SQUIRE PATTON BOGGS

Reinsurance Newsletter

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Editor's Note: This is our first newsletter since the novel coronavirus pandemic. We hope that all of you and your families and colleagues are well and staying safe. In our Recent Speeches and Publications section, you will find several of our articles covering COVID-19 loss issues that may affect reinsurers. Our *Insurance and Reinsurance Disputes Blog* also contains a series of COVID-19 related posts. All our firm's COVID-19 articles, alerts and blogs are located on our COVID-19 Coronavirus Hub on our firm website.

Recent Case Summaries

Second Circuit Reverses Judgment for Cedent and Finds Reinsurer Not Liable for Asbestos Losses

Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co., No. 18-828, 2020 U.S. App. LEXIS 13579 (2d Cir. Apr. 28, 2020)

In a significant reversal of a judgment for a cedent after a jury verdict, the Second Circuit Court of Appeals has held in favor of the reinsurer in an important follow-the-settlements case. The court agreed with the reinsurer that, as a matter of law, it was not obligated to the cedent because the losses did not exceed the attachment points for the reinsured umbrella policies.

After a jury verdict, the district court entered a judgment in favor of the cedent in this asbestos allocation reinsurance dispute. The breach of contract dispute centered on a series of facultative certificates reinsuring a series of umbrella policies. The umbrella policies sat on top of a series of primary policies issued by the cedent. The certificates provided that the reinsurer's liability followed that of the cedent consistent with the terms of the umbrella policies. The umbrella policies provided that the cedent was "liable only for the ultimate net loss resulting from any one occurrence in excess of . . . the amounts of the applicable limits of liability of the underlying insurance as stated in the Schedule of Underlying Insurance Policies."

The schedules included separate provisions for bodily injury claims and property damage claims. Aggregate limits were only provided for the property damage claims. The facultative certificates each had a follow form clause and a follow-the-settlements provision.

In the underlying asbestos coverage dispute with the insured, the parties ultimately settled. In the course of the settlement, the parties agreed that there were aggregate limits in the primary policies and that those limits had been exhausted. The cedent sought reinsurance recoveries under the certificates and when the reinsurer did not pay, brought this action for breach of contract. The case came down to whether the umbrella policies contained aggregate limits because without aggregate limits, the individual bodily injury claims were too small to reach the umbrella policies (and therefore the certificates). The district court instructed the jury that they only had to determine if the settlement was objectively reasonable. The jury found for the cedent and judgment for the cedent was entered.

In reversing, the circuit court concluded that the reinsurer was liable only if the losses exceeded the limits as stated in the schedules. While the asbestos bodily injuries were clearly covered occurrences, the applicable limits of liability for those claims were those stated in the schedules for bodily injury. Those limits included aggregate limits and for bodily injury, there were no aggregate limits stated. The court rejected the cedent's argument that only the occurrence limits listed should be considered and not the aggregate limits.

The court also rejected the cedent's argument that the follow-the-settlements provision bound the reinsurer to the cedent's claims determination. The court noted that the follow-the-settlements doctrine does not alter the terms or override the language of the reinsurance contract. The court held that the cedent's theory directly contradicted the relevant language in the certificates and the umbrella policies. The reinsurer cannot be held accountable for an allocation that is contrary to the express language of the reinsurance contract, said the court. The court found that the cedent's reading would essentially render the follow form clause in the certificates and the definition of loss in the umbrella policies meaningless, and "would be contrary to the parties' express agreement (citation omitted)."

The court defended its ruling by stating that it was consistent with the long line of relevant follow-the-settlements cases that hold "to trigger deference under the follow-the-settlements doctrine, the settlement decision in question must be reasonable and in good faith but must also be within the terms of the reinsured policy." The court noted that the reinsurer was not entitled to a de novo review of the cedent's decision-making process or allocation decisions. But the court held that "here, the relevant policy terms are unambiguous, [and] a reinsured cannot insulate itself from the application of those terms under 'follow-the-settlements.'"

The court concluded "that the umbrella policies unambiguously define their attachment point by reference to the underlying limits of liability 'as stated in the Schedule[s].' Where the losses in question did not exceed the limits stated for bodily injury in the Schedules, [the reinsurer] had no obligation under the reinsurance contracts to pay for those losses."

Second Circuit Rules Summons Enforceable Under Section 7 of the Federal Arbitration Act

Washington National Insurance Co. v. Obex Group LLC, No. 19-225-cv, 2020 U.S. App. LEXIS 14062 (2d Cir. May 1, 2020)

In a recent decision, the Second Circuit Court of Appeals addressed the enforceability of an arbitration panel's summons under Section 7 of the FAA in a reinsurance dispute. The arbitration panel issued summonses to third parties to appear and produce documents at a hearing in New York. The third parties failed to appear and the party seeking the evidence petitioned the court to enforce the summonses under Section 7. The district court denied the third parties' motions to dismiss the petition for lack of jurisdiction and to quash the summonses. The circuit court affirmed.

Section 7 of the FAA provides that:

> if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

In affirming, the circuit court concluded that each of the third parties' arguments was without merit. The third parties argued that the court lacked diversity jurisdiction, the summonses did not comply with FAA § 7, that the district court erred in refusing to quash without considering their objections, and that the district court lacked authority to grant the petition in the Southern District of New York. The court rejected each argument.

The court found that the only parties relevant for jurisdictional consideration were the parties to the petition and that there was jurisdiction. On the validity of the summons issue, the court noted that the properly issued summons is not rendered invalid by an offer or agreement to produce documents without a hearing. The court also noted that Section 7 contains no limit on the number of documents that may be deemed material. Section 7, said the court, only requires that the documents to be produced "may be deemed material as evidence in the case." The court found no basis to conclude that the summonses did not comply with Section 7.

The court also concluded that the district court properly declined to rule on the third parties' objections. Nothing in Section 7, said the court, required the court to consider objections based on Federal Rules of Civil Procedure Section 45.

As to venue, an issue that has become controversial in the past, the court found that for purposes of these summonses, the arbitrators were sitting in the Southern District of New York and it did not matter that that arbitrators once sat in the Eastern District of Pennsylvania concerning another summons. The court noted that the arbitration provision stipulated that arbitration would take place in New York, New York, unless the parties agreed otherwise.

Under this ruling, it is clear that in the Second Circuit, as long as the summons is issued for a hearing in the district where the arbitrators are sitting for purposes of the summons, the summons will be enforced. It does not matter to the present enforcement action that the arbitrators sat in other jurisdictions for other purposes.

Washington Federal Court Denies Motion to Compel Arbitration

Washington Cities Ins. Auth. v. Ironshore Indemn., Inc., No. 2:19-cv-0054-RAJ, 2020 U.S. Dist. LEXIS 39633 (W.D. Wash. Mar. 6, 2020)

A public entities association organized for the purse of self-insuring risks and jointly purchasing insurance and reinsurance, purchased a reinsurance agreement that included an arbitration provision. A dispute arose concerning the settlement of a police misconduct lawsuit, which the cedent presented to the reinsurer for payment. The cedent commenced an action because of the reinsurer's denial. The reinsurer moved to compel arbitration and the cedent moved to establish that the arbitration clause was void.

Washington, it turns out, is one of several minority states that have express provisions in their insurance laws that prohibit arbitration provisions in insurance agreements. RCW § 48.18.200 expressly provides that insurance contracts delivered or issued for delivery in Washington cannot contain a provision depriving the courts "of the jurisdiction of action against the insurer." As the court noted, although the FAA would normally preempt a conflicting state law under the Supremacy Clause of the US Constitution, the McCarran-Ferguson Act creates a system of reverse preemption for state insurance law. The court cited examples of cases that hold, and noted that the parties did not appear to dispute, that under the McCarran-Ferguson Act, RCW § 48.18.200 preempts Chapter I of the FAA.

The court then articulated the dispute before it: (1) does reinsurance qualify as insurance and (2) does the anti-arbitration provision apply to reinsurance agreements where the reinsurance was purchased by a joint self-insurance program. The court concluded that the answer to both questions was yes.

The court examined the definition of insurance under Washington law, RCW § 48.01.040, and concluded that "reinsurance" comes within the definition of "insurance." The court noted that both are contracts where one undertakes to indemnify the other or pay a specified amount upon determinable contingencies. The court found no basis to find that the reinsurance agreement did not fall within the definition of insurance. Moreover, the court noted that nothing in the statute's text expressly excluded reinsurance and that a review of other sections showed that the legislature knew how to specifically exempt certain types of insurance from the section and to carve reinsurance out of other sections.

The court also concluded that the statute governing the joint self-insurance program that created the cedent did not contain any language saving arbitration provisions in reinsurance contracts purchased by the cedent. Although the statute suggested that the legislature authorized the cedent to purchase their own reinsurance, the statute did not reference arbitration provisions or authorize the inclusion of arbitration provisions in those contracts. The court refused to read into the statute that which the legislature omitted.

The court concluded that there was nothing in the statutory language or the relevant case law to support the reinsurer's arguments and the motion to compel arbitration was denied.

Georgia Federal Court Finds Reinsurer Was Not Run-off Reinsurer and Compels Arbitration

Builders Ins. v. Maiden Reins. N.A., Inc., No. 1:19-cv-02762-SDG, 2020 U.S. Dist. LEXIS 34722 (N.D. Ga. Feb. 26, 2020)

A dispute arose between a cedent and its reinsurer over a series of reinsurance contracts reinsuring underlying commercial general liability policies issued to a homebuilder. Underlying lawsuits arose allegedly because of construction defects. The cedent settled the underlying lawsuits and sought recovery from the reinsurer.

Before the cedent settled the underlying litigation, it notified the reinsurer about the litigation and provided information. Shortly after, the reinsurer was acquired by a large international group that is known for its runoff operations. The cedent demanded payment from the reinsurer, but no payment was forthcoming for some time (well after 30 days). Approximately five months after the cedent demanded payment, and after the cedent commenced this lawsuit, the reinsurer paid the principal amount of the breach of contract claim. Nevertheless, the case continued on bad faith grounds.

After the case was removed from state to federal court, the reinsurer moved to compel arbitration. The cedent opposed the motion claiming that arbitration was no longer available to the reinsurer because it was a Run-off Reinsurer as defined in the reinsurance contracts.

The reinsurance contracts had two relevant provisions. First, Article 27, which was the Run-off Reinsurer article. This provision provided that if the reinsurer met the criteria of a Run-off Reinsurer the provisions of the arbitration article no longer applied. A Run-off reinsurer was defined as a reinsurer that "has ceased reinsurance underwriting operations; or has transferred its claims-paying authority to an unaffiliated party; or . . . in any other way has assigned its interests or delegated its obligations under this Contract to an unaffiliated entity."

The second relevant provision was the arbitration article, which except for the first year, stated: "Except as provided in the Special Termination, Commutation and Run-Off Reinsurer Articles, any dispute arising out of the interpretation, performance or breach of this Contract, including the formation or validity thereof, shall be submitted for decision to a panel of three arbitrators . . . ."

As the court noted, whether the reinsurer was a Run-off Reinsurer mattered because, if the answer was yes, the parties must litigate their dispute in court. The parties also disagreed about whether the reinsurance contracts delegated this issue to the arbitrators to decide.

The court first determined that it and not the arbitrators would decide whether the reinsurer was a Run-off reinsurer. The evidence, found the court, indicated that the parties did not intend to delegate arbitrability questions concerning the Run-off Reinsurer article. Delegation requires clear and unmistakable evidence that the parties intended to submit to the arbitrators disputes about Article 27. The court pointed to the arbitration article that, except for the first year, explicitly excluded the possibility that arbitrators should decide whether the reinsurer was a Run-off Reinsurer. Thus, held the court, the exception language in the arbitration provision specifically removed matters related to the interpretation of Article 27 from arbitration. Article 27, itself, also supports this analysis when providing that the arbitration article did not apply to any reinsurer that became a Run-off Reinsurer. At the very least, said the court, these provisions prevent the court from concluding that there was clear and unmistakable evidence of the parties' intent to delegate this question to the arbitrators.

After concluding that the parties did not delegate to the arbitrators the issue of whether the reinsurer became a Run-off Reinsurer, the court held that the reinsurer was not a Run-off Reinsurer. The court accepted evidence from the reinsurer that it had not ceased underwriting operations, had not transferred its claim-paying authority to an unaffiliated entity, and had not assigned its interests or delegated its obligations to an unaffiliated entity. The court found that the reinsurance contracts did not void the arbitration provisions when a reinsurer is in run-off in the ordinary sense. The court concluded that whether the reinsurer continued to accept new risks was beside the point. The reinsurer had not ceased reinsurance underwriting operations according to the evidence accepted by the court. The court also addressed the unaffiliated arguments and rejected their applicability.

Accordingly, the court granted the motion to compel arbitration on the remaining claims, including whether those claims were arbitrable.

New York Federal Court Compels Arbitration in Life Reinsurance Dispute Over Trust Assets

PB Life & Annuity Co., Ltd. v. Universal Life Ins. Co., No. 20-cv-2284 (LJL) (S.D.N.Y. May 12, 2020)

In a dispute over whether assets in a reinsurance trust account complied with the insurance law, a New York federal court ordered the parties to arbitrate under the arbitration provision of the reinsurance agreement. The parties entered into a coinsurance reinsurance agreement. The credit for reinsurance article of the reinsurance agreement required that a reinsurance trust fund be established to ensure that the cedent received full credit for reinsurance. The trust fund had to comply with the laws of each party's domiciliary jurisdiction.

The parties entered into a reinsurance trust agreement as required by the reinsurance agreement. A dispute arose over whether the assets the reinsurer placed in the trust agreement qualified under Puerto Rico law. Allegedly, over 65% of the trust assets were loan obligations of the reinsurer's affiliated entities, which violated the 10% limit on investing in assets of affiliated entities.

The cedent demanded arbitration and the reinsurer brought this action. The cedent moved to compel arbitration and the reinsurer sought an injunction precluding arbitration.

In granting the motion to compel and denying the injunction request, the court focused on the two agreements. The court ultimately determined that the reinsurance agreement's arbitration was broad enough to leave to the arbitrators the question of whether disputes under the trust agreement came within the arbitration clause of the reinsurance agreement. The arbitration provision provided that:

> . . . all disputes and differences between the Parties arising under or relating to this Reinsurance Agreement . . . shall be decided by arbitration . . . the arbitration proceeding shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

The entire agreement clause in the reinsurance agreement clearly incorporated the trust agreement:

> This Reinsurance Agreement, the Reinsurance Trust Agreement and the Comfort Trust Agreement supersede all prior agreements, whether written or oral, between the Parties with respect to its subject matter and constitutes . . . a complete and exclusive statement of the terms of the agreement between the Parties with respect to its subject matter.

The court found that the reinsurance agreement, which contained the binding arbitration clause, remained in effect and that the trust agreement did not amend or replace the reinsurance agreement. The court noted that the agreements were meant to be read in conjunction with each other. The court rejected the notion that the trust agreement could replace the reinsurance agreement and its arbitration clause, and agreed with the cedent that such an argument would lead to an absurd result.

The court then determined that the question of arbitrability should be left to the arbitrators. The reinsurer argued that the dispute about the trust agreement assets did not fall within the scope of the reinsurance agreement's arbitration clause. The court held that this was a question of arbitrability, which fell within the broad scope of the arbitration clause. The court also commented that the American Arbitration Association rules, which were incorporated into the arbitration clause, vested the arbitrator with the power to determine questions of arbitrability.

Accordingly, the court granted the cedent's motion to compel arbitration and denied the reinsurer's motion to enjoin arbitration.

Puerto Rico Federal Court Upholds Order Compelling Arbitration and Denies Motion to Stay

Integrand Assur. Co. v. Everest Reinsurance Co., No. 19-1111 (DRD), 2020 U.S. Dist. LEXIS 77407 (D.P.R. May 1, 2020)

A Puerto Rico federal court denied a reinsured's motion to alter or amend a judgment ordering the parties to proceed to arbitration in accordance with the terms of the arbitration provisions included in their reinsurance contracts, and denied the reinsured's motion to stay the proceedings and arbitration pending the court's ruling. At issue was whether the Superior Court of the Commonwealth of Puerto Rico (the "Receivership Court") has "exclusive jurisdiction to attend" to any action by or against the reinsurer and the reinsured's estate once receivership proceedings against the reinsured commenced.

In denying the reinsured's motion to alter or amend the judgment, the court found that the reinsured did not establish that there had been a manifest error of law in the preceding judgment. Given that the reinsured had previously presented all of the arguments before the court, the court refused to entertain the reinsured's attempt to re-litigate matters previously adjudicated.

Despite the reinsured's failure to meet the standards to warrant granting its motion to alter or amend a judgment, the court, for the sake of clarity, provided further insight as to why the court has jurisdiction over the case. First, the court found that, as a matter of law, a liquidation order issued by the Receivership Court could not divest the district court of jurisdiction. Second, the McCarran-Ferguson Act did not reverse-preempt the FAA, and, therefore, the court was entitled to enforce the valid arbitration clause included in the reinsurance contracts. The court denied the reinsured's motion to stay based on the same analysis.

The court then ordered the parties to appoint mutually agreed arbitrators within 25 working days.

Massachusetts Federal Court Holds Arbitrators Should Decide If Reinsurance Rebilling After Final Arbitration Award Is Precluded

Certain Underwriters at Lloyd's, London v. Century Indemnity Co., Nos. 18-cv-12041, 19-cv-11056, 2020 U.S. Dist. LEXIS 39242 (D. Mass. Mar. 6, 2020)

A dispute arose over the billing of molestation losses. After settling with its insured, the cedent allocated all of the molestation claim payments to the policy in effect at the time of the first act of molestation as agreed in the settlement agreement and then accumulated the payments allocated to each policy period and billed them as a single loss occurrence. An arbitration resolved the initial billing dispute in favor of the reinsurer holding that the allocation under the settlement agreement was not the product of a reasonable and business-like investigation. The ceding company then rebilled the same losses, but this time spread the loss payments across each of the policies in effect during the time of the abuse and then accumulated all the payments for each policy period and billed them as a single loss occurrence.

After the first arbitration, the final award (and a clarification) was confirmed and a judgment was entered. After the rebilling, the reinsurer refused to pay based on the judgment rendered confirming the original arbitration award. The cedent demanded arbitration and moved to compel arbitration. The reinsurer moved to enforce the judgment, to enjoin the second arbitration demand, and to dismiss the petition to compel arbitration.

The court allowed the reinsurer's motion to enforce the judgment in part, denied the motion to enjoin the second arbitration and the motion to dismiss the petition to compel arbitration. In doing so, the court addressed the preclusive nature of the first arbitration award (and judgment) and whether it was for the second arbitration to determine the preclusive effect of the first award.

As the court held, the preclusive effect of a prior arbitration on a subsequent arbitration is an arbitrable dispute. Here, said the court, the cedent was seeking to determine whether the preclusive scope of the prior arbitration decision encompassed the rebilling that was done without allocating the loss payments under the terms of the settlement agreement. Thus, the court found that the issue was not whether the ceding company was attacking the first arbitration, but whether the original arbitration award precluded arbitration of the rebilling.

The court found that nothing in the arbitration award indicated that it was intended to have a prospective effect over new billings or that it foreclosed submitting the reinsurance billings in a new format. The court stated that the arbitration award turned on the unreasonableness of the settlement agreement allocation in concluding that the billings were improper and did not address all other issues. Thus, the court held that the preclusive effect of the arbitration award was an issue for the subsequent arbitration panel to resolve.

The court applied the same principles to the reinsurer's motion to dismiss the petition to compel the second arbitration. The court found that the cedent was an aggrieved party because there was no umpire appointed and there was an ongoing dispute between the parties regarding the appointment of the arbitrators.

There was also an issue as to how many arbitration panels should be formed. The court declined to direct the formation of multiple panels because that issue was a procedural matter for the arbitrators to decide. As the court concluded, "[i] t will be up to the arbitrator to determine whether multiple arbitration panels should be formed."

Illinois Federal Court Confirms Final Arbitration Award Including Attorney Fees

Catalina Holdings (Bermuda) Ltd. v. Muriel, No. 18-cv-05642, 2020 U.S. Dist. LEXIS 59812 (N.D. Ill. Apr. 6, 2020)

The cedent, now in liquidation and represented by the receiver, and the reinsurer, now represented by a successor company, sought to vacate and confirm, respectively, an arbitration award that included attorney fees. In a rather lengthy opinion chocked full of analysis, an Illinois federal court denied the liquidator's petition to vacate or modify and granted the reinsurer's petition to confirm the award.

The case is interesting because it addresses confirmation and vacatur under both the Federal Arbitration Act's ("FAA") Chapter 1 and Chapter 2. The court ultimately concluded that there was no relevant difference between Chapter 1 and Chapter 2 of the FAA (the latter implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) as the same standards applied for purposes of this case.

The liquidator sought to vacate the award under FAA section 10(a) or modify under 11(b). Arguing that the arbitrators exceeded their powers in awarding attorney fees on a non-contractual basis. The reinsurer sought to confirm the award. In ruling against the liquidator, the court noted the various authorities holding that courts will enforce an arbitration award so long as it draws its essence from the contract, even if the court believes the arbitrator misconstrued the contract (citations omitted). The court quoted cases holding that courts will not overturn an award because an arbitrator committed serious error, or the decision is incorrect "or even whacky."

The court held that the award met these deferential standards. The court found that in the interim final award, the parties' submissions in response and the final award reflected the arbitrators' engagement with the relevant portions of the reinsurance contracts. The court also construed the provision allowing the panel to award costs, but not exemplary damages as consistent with the arbitrators' award of attorney fees. Additionally, as noted by the court, the issue of attorney fees was presented to the panel by both parties. The court rejected the argument that an award of attorney fees was punitive.

In some interesting commentary, the court addressed the honorable engagement language in the arbitration provision. The court cited the honorable engagement language as one of the contractual features supporting the interpretation of the word "costs" to include attorney fees.

Finally, the court rejected the reinsurer's request for sanctions, finding them not warranted in this case. Accordingly, the award was confirmed and converted into a judgment.

Illinois Federal Court Confirms Final Award Over Interim Final Award

Allstate Ins. Co. v. Amerisure Mut. Ins. Co., Nos. 19 C 4341, 19 C 7080, 2020 U.S. Dist. LEXIS 53923 (N.D. Ill. Mar. 25, 2020)

In this case, underlying asbestos claims manifested into a reinsurance dispute between the cedent and its facultative reinsurer over whether defense costs could be billed in addition to the limits under umbrella policies. The reinsurer resisted billings from the cedent because it could not understand why the cedent was paying costs in addition to the limits of the underlying umbrella policies. The reinsurer thought the cedent's answers were insufficient, so it demanded arbitration.

In the arbitration, the reinsurer sought an interim award directing the cedent to provide the reinsurer with the answers to its questions about the payment of costs under the umbrella policies and for an order that the reinsurer was not obligated to pay the cedent for its defense cost payments in addition to the limits of the umbrella policies. The panel issued an "Interim Final Award," which denied the cedent's claims for defense costs in addition to the umbrella policy limits on five of six certificates and granted the cedent's claim on only the 1982 certificate. The panel found that the 1982 umbrella policy allowed for the cession of costs in addition to the policy limits, but the earlier policies did not.

The parties disagreed as to how to interpret the interim award, could not come to a resolution of the dispute, and filed final briefs with the arbitration panel. Meanwhile, the reinsurer filed a petition to confirm the interim award. The panel then issued a "Final Award," which allowed the cedent to cede defense costs to the reinsurer, but for 5 of the 6 certificates only up to the policy limits, with the allowance of costs in addition to the limits for the 1982 policy and certificate. The cedent filed its petition to confirm the final award.

In granting the cedent's petition and denying the reinsurer's petition, the court held that the Final Award was the final award, not the Interim Final Award, and that the Final Award, although terse, only decided the issues that had not been decided under the Interim Final Award. The court rejected the reinsurer's argument that the arbitration panel was *functus officio* after it issued the Interim Final Award.

As explained by the court, while the Interim Final Award was not a model of clarity, it denied the cedent's claims under the pre-1982 contracts only to the extent that the cedent sought defense costs in addition to the policy limits. The interim award tracked the reinsurer's requests for the panel to order the cedent to provide more information, retain jurisdiction to resolve further disputes based on the information the cedent disclosed, and rule that defense costs were payable only within the underlying policy limits. The court stated that it was not reasonable to interpret the panel's interim award to mean that the panel denied the cedent's claims to any defense costs, regardless of whether they were within or without the underlying policy limits. The court concluded, that "it is clear that in the Interim Final Award the arbitration panel intended to address only whether [the cedent] could properly seek payment from [the reinsurer] of defense costs in addition to its policy limits, and it was only [the cedent's] claims to such payments that were denied."

The court granted confirmation of the Final Award, holding that in the Final Award, the panel only decided issues that it had not yet decided, so its decision was not *functus officio*. Thus, the cedent was able to recover defense costs paid within the limits of 5 of 6 umbrella policies and defense costs paid in addition to the limits under the 1982 policy.

Montana Federal Court Dismisses Claims Against Reinsurer For Lack of Personal Jurisdiction

First Nat'l Bank v. Estate of Carlson, CV 18-111-BLG-TJC, 2020 U.S. Dist. LEXIS 51089 (D. Mont. March 24, 2020)

A Montana federal court granted a reinsurer's motion to dismiss a complaint alleging breach of contract and declaratory relief for lack of personal jurisdiction. The dispute arises out of the death of the policyholder whose estate claims it is entitled to receive benefits under a business auto insurance policy.

In granting the reinsurer's motion to dismiss, the court found that there was no general or specific jurisdiction over the reinsurer under Montana law. As to general jurisdiction, it was clear, according to the court, that the reinsurer was not "essentially at home" in Montana merely because it was authorized to sell reinsurance in the state, or that it conducted business within the state. The court also found no specific personal jurisdiction given that the reinsurer's activities in the state during the relevant time period were limited to reinsurance, which, the court found, are unrelated to the policy at issue. Thus, reinsurance was not found to create a substantial connection with the forum state. The court also found that the reinsurer did not expressly consent to personal jurisdiction by becoming an accredited reinsurer under Montana's reinsurance regulation statute.

South Carolina Federal Court Finds for Bank After Bench Trial For Breach of Reinsurance Trust Agreement

Accident Ins. Co., Inc. v. U.S. Bank Nat'l Assn., No. 3:16-cv-02621-JMC, 2020 U.S. Dist. LEXIS 68918 (D.S.C. Apr. 20, 2020)

A dispute over a fronted reinsurance program resulted in a bench trial judgment in favor of a trustee bank against breach of contract and related charges over the management of a reinsurance trust account. A fronting carrier and reinsurer entered into a trust agreement for a reinsurance trust to secure the reinsurance obligations owed to the fronting carrier from the reinsurer. When the reinsurer stopped writing business and went into receivership, the fronting program went into runoff. Certain assets in the trust were then listed without value. This was important because the fronting carrier now had to pay all losses without the 100% reinsurance recovery.

The fronting carrier sued the trustee bank for breach of contract. In finding in favor of the trustee bank, the court concluded that the trust agreement was not breached because of the lack of negotiability of certain assets in the trust or for any of the other reasons submitted. Notably, the court found that nothing in the trust agreement required that it comply with the reinsurance trust regulations of either Delaware or New York and found no evidence that the parties sought approval of the reinsurance trust by either state's regulator.

Texas Appellate Court Affirms Fraudulent Inducement Judgment Against Reinsurer's Principals

Harrison v. Meritz Fire & Marine Ins. Co., Ltd., No. 14-18-00336-CV, 2020 Tex. App. LEXIS 3618 (Tex. Ct. of App. Apr. 30, 2020)

A Korean insurance company sued its purported reinsurer and the reinsurer's principals for fraud and obtained a jury verdict and judgment against the principals. Summary judgment against the reinsurer had already been granted. On appeal, the principals argued against the fraudulent inducement finding and the appellate court affirmed.

The case is an interesting study in how reinsurance can end up being the central issue in a fraud case. Here, the reinsurer claimed to have banking relationships with sufficient assets to secure its reinsurance obligations. It turned out that there were no bank accounts (perhaps because of a third party's fraud) and the cedent sought to cancel the reinsurance contracts and a refund of the reinsurance premium (which was never paid back). It is hard to imagine how a real insurance company and a broker could have fallen for a fraudulent trap, but it occurred.

West Virginia Federal Court Holds Reinsurance Information Can Be Relevant to Establish Bad Faith

Mid-State Auto, Inc. v. Harco Nat'l Ins. Co., No. 2:19-cv-00407, 2020 U.S. Dist. LEXIS 51727 (S.D. W.Va, Mar. 25, 2020)

In a fire loss claim, an insured brought suit in federal court against its insurer alleging breach of contract and bad faith after a loss at the insured's car dealership. The parties were engaged in a discovery dispute centered on the insurer's redactions in produced reinsurance information. The insured moved to compel full production of the reinsurance information, claiming that it was "highly relevant" to the insurer's allegedly unfair claims settlement practices. The court agreed.

Reinsurance information, the court reasoned, is relevant where it sheds lights on the insurer's state of mind in handling claims. In particular, prior deposition testimony revealed that the insurer had been preparing ongoing "reinsurance reports" for its reinsurer's benefit that contained summaries of the status of the fire loss claim and the insurer's investigation. Because those reports presumably contained the insurer's assessment of its claims handling, the court held that this type of reinsurance information was relevant to establishing whether the insurer acted unreasonably in denying coverage.

Idaho Federal Court Rules That Reinsurance Information Is Not Discoverable

Idahoan Foods, LLC v. Allied World Assur. Co. (US), Inc., No, 4:18-cv-00273-DCN, 2020 U.S. Dist. LEXIS 7243 (D. Id. Apr. 22, 2020)

An Idaho food processing company was a party to a contract with a potato company to produce potato flakes and slices. The food processor suffered major losses when a fire at the potato company's facility destroyed nearly one million hundred-weight pounds of potatoes.

As a result, the food processor produced 16 million fewer pounds of refined potato products than it had forecasted for fiscal year 2017. The food processor filed a claim under its policy with its insurer for business income and extra expense coverage due to the loss.

After the insurer denied a majority of the food processor's claim, the food processor filed suit in Idaho federal court to recover the additional losses it believed to be covered under its insurance policy. During discovery, the insured sought to compel production of the insurer's communications with its reinsurer. The court held that the reinsurance contracts themselves were discoverable, but any communications and discussions between the insurer and the reinsurer were "too far removed" for purposes of establishing breach of contract and bad faith by the insurer. There is little reason, the court held, "to involve another party [the reinsurer] that had essentially an 'arms-length' transaction with [the insurer]." The court ordered the insured to produce copies of its reinsurance contract, but denied the motion to compel production of communications and related information between the insurer and reinsurer.

Colorado Supreme Court Deals Blow to Interstate Insurance Compact

Amica Life Ins. Co. v. Wertz, No. 19SA143, 2020 CO 29, 2020 Colo. LEXIS 408 (Co. Sup. Ct. Apr. 27, 2020)

In the stunning decision, the Colorado Supreme Court dealt a serious blow to the Interstate Insurance Product Regulation Commission (the "Interstate Insurance Compact" or the "Compact"). The court ruled that the Colorado General Assembly was not permitted to delegate authority to the Interstate Insurance Compact to adopt a life insurance product standard that varied from the Colorado Insurance Code. This decision is a stunning setback for state insurance regulation and, in an effort to preserve a more generous suicide exclusion in Colorado law, the Colorado Supreme Court has called into question the Compact product standards, at least in Colorado.

A life insurer issued a term life insurance policy to a Colorado resident. The policyholder named another individual as the beneficiary. The policyholder committed suicide and the beneficiary filed a claim for the policy benefits. The life insurer denied the claim, based on the insured's suicide occurring before expiration of the two-year suicide period set forth in the policy. The insurer then filed a declaratory judgment action seeking a Colorado court's interpretation of the policy to validate that it had denied the claim properly.

Colorado is a member of the Interstate Insurance Compact. The policy was based on the Interstate Insurance Compact Individual Term Life product standards, and prior to the sale, the insurer had filed the policy form with the Compact, and the Compact staff reviewed and approved the form. Under the Compact's Individual Term Life product standards, a policy must include a suicide exclusion that extends no more than two years. In contrast, Colorado is one of the few states in the nation with a suicide exclusion of only one year.

The case found its way to the Colorado Supreme Court on the following certified question from the Tenth Circuit Court of Appeals: Whether the Colorado General Assembly could delegate power to an interstate administrative commission to approve insurance policies sold in Colorado under a standard that differs from Colorado statute.

In answering the question in the negative, the court first discussed the "non-delegation doctrine," outlining the long-established general rule in Colorado that the legislature cannot delegate its legislative power to another person or agency. The court explained that the non-delegation doctrine is a subset of the constitutional separation of powers. The court was careful to note that this preclusion is not absolute and certain authority could be delegated to an administrative agency. The court emphasized that the power to make law is non-delegable, while the authority to execute a law can be delegated. It clarified that the authority to execute a law certainly includes safeguards and administrative standards to protect against unnecessary and uncontrolled exercise of discretionary power.

Instead of beginning with any discussion of the Compact's framework, the court started its analysis with a public policy discussion. The court outlined Colorado's strong public policy that "disfavors suicide exclusions," citing Section 10-7-109 of the Colorado Insurance Code and a 2018 decision where the one-year suicide exclusion was narrowed further to require an insurance company to show the insured's intent to commit suicide in order to assert the exclusion successfully. The court contrasted Colorado's strong public policy against the suicide exclusion with the Compact's two-year suicide exclusion that "effectively overrides Colorado statutory law."

Omitting any discussion of the Compact framework or the terms of the Compact legislation as enacted by the Colorado General Assembly, the court jumped to its ruling that "[i]n our view, delegating to the Commission the authority to adopt a Standard that so circumvents the clear language of section 10-7-109 is to confer legislative powers on the Commission, and pursuant to the authorities discussed above, the General Assembly may not properly do this."

The court then summarily addressed several of the insurer's objections with no additional discussion of the Compact's framework. The insurer noted that each state legislature was able to opt-out of a standard if it had significant concerns. The court disregarded the Compact's state opt-out feature as being a check on delegation of authority to the Commission. Instead, the court questioned whether those opt-out standards were even effective because a product standard could go into effect before a legislature would have time to react to a product standard.

The court focused most of its attention, and harsh criticism, on the fact that the Interstate Insurance Compact was adopted by the member states, including Colorado, but had not been approved by Congress. The court said that it had no authority before it to support the position that a compact that had not been ratified by Congress could supersede conflicting state law. In the absence of Congressional consent, the court said that it was "not persuaded that the [Colorado] legislature has the authority to delegate to interstate agencies powers that it cannot constitutionally delegate to intrastate agencies." With this analysis, the court found that the Compact's product standards could not preempt the Colorado statutory suicide exclusion.

For a deeper analysis of this case and its ramifications on life insurance companies, please see Interstate Insurance Compact Dealt Blow in Colorado Decision.

Recent Speeches and Publications

Larry Schiffer spoke on "Arbitration of Policyholder Disputes: A Better Alternative to Litigation?" a Lawline Webinar on May 19, 2020.

Mary Jo Hudson and Larry Schiffer spoke on "Proposed Legislation Surrounding COVID-19", on the *Spot on Insurance Podcast*, April 17, 2020.

Mary Jo Hudson and Larry Schiffer spoke on "COVID-19 Update: Regulation, Legislation and Litigation", to the *Association of Bermuda Insurers and Reinsurers* webinar on April 9, 2020.

Ellen Farrell spoke 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 was 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 was the keynote speaker. This conference was 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's article, "Arbitration Should Play a Key Role in Resolving COVID-19 Insurance and Reinsurance Disputes," was published in the Q2 ARIAS•U.S. Quarterly in May 2020.

Larry Schiffer, Aaron Garavaglia and Ellen Farrell's article, "COVID-19 and the Exclusion for Virus and Bacteria," was published in the COVID-19 Litigation Report, Harris Martin Publishing, on May 15, 2020.

Ellen Farrell, Aaron Garavaglia and Larry Schiffer's article, "Fighting State COVID-Related Insurance Coverage Mandates," was published as a Law360 Expert Analysis on April 21, 2020.

Larry Schiffer's article, "Commentary: Reinsurance and COVID-19," was published in Mealey's Litigation Report: Catastrophic Loss on April 2020 and in Mealey's Litigation Report: Reinsurance on March 27, 2020. The same article was republished in Reinsurance and Arbitration Report, Harris Martin Publishing on March 28, 2020.

Ellen Farrell, Aaron Garavaglia, Kelly Mihocik and Larry Schiffer's article, "Businesses Scramble to Assess Business Interruption Insurance Coverage for COVID-19," was published in the COVID-19 Litigation Report, Harris Martin Publishing on March 30, 2020.

Larry Schiffer, Alex Al-Doory, Samantha Caspar, Dilpreet Dhanoa, Kelly Mihocik and Samantha Walker's article, "A Brief Review of Reinsurance Trends in 2019," was published in Westlaw Journal Insurance Coverage, March 4, 2020, 2020 WL 1237931.

Larry Schiffer's article, "Arbitrators and Social Media: Do They Mix?," was published in the ARIAS•U.S. Quarterly, Q1, 2020.

Larry Schiffer's commentary, "Social Inflation: What Is It and Why Reinsurers Should Care?" was published on IRMI.com on February 28, 2020.

Congratulations to the Squire Patton Boggs insurance group for its great showing in Chambers USA 2020. The Ohio office is ranked in Band 1 for Insurance: Insurer, the New York office is ranked in Band 2 for Insurance: Dispute Resolution: Insurer and the Washington, D.C. office is ranked in Band 3 for Insurance: Insurer. Individually, Doug Anderson, Pat Hatler, Mary Jo Hudson and Sue Stead are ranked in Band 1 Insurance: Ohio, Mark Sheridan is ranked in Band 3 Insurance: New Jersey, Suman Chakraborty is ranked in Band 3 Insurance: Dispute Resolution: Insurer: New York, Larry Schiffer is ranked in Band 3 Insurance: Dispute Resolution: Reinsurance in USA – Nationwide and in Band 2 Insurance: Dispute Resolution: Insurer – New York, Paul Kalish is ranked in Band 2 Insurance: Dispute Resolution: Insurer in USA – Nationwide and in Band 1 Insurance: Insurer – District of Columbia, and Deirdre Johnson is ranked in Band 4 Insurance: Insurer – District of Columbia.

Congratulations to Paul Kalish and Larry Schiffer for being named to the Best of the Best USA 2020 for Insurance and Reinsurance by Expert Guides.

Congratulations to Larry Schiffer for being named a Lexology Legal Influencer for Financial Services – US for Q1 2020.

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