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# ARIAS 2014 Spring Conference

Fact Pattern for Ethics Breakout Groups

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# It's Not Just the Arbitrators

- A New Element of the ARIAS Code of Conduct:

“Though these Canons set forth considerations and behavioral standards only for arbitrators, ***it is expected that the parties and their counsel will conform their own behavior to the Canons*** and will avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.”

- What Does It Mean? How Will It Work?

- Fact Pattern Will Explore

- Separate Breakout Groups Will Discuss Arbitrators, Party Reps, and Counsel

- Breakout Group Questions For Each Issue

- Is this behavior acceptable, close to the line, or over the line?
- What should be the response of the other participants to the behavior at issue?
- What can or should be done about behavior that is determined *not* to be acceptable?

# The Arbitration

- Perseus P&C is seeking to recover asbestos losses from Empire Re under Perseus's old First Blanket Excess of Loss Treaty - \$450K x/s \$50K "per accident"
  - In 1986, to persuade Empire Re to stay on the cover, Perseus agreed to retroactively increase the retention to \$250K for "IBNR Losses"
  - No documentation as to the meaning of "IBNR Losses"
- A few years ago, Perseus did an asbestos loss portfolio transfer (LPT) with Mega Re. Its asbestos claims and asbestos reinsurance recoveries, including on the First Blanket, are now handled by Mega Re's affiliate, Giga Managers.
  - Giga says that "IBNR Losses" means only insureds that had no asbestos losses at all as of 1986; the rest is just "normal asbestos loss development."
- Mega/Giga have entered into asbestos LPTs with a number of other companies, including non-party Mid-American Insurance Co.
- The LPTs have aggregate limits, so the original writing company has "out the top" exposure if losses are substantially larger than expected.

# The Parties and Players

## Empire Re

- Fred Forbush, Party Rep
- Claire Charles, Counsel

## Arbitrators

- Gina Gallant (Empire Re)
- Henry Hapgood (Mega)
- Jerry Johnson (Umpire)

## Mega Re / Giga / Perseus

- Brem Bartley, Party Rep
- Delbert David, Counsel

## Mid-American (non-party)

- Alan Alderson, General Counsel
- Gina Gallant's former employer

# Empire Re

Gina Gallant is now an ARIAS-certified arbitrator.

- She was formerly Mid-American's Claims and Reinsurance Manager and handled most of Mid-American's ceded reinsurance.
- She negotiated Mid-American's LPT with Mega/Giga and stayed at Mid-American for about two years after the transaction closed.
- She has a pension from Mid-American that makes up about 40% of her retirement income (not counting arbitrator fees).

Fred Forbush, a senior Empire claims executive, is Empire's Party Rep

- He is a long-time friend of Gallant's and gave her work as an arbitrator on several small arbitrations when she retired from Mid-American.
- Empire won a fair number of Gallant's first cases, and she is now being given assignments in larger cases. Gallant does not work only for Empire, but Empire does make up about 65% of her caseload as an arbitrator.
- This is the biggest case Empire has ever had, and Forbush really wants Gallant for his party arbitrator: "You're the best, Gina. You really understand this stuff, and you get along with people as well. We *win* with you."

# Gina Gallant's Appointment

- Gallant decides that since Mid-American does not have a treaty issue like the one between Empire and Perseus, she is free to accept the appointment, and does so.
- She adheres to her view even after Mega/Giga's counsel, Delbert David, writes a letter stating that Gallant had been privy to Mega's reinsurance collection strategy in her last two years at Mid-American and suggesting that she ought to recuse herself.
- Gallant asks for and receives from Claire Charles, counsel for Empire, a memorandum analyzing reinsurance arbitrator disqualification cases. The memorandum concludes that a person in Gallant's position could properly determine that she was able to sit.

# The Organizational Meeting

- David reiterates Mega/Giga's concerns that Gallant had been privy to his client's innermost thoughts ("You were inside the tent and now you're trying to set it on fire!").
- Gallant declines to recuse: The reports were not detailed and she's had no substantive contact with Mid-American since she left, only the occasional lunch with Alderson.
- Gallant discloses that she received the memorandum from Charles and eventually hands over a copy: "I've got nothing whatsoever to hide."
- David states that Perseus does not accept the Panel as properly constituted, but because challenges to arbitrators are unripe prior to final award, Perseus has no choice but to proceed with the arbitration under a full reservation of rights.
  - Johnson asks Forbush, "Did you select Gina Gallant as your party-appointed arbitrator?" "Yes."
  - Johnson asks Bartley, "Did you select Henry Hapgood as your party-appointed arbitrator?"
    - Bartley: "Can we take a break?"
    - Johnson: "In five minutes. Did you select Henry Hapgood as your party-appointed arbitrator?"
    - Bartley: "Yes, I did."
  - Johnson asks Hapgood and Gallant, "Did you two select me as umpire?" Both: "Yes."
- Johnson: "This panel is duly constituted. Let's take that break."
- During the break, Johnson says to Gallant and Hapgood:

"I've known you both a long time, and I trust you both to be fair. Gina, I might not have made the same decision you did, but Henry, I don't like the way parties and their counsel these days always try to game the system. Let's see if we can decide this case on the merits, shall we?"

# Gallant's Second Thoughts

- As the arbitration develops, it turns out that additional issues are likely to arise, including one —how Giga allocates direct settlements across its base of managed insurers when more than one of them is involved with the same insured — that a person who knew all the facts might conclude involved Giga's handling of the Mid-American book as well as the Perseus book.
- Another late-arising issue is the meaning of “per accident” in the First Blanket treaty between Empire and Perseus.
- When the “per accident” issue arises, Gallant recalls that some of Mid-American's outward reinsurance used similar language, but she does not recall it ever having been an issue with Mid-American's reinsurers, and she concludes that she has no need or basis on which to make a supplemental disclosure.



# The Bartley Maneuver

- At a regularly scheduled LPT status meeting between Giga and Mid-American, Bartley says to the assembled group, includes Alderson, that Mega/Giga is facing a “per accident” issue in an arbitration for “another company we manage”:

“If the issue goes badly for us and the result gets out -- which you can count on these days -- it would undermine our pricing assumptions at the time of the LPT and put serious ‘out the top’ exposure back on you folks.”
- Bartley’s comments at the meeting were exaggerated.
  - The “per accident” issue was a minor one on the Mid-American book, and although the “out the top” exposure was starting to look real, it had nothing to do with “per accident” but rather with some erroneous pricing assumptions Mega had made in negotiating the LPT.
- Bartley hoped, though, that if he was dramatic enough, Alderson would mention the “problem” to Gallant the next time they had lunch.
- The maneuver worked: During his next lunch with Gallant, Alderson said, “You know, that LPT may not get us everything we hoped for. Whoever knew that one little phrase like ‘per accident’ could put our pensions at risk?”

# Gallant's Third Thoughts

- After the lunch with Alderson, Gallant becomes concerned because she might have to be a witness on the meaning of “per accident” in the Mid-American outward treaties.
- She calls Forbush and says that a possible deep conflict has come up from her time at Mid-American, and she may have to withdraw from the Perseus arbitration.
- Forbush:

“You can’t do that to me. You’ve got a great relationship with Johnson, but so does Henry. If I have to get someone else, this arbitration is going to head South in a hurry. I didn’t give you all this work for you to make decisions like that.”
- Gallant responds that the issue may not be ripe yet, but if she has to be a witness for Mid-American down the line she will have no choice but to withdraw, and it will only be worse later.
- Forbush says, “Let’s deal with that if and when it happens, OK?”
- Gallant acquiesces and agrees to say and do nothing for the moment.

# The Forgetful Witness

After the deposition of Kent Kramer, the broker who was involved in the negotiation of the retroactive retention change on the First Blanket treaty, Claire Charles calls Gallant and says:

“Hi. I just wanted to flag something for you. Kramer was not young in 1986, when the deal was done, and he’s really getting up there now. His paper is good; his memory is not. When Delbert was done with his examination, I had to put document after document in front of Kramer and lead him by the nose. Delbert was objecting up, down, and sideways, and there’s no way I can do that at the hearing. You won’t have the transcript until the briefs, and *ex parte* will be over by then, but I wanted to make sure you focused on my examination of Kramer at his deposition. It’s really important that as much of it as possible gets out when Kramer testifies at the hearing.”

# Vetting the Expert Report

- A while later, Claire calls Gallant again:

“Hi. I wanted to get your take on an expert issue. We’ve got a guy who’s done an historical analysis of the perception of asbestos loss emergence at various points in time, both before 1986 and thereafter, and he’s very strongly of the opinion that, in 1986, ‘IBNR’ would have been understood to have been *any* claim that was not in fact reported, so that a claim would have been ‘IBNR’ unless the claimant himself was already identified at the time of the endorsement. I love his conclusions, but I’m a bit nervous as to how he got there. You were in the industry in 1986; I wasn’t. OK if I run some stuff by you?”

- Claire then proceeds to read chunks of the draft expert report to Gallant, stopping periodically to ask for Gallant’s comments.