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In this issue:

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Reinsurance Newsletter

Run-Off Symposium
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We are pleased to invite you to attend the 2009 Run-Off Symposium, hosted by Dewey & LeBoeuf LLP. The symposium insurance and reinsurance run-off business presented by experts on rehabilitation, run-off in a time of economic downturn, run-off strategies, structures and alternatives, and the new reinsurance collateral requirements.

For more information contact Michael Greening at mgreening@dl.com

Recent Case Summaries

U.S. Supreme Court Allows a Non-Party to Appeal a Denial of a Stay in Action in Favor of Arbitration

Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009).

In a non-reinsurance case, the U.S. Supreme Court addressed a point of appellate procedure that concerns arbitrations under the Federal Arbitration Act ("FAA"). While this decision covers an arcane aspect of appellate procedure, it nevertheless concerns the appeal of an application to stay litigation in favor of arbitration under Section 3 of the FAA. Because reinsurance disputes sometimes get filed in court first and a motion to stay the litigation and compel arbitration often follows, the issue is important. Even in reinsurance disputes, there are often affiliated or related persons or entities (or real parties in interest) that may not be parties to the arbitration agreement, but may have a strong interest in seeing the matter go to arbitration and the litigation stayed.

In this case, taxpayers who had their tax strategy rejected by the IRS as an illegal tax shelter sued their auditors, the investment advisor, and other related persons involved in recommending the advisor and/or the improper tax shelter. The relevant investment management agreements had an arbitration clause. The defendants moved to stay the litigation in favor of arbitration. The district court denied the motion (as concerns the non-investment advisor defendants – the investment advisor filed for bankruptcy). The defendants appealed under 9 U.S.C. § 16(a)(1)(A), which provides that an appeal may be taken from any order refusing a stay of any action under Section 3 of the FAA. The circuit court dismissed the appeal for lack of jurisdiction, taking the position that because the defendants were not eligible for a stay, the court had no jurisdiction to hear their appeal.

The Supreme Court reversed and remanded. The Court read Section 16 strictly (the opinion was authored by Justice Scalia), holding that the circuit court had jurisdiction to review the district court's denial of the stay regardless of whether the litigant is in fact eligible for a stay. The Court held that "any" litigant who asks for a stay under Section 3 is entitled to an immediate appeal from the denial of the motion, no matter the underlying merits. Thus, the statute allowing for immediate appeal makes the underlying merits irrelevant.

Because the circuit court held that those who are not parties to the arbitration agreement are not eligible for relief, the Court addressed this issue. In reversing, the Court relied on the "background principle" of state contract law concerning the scope of a contract and who is bound by the contract. Thus, state law principles are applicable to determine which contracts are binding under the FAA. Because state law allows a contract to be enforced by or against non-parties under certain circumstances and under specific legal theories (*e.g.*, assumption, veil piercing, alter ego, third-party beneficiary, etc.), then it was error to hold that non-parties to contracts are barred from relief under Section 3 of the FAA. It comes down to whether the relevant state contract law allows the non-party to enforce the arbitration agreement and, if so, that party is eligible to seek a stay of litigation under Section 3 of the FAA and an immediate appeal if the motion for a stay is denied.

A Split Second Circuit Reverses District Court and Upholds an Arbitration Award, Including Attorneys' and Arbitrators' Fees In Spite of Contractual Language That Each Party Is to Bear Its Own Attorneys and Arbitrators' Costs

ReliaStar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81 (2d Cir. 2009).

An arbitration award against a reinsurer included a provision awarding attorneys' and arbitrators' fees to the cedent as a sanction. The arbitration clause provided that "[e]ach party shall bear the expense of its own arbitrator . . . and related outside attorneys' fees . . . ." On cross-applications to confirm the award and vacate the fees and costs portion of the award, the district court vacated that portion of the final award and confirmed it in all other respects. The reinsurer appealed.

In reversing the district court, the Second Circuit, in a two-to-one decision, considered only whether the arbitrators were authorized to sanction bad faith conduct by awarding attorneys' and arbitrators' fees when considering the specific arbitration clause in the contracts. The appellate court found that the arbitration panel was so authorized because a broad arbitration clause, such as the one it found here, confers inherent authority on the arbitrators to sanction a party for bad faith participation in the arbitration and that the sanction may include attorney's and arbitrator's fees. The court found that sanctions, including attorneys' fees, are a remedy within an arbitrators' authority to effect the goals of the arbitration process.

In addressing the provision of the arbitration clause that required each party to bear its own costs, including attorneys' fees, the Second Circuit held that this provision was merely a statement of the general American Rule that each party will bear its own costs in the context of the expected good faith participation in the arbitration process. The court found nothing in the clause that indicated the parties' intent to limit the arbitrators' inherent authority to sanction bad faith participation in the arbitration. Concluding with a drafting point, the circuit court stated that sophisticated commercial entities are certainly capable of stating clearly their intent to exclude attorneys' and arbitrators' fees from the range of available sanctions for bad faith. In other words, if you don't want arbitrators to sanction bad faith conduct in an arbitration with attorneys' and arbitrators' fees, you need so say so expressly.

The dissent took a markedly different view. The lengthy dissent is premised on the view that the majority disregarded the principle that an arbitration award can only be vacated if it contradicts an express and unambiguous term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract. According to the dissent, the clear and unambiguous terms of the arbitration clause divested the arbitrators of any authority to make an award of attorneys' and arbitrators' fees.

Having never addressed this issue before, and in the face of a very strong and well-reasoned dissent, it is likely that this issue will be raised and challenged again before this court. A motion for en banc (full court) review has been filed, but the Second Circuit very rarely grants en banc review. Regardless, the majority's drafting point should be adopted by all companies that do not want arbitrators to have the power to award attorneys' or arbitrators' fees other than by equal sharing between the parties. Arbitrators are, of course, free to use interest as a de facto sanction where the arbitration clause is silent (Dewey & LeBoeuf co-represented the reinsurer in this case).

Third Circuit Dismisses Appeal of Order Requiring Guarantors to Post Pre-Award Security in a Separate Arbitration

Everest Nat. Ins. Co. v. Sutton, No. 08-4643, 2009 WL 921384 (3rd Cir. Apr. 7, 2009).

In a case not to be cited for precedential value, the Third Circuit Court of Appeals has dismissed an appeal of a district court order requiring the posting of pre-award security for a related reinsurance arbitration. The dispute involved the cedent's insurance of subprime automobile loans and its reinsurance agreement with a non-party reinsurer owned by the one of the defendants. In order to further secure its rights under the reinsurance agreement, the cedent obtained guarantees from the defendants.

When the reinsurer refused to pay $76 million due under the reinsurance agreement, the cedent sued under the guarantees for breach of contract. The guarantors filed counterclaims against the cedent. In the related arbitration against the reinsurer, the arbitration panel had ordered the reinsurer to post $70 million as pre-award security. The cedent moved for partial summary judgment in this case seeking an order requiring the guarantors to satisfy the security ordered in the arbitration when the reinsurer failed to post the security. The district court granted the cedent's motion requiring the guarantors to post the $70 million that the reinsurers had failed to post.

In dismissing the appeal for lack of appellate jurisdiction, the circuit court noted that this was not a close case. While the district court had granted the cedent's summary judgment motion and had dismissed most of the counterclaims, it left a breach of contract counterclaim standing. Because the district court's order was one for the payment of money and thus traditionally brought in law rather than equity, the circuit court determined that it did not have jurisdiction based on 28 U.S.C. Section 1292(a)(1), which provides the court with jurisdiction over "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."

New York Federal Court Compels Arbitration Against Assignee of an Insolvent Reinsurer

B.D. Cooke & Partners Ltd v. Certain Underwriters at Lloyd's, London, No. 08 Civ. 3435 (RJH), 2009 WL 792826 (S.D.N.Y. Mar. 26, 2009).

A New York federal court granted a motion by retrocessionaires to stay the action brought by the assignee of an insolvent reinsurer's estate and compel arbitration. The court held that the assignee can be compelled to arbitrate even though the liquidator cannot.

The retrocedent was placed in liquidation in 1971. The liquidator continued to accept claims related to asbestos injuries until 1996. A group of the insolvent's creditors agreed to surrender any claims against the estate in exchange for the liquidator's assignment of the estate's remaining claims to its agent. The liquidation proceeding was terminated on April 9, 1998.

On Feb. 26, 2008, the assignee sued the retrocessionaires in New York state court seeking to recover retrocessional proceeds concerning certain asbestos claims. The case was removed to New York federal court with the retrocessionaires arguing that the arbitration clauses in the retrocessional contracts were governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act, 9 U.S.C. § 201, *et. seq*., and that jurisdiction was proper before the federal court. The retrocessionaires moved to stay the action and compel arbitration and the assignee moved to remand.

In opposing jurisdiction, the assignee argued that the New York Convention does not apply because of the Convention's exception for an agreement that is "null and void, inoperative or incapable of being performed." The assignee claimed that the arbitration agreements are incapable of being performed due to the retrocedent's insolvency. The assignee also contended that it cannot be compelled to arbitrate because the operation of the arbitration clauses ceased with the retrocedent's liquidation and that the liquidator had assigned his exemption from arbitration to the assignee.

In rejecting these arguments, the court stated that the assignee "has cited no authority for the proposition that the liquidation extinguished defendants' right to arbitrate disputes under the contract." The court also said the cases cited show that the liquidator cannot be compelled to arbitrate, but noted that the assignee was not the liquidator. "[The underwriters'] inability to compel the liquidator to arbitrate…does not imply an inability to compel [the assignee] to arbitrate," the judge said.

In denying the motion to remand, the court distinguished *Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 232-33 (1990), noting that – as assignee – the assignee was not acting as a fiduciary or protecting the interests of the public. Citing *Travelers Inc. Co. v. Keeling*, No. 91 Civ. 7753, 1993 WL 18909 (S.D.N.Y. Jan. 19, 1993), *appeal dismissed*, 996 F.2d 1485 (2d Cir. 1993), the assignee argued that the arbitration provisions constituted a waiver of the retrocessionaires' right to removal. In response, the court noted that at least two other circuit courts had subsequently determined that the arbitration clause was consistent with the forum selection clause in the Convention and simply provided that the court of the party's choosing would decide whether to refer the matter to arbitration.

New York Federal Court Confirms Arbitration Award Where Argument Not Brought During Arbitration

Mut. Marine Office, Inc. v. Transfercom Ltd., No. 08 Civ. 10367, 2009 WL 1025965 (S.D.N.Y. Apr. 15, 2009).

A New York federal court has granted a cedent's petition to confirm an arbitration award for unpaid balances and for a letter of credit for outstanding loss reserves rendered against the reinsurer. The cedent and the reinsurer entered into arbitration over the reinsurer's obligations under certain marine reinsurance contracts. The arbitration panel rendered an award in the cedent's favor stating that the reinsurer shall pay a specified sum to the cedent within 30 days in satisfaction of unpaid balances under the reinsurance contracts. Additionally, the award required that the reinsurer post a letter of credit to secure reserves for outstanding losses.

After the issuance of the final award, the reinsurer contacted the panel and argued that the letter of credit had already been satisfied by an existing letter of credit that was posted prior to the arbitration and applied to the same losses and contracts in the arbitration. The panel declined to re-examine the award in reliance on the *functus officio* doctrine, which dictates that when the duties of a legal officer of official body have been accomplished, that officer or body has no further authority.

The cedent then petitioned for a confirmation of the award to enforce the reinsurer's obligation to post a new letter of credit. The court determined that the issue was not whether the award should be confirmed, but rather whether the reinsurer had already satisfied the terms of the award with its existing letter of credit. The reinsurer, however, was precluded from arguing that the losses had already been satisfied, as it had failed to raise the argument during the arbitration. The court held that the award unambiguously required that the reinsurer post a letter of credit for a specific amount within 30 days of the date set out in the award.

Additionally, the court refused the cedent's request that its petition and any related papers be placed under seal in accordance with the parties' confidentiality agreement, as there were no strong competing considerations that would override the presumption of public access to judicial documents.

New York Federal Court Holds That Arbitration Award Was Not in Manifest Disregard of Law; Declines to Review the Panel's Interpretation of Treaty Language

Global Reinsurance Corp of Am. v. Argonaut Ins. Co., No. 07 Civ. 7514 (WHP), 2009 WL 928014 (S.D.N.Y. Mar. 23, 2009).

A New York federal court confirmed a retrocedent's arbitration award and granted post-award, pre-judgment interest to the retrocedent based upon findings that the arbitration panel's decision had not been issued in manifest disregard of the law and had provided a justification for its treatment of certain language within the treaties.

The retrocedent ceded certain policies to its retrocessionaires, and subsequently commuted certain of those contracts with the underlying cedent for a lump sum payment. The retrocedent allocated the commutation payment among its retrocessionaries. When the cedent billed some of the claims arising out of its settlement to this retrocessionaire, the latter refused to pay them. The retrocedent demanded arbitration. The arbitration panel found that the claims were covered under the retrocessional treaties, and subsequently determined that the allocation of the commutation payment under the treaties had been reasonable. The retrocessionaire challenged the panel's determination that the claims were covered under the retrocessional treaties.

In confirming the arbitration award, the court declined to find that the panel's decision to disregard the notice provision found within the treaties was in manifest disregard of the law. Nothing in the record suggested that the retrocedent's failure to give notice of the settlement to the retrocessionaire was prejudicial or material to the retrocessional contract. Furthermore, notice would have been required under Massachusetts law, but would not have been required under New York law, resulting in uncertainty of applicable law. The court also declined to grant vacatur based upon the arbitration panel's broad interpretation of "loss occurrence." The court noted that the panel has been given "substantial freedom" to interpret the treaties and had offered a "colorable justification" for its broad reading, which was based on industry practices. Additionally, once the panel determined that the contingent claims were included under the treaties, it correctly determined that "follow the fortunes" precluded review of cedent's decision to settle these claims.

In its decision to award pre-judgment interest to the retrocedent, the court ruled that interest was to be calculated from the date when judgment had first been ascertained in a meaningful way. Because the original award was ascertainable, the court used the date of the original award in its pre-judgment interest calculations.

Finally, the court ruled that it could not award attorneys' fees absent statutory or contractual authority. Because no such authority had been cited, the court declined to award attorneys' fees to the retrocedent.

Illinois Federal Court Denies Motion for a Partial Stay Pending Arbitration and Request to Appoint an Umpire

Continental Cas. Co. v. Commercial Risk Re-Ins. Co., No. 07 C 6912, 2009 U.S. Dist. LEXIS 32208 (N.D. Ill. Apr. 16, 2009).

An Illinois federal court has denied reinsurers' motion for a partial stay pending arbitration and their request that the court appoint an umpire, noting among other things that a stay would unnecessarily retard the litigation. The dispute involves the scope of a commutation agreement and whether it included certain third-party reinsurance agreements. The court ultimately determined that the dispute did not fall within any enforceable arbitration agreement.

The cedents had entered into a series of reinsurance agreements with the reinsurers. The parties then executed a commutation agreement terminating certain of the reinsurance agreements and releasing the reinsurers from liability under those contracts. The commutation agreement did not contain an arbitration provision.

The cedents sued the reinsurers to declare that the commutation agreement did not apply to certain third-party reinsurance contracts that the cedents had purchased from others. The reinsurers argued that the commutation agreement terminated these contracts and that one set of these contracts was subject to a pending arbitration between the parties. Shortly after commencing the declaratory action, the cedent initiated arbitration against one of the third-party reinsurers seeking reinsurance recoverables under its contracts. The reinsurers in this case appeared in the arbitration, appointed an arbitrator, and advised that an award would be sought based on the commutation agreement. No umpire had been selected in the arbitration and no proceedings had commenced.

The reinsurers petitioned the court, under Section 3 of the FAA, that the litigation be stayed pending resolution of the arbitration. The reinsurers, in support of their claim, relied on the proposition that (i) they had assumed the arbitration rights as successor-in-interest to the third-party reinsurance contracts, (ii) the third-party reinsurance contracts had been terminated by the commutation agreement, and (iii) the complaint related to the same business already alleged in the arbitration. The cedents called for a narrow interpretation of the arbitration provision and refuted the reinsurers' claim to a contractual right to arbitrate as successor-in-interest. In deciding whether an arbitrable issue existed, the court considered whether the dispute fell within the scope of a written arbitration agreement that warranted a stay of the litigation. The court found that there was no enforceable agreement to arbitrate under the commutation agreement and refused the stay.

In a parallel application by the reinsurers, grounded on the same arguments of standing (*i.e.,* that it had assumed the arbitration rights as successor-in-interest to the third-party reinsurance contracts), they requested that, under Section 5 of the FAA, the court appoint an umpire to hear the arbitration. The reinsurers alleged frustration and delay on the part of the cedents for failure to conduct a timely arbitration. The court, in denying the motion, found that appointing an umpire before determining whether an arbitrable issue existed between the cedents and reinsurers would be premature.

This case once again brings up the complexities that may arise in attempting to commute all liabilities between parties and the problems with successor liability that may arise following commutation agreements.

Michigan Federal Court Denies Petition to Confirm Arbitration Award Based on Lack of Subject Matter Jurisdiction

Am. Bankers Ins. Co. v. Nat'l Cas. Co., No. 2:08 Civ. 13522, 2009 U.S. Dist. LEXIS 8621 (E.D. Mich. Feb. 3, 2009).

A Michigan federal court dismissed a petition to confirm an arbitration because of lack of subject matter jurisdiction. Reinsurers sought to confirm an arbitration award against their cedent in federal court. The cedent had previously sought to have the federal court appoint an umpire for the arbitration, but the court had held that the arbitration provision called for a state court to appoint the umpire. The arbitration resulted in an award of declaratory relief only without any monetary award.

In seeking to confirm the award, the reinsurers first claimed that there was continuing subject matter jurisdiction in the federal court because the federal court had previously considered a petition to appoint an umpire. In rejecting the reinsurer's argument, the court reasoned that because it had neither compelled nor stayed arbitration nor considered subject matter jurisdiction in the earlier proceeding, ongoing federal jurisdiction did not exist. Instead, the court stated that it had merely interpreted the arbitration clause to require that an umpire be appointed by a state court.

The reinsurers also argued that there was diversity jurisdiction. In rejecting this argument, the court held that, in the Sixth Circuit, for purposes of determining the amount in controversy in a request to confirm or vacate an arbitration award, a court is required to look at the face value of the arbitration award. Because the face value of the declaratory arbitration award here was zero, the court found that the amount in controversy was insufficient to meet the statutory threshold for diversity jurisdiction.

Eighth Circuit Enforces Premium Provisions of Crop Reinsurance Contract In Spite of Cedent's Insolvency

Granite Reinsurance Co. v. Acceptance Ins. Co., No. 08-1933, 2009 WL 1362346 (8th Cir. May 18, 2009).

In a complex crop insurance deal that involves the bankruptcy of the cedent's holding company affiliate, the Eighth Circuit held in favor of the reinsurer's claims for outstanding premium payments. The owner of a multiperil crop insurer sold various assets to another crop insurer. As part of the deal, a reinsurance contract was entered into between the purchaser and the seller's affiliated reinsurer. The reinsurance contract was set for a five-year term and had a premium payment schedule. The reinsurance contract was approved by the Federal Crop Insurance Corporation as part of the overall deal.

After the purchaser filed for bankruptcy, the reinsurer submitted a proof of claim for the unpaid premium deposits. The reinsurer also sued an affiliate of the bankrupt not in bankruptcy for failing to pay the unpaid premiums. All the disputes were consolidated in the bankruptcy court, including the proof of claim. The bankrupt then sued the reinsurer asserting that the reinsurance contract lacked consideration and that the cedent was entitled to a return of the premium paid. Motions for summary judgment were filed and the bankruptcy court conducted a consolidated trial of the proof of claim. After trial, the bankruptcy court held that all the cedent's affliates were parties to the reinsurance agreement, that the agreement provided reinsurance as intended, that the cedent did not need coverage for the full five years because it ceased writing business, and that the reinsurer was entitled to keep the initial premium deposit, but was not entitled to the later deposits. On appeal to the Bankruptcy Appellate Panel ("BAP"), the BAP held that the reinsurer was entitled to the full premium deposits. The cedent appealed to the Eighth Circuit.

In upholding the BAP's findings, the circuit court held that the reinsurance contract clearly stated that all the cedent's affiliated companies were within the definition of "Company" in the reinsurance contract. Moreover, the broad and unambiguous language of the written consent of the affiliate demonstrated that the affiliate was included as a party to the reinsurance contract. The court rejected the cedent's after-the-fact oral explanations of intent.

The circuit court also found that there was consideration for the reinsurance contract. Approval of the Federal Crop Insurance Corporation was one factor. But the circuit court did find the language concerning premiums to be ambiguous and uncertain (there was a question of whether "subject net retained premium" was identical to "subject net retained premium income" – an undefined term). Upon consideration of extrinsic evidence, which included expert testimony, the circuit court could not find that the bankruptcy court clearly erred in accepting the testimony of the reinsurer's expert. Thus, the court found that the parties intended the reinsurance contract to provide reinsurance coverage and that it was supported by consideration.

On premium payments, the court held that the reinsurance contract was unambiguous in its requirement that the cedent pay the remaining premium deposits. In so deciding, the court rejected the cedent's claim of frustration of fundamental purpose. The court held that the cedent was not discharged from its duty to pay the full premium because it ceased writing business. Placing the insurance subsidiaries into liquidation did not frustrate the purpose of providing reinsurance. The court found that the cedent was a sophisticated party that estimated and assumed the risk that it may or may not write insurance at certain levels depending on various factors. Had it not wished to enter into a five-year contract for a maximum reinsurance risk, it could have provided for annual renewals or early termination.

New York Federal Court Permits Amendment to Join Additional Claims Noting Delay Alone Not Sufficiently Prejudicial to Adverse Party

TIG Ins. Co. v. Century Indemn. Co., No. 08 Civ. 7322 (JFK), 2009 U.S. Dist. LEXIS 30011 (S.D.N.Y. Apr. 8, 2009).

A New York federal court granted a cedent's request to amend its complaint to include additional claims against one of the defendant reinsurers, holding that the delay that would result from additional discovery arising out of the new claims did not constitute sufficient prejudice to justify denying amendment of the complaint.

The cedent originally brought a claim against one reinsurer based on an alleged breach of the reinsurer's obligations under two related facultative reinsurance contracts. The court granted leave to amend its complaint to add a second reinsurer as a defendant under claims arising from the same facultative agreements. The cedent then made a second motion for leave to amend its complaint to add claims against the second reinsurer arising under two additional reinsurance contracts.

The reinsurers opposed the motion to amend the complaint, arguing that the new claims were separate from and unrelated to the original claims and that the additional discovery required would cause undue prejudice. In its decision, the court noted that under the Federal Rules of Civil Procedure, leave to amend a complaint should be freely given. The court stated that the rule in the Second Circuit is that leave to amend should only be denied if the opposing party can show bad faith or undue prejudice. The court rejected the reinsurers' argument that the amendment should be denied because the additional claims were not related to the original claims raised by the cedent. The court held that it is standard practice to join claims against the same party regardless of whether the claims are related. The court noted that "courts regularly permit amendments of pleadings to join additional claims, even when the claims arise out of different transactions."

The court also rejected the reinsurers' argument that the delay that would result from additional discovery arising out of the new claims rose to the level of prejudice. The court stated that delay alone does not constitute the type of prejudice that would justify denying an amendment. In addition, the court found that the delay would be de minimis. The court noted that additional discovery is a consequence of virtually every amendment to the pleadings and this alone cannot be held to constitute prejudice. The cases raised by the reinsurers where amendment had been denied were situations in which discovery had already been completed. In this case, discovery was just beginning and the court found that no prejudice would ensue from any additional discovery required, especially since the discovery schedule could be extended.

New York Federal Court Denies Summary Judgment to a Reinsurance Broker on Whether It Provided Sufficient Consideration for Its Placement of a Reinsurance Contract and Grants Summary Judgment to the Reinsurer on the Cedent's Fraudulent Conveyance Claim

Mills v. Everest Reinsurance Co., No. 7:05-cv-8928 (S.D.N.Y. Mar. 6, 2009).

A New York federal court has denied summary judgment in favor of a reinsurance broker because the broker could not demonstrate there was no genuine issue of fact as to whether the broker provided fair consideration to the cedent, but granted summary judgment to the reinsurer on the remaining claim for a fraudulent conveyance.

The cedent contacted the reinsurance broker to place reinsurance for the cedent's individual medical malpractice insurance business. The broker sent a detailed submission of underwriting information to several reinsurers, and cedent decided to proceed with one reinsurer's proposal. In the course of negotiations between the cedent and reinsurer, the cedent raised concerns whether the reinsurance contract sufficiently transferred risks in order to meet the terms of Financial Accounting Standard (FAS) 113. The cedent alleged that it relied on the broker to determine whether the reinsurance contract adequately transferred risks. The cedent ultimately was declared insolvent and was placed into rehabilitation. The reinsurance contract was then challenged by the rehabilitator as not transferring sufficient risk to allow for credit for reinsurance and both the broker and the reinsurer were sued. After most of the causes of action brought by the cedent were dismissed, all that remained was the cedent's claim for fraudulent conveyance under the New York Debtor and Creditor Law.

Both the broker and the reinsurer moved for summary judgment to dismiss this remaining cause of action. To prove fraudulent conveyance, the cedent bears the burden to show it was insolvent at the time of the transfer and there was a lack of fair consideration in the transfer. Because the broker did not raise the issue of insolvency in the summary judgment motion, the court only considered whether the broker provided fair consideration to the cedent.

Cedent argued that the broker in placing the reinsurance contract committed a fraudulent conveyance because the cedent did not receive a reinsurance arrangement, the bargained-for consideration. The court rejected the broker's reliance on *RGH Liquidating Trust v. Deloitte & Touche LLP*, 13 Misc. 3d 1219A (N.Y. Sup. Ct. 2006), a case finding that there could be no claim of fraudulent conveyance against an auditor. Unlike in *RGH Liquidating Trust* where the auditor charged based on some time period, here the broker did not charge on a time period, but instead was hired to procure a reinsurance contract. The court stated that it was the fact-finder's role to determine whether the broker had not earned its fees (*i.e.*, whether it failed to succeed in performing its task). The court further noted that the broker's contention that it acted in good faith was irrelevant to claims under the New York Debtor and Creditor Law.

In granting the reinsurer's motion for summary judgment dismissing the fraudulent conveyance claim, the court held that the reinsurer's payments were on account of an antecedent debt and did amount to fair consideration. Accordingly, under the New York Debtor and Creditor Law, if fair consideration is found, there can be no fraudulent conveyance. Because in earlier rulings on statute of limitations, the cedent was precluded from challenging the validity of the reinsurance contract, it no longer mattered that the cedent did not enter into the contract it thought it had. Thus, the cedent's expectations were no longer relevant.

Illinois Federal Court Declines to Consider Res Judicata Defense in Motion to Dismiss

Guar. Trust Life Ins. Co. v. First Student Programs, LLC, No. 05 C 1261, 2009 U.S. Dist. LEXIS 5834 (N.D. Ill. Jan. 28, 2009).

An Illinois federal court denied without prejudice, in part, a retrocessionaire's motion to dismiss a third-party complaint filed by a retrocedent as being barred by *res judicata*.

The cedent sells health insurance to college students, and obtained reinsurance. The reinsurance agreement required the reinsurer to obtain reinsurance, which it apparently did with the retrocessionaire, which also provided excess reinsurance directly to the cedent. When the retrocessionaire failed to pay claims, the cedent sued the reinsurer for breach of their reinsurance agreement and the reinsurer filed a third-party complaint against the retrocessionaire. The retrocessionaire moved to dismiss the third-party claims of breach of contract and promissory estoppel as being barred by *res judicata* because the claims were rejected in a previous arbitration. In an earlier arbitration between the cedent and the retrocessionaire (purportedly as the cedent's excess reinsurer), the arbitration panel found that the retrocessionaire was not contractually bound to provide excess reinsurance to the cedent.

The court declined to consider the retrocessionaire's argument that the entire third-party complaint was barred by *res judicata*. When the parties briefed the motion, the retrocessionaire had filed a separate motion to confirm the arbitration award before another federal judge, but the motion was still pending. In the parties' briefs, they assumed that the law of Pennsylvania applied because the claims themselves, both in the arbitration and in the reinsurer's complaint, were governed exclusively by Pennsylvania law. Since the briefing on this motion was completed, however, the arbitration award was confirmed. The court stated that had a state court confirmed the award, the court would be bound to give full faith and credit to the state court's judgment enforcing the award and would therefore have applied that state's *res judicata* law.

Because, as the court noted, the award was confirmed by a federal district court, federal common law, and not Pennsylvania law, governed the *res judicata* defense. The court stated that although this case involved a federal court decision and did not implicate the full faith and credit statute, federal law would still be implicated by the interest in vindicating the judgment entered in federal court. Therefore, the court concluded that it was bound to apply the federal common law of *res judicata*. Because the parties had only addressed the Pennsylvania law of *res judicata*, the court concluded that the parties be allowed to brief the federal common law of *res judicata* before making a ruling.

Illinois Federal Court Denies Insured's Successor's Motion to Dismiss Reinsurer's Successor's Third-Party Complaint

Carnforth Ltd. v. Mosaic Global Holdings, Inc., No. 08 C 3618, WL 1107711 (N.D. Ill. Apr. 22, 2009).

An Illinois federal court let stand a third-party complaint by the successor of a reinsurer against the successor of the underlying insured involving old environmental losses subject to various settlement and indemnification agreements. The underlying losses were settled and the cedent sought recovery under its reinsurance agreement. The successor to the reinsurer claimed that an agreement between its predecessor and the predecessor insured required the insured to indemnify the reinsurer for all sums expended in the defense and settlement of the cedent's claims. The reinsurer also claims that in a subsequent settlement agreement, the insured's obligation to indemnify the reinsurer for expenses associated with the cedent's claims was reaffirmed.

In denying the motion to dismiss, the court found that the insured was obligated to indemnify the reinsurer for the costs incurred in defending the cedent's claims. Thus, even if there could be no finding of indemnity against the insured, the third-party complaint still provided for recovery of expenses.

Missouri Federal Court Denies Summary Judgment to Reinsurer, Maintains That Genuine Issues of Material Fact Exist in Plain-Meaning Contract Dispute

Midwest Employers Cas. Co. v. Legion Ins. Co., No. 4:07CV870 CDP, 2009 WL 799573 (E.D. Mo. Mar. 24, 2009).

A federal court in Missouri has denied a motion for summary judgment in favor of a reinsurer based on its finding that there were genuine issues of material fact. The reinsurer had issued 43 separate reinsurance certificates between 1994 and 2001 to the cedent. The reinsurer contended that the plain language of the certificates established that the coverages were provided on a "loss occurring basis" rather than a "risk attaching basis." The reinsurer also contended that the plain language of the certificates did not contain any agreement to arbitrate disputes arising under the certificates.

The reinsurer moved for summary judgment on the basis that the language of the certificates represented the sole, complete and integrated agreements, and that the parol evidence rule and the Statute of Frauds therefore prohibited the consideration of other, contradictory evidence. The cedent argued that the language of the certificates was boilerplate language mistakenly attached to the agreements, and that it did not represent the true agreement or understanding of the parties.

The court found that there were genuine disputes of material fact as to what the parties said and understood in their negotiations, and that therefore it could not be determined as a matter of law that the parties had an objective meeting of the minds. Therefore, the reinsurer's motion for summary judgment was denied.

Supreme Court of Ohio Holds Promissory Estoppel Does Not Remove a Contract From the Statute of Frauds Based on Breach of a Promise to Execute an Agreement

Olympic Holding Co. v. ACE Ltd., No. 2009-Ohio-2057, 2009 WL 1259372 (OH. Sup. Ct. May 7, 2009).

The Ohio Supreme Court answered the question whether the breach of a promise to execute an agreement justifies using promissory estoppel to remove the agreement from the statute of frauds in the negative and reversed a judgment of the intermediate appeals court. The dispute centered on a title insurance and reinsurance facility being negotiated between insurers, reinsurers and title agencies.

An insurer offered to provide title insurance for various title agencies and title reinsurance to a title insurer that a joint venture of the title agencies would acquire. Before the plan could take effect, the title agencies had to acquire the title insurer. While various term sheets were exchanged between the parties, each term sheet contained a legend indicating that it was not an offer of insurance and other disclaimers of the discussions being an offer to enter into any transaction. The title agencies went ahead and eventually purchased the title insurer, but the insurer declined to go forward with the deal because of its own corporate divestiture. The title agencies signed a draft of one of the reinsurance agreements, but the insurer refused to execute the agreement.

The title agencies sued the insure listing ten causes of action and the insurer moved for summary judgment based on the statute of frauds. The title agencies countered that promissory estoppel took the contracts out from the statute of frauds.

After an earlier round of appeals, the Ohio Supreme Court took the case on discretionary appeal to resolve the issue concerning promissory estoppel. In finding for the insurer, the court ruled that breach of a promise to sign an agreement does not justify using promissory estoppel to remove the agreement from the statute of frauds. The court found that using promissory estoppel to evade the statute of frauds would erode the predictability that the statute of frauds brings to contract formation. The court, however, left open the possibility of recovering reliance damages for the breach of the promise to execute an agreement if that promise was misleading or fraudulent. An action for damages under promissory estoppel, held the court, is an adequate remedy for an unfulfilled or fraudulent promise. The court also found that the proposed joint venture agreement came within the statute of frauds because none of the drafts was a written agreement based on the contract disclaimer language contained in each draft.

This case points up the importance of including proper disclaimer language in term sheets and draft agreements to avoid being held in on a written agreement when the parties are still considering whether to go forward with a deal.

New Hampshire Supreme Court Denies Reinsurer's Setoff Claim Against Insolvent Cedent

In re Liquidation of the Home Ins. Co., No. 2008-407, 2009 WL 1228565 (N.H. Sup. Ct. May 7, 2009).

The New Hampshire Supreme Court reversed an order sustaining a referee's ruling granting a reinsurer's setoff claim against an insolvent cedent. The setoff claim involves a retrocessionaire of the insolvent retrocedent.

Under the insolvent's claims protocol, as claims are allowed under the reinsurance contracts assumed by the insolvent, the retrocessionaire pays the insolvent. Thus, the retrocessionaire is a debtor to the insolvent retrocedent. The claims protocol provides that the payments made by the retrocessionaire shall be set off in compliance with New Hampshire law.

For the specific claim in question, both the insolvent and the retrocessionaire were co-insurers for an insured. The retrocessionaire (as co-insurer) settled a claim with the insured and agreed not to seek indemnification, reimbursement or contribution from any other of the insured's insurers. The retrocessionaire, however, was allowed to pursue its own reinsurance collections or seek contribution from any other insurer that sought contribution from it. In a subsequent agreement on asbestos losses, the retrocessionaire and the insured amended the original agreement, which now allowed the retrocessionaire to seek indemnification or reimbursement for amounts it paid to the insured from any currently insolvent insurer of the insured.

The retrocedent filed a claim against the insolvent under the claims protocol seeking to setoff $8 million of the settlement with the insured against retrocessional claims against it by the liquidator. The matter went before a referee who agreed with the retrocessionaire and the trial court sustained the referee's determination.

In reversing, the New Hampshire Supreme Court construed New Hampshire's setoff statute, RSA 402-C:34. The statute has an exception to setoff rights where the obligation of the insurer to the person seeking the setoff was purchased or transferred to the person with a view to its being used as a setoff. The retrocessionaire argued that its right of contribution from the insolvent was not purchased or transferred to it, but derived from the original settlement with the insured under the common law doctrine of joint and several liability. While recognizing the appeal of the retrocessionaire's argument, the court held that it must construe exceptions to the setoff mandate broadly to achieve the purposes of the statute. The court found that the second settlement agreement, which after payment to the insured allowed the retrocessionaire to bring its contribution claim (which under the first agreement it promised it would not do), was a purchase or transfer under the statute made to specifically obtain the ability to setoff.

The court did say that under the proper circumstances and consistent with the claim protocol the retrocessionaire may use setoff to reduce amounts it owes the insolvent. Here, if it had not agreed to forego contribution in the original settlement agreement, it would have been able to exercise its setoff rights. But the payment in the second agreement to relieve itself of the first agreement's proscription was conduct barred by the statutory exception to the setoff mandate.

Illinois Appellate Court Applies Contract Choice-of-Law Provision, Finds the Plain Meaning of Commutation Agreement Not Ambiguous

Old Republic Ins. Co. v. Ace Prop. & Cas. Ins. Co., No. 06 CH 03502, 2009 WL 804146 (Ill. App. Ct. Mar. 24, 2009).

An Illinois state appellate court has affirmed a trial court's holding that under a commutation agreement between two reinsurers, all obligations between the parties were discharged. The reinsurers had previously, under various contracts, reinsured each other on various risks. Here, a reinsurer sought a declaration that only the obligations of one reinsurer were discharged by the agreement, and not those of the other reinsurer.

In considering whether to apply the agreement's choice-of-law provision (assenting to Nebraska jurisdiction), the court used Illinois' approach to resolving choice-of-law questions by following the formulation under the Restatement Second. The court found no exception to the general rule that choice-of-law provisions should be honored, as one of the parties was based in Omaha, Nebraska, and the agreement was primarily negotiated in Nebraska.

The court noted that a contract's meaning and whether it is ambiguous are questions of law, subject to *de novo* review. The court stated that Nebraska law has a "strong presumption" that a written instrument correctly expresses the intention of the parties, and that where the terms are clear, they must be given their plain and ordinary meaning. Further, a determination of ambiguity should only be made when language has, or is susceptible to, at least two reasonable but conflicting interpretations or meanings, which determination must be made on an objective basis. The agreement stated that the parties wished to fully and finally determine and settle all liabilities and obligations of the parties to each other under the reinsurance agreements, which agreements were otherwise described as "various reinsurance agreements."

The court found that the plain language of the agreement clearly showed that the parties intended to commute all of the reinsurance agreements between the two parties, including those agreements where the second party reinsured the first, and not just the agreements by which the first party reinsured the second. Therefore, the court held that the agreement was unambiguous as a matter of law.

Florida Intermediate Appellate Court Reverses Dismissal of Cedent's Action

Advantage Gen. Ins. Co. v. Kiln/QBE Intern'l, No. 4D08-1944, 2009 WL 439247 (FL Ct. of App. Apr. 29, 2009).

A Florida state intermediate appellate court reversed the dismissal of a cedent's complaint against its reinsurers holding that the claim did not arise out of an unauthorized insurance transaction. Like many states, Florida has a statute that precludes unauthorized reinsurers from commencing an action in the state to protect the state's insureds. Here, the cedent was an unauthorized insurer in Florida and the reinsurers sought to dismiss the action on that basis. In reversing, the appellate court found that in effect the cedent was the "insured" and that purchasing reinsurance was not "transacting insurance" under the statute. Thus, the statute, Section 626.903, Florida Statutes (2007), did not bar the cedent's claim.

New York Federal Court Grants Motion to Dismiss in Favor of Insurer Accused of Securities Law Violations

Zirkin v. Quanta Capital Holdings, Ltd., No. 07 Civ. 851 (RPP), 2009 WL 185940 (S.D.N.Y. Jan. 23, 2009).

A New York federal court granted an insurer's motion to dismiss a class action brought on behalf of certain of the insurer's shareholders, ruling that the pleadings did not establish a violation of Sections 11 or 12(a)(2) of the Securities Act of 1933. The complaint alleged that the insurer's loss projections and SEC filings deliberately underestimated the insurer's losses from Hurricanes Rita and Katrina.

In October 2005, the insurer issued a press release containing loss projections of $42-$58 million from the combined effect of the two hurricanes. Three weeks later, this projection was raised to $68.5 million. The insurer also filed a registration form with the SEC, stating that it estimated its losses from the hurricanes to be $68.5 million, but cautioned that the amounts were based on the best estimates that the company had to date, and were derived from a review of potential exposures, not actual reported losses. The same figure was reported in the company's third quarter earnings report.

On December 14, 2005, approximately two weeks before the end of the fourth quarter, the insurer filed a prospectus for an offering of preferred stock and priced three million shares at $25 per share. On March 2, 2006, the insurer disclosed preliminary results for 2005, which revealed that the hurricane-related losses were 15 percent higher than anticipated. The company explained that the loss was due to a $17.4 million loss from a single offshore energy account.

The plaintiffs' complaint alleged that the insurer's registration statement and prospectus contained an untrue statement of material fact or omitted a material fact necessary to make the statement not misleading. The crux of the plaintiffs' argument was that the stock offering was made within two weeks of the end of the fourth quarter, when the insurer should have had a better understanding of its exposure to hurricane-related claims.

Under the Securities Act, the salient question is not whether the loss estimate was correct, but rather whether the insurer knew or had reason to know, at the time the offering documents were filed, that any material statement was untrue. The court held that insurance reserves established for losses that have been incurred but not yet reported are by their nature "extremely conjectural, and may need adjustment as time passes." The fact that the insurer disclosed the potential for greater losses in both its press releases and its SEC filings helped assure the court that the insurer did not misstate or omit a material fact when making these disclosures.

New York Federal Court Holds a Desire to Maintain Ratings Is Not Sufficient to Establish an Inference of Scienter

In re PXRE Group, Ltd. Securities Litigation, 600 F. Supp. 2d 510 (S.D.N.Y. 2009).

In a case not involving a reinsurance dispute, but rather a securities fraud action against a reinsurer and its officers, a New York federal court recently held that allegations of securities fraud were not pleaded with sufficient particularity under the Federal Rules of Civil Procedure and the Public Securities Litigation Reform Act. This case grew out of a reinsurer's initial underestimation of the magnitude of its losses resulting from the Gulf Coast hurricanes of 2005. The reinsurer published an initial loss estimate with cautionary language indicating that the reinsurer might need to revise the estimate. It then published several revisions to that loss estimate, which also contained similar cautionary language and that were substantially lower than the losses ultimately incurred. Plaintiffs, purchasers of the reinsurer's securities during the period between the issuance of the first loss estimate and last loss estimate, claimed that the reinsurer and its officers had deliberately underestimated the losses with an intention to defraud them.

In reviewing a motion to dismiss the complaint, the court first considered whether the individual officers had a personal and concrete motive to commit fraud. The court held that a general desire to maintain high ratings from rating agencies is too general a desire to serve as the ground for inferring scienter in a fraud case. The court reasoned that all insurance companies have a strong motivation to maintain or improve their ratings and that if a desire to maintain ratings was sufficient to infer scienter for fraud, any incorrect statements by an insurer would be considered under an inference that it was fraudulent.

The court also considered whether scienter or even recklessness could be inferred from several other facts such as some other reinsurers modifying their loss estimates earlier, one of the officer's negotiation of a severance package after the underestimates were publicized, another officer's leaving the company, and the chief actuary having concerns. The court held that none of these factors was sufficient to create an inference of scienter or to support a finding of recklessness. The court held that a minority of other reinsurers adjusting their losses earlier was not sufficient to place the reinsurer on notice that its loss estimates were substantially too low. The court also held that the chief actuary's concerns were reflected in the cautionary language that accompanied the loss estimates and that the plaintiffs had failed to allege that the chief actuary's concerns were presented to the other officers. Finally, the court held that officers negotiate severance packages and leave companies all the time, particularly when companies are in trouble, and that these actions could therefore not serve to demonstrate recklessness or scienter.

New York State Court Grants Motion to Dismiss for Failure to State a Claim Under the Donnelly Act

Global Reins. Corp. v. Equitas Ltd., 876 N.Y.S.2d 325 (N.Y. Sup. Ct. 2009).

A New York state court granted a motion to dismiss a complaint alleging antitrust violations between UK-based reinsurers and certain Lloyd's syndicates for failure to state a claim under the Donnelly Act.

The US branch of a German reinsurer (the "US Reinsurer") entered into certain retrocessional treaties with various Lloyd's syndicates and thereafter commenced a proceeding against three United Kingdom reinsurers (the "UK Reinsurers") alleging that they had conspired with various syndicates to use their combined market power to pay uncompetitive payouts on reinsurance claims, enforce new contract terms on the US Reinsurer, and coerce it into renegotiating its treaties with the syndicates. The US Reinsurer thereafter filed a second amended complaint (the "complaint") that primarily alleged a violation of the Donnelly Act.

The complaint asserted that a worldwide market existed for non-life retrocessional reinsurance and, in contrast to the first amended complaint, did not allege that the geographic scope of the relevant product market could be limited to Lloyd's. The complaint alleged that there was only one product market—the Lloyd's submarket of the worldwide market for non-life retrocessional reinsurance.

In its motion to dismiss the complaint, the UK Reinsurers contended that the complaint failed to state a claim under the Donnelly Act because it failed to allege either a relevant product market (*i.e.*, that Lloyd's was a true submarket of the worldwide market for non-life retrocessional reinsurance) or a restraint of trade in that market. In order to state a valid claim under the Donnelly Act, a plaintiff must identify the relevant product market and allege how the economic impact of the purported conspiracy among two or more entities is to restrain trade in the market in question.

The court noted that a market within a market, also termed a submarket, may also be the subject of a monopoly provided that its confines are well-defined through the rule of reasonable interchangeability. The court held that to state a claim that Lloyd's is a true submarket, the complaint must allege that the products sold at Lloyd's are not interchangeable with other reinsurance products sold outside the Lloyd's market.

In addressing the complaint's allegations for violations of the Donnelly Act, the court analyzed each allegation separately. First, the court held that the allegation that Lloyd's was the single most significant seller of most forms of non-life retrocessional coverage to reinsurers worldwide did not describe a true submarket. The court noted that the test of a relevant product market is whether the products are interchangeable outside the proposed market, not the seller's "significance" in the world market and that this allegation did not indicate that the products at issue are not interchangeable with those sold outside Lloyd's.

Second, the court held that the allegation that Lloyd's provided the benchmark for prices, terms and conditions for most forms of non-life retrocessional coverage did not describe a true submarket and that this allegation was quite different from alleging that economic realities compelled customers to shop at Lloyd's, even if it charged higher prices or less favorable terms and conditions.

Third, the allegation that any prospective purchaser of retrocessional coverage "would have to at least consider approaching Lloyd's for quotes and would have to take into account the terms and conditions offered by various Lloyd's syndicates in determining what to purchase" also fell short of plaintiff's pleading obligation. The court held that even assuming it was true that prospective customers must "consider" asking Lloyd's for quotes and take Lloyd's quotes into account before purchasing coverage, this allegation fell short of alleging that market forces compel consumers to choose Lloyd's, even if its quotes are not competitive in the worldwide market.

Fourth, the allegation that competition within the Lloyd's marketplace is more significant to prospective purchasers of retrocessional coverage than is competition between Lloyd's as a whole and other sellers, because Lloyd's is expected to, and does, set the lead in establishing coverage was also inadequate to state a claim. The court reasoned that the allegation fell short of alleging that customers are somehow obliged by market forces to buy products through Lloyd's, and that they would continue to buy products through Lloyd's, even if its terms and prices are less favorable than those offered by sellers outside Lloyd's. Ultimately, the court held that even assuming all the product market allegations in the complaint were true – they were inadequate to state a claim under the Donnelly Act.

The court declined to reach the question of whether the complaint failed to allege a restraint of trade in the relevant market because, as the court noted, it had concluded that the complaint failed to adequately allege a relevant product market. Therefore, the court granted the motion to dismiss and dismissed the second amended complaint with prejudice.

Recent European Regulatory Developments

European Reinsurance Regulation — Solvency II
On May 5, 2009, the Solvency II directive was officially adopted. It is designed to be a groundbreaking revision of reinsurance regulation to increase consumer protection against bad practice, modernize cross-border supervision and improve the competitiveness of

European reinsurers. The implementation date is October 31, 2012.

Solvency II is a risk-based regulatory regime. It introduces more sophisticated solvency requirements with the result that companies will take into account not only insurance risks, but also market, credit and operational risks. Compliance will shift from being a "tick-box" exercise to being a more proactive supervision of companies' risk management. To improve cross-border supervision, supervisory colleges will be created, made up of national supervisors who are responsible for a group and its subsidiaries.

One of the most controversial aspects of the Solvency II directive was the group support regime (providing that the capital requirements of a subsidiary could be met by a parental guarantee). The group support provisions do not form part of the directive as adopted. Within three years of implementation, however, the European Commission has to review the benefits of group support. The measures may, therefore, have been delayed rather than permanently withdrawn.

The directive adopted is a "level 1" framework directive only. On a large number of issues, detailed "level 2" implementing measures need to be prepared and consulted upon. The first set of consultation papers was published in March this year and more are expected to follow in June.

The UK regulator, the Financial Services Authority, has advised the insurance industry that it must start preparing immediately for the new regime if it has not already done so. The timetable is tight and a detailed program is in place to ensure that UK companies meet the implementation deadline.

Renewal of the Insurance Block Exemption: What Are the Preliminary Views of the European Commission?

On March 24, 2009, the European Commission adopted a report setting out its preliminary views on how the Insurance Block Exemption Regulation (Regulation 358/2003) (BER) has functioned over the last six years. Its preliminary finding is that the BER is now justified in only two out of four categories.

The Commission's report is part of an ongoing consultation to assess whether the BER should be renewed for certain categories of agreements in the insurance sector. The next stage is a public hearing on June 2, 2009 when the Commission will hear final representations from the industry before deciding whether to renew.

Under the BER, four categories of agreements, decisions and concerted practices in the insurance sector, which might otherwise be prohibited as anti-competitive under the EC Treaty, are currently given a block exemption, provided the relevant conditions are satisfied:

1. Joint calculations, tables and studies such as calculations of the average cost of covering a specified risk in the past or joint studies on the probable impact of certain circumstances on claims frequency.

2. Standard policy conditions for direct insurance and non-binding models on profits.

3. Setting up and operating coinsurance and reinsurance pools for certain types of risks such as nuclear, terrorism and environmental.

4. Technical specifications, rules or codes of practice for security devices, including installation and maintenance.

The safe harbor provided by the BER for these four categories expires on March 31, 2010. In the Commission's preliminary view, the BER is only justified in the categories at points 1 and 3 above.

If the BER is renewed, the Commission will consult on a draft regulation. If the final decision is not to renew any part of the BER, the Commission will publish a communication to that effect before the end of 2009.

Recent Speeches and Publications

Larry Schiffer will be speaking on "Dispute Resolution: Whither Arbitration and ADR" at the American Bar Association's Tort, Trial & Insurance Practice Section's National Program: "Insurance Receivership & Run-Off: The Next Level," on June 4, 2009, in New York City.

Bill Marcoux will be speaking on "Evolution of the Brazilian Reinsurance Market: Tracing the Path of the Market From Its Opening to Present," at the American Conference Institute's Second International Forum on Brazilian Reinsurance, September 16-17, 2009, in New York City.

Bill Marcoux spoke on the "Brazilian Reinsurance in an International Market Place: How International Experience Can Shape a Nascent Framework" and Eridania Perez participated in a Workshop on "Reinsurance Contracts and Meeting International Standards in Legal Documentation" at the *Reactions* magazine's Brazilian Reinsurance Conference "Establishing a Global Reinsurance Centre in Brazil's Burgeoning Insurance Market," on March 4-5, 2009, in Rio de Janeiro, Brazil.

John Nonna participated as a panelist at a "Bonus Session: Mediation with a Fact Patterns," at the Mealey's 16th Annual Insurance Insolvency & Reinsurance Roundtable, on April 23, 2009, in Scottsdale, Arizona.

John Nonna presented an oral argument to The Honorable Dennis G. Jacobs, Chief Judge of the Second Circuit Court of Appeals (sitting by designation as a district court judge) as part of a presentation titled "Post-Award Challenge: Oral Argument and Decision" at The ARIAS US 2009 Spring Meeting on May 8, 2009, in Palm Beach, Florida. Larry Schiffer moderated a Workshop on "Time, Billing and Conflicts Software for Arbitrators," on May 7 at the same conference.

Larry Schiffer's Commentary, "Clash Cover Reinsurance and Economic Catastrophe Losses," was published on IRMI.com, the Web site of International Risk Management Inc., in March 2009.

Larry Schiffer's article, "Reinsurance Arbitration Clauses – Where the Courts Find Problems," was published in the ARIAS U.S. Quarterly, Vol. 16, No. 1 (1st Q. 2009).

"A Brief Review of Reinsurance Trends in 2008 – Part 1," by Larry Schiffer, Jennifer Lee, Victoria Melcher, John DiNapoli, and Tim Stapleton, was published in Andrews Insurance Coverage Litigation Reporter, Vol. 19, Issue 25 (March 27, 2009). Part 2 was published in the same Reporter in Vol. 19, Issue 26 (April 3, 2009).

Larry Schiffer has been named to the *Law 360* Insurance Editorial Advisory Board.

The *Reinsurance Newsletter* is a publication of Dewey & LeBoeuf LLP, and is not intended as legal advice regarding specific transactions or matters. Authors contributing to this newsletter are: Editor, Larry P. Schiffer, Jo Marshall, Rachel Berk, J. Michael Davis, Ryan W. Lang, Mahbod Moghadam, Yevgeniy Markov, Sabrina A. Miesowitz, Jeremy D. Scholem, Timothy Stapleton, Jennifer M. Stewart and Jennifer A. Tait. For further information, please contact your responsible Dewey & LeBoeuf lawyer at:

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