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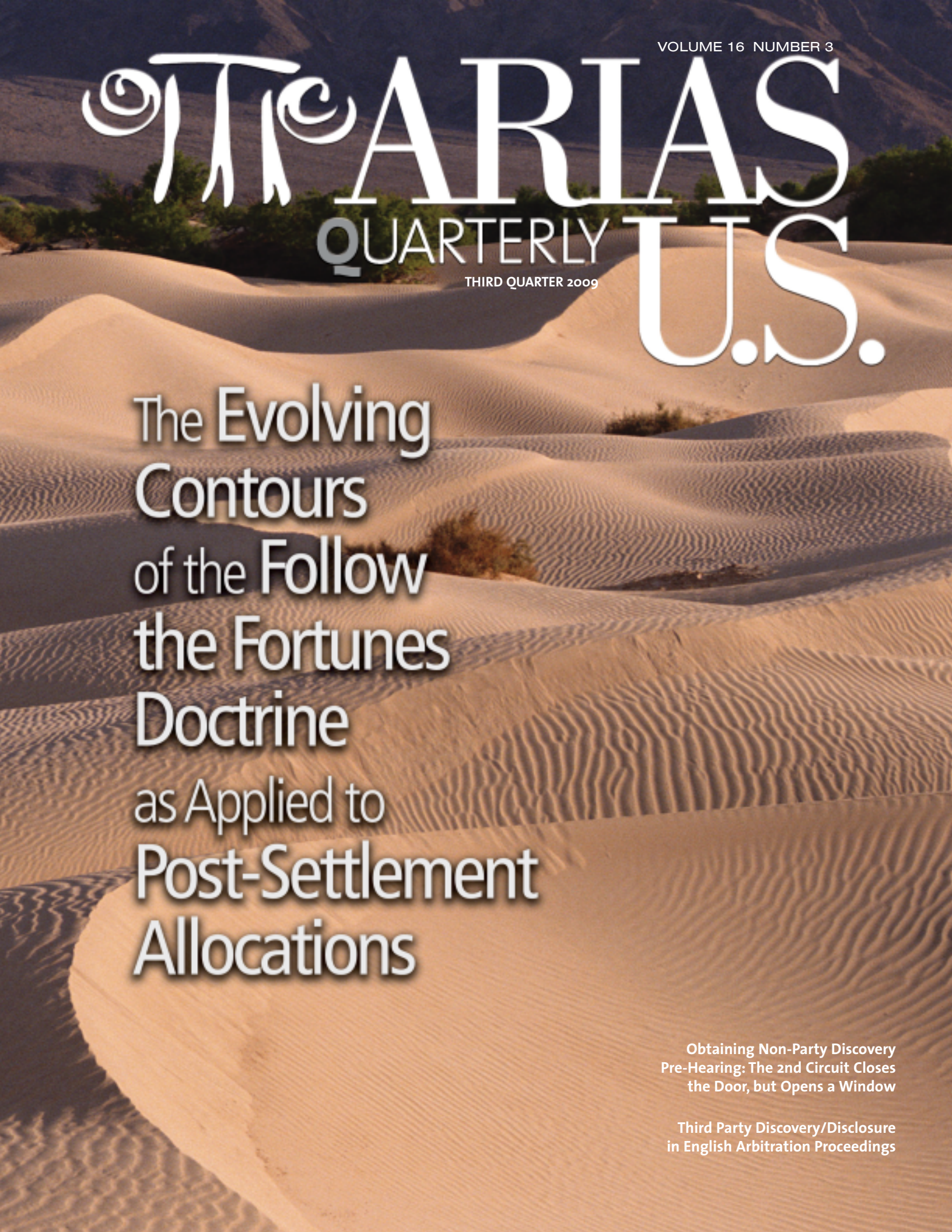

The Evolving Contours of the Follow the Fortunes Doctrine as Applied to Post-Settlement Allocations

Obtaining Non-Party Discovery Pre-Hearing: The 2nd Circuit Closes the Door, but Opens a Window

Third Party Discovery/Disclosure in English Arbitration Proceedings

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T. Richard Kennedy

editor's comments

In our lead article in this issue, *The Evolving Contours of the Follow the Fortunes Doctrine As Applied to Post-Settlement Allocations*, Wm. Gerald McElroy discusses the rationale of the follow the fortunes doctrine and how it has been applied in judicial decisions in the U.S. concerning allocations by cedents to reinsurers following settlements. As the author points out, various jurisdictions have taken different approaches, which are not always consistent. Even though arbitrators are not bound to adopt judicial precedents on the subject, it is important for both arbitrators and the parties to be aware of the different approaches taken by courts in the various jurisdictions. On the basis of such knowledge, Mr. McElroy's article offers some practical observations for cedents and reinsurers when confronted with application of the follow the fortunes doctrine to post-settlement allocations.

Arbitrators may be bound by judicial rulings of the federal courts in another area where the circuit courts continue to be split. Rick Rosenblum and Adam Offenhartz, in *Obtaining Non-Party Discovery Pre-Hearing: The 2nd Circuit Closes the Door, but Opens a Window*, consider whether a party participating in an arbitration can be compelled to produce documents without appearing to testify before the arbitrators at a hearing. The authors address the conflicting positions of the various circuits, and suggest some alternative strategies for obtaining pre-hearing discovery, even in the two circuits that seem to have imposed severe limitations on such discovery. The article is must reading for those involved or likely to be involved in reinsurance arbitrations where non-parties may hold information critical to the appropriate resolution of the dispute.

An interesting comparison of the rules governing discovery from non-parties in England is provided by Jonathan Sacher and David Parker in *Third Party Discovery/Disclosure in English Arbitration Proceedings*. The authors describe how development of such discovery in England has been similar to the U.S. in substance, but very different in procedure.

What happens in an arbitration proceeding when a party-appointed arbitrator is forced to resign because of serious illness? Ron Gass in Case Notes Corner discusses the Southern District of New York's recent ruling on this question. The note examines the unusual circumstance of the case that caused the court to deviate from the general rule in the Second Circuit.

Editor Gene Wollan in this issue follows up on his recent Off the Cuff piece regarding qualities of a good lawyer. In *A Good Judge Is Also Hard to Find*, Editor Wollan lists basic qualities that he expects to find in a good judge, whom he equates to a good umpire. You might find it interesting to review the ARIAS-U.S. umpire list to see which of those on the list you believe possess the qualities described by the author.

I hope to see all of you at the Annual Meeting in New York in November.

T. Richard Kennedy

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Editorial Policy

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feature

The Evolving Contours of the Follow the Fortunes Doctrine as Applied to Post-Settlement Allocations

Wm. Gerald McElroy, Jr.

Wm. Gerald McElroy, Jr.

Introduction[i]

The follow the fortunes doctrine[ii] is routinely invoked by cedents in support of their post-settlement allocation of settlement payments where disputes arise with their reinsurers concerning the reinsurers' obligations. While the fundamental principles underlying the follow the fortunes doctrine are straightforward, the application of the doctrine to a cedent's post-settlement allocation of payments has generated a significant body of case law, not all of which is consistent. In some cases, the courts have applied the doctrine liberally and rejected challenges by reinsurers to the reasonableness and good faith of the cedent's post-settlement allocation of the settlement payments. In other cases, the courts have given the reinsurer more leeway in challenging the reasonableness and good faith of the cedent's allocations. This article discusses the rationale of the follow the fortunes doctrine and how it has been applied in judicial decisions in the U.S. concerning post-settlement allocations and will provide some practical observations for cedents and reinsurers concerning the application of the follow the fortunes doctrine.

In other cases, the courts have given the reinsurer more leeway in challenging the reasonableness and good faith of the cedent's allocations.

Description of the Doctrine and Its Rationale

Reinsurance certificates often contain a follow the fortunes clause which "obligates the reinsurer to indemnify the reinsured for any good faith payment of an insured loss." *North River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1199 (3d Cir. 1995).[iii] The follow the fortunes doctrine requires that a reinsurer "accept the cedent's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured: coverage, tactics, lawsuits, compromise, resistance or capitulation." *British Int'l Ins. Co. v. Seguros La Republica*, S.A. 342 F.3d 78, 85 (2d Cir. 2003). The reinsurer "cannot second guess the good faith liability determinations made by its reinsured, or the reinsured's good faith decision to waive defenses to which it may be entitled." *Christiania Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 280 (2d Cir. 1992) In explaining the rationale for the doctrine, the Third Circuit stated:

> "Follow the fortunes" forecloses relitigation of coverage disputes because when an insurer disclaims coverage its interests are generally aligned with those of its reinsurer. Permitting reinsurers to revisit coverage issues would place insurers in an untenable position. Inevitably, defenses advanced in coverage contests would be used against them by reinsurers seeking to deny coverage. Accordingly, a reinsurer challenging coverage may obtain only deferential review of a determination of the insurers' liability to the insured... *North River v. Cigna*, 52 F.3d at 1204.

In one frequently cited case, the court observed that if the court were to conduct a de novo review of the reinsured's decision-making process, the "foundation of the cedent-reinsurer relationship would be forever damaged." *Int'l Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates at Lloyd's of London*, 868 F.Supp. 917, 921 (S.D. Ohio 1994). According to the court, the "goals of maximum coverage and settlement that have long been established would give way to a proliferation of litigation. Cedents faced with de novo review of their claims determinations would ultimately litigate every coverage issue before making any attempt at settlement." *Id.*

As one commentary has observed, the follow the fortunes doctrine "serves to ensure that the costs of the reinsurance transaction do

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not become economically prohibitive" by ensuring that the "reinsurer need not duplicate or monitor the adjustment efforts of the reinsured" and that the reinsured will not be denied indemnification "because of an error in an adjustment that was carried out in a sound, business-like manner." Edward J. Ozog., *et al, The Unresolved Conflict Between Traditional Principles of Reinsurance and Enforcement of the Terms of the Contractual Undertaking*, 35 Tort & Ins. L.J. 91, 92 (1999).

The follow the fortunes doctrine applies to both settlements and judgments. *North River v. Cigna*, 52 F.3d at 1205. It is well-established that the doctrine does not require indemnification for losses which do not fall within the terms of the underlying policies. *See Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co.*, 903 F.2d 910, 912 (2d Cir. 1990) (stating the follow the fortunes doctrine "burdens the reinsurer with those risks which the direct insurer bears under the direct insurer's policy covering the original insured.") Similarly, the doctrine does not require the reinsurer to pay amounts beyond those required in the reinsurance certificate. *See, e.g., Affiliated FM v. ERC*, 369 F. Supp. 2d 217, 227-228 (D.R.I. 2005) (holding that a reinsurer was not liable for settlement amount paid by a cedent to extinguish its liability for defense costs where they did not fall within the definition of "loss" covered by reinsurance).

The standard for determining if the amount paid by the reinsured falls within the scope of the underlying policy is quite favorable to the reinsured. The follow the fortunes doctrine "simply requires payment" where the insurer's "good-faith payment is at least arguably within the scope of the insurance coverage that was reinsured." *Mentor Ins. Co. (U.K) v. Brannkasse*, 996 F.2d 506, 517 (2d Cir. 1993). Thus, "a court or panel, faced with a reinsurer's denial of liability, would ask not whether the underlying claim was covered by the cedent's policy, but whether there is any reasonable basis to conclude there was such coverage." Clifford H. Schoenberg, *L'Histoire Ancienne De "Follow the Fortunes,"* Mealey's Litigation Reports (Reinsurance), May 28, 1992, at 17, 20.

The follow the fortunes doctrine does not apply to settlements made by the cedent which are fraudulent, collusive, or made in bad faith. Aetna Cas. & Sur. Co. v. Home Ins. Co., 882 F.Supp. 1328, 1346 (S.D.N.Y. 1995). However, a cedent violates the duty of good faith only where its "conduct rises to the level of recklessness or gross negligence." Unigard Sec. Ins. Co. Inc. v. North River Ins. Co., 4 F.3d 1049, 1069 (2d Cir. 1993).

Decisions Construing The Follow The Fortunes Doctrine Broadly To Post-Settlement Allocations

In Commercial Union Insurance Co. v. Seven Provinces Ins. Co., 9 F. Supp.2d 49 (D. Mass. 1998), aff'd, 217 F.3d 33 (lst Cir. 2000) ("Seven Provinces"), the court rejected the reinsurer's challenge to the cedent's allocation of the settlement amount to certain hazardous waste sites and the policies which covered them. In doing so, the court rejected the reinsurer's argument that the follow the fortunes doctrine applied only to the underlying settlement and not to post-settlement allocations of the settlement payment. Rather, the doctrine required the reinsurer to "follow the reinsured's good faith and reasonable allocation of settlement dollars between different policies and sites." 9 F.Supp.2d at 68. According to the court:

> In practical terms, the determination of which among several policies covers which particular loss among many is not much different from the more general decision that the losses are covered by the policies. Both are issues of judgment that the reinsured must be allowed to make for the sake of encouraging settlement. Review of either type of decision has an equal likelihood of undermining settlement and fostering litigation.
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> * * *
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> ....If a reinsured could be forced into litigation over its good faith judgment as to which policies covered which losses, it would be impossible for it to come to any settlement of such complex claims. When several reinsurers are involved, there would be a risk of successive litigations, in which each reinsurer offered an alternative allocation model that would reduce its own liability. *Id*. at 67-68.

In *North River Insurance Co. v. ACE American Reinsurance Co.*, 361 F.3d 134 (2d Cir. 2004) ("*North River*"), the Second Circuit relied upon the follow the settlements doctrine in rejecting the reinsurer's challenge to the cedent's post-settlement allocation to reinsurers based on a "rising bathtub" methodology[iv] in an asbestos coverage case. The court rejected the reinsurer's contentions that the follow-the-settlements doctrine applied only to the cedent's settlement decisions (not to its post-settlement allocation decisions) and that it most assuredly did not apply to a settlement allocation which was inconsistent with the cedent's own pre-settlement analysis.

In response to the reinsurer's argument that "mutuality of interest" (one of the factors underlying the follow the fortunes doctrine) was missing, the court stated that the "main rationale for the doctrine is to foster the 'goals of maximum coverage and settlement' and to prevent courts, through 'de novo review of [the cedent's] decisions-making process,' from undermining 'the foundation of the cedent-reinsurer relationship.'" 361 F.3d at 140-141 (brackets in original). citing *North River v. CIGNA*, 52 F.3d at 1206. The court noted that the reinsurer's challenge to North River's allocation was based on the "specific factual information on which it alleges North River relied in its settlement negotiations." 361 F.3d at 141. According to the court, it was "precisely this kind of intrusive factual inquiry into the settlement process, and the accompanying litigation, that the deference prescribed by the follow-the settlements doctrine is designed to prevent." *Id*. If there were a requirement that post-settlement allocations match pre-settlement analyses, the reinsurer would be permitted, and the courts would be required, "to intensely scrutinize the specific factual information informing settlement

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In *Allstate*, the court held that the reinsurer was not liable to the cedent for payments made to the insured in a multi-site environmental coverage case. The *Allstate* court found the cedent's post-settlement allocation to be unreasonable as a matter of law because it was based on a one-occurrence per site allocation which was at variance with the multiple-occurrence per site position which both the cedent and the insured (UTC) took in the underlying coverage litigation.

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negotiations, and would undermine the certainty that the general application of the doctrine to settlement decisions creates." *Id*.

Based on this reasoning, the court reached the following conclusion:

> Therefore, the court holds that the follow-the-settlements doctrine extends to a cedent's post-settlement allocation decisions, regardless of whether an inquiry would reveal an inconsistency between the allocation and the cedent's pre-settlement assessments of risk, as long as the allocation meets the typical follow-the-settlements requirements, i.e., is in good faith, reasonable, and within the applicable policies.

In *Travelers v. Gerling*, 419 F.3d 181 (2d Cir. 2005) ("Gerling") (involving the same non-products asbestos claims as *North River*), the Second Circuit extended the "follow the settlements" doctrine in rejecting the reinsurer's challenge to the cedent's post-settlement allocation based on a single occurrence theory even though the allocation was arguably contrary to the settlement agreement reached between the cedent and the insured. According to the court, a cedent's "post-settlement allocation is subject to follow the fortunes, regardless of any pre-settlement position taken by the cedent, whether that position is articulated in a pre-settlement risk analysis, or implicit in the settlement with the underlying insured." 361 F.3d at 188.

The Second Circuit stated it was not easy to establish bad faith in the context of post-settlement allocations:

> Indeed, we note that it would likely be even more difficult for a reinsurer to prove a cedent's bad faith in the present context (i.e., where a cedent allegedly attempted to maximize reinsurance recovery through a post-settlement allocation) than in the typical reinsurance dispute. Cases in which reinsurers allege bad faith usually involve a cedent's alleged failure to notify the reinsurer of coverage changes, as required in the reinsurance certificate. *Id*. at 192.

The court further explained, "[a]n allocation that increases reinsurance recovery – when made in the aftermath of a legitimate settlement and when chosen from multiple possible allocations –would rarely demonstrate bad faith in and of itself." *Id*. at 193.

In *National Union Fire Insurance Co. of Pittsburgh, Pa. v. American Re-Insurance Co.*, 441 F. Supp. 2d 646 (S.D.N.Y. 2006), the court relied upon *North River* and *Gerling* in interpreting the follow the fortunes doctrine expansively and accepting the cedent's post-settlement allocation based on a manifestation trigger of coverage in a coverage suit involving alleged personal injuries resulting from exposure to metalworking fluids.

Cases Construing the Doctrine More Narrowly To Post-Settlement Allocations

In *Allstate Ins. Co. v. American Home Assurance Co.*, 837 N.Y.S.2d 138 (N.Y.App. Div. 2007) ("*Allstate*"), a New York appellate court appeared to apply the follow the fortunes doctrine less expansively than the *North River* and *Gerling* decisions. In *Allstate*, the court held that the reinsurer was not liable to the cedent for payments made to the insured in a multi-site environmental coverage case. The *Allstate* court found the cedent's post-settlement allocation to be unreasonable as a matter of law because it was based on a one-occurrence per site allocation which was at variance with the multiple-occurrence per site position which both the cedent and the insured (UTC) took in the underlying coverage litigation. In distinguishing the case from *North River* (upon which the motion court had relied in granting summary judgment in favor of the cedent), the court stated:

> Here, unlike *North River*, the inconsistency is not between defendant's post-settlement allocation and its pre-settlement assessments of the risk, but between its pre-settlement allocation of loss with its insured (UTC) and its post-settlement allocation with its reinsurer (plaintiff)....A reinsurer is not bound by the follow-the-fortunes doctrine where the reinsured's settlement allocation, at odds with its allocation of the loss with its insured, designed to minimize its loss, reflects an effort to maximize unreasonably the amount of collectible reinsurance...837 N.Y.S.2d at 144.

The court attacked the cedent for switching its position on the number of occurrences issue:

> For defendant to assert aggressively the maximum number of occurrences at each site to minimize its liability to its insured in the UTC litigation, and then completely change its position in allocating its loss to plaintiff under the reinsurance certificates, is neither reasonable nor reflective of good faith. It is disingenuous. *Id*. at 144-145.

According to the court, a cedent "cannot treat its insured's claim on a per-occurrence-loss basis at each site and then allocate the loss to its reinsurer on a single-occurrence-per-site basis. That kind of inconsistent handling of loss is the very antithesis of the follow-the-fortunes doctrine." *Id*. at 146.

Further, the cedent's allocation methodology in its reinsurance claim was at odds with the district court's ruling in the underlying litigation that there were seven occurrences at the Windsor Locks site. The court observed that none of the reported cases involving the follow the fortunes doctrine involved a situation where the cedent "ignored a court ruling determining the number of occurrences at a covered site in its allocation of loss" to the reinsurer. *Id*. at 145. According to the court, the cedent's position on this issue was "neither reasonable nor based on good faith." *Id*. The court reached this conclusion without any "intrusive factual inquiry" into the cedent's allocation nor any "second guessing" regarding its settlement decisions. *Id*.

Since the cedent's position on the number of occurrences issue in *Allstate* was at odds with the positions of the cedent and insured in the underlying litigation and with a court ruling on this issue, there is some plausibility to the *Allstate* court's attempt to distinguish the case factually from *North River*. However, the reasoning of the court in Allstate weakens the force of the follow the fortunes doctrine as applied to the post-settlement allocations of the cedent. This is reflected in the *Allstate* court's refusal to lend its "imprimatur" to the cedent's "playing by two sets of rules":

> ....one, applied at the insured's claim level where the occurrence deductible is used as often as possible to minimize the amount of the reinsured's exposure and loss, and, later, in the same loss setting, another, where the occurrence deductible is used as sparingly as possible to maximize the reinsured's recovery against the reinsurer. The follow-the-fortunes doctrine was intended to foster consistency in the treatment of losses at both levels, insured and reinsured, not to allow an insurer to use a different set of rules at each level. We soundly reject the notion that the follow-the-fortunes doctrine requires that courts turn a blind eye to such manifest manipulation of the allocation process in total disregard of the reinsured's obligation to act in good faith. Id. at 143.

By contrast, the Second Circuit in *Gerling* was clearly not as concerned about insuring consistency in the treatment of losses at both levels.

In *American Employers Ins. Co. v. Swiss Reinsurance America Corp*., 413 F.3d 129 (lst Cir. 2005), the First Circuit also appeared to interpret the follow the fortunes doctrine less expansively than the Second Circuit in *Gerling* and *North River*. In *American Employers*, the court overturned the trial court's determination that the reinsurance certificate's per occurrence language was inconsistent with the cedent's (American Employers) demand that the reinsurer (Swiss Re) reimburse it based upon an annualization of the per-occurrence policy limits. However, the court was not "presently prepared to adopt" the cedent's argument that the follow the settlements clause required acceptance of the cedent's unilateral post-settlement decision as to allocation among reinsurance policies "regardless of what the settlement embodies." 413 F.3d at 136. The court remanded to the trial court the issue of the reasonableness and good faith of the cedent's settlement, including the annualization premise underlying it. It appears from the court's discussion of the issues to be considered on remand that the good faith defense is not as difficult to sustain as the Second Circuit suggested in the *Gerling* decision:

> Swiss Re is free on remand to challenge reasonableness and good faith. It may argue, for example, that the chances were very small in an Elf-American lawsuit that American would be held liable based on annualized limitations – a consideration that clearly bears on the reasonableness of paying out funds based on that premise. So, too, Swiss Re may try to show that American had little interest in contesting annualization in light of the S-16 policies and reinsurance coverage and argue that this undermines a claim of good faith....413 F.3d at 137.

The standard described by the First Circuit for determining the reasonableness and good faith of the cedent's post-settlement allocation appears to be less deferential to the cedent than the Second Circuit's articulation of that standard in *Gerling*.

Practical Observations Regarding The Application of The Doctrine

Based upon a review of the case law regarding the application of the follow the fortunes doctrine to post-settlement allocations, a number of practical observations can be made:

First, there are a number of cases where the courts have made rulings on the application of the follow the fortunes doctrine to the cedent's post-settlement allocations. While such decisions obviously provide some guidance to reinsurance panels, one should not assume that a reinsurance arbitration panel will parse through the case law on this issue in the same way as a court of

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law examining judicial precedent. Nor should the cedent or reinsurer assume that the panel will adopt a stance on the application of the follow the fortunes doctrine to post-settlement applications which is in accord with the decisions favoring their respective positions.

Second, there is a distinction, as the reinsurers argued in *Seven Provinces* and *North River*, between the application of the follow the fortunes doctrine to coverage determinations made by the cedent (where there is a mutuality of interests between the cedent and reinsurer) and post-settlement allocation decisions (where there is no such mutuality of interests). Reinsurers can emphasize this distinction in challenging post-settlement allocations on the grounds that they are unreasonable and self-serving. The cedent can counter that the follow the fortunes doctrine has been applied by the courts to post-settlement allocations as well as coverage decisions made by cedents and that the application of the doctrine to post-settlement allocations is required to foster the goal of avoiding protracted litigation over the issues underlying the allocation decisions.

Third, while there are judicial decisions which give the reinsured broad discretion in its post-settlement allocations based on the follow the settlements doctrine, the requirement that the allocation be reasonable and in good faith does provide the reinsurer with a foundation for challenging the allocation. The cedent's determination of the reinsurer's obligations is more likely to be upheld where it does not appear to be a "post-hoc characterization or a unilateral post-settlement allocation without grounding in the settlement process itself." *American Employers Ins. Co. v. Swiss Reins. Am. Corp.*, 413 F.3d 129, 135 (1st Cir. 2005). A red flag is an inconsistency between the settlement and the cedent's own determination of its liability. Conversely, consistency between the two enhances the likelihood of success. In *American Employers*, one of the factors cited by the court in favor of the cedent's allocation of liability to the reinsurer based on an annualized per-occurrence basis was that the settlement paid by the cedent was "based on a calculation of its own liability that did assume annualization." 413 F.3d at 135-136. According to the court, the cedent "did calculate its ultimate obligation using annualization and the settlement roughly matched this figure...." *Id.* at 136.

Fourth, post-settlement allocation decisions are most likely to be upheld where they do not appear to be affected by the existence of reinsurance. *See, e.g., Gerling*, 419 F.3d at 192 (citing the absence of any evidence that cedent's allocation was "based solely, or at all, on reinsurance maximization" as a factor in rejecting the reinsurer's charge of a "bad-faith intent to maximize reinsurance recovery by allocating on a single-occurrence basis"); *Seven Provinces*, 9 F. Supp. 2d at 60 (holding that the allocation of settlement payments to the most important hazardous waste sites was reasonable and noting the absence of evidence that the cedent "allocated the settlement among policies so as to maximize its reinsurance recovery, or that its allocation was in any other way affected by the existence of reinsurance."); and *Hartford Accident & Indemnity Co. v. Columbia Cas. Co.*, 98 F. Supp. 2d 251, 259 (D. Conn. 2000) (citing an internal memo concerning settlement of the underlying coverage action which referenced its value in maximizing a reinsurance recovery in support of its ruling that there was a factual dispute with respect to whether the cedent's allocation of the entire settlement to a single environmental site in a multi-site case constituted gross negligence)

Fifth, another factor which bears upon whether a reinsurer's post-settlement allocations will be upheld is whether the cedent's determination is consistent with opinions of counsel. In *Commercial Union Ins. Co. v. Swiss Re*, 413 F.3d 121, 126-27 (1st Cir. 2005), the First Circuit cited the settlement analysis and recommendation by coverage counsel on the annualization of the per occurrence limits issue as a factor favoring the application of the follow the fortunes doctrine. According to the court, the opinion of counsel that "annualization was a likely outcome in the then-ongoing New York lawsuit between the parties" was binding upon the reinsurer under its follow the fortunes clause "so long as the settlement was reasonable and made in good faith." *Id.* at 127.

Sixth, as reflected in *Allstate*, inconsistencies between positions taken by the cedent in the underlying case (whether in the context of the litigation itself or during settlement negotiations) and the post-settlement allocation may be cited by the reinsurer in challenging the reasonableness and good faith of the allocation.

Seventh, as also reflected in the *Allstate* decision, a post-settlement allocation which is at variance with a judicial decision in the underlying coverage action is likely to be subject to attack and difficult to sustain.

Eighth, in the case of excess coverage following form to a primary policy, the insurer is more likely to succeed in arguing that the follow the fortunes doctrine should be applied where the allocation to the reinsurer is consistent with the decision by the primary insurer. In *Suter v. General Accident Insurance Co. of America*, 2004 WL 3751734 (D.N.J. 2004), for example, the court found questions of fact with respect to whether the follow the fortunes doctrine required the reinsurer to accept the cedent's application of a date of implant trigger of coverage to various types of heart valve claims made against the underlying insured (Pfizer). In ruling that the follow the fortunes doctrine did not apply as a matter of law, the court noted that the trigger of coverage theory applied by the cedent (an excess insurer) differed from the determinations by the primary insurer even though the excess insurer followed form to the primary insurer.

Ninth, given the disparity in the level of scrutiny the courts have permitted of the cedent's allocation decisions in applying the follow the fortunes doctrine, there is some uncertainty concerning how much (if any) discovery is permissible with respect to the cedent's conduct. If the follow the fortunes doctrine is applied in the

manner set forth in *North River* and Gerling, cedents may argue with some force that the doctrine precludes discovery regarding their settlement and post-settlement allocation decisions. *See, e.g., Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyds,* No. 11867695 (N.Y. Sup. Ct. N.Y. County May 27, 1997), cited in Barry R. Ostrager & Mary Kay Vyskocil, *Modern Reinsurance Law & Practice* § 15.02[b] (2d ed.), where the court granted partial summary judgment to the reinsurer and refused to allow "full blown review of the ceding company's settlement decision" since it would undermine the follow the fortunes doctrine; *Hartford Accident and Indem. Co. v. Argonaut Ins. Co.*, No. 06-1813, 2008 WL 2559440, at *1 (D. Conn. June 23, 2008) (where the magistrate relied upon *North River* and *Gerling* in rejecting the reinsurer's discovery requests seeking "all of the policies involved in the underlying insurance dispute" and documents showing which policies of the cedent were reinsured and the extent of that reinsurance on the ground that the follow the fortunes doctrine would be "undermined" if such discovery were granted); *American Re-Ins. Co. v. U.S. Fidelity & Guaranty Co.*, 837 N.Y.S.2d 616 (N.Y. App. Div. 2007) (allowing only limited production of documents regarding the presentation of the reinsurance claim); cp. American Re-Ins. Co. v. U.S. Fidelity & Guaranty Co., 796 N.Y.S.2d 89 (N.Y. App. Div. 2005) (allowing reinsurers to obtain documents relating to settlement negotiations in the underlying litigation where they claimed, "with support in the record," that exceptions to the follow the fortunes doctrine applied).

Tenth, there are some cases where the reinsurer's challenge to the cedent's post-settlement allocation is based simply upon an attempt to find any excuse for not honoring its obligations. Conversely, there are cases where the reinsured may invoke the "follow the settlements" doctrine simply to justify self-serving manipulations to maximize its reinsurance recovery. Where the unreasonable party remains committed to its position, the prospects for settlement may not present themselves. In cases, however, where the reinsurer has raised legitimate challenges to the reasonableness of the post-settlement allocation, serious attempts should be made to resolve the dispute through settlement or mediation. The First Circuit made this point succinctly at the conclusion of its decision in *American Employers*: "[c]omparing the modest stakes with the cost of modern litigation, the parties would be well advised to settle." 413 F.3d at 139.▼

i Any views expressed in this article are those of the author and do not necessarily reflect those of Zelle Hofmann Voelbel & Mason LLP or its clients. The author acknowledges with thanks the research assistance of Christine Phan, an associate at Zelle Hofmann, in connection with the preparation of this article.

ii Since this article deals principally with the applicability of the follow the fortunes doctrine to post-settlement decisions by the cedent, the narrow term "follow the settlements" should technically be used. However, this article will use the terms "follow the fortunes" and "follow the settlements" interchangeably.

iii Most of the U.S. cases discussing the applicability of the follow the fortunes doctrine involve reinsurance contracts which contain express follow the fortunes clauses, and reinsurance certificates typically include such clauses. *See North River. v. Cigna,* 52 F.3d at 1199. There is a disagreement among the courts as to whether the follow the fortunes doctrine should be read into reinsurance contracts even where it is not expressly stated. Some courts have held that such a clause is implied even where it is not included in the reinsurance certificate. *See, e.g., Employers' Ins. Co. v. Swiss Reins. Am. Corp.*, 275 F.Supp.23d 29, 35, n. 32 (D. Mass.2003) (stating that the follow the fortunes doctrine is an "industry custom" and applies even in the absence of express language to that effect) (vacated on other grounds); *Aetna Cas. and Sur. Co. v. Home Ins.*, 882 F. Supp. 1328, 1349 (S.D.N.Y. 1995) (same). Other courts have required the clause to be set forth explicitly in the reinsurance certificate. *See, e.g., Affiliated FM v. ERC*, 369 F. Supp.2d at 227 (stating, in dictum, that the court was "hesitant to read terms into a contract" given the divergent precedent on this issue); *Am. Re-Ins. Co. v. Am. Re-Ins. Co.*, 2006 WL 3412079, at *4-5 (N.D. Cal. Nov. 27, 2006) (stating that the "majority of courts addressing this issue, and the better reasoned opinions" have refused to read a follow the fortunes clause into policies which do not contain one); and Graydon S. Staring, Law of Reinsurance §18.8 at 28 (1993) (stating, "[w]ithout a follow the fortunes clause, the reinsurer will probably not be bound...by a settlement of a claim without consent.")

iv Under the "rising bathtub" allocation method, the asbestos payments were "allocated on the basis of horizontal exhaustion, which means losses are allocated to the lowest layer of coverage first and, like a bathtub, fill from the bottom layer up..." *North River*, 361 F.3d at 138, n.6.

Third, while there are judicial decisions which give the reinsured broad discretion in its post-settlement allocations based on the follow the settlements doctrine, the requirement that the allocation be reasonable and in good faith does provide the reinsurer with a foundation for challenging the allocation.

ARIAS U.S.

FALL SEMINAR

November 11, 2009

NEW YORK HILTON

The Arbitration Hearing and Award

Join us on **November 11** (*the day before the ARIAS Fall Conference*) for a half-day seminar on "**The Arbitration Hearing and Award**" in the third installment of the ARIAS Arbitrator Continuing Education Series. Learn while watching a mock hearing, complete with witnesses, a live arbitration panel and counsel for cedent and reinsurer.

The program will include hearing issues such as the power to compel the appearance of witnesses, conduct of counsel and witnesses at a hearing, the presentation of evidence and evidentiary issues. In addition, watch as the panel deliberates various issues raised during the hearing, such as summary judgment motions, whether to sanction counsel, the award of arbitration costs and more. Also watch how the panel reaches its award.

Once the panel issues its award, you will have the chance to watch and learn as counsel requests reconsideration of all or a part of the award from the panel.

PLAN NOW TO ATTEND THIS IMPORTANT HALF-DAY PROGRAM!

Confirmed faculty includes the following members:

- **Bill Maher**, Wollmuth Maher & Deutsch LLP (counsel)
- **Tim Stalker**, Nelson Levine De Luca & Horst LLP (counsel)
- **Debra Roberts**, Debra Roberts & Associates, Inc. (arbitrator)
- **Claudia Morehead**, The Morehead Firm (arbitrator)
- **Susan Claflin**, Direct Response Corp., (arbitrator)
- **Mark Wigmore**, Avalon Consulting, LLC (narrator)

LOCATION:

Hilton New York, Mercury Ballroom, 3rd Floor.

Lunch: 12:00 P.M.

Meeting: 1:00 – 5:00 P.M.

ONLINE REGISTRATION:

Beginning at 11:00 a.m., EDT on Wednesday, October 7 – www.arias-us.com.

Fee: $361 for lunch and training session.

$350, if paid by check sent to ARIAS address…email claudio@cinn.com to hold place.

Limitations: Probably no space limitations. **All registrants must be ARIAS•U.S. members**.

news and notices

Kenneth Feinberg to Give Keynote at ARIAS•U.S. Fall Conference

ARIAS•U.S. announced in July that **Kenneth R. Feinberg** will provide the keynote address at the ARIAS•U.S. 2009 Fall Conference on November 12-13 at the Hilton New York Hotel. In June of this year, President Obama appointed Mr. Feinberg to determine executive compensation at companies receiving federal assistance. As "Compensation Czar," Mr. Feinberg will determine compensation for key executives at AIG, Citibank, Chrysler, Chrysler Credit, General Motors, GMAC and Bank of America.

Mr. Feinberg, a Washington, D.C. attorney and founding partner of Feinberg Rosen, LLP, has handled some of the highest profile assignments in mediation and dispute resolution, including service as Special Master in Agent Orange, asbestos personal injury, Dalkon shield and DES cases. Mr. Feinberg has also served as Fund Administrator for numerous claimant funds, including Distribution Agent for AIG Fair Fund claimants.

Mr. Feinberg is also an adjunct professor of law at Georgetown University Law Center and Columbia University Law School.

Mr. Feinberg received widespread acclaim for his pro bono service as Special Master of the Federal September 11th Victim Compensation Fund of 2001. Involved in the development and administration of the fund, and personally responsible for reviewing hundreds of claims, Mr. Feinberg later shared his extraordinary experiences in the 2005 book *What is Life Worth*?.

As an experienced arbitrator, Mr. Feinberg served on panels that determined the fair market value of the Zapruder film of the Kennedy assassination and the allocation of legal fees in the Holocaust slave labor litigation. Mr. Feinberg has also tackled the tough questions regarding the arbitration process itself, recently designing, implementing and administering an ADR settlement program involving Liberty Mutual Insurance Company, Zurich N.A. Insurance Company and Hurricane Katrina and other Gulf hurricane claimants.

ARIAS•U.S. is honored to present the keynote address as part of the 2009 Fall Conference, themed *Stimulating Debate: Tough Talk and Tough Economic Times*, which will take place on November 12-13 at the Hilton New York. Complete details are on the ARIAS•U.S. website. The registration final deadline is October 30.▼

Spring 2010 Intensive Workshop and Seminar Will be Combined with Spring Conference

During the first week of May 2010, ARIAS•U.S. will present a three-part spring-training event in California. Anyone who needs an intensive workshop or educational seminar for certification or renewal has the chance to put in a little extra time at the 2010 Spring Conference and take care of two, or even three, requirements with only one trip.

Details about the agendas and registrations will be announced as the events approach. However, the basic scheduling has been set. The intensive workshop will take place starting at 2:00 p.m. PDT on Tuesday and concluding at 12:30 on Wednesday, just in time for the opening of the Spring Conference. There will be the usual reception and dinner on Tuesday evening. The half-day educational seminar will begin just after the adjournment of the Spring Conference with lunch at 12:30 p.m. The seminar sessions will begin at 1:15 and conclude by 5:30.

All three events will take place at the historic Hotel del Coronado, just over the bridge from San Diego International Airport.

Remember that the full-day intensive workshop with participatory mock arbitrations is a very different type of training from a half-day educational seminar. They apply toward certification in different ways, so please be aware of what you may require. The terminology used in the certification requirements and procedures (ARIAS website) is consistent in referring to each, so be sure you are planning for the correct event. Contact Bill Yankus if you need any clarification.▼

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Mr. Feinberg received widespread acclaim for his pro bono service as Special Master of the Federal September 11th Victim Compensation Fund of 2001.

news and notices

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Old Search System Has Been Terminated

Now that the new profiles have reached a critical mass (66%) and the Advanced Arbitrator Search that searches them has become fully functional, the old search system has been retired.

The old profiles are still accessible one at a time, but they will not be in the results pages of any searches. They are marked by an asterisk on the arbitrator list. All names without an asterisk are linked to the new profiles and are in the database for the Advanced Search.

All certified arbitrators who have not yet completed their new profiles using the arbitrator data entry system are urged to construct their profiles now, so that they will be included in future searches. Instructions for entering data can be obtained by request to Christina Claudio at **claudio@cinn.com**.▼

Certification Deadline Delayed

The ARIAS•U.S. Board of Directors announced on June 17 that it is delaying the deadline for currently certified arbitrators to meet the new certification requirements. Originally, anyone certified as of December 31, 2008 under the previous requirements had until the end of 2009 to meet the new requirements. Now, current certifications will remain in effect until June 15, 2010 and arbitrators must submit applications by June 1, 2010.

Scheduling conflicts had made it difficult for some members to attend workshops or educational seminars they need to meet the new requirements in advance of the year-end deadline. Therefore, the Board felt it appropriate to extend the deadline until after the Spring Conference, intensive workshop, and educational seminar, which will be conducted together in California.

Also umpires, who must meet the new arbitrator requirements to be approved as Certified Umpires, now have until June 30, 2010, when the previous umpire list will be replaced by the new Certified Umpire list as the database for the Umpire Selection Procedure. Applications would have to be submitted by June 1 to be considered at the June 10 Board Meeting.

Specific details of the changes are now available on the website in the **Arbitrator and Umpire Certification Procedures** section.▼

Board Certifies Nine Previous Arbitrators under New Requirements

At its meeting on June 12, the ARIAS•U.S. Board of Directors approved certification of the following members under the new arbitrator certification requirements:

- **Wendell Oliver Ingraham**
- **Sylvia Kaminsky**
- **Denis Loring**
- **Barbara Niehus**
- **Constance O'Mara**
- **Peter A. Scarpato**
- **Savannah Sellman**
- **Elizabeth M. Thompson**
- **Andrew S. Walsh**

All had been previously certified.▼

Eight ARIAS•U.S. Umpires Are Certified

In addition at the June 12 meeting, the Board approved certification of eight more umpires.

The following arbitrators are now ARIAS•U.S. Certified Umpires:

- **Bruce Carlson**
- **Sylvia Kaminsky**
- **Wendell Oliver Ingraham**
- **Peter A. Scarpato**
- **Elizabeth M. Thompson**
- **Andrew S. Walsh**
- **W. Mark Wigmore**
- **Ronald L. Wobbeking**

The complete list of Certified Umpires can be found on the website.▼

Board Approves Jason Katz as Mediator

At its meeting on June 12, the Board of Directors also approved **Jason L. Katz** as an ARIAS•U.S. Qualified Mediator.

The Qualified Mediator Program was established in 2006 to provide a means for ARIAS•U.S. Certified Arbitrators with mediation training to be easily contacted for service in mediation of disputes. The Qualified Mediator Program section of this website includes a full explanation of how recognition may be obtained, along with links to the contact information of those who have been approved.▼

feature

Obtaining Non-Party Discovery Pre-Hearing: The 2nd Circuit Closes the Door, But Opens a Window

This article is based upon a paper presented at the ARIAS•U.S. 2009 Spring Conference.

Rick Rosenblum
Adam H. Offenhartz

Arbitration has been described by some as "litigation lite." While both arbitration and litigation strive to dispense justice through the application of procedures intended to ensure due process, arbitration scales back on many hallmark litigation procedures, ostensibly to achieve the salutary purpose of a more efficient, cost-effective resolution of civil disputes. But, how much scaling back of traditional litigation protections and procedures can occur in arbitration without compromising the fair dispensation of justice? This is a core question courts frequently confront when deciding the contours of the powers and rights created by the Federal Arbitration Act ("FAA").

Over the 84-years of the FAA's existence, the numbers and complexity of arbitrations have increased by orders of magnitude. Even as the arbitration process has evolved over those decades, though, discovery in arbitrations has remained relatively circumscribed, in part because arbitrations are defined by efficiency – but also in part because both arbitrators and courts have struggled to find agreement as to the scope and reach of the power of an arbitrator under the FAA. The latest disagreement about the proper scope of an arbitrator's power to compel the search for relevant information involves the question of whether a party participating in an arbitration can be compelled to produce documents without appearing to testify before the arbitrators at a hearing. The starting place to find an answer to this question is the FAA itself.

The first chapter of the FAA says next to nothing about pre-hearing discovery in arbitrations under the Act. Section 7 of the FAA is the sole exception, authorizing arbitrators to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case." See 9 U.S.C. § 7. This statutory language, however, has not proven to offer a clear answer to the debate over compelling third-party discovery. In the most recent appellate court decision addressing this issue, the United States Court of Appeals for the Second Circuit in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-17 (2d Cir. 2008), embraced the Third Circuit's interpretation, holding that section 7 does not confer pre-hearing document discovery powers over non-parties (with an important caveat, discussed below). Yet, in other circuits, such as the Eighth Circuit and, on a showing of "special need," the Fourth Circuit, and perhaps the Sixth, Seventh, and Eleventh Circuits, the ability to obtain pre-hearing discovery from third-parties remains.

In short, the split among the circuits has created something of an obstacle course for practitioners – it would appear that pre-hearing discovery from non-parties is no longer available in some jurisdictions, and available in others, but even then, subject to varying procedural requirements and standards. Below, we first address the conflicting positions of the various circuits and then discuss the opening that the Second and Third Circuits have left that enables limited pre-hearing discovery to continue in those jurisdictions. Finally, we suggest some alternative strategies for obtaining pre-hearing discovery and discuss related issues.

Five Circuit Courts, Three Holdings

A. The Second and Third Circuits: Shutting The Door(?)

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Rick Rosenblum

Adamn H. Offenhartz

But, how much scaling back of traditional litigation protections and procedures can occur in arbitration without compromising the fair dispensation of justice?

Rick Rosenblum is a partner at Akin Gump Strauss Hauer & Feld LLP. He represents insurers and reinsurers in litigation, arbitration, and insolvency matters in the U.S. and internationally. Adam Offenhartz is a litigation partner in the New York office of Gibson, Dunn & Crutcher LLP. He focuses on insurance and reinsurance disputes, as well as commercial litigation.

The Second Circuit rejected the argument that the subpoena should be enforced because Peachtree was "intimately related" to one of the arbitral parties and the requested documents were "essential" to the arbitration, because section 7 "contains no discovery exception for closely related entities."

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1. The Second Circuit – *Life* Receivables

The question before the Second Circuit in *Life Receivables* was whether section 7 of the FAA authorizes arbitrators to compel pre-hearing document discovery from non-parties to an arbitration proceeding. 549 F.3d at 212. The Second Circuit held that the answer is no, observing that section 7's language is "straightforward and unambiguous," and that it does not authorize arbitrators to compel pre-hearing document discovery from non-parties to an arbitration. *Id*. at 216-17.

In *Life Receivables*, an arbitration panel subpoenaed non-party Peachtree Life Settlements to produce documents relevant to the arbitration. *Id*. at 213-14. Peachtree moved to quash the subpoena in federal court. *Id*. at 214. A party to the arbitration cross-moved to compel compliance with the subpoena. Id. The District Court granted the motion to compel on the basis that Peachtree, although not a party to arbitration, was a signatory to the underlying arbitration agreement. *Id*. Peachtree complied with the subpoena and appealed. *Id*. at 214.[1]

The Second Circuit reversed the District Court's decision, holding that section 7's non-party subpoena power is limited to requiring a non-party to appear physically and produce documents at the time of appearance. *Id*. at 217 ("The limitation in the statute is expressed in terms of the method and timing of the subpoena. The documents must be produced by a witness at a *hearing* before the arbitrators." (emphasis added)).[2] The Second Circuit observed that a narrow scope for an arbitrator's subpoena power makes sense when placed alongside the original version of F.R.C.P. 45's subpoena power. *Id*. at 215-16. Prior to 1991, Federal Rule 45 did not allow courts to issue subpoenas requiring pre-hearing document production by non-parties to the litigation. *Id*.

The Second Circuit rejected the argument that the subpoena should be enforced because Peachtree was "intimately related" to one of the arbitral parties and the requested documents were "essential" to the arbitration, because section 7 "contains no discovery exception for closely related entities." *Life Receivables*, 549 F.3d at 217. The Court also rejected the argument that section 7 authorizes subpoenaing documents from entities that, like Peachtree, are parties to the underlying arbitration agreement but not the arbitration proceeding itself, reiterating that section 7 makes no distinction between parties and non-parties to an arbitration proceeding. *Id*. ("Although section 7 does not distinguish between parties and non-parties to the actual arbitration proceeding, an arbitrator's power over parties stems from the arbitration agreement, not section 7. . . . Arbitrators have no such power to compel discovery from third-parties—even those (like Peachtree) that signed the underlying arbitration agreements.").

2. The Third Circuit – *Hay v. E.B.S.*

The Second Circuit essentially adopted the Third Circuit's reasoning in *Hay Group v. E.B.S. Acquisition Corporation*, 360 F.3d 404, 407 (3d Cir. 2004) (Alito, J.), and referred to the Third Circuit's decision in *Hay* as the "emerging rule." *Life Receivables*, 549 F.3d at 216. In a decision authored by Justice Alito while still on the Third Circuit, that Court held in *Hay* that "[t]he only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party 'to attend before them or any of them as a witness and in a proper case to *bring with him or them* any book, record, document or paper which may be deemed material as evidence in the case.'" *Hay*, 360 F.3d at 407 (quoting 9 U.S.C. § 7) (emphasis in original). Arbitrators have power to compel production of documents only when the non-party "accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier." *Id*.

Hay Group, a management consulting firm, commenced arbitration against a former employee, alleging that he had breached the non-solicitation clause in his separation agreement. *See Hay*, 360 F.3d at 405. In an attempt to obtain information for the arbitration, Hay served subpoenas for documents on PriceWaterhouseCoopers ("PwC") and E.B.S. Acquisition Corporation. *Id*. Hay sought to have the documents produced prior to the panel's arbitration hearing. *Id*. PwC and E.B.S. objected to these subpoenas, but the arbitration panel disagreed. *Id*. When PwC and E.B.S. still refused to comply with the subpoenas, Hay asked the United States District Court for the Eastern District of Pennsylvania to enforce the subpoenas. *Id*.

The District Court compelled compliance with the subpoenas and held that it had the power to enforce subpoenas on non-parties for document production even if the documents were located outside the territory within which the court's subpoenas could be served. *Id*. at 406-07. The Third Circuit disagreed, holding that, "[i]f Hay wants to access the documents, the panel must subpoena PwC and E.B.S. to appear before it and bring the documents with them." *Id*. at 411. The Court added that, so long as the witness is within the territorial jurisdiction of the district court, the witness could be ordered to bring with them documents from outside the jurisdiction. *Id*. at 412-413.

3. An Important Caveat — A Small Opening

In a concurrence that has proven as influential as Justice Alito's majority opinion in *Hay*, Judge Chertoff wrote separately to observe that "our opinion does not leave arbitrators powerless to require advance production of documents when necessary to allow fair and efficient proceedings." *Id*. at 413. Judge Chertoff proposed a procedural work-around to avoid the harshness of the majority's ruling: "Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA." Id. at 413 (internal citation omitted). The Second Circuit adopted both the majority's textualist interpretation of section 7, and Judge Chertoff's ameliorative work-around. This work-around is discussed more fully below.

B. The Fourth Circuit: Guarding The Threshold

The Fourth Circuit has similarly held that arbitrators are not authorized by the FAA to subpoena non-parties as part of pre-hearing discovery – but with an important carve-out: an exception to the rule when there is a "special need or hardship." *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269, 276 (4th Cir. 1999). The Fourth Circuit observed that in a "complex case such as this one, the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing." *Id*. To prevent this, the Court held that, if a party seeking enforcement of a subpoena for pre-hearing discovery from a non-party can show a special need, or that denying discovery will cause hardship, the district court can order enforcement. *Id*. at 278. The Court declined to further define the contours of what would constitute a "special need or hardship" – but did note that, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." *Id*. at 276.

Under an agreement with the National Science Foundation (NSF), the government agency responsible for federally funded basic science and engineering research, Associated Universities, Inc. administered a network of research telescopes. *Id*. at 271. In 1990, Associated contracted with COMSAT Corp. to build a state-of-the-art radio telescope in West Virginia. *Id*. at 272. COMSAT claimed that late-breaking modifications to the telescope's specifications entitled it to $29 million in additional payments. *Id*. at 272. Pursuant to a provision in the contract, the parties submitted the dispute to arbitration. *Id*. At COMSAT's request, the arbitrator issued a subpoena requiring NSF to produce all documents in its possession relating to the telescope project. *Id*. NSF refused. *Id*. COMSAT persuaded the district court for the Eastern District of Virginia to compel compliance. *Id*. at 273-74.

The Fourth Circuit disagreed, holding that "[n]owhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery." *Id*. at 275. The Fourth Circuit held that section 7 confers "simply the power to compel non-parties to appear before the arbitration tribunal." *Id*. at 276. As noted above, the Fourth Circuit did, however, accept COMSAT's argument that there should be an exception where "a special need" for non-party discovery presents itself – but did not elaborate, as COMSAT had obtained extensive documentation through Freedom of Information Act requests. *Id*.

Courts have been reluctant to employ the "special need" escape hatch since *COMSAT* – the Fourth Circuit has done so only where evidence would become unavailable in the near future – such as the condition of a ship that is about to leave United States waters. *See Application of Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 481 (4th Cir. 1999). However, cases interpreting Federal Rule of Civil Procedure 27, which permits courts to perpetuate testimony in anticipation of arbitration in exceptional circumstances, can serve as an interpretive guide. Consistent with the Fourth Circuit, other courts have applied this doctrine only in situations "where a party's ability to properly present its case to the arbitrators will be irreparably harmed absent court ordered discovery." *Oriental Commercial & Shipping Co., Ltd. v. Rosseel, N.V.*, 125 F.R.D. 398, 401 (S.D.N.Y. 1989) (denying discovery as a finding of fraud does not, without more, constitute an "extraordinary circumstance"); *see also Ferro Union Corp. v. S. S. Ionic Coast*, 43 F.R.D. 11, 13-14 (S.D. Tex. 1967) (granting a petition to perpetuate evidence pending arbitration because a "special need for information" existed where a maritime vessel carrying crew members who possessed particular knowledge of a dispute was about to leave port).

C. The Eighth Circuit: The Open Door Policy

The Eighth Circuit has taken the opposite tack and held that section 7 authorizes issuance of a subpoena to compel documents from a non-party pre-hearing and without appearance by the non-party subpoenaed. *See In re Security Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000). The Court noted that, "[a]lthough the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this

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interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing," and therefore held, "that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." *Id*.

Security Life Insurance Co., a health insurer, entered into a reinsurance contract with a group of insurers, including Transamerica Occidental Life Insurance Co. *Id*. at 867. The reinsurance contract was managed by a third-party, Duncanson & Holt. *Id*. When Security was assessed a $14 million judgment, the reinsurers refused to acknowledge liability for their share of the judgment and related obligations. *Id*. Pursuant to an arbitration clause in the contract, Security demanded arbitration against Duncanson & Holt. *Id*. at 868-69. Security petitioned the arbitration panel for a subpoena duces tecum to require Transamerica to produce documents and provide testimony from one of its employees. *Id*. at 868. The arbitration panel issued the requested subpoena. *Id*. Transamerica refused to respond, arguing it was not a party to the arbitration and the panel therefore had no authority to subject it to the subpoena. *Id*. The District Court granted Security's motion to compel Transamerica's compliance. *Id*. at 869.

The Eighth Circuit affirmed and crafted an even more robust interpretation of section 7 than the District Court had by rejecting the contention that the district court was required to independently assess the materiality of the information sought before compelling compliance with the subpoena. *Id*. at 871. Transamerica had argued that this requirement derives directly from the language of section 7, which authorizes district courts to compel compliance with a subpoena "in a proper case." See 9 U.S.C. § 7. The Eighth Circuit disagreed, holding that this language "refers only to a panel's power to require a witness subpoenaed under section 7 to bring along documents." *In re Security Life*, 228 F.3d at 871 ("Transamerica's attempt to transform this language into a requirement that the district court second-guess the panel's judgment is thus misleading at best."). The Eight Circuit reasoned that "saddl[ing] the courts of this circuit with such a burden" would be "antithetical to the well-recognized federal policy favoring arbitration, and compromises the panel's presumed expertise in the matter at hand." *Id*.

* * *

In addition to the Eighth Circuit, the Sixth Circuit has authorized a subpoena to a non-party for pre-hearing documents. *See Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV* (*New World Commc'ns of Detroit, Inc.*), 164 F.3d 1004, 1009 (6th Cir. 1999). However, the Sixth Circuit only suggested that it might agree that the FAA implicitly permits the subpoena, choosing instead to base its holding on the Labor Management Relations Act of 1947. Id. at 1009 (citing 29 U.S.C. § 185); *see also Meadows Indem. Co., Ltd. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D.Tenn. 1994) ("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing."). One district court in the Seventh Circuit has also held that an arbitrator could subpoena a third-party to produce documents and, more surprisingly, to testify at a deposition. *See Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995). However, the Seventh Circuit itself has yet to reach the question. Although the Eleventh Circuit has also not reached the issue, another expansive reading of section 7 comes from the Federal District Court for the Southern District of Florida, which held that an order from an arbitrator directing the production of documents before the hearing was permissible and that the FAA gives arbitrators broad power to order and conduct such discovery as they find necessary. *See Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988).

In short, the split among the circuits has created a complicated landscape for practitioners – where pre-hearing discovery from non-parties remains available, but subject to varying procedural requirements and standards.

Strategies For Obtaining Non-Party Discovery: Climb In A Window (Or Break Down The Door)

On the surface, *Life Receivables Trust*, 549 F.3d 210, is just the latest appeals court decision holding that the FAA does not generally authorize pre-hearing document discovery from non-parties to an arbitration proceeding. *See also Hay Group*, 360 F.3d 404; *COMSAT Corp.*, 190 F.3d 269. On the other hand, the Eighth Circuit appears to stand alone in permitting more or less unfettered pre-hearing document discovery in arbitration matters. *See In re Security Life*, 228 F.3d at 870-71.

However, the reality is somewhat different: Each Circuit that has adopted a narrow reading of section 7 has also carefully crafted corridors to allow discovery of non-party information prior to the principal hearing. Indeed, the courts appear united in their concern that the complete absence of pre-hearing discovery could "degrade" the arbitration process or render it less efficient, in spite of the competing principle that limited discovery and arbitration go hand-in-hand. *See, e.g., COMSAT*, 190 F.3d at 276 ("[T]he much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing.").

A. Climbing Through The Window: The Pre-Hearing Hearing in the Second and Third Circuits

The Second and Third Circuits explicitly left a way around section 7's perceived lack of textual authorization for pre-hearing document discovery from non-parties. A party that seeks discovery can request the arbitration panel or an individual arbitrator to order a non-party to appear as a witness before the panel or panel member and to produce specific documents. Section 7 authorizes arbitrators to order "any person" to appear as a witness and, at the time of appearance, to produce "any book, record, document, or paper" deemed material evidence.

1. The *Hay, Stolt, Life Receivables* Trilogy

As discussed above, the Third Circuit's *Hay* decision began the relatively recent push toward a textualist interpretation of section 7 that both respects the "straightforward" language of the statute and gives arbitrators broad flexibility with regard to pre-hearing discovery. 360 F.3d at 407-08. The Third Circuit held that "[s]ection 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time," and noted that "[t]he requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties." *Id*. at 407, 409 ("This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed.").

The majority left it to Judge Chertoff, in his concurrence, to play out the necessary implication of the majority's reasoning and to point out the procedural work-around that appears to substantially ameliorate the harshness of the majority's interpretation. Judge Chertoff noted that, "[u]nder section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings," and that "[t]his gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA." *Id*. at 413. Judge Chertoff also echoed the efficiency rationale propounded by the majority, noting that "some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. . . . is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed." *Id*.

The next year, the Second Circuit provided a guide on how such a pre-hearing hearing might proceed in *Stolt-Nielsen, SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005). In *Stolt*, a shipping company that was not party to an arbitration involving alleged price-fixing and bid-rigging in shipping of bulk liquid chemicals sought to quash an arbitral subpoena directed at the shipper's former executive, former counsel, and records custodian. *Id*. at 569-70. The Second Circuit, citing *Hay*, affirmed the District Court's denial of the motions to quash, stating: "[T]he subpoenas in question did not compel pre-hearing depositions or document discovery from non-parties. Instead, the subpoenas compelled non-parties to appear and provide testimony and documents to the arbitration panel itself at a hearing held in connection with the arbitrators' consideration of the dispute before them. The plain language of [s]ection 7 authorizes arbitrators to issue subpoenas in such circumstances." *Id*. at 569. Because the party that sought discovery did issue non-party document subpoenas as such, but had requested a pre-hearing hearing, per Judge Chertoff's suggestion, the Stolt Court did not hold that pure non-party document subpoenas were forbidden under section 7 – although the message was clear enough. *Id*. at 569.

The *Stolt* Court did hold that there could be no objection to non-party discovery where the requirements of section 7, that the witness is "summon[ed] in writing . . . to attend before [the arbitrators] or any of them as a witness and . . . to bring with him . . . [documents] which may be deemed material as evidence in the case," are met. *Id*. at 577-78. The Stolt Court laid out three factors that, although not strictly required, were suggestive that the pre-hearing hearings in question were within the arbitrator's authority. *Id*. at 578. First, the arbitrator did not order a deposition, which typically takes place without the presence of the adjudicator – rather, all three arbitrators were present. *Id*. Second, the former counsel gave substantive testimony before the arbitrators, who ruled on several evidentiary issues on the spot. Id. Third, the testimony given became part of the arbitral record. *Id*. Finally, the Stolt Court echoed the policy rationale given by the Hay Court, noting that "the present case demonstrates the usefulness of employing subpoenas at a preliminary hearing before the arbitration panel," and that arbitrators will not "subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable." *Id*. at 580.

The *Life Receivables* Court made express the implied holding of *Stolt*, formally "join[ing] the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings" and reaffirming the pre-hearing hearing work-around set out in *Hay* and *Stolt*. 549 F.3d at 216-17. The Life *Receivables Court* noted *Stolt's* reasoning that "arbitral section 7 authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters," and approved Judge Chertoff's suggestions that "the inconvenience of making a personal appearance may cause the testifying witness to 'deliver the documents and waive presence,'" and that arbitrators also "have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings." *Id*. at 218 (quoting *Hay*, 360 F.3d at 413).

* * *

This pre-hearing hearing solution has not met with universal approval. Despite the Second Circuit's claim that the Third Circuit's *Hay* decision represents the emerging trend, Professor Siegel observed of the Second Circuit's proposed safety valve: "Extorting a circuitous gambol like that suggests in any event that maybe the federal cases on the other side of the conflict have the better of the argument." 204 Siegel's Prac. Rev. 2 (2008).[3]

This "circuitous gambol" will also likely be unwelcome or unnecessary in the

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Fourth and Eighth Circuits, respectively. The Fourth Circuit has enunciated a requirement that the party seeking pre-hearing document discovery from a non-party must state a "special need or hardship" – regardless of the procedural gymnastics. As noted above, this language will likely be interpreted narrowly. By contrast, the Eighth Circuit's broad conception of section 7 renders the procedural work-around simply unneeded.

Hay, *Stolt*, and *Life Receivables* present a rough outline of how to go about obtaining pre-merits hearing document discovery from non-parties, while navigating the Second and Third Circuit's narrow interpretations of section 7. However, there are still several issues that practitioners and arbitrators should be aware of under this new regime.

2. Depositions (Or The Lack Thereof)

As the *Stolt* Court made clear, the pre-hearing hearing will not be (and is not intended to be) a deposition by another name. Indeed, the *Life Receivables* Court specifically approved the *Stolt* Court's "careful[] distinguish[ing] of hearing testimony from depositions, observing that the hearing in question was before all three arbitrators, who ruled on evidentiary issues, and became a part of the arbitration record." 549 F.3d at 218 (citing *Stolt*, 430 F.3d at 578). Taking a deposition is a far different proposition than eliciting testimony for the first time in front of the adjudicator. As was the case in *Stolt*, the arbitrators may issue rulings on the spot and any testimony will become part of the record.

As noted above, the Second Circuit sent a strong signal that this procedural work-around should not be construed to open the door to depositions, noting that the *Stolt-Nielsen* case, although permitting great flexibility, drew a sharp line with depositions on the prohibited side. *Stolt*, 430 F.3d at 578. Similarly, the Fourth Circuit in *COMSAT* found no authority under the FAA for compelling a non-party to appear for a deposition – but did not draw a distinction between depositions and document discovery. 190 F.3d at 275 ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery."). Even pre-*Life Receivables* decisions from district courts within the Second Circuit that permitted pre-hearing document discovery from non-parties balked at the prospect of compelling depositions.[4] In other words, the availability of traditional third-party depositions in the arbitration context remains highly unlikely in the Second, Third, and Fourth Circuits, and problematic elsewhere.[5]

The *Stolt* case also provides a useful roadmap for making good use of the pre-hearing hearing. A party to an arbitration may have the panel issue a subpoena to the records custodian of a non-party, elicit testimony relating only to the authenticity of the documents before one or more of the arbitrators, then adjourn the hearing. The parties can then review the documents before eliciting any substantive testimony.

It is also not yet clear, however, what it means for the arbitrators to be "present." The Third Circuit held that a non-party witness must appear in the "physical presence of the arbitrator to hand over the documents at that time." *Hay*, 360 F.3d at 407. Yet, section 7 states only that a non-party witness must be summoned by the arbitrators "to attend before them" and is silent as to whether a physical presence requirement exists. Indeed, virtually every arbitration code provides for telephonic hearings. It is worth noting that the Second and Third Circuits premised their decisions in part on their belief that requiring the attendance of arbitrators for pre-hearing hearings would deter broad document discovery – a rationale that would likely be undermined by permitting telephonic hearings.

3. Geographic Restrictions (Or the Lack Thereof)

Practitioners and arbitrators should be aware of an additional important issue concerning the pre-hearing hearing: whether an arbitral subpoena, under the various approaches taken by the circuit courts, will be enforceable against a party more than 100 miles from the arbitration hearing. Perhaps not surprisingly, courts have taken differing positions on the territorial extent of a district court's authority to enforce a subpoena issued by an arbitrator.

Section 7 states that the U.S. district court in the district where the arbitrators (or a majority of them) "are sitting" may compel the attendance of a witness or punish non-

compliance with an arbitrator-issued summons "in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." F.R.C.P. 45(a)(2) covers subpoenas "for attendance at a hearing or trial" – including that such subpoenas must issue "from the court for the district where the hearing or trial is to be held." Rule 45(b)(2) geographically limits where a subpoena may be served to any place within the district where the court issuing the subpoena is located or any place within 100 miles of the site of the hearing.

The courts have split on the question of whether this geographical limit applies to the authority of a district court to enforce a subpoena issued by an arbitration panel in that district to compel attendance at a hearing – including, presumably, a pre-hearing hearing. The Second Circuit has held that the 100 mile restriction does apply, as the arbitrator is seeking to compel a non-party to attend a hearing and therefore taking an action analogous to compelling a non-party witness to appear for trial. *See Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89, 95 (2d Cir. 2006) ("Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention.") (quoting *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 106 (1987)). The Third Circuit did not have the opportunity to consider the 100 mile limit, but did add that, if the witness is within the court's jurisdiction, the witness may be compelled to produce documents located outside the 100 mile limit. *Hay*, 360 F.3d at 412 (holding that Rule 45 "makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the District or within the territory within which the subpoena can be served"). The Eighth Circuit, in *In re Security Life Insurance Co.*, avoided the question by simply holding that pre-hearing document discovery from non-parties was permitted under section 7, and that such document subpoenas had no territorial limitations. 228 F.3d at 871-72.

Two district courts have disagreed with the Second Circuit and crafted an awkward compromise: using deposition subpoenas – a device that now appears foreclosed in the Second and Third Circuits – to circumvent this problem. *See Amgen Inc.*, 879 F.Supp. at 882-83; *see also Fazio v. Lehman Bros., Inc.*, 2004 WL 5613816, *3 (N.D. Ohio 2004) ("[T]he FAA and Rules 45 and 81 permit the Plaintiffs to issue deposition subpoenas in the manner prescribed by Rule 45(a)(3), and use the depositions as an alternative to live testimony under Rule 32(a)(3)(B).") (citing *Amgen*, 879 F. Supp. 878). The *Amgen* Court enforced a subpoena against a distant non-party by permitting an attorney for one of the parties to the arbitration to issue a subpoena that would be enforced by the district court in the district where the non-party resided. *See Amgen Inc.*, 879 F.Supp. at 882-83. However, the Second Circuit rejected this approach, sating that "[w]e see no textual basis in the FAA for the Amgen compromise." *Dynegy Midstream*, 451 F.3d at 96. Section 7 confers authority to conduct discovery only on the arbitrators (indeed, all discovery in arbitration is technically conducted by the arbitrators, not the parties). Because "§ 7 explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents or witnesses." *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 187 (2d Cir. 1999); *see also* Beth H. Friedman, *The Preclusive Effect of Arbitral Determinations in Subsequent Federal Securities Litigation*, 55 Fordham L. Rev. 655, 672 & n. 126 (1987) ("While an arbitration panel has the power to subpoena documents or witnesses, the parties to the arbitration lack the advantage of discovery."). The Eight Circuit, in *In re Security Life Insurance Co.*, discussed the *Amgen* compromise, but took no position as the Court was only faced with document subpoenas. 228 F.3d at 871-72.

The *Amgen* Court noted that strictly enforcing the 100 mile limitations creates an odd "gap in the law." *Amgen*, 879 F.Supp. at 882. The notion that the interaction of the FAA and the F.R.C.P. 45 can lead to unenforceable subpoenas for geographical reasons can be particularly troubling to practitioners who are accustomed to issuing subpoenas in federal cases. However, there may be yet another work-around that is more faithful to the statutory text than the compromise crafted by the *Amgen* Court. Section 7 requires that a petition to compel compliance with a subpoena must be made in the district where the majority of arbitrators "are sitting" – not in the district embracing the arbitral locale, or any other fixed point. By addressing this issue within the text of the arbitration provision itself or by subsequent agreement, the parties may be able to craft a sensible procedure by agreement that authorizes the arbitrators to travel and convene pre-hearings in various locations. There is no language in the FAA that prohibits the district court sitting in whatever district the arbitrators happen to be sitting at that time to compel compliance with an arbitral subpoena. *See* Thomas Oehmke, Commerical Arbitration, § 13:2 ("Nothing in the FAA requires that an action to stay arbitration only be brought in the district designated by the contract as the arbitration locale."). Although this may seem like a "circuitous gambol" as well – the Second and Third Circuits have certainly signaled in *Life Receivable* and *Hay* an openness to procedural work-arounds of section 7 that are fundamentally rooted in the statutory text. *But see Dynegy Midstream*, 451 F.3d at 96 ("[W]e see no reason to come up with an alternate method to close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law."). Clever practitioners may well find other means to use the courts' subpoena power or the state courts' ability to issue commissions for out of state depositions to skirt the 100 mile restrictions.[6]

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However, in the absence of this or another procedural work-around, the pre-hearing hearing solution proposed by the Second Circuit is good only up to 100 miles – while no such restrictions yet exist in the Eighth Circuit.[7]

B. Breaking Down the Door: Joining a Non-Party in the Arbitration

It is far from simple to compel a non-party to produce documents under the Second and Third Circuits' new regime. However, given those Circuits' apparent willingness to allow creative paths around the statutory restrictions, it is worthwhile to consider another option explicitly referenced by the Courts – joinder.

It is black letter law that federal policy favors arbitration, and any doubts regarding arbitrability should be resolved in favor of arbitration. *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983). However, "no matter how strong the federal policy favors arbitration, 'arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration.'" *Simon v. Pfizer Inc.*, 398 F.3d 765, 775 (6th Cir. 2005) (quoting *United Steelworkers of America, Local No. 1617 v. General Fireproofing Co.*, 464 F.2d 726, 729 (6th Cir. 1972)). Accordingly, the general rule is that, if a party has not agreed to arbitrate, the courts have no authority to mandate arbitration. *See, e.g., CTF Hotel Holdings, Inc. v. Marriott Intern., Inc.*, 381 F.3d 131, 137 (3d Cir. 2004). Even if there are intertwining interests, when asked to compel a nonsignatory to arbitrate, a court asks whether the nonsignatory would be bound by that agreement under traditional principles of contract and agency law. *See, e.g., In re Continental Airlines, Inc.*, 484 F.3d 173, 182 (3d Cir. 2007).

There are exceptions.[8] Equitable estoppel may allow a signatory to compel a nonsignatory to arbitrate where, for example, the nonsignatory seeks to arbitrate or litigate claims that are intimately founded in and intertwined with underlying contract obligations which are arbitrable. *See Choctaw Generation Ltd. Partnership v. American Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir. 2001). Even if the court finds that the non-party is estopped from contesting joinder, the court will scrutinize the arbitration clause being invoked against the nonsignatory to determine whether the claim involving the nonsignatory would otherwise be arbitrable under the specific language of the arbitration clause. This issue is rarely discussed because most arbitration clauses are broad in scope, but presents one more issue to consider when determining how broadly to draft a given arbitration agreement.

The Second Circuit's mention of joinder should not be interpreted as a suggestion that joining a non-party to an arbitration will become easy – the Second Circuit might never have made the point if the non-party in question were not a signatory to the underlying arbitration agreement. See *Life Receivables*, 549 F.3d 210, 218 (2d Cir. 2008) ("[W]here the non-party to the arbitration is a party to the arbitration agreement, there may be instances where formal joinder is appropriate, enabling arbitrators to exercise their contractual jurisdiction over parties before them."). However, practitioners and arbitrators should be aware of joinder as a means to ameliorate the harsh consequences of the *Hay* and *Life Receivables* decisions.

C. Making a Copy of The Key: Writing Broad Discovery Rules Into an Arbitration Agreement

If parties to an arbitration agreement foresee the desirability of discovery, they can always include in the agreement a provision that authorizes discovery or requires application of the Federal Rules of Civil Procedure to arbitration proceedings. *See Amgen*, 879 F.Supp. at 883 ("Ortho and Amgen agreed to arbitrate their dispute pursuant to the Federal Rules of Civil Procedure. By so doing, they agreed to the liberal discovery allowed by those rules, and agreed that Judge McGarr in essence would act as and with the power of a judge applying those rules.").

This may facilitate discovery from non-

parties by giving arbitrators power to issue subpoenas to non-parties to and prevent parties from objecting to such subpoenas, at least on the basis of section 7 of the FAA. A subpoena issued by an arbitration panel is different from a subpoena issued by a party's counsel in litigation in that *all* parties, including the non-party, must agree to waive the requirement of section 7 in order to avoid encountering the strictures of the FAA.

Despite these obstacles, if the parties anticipate a need for discovery from non-parties and a willingness from non-parties to cooperate, arbitration agreements (or later waivers) can be helpful. However, no amount of careful drafting can bind a non-party or confer powers on the courts that are not authorized by the FAA – compelling a non-party's compliance with an arbitral subpoena will inevitably involve section 7.

Conclusion

The Second Circuit's decision is, in fact, far from a defeat for pre-hearing document discovery from non-parties to an arbitration. The Court's sole holding, enthusiastically adopted from the Third Circuit, is that one or more arbitrators must be present in connection with testimony of a witness in order for documents to be produced by a non-party – nothing more, nothing less. By contrast, the Fourth Circuit has adopted an approach that is, in some respects, more restrictive by permitting pre-hearing document discovery from non-parties only where a "special need" exists. The Eight Circuit, on the other hand, has imposed no such limitations.

Practitioners and arbitrators in the Second and Third Circuit (and elsewhere if the *Hay* decision does, in fact, represent the emerging trend) will now have to become more familiar with the procedural work-around of the pre-hearing hearing proposed by Judge Chertoff – including its limitations, geographic and otherwise. Practitioners may well want to explore other procedural work-arounds to ameliorate the harshness of the Second and Third Circuit's textualist approach to section 7.▼

1 On appeal, the Second Circuit held that Peachtree's compliance with the subpoena did not render the appeal moot. *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 214 (2d Cir. 2008) ("Peachtree has a privacy interest in the documents, and will be entitled to their return if the subpoena is quashed. Both the Supreme Court and this Court have held that interest is enough to defeat a mootness challenge (although Syndicate 102 raises no such challenge)." (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464,

members on the move

In each issue of the Quarterly, this column lists employment changes, relocations, and address changes, both postal and email, that have come in during the last quarter, so that members can adjust their address directories and PDAs.

Although we will continue to highlight changes and moves, remember that the ARIAS•U.S. Membership Directory on the website is updated frequently; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us.

Do not forget to notify us when your address changes. Also, **if we missed your change below, please let us know** at director@arias-us.org, so that it can be included in the next Quarterly.

Recent Moves and Announcements

Michael Pado is President & CEO of SCOR Americas and is now at 3900 Dallas Parkway, Suite 200, Plano, TX 75093, phone 469-246-9601, fax 469-246-9535, email: mpado@scor.com.

Rodney D. Moore is now located at 5909 Luther Lane # 1103, Dallas, TX 75225, phone 214-987-3699, fax 214-750-0169, cell 956-371-4667.

Leo J. Jordan has moved to 2601 Dame Brisen Dr., Lewisville, TX 75056, phone 972-899-0968, fax 972-898-1982, cell 973-615-4514, email leojordan@grandecom.net.

Peter Q. Noack now has a new address, specifically, 25 Northfield Ave., Dobbs Ferry, NY 10522, not to mention a new phone 914-439-7390, and new email pqnoack@gmail.com.

We had lost track of **Elliot S. Orol**, briefly, but found that he is Senior Vice President, General Counsel and Secretary of Tower Group, Inc., 120 Broadway, 31st Floor, New York, NY 10271. Other contacts are phone 212-655-4001, fax 212-202-3987, email eorol@twrgrp.com.

Eugene Wilkinson has relocated his office to the following address: The Wilkinson Group, 60 Morgan Lane, Basking Ridge, NJ 07920, phone 908 872 3748, cell 908 872 3748, fax 908 234 0337, email thewilkinsongroup@gmail.com.

Peter H. Bickford can now be found at 50 Park Avenue,12th Floor, New York, NY 10016, with a new phone 212-889-7384, but with the same email address.

Glen H. Waldman's new address is Heller Waldman, P.L., 3250 Mary Street, Suite 102, Coconut Grove, FL 33133, phone 305-448-4144, fax 305-448-4155, email gwaldman@hellerwaldman.com.

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David John Nichols
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microeconsulting@verizon.net

feature

Third Party Discovery/Disclosure in English Arbitration Proceedings

Jonathan Sacher
David Parker

Jonathan Sacher

David Parker

When commercial parties agree that disputes between them should be referred to arbitration (rather than the courts) in an arbitration agreement, they agree that an individual or a panel of arbitrators will hear disputes between them and has the powers set out in the relevant agreement. Necessarily, an arbitrator or panel does not derive powers from an arbitration agreement over any entity which is not a signatory to that agreement.

What happens where it is necessary or desirable to involve a third party to give witness evidence in the arbitration or where the third party holds documents which are relevant to the arbitration?

In the United States, the issue of obtaining pre-hearing disclosure from a third party has come before a number of appellate courts in recent years, including in the recent decision covered in an article in this ARIAS Quarterly.

Under English law (the Arbitration Act 1996 ("the Act")), the position is similar in substance, but very different in procedure, from the US. The legislation does not give the arbitration tribunal the power directly to order a person to attend before the tribunal with or without documents. Instead, it provides that parties to arbitration proceedings and/or the tribunal itself can apply to the English Court for support and, subject to proscribed limits, the English court has the same power to make orders as it has in legal proceedings.

Under English law (the Arbitration Act 1996 ("the Act")), the position is similar in substance, but very different in procedure, from the US.

Section 44 of the Act provides:

> *"Unless otherwise agreed by the parties, the Court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed as it has for the purposes of and in relation to legal proceedings."*

Similar to the United States, recent English authorities have also held that the court does not have the power to order that third parties are required to disclose documentation in English arbitration proceedings, but has found two mechanisms whereby, practically, participants in arbitration can seek an order having a similar effect:

(1) a court order requiring a witness to appear before the tribunal to give evidence or to produce documents[1]; and/or

(2) a court order to preserve documentary evidence[2].

Witness summons requiring a third party to produce documents

Section 43(1) of the Act is worded in a similar way to section 7 of the FAA:

> *"A party to arbitral proceedings may use the same Court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence."*

Initially, the English court appeared to take the view that third party disclosure was not available under this provision.

In *BNP Paribas v Deloitte & Touche LLP*[3], the claimant sought permission from the court to issue and serve a witness summons on the defendant auditors for the purpose of getting the auditors to produce documents relevant to arbitration proceedings in which the claimant was involved (but the auditors were not).

The court refused to make the order, holding that:

> *"However it is dressed up, it seems... clear that this is an application for disclosure rather than production in evidence of documents brought to the tribunal under a subpoena... There is an important distinction between requiring documents to be produced as evidence of some fact... and asking*

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for disclosure to trawl through documents to see if they support the applicant's case directly or by undermining the value of a witness' testimony."

In so doing, it appeared that English courts had closed the door on third party disclosure in arbitrations. However, on closer inspection, it can be seen that the reason underpinning the court's refusal to grant the order sought, was based on the way that the claimant had framed its application. The claimant's description of the documents requested was simply too wide. An application of this type "*had to... relate to specific documents which can be identified*" or it would not be successful.

The availability of what effectively amounts to third party disclosure for specifically identified documents under section 43 of the Act was confirmed by a subsequent case which dealt with a similar application, *Assimina Maritime Ltd v Pakistan National Shipping Corp* (The Tasman Spirit)[4].

Order preserving documentary evidence

In *Assimina*, the claimant issued applications seeking documents against the defendant which was not a party to the relevant arbitration proceedings under section 43 and section 44 of the Act. The primary relief claimed was under section 44 "for non-party disclosure", and that the third party should "disclose and make available for inspection and copying" the "documents/ information" in the application. In the alternative, the claimant requested a witness summons (pursuant to section 43 of the Act) requiring the attendance at the arbitration hearing of a director of the third party to produce those documents identified in the application under Section 44.

As in the *BNP Paribas* case, the court appeared, initially, to decide that an order requiring a third party to disclose documentation in an arbitration was not available, referring to the claimant's application as "misguided". The court held that the purpose of section 44 was to make available to participants in arbitration proceedings those ancillary powers of the court available in relation to legal proceedings, as specifically listed in the Act. The five types of order so listed do not include an order for disclosure by a non party of documents relevant to an issue in the arbitration[5].

However, the court went on to consider the documents requested and decided that a number of them were likely to contain evidence directly relevant to issues in the arbitration and, therefore, the preservation of the contents of those documents for the purpose of resolving the issues in the arbitration justified the exercise of the Court's jurisdiction under section 44.

In explaining its decision further, the court held:

"It is, however, to be kept in mind that s. 44 cannot be used as a means of obtaining ordinary disclosure of documents from a non-party... Accordingly, it is only where it can be shown that a question arises in relation to a particular document or documents of a non-party which need to be inspected or photocopied or preserved that an order under this section can be made. However, such documents must be capable of specific description. They cannot simply be defined by reference to their relevance to particular issues, as would be the case with an order for ordinary disclosure..."

In this way, the court interpreted the Act as effectively allowing parties to an arbitration to ask the court to order third party disclosure (provided its requests for documents are specific and sufficiently defined) to "leave no real doubt in the mind of the person to whom the summons is addressed about what he is required to do"[6].

Parties to arbitration agreements can choose to exclude section 44 of the Act but doing so does not mean that third party disclosure is unavailable. The court also allowed the claimant's application under Section 43 in Assimina and parties cannot exclude the court's powers under this section.

Conclusion

Third party disclosure in English arbitrations has developed in a similar way to the position under United States Federal law.

Whilst the English courts have decided that the Act does not give them power to order third party disclosure in support of arbitrations, the court has found ways to achieve a similar result, whether by use of a witness summons to produce documents or an order to preserve and copy documents. In either case, it is clear that any party to arbitration proceedings which wants third party disclosure will have to identify, with precision, those documents it requires. No fishing expeditions will be allowed, in line with the philosophy of greater restriction on discovery in English disputes than would be available in the USA.

1 Section 43 of the Arbitration Act 1996
2 Section 44 of the Arbitration Act 1996
3 [2004] 1 Lloyd's Rep 223
4 [2005] 1 All E.R. (Comm) 460
5 Section 44(2) lists the relevant matters as: (a) the taking of the evidence of witnesses; (b) the preservation of evidence; (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings:- (i) for the inspection, photographing, preservation, custody or detention of the property; or (ii) ordering that samples be taken from, or any observation to be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration; (d) the sale of goods the subject of proceedings; (e) the granting of an interim injunction or the appointment of a receiver.
6 See later case of *Tajik Aluminium Plant v Hydro Aluminium AS and others* [2006] 1 W.L.R. 767

off the cuff

This column appears periodically in the Quarterly. It offers thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the humorous side of the business.

A Good Judge is Also Hard To Find

Eugene Wollan

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My regular readers (if any) will by now have seen, read, and perhaps even pondered upon my piece entitled "A Good Lawyer Is Hard To Find," in which I expounded on the qualities that seem to me to be essential ingredients in the recipe for a "good lawyer." Since writing it, I have been prevailed upon by part of that readership (actually, one guy, but a very persuasive one) to give some thought and sacrifice a few trees to the question of what makes a good judge. (For this purpose, I equate a judge in a litigation with an umpire in an arbitration.)

The more I thought about it, the more it seemed to me that a judge needs many of the same basic qualities I described in the earlier article, but usually with a slightly different twist. So, here goes.

1. **Judicial Temperament**. I am tempted to issue a defiant challenge to anyone to tell me exactly what this cliché phrase consists of. I suspect that the primary requirement may be balance - balance, that is, between the extremes of the emotional poles. A good judge must be neither too irascible nor too laid-back. He (read "he or she") must not victimize or humiliate the lawyers in the case, as some judges seem to enjoy doing, but must also be prepared to rise to the occasion when a lawyer crosses the line. In other words, he does not ride roughshod over counsel but also does not allow counsel to reverse the process.

The judge's rulings should be decisive, consistent, rational, and coherent, and not peremptory or erratic. His thinking must be logical, analytical, and insightful. He must be capable of empathy but not ruled by it. His demeanor must be dignified but not pompous, cordial but not chummy; it should invite respect without generating fear.

2. **Intelligence**. It goes without saying (but I'll say it anyhow) that a judge must be intelligent enough to understand every aspect of the proceeding, including technical evidence and the subject matter of expert testimony. This is not always easily achieved. The lawyers preparing the case for trial have probably spent endless hours with their experts, not only to prepare the witnesses but also, of equal importance, making certain that they themselves understand the subject matter of expert testimony well enough to present the evidence properly and to cross-examine the opposing expert(s) effectively. The judge, on the other hand, has not had the benefit of similar preparation or education; he must catch the meaning and the nuances of the evidence "on the fly" as it were. In this situation, a special kind of intelligence is called for; it's not the depth of the intellect that matters nearly as much as its quickness.

In this respect, I would make a distinction between a judge and an umpire. A judge must, obviously, have a broad knowledge of the law generally, and an understanding of the uses and limits of precedent. The umpire has (presumably) been selected because, among other qualities, of his experience and familiarity with the subject matter of the dispute and the mores and usages of the industry. Not so the judge.

The judge brings to the case (presumably) a knowledge of the law but ignorance not only of the specific facts of the case but often of a context in which to consider those facts. The umpire, on the other hand, has a ready-made context arising from years of experience in the industry.

In some cases I've been involved in that were litigated rather than arbitrated, the judge made it a point to say at the very outset something like, "I've never had a reinsurance case before." Woe betide the litigator who doesn't find some effective way to educate his honor to a threshold of being able to deal with the case in a reasonably effective way.

3. **Integrity**. This is another quality a good judge must share with a good lawyer. In the judicial world, it includes not only the obvious (no bribes, please), but also the more subtle, such as recusal from a case involving

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a company that employs, say, the judge's brother-in-law. The concept of integrity applies not only to the morality aspect of the adjudication process, but also to the intellectual aspect. A judge who knowingly indulges in specious reasoning in order to rationalize a result he has already determined to reach is just as wanting in integrity as one who reaches such a result for meretricious reasons.

4. **Respect**. This quality applies in many ways. The judge should, above all, respect the judicial process. By this I mean not just the superficial trappings, such as courtesy to counsel and witnesses, but some elements that go a little deeper. For example, many judges do not have the time or the inclination or the perseverance (whatever you may call it) to read all the papers submitted to them on an important motion: this, to my mind, is disrespectful not only to counsel who labored over the papers but also to the process itself. I think the same applies to judges who sit on a motion for an inordinate length of time before deciding it (no names, please).

In this area, I see a major difference between the typical umpire and the offending judges. Perhaps it's just because the umpire has only one case at a time, or has the two party arbitrators applying pressure, but whatever the reason, the difference definitely exists.

Another aspect of respect for the process also applies to most judges but very few umpires: it might be called respect for the past. Judges should never forget that they started out as lawyers long before the bench beckoned. They should from time to time remember what it was like, particularly if they were litigators, as most were. This means some degree of sympathy for a lawyer with a scheduling problem or a witness problem; it means applying the rules of evidence in an even-handed fashion that favors neither side; it means, above all, letting the lawyers try their own case as they prepared them and as they seek to present them, and not for example, taking over the questioning of a witness the lawyer hasn't finished with, in the ostensible interest of "saving time." All of these elements are, of course, subject to the qualification "within reasonable limits," but they still apply.

5. **Patience**. A good judge must obviously display this quality, especially when an inexperienced lawyer, perhaps even one trying his or her first case, stumbles and bumbles around. In some exemplary cases, a pseudo-pedagogical instinct will take over, and the judge will find a way to guide the youth through the mine field without seeming to favor that side. Would that all judges could do so.

An umpire must also, of course, be reasonably patient, but seldom encounters the particular situation described. The lawyers handling insurance and reinsurance arbitrations tend to be very experienced and highly capable (said he modestly). The potential downside is that once in a while their qualifications and their demeanor are so imposing that a relatively inexperienced umpire may be awe-struck or intimidated into letting them get away with murder.

6. **Language skills**. This quality, I would submit, really applies to everyone, not just lawyers and judges, but let's not go there. In the judicial situation, the ingredients are the same as for the good lawyers, but perhaps with a difference in emphasis. A judge must certainly be able to read and understand every document before him, whether an exhibit , a reported case, a brief, or whatever.

Writing skill is perhaps more important for a judge than for an umpire. Judges routinely issue written decisions, although I confess I frequently shudder at some of the grammatical solecisms in many of the reported cases. Umpires are seldom required, by the language of the arbitration clause or by agreement of the parties, to prepare written "reasoned awards" (except of course in the UK), and when they are so required, they have the two party arbitrators to assist (or be conscripted).

Oral presentation is probably in most situations a bit more important for the litigator than for the adjudicator, but this is not to suggest that a judge is entitled to be inarticulate. The main difference is that a litigator needs to be particularly strong in the art of persuasion, whereas a judge must be more concerned with whether his rulings will withstand scrutiny than with whether they are persuasive in the traditional sense of the word.

* * * * *

Do you remember this classic example of logic: all spaniels are dogs, but not all dogs are spaniels? Perhaps we can extend that thinking to: all good judges are lawyers, but not all lawyers are good judges. Increasing the pool of good judges is definitely a "consummation devoutly to be wished."

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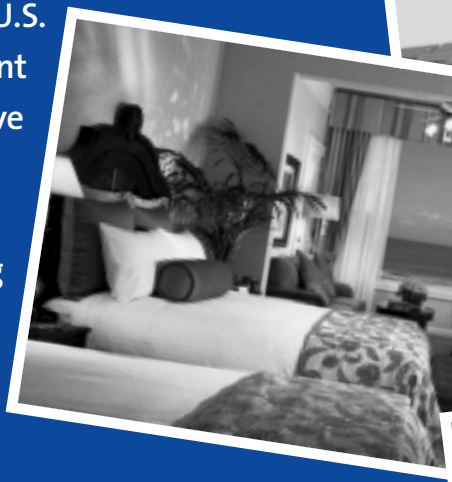
"Spring Training

May 4-7, 2010

During the first week of May 2010, ARIAS•U.S. will present a three-part spring-training event in California. Anyone who needs an intensive workshop or educational seminar for certification or renewal has the chance to put in a little extra time at the 2010 Spring Conference and take care of two, or even three, requirements with only one trip.



Intensive Arbitrator Training Workshop

The intensive workshop will take place starting at 2:00 p.m. PDT on Tuesday, May 4 and concluding at 12:30 on Wednesday, May 5, just in time for the opening of the Spring Conference. There will be the usual reception and dinner on Tuesday evening.

The ARIAS•U.S. 2010 Spring Conference

The Spring Conference will follow the usual pattern, running from Noon on Wednesday, May 5 until Noon on Friday. There will be a break on Thursday afternoon for golf, tennis, recreation, shopping, and touring.

Triple-Header"

Educational Series Seminar

The half-day educational seminar will begin on Friday, May 7 just after the adjournment of the Spring Conference with lunch at 12:30 p.m. The seminar sessions will begin at 1:15 and conclude by 5:30.

Sessions for all three events will be held at the historic Hotel del Coronado in Coronado, California, just over the bridge from San Diego International Airport. A National Historic Landmark, the Hotel del Coronado opened in 1888 and has, over time, become the most famous hotel in the West, serving as a vacation spot for celebrities from around the World and as the location for many movies, including the award-winning Some Like It Hot with Marilyn Monroe in 1958. It provides excellent meeting facilities and, after a complete renovation, offers outstanding restaurants and accommodations.

Complete details about these training events will be on the website calendar and will be announced to members as the time draws closer.

Be sure to mark your calendar with these dates.

case notes corner

Federal Court Rules That Party-Arbitrator's Resignation Due to Illness and Subsequent Recovery Does not Require Arbitration to Start Anew

Ronald S. Gass

Ronald S. Gass

The vexing procedural question of what happens after a party-arbitrator resigns due to a serious illness in the midst of an arbitration proceeding was recently addressed by a New York federal district court albeit under unusual factual circumstances. Diverging from the general Second Circuit rule that when a party-arbitrator dies during the pendency of an arbitration the arbitration must commence anew (*See* Ronald S. Gass, *When an Arbitrator Dies: Federal Court Rules that Arbitration Must "Begin Afresh"*, 11 ARIAS-U.S. Quarterly 30 (4th Quarter 2004)), the district court found in this unique case that the resigning party-arbitrator, who recovered several months later and had resumed his arbitration practice, should be reappointed to the *original* panel. If he was unwilling or unable to rejoin the panel, the appointing party must designate a new party-arbitrator to the *existing* panel within 30 days; otherwise, the court would select a replacement pursuant to its authority under § 5 of the Federal Arbitration Act ("FAA").

The Insurance Company of North America ("INA") and other entities were embroiled in a reinsurance arbitration against Public Service Mutual Insurance Company ("PSMIC"). In May 2008, INA's party-arbitrator learned that he had cancer requiring immediate and intensive treatment, and consequently, he resigned from the panel. His resignation came shortly after the panel had issued a unanimous summary disposition order, the principal ruling of which disposed of INA's main legal defense and set the stage for further discovery and a hearing on INA's other defenses to PSMIC's claim for payment under certain reinsurance contracts. Also, at the time of the party-arbitrator's resignation, an INA motion for reconsideration was pending before the panel.

In the wake of the INA party-arbitrator's resignation, the parties became deadlocked over how to proceed, and litigation ensued in federal district court. In December 2008, the court, after weighing the competing policy concerns over whether the arbitration should start anew (i.e., "troubling incentives for 'bad faith manipulation of the arbitration process'" versus the potential for wasted resources), decided to apply the Second Circuit rule given the "unique" facts of this case. It ordered the arbitration to start over from scratch, specifically noting the unfairness of requiring INA to submit its reconsideration motion on a summary disposition order (which the court did not consider to be a final partial award conclusively deciding every point the parties had submitted to the panel for resolution) before the two panelists who had heard the original arguments and decided the summary disposition motion and one who had not.

In January 2009 and before a new arbitration panel was constituted, PSMIC's counsel learned that the resigning INA party-arbitrator had recovered sufficiently to be actively soliciting new arbitration assignments. When the party-arbitrator was asked by PSMIC's counsel whether he was available to rejoin the original panel, INA interjected that it was unwilling to allow him to do so because the prior panel was now defunct per the court's December 2008 order. When the resigning party-arbitrator eventually replied to PSMIC's inquiry, he stated that his May 2008 resignation was "final and not conditional or provisional" and that he believed that he had no right to rejoin the panel. PSMIC then sought extraordinary judicial relief from the district court's order

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requiring the arbitration to begin afresh on the ground that newly discovered evidence required its vacation and the reappointment of INA's original party-arbitrator to the existing panel.

The parties did not contest the fact that INA's party-arbitrator had been seriously ill and required intensive cancer treatments at the time he resigned, nor did they dispute that he had recovered sufficiently to resume his arbitration practice by November 2008. However, PSMIC successfully demonstrated that it had no knowledge of the INA party-arbitrator's recovery until mid-January 2009, after the December 2008 hearing and court's order was issued. Given that the INA party-arbitrator was now actively seeking appointments to other arbitral panels, the court viewed this as a special circumstance justifying its departure from the Second Circuit "start anew" general rule, which the judge observed was premised on the *permanent* unavailability of the arbitrator. Given the INA party-arbitrator's subsequent availability, requiring the arbitration to continue, according to the court, "is the closest way to effectuate the intent of the parties under the arbitration agreement."

Having demonstrated its right to extraordinary judicial relief due to newly discovered evidence, PSMIC requested the court to reappoint INA's party-arbitrator to the existing panel pursuant to § 5 of the FAA. In opposition, INA argued that (1) its resigning party-arbitrator was unwilling to be reappointed, and (2) he was no longer qualified to serve because he was not currently an executive officer of an insurance company as required by the arbitration clause. Regarding the party-arbitrator's alleged unwillingness to serve, the court found this issue to be premature because he had not yet had the benefit of the court's latest order and reasonably may have been under the impression that its prior permanent stay of the arbitration and December 2008 order did not give him the right to rejoin the existing panel and to continue with the arbitration where it left off. As for the second argument, the court observed that the parties had agreed to waive the "active executive" requirement when this issue first emerged during the arbitration proceeding and, thus, dismissed this contention.

In vacating its December 2008 order and fashioning a new one on June 30, 2009, the district court also addressed the limitation in § 5 of the FAA that permits the court to appoint an arbitrator only if the arbitration agreement does not specify a method of appointment or if that method is not followed. The parties' arbitration clause merely provided, as is typical, that each was to select its own party-arbitrator but was silent on how a vacancy created by the death or resignation of a party-arbitrator was to be filled. Because INA originally selected the party-arbitrator who resigned, the court concluded that, if that party-arbitrator was willing, he should be reappointed and that the original panel should pick up where it left off at the time of his resignation. If he was unable or unwilling to rejoin the panel of his own accord, then INA would have the opportunity to select a replacement because there had been no failure to avail itself of the contractually prescribed method for appointing a party-arbitrator nor a "lapse" in naming one. If INA failed to appoint a new party-arbitrator within 30 days, then the court would appoint one pursuant to § 5 given the parties' appointment deadlock and the arbitration agreement's silence on the method for filling a party-arbitrator vacancy.

In an interesting coda to this case, the district court's June 30th order was vacated on July 16, 2009 because the parties had previously taken an appeal of its December 2008 order to the Second Circuit. Therefore, the lower court lacked jurisdiction to grant the relief subsequently sought by PSMIC in early 2009. However, the district court requested that the Second Circuit construe its June 30th order as "an expression of its willingness to grant PSMIC's . . . motion." On July 23rd, pursuant to a stipulation for remand, the Second Circuit remanded the case to the district court, and the judge reentered his decision in substantially identical form to the original June 30th order.

This case presents an unusual factual scenario that does not fit neatly into the general Second Circuit rule that the arbitration must commence anew with a fresh panel if one of the arbitrators dies before rendering an award. Here, the party-arbitrator did not die but resigned due to a serious illness but later recovered sufficiently to continue his arbitration practice and, at least theoretically, with this arbitration. Thus, he was not "permanently" unavailable to serve on the panel. Also, the court did not view the summary disposition order issued by the panel prior to the party-arbitrator's resignation to be tantamount to a partial final award, which may have been another important factor in the court's reversal of its initial December 2008 order, which had followed Second Circuit precedent.▼

Insurance Company of North America v. Public Service Mutual Insurance Company, No. 08CV7003 (HB), 2009 U.S. Dist. Lexis 66325 (S.D.N.Y. July 29, 2009).

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in focus

Recently Certified Arbitrators

Darleen J. Fritz

James S. Gkonos

Darleen J. Fritz

Darleen Fritz has been in the insurance industry for more than 20 years. For the past eleven years, she has served as President and Director of Aegis Security Insurance Company domiciled in Harrisburg, Pennsylvania. Aegis is a specialty niche insurance company primarily writing surety, nonstandard auto, manufactured homes, motorcycles, recreational vehicles and lower valued homeowner's products. She is also President and a Director of American Sentinel Insurance Company, wholly owned by Aegis specializing in accident and health and mini-med policies. Both companies are licensed nationwide.

Ms. Fritz has extensive experience in reinsurance areas, having primary responsibility for contract negotiations and development of treaties. Negotiation and formation of many reinsurance treaties for her company have been formulated under her direction and oversight. She also oversees and plays a direct role in all regulatory, transactional and litigation issues as related to insurance and reinsurance for both companies.

Ms. Fritz has been involved in the management and direct handling of mediations for her company. She was the sole corporate person overseeing and managing a six-party consolidated arbitration lasting ten days, with her direct testimony encompassing a minimum of 30% of the consolidated arbitration.

Preceding her employment at Aegis Security Insurance Company, Ms. Fritz served in a cabinet post of Deputy Secretary of Revenue for the Commonwealth of Pennsylvania where she was responsible for administration, operations, personnel, labor negotiations and budget processes. She is a graduate of The Pennsylvania State University with a BS Degree; she also obtained from that same school an insurance certification program degree, and she has taken several accredited reinsurance courses.▼

James S. Gkonos

James Gkonos has over 19 years of experience in the insurance and reinsurance industry. He is Vice Chairman of Saul Ewing LLP's Insurance Practice Group, where he advises clients regarding an array of regulatory, transactional and litigation issues related to reinsurance/insurance, including: financial guarantees; capital markets products; quota share, facultative and excess of loss reinsurance agreements; commutations; surety bonds; and insurance insolvencies. He has litigated insurance disputes in arbitration and in state and federal court.

Prior to joining Saul Ewing, Mr. Gkonos was general counsel of the surety division of Liberty Mutual Insurance Company. In that position, he was responsible for providing advice to management and underwriters on regulatory matters, structuring of domestic and international transactions, including offshore securitized transactions, and drafting of reinsurance agreements, indemnity agreements and arbitration clauses. He also handled international and domestic commercial claims, restructures and work-outs.

Preceding his employment at Liberty Mutual, Mr. Gkonos served as general counsel to the Rehabilitator of Mutual Fire, Marine and Inland Insurance Company (In Rehabilitation), then the largest U.S. insurance insolvency. His responsibilities included documentation of claim settlements for over 13,000 surplus lines claims, commutation of over 200 reinsurance agreements, supervision of arbitrations and litigation against the carrier's reinsurers, MGA's and accountants, and compliance with insurance laws and regulations. His prior positions also included positions as Associate General Counsel of Laventhol & Horwath and associate at Drinker, Biddle & Reath, specializing in complex business litigation.

Mr. Gkonos is a frequent speaker and author on issues relating to reinsurance and the intersection between insurance and the capital markets. He received his law degree from Dickinson School of Law and is licensed in Pennsylvania state and federal courts, as well as the Federal Circuit Court of Appeals and the Court of International Trade. He received his BA from the University of Delaware. ▼

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