make to the arbitrators.

New York Federal Court Denies Application to Seal Arbitration Award

TIG Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., No. 19 Civ. 10238 (PAE), 2019 U.S. Dist. LEXIS 205120 (S.D.N.Y. Nov. 25, 2019).

A New York federal court addressed an unopposed petition to confirm an arbitration award and an unopposed motion to seal the arbitration award and redact sections of the petition. Although the applications were unopposed, the court went through the confirmation analysis (and granted confirmation) and the request to seal in some detail. Following a long line of cases in the New York federal courts (the court cited seven cases), the court denied the motion to seal and ordered the parties to file unredacted copies of the award and petition.

The parties relied on a confidentiality agreement as the basis for the motion to seal. In rejecting the confidentiality agreement as a basis to seal, the court said that the confidentiality agreement was not binding on the court. Moreover, said the court, the confidentiality agreement did not by its terms require that the matter proceed under seal.

The court quoted most of the language from the confidentiality agreement, noting it provided that "information may be" disclosed in court proceedings and that sealing was subject to the court's approval. Thus, said the court, "as the plain text of the agreement acknowledges, it is up to the Court independently to determine whether the parties' desire to seal the arbitration information in this petition overcomes the weighty presumption that the 'public should have access to the proceedings and documents of courts.'" (citations omitted). In detail, the court went through the three-step test to see if the parties overcame the presumption of public access and found that it was not even close. The court concluded, "by availing themselves of the judicial process, the parties must also contend with the values of transparency and public access which undergird its legitimacy." (citations omitted).

Tenth Circuit Allows Life Reinsurer to Intervene in Underlying Policyholder Dispute

Barnes v. Security Life of Denver Ins. Co., No. 18-1487, 2019 U.S. App. LEXIS 38242 (10th Cir. Dec. 23, 2019).

A policyholder bought an adjustable life insurance policy that had an investment and savings component in addition to the life insurance component. The original insurance company eventually ceded the policy, along with other similar policies, to a reinsurer on a 100% indemnity reinsurance basis, along with a service agreement. The service agreement gave the reinsurer full administrative responsibility over the reinsured policies and allowed the reinsurer to control the defense of any lawsuits brought on the reinsured policies.

Over the years, the accumulated value of the policy was hit with deductions causing the cash value of the policy to be less than the policyholder anticipated. The policyholder sued the cedent for breach of contract on behalf of himself and other similarly situated policyholders. The complaint challenged the calculation of the cash value and the charges levied against the policy.

Determining the cost-of-insurance charges and all other policy-servicing items was no longer the responsibility of the cedent, but was the responsibility of the reinsurer under the service contract. Accordingly, the reinsurer sought to intervene in the lawsuit to protect its interests.

The district court denied the motion and the reinsurer appealed. On appeal, the circuit court granted the reinsurer's motion to intervene as of right, with one dissent. In reversing and granting the reinsurer's motion to intervene, the court found that the reinsurer established a direct, substantial and legally protectable interest in the action for purposes of intervention. The majority noted that the reinsurer had the financial interest in the proceeding as a 100% reinsurer and as the administrator of the business responsible for any extra-contractual damages.

The court also found that the reinsurer's interests would be substantially impaired if intervention was denied. The majority concluded that the interests of the cedent and reinsurer were not identical. This is because, among other things, there were policies administered by the reinsurer in issue and policies administered by the ceding insurer in issue and each party would have its own interests in defending the administration of the subsets of policies. Clearly, found the court, the cedent would turn to the reinsurer to defend the administration of the reinsured policies, but would have its own defense for those policies not reinsured by the reinsurer. Moreover, even though the reinsurer had the right to control the litigation against the cedent, the cedent refused to allow the reinsurer to control the litigation because the cedent's own unique interests were at stake.

Essentially, the appellate court found that the reinsurer met the criteria for direct intervention as of right, rather than relying on contractual rights to control the defense or approve settlements.

Policyholder's Attempt to Third-party in Reinsurers Denied

Integrand Assur. Co. v. Puma Energy Caribe, LLC, No. 19-1195 (FAB), 2019 U.S. Dist. LEXIS 221766 (D. P.R. Dec. 27, 2019).

An insurance company brought an action against its insured alleging fraud and misrepresentation in an insurance claim submitted by the policyholder to the company. The policyholder counterclaimed for breach of contract and several other wrongs, but also purported to bring a third-party complaint against a group of reinsurers. The third-party complaint alleged that the reinsurers collusively breached their reinsurance contracts by failing to pay the cedent on the claim and that, because of litigation between the cedent and the reinsurers, the cedent "has concocted a scheme to delay payments" by falsely alleging fraud. The third-party complaint also alleged third-party beneficiary status.

The reinsurers moved to dismiss the third-party complaint and the court granted the motion (without prejudice). As the court stated, the reinsurers raised "powerful points in favor of dismissal." These included that there was no privity of contract between the policyholder and the reinsurers, that the policyholder did not have standing to assert third-party beneficiary rights or the rights of the policyholder, and that any disputes under the reinsurance agreements must be arbitrated. The court accepted these arguments and found that the policyholder erroneously sought to implead the reinsurers under Federal Rule of Civil Procedure 14(a).

As the court noted, the policyholder was not seeking indemnity from the reinsurers for any claim asserted by the cedent against the policyholder. Rule 14(a) does not allow a party to assert its own claims. Moreover, held the court, other bases for impleading a third party also were not available to the policyholder. Thus, Rules 13(h), 19 and 20 provided no procedural vehicle by which the policyholder could join the reinsurers to assert claims against them. Thus, the purported third-party complaint was dismissed against the reinsurers.

Although the court stated that the purported third-party complaint came "close to obstinance or frivolity," the court denied the reinsurers' motion for attorney fees, finding that the policyholder's actions did not rise to the level of being unreasonably adamant or stubbornly litigious, beyond the acceptable demands of the litigation.

Alabama Federal Court Dismisses Claims Against Insurer Seeking Cut-through to Reinsurers

Bridges v. Poe, No. 7:19-cv-00529-LSC, 2020 U.S. Dist. LEXIS 11240 (N.D. Ala. Jan. 23, 2020).

A series of individual plaintiffs sued similar defendants for allegations of systemic sexual harassment, abuse and rape of female pretrial detainees at a city jail. After the first case was filed in federal court, the city's insurance company filed a state court declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the city or its employees in the case. Subsequent federal cases filed by other plaintiffs named the insurance carrier as a defendant.

Each plaintiff alleged that the insurer was a shell corporation with no real employees, was merely the alter ego for a state municipality organization and a fronting company for the insurer's reinsurers. The plaintiffs sought declarations that the insurance company had a duty to defend and indemnify the city defendants in the cases and that each plaintiff was an assignee of the insurance company's rights under its reinsurance contracts allowing plaintiffs to recover any judgment based on a cut-through to the reinsurers.

The insurance company moved in each of the federal cases to dismiss the claims against it for lack of subject matter jurisdiction. The plaintiffs argued that the court could retain the cases under supplemental jurisdiction. The district court granted the insurance company's motions to dismiss.

In granting the motion to dismiss, the court noted that the claims against the insurance company were state law claims between citizens of the same state. Thus, the analysis came down to whether supplemental jurisdiction was appropriate. Given that the claims against the insurance company were about insurance coverage, separate and distinct from the underlying tort claims, the court said that the exercise of supplemental jurisdiction "may not be appropriate."

The court found that the claims against the insurance company alleging alter ego, fronting and as an assignee on a cut-through basis were not typical tort claims, were complex and hinged on whether the insurer was a shell corporation and a mere front for its reinsurers. These allegations implicated matters of local law and policy. Because resolving these issues would cause the court to make decisions about state law, the court concluded that the state court would be better suited to hear and resolve those novel and complex state law claims.

The court also determined that it was not even clear that the plaintiffs had Article III standing to sue the insurance company for a declaration of coverage before the entry of judgment against the insured. Dismissing the claims, said the court, promoted judicial economy by avoiding substantial duplication of effort where there was a state case already pending.

Post-trial Motions Denied in Hard-fought Reinsurance Dispute

Utica Mut. Ins. Co. v. Century Indem. Co., No. 6:13-CV-995, 2019 U.S. Dist. LEXIS 207547 (N.D.N.Y. Dec. 3, 2019).

In our December 2019 Reinsurance Newsletter, we reported on the jury verdict in this rare reinsurance trial. As we mentioned, post-trial motions were filed. Those motions were denied.

The reinsurer made post-judgment motions seeking to overturn a jury verdict and judgment in favor of the cedent, which included pre-judgment interest on two breach of contract claims where the interest ran from the first billing to the reinsurer. Three motions were made: (i) to correct an alleged error in the interest calculation; (ii) a renewed motion for judgment as a matter of law or, in the alternative, a new trial; and (iii) judgment as a matter of law on the cedent's affirmative defenses. The court denied all motions in a detailed decision.

On the interest calculation motion, the issue was whether interest should run from the date selected by the jury (the first billing of asbestos losses under each contract) or from an intermediate point or from each date of each reinsurance billing. This is an interesting point because, as we know, reinsurance billings often come in a series over time as the cedent pays expenses and losses. The court went through a very careful explanation for why the motion was denied.

The denial was based primarily on the jury's selection of the date as requested in the verdict sheet and the jury charge. In other words, the reinsurer did not object to allowing the jury to select the date from which interest would run should the jury find breach of contract in favor of the cedent. The court pointed out how this issue was never raised by the reinsurer and that the reinsurer had the opportunity to argue for the selection of multiple dates.

In denying the motion for judgment as a matter of law in favor of the reinsurer, the court provided a useful analysis examining a cedent's conduct in allocating long-tail losses and whether the reinsurance allocation was consistent with the underlying settlement with the insured. The reinsurer argued (throughout the case and on the renewed motion) that the cedent's allocation was unreasonable as a matter of law and in bad faith. The court pointed out how the reinsurer was permitted to argue to the jury its claim that the cedent used "two sets of books" and that the "jury evidently credited some or all of [the cedent's] evidence in siding with [the cedent]."

The court also provided a very helpful analysis of two decisions where reinsurers were successful in challenging a cedent's allocation, pointing out that in neither case did the court pronounce any "categorical rule that inconsistent allocations are always unreasonable as a matter of law." *Allstate Ins. Co. v. Am. Home Assur. Co.*, 42 A.D.3d 113 (N.Y. App. Div. 2d Dep't 2007); *U.S. Fid. & Guar. Co. v. Am. Re-Ins. Co.*, 20 N.Y.3d 407 (2013). The court concluded that these cases signaled that "dramatically inconsistent pre- and post-settlement allocations, or perhaps ones in direct contravention of federal court rulings, can be unreasonable as a matter of law," and that "it is sometimes appropriate to take allocation cases to trial to determine whether the cedent acted reasonably when settling with its insured." The court noted that its jury instructions were consistent with the holding in U.S. Fidelity & Guaranty on the issue of objective reasonableness.

Other issues were also resolved in favor of the cedent and sustaining the judgment, with the court concluding that it "gave both sides a full and fair opportunity to air their grievances to a jury, which eventually sided with [the cedent]." The post-trial motions were denied because the reinsurer "failed to establish any grounds for post-trial relief."

Magistrate Judge Recommends Judgment for Reinsurer Following Discovery Violations

Lincoln Gen. Ins. Co. v. U.S. Auto Ins. Servs., No. 3:16-cv-03198-B, 2019 U.S. Dist. LEXIS 225429 (N.D. Tex. Dec. 31, 2019).

In this case, a US magistrate judge recommended entering a default judgment against a principal with controlling interests in several affiliated companies after having struck the principal's pleadings as a sanction for continuing discovery violations.

In a prior case, the reinsurer had sued the cedent and the principal's other affiliated insurance companies after the cedent failed to hold premiums in a trust account and diverted those funds to the affiliated entities. The parties settled the claims and entered into a Memorandum of Understanding. The cedent and the affiliated companies, however, failed to fulfill their obligations and the reinsurer filed this case. The court severed the claims against the affiliated entities from those against the principal and the cedent. Following a bench trial, the court found two of the affiliate entities liable for tortious interference with contract. The reinsurer than pursued its claims against the principal for breach of fiduciary duty. In deciding to strike the principal's pleadings, the magistrate judge determined that the principal had willfully violated the discovery orders and that no lesser sanction would deter further abuses.

New York Court Questions Whether Offshore Reinsurer Participated in Fraudulent Scheme

National Health Care Accoc., Inc. v. Liberty Mut. Ins. Co., No. 650272/2018, 2020 N.Y. Misc. LEXIS 248 (N.Y. Cty. Jan. 6, 2020).

A healthcare management company and its 26 corporate nursing home affiliates sued (among others) several insurance companies and an insurance intermediary, alleging that the insurers engaged in a willful scheme to evade the insurance laws of New York, Connecticut, Vermont and New Jersey by "requiring plaintiffs to enter into unapproved agreements and letters of credit that substantially altered the rates in plaintiffs' regulatory-approved insurance policies . . . [by using] a . . . captive reinsurance structure." The complaint included nine separate causes of action, including fraudulent inducement, negligent representation, breach of contract and violations of state insurance laws. The insurers moved to dismiss.

In this complicated decision, the court dismissed as time-barred most of the healthcare company's claims, including those for fraudulent inducement and negligent misrepresentation, as well as certain claims relating to the guaranteed cost and customer service agreements. The court determined that the claims for violations of New York's insurance laws were not time-barred, however, because the statute of limitations was not triggered until additional premium payments were demanded. Relatedly, the court determined that whether it was proper to exercise jurisdiction over one of cedent's offshore reinsurers was premature because the reinsurer could be a representative of cedent under New York insurance law.

Seventh Circuit Refers to the Duty of Utmost Good Faith

Lexington Ins. Co. v. RLI Ins. Co., No. 19-1426, 2020 U.S. App. LEXIS 2486 (7th Cir. Jan. 27, 2020).

Much has been written about the alleged demise of utmost good faith as a reinsurance doctrine. While not pertinent to the holding, the Seventh Circuit, in this case interpreting the meaning and application of an Aggregate Corridor Deductible (ACD) to an excess policy, mentioned the duty of utmost good faith to support its determination on how it interpreted the ACD. In relying on extrinsic evidence to support the manner in which the ACD should apply, the court discussed a memo describing the basis upon which a reinsurer would provide coverage to the excess insurer. The court stated "[a] bsent evidence to the contrary, we can assume [the cedent] was not lying to [the reinsurer], especially given the duty of 'utmost good faith' that governs reinsurance transactions" (citation omitted). Thus, the doctrine of utmost good faith seems alive and well in the Seventh Circuit.

Louisiana Federal Court Orders Production of Reinsurance Information

Lamar Adver. Co. v. Zurich Am. Ins. Co., No. 18-1060, 2020 U.S. Dist. LEXIS 13891 (D. La. Jan. 28, 2020).

This dispute involved an action for recovery under a commercial property insurance policy. The policyholder filed a motion to compel on three sets of written discovery and a noticed deposition. The policyholder asserted that the insurer failed to timely pay business interruption losses and professional fees, arbitrarily and capriciously failed to timely pay these and other claims, and failed to make a timely written offer to settle the policyholder's property damages claims.

On the requests within the motion to compel, the court opined on whether the requested information was within the scope of discovery or whether it was otherwise protected by privilege. Specifically as to the reinsurance information, the policyholder sought production of any "policies, contracts, and/or agreements providing or potentially providing coverage to [the insurer]." The insurer objected on the grounds of overbreadth, irrelevance, confidentiality, attorney-client privilege and work-product protection. The court agreed with the policyholder that the insurer was required to produce its reinsurance agreements as part of its initial disclosures. To the extent these agreements had not been produced, the court ordered the production of reinsurance agreements that obligate a reinsurer "to satisfy all or part of a possible judgment [against defendant] in the action or to indemnify or reimburse [defendant] for payments made to satisfy the judgment."

Similarly, the court ordered production of communication between the insurer and its reinsurers regarding the policyholder's insurance claims because those communications would contain information relevant to whether the insurer acted in good faith in explaining its reason or granting or denying portions of the claims or otherwise described or explained its handling of the claims. Furthermore, the court ordered the insurer to submit information related to the insurer's communications with its insurers or reinsurers regarding the policyholder's claim, and information related to any agreements, including reinsurance, that provide or potentially provide indemnity, defense and/or coverage to the insurer for any of the claims lodged against it by the policyholder.

A Brief Review of Reinsurance Trends in 2019

In 2019, courts addressed various reinsurance arbitration issues, trended toward strictly reviewing requests for reinsurance information in discovery and provided additional insight as to how we can expect the courts to address *Bellefonte* issues moving forward.

Arbitration

Most reinsurance arbitrations fall within the FAA and, in the reinsurance context, questions of arbitrability and the powers of the arbitrators arise often, especially where allegations of fraud are made or where the dispute is collateral to the actual reinsurance contract. In 2019, courts continued to emphasize that a court's authority to vacate or modify an arbitration award derived from the arbitration provisions of a reinsurance contract are exceedingly limited.

Arbitrability

In a non-reinsurance case with important arbitration implications, *Harry Schein, Inc. v. Archer and White Sales, Inc.*, 202 L. Ed. 2d 480 (2019), the US Supreme Court looked at whether there was a "wholly groundless" exception to permitting an arbitration panel to address issues of arbitrability. The "wholly groundless" exception had been used to permit a party to avoid arbitration if it convinced a court that the disputed issue clearly did not fall within the arbitration clause. The Court held that there was no "wholly groundless" exception under the FAA and that courts must respect the parties' decision in their contracts to delegate the arbitrability question to the arbitration panel.

Integrand Assurance Co. v. Everest Reinsurance Co., No. 19-1111, (D.P.R. Dec. 4, 2019), provided some guidance on when a court could compel arbitration. Here, the cedent sought to enforce its reinsurance contracts with its reinsurers. The purpose was to recover the allotment of payments made by the cedent to the insureds resulting from hurricane damage. The reinsurers moved to dismiss the complaint, requesting the court to order immediate arbitration under the arbitration clauses contained in the reinsurance contracts. The court held that four requirements must be satisfied for a court to grant a request to compel arbitration, all of which were met here: (1) a valid arbitration agreement must exist; (2) the moving party must be entitled to invoke the arbitration clause; (3) the other party must be bound by the arbitration clause; and (4) the claim must fall within the scope of that clause. Therefore, the court dismissed the cedent's action against the reinsurers and compelled arbitration between the parties.

Powers of the Arbitration Panel

In *Washington National Insurance Co. v. Obex Group, LLC*, No. 18 CV 9693, 2019 WL 266681 (S.D.N.Y. Jan. 18, 2019), the court granted a motion requiring non-parties to appear before a reinsurance arbitration panel and provide documents. The underlying arbitration involved a ceding company's claims that it was fraudulently induced to enter into the reinsurance agreement. During the course of the arbitration, the arbitration panel issued subpoenas to non-parties requiring them to appear as witnesses at the hearing and to bring documents. When the non-parties failed to appear at that hearing, the ceding company petitioned the court to enforce the summonses under Section 7 of the FAA. The court found there was diversity of citizenship in the case by looking to the citizenship of the parties to the Section 7 enforcement action, rather than in the underlying reinsurance arbitration.

In *In re Platinum-Beechwood Litigation*, Nos. 18-cv-6658, 18-cv-12018, 2019 WL 2999155 (S.D.N.Y. July 10, 2019), the cedents invested nearly US$600 million with the reinsurer under reinsurance agreements, each of which contained a broad arbitration clause providing for the arbitration of "all disputes or differences between the Parties arising under or relating to" the reinsurance agreements. The cedents terminated the reinsurance agreements and demanded arbitration for alleged breaches of the reinsurance agreements and fiduciary duties. The cedents sought an order compelling the reinsurer to post security for the cross-claims or striking the reinsurer's pleadings and entering a default judgment for failure to post security as required by state law. In a prior arbitration between the parties, the arbitration panel issued an interim security award in favor of the cedents, but at a much smaller amount. The federal court confirmed the interim security award and entered it as a judgment. The arbitration between the cedents and the reinsurer was stayed pending this litigation, with the arbitration panel retaining jurisdiction over the security award.

The reinsurer argued that the confirmed interim arbitration award, which was reduced to a judgment by the court, precluded the cedents from bringing their motion. The reinsurer also argued that the pre-answer security statutes did not apply to it as an insolvent reinsurer. In denying the cedents' motion, the court held that the security statutes applied to the reinsurer even though it was in liquidation. The court determined that the arbitration panel must decide in the first instance whether its interim security order as confirmed by the court precluded the cedents from moving to seek security in the litigation (a substantially greater amount in this case than had been granted by the arbitration panel). The court noted that the reinsurance agreements had very broad arbitration clauses and that, under Second Circuit precedents, the claims-preclusive effect of a prior federal judgment confirming an arbitration award must be left to the arbitrators to determine. Thus, the court denied the cedents' motion for security, although noting that if the arbitration panel concludes that the cedents are not precluded from bringing the security motion, then the parties can return to the court for further proceedings on the matter.

In a different case involving a prior arbitration award, *Chicago Insurance Co. v. General Reinsurance Corp.*, No. 18-CV-10450, 2019 WL 5387819 (S.D.N.Y. Oct. 22, 2019), the parties originally arbitrated over a billing on a settlement of asbestos-related losses. The arbitration panel entered a final award on the billing, retaining jurisdiction to resolve any dispute arising out of the award. Several months later, the cedent submitted a new billing, which the reinsurers rejected. The cedent commenced a new arbitration to resolve the dispute over the new billing. The reinsurers declined to participate. The cedent filed a motion to compel arbitration and stay the original panel from acting and the reinsurers filed a cross-petition to stay the new arbitration and for a declaration that the original arbitration panel had jurisdiction to resolve the new dispute.

In resolving this dispute in favor of the reinsurers, the district court looked to Section 4 of the FAA. Under Section 4, a party aggrieved by the alleged failure to arbitrate under a written agreement for arbitration may petition the court for an order directing that arbitration proceed in the manner provided for under the agreement. The court noted that the cedent argued that the original panel was *functus officio* after it issued its final award and that a new arbitration must take place. The court rejected this argument, finding that the *functus officio* doctrine was largely irrelevant here because the original arbitration panel explicitly retained jurisdiction. Moreover, said the court, the cedent consented to the panel retaining jurisdiction. Because the panel retained jurisdiction, the arbitrators' duties have not ended if the current dispute "arises out" of the final award. Given the cedent's repeated statements that the final bill arose from protocols set forth in the final award, coupled with the panel majority's assertion of jurisdiction, the court held it was clear that the new dispute arose out of the final award and that the original panel retained jurisdiction. Thus, the panel was not *functus officio* and the court denied the cedent's petition to compel and granted the reinsurers' cross-petition to stay arbitration and for declaratory relief.

The powers of an arbitration panel were further clarified in *Park Avenue Life Insurance Co. v. Allianz Life Insurance Co.* of North America, No. 19-CV-1089, 2019 WL 4688705 (S.D.N.Y. Sept. 25, 2019), where the court remanded a case back to an arbitration panel because an award was ambiguous. Under the FAA, a court must grant an order seeking confirmation of an arbitration award unless the award is vacated, modified or corrected, but, where the award is ambiguous, it should be remanded to the arbitrators for clarification. Here, the dispute was over a life reinsurer's obligations to pay for costs and claims arising out of an agreement with regulators to pay death benefits that would escheat to the government after a Death Master File search indicated that the insured person died. The reinsurer argued that the award required reimbursement of only those death benefit payments that arise from claims made by beneficiaries. The cedent argued that the award continued to require the reinsurer to reimburse payments that arise from claims made either by designated beneficiaries or by escheatment.

The court found that the award was susceptible to two meanings and, thus, remanded the matter back to the arbitration panel to clarify certain questions addressing escheatment claims, but suggested that the panel should "broadly aim to underscore the meaning and effect of the award so that the court will know exactly what it is being asked to enforce." Notably, and consistent with the recent trend in many courts, the court denied the parties' request to keep the arbitration award and related materials under seal because there was no basis to do so. The court rejected the argument that the parties' confidentiality agreement could bind the court (this point was conceded) and ordered the unsealing of the entire record (which included the award).

In *National Indemnity Co. v. IRB Brasil Resseguros S.A.*,767 F. App'x 154 (2d Cir. 2019), the Second Circuit vacated a district court order enforcing an arbitration award for a specific monetary amount because an underlying agreement between the retrocedent and the underlying cedent provided no basis for imposing liability for any particular amount on the retrocessionaire. An arbitration award was issued in a dispute between the retrocedent and retrocessionaire requiring the retrocessionaire to hold the retrocedent harmless and indemnify the retrocedent for the underlying cedent's claim for a return of premium it paid to the retrocedent. In a separate court proceeding, where the retrocessionaire was voluntarily dismissed, the cedent and retrocedent entered into a settlement agreement on the issue of the return premium for a fixed sum. The cedent and retrocedent then sought to enforce that settlement against the retrocessionaire based on the arbitration award. The circuit court held that the settlement agreement did not establish the liability of the retrocessionaire for the fixed sum, but the court was quick to reject the retrocessionaire's argument that the settlement agreement exonerated the retrocessionaire from any possible further liability under the arbitration award. While the private agreement between the cedent and retrocedent could not succeed in imposing liability on the retrocedent, that agreement, according to the court, did not relieve the retrocessionaire of liability for the return premium. To interpret the settlement that way, the court said, would "undermine and defeat the arbitration award."

Arbitrator Selection

An issue for parties to monitor industry-wide is diversity in selecting arbitrators. In *Enstar EU Ltd. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, No. 654089/2018, 2019 NY Slip Op. 31057(U) (N.Y. Cty. Feb. 19, 2019), the parties reached an impasse in an arbitration over asbestos-related claims ceded to three casualty excess reinsurance contracts. The contracts provided that if the parties could not agree on an umpire, they could apply to the court to appoint one. In her order, Judge Andrea Masley included a footnote in which she urged the parties to consider diversity as a factor in selecting arbitrators and umpires. The opinion also offers some insight into the qualifications (or disqualifications) that a court may be likely to consider in appointing arbitrators, including an arbitrator's past testimony as an expert witness being a potential source of bias, and the likelihood of a CPA's professional background to lead to a solid understanding of reinsurance contract disputes.

Arbitration Consolidation

This past year, we saw the Third Circuit Court of Appeals and a Connecticut trial court confront procedural questions on whether disputes could be consolidated before the same arbitration panel. Both courts ruled that whether consolidation was appropriate had to be determined by reviewing only the arbitration provision that was before the court.

In *Pennsylvania National Mutual Casualty Insurance Co. v. New England Reinsurance Corp.*, ___ F. App'x ___, 2019 WL 66522507 (3d Cir. Dec. 6, 2019), the court decided that whether to consolidate matters to be heard by a single panel was a question for the arbitrators to decide. Here, the agreement provided for consolidation under certain circumstances. The court found that it had no power to look beyond how the arbitrators were to be selected under the particular agreement before it, and that the panel, once selected, was responsible for determining whether the disputes should be consolidated.

This decision is in-line with a decision discussed in our March 2019 Reinsurance Newsletter. In *Employers Insurance Co. of Wausau v. The Hartford*, No. 2:18-cv-07240, 2018 WL 6330425 (C.D. Cal. Dec. 3, 2018), the cedent sought reimbursement from the reinsurer under 19 reinsurance contracts arising under eight reinsurance programs. The cedent pursued consolidated arbitration before a single panel. The reinsurer proposed three arbitrations, insisting on separate arbitrations for each of the agreements, and filed four petitions to compel arbitration in various jurisdictions. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," said the court. It then recognized that a majority of courts have determined that issues of consolidation are left for the arbitrators to decide. Because the contract before the court did not state that the parties agreed to consolidated arbitration, the court could not consolidate disputes arising out of the separate contracts.

These same general principles were restated in the related case of *Employers Ins. Co. of Wausau v. The Hartford*, No. HHDCV186099158S (Conn. Super. Feb. 13, 2019), while the court seemingly reached the opposite result. This action involved the same parties, raising the same arguments as in the 2018 Wausau case above, but under a different treaty. Here, however, the court granted the cedent's motion to compel arbitration, stating that "[i]f [the reinsurer] sought separate arbitration for each contract, it could have drafted such a provision. Because it did not, the court is bound by the parties' agreement." Although the results are different, the underlying reasoning is somewhat similar, in that each court maintained that it was confining its review to the arbitration provision in the agreement that was before it.

Bellefonte

In 2019, the Northern District of New York continued to follow the New York Court of Appeals' decision in *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 91 N.E. 3d 1186 (N.Y. 2017), which relegated the S*econd Circuit's holding in Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, 903 F.2d 910 (2d Cir. 1990), to the judicial scrap heap. Commentators and many courts believed that *Bellefonte* had held that, under New York law, the stated limit in a facultative certificate was an all-in-cap on a reinsurer's liability regardless of the underlying policy between the insured and the cedent.

In Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc., 381 F. Supp. 3d 185 (N.D.N.Y. 2019), the court held that a reinsurer was not obligated to pay expenses of the cedent because the facultative certificate did not have a follow-the-settlements or follow-the-fortunes provision. Those costs, however, could not be recovered to the extent that reinsurer had already made voluntary payments toward expenses because any mistake in paying those expenses was due to a lack of diligence on the reinsurer's part.

In Utica Mutual Insurance Co. v. Clearwater Insurance Co., No. 6:13-cv-1178, 2019 WL 3340644 (N.D.N.Y. July 15, 2019), the district court refused to grant summary judgment to the reinsurer on the cedent's claim that it was entitled to recover defense costs from its reinsurer. According to the court, whether the reinsurer was obligated to pay defense costs turned on whether the cedent was obligated to pay defense costs to the policyholders. The real issue, said that court, was whether exhaustion of the primary policies meant that the occurrence was no longer covered by the primary policies so as to trigger the defense obligations under the umbrella policies. "[T]he language . . . suggests that [the cedent] would provide defense costs to [the policyholder] for accidents that the underlying policies did not compensate them for, but it does not unambiguously state whether it is referring to compensation that does not occur because it is outside the scope of the underlying primary policies' coverage grant or because the underlying policy has been exhausted." Because the provision could apply to either or both situations, the case was set for trial.

Discovery and Sealing

Favoring the longstanding public policy of broad public access to the courts, the cases decided in 2019 emphasized that courts will carefully scrutinize the alleged privacy interest of a party seeking to seal reinsurance documents. The courts also continued to interpret broadly the scope of discovery and consistently found that reinsurance agreements are subject to discovery, particularly when the underlying claim involves allegations of bad faith.

Motion to Seal Documents

In *Pennsylvania National Mutual Casualty Insurance Co. v. Everest Reinsurance Co.*, No. 1:18-mc-653, 2019 WL 1205297 (M.D. Pa. Mar. 14, 2019), the court granted a petitioner's motions to seal arbitration documents, which included an arbitration demand, arbitration correspondence post-demand and the six reinsurance treaties subject to the arbitration demand. As part of its analysis, the court considered "whether disclosure will violate any privacy interests; [and] whether the case involves issues important to the public." The court found that the documents were private commercial agreements setting forth the terms of a private business relationship and that, as a result, the public interest in the agreements was minimal. The court further noted that the petitioner had a reasonably significant privacy interest in the reinsurance treaties and emphasized that the petitioner negotiated with various reinsurers such that disclosure of the precise terms of any one agreement could have a significant impact on the petitioner's ability to negotiate with other reinsurers. As a result, on balance the court found that the petitioner's privacy interest substantially outweighed the public's minimal interest in having access to the documents.

In contrast, and consistent with the decision in *Park Avenue Life Insurance Co. v. Allianz Life Insurance Co. of North America* discussed above, an unopposed motion to seal an arbitration award and to redact sections of the petition to confirm the arbitration award was denied by the court in *TIG Insurance Co. v. National Union Fire Insurance Co.* of Pittsburgh, P.A., No. 19 Civ. 10238 (PAE), 2019 WL 6310208 (S.D.N.Y. Nov. 25, 2019). Although the arbitration proceedings were subject to a confidentiality agreement, the court stressed that the confidentiality agreement was not binding on the court. Citing a long line of cases from New York federal courts favoring public disclosure of judicial documents and noting that there was neither a clear proprietary nor privacy interest in protecting the documents, the court ultimately determined that the petitioner did not "overcome[ ] the weighty presumption that 'the public should have access to the proceedings and documents of the court.'" The key distinction between the *Everest* decision and the *TIG* decision is that, in *Everest*, the court sought to protect a substantial privacy interest while no such privacy interest was alleged or implicated in *TIG*. Thus, although *TIG* stands for the premise that disclosure of judicial documents is of public importance, *Everest* reminds us that countervailing considerations, including future harm to the petitioner, should overcome the presumption of public disclosure.

Continuing the trend of favoring public disclosure of judicial records, in *Theriot v. The N.W. Mutual Life Insurance Co.*, 382 F. Supp. 3d 1255 (M.D. Ala. 2019), an Alabama federal magistrate judge denied a motion brought by a cedent and its reinsurer to designate a reinsurance agreement and other responsive documents as confidential. The movants sought to protect certain documents containing information about pricing, product identification and claim administrative expenses, including the reinsurance agreement, and alleged that those documents contained "highly confidential and sensitive business information." In denying the motion, the court relied on the right of the public to access judicial records and emphasized that the movants had failed to state the specific harm that would result from failing to seal the documents. In dicta, the court also suggested that the motion might have been granted if it related to discovery material, but that "material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right [of access]."

Use of Reinsurance Information

In *Ohio Casualty Insurance Co. v. Twin City Fire Insurance Co.*, No. 14-CV-858, 2019 WL 1365752 (E.D.N.Y. Mar. 26, 2019), an excess liability insurer sued a primary insurer, alleging that the primary insurer breached its duty of good faith and fair dealing by failing to settle an underlying claim within the policy limits of the primary policy. The primary insurer filed a motion in limine seeking to introduce evidence that the excess insurer did not notify its own reinsurer of the possibility of an excess verdict, which the primary insurer argued undermined the excess insurer's claims. In response, the excess insurer explained that the primary insurer's duty to the excess insurer is different from the excess insurer's duty to its reinsurer and that, as a result, the communications between the excess insurer and its reinsurer were irrelevant. The court determined that the primary insurer had met the "very low" threshold for relevance and granted the motion in limine without prejudice.

In *Certain London Market Company Reinsurers v. Lamorak Insurance Co.*, No. 18-cv-10534 (D. Mass. Nov. 8, 2019), the cedent did not meet this very low burden. The Lamorak case involved a reinsurance dispute regarding the cession to facultative reinsurers of a large environmental pollution settlement between the cedent and the underlying policyholder. Here, the cedent sought documents and interrogatory responses from the reinsurers concerning the reinsurers' billing and allocation of their own settlement with the underlying policyholder. The magistrate judge denied the cedent's motion to compel production because the court found that the relevance of the materials sought was too speculative and production would be difficult and unduly burdensome. Indeed, the documents the cedent sought to obtain related to costs that it had not asked the reinsurer to reimburse.

In contrast, and continuing the trend of finding reinsurance information relevant to claims against a primary insurer, in *99 Wall Development, Inc. v. Allied World Specialty Insurance Co.*, No. 18-cv-126, 2019 WL 2482356 (S.D.N.Y. June 14, 2019), a New York magistrate judge determined that certain reinsurance information was relevant to claims of bad faith against a primary insurer. Because the reinsurance coverage amounts could shed light on the primary insurer's internal evaluation of the claim, the court ordered that certain redacted documents relating to reinsurance coverage be unredacted or otherwise disclosed to the plaintiff.

In *Discover Property & Casualty Co. v. National Football League*, No. 652933/2012, 2019 N.Y.Slip. Op. 32930(U) (N.Y. Cty. Oct. 4, 2019), a referee appointed to supervise disclosure issued an order directing the primary insurers to produce their reinsurance contracts and communications between themselves and their reinsurers about claims stemming from a class action lawsuit filed by former National Football League (NFL) players against the NFL. The trial judge affirmed the order, noting that the plain language of CPLR 3101(f), which states "[a] party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment," mandates production of reinsurance contracts. The court also found that the reinsurance contracts were relevant to the NFL's bad faith claim against the primary insurers, noting that "the insurers' communications with their reinsurers is reasonably calculated to lead to information relevant to (1) whether the Insurers have handled the NFL parties' claims in good faith and (2) whether the Insurers lacked material information regarding the insured risks." This case thus supports the trend that reinsurance contracts will be discoverable where there is a bad faith allegation.

Trial Evidence

In *Utica Mutual Insurance Co. v. Century Indemnity Co.*, No. 6:13-cv-995, 2019 WL 4385765 (N.D.N.Y. Sept. 13, 2019), a New York district court addressed several pretrial motions in limine, arising from a breach of contract dispute between a cedent and its reinsurer. Following payment by the cedent of claims under its primary policies, the reinsurer refused to pay the cedent under 1973 and 1975 certificates. Before trial, both parties filed several motions in limine seeking to exclude various evidence. The court held that it was proper to grant a motion in limine only when the evidence is clearly inadmissible on all potential grounds. In ruling on the various motions in limine, the court excluded arguments related to the interpretation of policy language in prior cases with other reinsurers, evidence relating to the lack of aggregate limits in the underlying primary policies, evidence of the parties' litigation reserves and arguments that another reinsurer was responsible for the cedent's claims. Following a jury trial, the court entered judgment in favor of the cedent, which included a significant award of prejudgment interest. The reinsurer filed several post-trial motions, including motions for judgment as a matter of law and for a new trial, but all of its post-trial motions were denied. *Utica Mutual Insurance Co. v. Century Indemnity Co.*, No. 6:13-CV-995, 2019 WL 6482559 (N.D.N.Y. Dec. 3, 2019).

McCarran-Ferguson Act

In *Catalina Holdings (Berm.) Ltd. v. Hammer*, 378 F. Supp. 3d 687 (N.D. Ill. 2019), a reinsurer sought to confirm an arbitration award under the FAA and Convention on the Recognition and Enforcement of Arbitration Awards ("New York Convention"), 21 U.S.T. 2517, 9 U.S.C. § 201-208. The Illinois Director of Insurance moved to dismiss, arguing that, under the McCarran-Ferguson Act, Illinois insurance law reverse preempted the district court's ability to confirm the award. Under the McCarran-Ferguson Act "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). The Director also argued that a ruling by the federal court would improperly override the state's liquidation statutes. The court held that simply confirming the award did not require any construction of federal law in a way that "invalidates, impairs or supersedes, state law," nor would it interfere with future liquidation proceedings of the insolvent cedent. Parties in arbitration should take note of this decision in cases in which the existence, liability and amount of damages have been determined in arbitration – a federal court may be unlikely to be swayed by a preemption argument on a motion to dismiss for subject matter jurisdiction.

Third-party Claims

In 2019, one court made it abundantly clear that third-party claims against reinsurers will be dismissed if they are not procedurally sound. In *Integrand Assurance Co. v. Puma Energy Caribe, LLC*, No. 19-1195, 2019 WL 7288760 (D.P.R. Dec. 27, 2019), a policyholder sued its insurer. The insurer alleged that the policyholder committed fraud in filing its claims. In turn, the policyholder brought a third-party claim against a group of the cedent's reinsurers. The policyholder alleged that the reinsurers colluded to refuse payments to the cedent for the policyholder's claims. The policyholder claimed that the reinsurers' actions led the cedent to concoct a scheme to delay payments by falsely alleging that the policyholder committed fraud. The court dismissed the third-party claims.

First, the court said that the policyholder had improperly implead the reinsurers because the policyholder was not seeking indemnity under Federal Rule 14. Further, the policyholder could not join the reinsurers pursuant to Federal Rule 19 as additional parties because "the reinsurers were not named in the main action, and [the policyholder's] claims against the reinsurers are asserted solely against them. Put another way, no claim asserted against the reinsurers is also asserted against Integrand." Additionally, the policyholder "cannot simply join the reinsurers pursuant to Rule 20. Defendants cannot invoke Rule 20 outside the context of a counterclaim or crossclaim." The court noted that the third-party claims were borderline frivolous, but nevertheless denied the reinsurers motion for attorneys' fees.

This year also demonstrated that indemnifying reinsurers should consider intervention as a viable defense strategy. In *Barnes v. Security Life of Denver Insurance Co.*, No. 18-1847, 2019 U.S. App. LEXIS 38242 (10th Cir. Dec. 23, 2019), the cedent was embroiled in a class action suit related to the calculation of fees assessed in its administration of the cash value component of certain life insurance policies. The reinsurer, however, had entered into an agreement to administrator certain policies, including that of the named plaintiff. The district court denied the reinsurer's motion to intervene because it determined that the reinsurer had never contracted directly with the policyholder, it had the same rights and objectives as the cedent, and because the indemnifying reinsurer had a contractual right to control the litigation and approve any settlement entered into between the parties. The reinsurer argued that its position outside the litigation did not afford it a fair opportunity to protect its rights. For example, the reinsurer argued that it had been burdened by an ongoing obligation to produce documents and witnesses during discovery, but had no standing to dispute the parties' contract interpretation of the reinsurer's discovery obligations. The reinsurer further argued that, as the current administrator of the policy, it had a vital interest in defending the manner of administration. On appeal, the Tenth Circuit honed in on the contractual obligation between the reinsurer and the cedent:

> …under the terms of the Second Amended and Restated Indemnity Reinsurance Agreement, [the reinsurer] 'agree[d] to assume and discharge one hundred percent (100%) of all Extra Contractual Obligations, and thus bears the sole 'responsibility for paying or otherwise discharging, as and when due, all Extra Contractual Obligations.'… Thus, it appears that [the reinsurer], and not [the cedent], will bear the responsibility for paying any liability arising out of the misadministration of the Transferred Policies. Further, even assuming, for purposes of argument, that the Second Amended and Restated Indemnity Reinsurance Agreement did obligate [the reinsurer] to reimburse [cedent] for any liability imposed in this action, it is clear that [the reinsurer] has a financial interest in the proceeding that is sufficient to satisfy the minimal burden we have imposed for intervention as of right.

The circuit court also thought that the reinsurer and the cedent had divergent interests that would not be adequately represented at trial: "[the cedent] will presumably defend against [the policyholder's] claims, in part, by asserting that it was [the reinsurer], and not [the cedent], that was responsible for administering the Transferred Policies."

Rescission

In *AmTrust North America, Inc. v. Signify Insurance Ltd.*, No. 18-cv-3779, 2019 WL 3034891 (S.D.N.Y. Jul. 11, 2019), the court denied a captive reinsurer's motion to dismiss a cedent's complaint and, instead, dismissed several of the captive reinsurer's counterclaims against the cedent. The cedent and the captive reinsurer entered into a captive reinsurance agreement whereby the cedent and its affiliates would issue workers' compensation policies for the captive's parent, which the cedent would reinsure with the captive reinsurer. The agreement had several requirements for security given the offshore domicile of the captive reinsurer. The cedent then demanded payment of the security and the reinsurer refused. The cedent issued a demand letter stating that the reinsurer had 30 days to post the security or their captive reinsurance agreement would be terminated from inception. Two days later, the reinsurer posted most, but not all, of the security. The cedent responded by withdrawing its intent to terminate, but demanding the remainder of the owed security. In the ensuing breach of contract action, the court denied the reinsurer's motion to dismiss, holding that a reasonable person would understand that the cedent's letter was a request to cure and not a rescission of the contract.

Insurance/Reinsurance Trends: UK in 2019

Last year saw a spate of insurance and reinsurance cases in the UK Court of Appeal and Supreme Court, covering a range of insurance and reinsurance issues. These included the rights of third parties to access documents held by the court, employers' liability insurance arising out of asbestos-related diseases and the interpretation of the scope of cover of a standard form motor policy vehicle.

The two cases of *R&S Pilling t/a Phoenix Engineering v. UK Insurance Ltd [2019] UKSC 16 and Susan Plevin v. DAS Legal Expenses Insurance Co. Ltd* and *Miller Gardner Ltd* [2019] EWHC 1339 (Comm) are examples of the flexibility afforded by English law to the courts in order to resolve cases where a policy term cannot be given its literal meaning without leading to an absurd result. In *R&S Pilling*, the Supreme Court of the UK was prepared to read an entire additional phrase into the coverage clause in a motor vehicle insurance policy, so that it would meet the compulsory requirements of the Road Traffic Act 1988. Noting that there was "an apparent contradiction between the terms of the clause…, and the promise in the certificate," the Court identified this as "one of those rare cases where the mistake is clear as is the intended meaning." Relying on the case of *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, the Court reconfirmed, in an insurance context, that a court may construe a different meaning to a commercial contract where it is clear that the parties could not reasonably have intended the meaning of the language in the contract (in this case, resulting in an ambiguity with respect to the statutory provisions).

Following on from these cases, in *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805, in an appeal by aircraft insurers against a decision that the English court had jurisdiction to determine a claim concerning damage to an aircraft, the aircraft manufacturer sought a final declaration that it was not liable for the loss sustained and that proceedings commenced by the Italian insurers were in breach of the English exclusive jurisdiction clause.

In granting part of the declarations and dismissing the appeal, the Court of Appeal cited the principles summarized by Thomas LJ in *Sebastian Holdings* [2011] 1 Lloyd's Rep 106, and determined that an exclusive jurisdiction clause in a warranties agreement between the aircraft manufacturer and operator applied to all disputes arising out of or in connection with the warranties agreement itself and any non-contractual obligations connected with it. That included any dispute connected with a substantive claim under the warranties, which were originally set out in a purchase agreement that provided for any disputes to be resolved by Geneva arbitration. There was no evidence that the parties intended to reserve arbitration for a substantive claim under the warranties.

In the case of *Euro Pools Plc (In Administration) v. Royal and Sun Alliance Plc* [2019] EWCA Civ 808, the Court of Appeal interpreted the terms of a professional indemnity insurance policy that entitled the insured to recover the costs of remedial work to mitigate against potential claims by third parties where it had notified the insurance company of circumstances that might give rise to the claims. The court summarized and set out the existing legal principles applicable to the determination as to whether there has been valid notification of a circumstance and, in particular, whether a claim is within the scope of that notification. In setting out these principles, the court held that notification had been effected once the insured had informed the insurance company that there was a problem that could give rise to potential third-party claims; it did not have to know the cause of the problem or the consequences that might flow from it.

In last year's update, we considered the case of *Equitas Insurance*, noting that the debate had still been left open for asbestos claims. In 2019, this case featured once again and the Court of Appeal had to consider whether this bespoke principle should be extended to the reinsurance of employers' liability risks. In examining how the reinsurance market should deal with mesothelioma claims settled under employers' liability insurance policies, and the court determined that the practice of "spiking" (whereby cedents were entitled to present their reinsurance claims to any policy year of their choice) should not extend to a reinsurance context. The court made clear that a good faith term was to be implied so that the cedents' rights to present a reinsurance claim had to be exercised in a manner that was not arbitrary, irrational or capricious. Rationality required that reinsurance claims be presented by reference to each year's contribution to the risk, which would normally be measured by time on risk.

West v Stockport NHS Foundation Trust and Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220 concerned two appellants (D and W) who had each brought clinical negligence claims against the NHS trust. The latter appealed against a decision limiting the extent to which they could recover the cost of their after-the-event (ATE) insurance premium. In considering the matter (and permitting both appeals), the court gave guidance on the correct approach to challenges made by paying parties concerning the reasonableness and proportionality of ATE insurance premiums sought to be recovered by successful claimants in clinical negligence cases. In considering what the correct approach to proportionality should be in these cases, the Court of Appeal concluded that costs that were "fixed and unavoidable, or which have an irreducible minimum, without which the litigation could not have progressed" should not be left out of account. The court was keen to emphasize that leaving some fixed and unavoidable costs out of account when considering proportionality was not reintroducing the *Lowndes* test of proportionality. This drew a clear distinction between costs that are "fixed and unavoidable" and those that are "necessary and reasonable" – the latter being protected by the *Lowndes* approach to proportionality.

In terms of early emerging trends from 2019, we consider the following likely to be picked up on in the near future: climate change and its impact on the insurance industry, along with technology and transactions involving insurers and reinsurers. As the UK gradually starts to move away from Euro-centric politics, but mindful of GDPR, it is anticipated that the technology space will be a critical area to watch out for in insurance. As for climate change, the financial risk of this (along with the major threat it presents economically and on a socio-political level) is becoming a significant issue for insurers.

Recent Speeches and Publications

Ellen Farrell will be speaking on "InsurTech and AI: Savvy Solutions, or Bots Behaving Badly?" at the 2020 Insurance Coverage Litigation Committee CLE Seminar, Litigation Section, American Bar Association, March 5, 2020 in Tucson, Arizona.

Our firm is a Gold Sponsor of "Managing Risk at the Intersection of Cybersecurity, Data Privacy and Government," at the Georgia State University School of Law, March 5 – 6, 2020 in Atlanta, Georgia. Senior advisor Tony Scott is the keynote speaker. This conference is organized by the Cybersecurity and Data Privacy Committee of the American Bar Association's Tort, Trial and Insurance Law Section. Larry Schiffer is chair-elect of the Committee.

Larry Schiffer will be moderating a panel on "Social Inflation: What Does It Mean to Cedents and Reinsurers?" at the ARIAS•U.S. Spring Conference, May 6 – 8, 2020 in Amelia Island, Florida.

David Godwin is speaking on a panel on "Duty to Defend Bad Faith Issues" and, together with Melanie Cockrum, is presenting an article on "The Genuine Dispute Doctrine as a Defense to Bad Faith Claims," at the 2020 Annual Meeting of the American College of Coverage Counsel, May 6 – 8, 2020 in Chicago, Illinois

Larry Schiffer will be speaking on Arbitration of Policyholder Disputes on a live Lawline broadcast on May 19, 2020.

Larry Schiffer spoke on "Attorney-Client Privilege in Insurance Disputes: Preserving Confidentiality, Meeting Legal Ethics Standards," for Strafford Webinars, January 22, 2020.

Larry Schiffer had three articles published in the ARIAS•U.S. Quarterly, Q4, 2019: "In the Beginning: Reflections on the Birth of ARIAS•U.S.," "No Business Cards? No Problem. Use Your Smartphone," and, with co-author Kelly Mihocik, "Ensuring the Enforceability of an Arbitration Provision That Does Not Designate an Arbitral Forum."

Larry Schiffer's commentary, "A Reinsurer's Right to Recoveries" was published on IRMI.com in December 2019. This commentary marks Larry's 80th expert commentary on reinsurance for IRMI.com.

The International Risk Management Institute, Inc. (IRMI) published our "Top 50+ Reinsurance Cases Every Risk Professional Should Know," a white paper analyzing the top 50+ reinsurance coverage cases and their implications, on February 4, 2020. The white paper updated the earlier top 50 publication from five years ago, which was edited and authored by Larry Schiffer, Suman Chakraborty and Eridania Perez, with some former colleagues. The top 50+ update was edited and co-authored by Larry Schiffer, Dilpreet K. Dhanoa, Kelly Mihocik and Jacob M. Davis.

Larry Schiffer and former associate Alice Colarossi's article, "Should a Contract Designate an Arbitral Forum?" was published by *Global Arbitration Review* on February 7, 2020.

Congratulations to Larry Schiffer for being named a Lexology Legal Influencer for Financial Services – US for Q4 2019.

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