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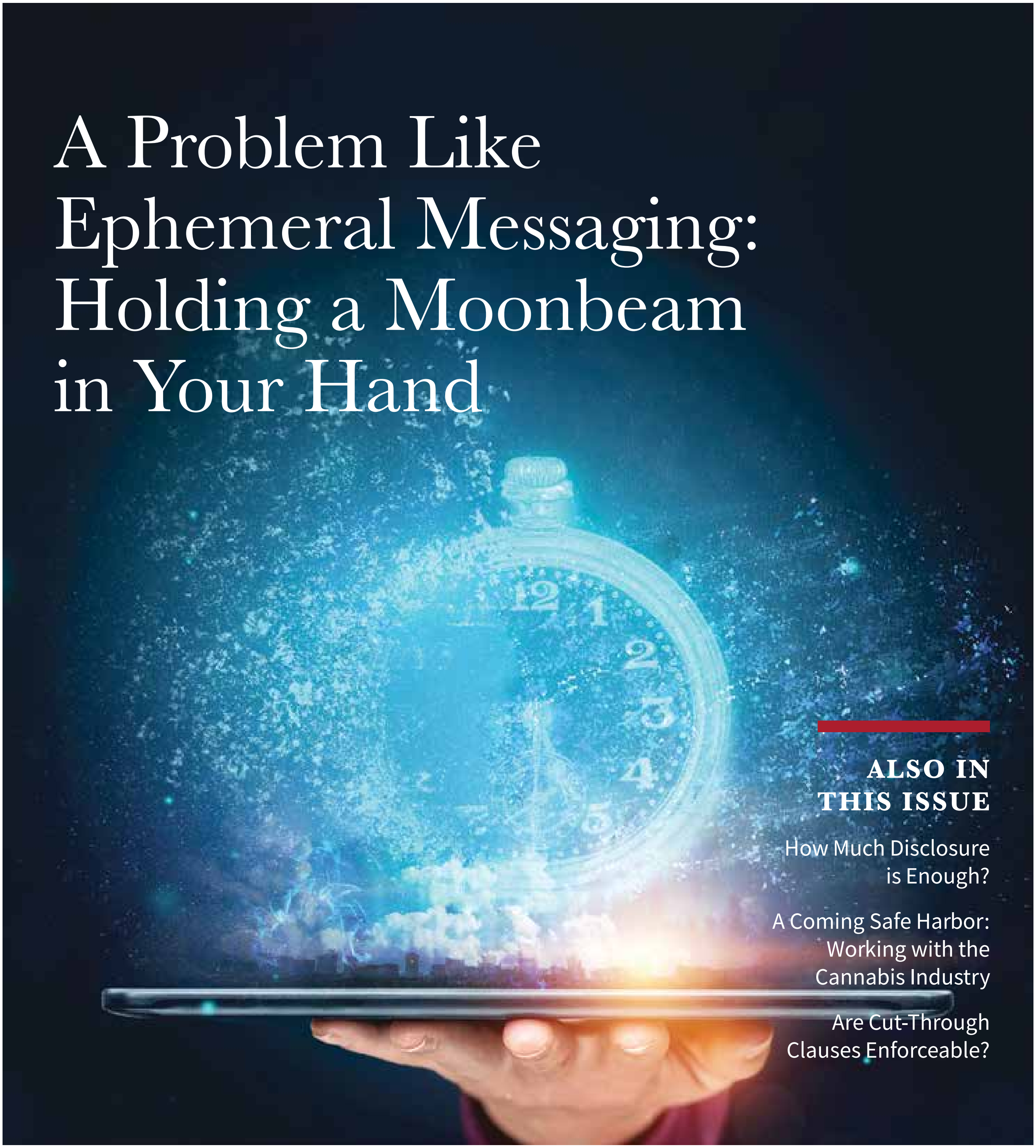
A Problem Like Ephemeral Messaging: Holding a Moonbeam in Your Hand



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With Spring in full swing, we bring you another action-packed issue of the *Quarterly*. We begin with an article from the technology side, as Kirsten Fraser and Andrew Foreman from Porter Wright Morris & Arthur LLP give us "A Problem Like Ephemeral Messaging: Holding a Moonbeam in Your Hand." For those of you who don't know, ephemeral messaging is a type of text message that lasts for a limited period of time and then disappears (ask your kids or grandkids about Snapchat). The article discusses this phenomenon in the business context and explores how discovery rules are trying to address these messaging systems. Will we see this in reinsurance arbitrations? Maybe, so we thought you should be ready for it.

Next, we have another excellent ethics article, "How Much Disclosure is Enough?" Authored by founding ARIAS Board Member Susan E. Mack, a member of the Ethics Committee, the article tackles the nettlesome issues of disclosure by arbitrator candidates in the panel selection process.

Following Susan's piece is an emerging issues article based on recent developments in the cannabis industry and the efforts by insurers (and, ultimately, reinsurers) to insure the industry. Titled "A Coming Safe Harbor: Working With the Cannabis Industry" and authored by Robin C. Dusek of Saul Ewing Arnstein & Lehr LLP (and new member of the *Quarterly* Editorial Board), this article provides a useful roadmap for insurers and reinsurers to follow as they try to navigate the inconsistent and changing legal landscape of this growing industry segment. This is a big issue because reinsurers are very interested in covering

cannabis risks, but are very wary of the legal minefield of inconsistent federal and state laws. Robin helps them navigate this problem and offers some "hope" for the future with the possibility of a safe harbor. With New York recently legalizing recreational marijuana, this article is very timely.

Finally, Robert M. Hall of Hall Arbitrations (and another member of the *Quarterly* Editorial Board) answers the age-old question, "Are Cut-Through Clauses Enforceable?" Cut-through clauses provide a very valuable service for certain types of insurance and reinsurance relationships, but could cause unintended consequences for other relationships. Bob gives us some guidance on these clauses.

Now is a great time for you to join these authors and submit your own article to the *Quarterly*. Submissions are welcomed on all topics related to insurance and reinsurance arbitrations and mediations. Don't let your thought leadership languish—send us your articles and you, too, will see your name on these pages.

Finally, for those who pay attention to citation form, you will notice that our endnotes are no longer in superscript but are now in brackets [2]. This new style is easier on our technical editors, saves ARIAS a little time and money in production cost, and is consistent with many professional magazines. We hope you find it a bit more readable.

Larry P. Schiffer
Editor

A Problem Like Ephemeral Messaging: Holding a Moonbeam in Your Hand

By Kirsten Fraser and Andrew Foreman

Even if you think you've never heard of ephemeral messaging, you've probably heard of ephemeral messaging. While the term itself may not be well known, it's likely you know of at least one ephemeral messaging app, especially if you know anyone under the age of 25: Snapchat. Nearly half of U.S. internet users under age 25 use Snapchat [1], and hundreds of millions of users worldwide send ephemeral messages through the Snapchat app daily [2].

Ephemeral messages, sometimes called self-destructing messages, are essentially text messages that disappear after a fixed period of time. Snapchat is not alone in the ephemeral messaging space—there's also Wickr, Confide, and CoverMe, while Signal, Telegram, WeChat, WhatsApp, Facebook Messenger, and Instagram offer ephemeral messaging as an option. And in case you might have thought of Snapchat (and, by proxy, ephemeral messaging) as just a way for teenagers to communicate, think again. Wickr describes its target audience as military installations, government agencies, private enterprise, and individuals [3], and Confide was created to be the Snapchat for professionals [4]. More and more, individuals and businesses are turning to ephemeral messaging as a secure means of communicating.

While there are legitimate business uses for ephemeral messaging, its use can also raise questions and present challenges within the context of litigation or arbitration. In this article, we aim to explain in broad terms the nature of ephemeral messaging, identify some of the challenges ephemeral messaging raises in relation to document preservation and discovery, describe some recent cases involving ephemeral messaging, and provide suggestions and ideas for litigants and arbitrators alike to consider.

Ephemeral Messaging Basics

Ephemeral messaging apps (aka disappearing messaging apps) allow users to share content that is automatically deleted immediately after it's viewed or within a defined period of time after receipt. The length of time a message will remain visible can usually be controlled by the sender. Messages can contain text, images, or videos, depending on the platform, and they are generally end-to-end encrypted and stored on your personal device. Often there is screenshot protection to prevent the recipient from bypassing the self-destruct feature. Ephemeral messages thus function much like oral communications—once the conversation has ended, the communications live on only in the memories of the participants.

The business case for ephemeral messaging can be robust, depending on the needs of an organization. The benefits can include saving on data storage, protecting trade secrets, protecting against data breaches, controlling e-discovery costs, and maintaining privacy. If confidential communications no longer exist, there is no risk of their inadvertent (or intentional) disclosure. By the same token, ephemeral messaging may be a useful tool for arbitration panel members to confer with one another candidly when a call, video conference, or other oral communication isn't feasible, without the risk of disclosure or breach of the confidentiality requirements that usually accompany arbitration.

> “While there are legitimate business uses for ephemeral messaging, its use can also raise questions and present challenges within the context of litigation or arbitration.”

Litigation and Arbitration Challenges

While there are legitimate reasons for using ephemeral messaging, it can also create challenges. For example, it may complicate corporate compliance obligations by circumventing regulatory retention requirements, violating the duty to preserve, and violating corporate information governance programs. And even if ephemeral messaging is used only for non-nefarious reasons, it can give the appearance of impropriety.

For example, the U.S. Department of Justice views ephemeral messaging apps with a suspicious eye. Indeed, in the 2017 version of its Foreign Corrupt Practices Act (FCPA) Enforcement Policy, the DOJ took aim at ephemeral messaging apps, requiring companies to prohibit employees from “using software that generates but does not appropriately retain business records or communication” as a remediation measure to receive full cooperation credit in connection with voluntarily self-disclosed misconduct [5]. In 2019, the DOJ refined its policy to loosen the outright prohibition on ephemeral messaging apps—it now requires that companies implement “appropriate guidelines and controls on the use of personal communications and ephemeral messaging platforms” as remediation [6]. However, the DOJ remains skeptical of ephemeral messaging apps, noting they “undermine the

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company’s ability to appropriately retain business records” [7].

The U.S. Securities and Exchange Commission (SEC) likewise is mistrustful of ephemeral messaging apps. In a 2018 National Exam Program Risk Alert, the SEC advised registered broker-dealers and investment advisers that they should specifically prohibit “business use of apps and other technologies that can be readily misused by allowing an employee to send messages or otherwise communicate anonymously, allowing for automatic destruction of messages, or prohibiting third-party viewing or back up” to comply with the SEC’s books and records rule [8].

Turning to civil litigation, parties also have a duty to preserve evidence where litigation is reasonably anticipated or ongoing—or, as the Federal Rules of Civil Procedure put it, “... potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable” [9]. This duty requires parties to retain documents, suspend destruction, and put in place litigation holds, and it includes electronically stored information (ESI), such as text messages. Failure to preserve ESI can lead to sanctions under Rule 37(e), as seen in certain of the cases discussed below, although the rule “does not apply when information is lost before a duty to preserve arises” [10].

While arbitral discovery is usually less onerous than discovery in civil litigation, the same preservation and spoliation issues may nevertheless appear in arbitration, and the litigation rules regarding preservation provide guidance for an arbitration panel addressing these issues. Although the scope of discovery in arbitration is often more limited than in litigation, sanctions for spoliation of evidence likely come within the arbitrators’ authority.

In discovery under the Federal Rules, ESI must be produced in a form “in which it is ordinarily maintained or in a reasonably usable form” [11]. That said, “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost” [12].

As you might imagine, the disappearing nature of ephemeral messages can cause problems when it comes to these duties and obligations, and courts and litigants are just starting to wade into these issues. For example, does the “duty to preserve relevant information” require a company to change the functioning of an ephemeral messaging app to preserve (rather than delete) messages going forward? Developing case law says yes. Are ephemeral messages “reasonably accessible” if it is possible to retrieve them through extraordinary means, since not everything deleted electronically is unrecoverable? More and more parties are turning to stipulated ESI orders to set the boundaries, defining what is and is not “reasonably accessible.” And if messages haven’t yet been deleted, is there an obligation to intervene and prevent their deletion or turn them over in discovery? Probably.

At one point, Snapchat revealed that over a six-month period it had produced unopened messages to law enforcement in response to about a dozen search warrants [13]. The messages had not self-destructed because they had not been opened. These issues are not isolated to the courts: arbitrators may soon find themselves in a similar position, being asked to issue discovery orders, draw adverse inferences, and apply sanctions in connection with ephemeral data.

Recent Cases Involving Ephemeral Messaging

In three cases over the past few years, ephemeral messaging has played a central role in the dispute. In each case, ephemeral messaging proved problematic (or at least potentially so).

In *Waymo LLC v. Uber Technologies, Inc.*, Waymo claimed that Uber misappropriated its trade secrets [14]. The litigation was beset by discovery disputes. Waymo filed motions, motions in limine, and multiple requests for relief for Uber's alleged discovery misconduct [15]. In a comprehensive discovery order prior to trial, the court ruled on the extent to which Uber's litigation misconduct might feature at trial. The court allowed Waymo to argue that Uber's use of ephemeral messaging was to purposefully conceal evidence that it had stolen trade secrets, while also allowing Uber to argue that its ephemeral messaging use was legitimate [16]. There was no final resolution of the issue, as the case settled before trial.

After litigation began in *Herzig v. Arkansas Foundation for Medical Care, Inc.*, the plaintiffs installed Signal on their phones, with the app set to delete messages [17]. One of the plaintiffs disclosed that they were messaging over Signal at his deposition [18]. The court inferred that the messages sent over Signal would have been responsive and held that the plaintiffs' installation and use of Signal represented an intentional act "to withhold and destroy discoverable evidence" [19]. While the court held that "[t]his intentional, bad-faith spoliation of evidence was an abuse of the judicial process and warrant[ed] a sanction," the court declined to determine the appropriate severity of the sanction, as it dismissed the case on merits in summary judgment [20].

In *WeRide Corp. v. Kun Huang*, after the start of litigation, the defendant CEO instructed his company to use DingTalk to correspond internally [21]. A company 30(b)(6) witness confirmed the company was unable to recover any DingTalk ephemeral messages, although the CEO said he had stored some messages but could not find a vendor to extract them [22]. The plaintiff moved the court to issue sanctions against the defendants for spoliation of evidence.

In deciding whether to impose sanctions under Rule 37(e) for spoliation of ESI, the court explained that it should consider whether "(1) the ESI should have been preserved in the anticipation or conduct of litigation; (2) the ESI is lost because a party failed to take reasonable steps to preserve it; and (3) [the ESI] cannot be restored or replaced through additional discovery" [23]. "Before terminating the action, the Court must find that 'the party acted with the intent to deprive another party of the information's use in the litigation'" [24].

The defendants continued to delete emails older than 90 days, deleted entire email accounts, wiped laptops, and began using DingTalk. Taking all of this conduct together, the court found it appropriate to issue terminating sanctions under Rule 37(b) and (e) [25].

> "At one point, Snapchat revealed that over a six-month period it had produced unopened messages to law enforcement in response to about a dozen search warrants."

What Does This Mean for You?

Based on the issues presented in *Waymo*, *Herzig*, and *WeRide*, arbitrators and parties need to be proactive about addressing issues related to ephemeral messaging. The case law suggests that decisions about the use of ephemeral messaging should be based on specific business justifications and not made "on the fly" (and especially not once there is already a duty to preserve evidence). As with other types of ESI, when litigation or arbitration is reasonably anticipated, parties should take steps to preserve any ephemeral messages that still exist and disable automatic deletion of messages. Once litigation or arbitration begins, parties may need to determine whether responsive ephemeral messages exist, discuss with each other the role of ephemeral messaging in discovery, and negotiate whether ephemeral messages should be part of the discovery plan.

Where ephemeral messaging is in play, arbitrators should understand how the ephemeral messaging apps used by the parties function, including whether automatic deletion can be disabled and whether use of the app can be avoided entirely. Arbitrators should also understand the implications of a party's decision to use ephemeral messaging—did the party start using ephemeral messaging before arbitration was reasonably anticipated for one of the legitimate business reasons described above, or is the situation more like *WeRide*, where the CEO's instruction to use ephemeral messaging came after the start of litigation? Finally, arbitrators should be prepared to craft discovery orders and relief, such as sanctions or adverse inferences, if evidence that could have been preserved is deleted.

With a greater understanding of the function and legitimate use of ephemeral messaging as well as the questions and challenges it can present in the context of litigation or arbitration, parties and arbitrators should be well positioned to handle any ephemeral messaging issues that may arise.

NOTES

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9. Fed. R. Civ. P. 37(e), Comm. Notes.

10. Fed. R. Civ. P. 37(e), Comm. Notes.

11. Fed. R. Civ. P. 34(2)(E)(ii).

12. Fed. R. Civ. P. 26(b)(2)(B) (emphasis added).

13. "Who Can View My Snaps and Stories." 2013. Snap. Accessed at https://newsroom.snap.com/viewing-snaps-stories

14. 2018 U.S. Dist. LEXIS 16020 (N.D. Cal. 2018).

15. *Id.* at *13–14.

16. *Id.* at *69–70.

17. 2019 U.S. Dist. LEXIS 111296 (W.D. Ark. 2019).

18. *Id.* at *12–13.

19. *Id.* at *13.

20. *Id.* at *15.

21. 2020 U.S. Dist. LEXIS 72738, at *29 (N.D. Cal. 2020),

22. *Id.*

23. *Id.* at *31–32 (internal quotation marks omitted).

24. *Id.* at *32.

25. *Id.*

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How Much Disclosure is Enough?

By Susan E. Mack

As one of the ethics partners at the law firm of Adams and Reese LLP, it is my frequent pleasure to assist other firm lawyers in resolving conflicts of interest and related disclosure issues, given applicable state bar rules. As one of the co-founders of ARIAS·U.S. and a proud member of the ARIAS·U.S. Ethics Committee, I embrace this opportunity to provide insights about disclosure issues addressed by our own society's benchmarks and, specifically, the ARIAS·U.S. Code of Conduct, Canon IV.

To refresh our collective memories, Canon IV succinctly states the following:

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

This article will explore the pragmatic ramifications of this broad call for disclosure affecting an arbitrator's [1] ability to fairly arrive at an award. What are minimum disclosure standards for arbitrators? Are there current best practices for disclosure and, if so, what are these practices? What are the best methods and appropriate times for disclosure? And, importantly, what happens if, upon motion for vacatur pursuant to the Federal Arbitration Act (9 U.S.C. Section 10 et seq.), a reviewing court determines that the disclosure provided is simply not enough?

A related subject addressed by Comments 4 and 5 to Canon IV is an arbitrator's withdrawal from service on the arbitration panel. Comment 4 addresses withdrawal mandated by an arbitrator's inability to reconcile his or her "duty to disclose and some other obligation, such as a commitment to keep certain information confidential." Comment 5 addresses an arbitrator's withdrawal for other "good reason," including "serious personal or family health issues."

This article will explore when and whether an arbitrator should withdraw or, alternatively, consider that a different and less drastic cure is in order. Finally, this article will discuss what happens to the tripartite panel when one of its three members does indeed withdraw. Should the panel be entirely reconstituted, or will the interests of justice and due process be served by replacing only the arbitrator who has tendered his or her resignation?

> It is axiomatic that an arbitrator should disclose any involvement, by employment or otherwise, with the actual contracts or claims at issue.

Minimum Standards and Best Practices for Arbitrator Disclosure

Comment 1 to Canon IV makes clear that it is not enough for an arbitrator to advise the parties to an arbitration, through counsel, of any obvious conflicts that the arbitrator readily remembers. Comment 1 evidences the expectation that arbitrators will undertake an affirmative responsibility to (1) determine the issues underlying the arbitration and understand the identities of counsel, parties, and witnesses as well as other interested parties and (2) seek out and disclose any present or potential conflicts that relate to same. Consider the following language:

*1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a **diligent effort to identify and disclose** any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial relationships with the parties **that others could reasonably believe would be likely to affect the candidate's judgment*** [emphasis mine].

Comment 1 is a further refinement to Canon IV's admonition that arbitrators must disclose "any interest or relationship likely to affect their judgment." The wording of Canon IV alone frames necessary disclosure in terms of what the arbitrator himself or herself subjectively deems likely to affect the ability to resolve the matters in controversy in the arbitration proceeding. But Comment 1 adds the perspective of what, objectively, "others" could "reasonably believe would be likely to affect the candidate's judgment."

Here are the minimum standards that should satisfy the reasonable beliefs of "others" analyzing adequacy of disclosure:

Identifying the issues central to the dispute. By means of the umpire questionnaire to be distributed to the party-appointed arbitrators as well as the umpire, counsel should disclose enough initial facts about the dispute that all panel members will know if they have addressed the involved principles previously by expert testimony or publications and presentations. For example, if a given controversy involves the Extra-Contractual Obligations Clause, the dispute description agreed upon by counsel should indicate that differing interpretations of this clause are central to the arbitration proceeding. That will allow the conscientious panel member to disclose whether he or she has testified, presented or written about this subject, as required by Comment 2 (a) to Canon IV.

It is axiomatic that an arbitrator should disclose any involvement, by employment or otherwise, with the actual contracts or claims at issue (see Comment 2 (c) to Canon IV). Whether it is necessary for an arbitrator to disclose his or her service on other arbitrations where an award was issued on facts and/or circumstances similar to the described arbitration is not expressly addressed in Canon IV or its Comments. The issue is relevant because, for example, several property/casualty reinsurance arbitrations deal with whether cedents have appropriately allocated settlements to different years and different layers of reinsurance treaties. On the life side, several arbitrations deal with the purported ability of reinsurers to raise rates on yearly renewable term treaties.

The results in these proceedings may well differ based on the facts, the treaty wording, and the course of dealing of the parties. Unless information about prior arbitrations is specifically requested by counsel, no affirmative disclosure is required unless the arbitrator believes that his or her prior service is likely to affect his or her judgment in the present arbitration.

If an arbitrator believes the issues description is insufficient, a communication to secure more information should be directed to both parties' counsel.

Keeping accurate records so that recurrence of parties, counsel and company representatives may be ascertained. Once an arbitrator learns of the involved parties, their counsel, their third-party administrators or managers, and their company representatives by means of the umpire questionnaire [2], he or she should consult his or her arbitration records for other matters involving these professionals. To meet this minimum standard, I recommend that the arbitrator keep a spreadsheet that does the following: (1) identifies matters chronologically and in relation to the involved parties; (2) identifies other members of the panel on each matter; (3) sets forth all counsel and their law firms; and (4) identifies company representatives and third-party administrators or managers for each party [3].

Additionally, I recommend that each arbitration listing on the spreadsheet refer to when and how each proceeding was resolved. This measure serves to satisfy the inquiry contained within the ARIAS·U.S. standard questionnaire as to whether other matters involving any of the same panel members, parties, counsel or company representatives resolved after the final hearing and award or, if not, whether they resolved before or after the organizational meeting.

Accurate recordkeeping then enables the arbitrator to disclose, in the words of Comment 1, "... any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment." This recordkeeping also allows for compliance with Comment 2 (b) to Canon IV by disclosing the following:

... *the extent of previous appointments as an arbitrator by either party, either party's counsel or either party's third-party administrator or manager; while it may be true in some circumstances that only the party technically appoints the arbitrator, the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either party's counsel or third-party administrator or manager; such relationships that must be disclosed include appointment as an arbitrator where the party's counsel and/or party's third party administrator or manager acted as counsel or third party administrator or manager for a party making the appointment.*

Determining the current employer's financial interest in the proceedings. Typically speaking, ascertaining one's own potential financial interest in the proceedings is a simple affair. For example, if an arbitrator has equity holdings in a publicly traded party to an arbitration, these holdings, as known, should be disclosed. But Comment 1 also places an obligation on the arbitrator to disclose the following:

... *where appropriate and known by a candidate, the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.*

At a minimum, those working for a company should disclose all known marketing, financial and business relationships actually known, as required by the plain language of Comment 1. I submit that current best practice goes beyond that minimum. Realistically, it would be difficult, at a time after the proceeding, to justify the arbitrator's state of knowledge about his or her current employer at the time of disclosure. For that reason, I advise the prudent arbitrator working in a law firm to conduct a confidential conflicts-of-interest scan to determine the extent to which other lawyers represent (or are adverse to) the parties. Similarly, I advise an executive currently working for an insurer or reinsurer to make direct inquiries about that employer's relationships with a party, without disclosing that the party is involved in an arbitration that may well be subject to confidentiality strictures.

The Continuing Duty to Disclose; Timing and Method of Disclosures

Comment 3 to Canon IV sets forth a baseline standard that the timing of disclosure should be "no later than when arbitrators first meet or communicate with both parties." At the organizational meeting, minimum standards dictate that the party-appointed arbitrators verbally advise counsel of their disclosures, while the umpire will provide verbal updates to his or her completed umpire questionnaire.

By contrast, current best practice mandates that the party-appointed arbitrators disclose their present and potential conflicts by means of a writing directed to all counsel and panel members. This measure guards against an arbitrator's inadvertent omission of a necessary disclosure. Ideally, these written disclosures will take place shortly after all panel members receive the position statements invariably exchanged prior to the organizational meeting. In that way, arbitrator disclosure may be made early in the proceeding, but after the arbitrator learns as much as possible about the parties, their relationships and the issues in contention from the position statements.

Comment 6 to Canon IV advises that "the duty to disclose all interests and relationships is a continuing obligation throughout the proceeding." As is aptly noted, supplemental disclosure should be made immediately when an arbitrator recalls interests or relationships that he or she has failed or neglected to disclose previously. Further, the arbitrator should explain why the disclosure was not made earlier, such as inadvertence or a good-faith belief that the disclosure was not germane to the particular interests or relationships presented by the arbitration proceeding.

But aside from these exceptional circumstances, there are routine touchpoints at which additional disclosure should be seriously considered. These touchpoints include the dates on which counsel reveal the identities of fact and expert witnesses. Prior to those dates, it is likely that the arbitrator does not have enough knowledge about the witnesses to make informed disclosures. Another obvious touchpoint is immediately before commencement of the final hearing. As counsel have made most of their written submissions by then, key information in those submissions may well trigger additional meaningful disclosure.

> "…there are routine touchpoints at which additional disclosure should be seriously considered."

What happens if, upon a party's motion to vacate, a reviewing court finds arbitrator disclosures to be insufficient? Simply put, Canon IV's dictates are more stringent than the preponderance of recent U.S. case law about unacceptable arbitrator disclosure. On the principal issue as to whether arguably insufficient arbitrator disclosure will allow a party to vacate an arbitration award, reviewing courts have been reluctant to disturb the validity of an arbitration award in all but the most extreme circumstances. See, e.g., *Monster Energy Company v. City Beverages, LLC* 940 F. 3d 1120 (9th Cir. 2019).

Specific grounds for vacating an arbitration award under 9 U.S.C. Section 10 include (1) where the award was procured by corruption, fraud or undue means and (2) where there was evident partiality or corruption in the arbitrators, or either of them. In the Second Circuit, the party seeking to vacate an arbitration due to an arbitrator's purported "evident partiality" faces a "high hurdle." *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72. (2d Cir. 2012). Courts in the Second Circuit are generally hesitant to vacate arbitration awards because of arbitrator nondisclosure alone. *National Indemn. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 475 (2016). As clarified in *Applied Industrial Materials Corp v. Ovalar Makine Ticaret Ve Sanavi, A.S.*, 492 F. 2d 132, 137 cited with approval in *National Indemnity Company* 164 F. Supp. 3d at 475, "evident partiality" sufficient to vacate an arbitration award is described as follows:

Unlike a judge, who can be disqualified in any proceeding in which his impartiality might reasonably be questioned, an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator is partial to one side.

Furthermore, unlike the reference in Canon IV, Comment 1 to the arbitrator's "diligent effort to identify any conflicts," the *Applied Industrial* court declined to impose on the arbitrator a "free-standing duty to investigate" for present or putative conflicts. *Id.* at 138.

A review of recent Second Circuit case law fails to disclose any court of appeals cases that vacate arbitration awards based on an arbitrator's evident partiality. Only the *Monster Energy* case in the Ninth Circuit illustrates the most extreme of undisclosed conflicts, whereby vacatur for "evident partiality" would be deemed appropriate.

> “Only when the situation cannot be resolved or will continue for an undetermined length of time should the arbitrator withdraw.”

The *Monster Energy* arbitration was conducted under the auspices of JAMS. The single arbitrator's written disclosure statement omitted that the arbitrator had a substantial ownership interest in JAMS, and JAMS had administered 97 decisions for Monster in the past five years. *Monster Energy*, 940 F.3d at 1136. These facts were only discovered after the proceeding concluded.

Where the arbitration award was in favor of Monster, these facts were sufficient to prompt the Ninth Circuit's reversal of the district court's denial of vacatur. In providing its rationale, the Ninth Circuit Court of Appeals stressed the significance and immediacy of the undisclosed interests, as opposed to any long-past, attenuated or insubstantial connections between Monster and the arbitrator.

While it is currently improbable that a reviewing court will opine that a given ARIAS·U.S. arbitrator's disclosures are not enough, I recommend that arbitrators should adhere to the more aspirational standards of Canon IV. Not only will adherence assure a just outcome, but doing otherwise is to place an ill-advised bet that case law standards will remain unchanged.

Arbitrator Withdrawal: When is this Step Necessary?

To best respect confidentiality strictures, arbitrators disclosing information about their past and concurrent arbitrations should not identify the parties to those arbitrations or related confidential details. Comments 3 and 4 to Canon IV envision the scenario where counsel presses for identifying details as to another of an arbitrator's proceedings in which a confidentiality order is in place. If counsel cannot be satisfied, the conflict between the disclosure obligation and the confidentiality obligation should prompt the arbitrator to withdraw. The arbitrator should remain only if both counsel are aware of an incomplete disclosure, acknowledge the necessity of same, and provide their informed consent for the continuation of the arbitrator in his or her role.

This example is Canon IV's most definitive reference to a reason prompting arbitrator withdrawal. Other reasons may include (1) an arbitrator's personal or family ill health, (2) unavoidable, urgent and unforeseen employment commitments, or (3) a new awareness of previously undisclosed facts by counsel making clear newly perceived conflicts to the arbitrator. Because arbitrator withdrawal may well hinder the parties' intention to bring the arbitration to a prompt and fair resolution, alternative solutions should be seriously considered. For example, if personal ill health does not equate to a continuing disability, the less drastic solution of postponing the final hearing date could accommodate anticipated recovery time. Only when the situation cannot be resolved or will continue for an undetermined length of time should the arbitrator withdraw.

Based on the authority of the Second Circuit's opinion in *Insurance Co. of North America vs. Public Service Mutual Insurance Co.*, 609 F. 3d 122, 129-130 (2d Cir. 2010), the solution to the withdrawal of one arbitrator from a tripartite panel is, in most instances, to replace the arbitrator as opposed to starting the arbitration anew with an entirely new panel. This court reasoned that replacing the entire panel would "open the door to significant potential for manipulation." *Id.* at 130, hypothesizing that "a party receiving unfavorable interim ruling would have an incentive to invite the member designated to resign to forestall an anticipated ultimate defeat" (citation omitted). Notably, the case of an arbitrator's withdrawal is different from the "general rule" espoused in *Marine Products Export Corp. v. M. T. Globe Galaxy*, 977 F. 2d 66, 68 (2d Cir. 1992), namely, that the arbitration must be commenced anew when one member of a tripartite panel dies.

Closing Thoughts

Exceptions such as arbitrator withdrawal and counsels' late discovery of purportedly material non-disclosure aside, Canon IV provides a workable template for how ARIAS·U.S. arbitrators can reasonably satisfy disclosure obligations on an ongoing basis. Pragmatic best practices continue to evolve. Accordingly, I advocate sharing any new practices by interacting at our ARIAS·U.S. Spring and Fall Conferences. I look forward to seeing you at our next conference, slated for beautiful Amelia Island, Florida, near my home and law practice in Greater Jacksonville.

NOTES

1. For purposes of this article, the terms *arbitrators* and *panel members* include both party-appointed arbitrators and umpires unless, for clarity's sake, specific reference must be made due to context.

2. An aside—in determining how best to exercise this disclosure, it is critical to learn the current parents and other affiliates of the parties. The identity of "parties" can change based on recent acquisitions and divestitures.

3. It is notable that Canon I, Comment 4 of the ARIAS·U.S. Code of Conduct as well as Canon IV, Comment 2 were not amended until 2014 to indicate that records should be kept as to third-party administrators or managers. Therefore, practically speaking, an umpire or arbitrator can reasonably explain that his or her records do not contain this information prior to 2014.

Susan Mack spent 25 years as a general counsel and chief compliance officer of both insurers and reinsurers in the life/health and property/casualty sectors of the insurance industry.

A Coming Safe Harbor: Working with the Cannabis Industry

By Robin Dusek

With the success of recent state-level legalization and decriminalization efforts, the cannabis industry is booming, and the need for financial services and insurance/reinsurance is acute and largely unmet [1]. However, given the patchwork legal status of cannabis—legal in some states, illegal in others, sometimes treated differently based on medicinal or recreational status, still unequivocally illegal at the federal level—more traditional businesses, including insurers and reinsurers, are rightly hesitant to become involved. Congress has considered various pieces of legislation to address these concerns, but none of these laws is perfect and, indeed, not one has passed both chambers of Congress, let alone been signed into law. New leadership in Washington might change that, but with or without this legislation, the cannabis industry presents unique challenges and concerns worthy of further review.

In 2019, the SAFE Banking Act was introduced in Congress [2]. The original act would have provided safe harbor provisions for financial services organizations that worked with state-legal cannabis [3] businesses [4], but the House Financial Services Committee expanded the safe harbor to include insurers and reinsurers providing coverage to cannabis businesses [5]. That safe harbor provision states that "an insurer that engages in the business of insurance [6] with a cannabis-related legitimate business or service provider or who otherwise engages with a person in a transaction permissible under State law related to cannabis" will not be held liable under federal law or regulation [7].

The SAFE Banking Act passed the House of Representatives with bipartisan support in 2019, with approximately one-third of House Republicans and all but one Democrat voting in support of the bill. However, it stalled in the Senate, where it never progressed out of committee despite bipartisan co-sponsorship [8].

The House didn't abandon the bill; instead, in 2020, it was folded into the legislation for COVID-19 relief (the HEROES Act) and passed the House once again [9]. The SAFE Banking Act provisions were, unfortunately, negotiated out of the bill that ultimately passed in December 2020. Still, a Senate under Democratic leadership may breathe fresh life back into the bill.

Even if safe harbor is eventually codified, there is no reason to be believe that federal legalization of cannabis is imminent, despite Democratic congressional leadership. The MORE Act, which would have decriminalized cannabis at the federal level, passed the House in 2020 but had few co-sponsors in the Senate, and there are no signs this will change anytime soon [10]. That said, it appears fairly evident that cannabis legalization is not a passing fad—in every state where it was on the ballot in November 2020, voters supported legalization efforts [11]. And legalization is no longer something that affects only "blue" states: Mississippi, Montana, and South Dakota are among the states recently taking steps toward legalizing cannabis [12].

At the same time, the legal cannabis industry has seen enormous job growth, even during the COVID-19 pandemic [13]. Given the momentum behind state-level legalization but the overall squeamishness that still exists relating to federal legalization, there will likely continue to be a period of years—maybe even decades—where state law and federal law regarding cannabis do not align. Still, federal lawmakers realize the necessity of taking some steps to make the differences in the laws more easily managed, and safe harbor is one way to do this.

Cannabis Insurance Considerations

The passage of the SAFE Banking Act would be a game changer for the cannabis industry, the banking industry, and the insurance industry. While not all banking institutions or insurance industry participants want to work with cannabis businesses, some see the sector's relative resilience [14] during the COVID-19 pandemic, especially as compared to more traditional industries, as a lucrative opportunity. Based on my discussions, there are many insurers and reinsurers eager to move into the cannabis space.

So, what are some considerations that industry participants should weigh before making the leap?

Federal illegality still matters, even if the SAFE Banking Act becomes law. Due to the confluence of factors relating to insuring cannabis businesses (federal illegality, perceived headline risk, and lack of historical data, for example), there are few insurers relative to the overall needs of the industry. In addition, nearly all insurers willing to insure cannabis businesses are operating on a surplus-lines basis, so most policies are not written for the cannabis industry, and general policy exclusions may be problematic when claims do arise. For instance, policies may exclude illegality, smoke, or pollution (among others) that theoretically could apply to many, or even all, claims that arise.

For an insurance contract that covers a state-legal but federal-illegal cannabis business (even with a safe harbor), the applicability of these types of exclusions is an open issue. In 2012, the Hawaiian District Court sided with an insurer that had used federal illegality as the basis for declining coverage for the loss of state-legal medical cannabis plants under a homeowner's policy [15]. A few years later, however, a Colorado court sided with the insured in a coverage dispute where the CGL carrier had relied on a public-policy exclusion to decline coverage for its insured cannabis business. The court pointed out that the insurer, "having entered into the Policy of its own will, knowingly and intelligently, is obligated to comply with its terms or pay damages for having breached it" [16]. It is fair to say that the law on this issue is neither mature nor clear, and it is possible, if not likely, courts will take different views of these exclusions.

Given the lack of clear guidance, will reinsurers claim that cedents that do pay, despite exclusions, have paid claims ex gratia? While at first blush it would seem to verge on bad faith for an insurer or reinsurer covering a cannabis business to argue that cannabis products are excluded from coverage, it may be the case—depending on the scope of coverage and definition of the insured—that an underwriter believed coverage to be narrowly focused. As such, cedents and reinsurers entering into contracts reinsuring cannabis businesses would be wise to communicate regarding the applicability of policy exclusions. These communications can help ensure that the parties are on the same page regarding the scope of coverage, thereby minimizing or avoiding future disputes.

Federal illegality can also complicate the relief that federal courts are willing to consider. In 2020, courts repeatedly cited the federal illegality of cannabis when denying relief in commercial disputes [17]. Whether this is a blip or a trend remains to be seen. But any party touching the cannabis industry in any respect would be well advised to draft contracts with severability provisions to ensure that the entire contract does not fall apart if one provision is found to be unenforceable. Forum selection clauses should be carefully considered, as the forum selected may determine wither a contract is fully enforceable as written.

> "It is an open question whether public policy will be used as a basis to decline to enforce arbitration awards that relate to the cannabis industry."

Cannabis is illegal in many countries around the world. Given the issues surrounding the enforcement of cannabis-related contracts in federal court, reinsurance industry participants might find themselves comforted by the relative ubiquity of arbitration clauses in reinsurance contracts. But is this comfort warranted?

It should come as no surprise that cannabis remains illegal in many countries around the world. Some countries have legalized medical but not recreational cannabis; others have legalized certain cannabis products, but not products sold in certain state-legal medical or recreational dispensaries. This could have consequences relating to the enforceability of arbitrations involving cedents or reinsurers located in countries where cannabis products remain partially or entirely illegal. Typically, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that arbitration awards between parties whose home countries are Convention signatories may be enforced. However, the New York Convention permits courts (or the relevant "competent authority") to refuse to enforce awards that are contrary to public policy in the country in which recognition and enforcement are sought [18].

It is an open question whether public policy will be used as a basis to decline to enforce arbitration awards that relate to the cannabis industry. In the absence of clarifying guidance, parties to reinsurance contracts covering the cannabis industry should carefully consider business partners and decide whether they prefer to rely on courts or arbitration, based on the specific parties to a relationship.

The legality of cannabis will remain a gray area. The cannabis industry has been flooded with new participants, regulations, and laws. Understanding the nature of the risk is a challenge, and pricing coverage appropriately may take time to get right. Given the relative lack of coverage capacity at the moment, insurance appears to be expensive relative to risk [19]. But this may change quickly if the SAFE Banking Act passes and the market is flooded with insurers and reinsurers comforted by the law's enactment. And as we all know, when participants are losing money on risks, the likelihood of disputes increases.

Assuming the SAFE Banking Act passes, the legality of cannabis will still continue to be a maze in the United States. Even with a safe harbor, cannabis will still be illegal at the federal level absent the passage of the MORE Act (or something similar). Moreover, state-level legality will vary, with each state having a different set of laws and regulations. Staying on top of the labyrinthine complex of laws, regulations, and standard practices will be difficult for even the most sophisticated industry participants. Navigating this maze is critical for understanding the scope of risk insured or reinsured, the best forum for resolving disputes, and the enforceability of judgments. As such, it is vital that those entering the space do so with their eyes wide open and in conjunction with a competent advisory team.

NOTES

1. See generally National Association of Insurance Commissioners Cannabis Insurance (c) Working Group, "Regulatory Guide: Understanding the Market for Cannabis Insurance," May 24, 2019.

2. H.R.1595 – Secure and Fair Enforcement Banking Act of 2019. 116th Congress (2019–2020). "All Actions." Accessed at https://www.congress.gov/bill/116th-congress/house-bill/1595/all-actions?overview=closed#tabs.

3. "Cannabis" is used in this article, rather than the outdated term "marijuana." See Alex Halperin, "Marijuana: is it time to stop using a word with racist roots?" *The Guardian*, January 29, 2018.

4. H.R.1595 – Secure and Fair Enforcement Banking Act of 2019. 116th Congress (2019–2020). "Text." Accessed at https://www.congress.gov/bill/116th-congress/house-bill/1595/text/ih.

5. H. Rept. 116-104 - Safe Banking Act of 2019. Accessed at https://www.congress.gov/congressional-report/116th-congress/house-report/104.

6. The "Business of Insurance" is defined in Section 14(1) by reference to the Dodd-Frank Act, which defines "Business of Insurance" as "The term 'business of insurance' means the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons." 12 U.S.C. § 5481.

7. H.R. 1595 – Secure and Fair Enforcement Banking Act of 2019. 116th Congress (2019-2020). "Text." Accessed at https://www.congress.gov/bill/116th-congress/house-bill/1595/text.

8. H.R. 1595. "All Actions."

9. Schiller, Melissa. 2020. "U.S. House Includes SAFE Banking Act in Latest COVID-19 Relief Package." Cannabis Business Times, September 29.

10. S. 2227 –MORE Act of 2019. 116th Congress (2019-2020). "Cosponsors." Accessed at https://www.congress.gov/bill/116th-congress/senate-bill/2227/cosponsors?-searchResultViewType=expanded.

11. Smith, Kelly Anne. 2020. "These States Passed Provisions to Legalize Marijuana in the 2020 Election." *Forbes*, November 4.

12. Schaneman, Bart. 2020. "Newly legal states offer marijuana growers fresh opportunities, but some greener than others." *Marijuana Business Daily*, November 20.

13. Barcott, Bruce, Beau Whitney, and Janessa Bailey. 2021. "The U.S. cannabis industry now supports 321,000 full-time jobs." Leafly, February 16.

14. Schroyer, John and Andrew Long. 2021. "Cannabis sales records smashed or set in 2020, and insiders expect the gains to continue." *Marijuana Business Daily*, January 22.

15. *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487 LEK-KSC. (D. Haw. Mar. 16, 2012).

16. *Green Earth Wellness Ctr. LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 831 (D. Colo. 2016).

17. See *Bart St. III v. ACC Enterprises, LLC*, No. 217CV00083GMNVCF, 2020 WL 1638329 (D. Nev. Apr. 1, 2020) ("Plaintiff cannot prevail for unjust enrichment because the parties' contract involves moral turpitude. If the Contract is unenforceable, it is because Plaintiff invested in Defendants' marijuana cultivation business primarily to obtain a pathway to an equity investment therein … Providing funds in exchange for equity violates the CSA because it would allow the investor to profit from the cultivation, possession, and sale of marijuana …. Conspiracy to cultivate marijuana is a crime of moral turpitude."); *Polk v. Gontmakher*, No. 2:18-CV-01434-RAJ, 2020 WL 2572536 (W.D. Wash. May 21, 2020)("[A]s this Court has previously explained to Mr. Polk, it cannot award him an equitable interest in NWCS because to do so would directly contravene federal law."); *J. Lilly, LLC v. Clearspan Fabric Structures Int'l, Inc.*, No. 3:18-CV-01104-HZ, 2020 WL 1855190 (D. Or. Apr. 13, 2020) ("The Court is persuaded by the reasoning of the district courts in *Tracy* and *Hemphill* and finds that awarding Plaintiff damages for lost profits would require the Court to compel Defendants to violate the Controlled Substances Act.")

18. New York Convention V(2)(b).

19. Sacirbey, Omar. 2018. "Finding right insurance is key to any marijuana company's business plan." *Marijuana Business Daily*, February 28.

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Are Cut-Through Clauses Enforceable?

By Robert M. Hall

Sophisticated insureds often have size and quality rating standards for their insurers. Sometimes, however, insureds may be willing to accept insurers with lower ratings if (1) the insurers are backed by large, quality reinsurers and (2) the reinsurers are willing to allow the insured to "cut through" and collect from the reinsurer if the ceding insurer becomes insolvent. However, there is a line of cases in which the courts have denied a cut-through just when it is most needed—when the ceding insurer is insolvent.

These decisions may be the result of an inadequate understanding of the history of cut-throughs and their interaction with receivership-related laws. The purpose of this article is to examine this history and the cases that do not reflect the history of cut-throughs.

Fidelity and Its Aftermath

In *Fidelity & Deposit Co. v. Pink*, 302 U.S. 224 (1937), the ceding insurer was insolvent. Its quota share reinsurer argued that because the reinsurance contract was one of indemnity, the reinsurer was not required to pay its portion of the loss until the cedent paid its portion. Unfortunately, the cedent was unable to do so due to its insolvency. The Supreme Court found for the reinsurer on the indemnity issue.

The "Pink" in this case was the superintendent of insurance of the state of New York. He devised a statutory remedy by requiring an "insolvency clause" in each reinsurance contract if the cedent wanted to take credit for the reinsurer in its financial statements—effectively a mandatory clause. The relevant statute required that the reinsurer pay claims "without diminution" because of the insolvency of the ceding company. However, through compromise, the statute recognized two exceptions: (a) where the contract specifically provides another payee of the reinsurance in the event of the insolvency of the ceding insurer (a cut-through), and (b) where another insurer has assumed the obligations of the insolvent ceding insurer (assumption reinsurance).

The requirement for an insolvency clause, with these exceptions, currently appears in the New York Insurance Law at 13 § 1308 (a). Other states require an insolvency clause with these same exceptions or accept them de facto because the clause is used universally in the reinsurance industry. Thus, the cut-through exception is an express or de facto exception to the authority of state insurance company receivers to marshal the reinsurance recoverables of the cedent [1].

Caselaw Adverse to Cut-Throughs

There is a line of cases adverse to cut-throughs on the basis that they undercut the ability of the receiver to marshal assets and control the receivership proceeding. These cases fail to recognize the cut-through clause as the contractual manifestation of a statutory exception to the requirement that reinsurers pay reinsurance payables to the receiver and no other entity. Perhaps this has become lost in the mists of reinsurance history.

When Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire") was placed in rehabilitation by the Pennsylvania Insurance Department, a rehabilitation plan was adopted that impaired a variety of contractual rights (including cut-throughs) on the part of third parties. The Pennsylvania Supreme Court rejected challenges to the plan: "While this [impairment of contractual rights] may in fact be an accurate assessment of the consequences of the proposed rehabilitation, such an impairment is not a per se violation of law and … any actual impairments are insubstantial" [2].

> "Apparently, it was never argued that the cut-through was an express or de facto limitation on the authority of the receiver to marshal assets."

Following the Mutual Fire case was *Colonial Penn Insurance Co. v. American Centennial Insurance Co.*, 1992 U.S. Dist. LEXIS 17552 (S.D.N.Y. Nov. 17, 1992). This case involved a primary insurer, Colonial Penn, that ceded business to Mutual Fire and then obtained a cut-through to Mutual Fire's retrocessionaire. When Mutual Fire was put into rehabilitation, Colonial Penn attempted to collect from the retrocessionaire. The Mutual Fire receiver objected on the basis that enforcement of the cut-through violated the rehabilitation plan. The district court declined to override the rehabilitation plan approved by the Pennsylvania courts:

The Pennsylvania courts have addressed Colonial Penn's requests to limit the reach of the [Rehabilitation] Plan and refused to impose any limitations upon the Rehabilitator's ability to impair Colonial Penn's rights as third party beneficiary under the Treaties. This court should not enter such relief collaterally [3].

Apparently, it was never argued that the cut-through was an express or de facto limitation on the authority of the receiver to marshal assets.

Performance bonds in Indiana were involved in *Cummings Wholesale Electric Co. v. Home Owners Insurance Co.*, 492 F.2d 268 (7th Cir. 1974). By statute, Indiana limited the size of the bond a surety could issue as a percentage of paid up capital, surplus and contingent reserves. This sum, however, could be exceeded through reinsurance that gave a direct right of action against the reinsurer to the beneficiary of the bond. When the surety that issued the bond became insolvent, the beneficiary of the bond attempted to collect from the reinsurer. The court declined to enforce this statutory cut-through, as it undercut the ability of the receiver to marshal assets and distribute them in an orderly fashion:

While we agree with the claimants that [the statutory cut-through] accorded them a direct right of action against the insurer jointly with the reinsurers, we do not agree that the Indiana legislature intended to give them a preference over general creditors of an insolvent reinsured ... [Indiana law] provides that an Indiana court may issue any orders necessary to prevent the obtaining of any preferences against any part of the assets of an insolvent insurance company ...

We conclude that if the Indiana Insurance Law were intended to give claimants a preference in the assets of an insolvent insurance company, the statutory expression would have been equally explicit. Our determination that there is no preference leads to the conclusion that the direct cause of action does not survive the commencement of liquidation proceedings [4].

The court recognized that a Puerto Rican statute allowed a cut-through by insureds to reinsurers and that the reinsurance contract involved was so endorsed in *Warranty Association of Insurance of All Kinds v. Commonwealth Insurance Co.*, 114 D.P.R. 166 (1983). The court, however, declined to enforce the cut-through, as it was an improper preference to the assets of the estate.

> "The courts have elevated the avoidance of preferences over contractual rights, but have failed to address cut-throughs as an express or de facto statutory limitation on the powers of receivers."

Commentary

While not all courts have rejected cut-throughs [5], it has happened with sufficient frequency to create doubt as to their efficacy when they are most needed—upon the insolvency of the cedent. In doing so, the courts have elevated the avoidance of preferences over contractual rights, but have failed to address cut-throughs as an express or de facto statutory limitation on the powers of receivers.

NOTES

1. Semple, T.D., and R.M. Hall. 1986. "The Reinsurer's Liability in the Event of the Insolvency of a Ceding Property and Casualty Insurer." *Tort & Insurance Law Journal*, 21(3): 407–424.

2. *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1094 (PA. 1992)(emphasis in the original).

3. 1992 U.S. Dist. LEXIS *18.

4. 492 F.2d at 272.

5. See, e.g., *International Matex Tank Terminals v. Louisiana Ins. Guar. Ass'n.*, 663 So.2d 712 (Ct. App. La. 1993).

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Spring Conference Recap

By Rob Kole, Spring Conference Co-Chair

For what we all hope will be the last time, the ARIAS Spring Conference took place not live in sunny Florida, but virtually in our own offices, coffee shops, basements, living rooms, attics and pet rooms. In other words, wherever our families let us set up and the Wi-Fi worked. But if this ends up being the last of the pandemic-era virtual conferences, it will have ended on a high note. Disproving the notion of quality over quantity, four co-chairs—Cindy Koehler, Sarah Gordon, Alex Furth and Rob Kole—put together a program filled with quality speakers, new ideas and fresh approaches to old ideas, with remarkably few technological glitches (thanks to the ARIAS•US internal team).

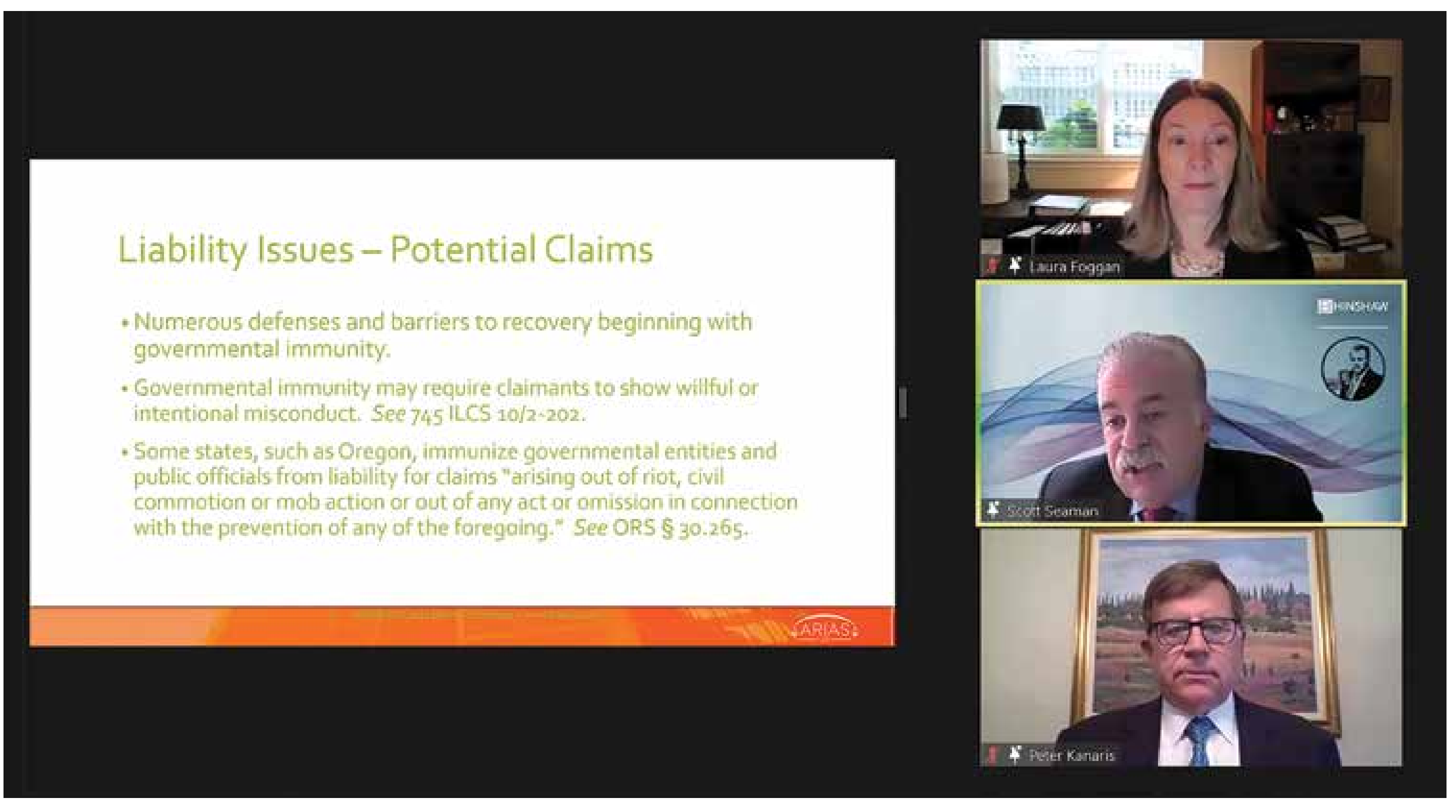
After a pre-conference chocolate tasting event hosted by The Women's Resource Committee, the official festivities kicked off on Thursday, May 6, with a short welcome speech by co-chair and ARIAS Board Member Cindy Koehler. With the audience properly warmed up, the first speaker was keynote John Keogh, president and chief operating officer of Chubb Group. In response to probing questions from Josh "Oprah" Schwartz, John provided fascinating insight into how the industry has responded to the unprecedented events of 2020, and how it can do better going forward. John's talk was as timely as it was informative, setting just the right tone for the rest of the conference.

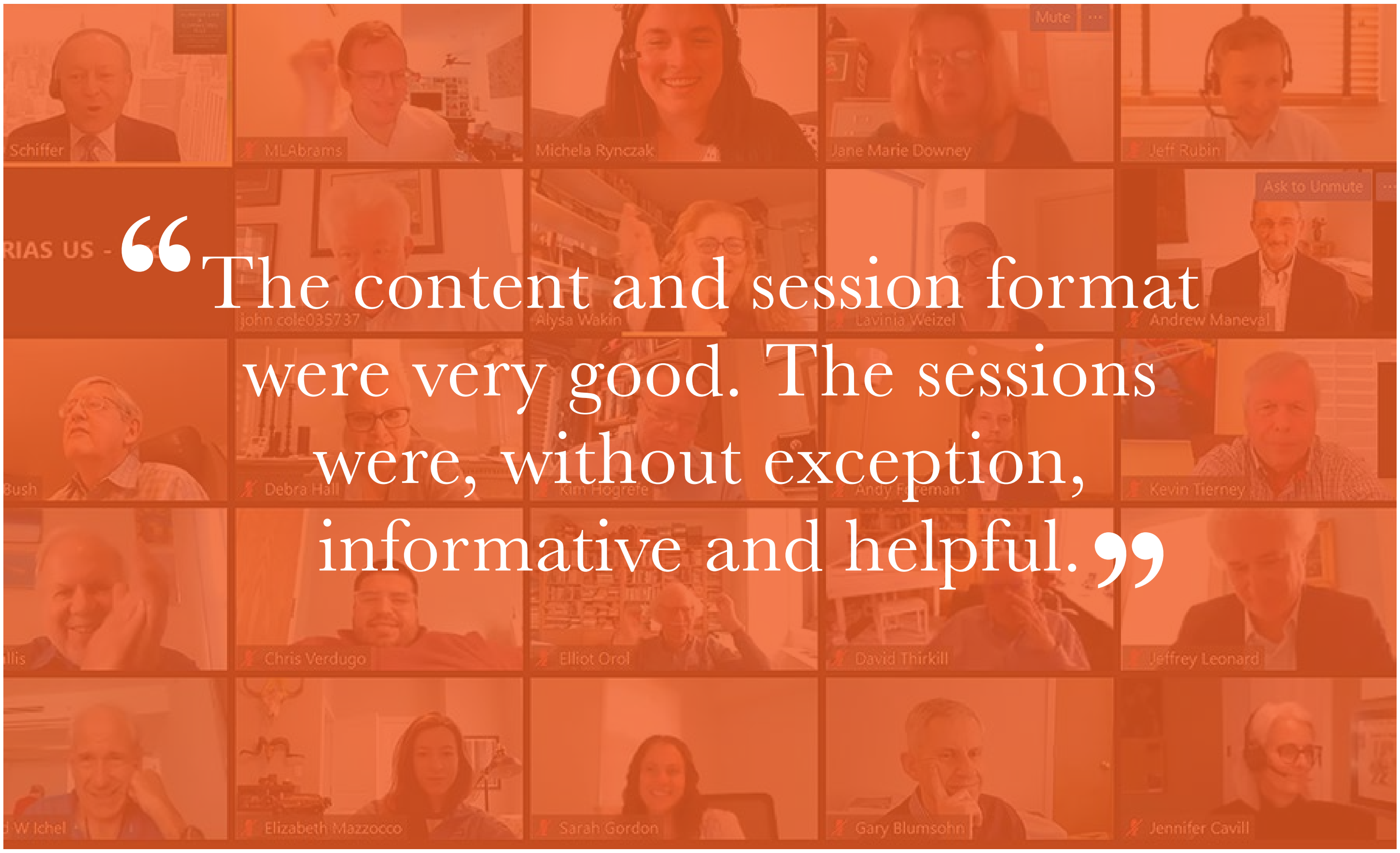
What followed were two separate panels tackling different aspects of the same topic: virtual arbitrations. The panels discussed what works well, what doesn't work quite as well and what might outlive the pandemic, starting with the organizational meeting and going right through mediation, discovery, the final hearing and panel deliberations. Panelists Jack Vales, Andrea Giannetta, Erika Lopes-McLeman and Andrew Nadolna (Panel 1), and Katheleen Ehrhart, Peter Steffen, Mark Gurevitz and Katherine Billingham (Panel 2), presented a generally positive view of the virtual arbitration process, while many of the "chatters" online expressed more skepticism. Welcome to America, 2021.

Just prior to afternoon breakout sessions, Marissa Beyers of Trial Behavior Consulting offered an in-depth study of nuclear verdicts and juries in a COVID and post-COVID world. Marissa was a dynamic speaker, and the attendees were impressed by both the substance of her presentation and her energetic delivery. Remarkably, the news from the jury front was generally positive for defendants, which took everyone by surprise.

The breakout sessions that followed offered topics ranging from (a) substantive insurance and reinsurance issues like opioid, PFAS and sexual abuse claims to (b) the latest from the international arbitration space to (c) social science issues like unconscious bias and diversity, equity and inclusion. There truly was something for everyone in the breakouts!

> “I thought the content was excellent and the speakers overall were strong. It is challenging to put on a conference by Zoom in the age of Zoom overload, but I thought ARIAS pulled it off well.”





Day 1 of the substantive program ended with a topic that is on everyone's mind right now: reinsurance of COVID claims. The proof that this presentation struck a chord with the audience was the vigorous debate in the chats. Speakers Jeff Burman, Chris Foster, Corinne Kruse and Cecilia Moss provided a detailed overview of the many ways COVID-related issues are similar to some of the key reinsurance issues of the past, and the critical ways in which they may be different.

After several networking opportunities and a chance to catch everyone's collective breath, Day 2 began with a video from a surprise guest, Congressman Jamie Raskin. Congressman Raskin emphasized the importance of the insurance industry generally, and the arbitration process specifically, in addressing the important societal issues that have become the hallmarks of 2021. The Congressman's introduction segued perfectly into the first session of the day, titled "Ripped from the Headlines–Insurance and Reinsurance Issues in Current Events." Speakers Laura Foggan, Peter Kanaris and Scott Seaman talked about three recent hot button issues: (a) mass shootings, (b) strikes, riots and civil commotions, and (c) the Southwest freeze. The presentation was like an episode of Law and Order, just with fewer killings and sound effects and more Southwestern Freeze.

The last substantive session was either an ethics presentation styled as a game show, or a game show styled as an ethics presentation. Either way, host Larry "Wink" Schiffer, with the help of a number of team leaders, presented fifteen challenging ethics questions to the audience. The audience members were then sent to separate small groups to come up with the answers. After the final answers were revealed, a team led by Marc Abrams was declared the winner. Considering the difficulty of the questions, the perfect score by Team Abrams may be subject to appeal under the FAA.

And with that, Steve "Stretch" Schwartz brought the Spring Conference to a close by noting that he would be happy to trade the benefits he gets from appearing taller on Zoom to see everyone in person in the fall, a sentiment shared by everyone. But the inherent limitations of the format should not in any way diminish the hard work put in by so many to make this an educational, informative and fun 2021-style get together.

Rob Kole is a partner in the Insurance & Reinsurance Group of Choate, Hall & Stewart.

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Who Decides the Threshold Question of Arbitrability?

The ARIAS·U.S. Law Committee publishes summaries of recent U.S. cases addressing arbitration- and insurance-related issues. Individual ARIAS·U.S. members are also invited to submit summaries of cases.

Case: *TIG Insurance Company v. American Home Assurance Company,* (18-CV-10183, S.D.N.Y. Feb. 7, 2020)

Court: U.S. District Court for the Southern District of New York

Date decided: Feb. 7, 2020

Issue decided: Whether the arbitrability of a dispute is determined by the terms of an arbitration agreement or is an issue for judicial determination

Submitted by: Suzanne R. Fetter

American Home Assurance Company and New Hampshire Insurance Company (collectively, "Defendants" or "AIG") entered into two reinsurance agreements ("Treaties") with TIG Insurance Company in 1974 and 1976 (the "Agreements"). The Agreements provided that disputes between the parties would be arbitrated before two arbitrators: "one to be chosen by each party and in the event of the arbitrators failing to agree, to the decision of an umpire to be chosen by the arbitrators."

Granite State Insurance Company, an affiliated company of the defendants (though not a party to the Treaties) insured Foster Wheeler Corp., Crane Co., and Transamerica Corp. for asbestos-related exposures, which were later presented to TIG for reimbursement. Subsequently, several demands for arbitration were made on July 13, 2018, by American Home Group, New Hampshire Insurance Company (NHIC), National Union and AIU Insurance Company. After each party appointed an arbitrator per the terms of the Agreements, TIG objected to arbitration on the grounds that Granite State was not a party to the Treaties. To support its refusal to pay the asbestos-related claims, TIG filed an action in the Southern District of New York on November 1, 2018, to determine who should decide the threshold question of arbitrability.

TIG argued that the question of whether NHIC's policies issued by Granite State fell under the terms of the Treaties—where Granite State was not a party to the Agreements—raised an issue of arbitrability. TIG further argued that the arbitrability issue was for the court to decide, as opposed to an arbitration panel.

On January 3, 2019, Defendants filed a motion to compel arbitration and dismiss the complaint. On February 7, 2019, Defendants filed a motion to appoint umpires under the Federal Arbitration Act, 9 U.S.C., Section 5, to serve as neutral umpires in the disputes, and subsequently withdrew that motion.

TIG argued to the district court that the arbitration panel did not have the authority to grant AIG's requested relief under the Treaties, and therefore the dispute concerning the billings should reside with the court. The court, however, in a decision by Judge Vernon Broderick of the Southern District Court of New York, rejected this argument. The court found that the Federal Arbitration Act "provides that an arbitration provision in a 'contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'." 9 U.S.C. Section 2. *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011).

Judge Broderick granted Defendants' motion to compel arbitration and denied Defendants' motion to dismiss claims against Granite State Insurance. The court found that the arbitration clauses created valid agreements to arbitrate, and that the arbitration clauses controlled the interpretation of the underlying Treaties at issue.

The question of whether the underlying demands for payment are covered by the Treaties is one of contract interpretation, not arbitrability, said Judge Broderick. The court also found that TIG brought the suit in good faith and not for purposes of harassment or delay, and thus rejected Defendants' claim for attorneys' fees.

Suzanne Fetter is the owner of the Fetter Company and a former director and (re)insurance executive.

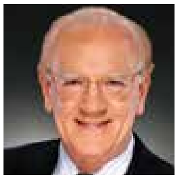
Newly Certified Arbitrators

Gary Blumsohn is an actuary with 30-plus years of experience in property and casualty insurance and reinsurance. He served as chief actuary of Arch Reinsurance from 2002 to 2017 and still works at the company; he has also been involved in underwriting reinsurance treaties, both at Arch Re and in his previous job at St. Paul Re. He has been involved in a significant number of reinsurance commutations and published an award-winning paper on workers' compensation reinsurance commutations. He is a Fellow of the Casualty Actuarial Society and a Certified Enterprise Risk Analyst.

Frank A. Lattal, a past president and chairman of ARIAS•U.S., has 35 years of conflict resolution experience, 14 in private legal practice followed by 21 as a senior executive at Chubb Group (formerly ACE Group). Before retiring from Chubb in 2019, he served as senior vice president and head of claims for ACE Bermuda, became executive vice president and general counsel for ACE's Bermuda-based operating companies (ACE Bermuda and Tempest Re), then served for 15 years as the worldwide chief claims officer for the entire group. He is the co-author of a one-volume insurance law treatise, New Jersey Insurance Law, which has been published annually since 1993.

Newly Certified Mediators

James E. Fitzgerald is the principal of Fitzgerald Legal Consult, P.C., in Los Angeles and acts as a mediator for direct insurance and reinsurance disputes around the United States. He is a former partner of several national and international law firms, where he specialized in trial and arbitration work, primarily in complex insurance coverage and bad-faith disputes. During his 40+ years as a trial and litigation specialist, he participated in more than 400 mediations. This summer, he will be moderating a Rutter Group panel discussion on practical tips for mediation.



Fred Pinckney is a certified neutral arbitrator with ARIAS. Mr. Pinckney has had more than 25 years experience in cedant and reinsurer matters as outside counsel and then general counsel for a NYSE-listed commercial specialty Bermuda insurance holding company, its domestic insurer and its affiliated Vermont risk retention group. He is now the principal of Business Law & Arbitration Services in Atlanta, Georgia. Mr. Pinckney also has over 17 years experience as a commercial arbitrator and mediator in business, healthcare, and insurance policy disputes with the American Arbitration Association. He has a Martindale-Hubbell peer review rating of "AV preeminent.w"

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