

September 2009

Larry P. Schiffer
Editor

In this issue:

- 1 Recent Case Summaries
- 10 Recent Regulatory Developments
- 10 Recent English Case Summaries
- 11 Recent Speeches and Publications

DEWEY & LeBOEUF

Reinsurance Newsletter

Falconbury Reinsurance Contract Wordings and Disputes Conference, October 8-9, 2009, Hamilton, Bermuda

Please join us at Falconbury's Reinsurance Contract Wordings and Disputes Conference, October 8-9, 2009, at the Hamilton Princess, in Hamilton, Bermuda. Co-chaired by Francis Mackie and Larry Schiffer, the conference features experts on

contract wording covering subjects from contract certainty to dispute resolution clauses, and a mock reinsurance arbitration with live witnesses on disclosure of coverage counsel advice and contract ambiguity issues. For more information and to register, please go to <http://www.falconbury.co.uk/public/course/reinsurance-contract-wordings-and-disputes-bermuda>. Clients and colleagues of Dewey & LeBoeuf receive a 50 percent discount off the registration fee.

Recent Case Summaries

Seventh Circuit Confirms Award and Upholds Appointment of Replacement Arbitrator

WellPoint, Inc. v. John Hancock Life Ins. Co., No. 08-2283, 2009 U.S. App. LEXIS 17841 (7th Cir. Aug. 7, 2009).

The Seventh Circuit Court of Appeals has affirmed an Illinois federal court's confirmation of an arbitration award, which was challenged based on an objection to the replacement of a party-appointed arbitrator during the discovery stage of the arbitration.

WellPoint Health Networks ("Well-Point") purchased various business operations from John Hancock

Life Insurance Company (“John Hancock”) in a transaction accomplished through three agreements, each containing an arbitration provision. A dispute arose between the parties regarding payments under the agreements, and WellPoint filed an arbitration demand against John Hancock seeking information from John Hancock and a declaration of WellPoint’s rights and obligations under the contracts. John Hancock filed a counter-demand, seeking \$42.4 million from WellPoint.

A provision in the Purchase and Sale Agreement set forth the process for appointing the arbitrators. The provision was silent on how an arbitrator would be replaced should one resign. Within 20 days after service of the arbitration demand each party appointed its own arbitrator and ultimately an umpire was appointed. Over the next two years, the parties conducted extensive discovery and the panel resolved several discovery and procedural disputes, in preparation for a hearing scheduled to take place in March 2006.

In July 2005, John Hancock increased its damages demand to \$464.6 million, and three weeks later WellPoint replaced its counsel. At the same time, WellPoint asked its arbitrator to resign. John Hancock objected, but after receiving assurances from WellPoint

that the hearing would take place in March 2006 as planned, the arbitrator formally asked to withdraw. The panel accepted the arbitrator’s resignation on September 3, 2005.

WellPoint attempted twice to name a replacement arbitrator, and John Hancock objected. John Hancock’s party-arbitrator suggested that the remaining panel members propose three replacement arbitrators, and allow WellPoint to choose its party-arbitrator from that list. Although WellPoint objected to this idea at first, John Hancock supported it and WellPoint eventually agreed to it. A replacement arbitrator was appointed over John Hancock’s renewed objections to the prior arbitrator’s resignation.

In March 2006, a three-week hearing was held. After the hearing, the panel issued a determination finding that WellPoint had assumed liability for certain books of business, but that it had no liability arising out of one large loss-producing book of business in Bermuda.

WellPoint filed a petition to confirm the ruling, and John Hancock filed a cross-petition to vacate the award on the ground that the panel was not selected in accordance with the arbitration provision. The following week, the damages phase of the arbitration hearing

took place. In April 2007, the panel issued an award ordering WellPoint to pay John Hancock \$26 million in damages and \$2.9 million in “offsetting balances and interest assessments” – a small portion of the \$464 million that John Hancock sought to recover from WellPoint. At the request of the parties, the award was revised slightly to \$26.4 million. The District Court then confirmed the award, finding that the agreement between the parties required only that the arbitration proceed before a panel comprised of two party-appointed arbitrators and one neutral arbitrator, and that is what the parties got.

On appeal, John Hancock challenged the award under § 10(a)(4) of the Federal Arbitration Act (“FAA”), 9 USC § 10(a)(4), asserting that the panel exceeded its authority when it accepted the arbitrator’s resignation and appointed the new arbitrator in his place. John Hancock argued that, as the arbitration agreement was silent on the issue of the replacement of a panel member, the arbitration process should start anew with a new panel.

The Court of Appeals sharply rejected this argument, stating that “[w]e find no such inflexible and wasteful rule in the law of arbitration.” Instead, the court held that the route to be taken by a party in that position is to avail itself of the

relief provided in § 5. This provision allows parties to apply to the court for the appointment of an arbitrator when there is a lapse in naming an arbitrator or filling a vacancy and (1) there is no provision in the agreement for filling a vacancy; (2) the method is provided but a party fails to avail himself of that method; or (3) for another reason, there is a lapse in filling the vacancy. The Court of Appeals reasoned that it would be inconsistent with the purpose of the FAA to allow a party to sit idly by while a replacement arbitrator is appointed, and then oppose confirmation of the award on the basis of the method of replacement only after it has lost before the panel.

The court noted that under the approach being advocated, where a party can contest the replacement of the arbitrator either under § 5 or § 10(a)(4), parties would have no incentive to avail themselves of § 5, but rather would opt for a “wait and see” approach under which the party could wait until the outcome is determined to, if then desired, attack the method of the selection of the arbitrator. The court rejected this “heads I win, tails you lose” interpretation of § 5.

The court recognized that circumstances may exist where it is appropriate for a party to raise its objections to the appointment

of an arbitrator at the § 10(a)(4) phase rather than at the earlier § 5 stage. The court stated that this case, however, “is so far from any plausible scenario” that discussing the specifics of when § 5 can be bypassed was unnecessary. Rather, the court said, the actions of Hancock were a “transparent attempt to preserve a threshold procedural issue in case ... [it] eventually lost the arbitration on the merits.” (quoting *Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 748-49 (8th Cir. 2003) (alterations original).

The Court of Appeals also rejected John Hancock’s argument that use of challenges under § 5 would encourage interlocutory appeals generally, and would undermine the efficiency of the arbitration process. The court explained that as applications under § 5 are limited to issues regarding arbitral appointments, fears of endless interlocutory appeals were baseless. Furthermore, the court stated that it is far less efficient for the court to find the replacement of an arbitrator inappropriate at the § 10 phase than at the § 5 phase. Finally, the court found that John Hancock’s own participation in the substitution process estopped it from complaining about the selection process.

The message from the Seventh Circuit to parties is that if there is a problem with the appointment of an arbitrator, do not sit on your hands and wait for the award to challenge the appointment. The court strongly encouraged parties to use § 5 of the FAA right away. This is in contrast to many prior cases in other federal circuits where pre-award challenges to the appointment of an arbitrator have been rebuffed. It will be interesting to see if other courts follow the Seventh Circuit's lead and allow more arbitrator appointment challenges at an earlier stage in the arbitration. (Dewey & LeBoeuf represented WellPoint in this matter)

of which contained an arbitration clause. In 2006, the cedent brought suit against the reinsurer, alleging breach of the agreements. The reinsurer moved to compel arbitration and the cedent objected, arguing that Oklahoma law prohibited arbitration of reinsurance contract disputes.

In Oklahoma, arbitration clauses are invalid unless expressly authorized by statute. The Oklahoma Uniform Arbitration Act ("OUAA") applied to reinsurance contract arbitration clauses at the time the agreements were executed, rendering the clauses presumptively valid and enforceable. In 2005, the OUAA was revised such that it no longer applied to reinsurance contracts, and also so that it included a retroactivity provision, effective as of 2006, stating that the revised OUAA governs an agreement to arbitrate whenever made. In 2008, after oral argument in this case in district court had occurred, OUAA was amended to include reinsurance contracts once again, effective as of November 1, 2008.

The Court of Appeals reviewed the denial of the motion to compel arbitration *de novo*, in order to decide whether the revised OUAA, as amended, makes effective the arbitration clauses contained in the agreements. The court did not hesitate in finding that the retroac-

tivity provision in the revised OUAA was also applicable to the amendment of that revised OUAA, based on the wording of the statute and also the interpretation of the Oklahoma Supreme Court. Additionally, the court stated that to interpret the amendment to be a counterholding (meaning the revised OUAA is retroactively applicable, but the amendment is not) would go against legislative intent and against the presumption under Oklahoma law that procedural laws are immediately effective. The court concluded that the amendment does render the arbitration clauses found in the reinsurance agreements to be valid and enforceable, because "the common law rule prohibiting arbitration does not apply when there is specific legislative approval."

Illinois Federal Court Denies Petition to Compel Testimony in Aid of a Foreign Arbitration
In re Arbitration between Norfolk Southern Corp. and ACE Bermuda Ltd., No. 09 C 3092, 2009 U.S. Dist. LEXIS 49827 (N.D. Ill. Jun. 15, 2009).

An Illinois federal court was asked to order a former outside lawyer for a reinsurer to testify in an arbitration being conducted in London. The petition was made under 28 U.S.C. § 1782. The underlying claim involved a train derailment and the insured and cedent believed that

4 |

Tenth Circuit Court of Appeals Finds Oklahoma State Law Does Not Prohibit Arbitration of Reinsurance Contract Disputes

Mid-Continent Cas. Co. v. Gen. Reinsurance Corp., No. 07-5050, 2009 U.S. App. LEXIS 11057 (10th Cir. May 22, 2009) (not binding precedent).

The Tenth Circuit Court of Appeals has reversed a district court's denial of a motion to compel arbitration, finding that Oklahoma law does not prohibit arbitration of reinsurance contract disputes.

The reinsurer and the cedent executed one reinsurance agreement in 1992 and one in 2000, each

the lawyer had personal knowledge of facts relevant to the reinsurance dispute. The lawyer, naturally, and the reinsurer opposed the application. The court denied the application in what is largely a scholarly analysis of § 1782 and its application to private arbitration.

Section 1782 allows a district court to order a person that resides in that district to give testimony or produce documents for use in “a proceeding in a foreign or international tribunal ...” The provision is discretionary, not mandatory. In denying the petition, the court focused on the phrase “a foreign or international tribunal,” because the lawyer contended that an arbitration panel in London is not a “foreign or international tribunal” under the statute. After going through the history of the statute, Supreme Court and other judicial interpretations, and revisions to 1782, the court held that the reinsurance arbitration in this case was outside the scope of the statute. The court interpreted the Supreme Court’s reference to arbitration tribunals to refer to state-sponsored arbitral bodies and not to purely private arbitrations. Accordingly, the court held that it did not have the authority to grant the relief requested and denied the motion.

New Jersey Federal Court Certifies Questions to an Arbitration Panel to Clarify Ambiguities in the Award

Certain Interested Underwriters at Lloyd’s v. Pinehurst Accident Reinsurance Group, No. 08-2950 (RMB), 2009 U.S. Dist. LEXIS 47443 (D. N.J. Jun. 4, 2009).

Courts have limited authority to review an arbitration award under the Federal Arbitration Act (“FAA”) and generally must confirm an arbitration award unless one of the grounds for non-confirmation is demonstrated. One of those grounds is when the award is ambiguous.

Here, the retrocedent sought to confirm an arbitration award in its favor, which the court originally granted as unopposed, but requested further briefing on enforcement of the award because of perceived ambiguities. After briefing, the court vacated the award and remanded it to the arbitration panel for clarification in an unpublished May 20, 2009 order. The retrocedent then made a motion for reconsideration, asking the court to certify specific questions to the arbitration panel to clear up the ambiguities.

The underlying dispute concerned the enforcement of certain mandatory commutation clauses within

a series of group accident treaties. The arbitration panel’s final award held that as to contracts with the stated examples of clauses “and any other contracts with this mandatory commutation language,” the parties were to calculate the results of those treaties had the mandatory commutation clauses been applied. The parties, in the court proceedings, disputed which contracts came within the final arbitration award. After holding a hearing with witness testimony, the court concluded that paragraph four of the final award was ambiguous and refused to engage in a “guessing game” as to what the arbitrators meant.

In granting the motion for reconsideration, the court agreed that presenting the questions posed to the arbitrators might be useful in the remand proceeding. Thus, rather than merely vacating the award and sending it back for clarification, the court “certified” a series of questions to the arbitrators to aid in clarifying the award. The court held that the parties may renew their motion to confirm after the arbitrators had clarified the award.

New York Federal Court Vacates Judgment Requiring New Arbitration After Arbitrator Recovers From Illness

Ins. Co. of N. Am. v. Pub. Serv. Mu. Ins. Co., No. 08 Civ. 7003 (HB), 2009 U.S. Dist. LEXIS 66325 (S.D.N.Y. Jul. 29, 2009).

In our March 2009 edition, we reported on the December 12, 2008 judgment in this case, in which the court ordered the parties to start their arbitration over when the reinsurer's party-appointed arbitrator resigned for health reasons after the reinsurer had lost a motion for summary judgment on critical issues and before the panel could hear reargument. It now turns out that the arbitrator had recovered prior to oral argument of the earlier motion, which was not brought to the court's attention during that argument. Upon learning that the reinsurer's former party-appointed arbitrator was actively soliciting arbitration work, the cedent moved to vacate the judgment. The court granted the motion and ordered the parties to continue the arbitration before the original panel, reappointed the resigned arbitrator, and ordered that if the resigned arbitrator was unable to serve, that the reinsurer would have to choose a replacement arbitrator or suffer court appointment of the replacement.

In granting the motion to vacate the judgment, the court held that the cedent had satisfied each element required to establish relief based on newly discovered evidence. The court rejected the reinsurer's argument that the cedent should have known the arbitrator had recovered through reasonable diligence. The court indicated that it would have reappointed the resigned arbitrator if the court knew that the arbitrator was actively soliciting arbitration work at the time of oral argument.

New York Federal Court Confirms Arbitration Award Although Payment Under the Award Had Been Made

Global Reinsurance Corp. v. Argonaut Ins. Co., No. 08 Civ. 8482 (PKC), 2009 U.S. dist. LEXIS 47860 (S.D.N.Y. May 21, 2009).

Even though the amount awarded to a retrocedent in a final arbitration award was paid by the retrocessionaire, a New York federal court still confirmed the award because it denied the retrocessionaire's request to dismiss future claims that might arise. The retrocessionaire, while answering the petition, did not challenge the arbitration award. Because the retrocedent was a citizen of a foreign country, the petition to confirm the arbitration award was governed by the U.N. Convention on the Recognition and Enforcement of Arbitral

Awards (the "Convention"). Under the Convention, any party may apply to the court to confirm the award and the court must grant the order confirming the award unless it is vacated, modified, or corrected. Because there was no basis to vacate or otherwise alter the award, the court was required to confirm the award and entered a final judgment in favor of the retrocedent.

New York Federal Court Denies Motion to Vacate Award

TIG Ins. Co. v. Global Int'l Reinsurance Co., No. 09 Civ. 1289 (JSR), 2009 U.S. Dist. LEXIS 69184 (S.D.N.Y. Aug. 7, 2009).

A New York federal court has rejected a reinsurer's petition to vacate an arbitration award and has confirmed the award commenting that "the loser is hard-pressed to complain if there is even a colorable justification for the result. Here, the losing party got all that it bargained for when it elected arbitration."

This dispute has had a number of arbitration awards and related audits following awards and settlement agreements all concerning whether certain claims were properly coded and submitted to the reinsurer. The current dispute involves a claim that the cedent had miscoded and misallocated certain claims in bad faith and fraudulently

concealed these errors to induce the reinsurer into a settlement agreement. The cedent moved for summary judgment on the fraud and bad faith claims before the arbitrator. The issues were fully briefed, multiple exhibits were submitted by both sides, and oral argument was heard by the arbitrator. The arbitrator granted the motion and dismissed the reinsurer's fraud and bad faith claims.

In denying the petition to vacate, the court noted that it was compelled to enforce the award as long as there is a barely colorable justification for the outcome reached. The court rejected the reinsurer's claim that the arbitrator was guilty of misconduct in refusing to hear evidence and found that the submissions and oral argument were "far from a fundamentally unfair hearing." The court also rejected the reinsurer's attempt to argue manifest disregard of the evidence, which is not recognized under the law as a ground to vacate an arbitration award. Finally, the court rejected the reinsurer's attempt to argue manifest disregard of the law because the settlement agreement was fraudulently obtained, stating that there was no basis for this claim, assuming this ground still even exists, because the reinsurer was aware of certain prior miscodings and misallocations.

This is yet another in a long line of examples of court orders confirming arbitration awards. The challenge to obtain vacatur is significant and only those very few cases with solid facts and which fit within the very limited grounds for vacatur will be successful.

Pennsylvania Federal Court Denies Petitions to Confirm and Vacate a Final Arbitration Award

Century Indemn. Co. v. Fencourt Reinsurance Co., No. 09-MC-53, 2009 U.S. Dist. LEXIS 68599 (E.D. Pa. Jul. 22, 2009).

Taking a bit of a different view from the *Global Re* case cited above, a Pennsylvania federal court denied both the petition to confirm a final arbitration award and the request to vacate a portion of the award based on the panel exceeding its jurisdiction. The dispute following an arbitration award was solely about whether the arbitration panel exceeded its authority by failing to award interest and lawyer's fees under the reinsurance contracts. Except for one paragraph of the award denying interest and costs, the parties had already complied with the award.

The reinsurance contracts contained a provision providing that subsequent to the termination of the policies, "each party will reim-

burse the other for amounts which became owing ... and which are not paid in accordance to the terms of this Agreement and will also pay the following interest charges ... Attorney's fees and court costs reasonably incurred by the party collecting such amounts shall be reimbursed by the party from whom such amounts are collected." The arbitration clause required the parties to pay for the cost of their own arbitrators and that the remaining costs "shall be allocated by the arbitral tribunal." The award denied all claims for interest and costs.

The court first denied the petition to confirm as moot for the balance of the arbitration award that was not contested and to which the parties had already complied. Section 9 of the Federal Arbitration Act states that "the court must grant [an order confirming the award] unless the award is vacated, modified, or corrected ..." Nevertheless, the court determined that confirmation was not required because the parties had already complied with those eleven paragraphs of the award.

In construing the challenged paragraph of the award, the court found it was somewhat ambiguous. Accordingly, the court held that the panel's interpretation was not completely irrational and that the

panel did not exhibit “a manifest disregard” for the agreement. The court denied the petition to vacate that paragraph of the award and also denied the petition to confirm that paragraph as moot. The court also declined to award attorneys’ fees and costs on the petition because neither party needed to request confirmation to achieve compliance.

The manifest disregard standard, which has been limited by recent case law, refers to manifest disregard of the law, not manifest disregard for the agreement. What the court probably meant was that the arbitrators had not exceeded their powers by rendering an award that was outside the scope of the reinsurance agreement and its arbitration clause.

New York Federal Court Adheres to Summary Judgment Ruling

Mills v. Everest Reinsurance Co., No. 05 Civ. 8928 (WWE) (S.D.N.Y. Jun. 8, 2009).

In our June 2009 Reinsurance Newsletter, we reported on this case and the court’s granting of summary judgment dismissing the remaining causes of action against the reinsurer, but denying summary judgment to the reinsurance intermediary. Both the cedent and the intermediary moved for

reconsideration. While the court granted the motion, it adhered to its original determinations. The court also denied the intermediary’s request to limit damages at trial to exclude amounts paid directly from the cedent to the reinsurer, stating that the court would determine the proper extent of damages at trial.

California Federal Court Dismisses Suit Alleging Fraudulent Undercapitalization of a Captive Reinsurer Due to Statute of Limitations

Mills v. Ramona Tire, Inc., No. 07cv52-MMA (AJB), 2009 U.S. Dist. LEXIS 43525 (S.D. Cal. May 22, 2009).

A California federal court granted summary judgment in favor of a reinsurer because cedent’s fraud claims were barred by the applicable statute of limitations. The parties entered into an agreement in which the reinsurer agreed to reinsure insurance proceeds paid out on policies for a group of independent tire dealers who pooled their purchases to obtain better prices. The reinsurance agreement obligated the reinsurer to pay 100 percent of cedent’s losses and loss expenses on cedent’s workers’ compensation and employers’ liability policies. The reinsurer made only two payments to cedent, the

last of which was in December 2000.

In July 2006, reinsurer wrote to cedent stating that it was underfunded by its shareholders and was incapable of paying claims as promised. Cedent then brought suit (against the sole shareholder of the reinsurer), alleging that it was defrauded when the defendant purposefully underfunded the captive reinsurance company so as to make it unable to comply with its contractual obligations to cedent. Defendant moved for summary judgment, asserting that cedent’s claims of fraud were barred by California’s applicable statute of limitations, which provides that claims must be brought within three years. The cedent claimed that it did not have notice of the reinsurer’s undercapitalization until the July 2006 letter. The court disagreed, stating that the cedent was on notice of the capitalization levels (the facts giving rise to the fraud claims and beginning the tolling of the statute of limitations) over six years earlier, prior to even entering into the agreement. Evidence indicated that the parties specifically negotiated the amount of capital the captive reinsurer would maintain, with cedent indicating that it was making an exception for the reinsurer by only requiring it to maintain capital of \$400,000 when it generally required \$500,000 of captive

reinsurers. Evidence further indicated that after the initial, and only, two payments in 2000, there were a series of requests and demands on the reinsurer to pay its increasing debts. Thus, the court found that the statute of limitations began to run in 2000, if not prior to the parties entering into the agreement.

New York Federal Court Denies Change of Venue to Philadelphia

TIG Ins. Co. v. Century Indemn. Co., No. 08 Civ. 7322 (JFK), 2009 U.S. Dist. LEXIS 47558 (S.D.N.Y. Jun. 4, 2009).

A New York federal court denied reinsurers' motion to transfer a dispute over facultative certificates from New York to Philadelphia. In denying the motion, the court went through the factors courts must consider in deciding whether a transfer is appropriate. Here, the court found that convenience of the parties and witnesses, an important factor, did not support transfer because of the close proximity between New York and Philadelphia. The court stated that the reinsurers were sophisticated parties that frequently litigate in New York and having assumed the obligations under these certificates made in New York, should expect to be sued in New York. Because the reinsurers could not make a clear and convincing showing that

considerations of fairness and convenience weigh heavily in favor of transfer, the motion was denied.

New York Federal Magistrate Judge Modifies Prior Order to Produce Documents Involving Privilege

AIU Ins. Co. v. TIG Ins. Co., No. 07 Civ. 7052 (SHS) (HBP), 2009 U.S. Dist. LEXIS 58070 (S.D.N.Y. Jul. 8, 2009).

In our December 2008 Reinsurance Newsletter, we reported on the August 28, 2008 decision in this case ordering disclosure of documents that the reinsurer had claimed were protected by the attorney-client or attorney work-product privileges. Shortly after that decision, the reinsurer moved for partial reconsideration concerning 25 documents. The court granted the motion and, in a document-by-document analysis, modified its order as to specific lines of each document that contain privileged information. For example, the court concluded that while handwritten notes by a claims person memorializing a meeting with outside counsel were not protected by the attorney work-product doctrine, certain lines were, in fact, privileged because they reflected counsel's analysis regarding choice-of-law issues and mental impressions and opinions on two material legal issues in dispute.

After a second review, a number of the 25 documents, and certain sentences within certain of the documents were deemed to contain privileged materials and were ordered either withheld or redacted.

California Federal Court Denies Insured's Request for Reinsurance Information

The Flintkote Co. v. Gen. Accident Assur. Co. of Canada, No. C 04-01827 MHP, 2009 U.S. Dist. LEXIS 44066 (N.D. Ca. May 26, 2009).

In a coverage dispute involving insurance for asbestos risks and including bad faith allegations, the insured requested discovery of reserves and reinsurance information that was withheld or redacted by the insurer. The court ordered discovery of the reserves information because it was relevant to the insured's claims of bad faith and may lead to admissible evidence. On the reinsurance information, however, the court denied the discovery request.

In analyzing the request for reinsurance information, the court indicated that courts generally have chosen to deny discovery of reinsurance because it was irrelevant and based solely on business considerations. The court did find that reinsurance information should be discoverable when the reinsurance agreement was directly at

issue and relevant to the litigation. Because that was not the case here, discovery was not warranted.

Recent Regulatory Developments

Legislation Introduced Disallows Deductions for Reinsurance Premiums

On July 30, 2009, Representative Richard Neal (D-MA) introduced a bill that would disallow deductions to certain non-life insurance companies for excess reinsurance premiums concerning US risks paid to affiliated insurers not subject to US income taxation (the “Neal Bill”). The Neal Bill, now numbered H.R. 3424, is very similar to a bill Rep. Neal introduced last year, which did not become law. The Neal Bill also is very similar to a discussion draft of a bill released for comment by the Senate Finance Committee in December 2008 (the “Discussion Draft”). To date, over 50 interested parties have submitted comments on the Discussion Draft, representing positions for and against it.

In summary, the Neal Bill disallows a US federal income tax deduction for certain premiums paid by a non-life insurance company to a foreign affiliate for reinsurance. Premiums that are subject to US federal income tax in the hands of the reinsurer or that are taxable

in the US as subpart F income of the reinsurer are excluded from the rule. The amount of the premium deduction that is disallowed generally is computed by determining the amount by which a company’s ceded premium exceeds an industry average for ceded premiums paid to nonaffiliated companies calculated by line of business. For more information on the Neal Bill, go to <http://www.deweyleboeuf.com/en/Ideas/ClientAlerts/2009/07/RepNealIntroducesBilltoDisallowDeductionsforCertainReinsuranceRelated-PartyPremiums.aspx>.

Recent English Case Summaries

Reinsurers Win Back-to-Back Battle

Lexington Ins. Co. v. AGF Ins. Ltd.
[2009] UKHL 40

The long-running saga of *Lexington v. Wasa* was resolved by the House of Lords on July 30, 2009, in a landmark judgment in favor of the reinsurers. It unanimously reversed last year’s controversial decision by the Court of Appeal, which was widely seen as undermining the construction and agreed terms of reinsurance contracts and had caused considerable market uncertainty.

In all material aspects, except one, the facultative reinsurance mirrored the underlying insurance, and was intended to do so. That one aspect, which was central to the appeals, was the governing law. The underlying insurance was subject to Pennsylvania law (although this was not predictable at the date the contract was entered into) and the reinsurance contract was subject to English law.

The short question was whether the English law on the reinsurance mirrored or followed the relevant US law applicable to the insurance, obliging reinsurers to pay Lexington under its settlement with the insured. The settlement followed a decision by the Supreme Court of Washington, applying Pennsylvania law, that Lexington was liable for all damage “manifesting” itself during the three-year insurance period including damage that occurred, started or began spreading prior to (or after) the policy period.

Last year, the Court of Appeal took the view that the insurance and reinsurance were back-to-back and, therefore, the policy period of the reinsurance should follow the period of the cover in the underlying contract even though that may not have been the intention of the parties or the effect of English law. This finding meant that reinsurers (along with Lexington) were liable

for decades of pollution clean-up costs falling outside of the three-year reinsurance policy period.

The House of Lords overturned the Court of Appeal, and reinstated the original Commercial Court decision, holding that there was no reason to treat the three-year policy period in the reinsurance as the same as the insurance interpreted under Pennsylvania law. Not only was it wholly uncommercial, it was also outside any party's reasonable commercial expectation for a reinsurer to be liable for all damage, including damage occurring before inception or after expiry of the policy period. Under English law there is no principled basis for concluding that the parties meant the reinsurance to respond to all claims irrespective of when the damage occurred or the period to which the losses related; this was not the bargain made by the reinsurers at the time.

The House of Lords distinguished the cases of *Vesta v. Butcher* [1989] AC 852 and *Groupama Navigation et Transports v. Catatumbo CA Seguros* [2000] 2 LR 350, which were relied on by the Court of Appeal. It did so on the basis that in 1977 when the Lexington insurance and reinsurance were concluded, there was no identifiable system of law applicable to the insurance providing a basis for interpreting the reinsurance other than using

its ordinary meaning in the London insurance market.

Vesta and *Catatumbo* were also cases of breach of warranty under the original insurances governed by Norwegian and Venezuelan law respectively. It was held in both that reinsurers were not able to apply the governing law of the reinsurance, English law, to the breaches that would have automatically discharged them from liability to the reinsured. Considering these cases, the House of Lords decided that with so fundamental an aspect of reinsurance as its governing law, this sensible principle of construction should not become an inflexible rule of law to impose on reinsurers a liability which they did not agree.

Recent Speeches and Publications

John Cleary will speak on "Reinsurance Considerations in Finance," at the HB Litigation Reinsurance Claims & Dispute Resolution Conference on September 10, 2009, in Washington, DC.

Bill Marcoux will speak 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, New York City.

Francis Mackie and Larry Schiffer will co-chair and speak at Falconbury's Reinsurance Contract Wordings and Disputes conference on October 8-9, 2009, in Hamilton, Bermuda. Francis will speak on "Contract Certainty" and Larry will speak on "Follow the Settlements/Follow-the-Fortunes Clauses." Both will participate in a mock reinsurance dispute involving contract wording issues.

Larry Schiffer will speak on "Perjury and Other Misbehavior in Arbitration" at the Annual Meeting of ARIAS US on November 12-13, 2009, in New York City.

On July 22, 2009, Dewey & LeBoeuf held its fifth annual Runoff Symposium in conjunction with the summer meeting of the Association of Insurance and Reinsurance Runoff Companies ("AIRROC"), which was held at our offices on July 23. The 2009 Runoff Symposium attracted over 100 attendees from throughout the insurance industry. Speakers included Jane Boisseau, who gave welcoming remarks, Peter Ivanick, Mark Goodman, and Lynn Roberts, who spoke on alternatives to traditional rehabilitation, Ellen Dunn, who interviewed Mark Peters, Special Deputy Superintendent in Charge of the

New York Liquidation Bureau, about the Insurance Department's experimental effort to sell off the Midland Insurance Company liquidation to a private bidder, John Mulhern, who spoke on the new proposed rules for collateral for reinsurance, and Larry Schiffer, who moderated a panel on the effect of the current economic downturn on the business of insurance and reinsurance runoff, moderated another panel on new products for structuring a runoff, and who spoke on collecting from companies in runoff, including collecting reinsurance recoveries from non-US entities pre-answer and pre-hearing security issues, and enforcing arbitration awards.

Larry Schiffer participated in the Reinsurance Association of America's Re Contracts: The Art of Designing Reinsurance Contracts and Programs conference as a facilitator for the contract drafting session of the program on July 15, 2009. Dewey & LeBoeuf was a sponsor of the program.

Larry Schiffer spoke on "Dispute Resolution: Whither Arbitration and ADR" at the American Bar Association's Tort, Trial & Insurance Practice Section's National Program: "Insurance Receivership & Runoff: The Next Level," on June 4, 2009, in New York City. Larry was on the event planning committee.

Larry Schiffer, Alexander Kayne, and Suman Chakraborty's article, "Reinsurance and Islamic Law: Arbitrating Disputes in the Retakaful World," was published in *Mealey's Litigation Report: Reinsurance*, Vol. 20, No. 8 (Aug. 21, 2009).

Larry Schiffer's commentary, "Clash Cover Reinsurance and Economic Catastrophe Losses," was re-published as the Cover Story in *India's Insurance Chronicle*, July 2009, published by the ICFAI University Press.

Larry Schiffer's Commentary, "Third-Party Guarantees of Reinsurance Obligations: I Guarantee It!" was published on IRMI.com, the website of International Risk Management Inc., in June 2009.

Awards and Recognition

Dewey & LeBoeuf Named Best Overall US Law Firm by Reactions Magazine

Thanks to our clients, the firm has been recognized again as the best overall US law firm in this year's *Reactions* magazine "Legal Survey," which was published in the magazine's May 2009 issue. The insurance publication ranks law firms according to reader feedback, which mainly consists of in-house counsel of insurers, reinsurers and

brokers. In addition, the firm was also recognized in several other categories. We are grateful to our many clients and friends in the industry who made the effort to respond to the *Reactions* survey to indicate their high regard for the firm's insurance and reinsurance practice areas. We will work hard to continue to earn the support of this industry.

**Dewey & LeBoeuf Lawyers
Ranked by Chambers &
Partners and Other Lawyer
Rankings**

Congratulations to the following lawyers ranked by *Chambers & Partners* 2009: John Nonna (Band 1, Insurance: Insurer Firms – National, Dispute Resolution – New York); Alex Dye (Band 1, Insurance: Regulation – National, Transactional & Regulatory – New York); Mark Goodman (Band 1, Insurance: Transactional & Regulatory – Illinois); David Hancock (Band 1, Insurance: Regulation – National); Larry Schiffer (Band 2, Insurance: Dispute Resolution – New York); Jane Boisseau (Band 2, Insurance: Transactional & Regulatory – New York); Michael Groll (Band 2, Insurance: Transactional & Regulatory – New York); John Schwolsky (Band 2, Insurance: Transactional & Regulatory – New York); Harvey Kurzweil (Band 3, Insurance: Dispute Resolu-

tion – New York); Tony FitzPatrick (Band 3, Insurance: Transactional & Regulatory – New York); Don Henderson (Band 3, Insurance: Transactional & Regulatory – New York); Steve Rooney (Band 3, Insurance: Transactional & Regulatory – New York); Cynthia Shoss (Band 3, Insurance: Transactional & Regulatory – New York).

Congratulations to the following lawyers ranked by *Legal 500 US* 2009: John Nonna (Litigation: Insurance: Advice to Insurers, Reinsurance); Eridania Perez (Litigation: Insurance: Advice to Insurers); Larry Schiffer (Litigation: Insurance: Reinsurance).

Reinsurance Newsletter September 2009

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, Saren R. Goldner, Victoria Melcher, Rachel Berk and Alan Maguire. For further information, please contact your responsible Dewey & LeBoeuf lawyer at:

New York

1301 Avenue of the Americas	+1 212 259 8117	Lawrence W. Pollack	lpollack@dl.com
New York, NY 10019-6092	+1 212 259 8311	John M. Nonna	jnonna@dl.com
Facsimile: +1 212 259 6333	+1 212 259 8086	Larry P. Schiffer	larry.schiffer@dl.com
	+1 212 259 8239	Eridania Perez	eperez@dl.com

Los Angeles

333 South Grand Avenue, Suite 2600	+1 213 621 6031	Dean Hansell	dhansell@dl.com
Los Angeles, CA 90071-1530			
Facsimile: +1 213 621 6100			

Washington, DC

1101 New York Avenue, N.W., Suite 1100	+1 202 346 8061	Fred W. Reinke	freinke@dl.com
Washington, DC 20005-4213	+1 202 346 8036	Elizabeth B. Sandza	ebsandza@dl.com
Facsimile: +1 202 986 8102			

London

1 Minster Court	+44 20 7459 5007	Peter J. Sharp*	pzsharp@dl.com
Mincing Lane	+44 20 7459 5031	Nicholas D. Rochez*	nrochez@dl.com
London, EC3R 7YL	+44 20 7459 5013	Francis O. Mackie*	francis.mackie@dl.com
Facsimile: +44 20 7459 5099	+44 20 7459 5006	David J. Waldron*	dwaldron@dl.com
	+44 20 7459 5008	Nicholas E. Greenwood*	ngreenwo@dl.com
	+44 20 7459 5070	Damian Cleary*	damian.cleary@dl.com

Paris

51 rue Pierre Charron	+32 1 53 93 77 00	Jean Alisse	jalisse@dl.com
75008 Paris			
Facsimile: +33 1 42 56 08 06			

* Partner in the London-based multinational partnership

Dewey & LeBoeuf LLP is one of the world's leading law firms practicing in major capital markets worldwide. Dewey & LeBoeuf's Reinsurance practice includes all aspects of reinsurance law, including mediation, arbitration and litigation of reinsurance disputes worldwide, coverage and contract analysis, and corporate reinsurance and regulatory matters.

Other Dewey & LeBoeuf newsletters, bulletins and client alerts are available on insurance, antitrust, Internet and e-commerce, EMF, employment/benefits/labor and environmental/health/safety. If you or anyone else in your organization are interested in receiving any of these publications, please let us know.

The material in this publication may be reproduced, in whole or in part, with acknowledgement of its source and copyright.

© 2009 Dewey & LeBoeuf LLP. All rights reserved.

For further information on Dewey & LeBoeuf, please visit www.dl.com.

8064 REV3 08-27-2009