SQUIRE PATTON BOGGS

REINSURANCE NEWSLETTER

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- Congratulations to the following Squire Patton Boggs lawyers who were listed in *Who's Who Legal 100 2015* John Nonna, Larry Schiffer and Carole Sportes for Insurance & Reinsurance and Valérie Ravit for Life Sciences.
- Congratulations to Suman Chakraborty, who was named a "Rising Star" in both Insurance and Litigation in Legal Media Group's Expert Guide's inaugural *Rising Stars in the US* edition for 2015.
- Congratulations to John Nonna, who was listed in *Best Lawyers 2016* for Commercial Litigation, Insurance Law and Litigation – Mergers & Acquisitions
- Congratulations to John Nonna and Larry Schiffer, who were listed as a Leading Lawyer, Insurance – Advice to Insurers, in *Legal 500* for 2015

Recent Case Summaries

Second Circuit Closes an Open Question: Grant of Motion to Compel Arbitration Requires Stay Not Dismissal

Katz v. Cellco Partnership, Nos. 14-138, 14-291, 2015 U.S. App. LEXIS 13055 (2d Cir. Jul. 28, 2015).

In a non-reinsurance case, the Second Circuit Court of Appeals has answered what had been an open question in the Second Circuit: When faced with an application to compel arbitration and stay litigation, may the district court nevertheless dismiss the complaint?

The United States Supreme Court has yet to rule on this issue and the federal circuit courts are split on this issue. The Second Circuit Court of Appeals has now ruled definitively on that issue holding that the Federal Arbitration Act (FAA) requires a stay of proceedings when all claims are referred to arbitration and a stay is requested.

The case arose when a putative class action was brought by local wireless subscribers against a network. The plaintiff moved for summary judgment and the network moved to compel arbitration and to stay proceedings based on the arbitration clause contained in the customer service agreement. The district court granted the motion to compel arbitration and dismissed the complaint.

On appeal, the circuit court recognized that the district court's ability to dismiss was an open question in the Second Circuit. The court, which only addressed the dismissal issue, outlined the split of authority among the circuit courts. The court recognized the advantages of dismissing the complaint, but nevertheless came down on the side of the stay rather than dismissal.

The court's rationale centered on the plain and unambiguous language of Section 3 of the FAA:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. 9 USC § 3 (emphasis added).

The court held that this was a mandatory provision consistent with the FAA's statutory scheme and pro-arbitration policy. It allows the parties to proceed directly to arbitration and avoids unnecessary interlocutory appeals.

While it might be more efficient to dismiss the action considering that the stay will most likely result in dismissal once the arbitration is concluded, the court, although recognizing that efficient docket management is often the basis for dismissal of the complaint, nevertheless held that efficiency is not reason enough to trump a statutory mandate.

Second Circuit Directs District Court to Appoint Umpire

Odyssey Reins. Co. v. Certain Underwriters at Lloyd's London, No. 14-2840-cv, 2015 U.S. App. LEXIS 15052 (2d Cir. Aug. 26, 2015).

In a summary order without precedential effect, the Second Circuit has vacated a district court's order denying a retrocedent's petition to appoint an umpire and remanded the case to the district court to appoint an umpire under Section 5 of the Federal Arbitration Act (FAA), 9 U.S.C. § 5. The district court's decision was discussed in our September 2014 Reinsurance Newsletter.

In granting relief to the retrocedent, the court found that the parties continued to contest the qualifications of the other side's umpire candidates and have sharply disputed the meaning of various terms in the arbitration agreement resulting in a deadlock over whether certain candidates are qualified. The retrocedent refused to proceed with the candidates on the retrocessionaire's list. Accordingly, this deadlock has caused a lapse in the naming of an umpire and is subject to resolution under Section 5 of the FAA.

The court did not reach the question of whether and under what circumstances a district court might be empowered to review a candidate's qualifications prior to arbitration proceedings. The court also made it clear that the district court need not appoint an umpire from the retrocedent's list and that the district court can consider the candidates' qualifications as incidental to the court's role in appointing an umpire under Section 5.

Connecticut Federal Court Grants Petition to Compel Arbitration in Dispute Over Different Types of Panels

Am. United Life Ins. Co. v. Travelers Indemn. Co., No. 3:14cv1339 (WWE), 2015 U.S. Dist. LEXIS 108585 (D. Conn. Aug. 18, 2015).

A Connecticut federal court has granted a reinsurer's petition to compel arbitration to resolve whether a prior arbitration award has preclusive effect on the valuation of certain claims and the threshold issue of the type of panel that should be convened to resolve the pending issues.

In a prior arbitration, the panel issued an award concerning the valuation method the cedent could use for certain claims to determine the commutation payment it was entitled to from the reinsurer. A dispute arose as to certain information the cedent was to provide on specific claims. The reinsurer demanded arbitration under the reinsurance contract's broad arbitration clause.

After both parties appointed party-appointed arbitrators the parties were to exchange names of umpire candidates. The reinsurer did, but the cedent did not on the date required because of efforts to resolve the issues. Essentially, the cedent believed that the issues concerning the value of the specific claims should be resolved by a panel of actuaries under the commutation and sunset clause of the reinsurance agreement.

In resolving this dispute, the court granted the reinsurer's petition to appoint an arbitration panel, which was then to decide whether the valuation issue should be decided by that panel or by a panel of actuaries under the sunset and commutation clause. The court's decision was based upon the broad language of the arbitration clause covering "any dispute" between the parties.

The court also allowed the cedent to name umpire candidates under the procedures agreed upon, holding that the cedent had not forfeited its right to participate in the umpire selection process. The court found that the cedent did not waive its right to participate, but was trying to settle the dispute when it failed to submit its list of candidates. Thus, the court gave the ceding company an additional chance at participating in the umpire selection process.

New York Federal Court Once Again Denies Reinsurers' Attempt to Avoid Arbitration Award

Arrowood Indemn. Co. v. Equitas Ins. Ltd., No. 13cv7680 (DLC), 2015 U.S. Dist. LEXIS 99787 (S.D.N.Y. Jul. 30, 2015).

For the second time, a New York federal court has rebuffed a reinsurers' attempt to avoid the affects of an adverse arbitration award. You have to admire their persistence.

This second dispute arises out of a 2013 adverse arbitration award concerning underlying asbestos losses. After the award was confirmed and after the time to appeal had passed, the reinsurers discovered some evidence that they believed demonstrated that the cedent's arguments in the original arbitration were disingenuous and that the evidence was purposely hidden from disclosure.

In the first post-confirmation challenge to the award, which we discussed in our March 2015 Reinsurance Newsletter, the court rejected the reinsurers' attempt to challenge the judgment confirming the award. In this second challenge, the reinsurers brought a second arbitration challenging the post-award billings and seeking documents under the access to records provisions of the reinsurance contracts and the award.

The court rejected the reinsurers' second challenge as well and granted the cedent's motion to enjoin the second arbitration. As in the first decision, the court found this second arbitration to be a collateral attack on a final arbitration award that had been confirmed by the court. Essentially, held the court, the reinsurers were attempting to vacate and reverse the first arbitration award.

What the reinsurers were trying to do was to compel discovery of a document that the reinsurers claimed would demonstrate that the cedent intentionally misled the first arbitration panel and that the panel's interpretation of the contract's Common Cause Coverage and First Advised Clause provisions was erroneously interpreted because of the cedent's withholding of this document. The court, while recognizing what the cedent was attempting to do, rejected the attempt, holding that "[s]uch arbitral mulligans are forbidden by the FAA."

The court enjoined the second arbitration because it directly contravened the FAA. The court found that the right of reimbursement in the award was not a loophole that allows another arbitration panel to revisit and potentially alter the interpretation of the contract that was at the heart of the first arbitration award. As the court stated, "the FAA does not permit a second arbitration demand to be used to nullify an arbitral award, in whole or in part, on the same untimely ground.

Massachusetts State Appeals Court Affirms Confirmation of Arbitration Award Denying Reinsurer Access to Privileged Documents

Liberty Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 87 Mass. App. Ct. 1127 (2015).

A Massachusetts intermediate appeals court has affirmed the confirmation of an arbitration award denying a reinsurer unfettered access to documents the cedent claimed were privileged. The quest by reinsurers to obtain privileged documents concerning underlying claims ceded to the reinsurers has been a matter of controversy now for several years. Cedents often refuse to provide reinsurers documents protected by the attorney-client and attorney work-product privileges to avoid claims of waiver by coverage counsel and plaintiff's counsel in the underlying claims.

In this case, the reinsurer demanded arbitration to resolve whether, under the applicable access to records clause, the cedent was required to provide all documents relevant to the underlying claims, including privileged documents. The arbitration panel decided that the access to records clause did not include privileged documents. The motion court confirmed the arbitration award and denied the reinsurer's motion to vacate.

On appeal, the court affirmed the confirmation order citing the very limited review courts are permitted to give to arbitration awards.

DC Circuit Affirms Holding That Excise Tax Does Not Apply to Foreign Retrocessional Contracts

Validus Reinsurance, Ltd. v. U.S., 786 F.3d 1039 (D.C. Cir. 2015).

The United States Court of Appeals for the DC Circuit affirmed a district court decision holding that the excise tax imposed under 26 USC § 4371 does not apply to wholly foreign retrocession contracts. The opinion noted that the relevant language in the statute is ambiguous, and found that each party had raised a reasonable interpretation of what the statute meant. A focus of the court's analysis was on what the term "covered" meant in the context of reinsurance. In considering the meaning of "covered," the court looked to dictionary definitions, statutory materials and case law in considering what meaning would be most appropriate in the insurance context. Ultimately, however, the court was unable to determine if the term was intended to include both direct and indirect coverage of US risks.

The court resolved the ambiguity by applying a presumption against extraterritoriality. This presumption against extraterritoriality is consistent with US federal income taxation as a whole, which imposes taxes on worldwide income only on US persons. Non-US persons are generally only subject to taxation on income for which there is a US connection.

By basing its decision on the presumption against extraterritoriality, the court narrowed the possible scope of the district court's decision. The district court holding would have prevented the application of the excise tax to retrocession transactions between US reinsurance companies and non-US reinsurance companies. The decision related to only retrocession transactions between non-admitted non-US reinsurers, but some commentators have asserted that it could also be read to apply to reinsurance transactions involving non-US counterparties where US risks are involved. By statute, there is also an exemption from the excise tax for amounts received by non-US insurers that are effectively connected with a trade or business in the US unless such amounts are exempt from tax under a treaty.

Second Circuit Affirms Cat Bond Decision

Mariah v. Am. Family Mut. Ins. Co., No. 14-4062-cv, 2015 U.S. App. LEXIS 11162 (2d Cir. Jun. 30, 2015).

In a summary order, the Second Circuit Court of Appeals has affirmed the district court's order requiring a special purpose vehicle to pay on its Cat Bond issued to the cedent for storm losses. Our December 2014 Reinsurance Newsletter discussed the decision at the district court level. This was the case where a PCS catastrophe bulletin on the storm was amended and the special purpose vehicle argued that the beneficiary could not access the Cat Bond funds based on an amendment to the bulletin after the record date. The district court rejected that argument and the Second Circuit affirmed for the reasons expressed by the district court.

Fifth Circuit Construes Claims Arising Out of a Fronting Arrangement

Lincoln Gen. Ins. Co. v. U.S. Auto Ins. Servs., Inc., 787 F.3d 716 (5th Cir. 2015).

Fronting deals are often complicated especially when managing agents and various affiliates are involved. That is precisely what the Fifth Circuit had to deal with in this case. The underlying dispute involved a complex fronting arrangement with a family-owned series of affiliates that produced and underwrote automobile business. The MGA's compensation was tied to target loss ratios and the reinsurer – the real risk bearer – received tis margin depending on whether paid claims exceeded the expected loss ratio.

Unsurprisingly, the target loss ratio was not met and the reinsurer lost millions. The premium trust fund set up to fund claims ran out of funds and the reinsurer had to fund the claims. The reinsurer sued everyone in sight and settled with certain parties. In this case, the reinsurer won a substantial verdict, but appealed the dismissal of even more claims against the remaining defendants.

The opinion is long and detailed into the various causes of action. The court rejected the defendants' challenge to the viability of a tortious interference claim based on the statute of limitations. No time bar was found given that the reinsurer did not know about the claims prior to the premium funds being depleted. The court remanded certain claims for further proceedings. Those interested in complicated fronting deals and the potential for disputes will find this case interesting.

New York Federal Court Allows "Reverse Bad Faith" Counterclaim

Utica Mut. Ins. Co. v. Century Indemn. Co., No.6:13-CV-995, 2015 U.S. Dist. LEXIS 71348 (N.D.N.Y. May 11, 2015).

A New York federal court has upheld a magistrate judge's determination allowing a reinsurer to amend its answer to add a counterclaim alleging that the cedent had manipulated its records to extract millions of dollars from the reinsurers in what the parties have termed a "reverse bad faith" claim.

The dispute stems from asbestos losses and whether those losses were properly allocated to primary or umbrella policies. On a procedural note, the court reviewed the magistrate judge's order under the clearly erroneous or contrary to law standards.

The cedent challenged the amendment claiming that no New York court has recognized a reverse bad faith claim in the reinsurance context. In refusing to reject the magistrate judge's order, the court found that allowing the amendment to assert the counterclaim was neither clearly erroneous nor contrary to law. The court noted that all parties agreed that there is in New York law the implied duty of good faith and fair dealing in all contracts. The court also pointed to the New York decisions characterizing the reinsurance relationship as one of utmost good faith.

While the court acknowledged the cedent's argument that no New York court has expressly allowed this theory to proceed, the court found that the lack of any controlling authority explicitly rejecting the claim was fatal to any contrary to law objections. The court found the counterclaim at least plausible under current New York law and the objections to the magistrate judge's order were overruled.

New York Federal Court Rejects Cedent's Reconsideration Motion on Bellefonte Ruling

Utica Mut. Ins. Co. v. Clearwater Ins. Co., No. 6:13-cv-1178 (GLS), 2015 U.S. Dist. LEXIS 95826 (N.D.N.Y. Jul. 23, 2015).

A New York federal court rejected a cedent's efforts at reconsideration of an earlier order granting a reinsurer partial summary judgment on Bellefonte grounds. The earlier decision was reported in our December 2014 Reinsurance Newsletter.

In seeking reconsideration, the cedent pointed to a recent unpublished Second Circuit decision, *Utica Mut. Ins. Co. v. Munich Reins. Am. Inc.*, 594 F. App'x 700 (2d Cir. 2014)(reported in our March 2015 Reinsurance Newsletter), which allowed the cedent to pursue discovery because of an ambiguity in the facultative certificate in that case. The court rejected the reconsideration application on various grounds, including that unpublished decisions by the Second Circuit do not have precedential effect.

First, the court found the cedent's application untimely under the local rules. Second, the court did not consider the Second Circuit's unpublished decision to be an intervening change in controlling law. In fact, the court found that the Second Circuit merely applied existing law to the facts and circumstances of that case and that it was unlikely that the Second Circuit intended to "break new ground" in a summary order. Third, the court found the specific language of the facultative certificate in that case was distinguishable from the facultative certificate in this case and that even if the court found the Second Circuit case to be binding, it would not mandate a different result.

Pennsylvania Federal Court Dismisses Complaint Without Prejudice in a First Filed Dispute

Excalibur Reins. Corp. v. Select Ins. Co., No. 15-2522 (E.D. Pa. Jul. 7, 2015).

A Pennsylvania federal court dismissed a reinsurer's complaint without prejudice in a reinsurance dispute even though the complaint was the first filed complaint in the dispute. A second complaint was filed by the cedents in Connecticut less than a week later.

The dispute arises out of a billing request by the cedents to the reinsurer, which was accompanied by a draft complaint that the cedents indicated they would file if payment was not received by the deadline. Instead of responding to the demand letter, the reinsurer filed its own complaint for a declaratory judgment prior to the deadline in Pennsylvania. The cedents filed their complaint five days later in Connecticut.

The cedents moved to dismiss or, in the alternative, transfer the reinsurer's action to Connecticut. The reinsurers opposed based on the first-filed doctrine.

In granting the motion to dismiss, the court noted that it has discretion to depart from the first-filed doctrine under certain rare circumstances and this case fit those circumstances. The cedents argued that the reinsurer's action was merely declaratory, was filed in bad faith, was filed for forum-shopping purposes, and was anticipatory and inequitable. The court found that the chronology of the request for payment and the reinsurer's filing was indicative of an improper first filing. The court also found that there was forum-shopping because filing in Pennsylvania avoided Connecticut's posting of security provisions. Finally, the court held that the cedents had established a nexus between Connecticut and the dispute. Accordingly, the court declined to exercise its jurisdiction over the case and dismissed the complaint without prejudice.

Florida Federal Court Dismisses Some But Sustains Other Utmost Good Faith Counterclaims

Old Republic Nat'l Title Ins. Co. v. First Am. Title Ins. Co., No. 8:15-cv-126-T-30EAJ, 2015 U.S. Dist. LEXIS 73891 (M.D. Fla. Jun. 8, 2015).

A Florida federal court dismissed some but sustained other counterclaims alleging breach of the duty of utmost good faith in this title reinsurance dispute. We discussed an earlier motion in this case against another reinsurer on the same basis in our June 2015 Reinsurance Newsletter.

The cedent counterclaimed against a reinsurer that brought an action seeking rescission, reformation and a declaratory judgment. Among the counterclaims were a series asserting breach of the duty of utmost good faith. The reinsurer moved to dismiss these counterclaims.

In granting the motion in part, the court dismissed those claims that were the same counterclaims as asserted by the cedent against the other reinsurer and which were dismissed by the court in its earlier ruling. The court dismissed those counterclaims because they were not related to breach of a contractual provision. As the court previously stated, a claim for breach of the duty of utmost good faith does not exist apart from a breach of contract.

In denying the motion on some of the other counterclaims, the court held that the remaining allegations were sufficiently related to the breach of contract claim and were permitted to proceed. These included failure to pay the claim under the reinsurance agreement and using delay tactics to avoid paying the claim. The court, however, dismissed the cedent's counterclaim for misrepresentation finding that the cedent failed to provide a specific contractual provision that proscribes that conduct.

Connecticut Federal Court Denies Summary Judgment, Allows Amendment to Pleading and Dismisses Counterclaim

Odyssey Reins. Co. v. Cal Regent Ins. Servs. Corp., No. 3:14-cv-00458-VAB, 2015 U.S. Dist. LEXIS 109890-91 (D. Conn. Aug. 20, 2015).

In companion decisions, a Connecticut federal court denied a reinsurer's motion for summary judgment, allowed the managing agent to amend its pleading and dismissed the managing agent's counterclaim for setoff.

This dispute arises out of a commercial automobile and garage liability program underwritten by the managing agent and reinsured by the reinsurer. The dispute was over the commissions that the managing agent was entitled to receive and whether the managing agent had to pay back provisional commissions because of subsequent adjustments.

The managing agent denied any obligation to pay commission adjustments claiming that the reinsurer has not proven its performance on all the terms of the reinsurance agreements. The managing agent alleged that the reinsurer may have participated in certain claims settlements and by doing so breached the loss settlement provisions of the reinsurance agreements.

Finding that Texas law applied, the court held that, under Texas law, the managing agent had the burden to deny the reinsurer's performance with particularity. The managing agent had not done so, but the court magnanimously granted the managing agent leave to amend its answer with particularity on the specific claim raised by the managing agent. The court warned the managing agent that it could only amend its answer if it had a good faith belief that the reinsurer failed to follow the cedent's instructions concerning the single specific claim raised by the managing agent. In fact, the court noted that it was highly unlikely that the managing agent can raise a genuine dispute as to whether the cedent told the reinsurer not to assist in the settlement of that contested claim.

The reinsurer was granted leave to re-file its motion for summary judgment after the amended answer was to be filed. In a second decision, the court dismissed the managing agent's setoff counterclaim because it was pleaded under Connecticut law instead of Texas law. Accordingly, it failed to state a claim upon which the court could grant relief.

New York Federal Court Allows Reinsurance Communications in Trial

U.S. Bank Nat'l Ass'n v. PHL Variable Life Ins. Co., Nos. 12 Civ. 6811 (CM), 13 Civ. 1580 (CM), 2015 U.S. Dist. LEXIS 81080 (S.D.N.Y. Jun. 22, 2015).

A New York federal court, on motions in limine, has allowed the introduction of reinsurance communications as evidence in a dispute between a policyholder of a series of universal life policies.

The dispute centers on whether the insurer could raise the cost of insurance rates on these universal life policies. As part of the evidence at trial, the policyholder sought to introduce certain reinsurance communications. These included communications between the insurance company and its reinsurer discussing a rate increase and internal communications at a reinsurer discussing the nature of a rate increase by the insurer. The court denied the motions in limine by the insurer to preclude these reinsurance communications holding that they were both relevant and probative on whether the insurer breached its duties.

New York State Court Upholds Determination That Certain Insurance Company Records Are Protected by Attorney-Client Privilege Against Reinsurer

Granite State Ins. Co. v. R&Q Reins. Co., No. 654494-2013, 2015 N.Y. Misc. LEXIS 2616 (N.Y. Sup. Ct. Jul. 21, 2015).

This case involves a breach of contract claim by a cedent alleging that its reinsurer wrongfully refused to pay amounts due under several reinsurance agreements. During discovery, the reinsurer sought communications between the cedent and its outside counsel retained to defend the cases for which the cedent now seeks reinsurance recovery and other documents related to cedent's reinsurance collections from other unrelated reinsurers.

In a prior order, the court held that these documents were protected by the attorney-client privilege because, among other reasons, neither the "common interest" exception nor the "at issue" exception to the privilege applied to the dispute. As between an insurer and a reinsurer, the court held that the common interest doctrine does not apply to the issue of waiver of privilege. Additionally, the court held that an insurer does not place the bona fides of a settlement at issue merely by alleging in a pleading that the settlement was reasonable and in good faith.

The motion sought reconsideration of this prior determination, but did not proffer any argument that there has been a change in the law and did not point to any new fact that would change the court's prior decision. As such, the court denied the reinsurer's motion.

Texas Appeals Court Affirms Ruling That Premiums Received From Government Risk Pools Cannot Be Booked as Reinsurance Premiums to Avoid Premium Taxes

Argonaut Ins. So. v. Hegar, No. 03-13-00619-CV, 2015 Tex. App. LEXIS 6353 (Tx App. Jun 24, 2015).

A Texas appeals court has turned away a reinsurer's claim seeking to recoup premium taxes it paid under protest while challenging the state comptroller's assessment of premium tax on premiums collected from Texas government risk pools. In this case, the reinsurer entered into reinsurance agreements with self-funded risk pools created by Texas political subdivisions. The pools ceded 100% of the premiums on the policies issued to their members to the reinsurer. The reinsurer booked the premiums as reinsurance premiums and did not pay premium tax on the premiums.

The state comptroller audited and disallowed the reinsurer's classification of the premiums as reinsurance and assessed premium tax, penalties and interest. The reinsurer paid the amount and filed this action to recoup the funds paid.

In upholding the comptroller's findings and affirming the lower court, the appellate court found that regardless of what the agreements were titled, the self-funded risk pools were expressly not insurers and, therefore, under the relevant statutory definitions, the direct premium tax applied. Under the Texas Insurance Code, the exclusion for premium tax only applies to premiums received from another authorized insurer for reinsurance. Here, the risk pools were not authorized or licensed insurers, but were nonprofit civic leagues not engaged in the business of insurance and statutorily declared not to be insurers. Thus, the premiums the reinsurer received were not from another insurer and are taxable as direct insurance premiums.

New York Federal Court Denies Standing to Policyholders Challenging "Shadow Insurance"

Ross v. AXA Equitable Life Ins. Co., No. 14-CV-2904 (JMF), 2015 U.S. Dist. LEXIS 95161 (S.D.N.Y. Jul. 21, 2015).

A New York federal court dismissed a complaint for lack of Article III standing in a complex challenge to what the New York Department of Financial Services has described as the practice of "shadow insurance" in the life insurance industry. Plaintiffs brought a putative class action challenging the use of captive reinsurers by a life insurer to affect the life insurer's financial strength and reserves for losses. The opinion goes into great detail describing the various ways life insurance companies use reinsurance and off-shore captive reinsurers to collateralize their reserve obligations.

In dismissing the complaint for lack of standing, the court noted that the plaintiffs were not injured (no injury in fact), had not relied on the insurer's financial statements in their purchase decisions and that no court has held that a state legislature can confer Article III standing on a plaintiff that suffers no concrete harm.

This is not the first case that has attempted to challenge this so-called "shadow insurance" and will likely not be the last. But regulatory changes have taken place in New York and in other states that may limit future challenges.

California Federal Court Upholds Class Certification Against Captive Reinsurer and Affiliated Mortgage Provider; Dismisses Tolling Subclass

Munoz v. PHH Corp., No. 1:08-cv-0759-AWI-BAM, 2015 U.S. Dist. LEXIS 67226 (E.D. Cal. May 21, 2015) and 2015 U.S. Dist. LEXIS 75960 (E.D. Cal. Jun. 10, 2015).

In two separate rulings, a California federal court dismissed equitable estoppel and equitable tolling claims brought on behalf of a subclass of plaintiffs and upheld the court's prior recommendation to certify the remainder of the class. In this putative RESPA class action, the plaintiffs allege that a mortgage lender received illegal referral fees from mortgage insurance companies who agreed to reinsure with the lender's captive reinsurance company. Ceded premiums allegedly funded reinsurance trusts, rather than the reinsurer's own capital, and, therefore, reinsurer allegedly assumed no real or commensurate risk.

The first of the two decisions upheld the court's earlier determination that the subclass of plaintiffs seeking equitable tolling was on inquiry notice of their potential claims through the mortgage provider's loan documentation, which, the court held, clearly indicated that the mortgage provider or any of its affiliates may receive a portion of the mortgage insurance premiums in exchange for reinsurance. The court held that the second amended complaint, which gave rise to the current ruling, merely restated the same facts in a new legal theory. The court refused to relitigate issues that were already resolved and dismissed the equitable estoppel and tolling claims with prejudice. The court also struck the related pleadings from the record.

The second decision considered both parties' objections to the court's previously-issued Findings and Recommendations, which recommended certification of the class of plaintiffs excluding the plaintiffs who relied upon equitable tolling or equitable estoppel to excuse late filings. The mortgage provider argued, among several objections, that the plaintiffs lacked standing because the proposed class includes a reinsurance arrangement where there is no named plaintiff and the proposed class includes borrowers who obtained loans from lenders other than the defendants. The plaintiffs objected to the dismissal of the plaintiffs who relied upon equitable tolling or equitable estoppel to excuse late filings, which had become moot by the decision discussed above. The court held that the Findings and Recommendations regarding the tolling subclass had been rendered moot and otherwise adopted the Findings and Recommendations in full.

Recent Speeches and Publications

- **Larry Schiffer** is moderating a panel on "Recent Changes in Contract Wording: Not Your Grandfather's Clauses Anymore," at the ARIAS•U.S. 2015 Fall Conference, November 12, 2015 in New York City.
- **Larry Schiffer** moderated a high-level expert panel at the American Bar Association's 2015 London Sessions on "Adapting to an Ever-changing and Risky World of Tort Liability," on June 12, 2015 in London as part of the 800th Anniversary of the Magna Carta.
- **John Nonna** spoke at the webinar "Uncovering Insurance Issues in M&A – What Every Firm Needs to Know," by The Knowledge Group, LLC, on August 7, 2015..
- **Larry Schiffer's** Reinsurance Commentary, "The Interplay Between Fronting and MGA Arrangements," was published on IRMI.com in June 2015.
- **Larry Schiffer's** article, "When Workers' Comp Board Rulings Affect Excess Insurance," was published on *Law360* on July 27, 2015.

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