JANUARY 2013

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Insurance Practice

Reinsurance Redux

The redux on developments in the law of reinsurance

In This Issue

Federal Court in Wisconsin Holds That It Lacks Jurisdiction to Address Disqualification of Counsel in Arbitration

National Cas. Co. v. Utica Mut. Ins. Co., No. 12–cv–657–bbc, 2012 WL 6190084 (W.D. Wis. Dec. 12, 2012).

The United States District Court for the Western District of Wisconsin declined to determine whether an insurer was prohibited from using a certain law firm in arbitration proceedings on the basis of a conflict of interest because the party that removed the case to federal court failed to demonstrate the requirements of diversity jurisdiction were satisfied—namely, that the amount in controversy exceeded $75,000.

National Casualty Company ("National") agreed to reinsure certain policies that Utica Mutual Insurance Company ("Utica") issued to its customer, Morton-Norwich Products, Inc. ("Morton-Norwich"). Utica disputed certain claims submitted by Morton-Norwich under a policy reinsured by National, but ultimately settled after initiating litigation. The law firm of Hunton & Williams LLP ("Hunton") represented Utica in that dispute and submitted its bill for legal fees to National for payment pursuant to the terms of the applicable reinsurance agreements. National refused to pay, asserting that Utica failed to provide it with all the records to which it was entitled under the agreements.

In May 2012, Hunton sent a letter to National informing it that Hunton represented Utica with respect to the billing dispute and demanded arbitration pursuant to the parties' contracts. National refused to proceed with arbitration until Hunton withdrew from representation of Utica, alleging that a conflict of interest existed because, among other things, Hunton had purportedly represented both National's and Utica's "interests" in the underlying litigation against Morton-Norwich. When Utica refused to retain new counsel, National filed a declaratory judgment action in state court seeking a declaration that Utica was prohibited from using Hunton in arbitration proceedings against National under the rules of professional conduct for Pennsylvania and New York. Utica removed the case to federal court in the Western District of Wisconsin.

However, the district court declined to address the merits of the case because Utica failed to demonstrate that the amount in controversy was at least $75,000. Utica had alleged that "the amount in dispute in the arbitration, and the additional expenses Utica will incur if Utica is ordered to obtain new counsel" were greater than $75,000. First, the court took issue with the fact that Utica did not identify, with at least a good faith basis, the amount in dispute in arbitration or the amount that it would cost to replace counsel. Second, Utica did not cite any authority for its presumption that it could satisfy the amount in controversy requirement by combining the arbitration dispute amount with the amount it would cost to replace counsel. Third, it was unclear whether the amount in dispute in arbitration was relevant to the court's jurisdictional assessment, because the only issue before the court was disqualification of counsel, rather than either party attempting to compel arbitration or challenging an arbitration award. In a November 8, 2012 order, the court chose to give Utica an opportunity to address its questions regarding the amount in controversy.

Additionally, the court recognized a separate issue not addressed by the parties—whether the court had authority to hear National's request to disqualify Utica's counsel "in the context of another proceeding." The court noted that the "authority to grant those requests comes from a federal court's inherent power to regulate its own cases," and that, "[a]lthough the Federal Arbitration Act creates a cause of action for various disputes that arise in arbitration, a dispute about counsel is not one of them."

After further briefing, on December 12, 2012, the court found that Utica had again failed to establish a good faith basis for its belief that the amount in controversy was at least $75,000. Utica failed to explain why the amount in controversy in the underlying arbitration (estimated at about $350,000) was relevant to the amount in controversy in an action to disqualify counsel. Utica also failed to demonstrate a good faith basis for believing that it would incur more than $75,000 to replace counsel, as the only basis for this belief was that it had cost Utica more than $75,000 to replace counsel in a related litigation against Morton-Norwich. The court found that this was not evidence that Utica would incur the same costs to replace counsel in this litigation. The court noted that Utica failed to

submit sufficient evidence, "such as an affidavit describing the work replacement counsel would need to perform and estimating the billing rate." Having concluding that Utica failed to meet its burden to show that the court had subject matter jurisdiction on grounds of diversity, the court remanded the action to state court.

Redux in Context:

- A dispute over the disqualification of counsel does not create a cause of action under the Federal Arbitration Act.
- The amount in controversy for purposes of diversity jurisdiction in an action to disqualify counsel in an arbitration cannot be established based on the damages at issue in the underlying arbitration.
- To establish the amount in controversy in an action to disqualify counsel in an underlying arbitration, a party must submit evidence of the actual costs that would be incurred by replacing counsel, such as the work that would need to be performed, the amount of time required and the expected billing rates.

New York District Court Refuses to Quash Subpoenas Served on Non-Party Reinsurers but Orders Party Issuing Subpoenas to Pay Expenses of Responding

U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co., No. 12 Civ. 6811(CM)(JCF), 2012 WL 5395249 (S.D.N.Y. Nov. 5, 2012).

On November 5, 2012, the United States District Court for the Southern District of New York refused to quash subpoenas served on two non-party reinsurers seeking information related to life insurance policies; however, the court did order the issuing party to pay the reinsurers' costs of responding to the subpoenas.

PHL Variable Insurance Company ("PHL") issued twelve life insurance policies to U.S. Bank National Association ("U.S. Bank"). The policies were reinsured by Reinsurance Group of America ("RGA"). The policies permitted PHL to adjust the cost of insurance rates, but only based on specific factors, such as mortality.

On November 16, 2011, U.S. Bank commenced an action against PHL, alleging that PHL breached the policies and violated various laws when it raised its insurance rates. U.S. Bank argued that because life expectancy had increased, the rates should have been reduced rather than increased. U.S. Bank further alleged that PHL changed its rates to increase fees and induce policyholders to allow their policies "to lapse . . . thereby relieving PHL of the risk of ever having to pay out on the policy." At U.S. Bank's request, RGA voluntarily produced documents allegedly showing that PHL had reported the reasons for the changes in its cost of insurance to RGA. Additionally, internal RGA communications allegedly demonstrated a belief that PHL raised costs simply to aid its failing financial situation.

U.S. Bank served subpoenas seeking documents from numerous non-parties, including five other reinsurers. PHL moved for a protective order pursuant to Fed. R. Civ. P. 26(c), or, in the alternative, requested that the court quash the subpoenas pursuant to Rule 45(c)(3). PHL argued that the requested information could be obtained directly from PHL and that the subpoenas were overbroad and sought irrelevant information. In response, U.S. Bank argued that PHL lacked standing to contest the subpoenas. Additionally, two of the subpoenaed non-party reinsurers, Transamerica Life Insurance Company ("Transamerica") and SCOR Global Life Americas Reinsurance Company ("SCOR") moved to quash the subpoenas or alternatively for a protective order. Transamerica and SCOR adopted PHL's relevance arguments and also argued that compliance with the subpoenas would be unduly burdensome.

The district court ruled that PHL lacked standing to challenge the subpoenas served on the non-party reinsurers. To have standing, PHL was required to assert a personal right or privi-

lege, "such as an interest in proprietary, confidential information" or in "maintaining a privilege that would be breached by disclosure." The court ruled that, because PHL represented that it would produce the documents from one of the non-parties, PHL had no interest in preventing the subpoenaed entities from doing so. The court further held that PHL had no proprietary interest in the internal communications of the non-parties.

PHL alternatively contended that even if it did not have standing under Rule 45, it nevertheless did under Rule 26 for purposes of a protective order. The court likewise denied PHL's request for a protective order because it refused to allow PHL to "circumvent the well-established standing requirements under Rule 45 simply by styling what [was] effectively a motion to quash as a motion for a protective order."

Nonetheless, Transamerica and SCOR did have standing to challenge the subpoenas served on them. The court ruled that, given the broad scope of relevance in discovery, the communications between PHL and reinsurers about cost increases for the type of policies at issue were relevant, even if less so than communications about the specific policies at issue. Likewise, the reinsurers' internal communications about PHL's conduct could lead to admissible evidence.

Although the court ordered the non-party reinsurers to respond to the subpoenas, it decided to shift the costs of production in light of the burden arguments raised by the reinsurers. The court observed that the factors determining whether to shift discovery costs include "(1) whether the nonparty has an interest in the outcome of the case; (2) whether the nonparty can more readily bear the costs; and (3) whether the litigation is of public importance." The court found that each of those factors favored cost-shifting here because neither reinsurer had any interest in the litigation, neither was in a better position than U.S. Bank to bear the costs, and the litigation involved a "purely private dispute." Accordingly, the court ordered U.S. Bank to "bear the search, collection, and production costs associated with compliance with the subpoenas served on Transamerica and SCOR." The responding reinsurers would only have to bear the costs of reviewing documents for privilege.

Redux in Context:

- Absent a showing of a proprietary interest, a party lacks standing to challenge a subpoena served on non-party reinsurers on grounds of relevance or burden.
- Where a party lacks standing to challenge a subpoena under Fed. R. Civ. P. 45, it may not circumvent Rule 45 standing by seeking a protective order under Rule 26.
- In certain circumstances, equity may require that the costs of responding to a subpoena be shifted to the party seeking discovery.

2012 Redux Year in Review

The *Reinsurance Redux* debuted in March 2011 as a monthly publication of the Insurance Practice. Below is a retrospective review of the top ten categories of cases featured in the 2012 issues of the *Reinsurance Redux*.

(1) Reinsurance Contract Interpretation

Texas Court of Appeals Holds that Insurer's Consent was Not Required for Modification of a Reinsurance Agreement to be Enforceable

The Texas Court of Appeals held that an insurer's consent was not required for the modification of a reinsurance agreement to be enforceable where the modification did not adversely affect the insurer. *Arch Reinsurance Co. v. Underwriters Serv. Agency, Inc.*, No. 02-10-00365-CV, 2012 WL 1432556 (Tex. Ct. App. Apr. 26, 2012).

Pennsylvania Court Grants Plaintiff's Motion for Summary Judgment and Holds that Terms Not Defined in Reinsurance Certificates are Defined As Set Forth in the Underlying Insurance Policies

The Pennsylvania Court of Common Pleas granted Plaintiff's motion for summary judgment, holding that the meaning of terms not defined in reinsurance certificates were set forth in

the underlying policies for which the reinsurer provided reinsurance. *Ace Prop. & Cas. Ins. Co. v. R & Q Reinsurance Co.*, No. 11081920 (Phila. Ct. Com. Pl. May 15, 2012).

United States Court of Appeals for the Second Circuit Affirms District Court's Unpublished Opinion that a Surety Bond Holder Did Not Enjoy Cut-Through Rights to Reinsurance

The United States Court of Appeals for the Second Circuit affirmed a District Court's unpublished decision, holding that the reinsurance agreement at issue did not offer any third-party right to recovery from a surety bond reinsurer. *Callon Petroleum Co. v. Nat'l Indem. Co.*, No. 11-241, 2012 WL 2549500 (2d Cir. July 3, 2012).

Third Circuit Finds that Reinsurance Certificate Contains Condition Precedent to Coverage and Holds That, Because There Was Not Timely Notice of Claims, Reinsurer Is Not Liable to Cedent

Applying New York law, the United States Court of Appeals for the Third Circuit held that a provision in a reinsurance agreement requiring a cedent to promptly provide a statement of loss for certain claims was enforceable as a condition precedent to coverage and that prompt notice was required from the date that the cedent received notice of the claim or occurrence, and not from the date that the cedent made a demand for indemnity. *Pac. Emp'rs Ins. Co. v. Global Reinsurance Corp. of America*, 693 F.3d 417 (3d Cir. Sept. 7, 2012).

First Circuit Holds Reinsurer Did Not Have Obligations Beyond Time Period Stated in Reinsurance Certificate

The First Circuit Court of Appeals affirmed summary judgment for a reinsurer because the insurance company failed to prove a facultative certificate issued for one policy applied to two policies not expressly stated in the certificate. The fact that the insurance company did not contribute a portion of the premium payments received from the insured for the two policies at issue further supported the lack of reinsurance coverage for these policies. *OneBeacon Am. Ins. Co. v. Comm. Union Assurance Co. of Canada*, 684 F.3d 237 (1st Cir. 2012).

District of New Jersey Grants Summary Judgment on Late Notice Defense and Calculation of Retention Under Retrocessional Agreements

The United States District Court for the District of New Jersey granted a reinsurer's motion for summary judgment with respect to the untimely notice defense raised by its retrocessionaire and with respect to the calculation of its retention under retrocessional agreements, but held that there were genuine issues of disputed fact with respect to the retrocessionaire's rescission counterclaim and whether certain claims were covered under the agreements. *Munich Reinsurance America, Inc. v. American Nat'l Ins. Co.*, – F. Supp. 2d – , Civ. A. No. 09-6435(FLW), 2012 WL 4475589 (D.N.J. Sept. 28, 2012).

Illinois District Court Finds Revenue-Sharing Agreement Between Reinsurer and Broker to be Ambiguous

A Northern District of Illinois judge denied cross-motions for summary judgment filed by a reinsurer and the broker in their dispute over the reinsurer's annual fee in a revenue-sharing agreement because the operative language in the agreement was ambiguous. *Homeowners Choice Inc. v. Aon Benfield Inc.*, No. 19-7700 (N.D. Ill. Sept. 10, 2012).

Northern District of Illinois Upholds "Follow the Settlements" Clause of Reinsurance Treaty and Orders Reinsurer to Pay Underlying Settlement

Upholding a reinsurance treaty's "follow the settlements" clause and its application to the settlement of an underlying insurance dispute, the Northern District of Illinois recently granted summary judgment in favor of a plaintiff insurer and ordered the reinsurer to pay the underlying settlement. *Arrowood Indem. Co., et al. v. Assurecare Corp.*, No. 11-cv-05206 (N.D. Ill. Sept. 19, 2012).

New York Appellate Court Applies "Follow the Fortunes" Doctrine to Dispute Over Reinsured's Settlement Decisions

The New York Supreme Court Appellate Division held that under the "follow the fortunes" doctrine, reinsurers were precluded from second-guessing the reinsured's decisions concerning the settlement of asbestos injury-related claims. *U.S. Fidelity & Guar. Co. v. Am. Re-Ins. Co.*, 2012 WL 178229 (N.Y. App. Div. Jan. 24, 2012).

(2) Arbitration Compelled

Seventh Circuit Compels Arbitration in Putative Class Action

The United States Court of Appeals for the Seventh Circuit reversed the decision of the Southern District of Illinois denying a motion to compel arbitration in a putative class action against a cellular phone service provider and held that the arbi-

tration clause in the provider's service agreement was applicable. *Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, No. 11-2089, 2012 WL 169758 (7th Cir. Jan. 19, 2012).

U.S. Supreme Court Reaffirms Preemption by Federal Arbitration Act and Enforces Arbitration Clause

A unanimous U.S. Supreme Court recently vacated a ruling by West Virginia's highest court refusing to enforce an arbitration clause in a nursing home admission agreement compelling patient personal injury or wrongful death claims to arbitration on Federal Arbitration Act preemption grounds. *Marmet Health Care Ctr, Inc., et al. v. Brown,* et al., 565 U.S. — , 132 S. Ct. 1201 (2012).

Third Circuit Court of Appeals Reaffirms Enforceability of Arbitration Clause and Compels Arbitration of Dispute

The U.S. Court of Appeals for the Third Circuit recently found that an arbitration provision contained in a nurse's employment agreement was not procedurally and substantively unconscionable, and was therefore enforceable, and compelled the nurse to submit her employment claims to arbitration. *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, et al., No. 11-1393, 2012 WL 833742 (3d Cir. Mar. 14, 2012).

United States Court of Appeals for the Federal Circuit Affirms Decision to Compel Arbitration of Licensing Dispute

United States Court of Appeals for the Federal Circuit affirmed the United States District Court for the Western District of Wisconsin's decision to compel arbitration of a licensing dispute, holding that the dispute was within the scope of an arbitration provision and that the contractual terms agreed to by the parties could not be disturbed. Promega Corp. v. Life Tech. Corp., 674 F.3d 1352 (Fed. Cir. 2012).

United States Court of Appeals for the Eighth Circuit Affirms Order Compelling Arbitration of a Subcontract Agreement Dispute, in Which Other Portions of the Subcontract Were Held to be Unenforceable

The United States Court of Appeals for the Eighth Circuit affirmed the Minnesota District Court's decision to compel arbitration of a subcontract agreement dispute, holding that the specific agreement to arbitrate was severable from the remainder of the contract, even where other terms of the relevant agreement were unenforceable. The court further held that the arbitration provision agreed to by the parties was not unconscionable. *M. A. Mortenson Co. v. Saunders Concrete Co., Inc.*, 676 F.3d 1153 (8th Cir. 2012).

District Court Compels Arbitration of Claims Against Reinsurer

The United States District Court for the District of Arizona issued an order compelling arbitration of a dispute over the validity of a commutation agreement and holding that the dispute arose under a quota share reinsurance agreement containing an arbitration provision and that the reinsurer had not agreed to litigate or otherwise waived its right to arbitrate. *Repwest Ins. Co. v. Praetorian Ins. Co.*, – F. Supp. 2d – , No. CV 12-0369-PHX-JAT, 2012 WL 3704692 (D. Ariz. Aug. 28, 2012).

(3) Role of Court vs. Arbitrator

Illinois Federal Court Dismisses Party's Amended Complaint Following Seventh Circuit Ruling on Related Arbitration Issues

Following the Seventh Circuit's decision on related issues, the Northern District of Illinois granted an insurer's motion to dismiss a reinsurer's amended complaint finding claims sounding in fraud and unjust enrichment were aimed at securing the arbitration decision itself, thus, by extension, the sole viable claim remaining was a Rule 60 "reconsideration" claim, but such a claim was untimely. *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, No. 09-cv-3959 (N.D. Ill. Nov. 15, 2011).

Fourth Circuit Holds That The Court, Not an Arbitrator, Must Determine the Issue of Whether a Dispute is Arbitrable Absent "Clear and Unmistakable" Evidence of the Parties' Intent That an Arbitrator Make this Determination

The Fourth Circuit held that *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) does not signal a retreat from requiring courts to apply the "clear and unmistakable" doctrine to determine whether the court, not an arbitrator, must determine the intent to arbitrate arbitrability. The court further explained its holding in *Virginia Carolina Tools, Inc. v. Int'l Tool Supply, Inc.*, 984 F.2d 113 (4th Cir. 1993) that in a narrow class of cases, courts – not arbitrators– must decide

questions of contract duration is limited to cases where the contract contains an express termination-date provision. *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96 (4th Cir. 2012).

District of Columbia Circuit Holds Arbitrator Could Not Determine Arbitrability Because There was No "Clear and Unmistakable" Evidence that Parties Intended Arbitrator to Make Such Determination

The District of Columbia Circuit Court vacated an arbitration award that held arbitrators lacked authority to determine arbitrability; district court erred in affirming the award because there was no "clear and unmistakable evidence" that parties intended arbitrability to be determined by arbitrators. *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363 (D.C. Cir. 2012).

Second Circuit Finds Error by District Court But Affirms Decision to Confirm Arbitration Award Where Parties Agreed to Submit Arbitrability Questions to Arbitrator

The United States Court of Appeals for the Second Circuit held that the United States District Court for the Southern District of New York improperly refused to determine whether a dispute was arbitrable but nonetheless affirmed the district court's decision to confirm an arbitration award because the parties had clearly and unmistakably agreed to submit questions of arbitrability to the arbitrator. *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012).

U.S. Supreme Court Vacates Ruling By Oklahoma Supreme Court Preventing the Arbitration of a Dispute Over Non-Competition Agreement on Federal Arbitration Act Grounds

The U.S. Supreme Court recently vacated a ruling by the Oklahoma Supreme Court preventing the arbitration of a dispute over a non-competition agreement on Federal Arbitration Act grounds, holding that a court may review the enforceability of an arbitration clause itself, but if the clause is valid, the validity of the remainder of the agreement is for the arbitrator to decide. *Nitro-Lift Tech., LLC v. Eddie Lee Howard, et al.*, 568 U.S. 500 (2012).

(4) Arbitration Award Affirmed

Second Circuit Confirms Arbitration Award Because Reinsurer Failed to Show "Evident Partiality" of Arbitrators

The Second Circuit Court of Appeals reversed the Southern District of New York's decision to vacate an arbitration award and held that the reinsurer seeking to vacate the award had failed to meet its burden of demonstrating the "evident partiality" of two arbitrators who had not disclosed that they were simultaneously serving together on another arbitration panel. *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2d Cir. Feb. 3, 2012).

United States District Court Denies Request to Vacate an Arbitration Award Notwithstanding Alleged Nondisclosure by Arbitrator

The United States District Court for the Eastern District of Pennsylvania denied a petitioner's request to vacate an arbitration award, holding that an arbitrator's nondisclosure did not render her ineligible to serve as a public arbitrator. *Stone v. Bear Stearns & Co., Inc.*, No. 2:11-CV-5118, 2012 WL 1946938 (E.D. Pa. May 29, 2012).

United States District Court for the Eastern District of Pennsylvania Grants Petition for an Arbitration Award in a Reinsurance Dispute, Finding that the Court Had Not Received Opposition to the Confirmation

The United States District Court for the Eastern District of Pennsylvania granted a petition to confirm an amended arbitration award of $7,957.88 in a reinsurance dispute, finding that the court had not received any opposition to the confirmation. *Aurum Asset Managers, LLC v. Banco Do Estado Do Rio Grande Do Sul*, No. 08-mc-00102 (E.D. Pa. June 26, 2012).

Southern District of New York Confirms Arbitration Award and Holds Arbitrators Did Not Exhibit Manifest Disregard of the Law

The Southern District of New York confirmed an arbitration award in favor of a reinsurer and held that the arbitrators did not engage in manifest disregard of the law after reviewing and considering the parties' briefing on legal issues. The arbitrators also did not exhibit a manifest disregard of the parties' agreement by issuing a thirty-numbered paragraph award which identified the reasons for the award. *Am. Centennial Ins. Co. v. Global Int'l Reinsurance Co. Ltd.*, 2012 WL 2821936 (S.D.N.Y. July 9, 2012).

Southern District of New York Confirms Arbitration Award and Holds Arbitration Panel's Refusal to Hear Certain Evidence Did Not Limit Reinsurer's Right to a Fair Hearing

The Southern District of New York recently granted a group of insurers' petition to confirm a series of arbitration awards and denied a reinsurer's cross-petition to vacate the awards holding an arbitration panel's refusal to hear certain evidence did not limit reinsurer's right to a full and fair hearing. *Century*

Indem. Co., et al. v. AXA Belgium, No. 11-cv-07263, 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012).

(5) Reinsurance Discovery

Southern District of New York Affirms Order Compelling Production of Document Relating to Insurer's Reserve Practices

The United States District Court for the Southern District of New York affirmed a magistrate judge's order compelling the production of documents relating to the adequacy and reasonableness of an insurer's reserve practices where the reinsurer was claiming that the insurer acted in bad faith in failing to provide timely notice of claims. *Granite State Ins. Co. v. Clearwater Ins. Co.*, No. 09 Civ. 10607 RKE, 2012 WL 1520851 (S.D.N.Y. Apr. 30, 2012).

Southern District of New York Holds Communications Between Insurer and Reinsurer Were Not Protected From Disclosure Under the Common Interest Doctrine

The Southern District of New York ordered an insurer to produce communications with its reinsurer and rejected the insurer's argument that such documents were irrelevant or protected by a common interest doctrine. The documents sought were relevant to showing what the insurer and reinsurer knew or did not know about the property at issue and the "follow the fortunes" doctrine does not automatically create a common legal interest between an insurer and reinsurer. *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 2012 WL 2588754 (S.D.N.Y. July 3, 2012).

(6) Waiver of Arbitration

United States Court of Appeals for the Sixth Circuit Affirms District Court's Decision that Defendant Waived its Right to Arbitrate

The United States Court of Appeals for the Sixth Circuit affirmed a district court's decision that the defendant waived its right to arbitrate a dispute relating to a sourcing agreement. *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713 (6th Cir. 2012).

Eleventh Circuit Court of Appeals Rules in Class Action That Bank Waived Right to Compel Arbitration By Failing to Move to Compel Arbitration

In a multi-district class action, the U.S. Court of Appeals for the Eleventh Circuit recently affirmed a Florida District Court's denial of a bank's motion to compel arbitration because the bank waived its right to compel arbitration when it failed to move to compel arbitration, and the failure was not excused on *grounds that such a motion would have been futile. Garcia, et al. v. Wachovia Corp., et al.*, No. 11-16029, 2012 WL 5272942 (11th Cir. October 26, 2012).

(7) Reinsurer Conduct

District Court Denies Motion to Dismiss Claims Against Related Administrator and Reinsurers Based on Alter Ego Theory

The United States District Court for the District of Minnesota denied a motion to dismiss claims for breach of contract, breach of fiduciary duty and fraud based on an alter ego theory where the defendant administrator for a series of reinsurance agreements also organized and administered the defendant offshore reinsurance companies. *Sec. Life Ins. Co. of Am. v. Sw. Reinsure, Inc.*, Civil No. 11-1358 (MJD/JJK), 2011 WL 6382857 (D. Minn. Dec. 20, 2011).

Illinois Court Dismisses Insured's Claims Against Reinsurers Because Insured Possessed No Third-Party Rights Against Reinsurers

A Cook County, Illinois judge recently granted the motion of three reinsurers to dismiss an insured's breach of contract and tortious interference claims because, absent special circumstances, such an insured was not in privity with the reinsurers, and thus the insured failed to state a claim for direct coverage liability against the reinsurers. The insured's tortious interference claims also failed because as third-party administrators acting as agents for other insurers, any of the reinsurers' alleged conduct was privileged. *Navistar, Inc. v. Affiliated FM Ins. Co.*, et al., No. 2009 CH 20384 (Cook Co. Chanc. Div. Feb. 29, 2012).

(8) Arbitrator/Counsel Disqualification

Southern District of New York Denies Reinsurer's Motion to Stay Disqualification of Counsel in Pending Arbitration Where Counsel Reviewed 182 Pages of Private Panel Communications

In a case presenting *sui generis* facts about counsel reviewing private e-mail correspondence between arbitration panel members, the Southern District of New York refused to grant a reinsurer's motion to stay disqualification of its selected counsel in the pending arbitration despite arguments that the

decision would result in severe hardship. *Northwestern Nat'l Ins. v. INSCO, Ltd.*, No. 11 Civ. 1124 (SAS), 2011 WL 6074205 (S.D.N.Y. Dec. 6, 2011).

(9) Classification of Reinsurance

Texas Supreme Court Holds that Stop-Loss Insurance is Not Reinsurance, but Rather, is Direct Health Insurance Subject to Regulation under the State Insurance Code

The Texas Supreme Court reversed the judgment of the state's Court of Appeals, holding that, as a matter of law, stop-loss insurance sold to a self-funded employee health-benefit plan is not "reinsurance," but rather, "direct insurance" subject to regulation under the Insurance Code. *Texas Dep't. Ins. v. Am. Nat'l Ins.*, No. 10-0374, 2012 WL 1759457 (Tex. May 18, 2012).

(10) Arbitrator Selection

Southern District of New York Orders Arbitration Panel to Proceed with Umpire Selection

Finding the Federal Arbitration Act mandates that a provision in a reinsurance agreement establishing a method for umpire selection must be followed, a judge in the United States District Court for the Southern District of New York recently granted an insurer's petition to appoint an arbitration umpire. *In the Matter of the Arbitration between OneBeacon America Ins. Co. and Swiss Reinsurance America Corp.*, No. 12-CV-5043 (S.D.N.Y. October 19, 2012).

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