VOLUME 14 NUMBER 1

ARIAS U.S. QUARTERLY

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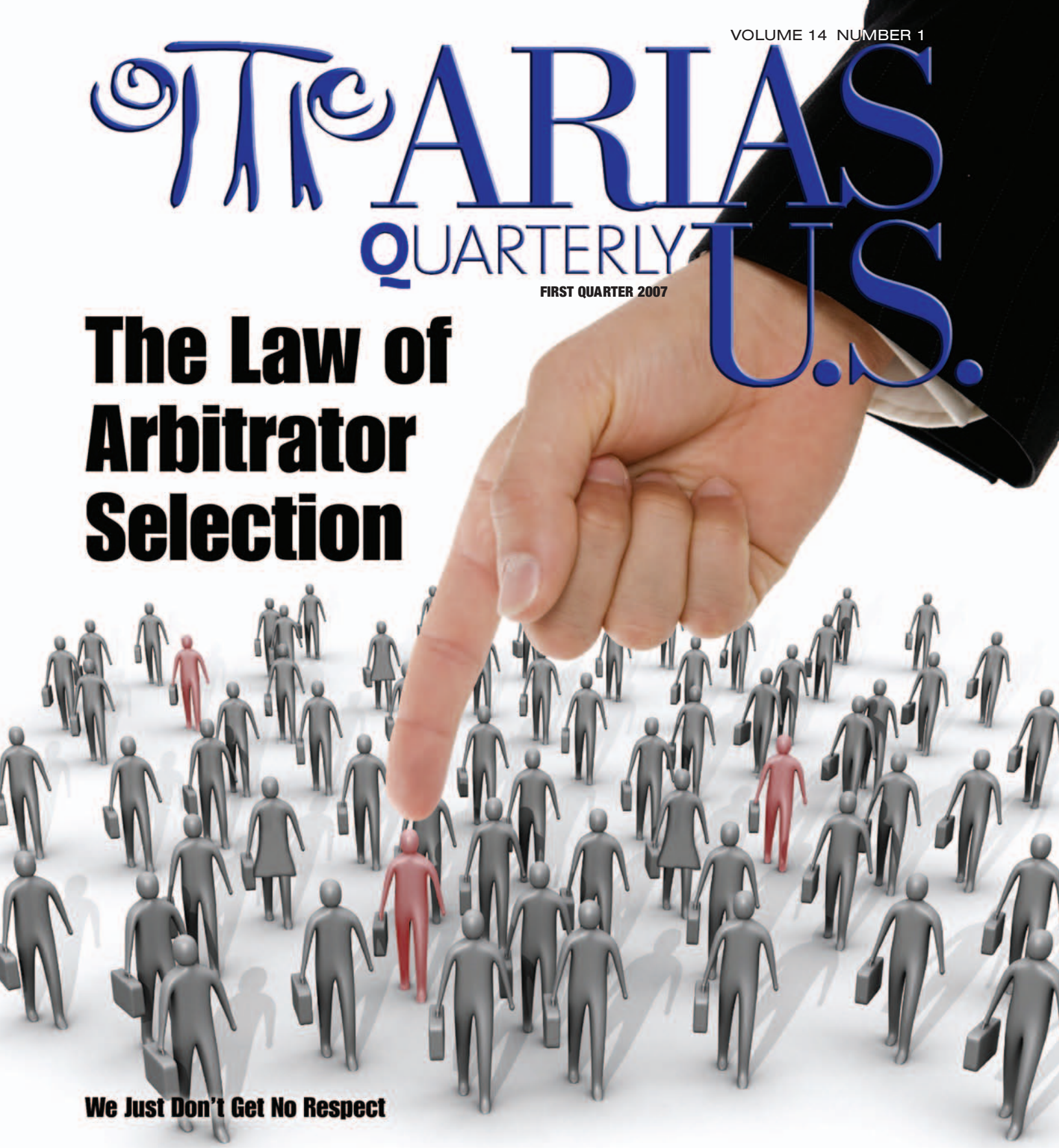
The Law of Arbitrator Selection



We Just Don't Get No Respect

Privilege, Waiver, and the Voluntary Disclosure of Privileged Documents to Reinsurers

Recently Certified Arbitrators

editor's comments

T. Richard Kennedy

Congratulations to Frank Lattal on being elected President Elect of ARIAS•U.S. Frank has been active in the association for several years, and has served admirably as a Board member and Vice President of the Society. As a Board liaison, he has been particularly helpful to editors of the Quarterly, providing us with valuable guidance and input in our publication. Congratulations also to Susan Stone on her well-deserved re-election as Vice President.

All too often, disputes between parties to an insurance or reinsurance transaction spill over into who should decide the merits of the disputants' respective positions. Each party normally believes its position is correct and understandably seeks to have a panel that will agree with that position. However, overly zealous contention in picking arbitrators can result in court proceedings which the parties presumably sought to avoid in the first instance by putting an arbitration provision in their contract.

In this issue, Paul Hummer, in *The Law of Arbitrator Selection*, reviews what courts have done when called upon to resolve procedural disputes in the process of arbitrator selection, as well court decisions dealing with challenges based on alleged bias of an arbitrator both before and after an award. One may take away from the review the impression that courts in most circumstances are reluctant to intervene in matters relating to arbitrator selection.

A non-insurance ruling by the Fifth Circuit involving challenge to an award based on alleged bias and nondisclosure is discussed by Ron Gass, in *Case Notes Corner*. The note discusses an interesting, divided Court decision reversing a lower court, and suggests that Federal Arbitration Act requirements relating to nondisclosure – as interpreted by the courts – remain unsettled.

A question that frequently arises in reinsurance arbitrations is whether a ceding company is required to produce to its reinsurer certain privileged documents. In *Privilege, Waiver, and the Voluntary Disclosure of Privileged Documents to Reinsurers*, Teresa Snider reviews the attorney-client and work-product privileges and then analyzes under what circumstances those privileges may be unavailable to an insurer in a dispute with its reinsurer or a policyholder.

Members of the Law Committee continue to produce excellent summaries of recent court decisions of interest to those of us involved in insurance and reinsurance arbitrations. Included in this issue are three of those reports. Members are encouraged to visit the ARIAS•U.S. website to see all the existing reports as well as those being added.

As indicated elsewhere in this issue, I have relocated my winter office/residence from Manhattan to Naples, Florida. However, my timing has not been that good, because by the time of the ARIAS•U.S. Spring Meeting, I will be back in my Fishers Island, New York office/residence. Anyway, I look forward to seeing each of you in Boca Raton.

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Editorial Policy

ARIAS•U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution.

All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to trk@trichardkennedy.com .

Manuscripts are submitted at the sender's risk, and no responsibility is assumed for the return of the material. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles.

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feature

The Law of Arbitrator Selection

Paul M. Hummer

Paul M. Hummer
Saul Ewing LLP

An old axiom, which many practitioners believe, is that arbitrations are won or lost in the panel selection process. Notwithstanding its importance to the outcome, the law of arbitrator selection is fairly simple. As reflected in the decisions discussed below, the law of arbitrator selection can be summed up in two simple rules: (1) procedural requirements for arbitrator selections will be strictly enforced; and (2) challenges to an arbitrator's impartiality are rarely successful.

...the majority of courts to have considered the issue have upheld the right of the opposing party to appoint a second arbitrator if the event of a failure to appoint an arbitrator within the time specified in the arbitration provision.

Paul Hummer is the Vice-Chair of the Litigation Department of Saul Ewing LLP, Co-Chair of the firm's Insurance Group and a member of the firm's Executive Committee. He concentrates his practice in complex civil litigation, with an emphasis on litigation involving insurers and reinsurers.

Procedural Requirements for Selecting the Arbitrator

Time Limits

Although there are a few cases where courts have excused a party's failure to make a timely appointment of an arbitrator, the majority of courts to have considered the issue have upheld the right of the opposing party to appoint a second arbitrator if the event of a failure to appoint an arbitrator within the time specified in the arbitration provision. *See, e.g., Universal Reins. Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1993) (clerical error resulting in failure to name arbitrator within 30 days constituted waiver of right to arbitrator); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, No. 04 C 5852, 2006 U.S. Dist. Lexis 58964 (N.D. Ill. 2006); *Continental Cas. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, No. 03C1441, 2004 WL 725469 (N.D. Ill. Mar. 30, 2004); *Cravens, Dargan & Co. v. General Ins. Co. of Trieste & Venice*, No. 95 CIV 1850 (JFK) 1996 WL 41825 (S.D.N.Y.Feb. 2, 1996) (in light of party's six month delay, "the Court will enforce the arbitration clause as written"); *Argonaut Ins. Co. v. Reins. Corp.*, No. 93 C 6932, 1994 WL 178293 (N.D. Ill. May 9, 1994) (failure to timely appoint an arbitrator results in waiver of right to select arbitrator); *Everest Reins. Co. v. ROM Reins. Mgmt. Co.*, 756 N.Y.S.2d 739 (N.Y. App. Div. 2003) (finding that the Federal Arbitration Act requires "rigorous adherence to the agreement's plain terms," the court found that failure to appoint an arbitrator within the time provided in the arbitration provision entitled the other party to appoint the second arbitrator); Employers Ins. of Wausau v. Jackson, 527 N.W.2d 681 (Wis. 1995) (failure to timely appoint arbitrator resulted in court confirming second arbitrator selected by party demanding arbitration); Northwestern Nat'l Ins. Co. v. Kansa General Ins. Co., No. 92 CIV 7433 (LJF), 1992 WL 367085 (S.D.N.Y. Nov. 25, 1992) (failure to timely designate nationality of umpire). *But see Compania Portorafti Commerciale v. Kaiser Int'l Corp.*, 616 F. Supp. 236, 238 (S.D.N.Y. 1985) (excusing party's three calendar day and one business day delay in naming an arbitrator in view of the policy that "arbitration agreements are aimed at amicable determination of disputes with results which both parties would be willing to accept"); *Lobo & Co. v. Plymouth Navigation Co.*, 187 F. Supp. 859, 860 (S.D.N.Y. 1960) (excusing party's one day delay in naming an arbitrator).

Method of Selection

Courts have also enforced contractual provisions which govern the means of selecting an arbitrator. *See, e.g., Continental Cas. Co. v. Certain Underwriters at Lloyd's*, No. C-92-4904-DLJ, 1993 WL 299232 (N.D. Cal. July 21, 1993) (declining to interfere with contractual provision which provided that the Chairman of Lloyd's would select the arbitration umpire).

Mid-Term Withdrawals

Many arbitration clauses do not address what happens if an arbitrator withdraws for some reason before an award is rendered by the panel. In general, courts have not been

willing to find a forfeiture where a party timely complies with a demand to appoint an arbitrator and the arbitrator subsequently withdraws or becomes unable to serve. *See, e.g., Argonaut Midwest Ins. Co. v. Gen. Reins. Corp.*, No. 96 C 6437, 1998 WL 474142 (N.D. Ill. Aug. 6, 1998) (arbitrator retired after appointment); *Evanston Ins. Co. v. Kansa Gen. Int'l Ins. Co.*, No. 94C4957, 1995 WL 23063 (N.D. Ill. Jan. 13, 1995) (arbitrator withdrew). In *National American Insurance Co. v. Transamerica Occidental Life Insurance Co.*, 328 F.3d 462 (8th Cir. 2003), one member of a three arbitrator panel resigned one year into the arbitration and prior to any final award. The arbitration agreement was silent as to what should occur in those circumstances. When the parties could not agree, a federal court appointed a replacement arbitrator. On appeal, the Court of Appeals affirmed the authority of the court to appoint an arbitrator under the Federal Arbitration Act.

Challenges to Arbitrators

Notwithstanding the central importance that the composition of a panel makes to the outcome of an arbitration proceeding, a party's opportunity to challenge the make-up of a panel is extremely limited.

Challenges Prior to a Final Award

Courts are divided on the propriety of judicial review of an arbitrator's qualifications or apparent biases prior to the arbitration hearing. Many courts have refused to hear pre-hearing challenges, leaving the litigant with little choice but to proceed to arbitration and raise a challenge to any subsequent award. The Fifth Circuit in *Gulf Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co.*, 304 F.3d 476 (5th Cir. 2002), reversed a lower court ruling removing an arbitrator. The district court ordered the removal of the third arbitrator based on the arbitrator's failure to meet the qualifications set forth in the arbitration clause of the reinsurance agreement. In reversing, the Fifth Circuit held that the courts do not have the authority to remove an arbitrator from service prior to the issuance of an award, unless the challenge to the arbitrator calls into question the validity of the agreement to arbitrate under general contract principles.

Certain Underwriters at Lloyd's London v. Argonaut Insurance Co., 264 F. Supp. 2d 926 (N.D. Cal. 2003), involved a motion to disqualify the neutral umpire and vacate certain interim orders of a panel prior to a final award. The orders at issue directed a reinsurer to make interim payments and imposed sanctions of $10,000 for every day the reinsurer was not in compliance with the interim order. The court first addressed the question of what law was controlling, concluding that the federal arbitration act, rather than the California arbitration act, governed the motion to disqualify and vacate. Turning to the motion to disqualify the umpire, the court found that it lacked the authority under the Federal Arbitration Act to disqualify an umpire prior while arbitration proceedings were pending and prior to a final award. With respect to the motion to vacate certain interim orders, the court found that "there is no question that an arbitration panel has the authority to require escrow to serve as security for an ultimate award" and that such authority may be derived explicitly from the arbitration agreement or implicitly from "a panel's power to ensure that the parties receive the benefit of their bargain." The court similarly rejected claims to vacate based on evident partiality, finding no evidence that the umpire was predisposed to favor either party or acted out of improper motives and concluding that the mere fact that the umpire consistently ruled against the reinsurer was not a basis for finding evident partiality.

Other decisions are in accord. *See, e.g., Old Republic Ins. Co. v. Meadows Indem. Co.*, 870 F. Supp. 210 (N.D. Ill. 1994); *Metro. Prop. & Cas. Ins. Ltd. v. American Centennial Ins. Co.*, No. 3:94-1014 (N.D. Tex. Oct. 31, 1994); *Insurance Co. of N. Amer. v. Pennant Ins. Co.*, No. 97-MC-154, 1998 WL 103305 (E.D. Pa. Feb. 18, 1998).

Some courts, however, have entertained pre-hearing challenges to allegedly interested arbitrators or to arbitrators who do not satisfy other contractual requirements. *See, e.g., Evanston Ins. Co. v. Kansa General Int'l Ins. Co.*, No. 94-C-4957 (N.D. Ill. Oct. 17, 1994), *reprinted in Mealey's Litigation Reports - Reinsurance*, Vol. 5, No. 14 (Nov. 23, 1994); *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991); *Hartford Steamboiler Inspection & Ins. Co. v. Industrial Risk Insurers*, No. CV94-705105, 1995 WL 645971 (Conn. Super. Ct. Oct. 26, 1995). At least one court, while not disqualifying any arbitrator, did imply into the arbitration agreement an obligation on the part of the arbitrators to complete "disclosure" statements to enable the parties to confirm that the arbitrators were in fact disinterested. *Fireman's Fund Ins. Co. v. Sorema N. Am. Reins. Co.*, No. C 94-3617 SC, 1995 WL 597266 (N.D. Cal. Jan. 11, 1995). Another court noted, without citation to any authorities, that "although the FAA does not explicitly provide for removal of arbitrators, federal or state courts acting in equity can remove biased or corrupt arbitrators prior to the commencement of the arbitration. *Hartford Steamboiler Inspection & Ins. Co.*, 1995 WL 645971.

Post-Award Challenges

Parties challenging an award based on the qualifications or impartiality of an arbitrator face a high hurdle. In *In re Arbitration Between Certain Underwriters at Lloyd's London & Continental Casualty Co.*, No. 97 C 3638, 1997 WL 461035 (N.D. Ill. Aug. 11, 1997), for example, the issue was whether a district court should disqualify certain party-appointed arbitrators on the grounds that they were not impartial. The arbitrators in question worked for an insurance company which had an attorney-client relationship with the law firm representing the cedent and which was itself currently in negotiations with certain of the reinsurers on issues similar to those involved in the arbitration. The court held first that although it lacked jurisdiction under section 10 of the Federal Arbitration Act (FAA) to entertain a pre-award challenge to an arbitrator, it had jurisdiction to

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The court rejected the challenges, however, because it found that the arbitration provision, which provided that each party would choose one arbitrator and the two arbitrators would then choose an umpire, "appear to suggest advocacy arbitration and implicitly concede that some bias may exist."

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review a pre-award challenge to an arbitrator's impartiality as part of its jurisdiction to enforce arbitration agreements under section 4 of the FAA. The court rejected the challenges, however, because it found that the arbitration provision, which provided that each party would choose one arbitrator and the two arbitrators would then choose an umpire, "appear to suggest advocacy arbitration and implicitly concede that some bias may exist." The court concluded that while there was perhaps evidence of "potential bias," there was no evidence of the sort of "actual misconduct" which should result in pre-award disqualification.

Sphere Drake Insurance Ltd. v. All American Life Insurance Co., 307 F.3d 617 (7th Cir. 2002), *cert. denied*, 538 U.S. 961 (2003), involved an appeal from a district court decision vacating an arbitration award on the basis of the evident partiality of an arbitrator who had failed to reveal that he had previously represented as outside counsel the party that appointed him. The court of appeals reversed. Noting that the district court decision was "the first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to the neutral, displayed 'evident partiality', the court held that where the arbitration agreement entitled parties to select interested arbitrators, the "evident partiality" provision of section 10(a)(2) of the FAA "has no role to play."

Other decisions are in accord. *See, e.g., Nationwide Mutual Insurance Co. v. Home Insurance Co.*, 278 F.3d 621 (6th Cir. 2002) (disclosure that one of the panel members was engaged in a "runoff relationship" with the party challenging the award was sufficient to put the party on notice that there might be disputes that arose in the course of that relationship); *Nationwide Mutual Insurance Co. v. First State Insurance Co.*, 213 F. Supp. 2d 10 (D. Mass. 2002) (the cedent alleged that the arbitrator had reached a conclusion in the past identical to that urged by the reinsurer, had had impermissible ex parte communications with the reinsurer, and had improperly influenced the resolution of a discovery dispute; the Court rejected these challenges, noting that the Federal Arbitration Act allows a district court to vacate an arbitration award where there was "evident partiality or corruption in the arbitration," but that this burden was even greater because the arbitrator was the reinsurer's party-appointed arbitrator on a three-person panel).

Courts have also demonstrated a reluctance to overturn awards based upon challenges to umpires. The Southern District of New York rejected a challenge to an arbitration award based upon a claim that the umpire lacked the qualifications required in the arbitration agreement, noting that "in light of the compelling policy reasons favoring arbitrations, the Court will not overturn [an award] based upon a technical procedural irregularity." *In re Arbitration Between Northwestern Nat'l Ins. Co. & General Mexico Compania de Seguros*, No. 00 Civ. 1135 (NRB), 2000 WL 520638 (S.D.N.Y. May 1, 2000). In *In re Arbitration Between Northwestern National Insurance Co. & Generali Mexico Compania de Seguros*, No. 00 Civ. 1135 (NRB), 2000 WL 520638 (S.D.N.Y. May 1, 2000), the court rejected a challenge that the umpire did not meet the qualification requirements for arbitrators in the reinsurance agreement. The court held that the reinsurer failed to sustain its burden of proof on the issue of whether or not the umpire had the requisite qualifications and, in any event, " 'in light of the compelling policy reasons favoring arbitration, the Court will not overturn [an award] based upon a technical procedural irregularity.'" Courts have, however, demonstrated greater sensitivity to bias or partiality issues concerning umpires. *See, e.g., In re The Travelers Indem. Co.*, No. Civ. 3:04 NC 196 (TPS), 2004 WL 2297860 (D. Conn. Oct. 8, 2004). ▼

news and notices

Spring Conference Deadlines Are April 13

If you are reading this item in early April, you may still have time to reserve a room and register for the conference early. But after April 13, you probably will not be able to reserve a room at the Boca Raton Resort and you will pay $50 more to register. If Resort rooms are available, they will be at market rates.

The Spring Conference is scheduled for May 9-11 at the Boca Raton Resort & Club in Boca Raton, Florida.

Guest rooms can be reserved by visiting the "Welcome ARIAS" page of the Resort's reservation system (accessed through the ARIAS website Calendar) or by calling 1-888-491-2622. Registration for the conference, itself, is through the home page of the ARIAS website, where the announcement brochure is available with complete details. The final registration deadline is April 27.

Lattal Named President Elect of ARIAS

At the November Board meeting, Frank A. Lattal, Chief Claims Officer, ACE Ltd. was elected President Elect of ARIAS-U.S. He had previously been a Vice President of the Society. Mr. Lattal is the senior executive responsible for all aspects of claims management and administration for the ACE Group of Companies, worldwide.

At the same meeting, Susan A. Stone, of Sidley Austin LLP, was re-elected Vice President of ARIAS.

Elaine Caprio Brady Promoted at Liberty Mutual

Liberty Mutual Insurance Company recently announced that Elaine Caprio Brady, a member of the ARIAS Board of Directors, has been named Vice President and Manager of Ceded Reinsurance Operations for the firm. In this role, Ms. Caprio Brady will be responsible for managing reinsurance placement and credit risk, and establishing policies and procedures for reinsurance placement and contract administration, including reinsurer and broker relationships. The new position was effective February 5.

Intensive Workshop Returns to Tarrytown

On March 5-6, Tarrytown House Estate and Conference Center returned as the venue for the ARIAS Intensive Arbitrator Training Workshop.

This location had been the site of both the March and September workshops in 2004, as well as the March workshop in 2005. After locating in New Jersey, Chicago and Long Island for the last three events, Tarrytown was chosen again in light of its recent renovation and reasonable accessibility.

Three hearing rooms operated simultaneously. The law firms **Sidley Austin** (Chicago), **Edwards Angell Palmer and Dodge** (New York), and **Mound Cotton Wollen & Greengrass** (New York) assigned top-level teams to present arguments in the dispute. They were well prepared and very effective in representing the two sides of the fictional arbitration scenario.

The 27 student arbitrators accepted their roles enthusiastically, as they dealt with the complex intricacies resulting from the Philadelphia subway attack.

John Diaconis, **Andrew Maneval**, and **Andy Walsh** provided the voices of arbitration experience for the training in the general sessions.

The next workshop, in September, will take place in California, somewhere in the Los Angeles area. As usual, the website calendar will have the details first.

Board Certifies Ten New Arbitrators; Alexander, Daly, Tickner, and Trutt Added to Umpire List

At its meeting in New York on January 17, the Board of Directors added **Hugh Alexander**, **Thomas M. Daly**, **John J. Tickner**, and **William J. Trutt** to the ARIAS Umpire List, bringing the total to 84.

At the same meeting, the Board approved certification of ten new arbitrators, bringing that total to 318. The following members were certified; their respective sponsors are indicated in parentheses.

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Michael V. Balzer (Edwin Millette, William Kinney, John Cuff)

Brian Z. Brown (David Appel, Robert Bear, David Spiegler)

Joelle de Lacroix (Daniel Schmidt, Dale Diamond, Christian Bouckaert)

Hugh W. Greene, Jr. (Diane Nergaard, Evan Smoak, Richard Shusterman)

Mark T. Megaw (Jack Scott, Howard Denbin, Linda Barber)

Raymond M. Neff (John Tickner, Donald DeCarlo, William Hager)

Joseph W. Rachinsky (John Jacobus, Denis Loring, Eugene Wilkinson)

Molly P. Sanders (John Dore, Lawrence Magnant, Paul Feldsher)

Richard L. Watson (John Cole, James Powers, Patrick Murphy)

Allan M. Zarcone (Joseph Carney, John Dattner, Robert Bear)

Biographies of many of these new arbitrators can be found in the "Recently Certified Arbitrators", which begins on page 14.

Charles L. Niles, Jr.

Charlie Niles, a long-time member and former Director of ARIAS, died on Friday, December 15.

A detailed summary of his full and productive life, provided by his daughter, is on the ARIAS website under *News Articles*.

George Gottheimer

George Gottheimer, an eight-year member of ARIAS and a long-time, highly esteemed arbitrator, died on Friday, March 2 after a battle with cancer. George was President and CEO of Kernan Associates of Berkeley Heights, New Jersey. A memorial service was held on March 5 at Paul Ippolito Memorial in Berkeley Heights.

ARIAS Antitrust Policy Announced

At its meeting in November, The Board of Directors approved the ARIAS•U.S. Policy and Guidelines Concerning Antitrust Compliance. The document reconfirms the Society's requirement for full compliance with antitrust laws in all meetings and discussions involving ARIAS members. The statement cautions members to safeguard against even the appearance of an antitrust violation. Specific guidelines are included to assist in understanding what could constitute such activity or its appearance.

The ARIAS Antitrust Policy is permanently posted on the website in the *About ARIAS* section.

2008 Fall Conference Set for November 6-7

In **2008**, ARIAS will once again gather at the New York Hilton for the Fall Conference and Annual Meeting. The Conference will follow the usual pattern, with meetings all-day Thursday and all-morning Friday. The general sessions will again be located in the Grand Ballroom.

Detailed information will be sent to members in early September of 2008 and will be available on the website, along with online registration.

Room reservations will open through the website in early August, 2008.

28 Certified Arbitrators Dropped

To their astonishment, 28 ARIAS Certified Arbitrators could not find their names on the list in the ARIAS Quarterly that reached homes and offices in late December. Somehow, in the transfer of names from the website to the list that was being published in the Quarterly, everyone after Mancino and before Nichols was dropped, including Director Emeritus Bob Mangino.

Some of the dropped arbitrators felt it was a somewhat insensitive way to notify them of their de-certification. However, Executive Director Bill Yankus assured the 28 that they are still on the list and asked them to check the website, which is always the most accurate place to find any information about ARIAS. He also apologized for the error and asks anyone considering appointment of an arbitrator to be sure to use the website search system as the starting point.

2007 Dues Payments Accepted until June 30

Several rounds of invoices for 2007 dues have been emailed to individual members. Corporate key contacts were asked to confirm rosters and have been sent invoices.

Some members still have not paid. Any member who has not paid by June 30, 2007, will have his or her membership terminated.

Dues payments are most easily accomplished through the website's secure payment system, using a credit card. Access to the system is through the dues button on the home page.

Membership Directory Due in April

The new ARIAS Membership Directory is scheduled to be printed in March and shipped to all members in April. The layout will be similar to the membership listings that were formerly at the back of the ARIAS Directory, which has now been discontinued. In appearance, it will be similar to the ARIAS Practical Guide. The size will be smaller for greater convenience in handling and storing.

Sponsors Asked to Check Guidelines (Repeat)

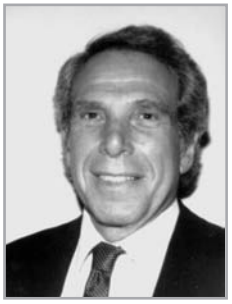
Executive Director Bill Yankus requests that anyone who is asked to nominate or second someone for certification first review the guidelines for sponsorship. Some very specific comments are required in the sponsor letters. When those comments are missing, the letter is not accepted and certification can be delayed.

Full details are available in the Certification Procedure area of the website.

feature

We Just Don't Get No Respect
(with apologies to Mr. Dangerfield)

Eugene Wollan
Mound Cotton Wollan and Greengrass



Eugene Wollan

These latest musings were prompted initially by recent encounters with a doctor (annual check-up) and dentist (root canal, I regret to report).

Those professions, especially the MDs, occupy a particularly elevated status in our society, and I certainly don't begrudge them that (well, maybe just a little). They generally receive a certain deference, sometimes even reverence, that is accorded no other profession. Yes, yes, I know: they are dealing routinely with people's lives and health, not just their money, and that certainly merits a special position in our cultural hierarchy. But it seems to me that other factors as well contribute to this unique status:

- The abiding stereotype, long since obsolete but still embedded in our cultural unconscious, of the kindly, Norman Rockwell-style country doctor making house calls until the wee hours in his horse-drawn buggy.
- The phenomenon of the distinctive MD license plate, which I believe originated as a device to permit physicians making house calls to ignore parking regulations so that they need not waste time hunting for a parking space and could instead hurry to their destination where a medical emergency awaited them. (How about a new law requiring all doctors sporting MD plates to continue making house calls?)
- Utilization of an entirely distinct school of penmanship/shorthand that absolutely no one in the world except another doctor or a pharmacist could possibly decipher;
- The irritating habit so many practitioners adopt of immediately calling even a brand new patient by his or her first name, like a third-grade teacher addressing a new pupil. This is particularly grating to someone like me, who is generally old enough to be the offender's father. My usual response is to call the doctor by his/her first name too.

Nor is this kind of deference limited to the medical professions. Engineers for example, are generally held in awe by the lay populace. I suspect this is because they too function in a technical environment that is simply unfathomable to folks who don't know a slide rule from a compass. The same is, of course, equally true of people like nuclear physicists, genetic biologists, astronomers, cosmologists, and the like. They simply live in a world that no one outside that world can really understand.

And that may be the key to why so many other professions are accorded a degree of respect so conspicuously absent for lawyers: people generally admire those who know something they don't. The world realizes that it takes very special training and aptitudes to achieve success in medicine, dentistry, engineering, or other scientific disciplines. But the world doesn't fully realize that it also takes a certain amount of special training and aptitude to be a good lawyer. Why? I think the answer is simple: lawyers operate essentially with words only, not with instruments or laboratory equipment or giant telescopes or whatever. And just about every literate individual seems to feel that he or she is equally, or almost equally, capable of dealing with words as any lawyer (except perhaps for the patent or tax specialist).

It is not my intention to denigrate any other profession. My purpose is not to resent the respect they get, but to question why my

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And just about every literate individual seems to feel that he or she is equally, or almost equally, capable of dealing with words as any lawyer (except perhaps for the patent or tax specialist).

Eugene Wollan is a former senior partner, now counsel of Mound Cotton Wollan & Greengrass. He is resident in the New York Office.

The old saw about the effects of a few bad apples applies here in spades. By and large, we are an honorable and honest profession, and it's just not fair to identify all of us as the Darth Vaders of the courtroom.

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own profession doesn't seem to rise to the same level of respectability in the mind of John Q. Public. The others just don't attract the same kind of contemptuous, derisive humor that is embodied in the plethora of lawyer jokes that are constantly in circulation.

[Incidentally, that's not equally true everywhere. In many European countries the profession is much more respected than in the U.S. In Germany, every lawyer is a "Herr Doktor." In the UK, the lawyers, and especially barristers, really are highly regarded. Even in this country, it varies from place to place; in many parts of the Deep South, a telephone will be answered (often in that dulcet Scarlett O'Hara voice) "Attorney X's office" instead of "Mr. X's office," suggesting at least a modicum of distinction.]

A very large part of the problem the legal profession has in gaining respect stems, it seems to me, from the public's tendency to identify all lawyers with the prominent (notorious?) minority that gives us all a bad name, and our own inability to educate that public to the importance of distinguishing that minority from the rest of us. The pejorative (and now politically sensitive) term "trial lawyer" is too often and too widely taken as synonymous with the entire legal profession, even though it really refers, only in even a broad sense, to the plaintiffs' negligence bar, and in a narrower sense to the plaintiffs' medical malpractice bar. (Is that why doctors hate us?)

We could perhaps, as a profession, do a lot more to acquaint the general populace with certain basic facts of life:

- Not all lawyers are litigators.
- Not all litigators act for plaintiffs in negligence cases.
- Not all litigators chase ambulances.
- Not all litigators descend like vultures on the victims of a natural disaster.
- Not all litigators advertise in subway cars.
- Not all litigators appear on local TV stations, combining a carefully coiffed look with a mellifluous but businesslike voice promising a "free consultation" and "no fee unless you get a recovery."
- Not all lawyers make a living bending the truth, burying their scruples, and ignoring fundamental considerations of ethics and morality.

From my personal vantage point, I would add these items to those crying out for more general awareness:

- Not all lawyers representing insurance companies in coverage disputes have devoted their lives to efforts to depriving deserving insureds of recoveries to which they are legitimately entitled.
- Not all insurance coverage counsel spend hours poring over the "fine print" with a magnifying glass, looking for reasons to justify turning down a claim, instead of simply evaluating the claim in light of the specific facts and the relevant provisions of the applicable policy.
- Not all insurance regulatory counsel are more interested in evading the statutes and regulations than in complying with them.

The fact is that most lawyers who represent insurers in coverage litigation realize very well that they start out in court at a serious disadvantage — psychologically if not tactically — and their professional behavior reflects that reality. They do not recommend declining a claim in the absence of a solid, legitimate basis for doing so, because they know they will probably later be called on to validate that judgment before a judge and jury. Unfortunately, however, too many people are either unaware of this fact or choose to ignore it; they prefer to embrace the image of the legal barracuda, rubbing his hands together like Uriah Heep and cackling like Madame Defarge with glee as he zeroes in on an awkwardly placed comma as a basis for turning down a perfectly legitimate claim.

If I sound defensive on this subject, it is doubtless a reaction to being cast too often in the stereotype of one who is —

— a lawyer, and

— not only a lawyer but a litigator, and

— not only a litigator but a litigator for insurance companies.

So let me here enter my plea of Not Guilty. The old saw about the effects of a few bad apples applies here in spades. By and large, we are an honorable and honest profession, and it's just not fair to identify all of us as the Darth Vaders of the courtroom.

The defense rests. ▼

members on the move

In each issue of the Quarterly, we list member announcements, employment changes, re-locations, and address changes, both postal and email, that have come in over the quarter, so that members can adjust their address books and PDAs.

Because the first annual Membership Directory is being distributed to members in April, that will become the starting point for future changes in contact information. The many changes solicited for that publication will not be repeated here. However, some recent changes are noted below.

Do not forget to notify us when your address changes. If we missed your change in the new directory, please let us know at info@arias-us.org, so that it can be included in the next Quarterly.

Recent Moves and Announcements

John McKenna is now located at Finance & Risk Services, Ltd.,4 Kirkdale Drive, Warwick, WK 06, Bermuda, phone 441-236-0167, email jcm@frsl.bm .

In January, Butler Rubin Saltarelli & Boyd LLP named two members, **Jason S. Dubner** and **Amy B.Kelley**, to the partnership. Both Dubner and Kelley joined Butler Rubin in 1999.

David Grefe is now connected through phone 828-337-6300, fax 866-495-1547, cell 828-337-9664 and email dgrefe@charter.net .

Theodore Verspyck's mailing address has changed to 37 Turtleback Road, Wilton, CT 06897-1224.

James McCarthy has notified us that the name of his firm has been changed, dropping the Bryant name. The full name is now **Diamond McCarthy Taylor Finley & Lee, LLP**.

Similarly, **John Cole** informed us that the departure of Fred Fielding to become "Counsel to the President" has resulted in a shortening of the name of the firm to **Wiley Rein LLP**.

Dick Kennedy has relocated his office/residence for the winter months from 16 Sutton Place, New York, NY to 811 Ashburton Drive, Naples, Florida 34110. From May 1 through September 30, his office/residence will remain at East End Avenue, PO Box 737, Fishers Island, NY 06390. Dick's email address remains unchanged.

New Email Address

John Drew's new email address is johnhdrew@verizon.net .

feature

Privilege, Waiver, and the Voluntary Disclosure of Privileged Documents to Reinsurers

Teresa Snider

Teresa Snider
Butler Rubin Saltarelli & Boyd LLP

Ceding companies have grown more sensitive to the possibility that they might waive the protection afforded to privileged coverage and defense documents by disclosing those documents to their reinsurers. If the documents lose their protection as privileged communications, they are vulnerable to discovery by policyholders and others. Because such documents may reveal case weaknesses or strategy decisions that could be exploited by policyholders or claimants to the disadvantage of the ceding company (and its reinsurers), cedents are increasingly cautious in disseminating privileged documents to reinsurers.

There are two general categories of "privilege": the attorney client privilege and the work product doctrine. The parameters of the privileges may vary from jurisdiction to jurisdiction, but the general outlines of the privileges are relatively constant.

The Attorney-Client Privilege and Work Product Doctrine

There are two general categories of "privilege": the attorney client privilege and the work product doctrine. The parameters of the privileges may vary from jurisdiction to jurisdiction, but the general outlines of the privileges are relatively constant. A document is subject to the attorney client privilege if it is (1) a communication; (2) made between an attorney and a client; (3) in confidence; and (4) for purposes of seeking, obtaining, or providing legal advice. A document is protected pursuant to the work product doctrine if it is prepared (1) by or for a party or that party's representative (usually an attorney); (2) in anticipation of litigation or for trial. The requirement that a document be prepared "in anticipation of litigation" has both a temporal element (was there a likelihood of litigation at the time the document was prepared?) and a motivational element (was the document created because of the prospect of an adversarial proceeding?).

The work product protection is not absolute. The extent of the work production protection has been codified in Federal Rule of Civil Procedure 26(b)(3) (and in the Federal Rules of Criminal Procedure), which govern all cases tried in the federal courts. This is different than the attorney-client privilege, where federal courts will look to the forum state's law of privilege. Federal Rule of Civil Procedure 26(b)(3) provides that:

> a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Rule 26(b) thus draws a distinction between "opinion" work product and "ordinary" work product. While ordinary work product is subject to discovery on a showing of need or hardship, opinion work product is more protected.

Waiver of Privileges

Even when a document meets the requirements necessary to establish the existence of the attorney-client privilege, the

Teresa Snider is a partner at Butler Rubin Saltarelli & Boyd LLP. The views expressed in this paper do not necessarily reflect the views of Butler Rubin Saltarelli & Boyd LLP, any of its attorneys, or those of its clients.

privilege will not be recognized if it has been waived. The client holds the privilege and it is the client's purview to decide whether to waive the privilege, although counsel acting on a client's behalf, a successor-in-interest, and a trustee in bankruptcy stand in the shoes of the client and thus can also waive the privilege. Most often the waiver will occur because of a disclosure - inadvertent[2] or deliberate - that vitiates the confidential nature of the communication. The purposeful disclosure of privileged documents to a third party is generally viewed as waiving the privilege as to all others - unless the disclosure is between privileged parties (e.g., between parties with a common interest or within the control group of a corporation).

While the attorney-client privilege is often treated as waived by any voluntary disclosure, only disclosures that are "inconsistent with the adversary system" are deemed to waive work product protection. This is because strategic disclosure of work product is consistent with the work product doctrine. Thus, voluntary disclosure to an adversary is almost invariably seen as total waiver. *See In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-35 (9th Cir. 1993) (voluntary disclosure of protected work product to SEC, with whom trader was in an adversary relationship, waived protection in subsequent litigation with private parties). A waiver can occur without actual disclosure to an adversary if a substantial risk of disclosure to an adversary has been created. A confidentiality agreement concerning disclosed work product may be sufficient to show an intent to protect the work product from actual or potential litigation adversaries. *Blanchard v. Edgemark Fin. Corp.*, 192 F.R.D. 233, 236 (N.D. Ill. 2000). When confidentiality is protected, disclosure of documents for legitimate business reasons is unlikely to waive the work product doctrine. Where parties have a common adversary in litigation and are conducting a joint defense, they may share work product without thereby waiving the protection of the doctrine. *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 583 (E.D. Pa. 1989) (no waiver when work product shared with one having interests in common under understanding of confidentiality and of pursuing a joint defense).

The Common Interest Doctrine - Generally

The common interest doctrine enables a party to share privileged documents with another party with whom it shares a "common interest" in litigation against a common adversary while still maintaining the ability to assert the privilege against third parties. *See Miron v. BDO Seidman, LLP*, No. Civ.A 04-968, 2004 WL 3741931, at *2 (E.D. Pa. October 21, 2004). However, courts are reluctant to expand the common interest doctrine to include cases where the parties merely share a common business interest rather than a common legal interest. For example, in *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyd's London*, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Cty. 1998), the court did not accept that communications among reinsurers were privileged where the reinsurers were engaged in strategic discussions of business issues, and the attorneys present at the meetings merely acted as scriveners rather than providing legal advice:

> any "common interest" privilege must be limited to communications between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest. . . [i]t may not be used to protect communications that are business oriented or are of a personal nature. . . This court does not find that the limited New York authority on the subject permits the carving out of a large class of communications between potential parties so as to immunize their communications between themselves and counsel for other parties.

Id. at 732-33. Thus, a "common interest," standing alone, is insufficient to establish the existence of a legal privilege.

Access to Records Clauses

The typical access to records clause, on its face, seemingly entitles the reinsurer to broad access to the cedent's records, including privileged documents.

Some cedents are sufficiently concerned about the potential for third parties to gain access to privileged documentation as a result of disclosure to reinsurers that they add language to the Access to Records clause explicitly removing access...

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> Sample A: The Reinsurer or its designated representatives shall have free access at any reasonable time to all records of the Company which pertain in any way to this reinsurance.[3]
>
> Sample B: The Reinsurer or its designated representatives shall have access to the books and records of the company on matters relating to this reinsurance at all reasonable times for the purpose of obtaining information concerning this Contract or the subject matter hereof.

Some cedents are sufficiently concerned about the potential for third parties to gain access to privileged documentation as a result of disclosure to reinsurers that they add language to the Access to Records clause explicitly removing access to both attorney-client privileged documents and attorney work product documents. Reinsurers may object to such carve-outs, contending that the result is to deny the reinsurers access to relevant information about claims they have been asked to pay.

Despite these concerns by cedents, however, courts have not been so quick to find that such clauses waive legal privileges held by the ceding company. For example, in *Gulf Insurance Co. v. Transatlantic Insurance Co.*, 13 A.D.3d 278 (N.Y. App. Div. 2004), the appellate court overruled the lower court's decision finding that the access to records clause waived legal privileges that would have been otherwise applicable to documents held by a cedent:

> Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges. To hold otherwise would render these privileges meaningless.

Id. at 279. Thus, the access to records clause did not constitute a blanket waiver of privilege and thereby entitle the reinsurer to access to the cedent's privileged documents. *Id.* at 280. Similarly, the court in *North River Insurance Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363 (D.N.J. 1992), interpreted a cooperation clause, which provided that the insurer would provide to the reinsurer "any of its records relating to this reinsurance or claims in connection therewith," so as not to result in an automatic waiver of the attorney-client privilege. Id. at 368-69. In that case, the reinsurer moved for production of documents that the insurer, on the basis of the attorney client-privilege, refused to produce. The court held that the reinsurer was "not entitled under a cooperation clause to learn of any and all legal advice" that had been obtained "with a reasonable expectation of confidentiality." *Id.* at 369 (citation omitted). Rather, "more explicit language" was necessary to show that the cedent had "wholesale" given up its rights to preserve the confidentiality of privileged information. *Id.*

The Existence or Absence of a Common Interest between a Cedent and Its Reinsurers

At least in instances in which a cedent and its reinsurer are not engaged in a reinsurance coverage dispute, some courts have held that cedents and their reinsurers enjoy a common interest such that the cedent can share privileged information with its reinsurer without waiving the privilege as to other third parties. *See, e.g., Durham Indus. Inc. v. North River Ins. Co.*, No. 79 Civ. 1705 (RWS),1980 WL 112701, at *3 (S.D.N.Y. Nov. 21, 1980) (surety bondholder's motion to compel production of cedent's privileged communications denied even though communications were disclosed to reinsurer because "where the reinsurers bear a percentage of liability on the bond, their interest is clearly identical to that of defendant [cedent]" and no waiver of the privilege occurred as a result of the disclosure); *Minn. School Bds. Assoc. Ins. Trust v. Empl. Ins. Co. of Wausau*, 183 F.R.D. 627, 631-32 (N.D. Ill. 1999) (finding that because of common interest between cedent and reinsurer, cedent did not waive work product privilege by providing privileged documents to reinsurer, and thus quashing subpoena issued by insured to reinsurer to obtain privileged documents); *Hartford Steam Boiler Inspection & Ins. Co. v. Stauffer Chem. Co.,* Nos. 701223, 701224, 1991 WL 230742, at *2 (Super. Ct. Conn. Nov. 4, 1991) (finding that cedent did not waive privilege by disclosing privileged documents to reinsurer because cedent and reinsurer shared legal and economic common interest, and thus denying insureds' motion to compel production of those privileged documents); *Lipton v. Superior Court of Los Angeles County*, 48 Cal. App. 4th 1599, 1618 (Cal. App. Ct. 1996) (Communications to a reinsurer may contain advice from counsel for the ceding insurer relating to coverage, exposure and other liability issues. These would, in all probability, be protected by the attorney-client privilege.") (citing Cal. Ins. Code § 622).

However, in certain circumstances, courts have held that, regardless of the interests a reinsurer may share with its cedent, such interests alone are not sufficient to protect the voluntary production of privileged documents from effecting a waiver of that privilege. For example, in *Reliance Insurance Co. v. American Lintex Corp.*, No. 00 CIV 5568 WHP KNF, 2001 WL 604080 (S.D.N.Y. June 1, 2001), on a motion by Reliance's policyholder, the court compelled Reliance to produce to the policyholder a privileged letter that Reliance had sent to its reinsurer. Reliance argued that the attorney-client privilege had not been waived "because primary insurers and reinsurers share a 'unity of interest.'" However, the court held that Reliance

> failed to establish that Reliance and its reinsurance underwriter share a common legal interest that warrants the extension of the attorney-client privilege to the document in question. While their commercial interests coincide, to some extent, no evidence has been proffered

> that establishes that Reliance and its reinsurer share the same counsel or coordinate legal strategy in any way.

Id. at *4.

Unlike the *Reliance* case, most cases that have failed to find a common interest between the cedent and its reinsurer have done so in the context of a reinsurer asking a court to compel its cedent to produce privileged materials, and thus, by definition, after a dispute has arisen between cedent and reinsurer. *See, e.g., North River Ins. Co. v. Columbia Cas. Co.*, No. 90 Civ. 2518 (MJL), 1995 WL 5792, at *4-*5 (S.D.N.Y. Jan. 5, 1995). The court in *Columbia Casualty* rejected the reinsurer's motion to compel the cedent to produce privileged documents from an underlying coverage dispute, holding that no common interest existed between North River (the cedent) and Columbia Casualty (the reinsurer) because (1) they were not represented by the same attorney in the proceeding in which the privileged documents were generated; (2) the reinsurer did not contribute to the cedent's legal expenses; (3) the reinsurer did not exercise any control over the cedent's conduct of the underlying proceedings; (4) the parties did not coordinate litigation strategies; and (5) the parties' legal interests diverged. *Id*. at *5. The court further stated that "Columbia Casualty's only argument for finding a common interest is that the two parties stand in the relation of reinsurer to ceding insurer, and that is insufficient." *Id*. at *5.

However, Columbia Casualty also sought the production of two privileged documents that North River had previously provided to another reinsurer, CIGNA. North River objected to the disclosure, arguing that it was entitled to use the common interest doctrine as "a shield" to resist disclosure even though it had asserted that Continental Casualty was not entitled to use the common interest doctrine as "a sword" to compel disclosure. *Id*. at *7. The court was not persuaded, and concluded that there had been no common legal interest between North River and CIGNA at the time of the disclosure, and that North River had waived the attorney-client privilege with respect to those documents:

> In the process of seeking payment from CIGNA under their reinsurance contract, North River provided the . . . Memos, apparently hoping that CIGNA would be persuaded to pay. It was not and litigation ensued. At no point did North River and CIGNA engage in a common legal enterprise and the common interest doctrine therefore does not apply.

Id. at *8. Having waived the privilege with respect to CIGNA, North River could not reassert the privilege to preclude Columbia Casualty from obtaining the documents at issue.

In evaluating the rationale underlying the common interest doctrine, the court also pointed out that "[w]hat is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal." *Id*. at *4. Thus, in the *Columbia Casualty* case, the court focused on a functional analysis of the common interest doctrine rather than relying on the status of the parties. A cedent and its reinsurer cannot be said to be cooperating "toward a common legal goal" once one party has contemplated suing or has actually sued the other over reinsurance coverage. *See also, e.g., North River Ins. Co. v. Phila. Reinsurance Corp.*, 797 F. Supp. at 366-67 (because relationship between cedent and insurer "does not fall within the confines of the classic common interest doctrine", court denied reinsurer's motion to compel production of cedent's privileged documents).

Conclusion

The critical conclusion that necessarily follows from these decisions is that voluntary production of privileged materials - even in situations where the interests of the cedent and the reinsurer are aligned - could effect a waiver of privilege. Moreover, once a dispute between a cedent and its reinsurer ripens, any "common interest" arguably ceases to apply, rendering the cedent even more vulnerable to an argument that voluntary production to its reinsurer of privileged materials (such as those relating to the cedent's coverage analysis or to the defense of the underlying claims against its policyholders) waives any applicable privileges. Although more is required to waive the work product protection than the attorney-client privilege, disclosure to a reinsurer with which the cedent is in an adversarial relationship creates the very real prospect of such a waiver. ▼

2 Courts take a number of different approaches to whether inadvertent disclosure waives the privilege. This paper does not examine the varying approaches because the issue addressed herein is the potential impact on privilege of a cedent's *deliberate* disclosure of privileged documents to its reinsurer.

3 These sample clauses (with emphasis added) have been obtained from the Brokers & Reinsurance Markets Association Contract Wording Reference Book.

The critical conclusion that necessarily follows from these decisions is that voluntary production of privileged materials – even in situations where the interests of the cedent and the reinsurer are aligned – could effect a waiver of privilege.

Recently Certified Arbitrators

Michael V. Balzer

William K. Borland

Brian Z. Brown

Michael V. Balzer

Michael Balzer has 29 years of experience as an underwriter, broker, and manager, working for insurance and reinsurance companies. He received a degree in Risk Management and Insurance from Florida State University and an MBA from Pepperdine University.

He began his career at General Reinsurance as a reinsurance underwriter in the casualty facultative department where he wrote commercial auto, products liability, commercial umbrella, professional liability, and workers compensation business. Mr. Balzer moved to the E & S Division of CIGNA where he started as a Branch Underwriting Manager. He ultimately became the E & S Division Home Office Casualty Underwriting Manager, and was involved in the underwriting, authority, reinsurance and management of umbrella, products liability, and commercial auto business for the five companies in the E & S Division.

After five years working for Swett and Crawford Wholesale Brokers as Second Vice President in charge of Corporate Business Development, Mr. Balzer moved to Chicago to continue his underwriting career. He spent five years at AIG as the Regional Middle Market Manager responsible for General and Products Liability business. Over the next eleven years, he was a treaty reinsurance underwriter and manager. First, at CNA Re as Assistant Vice President writing treaty reinsurance on pro rata and excess property, casualty, and umbrella treaties. He developed the company's business strategy for non-standard automobile business. Mr. Balzer moved to GE Re, where as a Second Vice President, he was the Specialty and MGA treaty reinsurance team leader. The team wrote all lines of E & S treaty business including primary, multi line, excess and umbrella business for insurance companies and MGA programs.

Mr. Balzer currently is a Project Management Director working for Global Resource Managers as a team leader for claims and underwriting audits of CNA Re and CNA run-off business.

William K. Borland

William Borland has 40 years in the insurance and reinsurance industries. Following graduation from the Loyola University of Chicago law School in 1967, he joined the law staff of the American Life Convention (now the ACLI) and then in 1970 the Washington National Life Insurance Company's Corporate Law Department. He joined Allstate Life Insurance Company's Corporate law Department in 1974, where he oversaw all litigation, legislative and regulatory compliance matters in twenty states, as well as national class actions. He also served as lead counsel to Allstate's Marketing and Group Insurance Operations, as well as to Allstate's GIC investment unit.

In 1986 he became General Counsel of American Chambers Life Insurance Company, where he had oversight of all company legal matters, including underwriting, claims, reinsurance and product development.

In 1988 Mr. Borland was appointed Vice President and Assistant General Counsel of the CNA Insurance Companies managing the legal affairs of CNA's group insurance life and health reinsurance and viatical settlement operations. Additionally, he served as CNA's coordinating attorney for GLB implementation and latter for HIPPA compliance. He was also charged with the handling of 9/11 related legal issues and reinsurance recoveries.

The Hartford Financial Group purchased CNA's group operations in 2004 and he transferred to the Hartford Life Insurance Company's law Department, where he assisted with the transition of the business to Hartford.

Mr. Borland started his consulting practice in July 2004 and has worked with insurance companies and law firms on product development, trade practice and general insurance regulatory issues. He has a broad and varied experience base and has worked closely with company management for over 40 years.

Brian Z. Brown

Brian Brown is a Principal and Consulting Actuary with Milliman, Inc. He has been with the firm since 1990. Prior to joining Milliman, he held various positions with Allstate, Zurich and CNA. Milliman is a firm of consultants

Profiles of all certified arbitrators are on the web site at www.arias-us.org

and actuaries serving the full spectrum of business, governmental and financial organizations. Founded in 1947, the firm has 31 offices in the United States as well as 15 offices outside the United States.

Mr. Brown's clients include many of the largest insurers and reinsurers in the world. In addition, he has done work for various law firms, the NAIC, the NCCI, hospitals, manufacturers and local governments. In addition to pricing, reserve certification and funding work, Mr. Brown evaluates excess insurance programs, values target companies in mergers and acquisitions, estimates environmental liabilities and assists companies in restructuring their dividend programs. He has also assisted clients with rating agency issues and strategic planning. Due to his work for many clients, he has developed a national reputation in analyzing workers' compensation products.

Over the years, Mr. Brown has been very active in professional organizations. He currently serves on the Board of Directors of the Casualty Actuarial Society (CAS) and is a member of CAS's Reinsurance Committee and Loss Reserve Committee. He has also served as President of the Midwestern Actuarial Forum.

Mr. Brown has spoken at more than 20 industry meetings and has published 20 papers on various topics including: Reinsurance Collectibility, Workers' Compensation, Asbestos and Pollution Liabilities, Employment Practices Liability and Credit Issues.

He has been an expert witness in a number of cases for various clients, testifying on a variety of topics including: Underwriting, Pricing, Loss Reserves, Reinsurance Disputes, Credit Risks, and Fair Value. He has also served as an arbitrator.

Charles F. Cook

Charles Cook graduated from Princeton University in 1963, majoring in Mathematics. He became a Fellow of the Casualty Actuarial Society in 1966 and a Member of the American Academy of Actuaries in 1971. He received his MBA degree in Finance from St. Mary's — Texas in 1974. In 1977 he became a Chartered Property-Casualty Underwriter. Mr. Cook has been a Director and Officer of the Casualty Actuarial Society and the Conference of Consulting Actuaries.

In 1963 he started at ISO. He moved upward regularly: Assistant Actuary at Continental, Actuary at General Accident, VP - Chief Actuary at USAA. From 1975 to 1980, Mr. Cook was a Senior VP with AIG with a variety of underwriting and financial responsibilities in the International and domestic brokerage divisions, and in 1980 he became Senior VP and Chief Underwriting Officer of AIG's Domestic Agency Division, responsible for all underwriting, Actuarial, Research and Reinsurance.

Mr. Cook was President and Chief Executive Officer of American Universal Group from 1982 to 1988. When he took over, it was essentially in bankrupt condition due to simultaneous crises in reinsurance, Surplus Lines underwriting, and loss reserves. After he reorganized it and "cleaned up the mess," the parent conglomerate sold it. Mr. Cook felt that the new owners were not sufficiently reputable and he declined to stay.

In 1988, he became a Consulting Actuary. Since 1993 he has been President of MBA, Inc., Actuarial Consultants. Practice areas of particular interest include loss reserves, financial modeling, Captives, self-insurance, agricultural risks, information systems, reinsurance, pricing and new product development. Experience particularly relevant to arbitration includes over 35 expert witness and litigation support engagements, both plaintiff and defense, including several reinsurance cases. Mr. Cook has twice been a Special Master in the New Jersey Superior Court, and has served as a Mediator.

Charles F. Cook

Hugh W. Greene, Jr.

Hugh W. Greene, Jr.

Over the past 38 years, Hugh Greene has had broad experience in the insurance and reinsurance industry, especially in the areas of claim management, run-off management, litigation management of outside counsel, and management of and participation in reinsurance arbitrations. Mr. Greene began his career in 1969 as an adjuster. He advanced through the ranks of Supervisor to Claim Vice-President. He has served in branch office and home office capacities, as well as a Risk Manager for a motor carrier.

In 1985, Mr. Greene began his career in reinsurance, becoming Assistant Vice-President of Universal Reinsurance Corporation. He served as Claim Vice President, as well as an Officer and Director of Risk Consultants, Inc, its captive insurance company, and its captive brokerage company.

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ARIAS 2007 Spring Conference

Boca Raton Resort • May 9-11, 2007

We will arrive at the Boca Raton Resort at a perfect point in its 80-year history. The resort has just undergone a wide-ranging renovation to bring it to a new level of luxury and beauty. The main public spaces have been dramatically renovated. Guest rooms have been tastefully refreshed. The fitness centers have been expanded and updated.

Boca Resort offers some impressive characteristics:

- 1,043 luxurious guest rooms and suites, in five distinct styles
- Outstanding conference facilities and support services
- A half-mile stretch of private Atlantic oceanfront, at Boca Beach Club
- Two 18-hole, private championship golf courses
- Highly acclaimed Spa Palazzo
- World-class restaurants and dining options
- 30 award-winning tennis courts
- Three state-of-the-art fitness centers, and six swimming pools

Our conference will run from Wednesday noon until Friday noon, offering the option for attendees to enjoy a weekend vacation after adjournment. We will take a break on Thursday afternoon for recreation.

The announcement brochure has been sent to all members and is available on the home page of the website, along with online registration. **The deadline for room reservations and early conference registration is April 13. The final registration deadline is April 27.**

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In 1998, Mr. Greene, as a consultant, assumed the claim duties of several run-off companies, managing the staff and the remaining claims that include direct business and all ceded and assumed reinsurance business, as well as managing all litigation and arbitrations of Northwestern National Insurance Company. In addition to his claim management responsibilities, Mr. Greene performs all outside claim audits, has managed numerous ceded and assumed reinsurance arbitrations, served as a fact witness and the corporate representative in those arbitrations, and currently serves as a member of the Board of Directors of Compass Insurance Company.

Mr. Greene holds a Bachelor's degree in English, with a minor in History from Arkansas State University. In the course of his career, he has made multiple formal presentations of materials ranging from product liability and reinsurance, to industrial injury management and prevention of lost work days. He co-authored a CPCU Journal Article on recognizing and dealing with psychological injuries. He received his CPCU designation in 1989, holds an "all lines" adjusting license in Texas, and is an active member of ARIAS.

Mark T. Megaw

Mark Megaw is the Director of Reinsurance Litigation for ACE Group Holdings. This position manages all of ACE's ceded and assumed arbitration disputes throughout the world. Previously, Mark has been the General Counsel to the ACE Tempest Re Group, ACE's assumed reinsurance division for life and property casualty business, and before that he was counsel to ACE's direct US property, casualty and aviation/aerospace business.

Mr. Megaw has been in the world of reinsurance arbitrations since 1989. From 1989 to 1994, he was senior counsel to CIGNA's US and international ceded business. From 1994 to 1998, he was based in London with CIGNA Re, during which time he was the Executive Director of European Contracts. Prior to his in-house roles, Mr. Megaw was a litigator in the law firm now known as Bracewell and Giuliani, in Houston, Texas. He is a graduate from the University of Houston Law School and from the University of Virginia, where he met his wife.

Raymond M. Neff

Raymond Neff has been in the insurance business since 1965 when he obtained his Masters Degree in Actuarial Science from the University of Michigan. He has functioned as an officer of an insurance company, insurance agency, and insurance service company and served as an insurance regulator in two states. He is a member of the American Academy of Actuaries (MAAA), and an Associate in the Society of Actuaries (ASA).

Since 1999, he has been President and CEO of Neff and Associates and also Insurance Home Office Services. His business is focused on Arbitrations, Expert Witness, Insurance Management Consulting, Strategic Planning and Insurance Home Office Administration.

Mr. Neff started his insurance career at the Michigan Insurance Department in 1965 as Assistant Actuary. In 1969, he joined the Foremost Insurance Group as Vice President and Actuary of Foremost Life Insurance Company. In 1973, he joined the Kenny Corporation, a multi-line insurance agency operating in several states, as Chief Operations Officer. In 1978, he worked for W.W. Stribling and Associates as a senior examiner and did consulting with primary emphasis on auditing insurance companies.

In 1979, Mr. Neff relocated to Tallahassee, Florida and was employed with the Florida Insurance Department, first as an actuary and finally as Chief of the Bureau of Rates. In 1982, he joined the Florida Department of Labor and Employment Security, Division of Workers' Compensation, as Senior Actuary and then as Division Director. In 1986, Ray Neff joined the FCCI Insurance Group and served as President and CEO from 1987 until 1999. He transformed an assessable insurance organization writing one product in one state with minimal surplus, into a mutual insurance holding company with several certificates of authority and infrastructure. Mr. Neff started his consulting business upon leaving FCCI. His interests include family, business, reading, golf and bridge.

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in focus

Mark T. Megaw

Raymond M. Neff

in focus

Joseph W. Rachinsky

Molly P. Sanders

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Joseph W. Rachinsky

Joseph Rachinsky is currently employed as Vice President Disability Product Management for Prudential Insurance Company of America.

Mr. Rachinsky began his insurance career in 1970 as a group insurance underwriter for The Mutual Benefit Life Insurance Company in Newark, NJ. Over time, he became Director of Group Underwriting and Issue. He was also responsible for broker and client relations on over fifty national accounts on which he was the assigned underwriting officer. He left Mutual Benefit Life in 1978 to join Reliance Standard Life Insurance Company in Philadelphia, PA.

While with Reliance Standard, Mr. Rachinsky oversaw all of the non-actuarial operations of the company. He held a variety of vice presidential level positions in charge of Underwriting, Claims, Product Development, Marketing and Reinsurance and Partnering. In the last role, he was responsible for the development of wholesale business through strategic alliances, acquisitions and reinsurance. He served as the insurance expert in a multi-disciplined working group acquiring blocks of business and executing loss portfolio transfers. Mr. Rachinsky initiated the company's entry into the reinsurance market and managed the working relationships with managing underwriters and pool managers. He served on the Underwriting Committees and Management Committees for five reinsurance facilities. He left Reliance Standard in 2001 to join Prudential Insurance Company of America in Livingston, New Jersey.

Mr. Rachinsky joined Prudential as Vice President Disability Product Management for Prudential's Group Insurance Division. He is responsible for the product management of an $ 800 million dollar group disability insurance portfolio for one of the nation's largest group insurers. In his position at Prudential, he directs product strategy, product development and product standards for Prudential's insured products and administrative service products to support self-insured clients. Mr. Rachinsky led a multi-disciplined task force in the development of an aggregate and a specific group long-term disability product for large, self-insured clients and is active in captive reinsurance.

Mr. Rachinsky is well versed in the operations of insurers and reinsurers and specializes in group life, disability, A&H and specialty lines insurance and reinsurance. He has served as an arbitrator and as a witness in litigations and arbitrations.

Molly P. Sanders

Molly Sanders has over 28 years of experience in insurance and reinsurance, and for the past 11/2 years has been Principal of Leidy & Sanders, LLC, an entity that provides specialized consulting services to insurers, reinsurers, law firms, risk managers, as well as to other consultants. Ms. Sanders began her career as a casualty facultative underwriter at General Re, and held various underwriting positions within General Re, as well as in its broker market insurance and reinsurance subsidiary, North Star.

In 1985, Ms. Sanders participated in the founding of Re Capital, a publicly-traded property/casualty reinsurance company. At Re Capital, Ms. Sanders was a Senior Vice President and a member of its board of directors. She also served on a Reinsurance Operations Committee that was responsible for management of the underwriting and claims functions.

After nine years at Re Capital, Ms. Sanders joined Trenwick as a Senior Vice President and account executive with responsibility for underwriting and marketing all casualty lines of reinsurance. In 2002 she joined Folksamerica as a Senior Vice President and Manager of its casualty facultative unit. While at Folksamerica, she served in a variety of capacities, including Manager of its Greenwich, Connecticut and Chicago branch offices.

Since forming a consulting operation in mid-2005, Ms. Sanders has worked on various projects for clients in the insurance, reinsurance, and legal arena. Engagements have included arbitrations, expert witness work, acquisition due diligence, underwriting and claims assessments, coverage analyses, systems development, and training.

Ms. Sanders is a graduate of Washington University in St. Louis, as well as the summer executive program at Dartmouth's Amos Tuck School. She has been a resident of Stamford, Connecticut since 1981.

in focus

Richard L. Watson

Richard Watson retired in July 2005 as Vice President of Claims at the Folksamerica Reinsurance Company after spending over 41 years working in the insurance, reinsurance and ceded reinsurance industries. He has over 29 years of reinsurance experience handling treaty and facultative asbestos, environmental, cumulative injury and other long tail claims. He has experience not only in heavy casualty involving coverage and allocation issues, but also in the handling of large reinsurance property claims. After retiring, he formed his own consulting company, RLW Consultants LLC, which specializes in reinsurance claim reviews and arbitration.

Mr. Watson's primary insurance experience began in 1964 when he joined Crawford and Company as a claims representative. In 1969, he joined the Aetna Insurance Company where his career progressed from being a Claims Manager in Rochester, NY to Casualty Claims Manager in the New York office. In 1978 he left Aetna to become a Reinsurance Claims officer at ECRA, which later became St. Paul Re. At St. Paul Re, he was the Assistant Vice President of Claims in charge of the casualty claims department which handled asbestos, environmental, and long tail claims.

In 1968, Mr. Watson joined Belvedere America Re, as the Vice President of Claims and as one of the four founding fathers. Belvedere was acquired in 1990 by the Christiana General Reinsurance Company, which in turn was later acquired by Folksamerica Re in 1996. During his tenure at Folksamerica, Mr. Watson was in charge of both the environmental and the property claims departments. After 9/11, he abrogated his property responsibilities to a newly hired property claims officer so that his attention could be placed solely on asbestos and environmental exposures which continued to develop throughout the industry.

Mr. Watson holds a Bachelor of Science Degree from Syracuse University and received his CPCU designation from the American Institute for Property and Liability Underwriters, Inc. in 1981. He has served on the Board of Directors of Surety Re, on the IRU educational committee and was an active member of the Asbestos Claims Managers Association during its existence. He has been involved in numerous claims involving coverage and allocation issues.

Allan M. Zarcone

Allan Zarcone has over 30 years of insurance/reinsurance industry experience. He is currently Assistant Vice President of Claims for GLOBAL Reinsurance Corporation of America, formerly known as Gerling Global Reinsurance Corporation, a multi-national company based in Germany. He is responsible for managing complex claims under treaty and facultative contracts, conducting audits of ceding company claim operations, provides claim assistance in commutations and the successful run-off of the U.S. operation.

Mr. Zarcone began developing his international claim expertise in 1980. He joined AFIA Worldwide Insurance Company, where he served as Home Office, Territorial Manager for all casualty claims occurring in Continental Europe and the Middle East. His clients were major U.S corporations, with overseas operations. He also managed claim handling by the AFIA branch offices and conducted audits of their overseas operations.

In 1984, he became a Home Office unit manager in the Excess Claim Department of the Home Insurance Company. There he supervised five claim analysts and directed investigations involving national accounts. He was also responsible for directing all branch offices in their handling of environmental/mass tort and maritime liability claims.

Mr. Zarcone joined General Reinsurance/North Star in 1989, where he served as Assistant Vice President of Claims for thirteen years. In this capacity, he managed complex claims, conducted 190 claim reviews of insurer operations and assisted client companies in improving reserves and control of expenses.

In 2002, he joined Marsh & McLennan as a Senior Risking Consulting Broker. There he provided claim management consultation services to Fortune 1000 clients, in a variety of industries. He worked with clients and their claim service providers in resolving coverage issues and payment disputes.

Throughout his career, Mr. Zarcone has developed an excellent understanding of a wide variety of claim issues, including contract interpretation, loss allocation and issues of bad faith. Mr. Zarcone received his B.A. degree from Rutgers University.

Richard L. Watson

Allan M. Zarcone

case notes corner

En Banc Fifth Circuit Denies Vacatur for Alleged "Evident Partiality" Due to Arbitrator Nondisclosure of Past Relationship with Counsel

Case Notes Corner is a periodic feature on significant court decisions related to arbitration

Ronald S. Gass

Arbitrators would do well in this environment to disclose all of their professional and social relationships with the parties and counsel...

Following an unusual en banc hearing before all the judges sitting on the U.S. Court of Appeals for the Fifth Circuit, a majority of the court denied a motion to vacate an arbitration award due to alleged bias when an arbitrator failed to disclose a prior professional association with a member of one of the law firms that had engaged him as a neutral. In an 11-5 decision, the court ruled that the "evident partiality" standard under the Federal Arbitration Act ("FAA") does not mandate the "extreme remedy of vacatur" for a nondisclosure of what it characterized as a "trivial" past association.

A Texas software vendor, Positive Software Solutions, Inc., alleged that one of its customers, New Century Mortgage Corp., had copied its proprietary software in violation of the parties' agreement and applicable copyright law. The matter was submitted to arbitration in accordance with American Arbitration Association ("AAA") rules before a single arbitrator selected by the parties from a list of candidates provided by the AAA. Upon agreeing to serve, the arbitrator stated that he had nothing to disclose regarding past relationships with either party or their counsel. Following a 7-day hearing, the arbitrator ruled that New Century had not infringed Positive Software's copyrights, misappropriated its trade secrets, or otherwise breached the contract. He denied the relief sought by the software vendor and granted New Century $11,500 on its counterclaims and $1.5 million in attorney's fees.

In the aftermath of this stunning defeat, Positive Software conducted a detailed investigation of the arbitrator's background and discovered that several years earlier he and his former law firm had represented the same client as New Century's counsel in complex patent litigation between unrelated parties in the early 1990s. One of the attorneys representing New Century in this arbitration was involved in that prior litigation along with at least 34 other lawyers. Although their names had appeared together on signed pleadings, the arbitrator and the New Century attorney never had any direct contact.

Armed with this new information, Positive Software filed a motion in federal district court to vacate the arbitration award alleging that it had been procured by fraud, that the arbitrator had manifestly disregarded applicable laws, and that he was biased as evidenced by his failure to disclose his past connection with its opponent's counsel.

The district court below ruled that the arbitrator had failed to disclose "a significant prior relationship" with New Century's counsel, thus creating an "appearance of partiality" requiring vacatur. On appeal, a Fifth Circuit three-judge panel affirmed the lower court's vacatur order on the similar ground that the prior relationship "might have conveyed an impression of possible partiality to a reasonable person." Notably, neither the district court nor the Fifth Circuit panel found that the arbitrator was *actually* biased toward New Century.

Granting New Century's petition for rehearing en banc, the Fifth Circuit observed at the outset that the FAA "narrowly restricts" judicial review of arbitral awards to assure that arbitration serves as an efficient and cost-effective alternative to litigation and to hold parties to their agreements to arbitrate. The FAA's use of the term "evident partiality" in 9 U.S.C. § 10(a)(2), according to the majority opinion, conveys a "stern standard," requiring the upholding of arbitral awards unless bias was "clearly evident in the decisionmakers." It rejected the three-judge panel's view that the arbitrator selected by the parties displayed evident partiality by his very failure to disclose facts that might

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create "a reasonable impression of the arbitrator's partiality."

After analyzing the plurality opinion in the U.S. Supreme Court's seminal "evident partiality" decision, *Commonwealth Coatings Corp. v. Continental Casually Co.*, 393 U.S. 145 (1968), scrutinizing Justice White's "pivotal" concurrence, and considering the state of the law in the sister circuits, the majority of the en banc panel concluded that the better interpretation of *Commonwealth Coatings* was that an award may not be vacated because of "a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding" in nondisclosure cases. The "reasonable impression of bias" standard must be "interpreted practically rather than with utmost rigor."

Based on a close examination of the facts in this case, the majority concluded that the arbitrator's prior relationship with New Century's counsel was comparatively limited insofar as they never met or spoke to each other before the arbitration, they were two of 34 lawyers involved in the unrelated patent litigation, and this limited contact ended at least seven years prior to this arbitration. In the majority's opinion, these contacts were "tangential, limited, and stale" and would not have breached "an impression of possible bias" standard.

From an FAA policy standpoint, the majority agreed that awarding vacatur in situations such as this one would seriously jeopardize the finality of arbitration and give losing parties an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made. Requiring vacatur on these "attenuated facts," according to the majority, would also rob arbitration of one of its most attractive features apart from speed and finality, i.e., arbitrator expertise. The court perceived a real risk that the best arbitration professionals would not subject themselves to "blemishes on their reputations from post-arbitration lawsuits attacking them as biased." In short, cases of nondisclosure by an arbitrator do not merit vacatur "unless it creates a concrete, not speculative, impression of bias," i.e., it must be a nondisclosure that involves "a significant compromising relationship."

In two spirited dissents, the 5-member minority of the en banc panel vehemently disagreed with the majority's ruling. One dissenter, for example, proposed that the avoidance of partiality in the selection of the arbitrator can be achieved "only if, in discharging his duty of disclosure, the potential arbitrator objectively disgorges absolutely every conceivable fact of prior or present relationships with parties or counsel, regardless of how tenuous or remote they might seem to him." Another dissenting judge asserted that the majority was attempting to overrule the Supreme Court's *Commonwealth Coatings* decision and advocated that a failure to disclose "any dealings that might create an impression of possible bias" would justify vacatur of the award.

As readers can readily surmise, the contours of the FAA "evident partiality" standard are still evolving in nondisclosure cases when actual arbitrator bias is absent. Arbitrators would do well in this environment to disclose all of their professional and social relationships with the parties and counsel as well as any known potential witnesses and experts, with caveats if necessary, after appropriate due diligence. They should also promptly update their prior disclosures as soon as new information emerges or their recollection is refreshed during the pendency of the arbitration. Erring on the side of full disclosure, even if the prior business or social relationship may seem subjectively trivial, is probably the safest course. However, there will inevitably be those instances when memory fails due to the passage of time and a reviewing court must then determine whether such inadvertent omissions are something more than just "trivial."

Positive Software Solutions, Inc. v. Century Mortgage Corp., No. 04-11432, 2007 U.S. App. LEXIS 1012 (5th Cir. Jan. 18, 2007). ▼

...the "evident partiality" standard under the Federal Arbitration Act ("FAA") does not mandate the "extreme remedy of vacatur" for a nondisclosure of what it characterized as a "trivial" past association.

Law Committee Case Summaries

Since March of last year, in a section of the ARIAS-U.S. website entitled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration and reinsurance-related issues. Individual members are also invited to submit summaries of cases, legislation, statutes or regulations for potential publication by the committee.

As of the beginning of March, 2007, there were 20 published case summaries and one regulation summary on the website. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions

Provided below are four case summaries taken from the Law Committee Reports...

OneBeacon America Insurance Company; International Marine Underwriters v. Thomas J. Turner WL 3102578 (5th Cir)

Court: United States Court of Appeals for the Fifth Circuit

Date Decided: October 30, 2006

Issues Addressed: Whether an arbitration award should be vacated for Manifest Disregard of the law.

Submitted by: John R. Cashin*

In *OneBeacon America Insurance Company v. Turner*, the Court of Appeals for the Fifth Circuit affirmed the District Court's judgment that in part denied OneBeacon's effort to vacate an arbitration award on grounds that the arbitrators acted in manifest disregard of the law in awarding attorney's fees and had exceeded their powers in awarding administrative fees and expenses.

The dispute arose from an insurance policy covering a yacht owned by Turner that the parties agreed had an insured value of $95,000. The vessel was reported missing and was subsequently discovered with damage from flood and vandalism. An initial insurance estimate determined that the damage was between $55,000 and $65,000. Believing that Turner was partially responsible for the loss, OneBeacon offered $9,000 to settle the claim. Turner rejected the offer and invoked the policy's arbitration provisions. Such provisions called for each party to appoint an arbitrator and the two arbitrators appoint a third. The policy also provided that each party was responsible for its arbitrator's fees and half the third arbitrator's fees and expenses.

The arbitration panel conducted a hearing and both parties waived their right to record the proceedings. The panel issued an award finding the vessel a "total loss" and awarded Turner the full value of the yacht. The panel also awarded Turner for personal property damage and for administrative fees and expenses relating to the arbitration and for attorney's fees. OneBeacon moved to vacate the award, arguing that the arbitrators had acted in manifest disregard of the law in awarding attorney's fees and expenses. OneBeacon also challenged the panel's factual findings relating to personal effects and total loss of the yacht. The District Court vacated the portion of the award allocated to the fees and expenses of the arbitration, finding that the arbitrators has acted "in a manner inconsistent with the arbitration provision". *OneBeacon America Insurance Company v Turner*, 2006 wl 547959, at *3 (S.D. Tex. 2006). As to attorneys fees, however, the District Court denied the motion to vacate, noting there was "no evidence in this case that the arbitral panel was aware of the Fifth Circuit law requiring litigants in maritime cases to pay their own attorney's fees." *Tex A&M Research Found v Magna Carta Transp., Inc.*, 338 F. 3d 394 (5th Cir. 2003). The Court also dismissed OneBeacon's challenge to factual findings. OneBeacon appealed solely on the issue of the award of attorney's fees alleging manifest disregard of the law.

In a per curiam opinion the Fifth Circuit affirmed the judgment of the District Court and described the two step analysis necessary to determine manifest disregard of the law. First, "the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Kergosien v. Ocean Energy, Inc.*, 390 F. 3rd. 356, 355 (5th Cir. 2004) In addition, "the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it." *Id*. The second step requires "the Court must find that the award results in significant injustice". *Id*. The Fifth Circuit agreed with One Beacon's argument that the general rule applicable to maritime disputes requires litigants to pay their own attorney's fees. It held nevertheless that "the failure of an arbitrator to apply the law correctly is not a basis for setting aside an arbitrator's award." *Kergosien* 390 F. 3rd at 356. Having failed to secure a record of the Panel's proceeding, OneBeacon failed to show that the arbitration panel was aware of the governing principle and refused to follow it so "its claim that the award was in manifest disregard of the law fails at the first step" of the required analysis.

* *John R. Cashin is General Counsel - Group Reinsurance at Zurich Financial Services, Zurich, Switzerland. He is an ARIAS Certified Arbitrator.*

Superadio Limited Partnership v. Winstar Radio Productions, LLC.,

446 Mass. 330, 844 N.E.2d 246 (2006)

Court: Massachusetts Supreme Judicial Court

Date Decided: March 28, 2006

Issues Addressed: 1) Whether an arbitration panel has authority to impose monetary sanctions for violation of a discovery order.

2) Whether an out-of-state attorney's representation of a party at a Massachusetts arbitration proceeding provides a basis for vacating the award.

Submitted by: Christine E. Bancheri and Natasha C. Lisman*

In *Superadio Limited Partnership v. Winstar Radio Productions, LLC.*, the Massachusetts Supreme Judicial Court held that (1) the representation of a party in an arbitration in Massachusetts by an attorney not admitted to practice in that state did not provide a basis to vacate the award, even if it was unauthorized practice of law; and (2) that an arbitration panel had authority to impose monetary sanctions for a violation of the panel's discovery order.

Pursuant to an agreement, Superadio Limited Partnership ("Superadio") served as the exclusive advertising sales agent for Baby Love Productions, Inc. ("Baby Love"). The agreement provided that the net revenues from advertising would be split equally between the two parties. The agreement contained a Massachusetts choice of law provision and an arbitration clause providing that "[a]ny dispute under the agreement, including but not limited to any dispute concerning payments due, shall be arbitrated under the rules of the American Arbitration Association (AAA) before a panel of the AAA sitting in Boston, Massachusetts." The agreement terminated three years later.

After the termination, Superadio demanded arbitration, alleging that Baby Love had withheld approximately $150,000 in advertising revenues that should have been shared with Superadio. Baby Love counterclaimed for $841,239 in damages arising from revenues collected by Superadio and not paid to Baby Love. Superadio agreed that Baby Love was entitled to approximately $75,000 of those revenues but claimed them as an offset to moneys owed to it by Baby Love. The panel entered a partial summary judgment award in Baby Love's favor, finding that Superadio had no right to offset, and ordering Superadio to pay the amount withheld to Baby Love.

In the course of the remainder of the arbitration, the panel was presented with the two procedural issues that resulted in post-award litigation:

- Superadio objected to Baby Love's representation by a New York attorney, who, it contended, was engaging in unauthorized practice of law because he was not admitted in Massachusetts and had neither sought admission pro hac vice nor retained local counsel. With respect to out-of-state representation, the panel rejected Superadio's objection on the ground that it had agreed to abide by the AAA rules, which permit even non-lawyers to appear on behalf of parties.
- Baby Love complained of Superadio's failure to comply with discovery requests, and sought intervention from the panel which entered an order directing Superadio either to satisfy certain discovery requests by a specified date or to pay Baby Love "$1,000 per day until Superadio is either in compliance or until the date of the hearing, whichever shall occur first." The parties were also notified that the failure to produce discovery would result in its exclusion as evidence at the hearing.

Superadio failed to comply with the discovery order and withdrew its demand for arbitration. Baby Love proceeded to arbitrate its counterclaim.

While ruling in favor of Baby Love on liability, the panel found that Baby Love was unable to prove the amount of its contract damages. Attributing this failure to Superadio's refusal to comply with the discovery order, and invoking its powers under Rule 23(c) of the AAA Commercial Arbitration Rules, the panel awarded Baby Love the amount of monetary sanctions it had provided in its discovery order in lieu of contract damages, which, together with some costs and interest, came to $287,566.83.

The panel's award then was subjected to three rounds of litigation in state courts. At the trial level, the judge denied Superadio's motion to vacate and granted Baby Love's motion to confirm. On Superadio's appeal, the Massachusetts Appeals Court (an intermediate appellate court) reversed, ruling that that arbitration panel was without authority to impose monetary sanctions. On further review, the Massachusetts Supreme Judicial Court (SJC) disagreed with the Appeals Court and affirmed the judgment of the trial judge.

Emphasizing the policy strongly favoring arbitration, the SJC reiterated the narrow scope of review of arbitration awards. "Judicial intervention is permitted where an award is procured by corruption, fraud or other undue means" (Footnote 1) or "where the arbitrators exceeded their powers"(Footnote 2). "An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement ... by awarding relief beyond that to which the parties bound themselves ... or by awarding relief prohibited by law."

Addressing Superadio's argument that the award was procured by 'undue means' because Baby Love's attorney was not licensed to practice in Massachusetts, the SJC noted that whether representation of a party by an out-of-State licensed attorney at a Massachusetts arbitration proceeding constitutes the practice of law was an issue of first impression in Massachusetts. The Court noted that ABA Model Rule of Professional Conduct (2003) 5.5(c) (3) expressly permits multi-

CONTINUED ON PAGE 24

jurisdictional practice in arbitration. Noting that adoption of Rule 5.5(c) is currently under consideration in Massachusetts, the Court determined that it should not, and need not, decide whether Baby Love's attorney engaged in the unauthorized practice of law, holding instead that, even assuming that the representation might constitute the unauthorized practice of law, that alone did not constitute 'undue means' within the meaning of the Massachusetts Uniform Arbitration Act and provide a basis to vacate the award. The Court defined 'undue means' as "in an underhanded, conniving, or unlawful manner similar to corruption or fraud as those terms are used in arbitration law and practice."

With two justices dissenting, the five-justice majority of the Court likewise rejected the attack on the panel's power to award monetary sanctions and concluded that such sanctions were a proper and necessary exercise of arbitral authority to which the courts owed deference. The majority based its conclusion on the following factors: (1) the absence in the parties' arbitration agreement of any limitation on the scope of relief the arbitrator could fashion; (2) the breadth of arbitral authority conferred by AAA Commercial Arbitration Rules 45(a) and 23 with respect to relief and discovery, combined with the absence of any limitation on the exercise of that authority; and (3) the absence of any prohibition on monetary discovery sanctions in the Massachusetts Uniform Arbitration Act.

Footnote 1: Mass.G.L. c.251, §12 (a)(1)
Footnote 2: Mass.G.L. c.251, §12 (a)(3)

**Christine E. Bancheri is an ARIAS•U.S. Certified Arbitrator. She is the former General Counsel of Colonial Penn Insurance Company and is a member of the Pennsylvania and New Jersey bars.*

Natasha C. Lisman is a litigation partner in the Boston firm of Sugarman, Rogers, Barshak & Cohen, P.C..

ACandS, Inc. v. Travelers Casualty and Surety Company

435 F.3d 252, Bankr. L. Rep. P 80,447, 45 Bankr.Ct.Dec. 243 (2006)

Court: 3rd Circuit U.S. Court of Appeals

Date Decided: January 19, 2006

Issues Addressed: Impact of Automatic Bankruptcy Stay on Claims in Arbitration Proceedings

Submitted by; Mary Kay Vyskocil*

In ACandS, Inc. v. Travelers Casualty and Surety Co., the Third Circuit held that an arbitration award in favor of Travelers Casualty was void because it violated the automatic stay provision of the Bankruptcy Code even though the arbitration had been brought by the debtor, ACandS, against Travelers Casualty. Case Nos. 04-3926, 04-3929, — F.3d —, 2006 WL 133546 (3d Cir. Jan. 19, 2006).

ACandS was an installer of asbestos insulation that was insured by Travelers Casualty between 1976 and 1979. Pursuant to a 1988 letter agreement, the parties assigned 55% of all asbestos claims payments to the policies' "products" coverage, and 45% to the policies' operations coverage. In July 2002, three arbitrators were appointed at ACandS's request to hear ACandS's demand for a change of the allocation to near 100% operations coverage. In response, Travelers asserted that 0% should be allocated to operations coverage.

Thereafter, in September 2002, ACandS filed a Chapter 11 petition for bankruptcy. Four days later, ACandS wrote to the arbitrators that "the arbitration is not subject to the automatic stay provisions of Section 362(a) of the bankruptcy code." The parties continued to arbitrate and, following an evidentiary hearing and oral argument, the arbitration panel issued an award holding that the allocation to operations coverage should be 0%. ACandS moved to vacate the award in the United States District Court for the Eastern District of Pennsylvania. The District Court denied ACandS's motion, and ACandS appealed the decision to the Third Circuit.

On January 19, 2006, the Third Circuit declared, in an opinion by Judge Samuel A. Alito, Jr., that the arbitration award was void because it violated Sections 362(a)(1) and 362(a)(3) of the Bankruptcy Code. Citing Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189 (3d Cir. 1994), the Third Circuit observed that "the automatic stay provision of the Bankruptcy Code promotes a public policy sufficient to preclude enforcement of an award that violates its terms or interferes with its purposes." ACandS, 2006 WL 133546, at *3. Applying these principles, the Third Circuit found that the arbitration award violated Section 362(a)(1), which stays an "action or proceeding against the debtor." While acknowledging that the arbitration's "procedural flexibility" allowed Travelers to "make a colorable argument that it respected the stay by merely defending its interests" in an arbitration commenced by the debtor, the Third Circuit concluded that subsection (a)(1) was violated because Travelers' argument that 0% should be allocated to operations coverage was analogous a counterclaim in the trial context.

The Third Circuit also found that the arbitration award constituted "an act to obtain possession of property of the estate" in violation of Section 362(a)(3). The Third Circuit determined that the "contractual right secured by the Letter Agreement allocating 45% of the asbestos claims to operations" constituted "property of [ACandS's] bankruptcy estate." As such, the award's "grant of affirmative relief to Travelers" - i.e., the reallocation of claims under the Letter Agreement from 45% operations to 0% operations - was an "an act to obtain possession of ACandS's contractual right to a 45% allocation" in violation of the automatic stay.

** Mary Kay Vyskocil is a partner at Simpson Thacher & Bartlett LLP.*

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