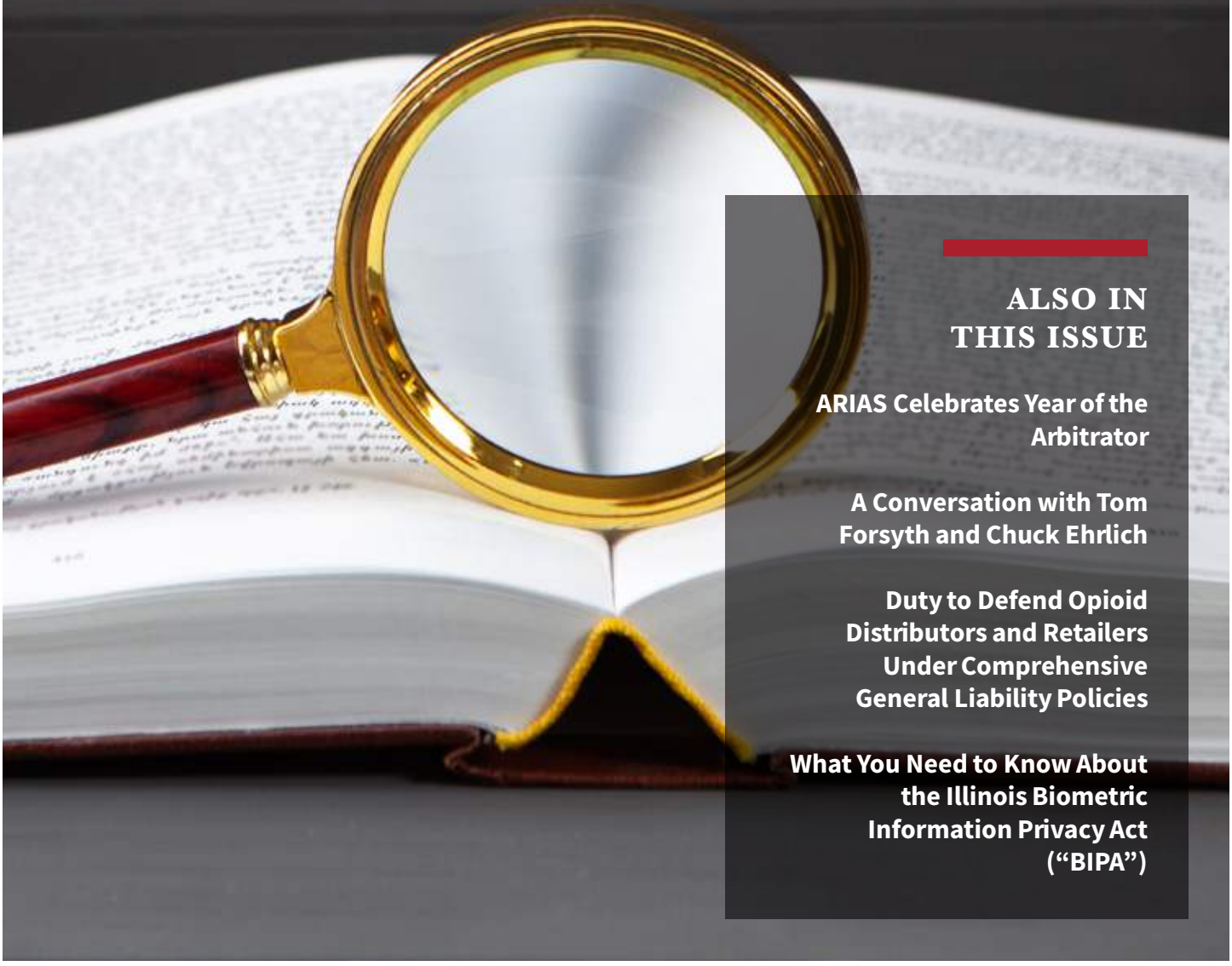
ARIAS U.S.

QUARTERLY

In Search For Clarity

U.S. Court Decisions On Whether to Imply Follow-the-Fortunes and Follow-the-Settlements Principles Into Reinsurance Contracts



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ARIAS Celebrates Year of the Arbitrator

A Conversation with Tom Forsyth and Chuck Ehrlich

Duty to Defend Opioid Distributors and Retailers Under Comprehensive General Liability Policies

What You Need to Know About the Illinois Biometric Information Privacy Act ("BIPA")

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All of ARIAS wishes a speedy recovery to ARIAS Certified arbitrator Mark Megaw.

EDITORIAL POLICY — ARIAS • U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the *Quarterly* may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the *Quarterly* may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS • U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

By the time you read this the ARIAS Spring Conference will be upon us and we will be getting ready for an exciting program with fun in the sun at the Ritz Carlton on Amelia Island. Keeping with this year's theme of The Year of the Arbitrator, the Spring Conference will feature several important sessions featuring arbitration and arbitrators. I hope to see you all there in my new role as Executive Director.

This issue of the Quarterly features three diverse articles covering important subjects. First, we have another article in our series on follow-the-fortunes and follow-the-settlements. Max B. Chester and Andrew M. Meerkins from Foley & Lardner LLP share their views on whether the follow-the-fortunes and follow-the-settlements doctrines should be implied into reinsurance contracts. Titled: "In Search For Clarity: U.S. Court Decisions On Whether to Imply Follow-the-Fortunes and Follow-the-Settlements Principles Into Reinsurance Contracts," the authors carefully analyze the caselaw on this subject and conclude that overall, courts have been hit or miss in recognizing and distinguishing between the two following principles. We welcome other authors to continue the debate over aspects of the following doctrines.

Next, we kick "The Year of the Arbitrator" into high gear with interviews of two well-known industry figures who are ARIAS certified arbitrators.

The Arbitrator's Corner features Alysa Wakin's interview of Tom Forsyth, a new arbitrator, but a past ARIAS Chair and President. Who knew that Tom was a fan of mega stuffed Oreos? Alysa's second interview is with Chuck Ehrlich. Chuck, a long-time arbitrator, gives some sage advice for new arbitrators and discloses his secret past as an amateur racecar driver. Look for more insightful interviews in the Arbitrator's Corner in future issues. Let Alysa know if you would like to be interviewed.

Following the interviews, regular contributor and a member of the editorial committee, Robert M. Hall, of Hall Arbitrations, brings us an important analysis of whether there is a duty to defend opioid distributors and retailers under the CGL policy. In "Duty to Defend Opioid Distributors and Retailers Under Comprehensive General Liability Policies," Bob explains how the courts have addressed this issue and documents a significant judicial split among the federal circuits and state courts.

Finally, our Technology Committee is bringing back the Tech Corner but this time with a far-reaching article on biometric information laws. Technology Committee co-chairs, Frank DeMento and Michael Kurtis from Transatlantic Reinsurance Company, have authored "What You Need to Know About the Illinois Biometric Information Privacy Act ("BIPA")." The article focuses on BIPA, its history and its status and enforcement. It provides a good overview of BIPA and why insurance and reinsurance companies need to be aware of the statue and its scope.

We hope you enjoy this issue of the Quarterly. We still need more of you to contribute to future issues. The deadlines and requirements are on the ARIAS website. We welcome committee reports, original articles and repurposed articles from ARIAS CLE programs or from company or firm publications. Leverage your thought leadership and publish an article in the Quarterly. Don't be shy. Your thought leadership is worthy of publication.

Larry P. Schiffer
Editor

Schiffer Named as New Executive Director

As many of you have experienced firsthand, ARIAS has faced a number of challenges this year in the transition from MCI to DPS. As a result, and together with DPS, the Board has made the decision to replace Tracy Schorle with Larry P. Schiffer as the new Executive Director.

Larry is a long-time ARIAS member and currently serves as the Editor-in-Chief of the ARIAS Quarterly and as a member of the Ethics Discussion Committee, the Technology Committee, and the MemberClicks Task Force. Larry has extensive experience with most facets of ARIAS and has held numerous leadership positions in various organizations and bar associations.

Larry will take on all responsibilities of Executive Director and will supervise and work with the staff of DPS to provide administrative and member services to ARIAS. Like Bill Yankus before him, I have no doubt that Larry will whip us into shape and keep the trains running on time. I hope all of you will welcome Larry as he works to resolve the various issues with registrations, membership, certifications and the interface between the membership database and the arbitrator database on the ARIAS website.

Alysa Wakin - Chairperson

UPCOMING EVENTS

Spring Conference

May 17-19, 2023

Ritz-Carlton on
Amelia Island, Florida

In Search For Clarity

U.S. Court Decisions On Whether to Imply Follow-the-Fortunes and Follow-the-Settlements Principles Into Reinsurance Contracts

By Max B. Chester and Andrew M. Meerkins

Introduction

Undoubtedly, reinsurance practitioners learn early on certain fundamental principles and customary practices that define reinsurance. For many, Robert W. Strain, *Reinsurance* (6th ed. 1997) [1] was required reading to try to understand what reinsurance is and isn't (such as, for example, "reassurance"). Small wonder: the Strain treatise's essays were written by, edited, and reviewed by "a veritable WHO's WHO in the reinsurance business," and recommended by their peers, "whose knowledge, experience, and judgment… was, for the most part, from a life's work."[2] In other words, Strain captures the principles and customs of the industry as well as anyone.

The Strain treatise outlines "three major fundamentals" for the reinsurance business: "mutual trust, utmost good faith (or good faith) and, the often-used and misunderstood concept of following the underwriting fortunes of the reinsured."[3] We were surprised (but validated) on rereading this passage, knowing we were in the good company of Mr. Strain in observing that one of the fundamental principles of reinsurance—"following the fortunes"—was "often-used and *misunderstood*." (emphasis added). Strain's characterization reflects the inconsistent decisions and glosses courts have put on the fortune-following principles. The confusion Strain observed arises because there are, in fact, *two* types of "following" doctrines: "follow-the-fortunes" and "follow-the-settlements." The Strain treatise explains:

Follow-the-Fortunes:

[Follow the fortunes] deals with the underwriting fortunes of the reinsured. The expression "following the fortunes" reflects that the reinsurer has given up to the reinsured, especially in treaty reinsurance, a large measure of its own discretion and therefore of its "fortunes," … which must follow that of the reinsured.

Following the fortunes means that, so long as the reinsured acts in good faith, its losses from underwriting that looks improvident in retrospect or was simply unlucky will be indemnified within the terms of the reinsurance contract. This may include the misfortune of an insurer where coverage was not anticipated or intended by it but nevertheless is imposed by a court's interpretation of the insurance policy.

…

Clearly, the concept of following the fortunes does not extend either to liabilities of the insurer not covered by the policy or to liabilities affected by exclusions in the reinsurance contract.[4]

"Following the fortunes means that, so long as the reinsured acts in good faith, its losses from underwriting that looks improvident in retrospect or was simply unlucky will be indemnified within the terms of the reinsurance contract."

The Strain treatise notes that "[w]hile the concept of following the fortunes is often understood to inhere in reinsurance generally, some contracts adopt it by express clauses and some contracts negate it by express clauses."[5]

Follow-the-settlements is different. The Strain treatise notes that U.S. courts often treat follow-the-fortunes and follow-the-settlements as one and the same but argues "there is a historical basis for the view that following fortunes focuses more on underwriting and actual coverage of the reinsured, [while] following settlements focuses more on the reinsured's process of settling the claims of its insureds."[6] Because follow-the-settlements is a claims concept, it naturally tends to be subject to litigation more frequently than follow-the-fortunes, an underwriting concept.[7]

The Strain treatise discusses how the follow-the-settlements principle might be applied both in the absence and presence of a specific provision:

> Without any special provision in the agreement, the reinsured who voluntarily settles a claim by payment in full or by compromise of a dispute would have to present evidence to its reinsurer that the claim was covered by its direct policy and was authentic in fact as to the occurrence and amount of loss. If the claim were disputed and compromised, the reinsured would also have to show that the compromise was beneficial and the amount reasonable.
>
> Following settlements clauses generally allow the reinsured to recover by showing settlement of a claim of a type covered under both the

> direct policy and the reinsurance contract. The reinsurer can then contest the claim only by showing that the settlement was manifestly outside the coverage or in bad faith or the result of negligent and unbusinesslike practice.[8]

From the above, it appears obvious that the authors of the Strain treatise recognized the differences between (1) the follow-the-fortunes and follow-the-settlements principles, and (2) the different ways these principles factored into the reinsurance relationship. The Strain treatise concludes on the subject:

> Mischief may follow if courts or arbitrators infer that following settlements and following the fortunes concepts are inherent in the contract without the clause, rather than a matter for agreement between the parties.[9]

Over the years, several articles appearing in this publication and elsewhere examined the case law about whether follow-the-fortunes and/or follow-the-settlements principles should be implied as a matter of law into reinsurance contracts when the contracts omit them entirely or, in the opinion of the courts, are not expressed clearly enough.[10] The answer to this question can have real consequences for ceding companies and reinsurers. For example, if a reinsurer purposefully left out a following clause from its reinsurance contracts, but a court applied one anyway, it would seem to result in the sort of "mischief" Strain warned about. The literature breaks down these issues and provides a good overview of cases in which the courts implied the clauses as well as cases in which the courts rejected the implication. In his 2018 article, Robert Hall concluded: "[t]he weight of the case law seems to be that follow the settlement is not implied into reinsurance contracts absent at least a preponderance of extrinsic evidence that it is custom and practice in the industry."[11] On the other hand, the courts that have decided to imply following principles have concluded the principles are so foundational that failing to apply the principles "would … forever … damage" the cedent-reinsurer relationship.[12]

> "There has been a roughly even split between those courts that have heeded the Strain treatise's warning that 'mischief' could result if the following principles are applied as a matter of law and those courts that have concluded otherwise."

In this article, we examine case law considering whether follow-the-fortunes and/or follow-the-settlements principles should be implied as a matter of law into reinsurance contracts when the clauses expressing these principles are either absent from the contracts or the clauses are imprecise. In doing so, we identify instances where courts, perhaps, misconstrued or conflated the following principles and consider the effects these taxonomy decisions may have had on the courts' conclusions. There has been a roughly even split between those courts that have heeded the Strain treatise's warning that "mischief" could result if the following principles are applied as a matter of law and those courts that have concluded otherwise. Many courts refusing to automatical-

ly imply the following principles have nevertheless stated that whether to imply a following clause into a contract is a fact issue, depending on the custom and practice of the industry, testimony on which topic the courts are willing to entertain. The more recent decisions have also trended away from implying the clauses as a matter of law. Before discussing the more recent decisions, we first discuss older decisions where courts concluded follow-the-fortunes and follow-the-settlements principles are inherent in every reinsurance agreement and often—perhaps not coincidentally—also conflated the two principles.

I. Courts Implying Follow-the-Settlements Principles Generally Conflated or Equated Follow-the-Fortunes and Follow-the-Settlements

The Second Circuit's 1993 decision in *Mentor Insurance Co. v. Norges* was one of the first to consider whether to imply a follow-the-fortunes or follow-the-settlements clause into a reinsurance contract as a matter of law, and in doing so conflated the two principles.[13] Specifically, in a pattern to be repeated, the court wrote: "[t]he follow-the-fortunes principle does not change the reinsurance contract; it simply requires payment where the cedent's good-faith payment is at least arguably within the scope of the insurance coverage that was reinsured."[14] The court's broad statement was *dicta*, however, because the court also concluded that an express follow-the-*form* clause was present in the contract.[15] The case was therefore not a true instance of "implying" a following principle, but perhaps the court's willingness to give an expansive reading to the contract was because of its imprecise view of the following-the-fortunes principle.

Shortly after *Mentor*, an Ohio federal court decided *International Surplus Lines Co. v. Certain Underwriters*.[16] The reinsurers of International Surplus Lines, which insured asbestos manufacturer Owens-Corning, disputed the cedent's "number of occurrences" determination. The question was whether follow-the-fortunes or follow-the-settlements—which were not explicitly stated in the reinsurance agreements—would nevertheless be implied and foreclose the reinsurers from disputing the cedent's decision.[17] Discussing *Mentor* and the contrary decision in *National American*, discussed *infra*, the court broadly concluded the doctrines were implied as a matter of law. The court stated the follow-the-fortunes "doctrine applied to all reinsurance contracts," whether expressly included or not.[18] As did the *Mentor* court, the *International Surplus Lines* court lumped both the follow-the-fortunes and follow-the-settlements doctrines together to conclude the reinsurers were required to reimburse the cedent "so long as the payments were made reasonably and in good faith."[19]

> "The court stated the follow-the-fortunes 'doctrine applied to all reinsurance contracts,' whether expressly included or not."

Fast forward a few years to 2002 and the Eighth Circuit's decision in *Reliastar Life Ins. Co. v. IOA Re, Inc.*[20] In that case, the district court granted summary judgment to Reliastar (retrocedent), and the court of appeals affirmed but remanded on the issue of damages.[21] The court of appeals began its analysis by stating that reinsurance is based on utmost good faith and that under this principle, a reinsurer may not second-guess the coverage if a cedent acts in good faith in handling the claim.[22] Needless to say, the court appears to have conflated foundational underwriting principles with claims-handling ones in a single sentence. From there, the court cited Graydon S. Staring, *Law of Reinsurance* § 18:1 (1993), for the proposition that some courts have confused following fortunes with following settlements but did not resolve the issue because the retrocessionaires "agree … as to the nature of the doctrine as it may apply to them, and disagree only

as to whether they have written it out of their insurance contracts."[23] The court decided to imply a following provision because it did not see anything in the treaty suggesting the doctrine was written out.[24]

The next year, a federal court in Massachusetts decided *American Employers Insurance Co. v. Swiss Reinsurance Americas Corp.*[25] Unlike the *ISLIC* and *Mentor* cases, *supra*, the *American Employers* court acknowledged that follow the settlements was distinct from follow the fortunes. The court did, however, conclude the doctrines were "related" such that it could refer to both doctrines by the follow-the-fortunes label.[26] The court then went on to conclude that the weight of authority and common sense favored implying, as a matter of law, either follow-the-fortunes or follow-the-settlements.[27]

In 2008, the Western District of Missouri followed *American Employers* and conflated the doctrines before implying them as a matter of law. The court in *Employers Reinsurance Corp. v. Massachusetts Mutual Life Insurance Co.*[28] explicitly stated "[t]he phrases 'follow-the-fortunes' and 'follow-the-settlements' are used interchangeably" and "[b]oth doctrines are related."[29] The court explained:

> The follow-the-fortunes doctrine binds a reinsurer to 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. … The related doctrine of 'follow-the-settlements' refers specifically to the duty of the reinsurer to follow the actions of the reinsured in adjusting and settling claims.[30]

The court in *Trenwick American Reinsurance Corp. v. IRC, Inc.*[31] took a slightly different approach before implying a following clause. Whereas the above courts decided to imply a follow-the-fortunes provision during dispositive motion practice, the *Trenwick* court heard extensive fact and expert testimony on, among other topics, the custom and practice surrounding following doctrines during the trial phase.[32] The court decided to imply the follow-the-settlements doctrine into the subject reinsurance contracts and used the following doctrines interchangeably, stating the "'follow the fortunes' doctrine imposes a legal duty on the reinsurer to pay its share of a settlement made by the reinsured with the original parties."[33]

The only case we were able to locate that specifically distinguished the follow-the-fortunes and follow-the-settlements doctrines and still decided to imply a follow-the-settlements clause is the 1995 decision in *Aetna Casualty & Surety. Co. v. Home Insurance. Co.*[34] After Aetna settled with its insured, the manufacturer of Dalkon Shield birth-control devices, Aetna got into a dispute with reinsurer Home about whether defense costs were inside or outside of the policy limits, and the case turned in part on whether the court would imply a follow-the-settlements provision where none existed. The court in this case explicitly recognized the difference between the follow-the-fortunes and follow-the-settlements principles, and recognized it was dealing with the latter.[35] The court then concluded, after considering expert testimony from both sides and acknowledging the split in authority, that it was "customary within the reinsurance industry to follow the claim settlement decisions of the ceding company even in the absence of an explicit loss settlements clause."[36]

II. Courts Declining to Imply Follow-the-Settlements Principles as a Matter of Law Generally did Not Collapse the Two Doctrines

As we noted above, the alternative and more recently ascendant viewpoint from courts is that follow-the-settlements principles should not be implied as a matter of law into a reinsurance contract. Interestingly, the courts that have reached this conclusion have, for the most part, not conflated the follow-the-fortunes and follow-the-settlements doctrines, in contrast to the courts that came out the other way. Among the courts refusing to imply the following principles, there has been a further split. Some have concluded that it *may* be permissible to imply a follow-the-settlements clause if custom-and-practice evidence supported the implication, but further concluded that determining custom and practice requires resolution of fact issues. Other courts have swung fully away and concluded that the following doctrines may not be implied as a matter of law.

Consider first the Ninth Circuit's decision in *National American Insurance Co. v. Certain Underwriters.*[37] Whereas the district court granted summary judgment to National American on the issue of follow-the-settlements after National American presented expert testimony that the doctrine is customarily

part of every facultative agreement, the court of appeals reversed, finding the issue presented a question of fact.[38] In so holding, the court noted there was no controlling California law requiring the explicit inclusion of follow-the-settlements doctrine in a contract."[39]

In *North River Insurance Co. v. Employers Reinsurance Corp.*, an Ohio federal court engaged in detailed analysis of these issues, applying New Jersey law, and decided not to imply a following provision.[40] The case involved North River's insurance of asbestos manufacturer Owens-Corning, where North River first denied coverage but later decided to settle.[41] ERC, North River's reinsurer, refused to pay, and the issue became whether to imply a follow-the-settlements clause. The court meticulously analyzed the various decisions and industry literature discussing whether to imply the clause and concluded that a trial was necessary to determine whether custom and practice supported implication.[42] As did the court of appeals in *National American*, the *North River* court specifically and correctly referred to the doctrine at issue as follow-the-settlements.[43] The court also specifically noted confusion on the issue, stating that "[s]ome cases refer to the concept of 'follow the settlements' as the 'follow the fortunes' doctrine."[44] The court then correctly noted that:

> Although these terms are frequently used interchangeably in opinions, the term 'follow the fortunes' more accurately describes the reinsurer's obligation to follow the reinsured's underwriting fortunes, whereas 'follow the settlements refers to the duty to follow the actions of the reinsured in adjusting and settling claims.[45]

"Although these terms are frequently used interchangeably in opinions, the term 'follow the fortunes' more accurately describes the reinsurer's obligation to follow the reinsured's underwriting fortunes, whereas 'follow the settlements refers to the duty to follow the actions of the reinsured in adjusting and settling claims.[45]"

A 2006 decision in *American Insurance Co. v. American Re-Insurance Co.* is to the same effect, correctly distinguishing between the following principles, concluding that follow-the-settlements clauses cannot be implied as a matter of law, and holding that evidence of custom and practice can be presented to determine the issue.[46] A Rhode Island federal court likewise considered the issue at the summary judgment phase in *Affiliated FM Insurance Co. v. Employers Reinsurance Corp.*[47] The court reviewed the two divergent strands of case law, including discussions of the divergent *Aetna* and *North River* decisions, and

noted it was "hesitant to read terms into a contract given such divergent precedent." As with the other decisions just discussed, the *Affiliated FM* court did not conflate the two doctrines, but its discussion was *dicta*, because the court concluded that cedent's arguments for reimbursement failed for independent reasons.[48]

In U*tica Mutual Insurance Co. v. Munich Reinsurance America Inc.*,[49] at the time of issuance, the underlying policy was "expenses-within-limits" but subsequently the ceding company agreed on a defense endorsement without notifying the reinsurer. The cedent argued that under the follow-the-fortunes principle, the reinsurer was bound by the cedent's determination that the defense endorsement was part of the underlying policy.[50] The Northern District of New York denied summary judgment to the cedent, declining to imply this term as a matter of law.[51] The court noted that in any event, a follow-the-fortunes clause would not prohibit the reinsurer from arguing it never agreed to cover expenses in addition to limits because the policy it agreed to reinsure was an expense-within-limits policy.

There are, naturally, a few decisions conflating the follow-the fortunes and follow-the-settlements doctrines yet still refusing to imply such a clause. The Michigan Court of Appeals decision in *Mich. Township Participating Plan v. Federal Ins. Co*. is an example.[52] After a fire destroyed an old schoolhouse, the insurer got into a dispute with its reinsurer about reimbursing the insurer's settlement with the policyholder.[53] The trial court stated the insurer "probably put up too much money on this claim" but that it would apply "follow the fortunes" and require the reinsurer to reimburse the insurer. The court of appeals reversed, concluding the trial court should not have supplied a provision where no such provision appeared in the contract.[54] Notably, the court of appeals, as did the trial court, referred to the provision that "will bind the reinsurer to the settlement or adjustment of loss" as a "follow-the-fortunes" provision.[55] Moreover, the court of appeals did not state that the implication of a follow-the-fortunes provision was a fact issue, but rather that the "trial court erred in reading into the reinsurance contract at issue in this case a 'follow the fortunes' clause that was not agreed to by the parties."[56]

A 2007 Florida decision, *Employers Reinsurance Corp. v. Laurer Indemnity Co.*, is similar in failing to distinguish between the doctrines.[57] The *Employers* court granted summary judgment to reinsurer on the issue of whether a follow-the-fortunes clause could be implied, concluding that the contract unambiguously did not permit one and that no evidence of custom and practice was therefore appropriate.[58]

In 2022, the Eleventh Circuit decided *Public Risk Management v. Munich Reinsurance America, Inc.*, [59] refusing to imply a following clause as a matter of law and granting summary judgment for the reinsurer. The court did not reach the issue of whether it would ever be appropriate to imply a follow-the-settlements clause, because it concluded that the reinsurance contract contained provisions that were *inconsistent* with the notion of implying a following principle.[60] As did the Michigan appellate court and the Middle District of Florida, however, the Eleventh Circuit exclusively used the phrase "follow the fortunes" even though it was referring to "reinsurers [being] bound by the reinsured's decision to pay the claim and [being forbidden] from second guessing a good faith decision to do so."[61]

"There are, naturally, a few decisions conflating the follow-the fortunes and follow-the-settlements doctrines yet still refusing to imply such a clause."

Conclusion

Courts have trended away from implying following clauses into reinsurance contracts that do not contain them, although they have differed in whether to allow evidence of custom and practice on the issue. This trend has taken place despite the handful of cases that decided to imply both follow-the-fortunes and follow-the-settlements principles into the contracts as a matter of law, perhaps in part because of the way the courts conflated the two doctrines. Overall, courts have been hit or miss in recognizing and distinguishing between the two following principles, and none we are aware of has ever considered implying just one principle separate from the other.

NOTES

1 Hereinafter the "Strain treatise."

2 Strain treatise at Preface and Acknowledgements vi. By no means do we even implicitly suggest that hundreds of experienced reinsurance professionals whom we have the privilege of knowing as clients, adversaries, and esteemed arbitrators are lesser experts in the field than the contributors to the Strain treatise or that they may hold contrary but no less valid opinions based on their life's work in reinsurance, all of which we value and benefit from.

3 *Id*. at 23. The Strain treatise also addresses the "following settlements" principle and distinguishes it from "following fortunes," while acknowledging that "in many peoples' minds, following fortunes and following settlements are treated as one and the same, and U.S. court cases appear to reach that conclusion by referring to following settlements as 'following fortunes.'" *Id*. at 26. For another recent similar observation, *see* Robert M. Hall, '*Distinguishing Follow the Fortunes from Follow the Settlements*, HarrisMartin's Reinsurance & Arbitration Publication (1/3/23), available at https://www.harrismartin.com/publications/14/reinsurance/articles/30184/distinguishing-follow-the-fortunes-from-follow-the-settlements-by-robert-m-hall/

4 Strain treatise, *supra*, n.i at 25-26.

5 *Id*. at 25.

6 *Id*. at 26; see also Hall, supra n.iii.

7 Larry Schiffer, *The Conundrum of Following Clauses in Reinsurance Contracts,* National Law Review (Mar. 26, 2015) available at https://www.natlawreview.com/article/conundrum-following-clauses-reinsurance-contracts ("when dealing with whether a reinsurer has to pay a claim, the issue is follow-the-settlements").

8 Strain treatise, *supra*, n.i at 27.

9 *Id.*

10 *See, e.g.*, Robert M. Hall, *Should Follow the Fortunes / Settlements Be Implied Into Reinsurance Contract*, XVII Mealey's Rpt. No. 21 at 27 (2007), also available at https://robertmhalladr.com/publications ("Hall I"); David R. Nelson, *The Follow-the-Settlements Doctrine*, ARIAS-U.S. Quarterly Vol. 17, No. 2 at 18 (2010); Robert M. Hall, *An Update: Should Follow the Settlements be Implied into Reinsurance Contracts?*, Mealey's Litigation Report: Reinsurance, Vol. 29, No. 12 (2018). also available at https://robertmhalladr.com/publications ("Hall II").

11 *See* Hall II, *supra* n.x at 4. The cases have likewise observed the lack of unanimity on the topic, observing that "the authorities admittedly do not speak with one voice. *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1349 (S.D.N.Y. 1995).

12 *Int'l Surplus Lines Ins. Co. v. Certain Underwriters*, 868 F. Supp. 917 (S.D. Ohio 1994).

13 996 F.2d 506 (1993).

14 *Id*. at 517.

15 *Id*. at 516. The clause stated that the reinsurance was to include the same provisions as the underlying policy.

16 868 F. Supp. 917.

17 *Id*. at 919.

18 *Id*. at 920.

19 *Id*. at 921 (noting further that the standard was "purposefully low").

20 303 F.3d 874.

21 *Id*. at 876.

22 *Id*. at 877–78.

23 *Id*. at 878 n.3. The court did not specify which doctrine the retrocessionaires agreed applies to them.

24 *Id*. at 881.

25 275 F. Supp. 2d 29 (D. Mass. 2003).

26 *Id*. at 35 n.32.

27 *Id*. The court went on, however, to conclude that the ceding company had not acted reasonably in its settlement with the insured, such that the follow-the-settlements principle could not rescue its claim. *Id*. at 39.

28 No. 06-188, 2008 WL 3890358 (W.D. Mo. Aug. 19, 2008).

29 *Id*. at *6.

30 *Id*. at *5 (citations and quotation marks omitted). Like in the *Mentor* case, however, the court concluded that certain provisions in the contract constituted an "express" follow-the-settlements provision, so technically this case is not one where the court decided to "imply" the clause, despite its dicta. *Id*. at *9.

31 764 F. Supp. 2d 274 (D. Mass 2011).

32 *Id*. at 297.

33 *Id*. at 295 (citations omitted).

34 882 F. Supp. 1328 (S.D.N.Y 1995).

35 *Id*. at 1346 n.9.

36 *Id*. at 1350.

37 93 F.3d 529 (9th Cir. 1996).

38 *Id*. at 537. While National American argued its expert testimony was uncontroverted, the court of appeals concluded the Underwriters controverted the evidence, "albeit obliquely." *Id*.

39 *Id*. at 536.

40 197 F. Supp. 2d 972 (2002).

41 *Id*. at 977.

42 *Id*. at 991.

43 *Id*. at 978.

44 *Id*. at 978 n.1.

45 *Id*.

46 2006 U.S. Dist. LEXIS 95801 at *15–16 (N.D. Cal.) ("Accordingly, the Court … will … not read the 'follow the settlements' or 'follow the fortunes' doctrine into the reinsurance contract as a matter of law."). The court denied summary judgment to American Insurance because it did not present any evidence of custom and practice at that stage of the proceedings but said American

Insurance can do that at trial.

47 369 F. Supp. 2d 217 (D.R.I. 2005).

48 *Id*. at 225–26. The court concluded that it did not need to decide the issue at all, because even if the follow-the-settlements doctrine was implied, the cedent had not acted reasonably.

49 2018 U.S. Dist. LEXIS 107997 at n.4 and *70 (N.D.N.Y.).

50 *Id*. at *15.

51 *Id*.

52 592 N.W.2d 760 (1999).

53 *Id*. at 425.

54 *Id*. at 431.

55 *Id*. at 430–31.

56 *Id*.

57 2007 U.S. Dist. LEXIS 45670 (M.D. Fla. 2007). The court in *Laurer* actually went further than others and held no follow-the-fortunes provision could be implied as matter of law. *Id*. at

58 *Id*. at *10 (stating the court "cannot go outside the laws of contract construction and outside the four corners of an unambiguous contract to add a clause that was not bargained for").

59 38 F.4th 1298 (11th. Cir. 2022).

60 *Id*. at 1312.

61 *Id*. at 1310 (quotation marks and citations omitted).

Max B. Chester focuses his practice on litigation and arbitration of domestic and international commercial business disputes and government enforcement actions, primarily in the areas of insurance and reinsurance, financial fraud, securities enforcement and FCPA. He is a partner in the firm's Insurance and Reinsurance Litigation Practice Group and the International Arbitration Team.

Andy Meerkins is a senior counsel with Foley & Lardner LLP. Andy has litigated a variety of complex commercial matters and concentrates his practice in the areas of insurance and reinsurance. Andy has represented and counseled ceding companies and reinsurers in a variety of complex disputes involving both property and casualty and life, accident, and health business. Andy also regularly counsels many of Foley's clients on matters touching on insurance coverage.

In addition to handling insurance and reinsurance issues, Andy has notable experience with disputes involving distribution and franchise and antitrust and unfair competition. Before entering private practice, Andy served as a law clerk to The Hon. Joel Flaum, United States Court of Appeals for the Seventh Circuit. Prior to taking up law, Andy was a Teach for America corps member, teaching high school history and government on Chicago's west side.

ARIAS Celebrates
THE YEAR OF THE ARBITRATOR

The ARIAS Board has designated 2023 as 'The Year of the Arbitrator' to express our appreciation for the objectivity, hard work, and good judgment that ARIAS arbitrators bring to the dispute resolution process. On March 1, 2023, we held a kick-off 'Year of the Arbitrator' networking reception at Mintz Levin's new offices in New York City. Dozens of arbitrators, company representatives, and outside lawyers from New York and beyond enjoyed general networking and cocktail merriment.

Please save the date for our next networking event, which will be hosted by Locke Lord at their offices in Chicago on July 13, 2023.

A Conversation with Tom Forsyth and Chuck Ehrlich

By Alysa Wakin

In keeping with 'The Year of the Arbitrator' theme, this new Quarterly column will spotlight some of our individual arbitrators, both personally and professionally. Anyone wishing to be considered for a future feature in this column, please contact Alysa Wakin at awakin@odysseygroup.com.

A CONVERSATION WITH TOM FORSYTH

Tom first joined ARIAS in 1996 and has held numerous positions including General Counsel of Partner Reinsurance Company of the U.S. and Secretary of PartnerRe Life Reinsurance Company of America; General Counsel of One Beacon Insurance Company; General Counsel of Swiss Re America and Head of Claims and Liability Management of the Americas division of Swiss Re; and Deputy General Counsel of the Travelers Insurance Companies.

Tom is also a former President and Chair of the Board of Directors of ARIAS, was a member of its Long-Range Planning Committee, and a former chair of the Law Committee of the Reinsurance Association of America.

I caught up with Tom on March 8, his one-year anniversary of becoming a certified arbitrator.

Q: Do you remember your first ARIAS conference?

A: I can't remember the year, but I do remember it was in New York City. And not at the Hilton.

Q: What are some of the biggest challenges facing new arbitrators?

A: Getting assignments. My last job interview was 16 years ago so it is challenging to figure out how to approach people without being a nuisance. Implementing the arbitral process isn't a problem, but getting started is challenging. People know you, but they don't necessarily know you in the context of sitting on a panel.

Q: Biggest challenge facing ARIAS?

A: There are two big challenges facing ARIAS. The first is maintaining the perceived integrity of the process. The second is expanding opportunities for certified arbitrators outside of the reinsurance context. Number 1 is more important for the industry and for ARIAS's long-term survival. Number 2 is more important for the individual ARIAS members.

Q: Greatest things ARIAS has to offer?

A: Trained panel members with relevant industry experience for reinsurance arbitrations.

Q: Favorite ARIAS memory?

A: When I got my award for being Chair, I got a standing ovation. People don't normally applaud when I walk down the street and that was truly nice.

LIGHTNING ROUND:

Q: Where do you spend most of your time?

A: Six months in South Carolina and the other six months in New Hampshire.

Q: Favorite hobby?

A: Hiking

Q: Something about you that would surprise most people?

A: I dropped out of law school to chase a sorority girl from USC. Yesterday was our forty-second anniversary.

Q: New York Times or Wall Street Journal?

A: Wall St Journal

Q: Biggest grammatical pet peeve?

A: Run on sentences

Q: Favorite guilty pleasure?

A: Mega-stuff Oreos

Q: Your perfect meal?

A: Anything at the beach with my family.

For more information about Tom Forsyth, see https://www.arias-us.org/profile/?id=10572.

A CONVERSATION WITH CHUCK EHRLICH

Chuck first joined ARIAS sometime in the "deep dark past," i.e., 1997 or 1998. In his professional life, Chuck enjoyed a long career as a partner in a major national law firm, as well as in executive roles including SVP Claims and General Counsel in the Xerox and Fairfax organizations. Chuck became a certified arbitrator in 2005 and has since been involved in dozens of arbitrations as well as claims expert work.

I recently caught up with Chuck, who was kind enough to speak to me from what I imagine was a room with a view in Florence, Italy.

Q: Do you remember your first ARIAS conference?

A: It was at the Hilton (I think) but in a little theatre-like ballroom—far more intimate than these days. It seemed very informal, and I remember thinking everyone knew each other—except for me.

Q: Advice to new arbitrators?

A: It is advice I got from David Thirkill, "it ain't as easy as you think it will be." Knowing people, and having them know you as competent, is not an automatic ticket to being busy. Clients are understandably risk adverse. They have all done arbitrations with the busiest people but not much (or at all) with the newer arbitrators. Even if clients and counsel know and respect a new arbitrator personally, they don't know how that person will perform in an arbitration, and thus they're reluctant to take the plunge.

Q: Biggest challenge facing ARIAS?

A: The decline in reinsurance arbitration business. ARIAS has been remarkable in its efforts to expand, but it remains to be seen if that will succeed, especially given how competitive the market is. There is also a challenge for all ADR providers in providing the promised quicker and smarter alternative, which doesn't always wind up being the case.

Q: Greatest things ARIAS has to offer?

A: Educational opportunities, keeping in contact with the industry, and authentic friendships.

Q: Favorite ARIAS memory?

A: I umpired an arbitration in which one of the parties got a very disappointing outcome. When I next saw the executives from that company at ARIAS, they were perfect gentlepersons. That's part of the ARIAS ethos that is special.

LIGHTNING ROUND:

Q: Where do you spend most of your time?

A: Menlo Park, California or at the coast over the hill.

Q: Favorite hobby?

A: Sports cars and classic cars

Q: Something about you that would surprise most people?

A: I once was an amateur race-car driver. The closest I came to death was on the freeway trailering my race car up to Sonoma. I packed the trailer incorrectly, got spun around 180 degrees by the wind, and barrel rolled down an embankment, landing with a fence pole right next to my head. End of hobby.

Q: New York Times or Wall Street Journal?

A: Love them both, but not the editorial section in the Journal.

Q: Biggest grammatical pet peeve?

A: Failure to use Oxford commas
Failure to understand that pronouns must relate back to their antecedent.

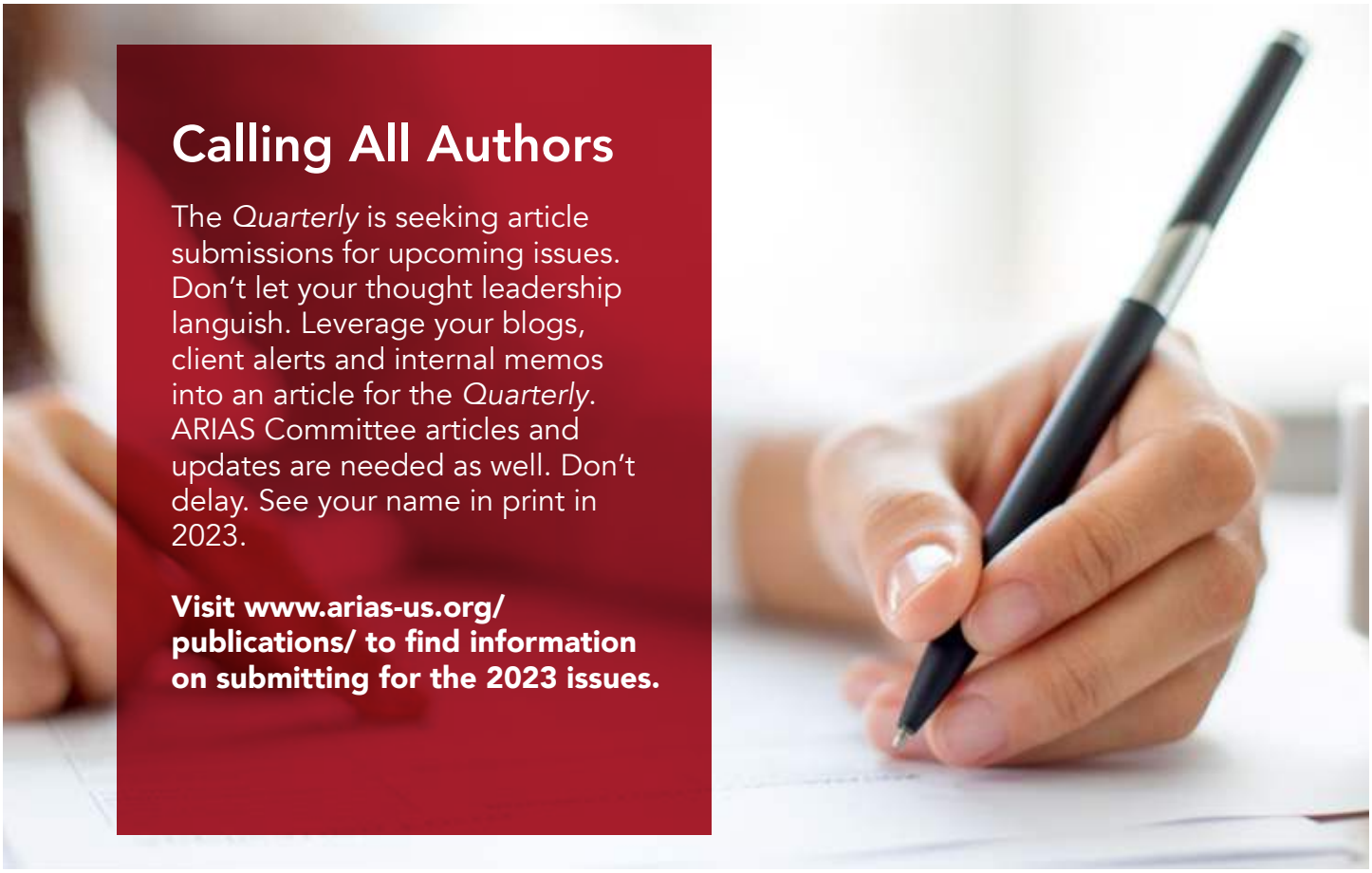
Q: Favorite guilty pleasure?

A: Chocolate

Q: Your perfect meal?

A: Florentine steak. In Florence. With Chianti Classico. And an appetizer of Crostini Fegatini (which I won't further identify).

For more information about Chuck Ehrlich, see https://www.arias-us.org/profile/?id=10240.



Duty to Defend Opioid Distributors and Retailers Under Comprehensive General Liability Policies

By Robert M. Hall

I. Introduction

Hundreds, perhaps thousands, of lawsuits have filed by governmental entities against distributors and retailers of opioids to recover expenses of those entities related to the opioid crisis. Many, if not most, of these defendants have comprehensive general liability ("CGL") policies and have sought defense and coverage under these policies. Because the obligation to defend is broader than the obligation to pay, the initial battle line is whether the insurers are required to provide a defense to these suits.

Common to most of the cases described in this article is policy language stating that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." The policy language goes on to cover "damages claimed by any person or organization

for care, loss of service or death resulting at any time from the bodily injury."[1] Also common to these cases is the effort to define the role of the plaintiffs and apply it to this coverage language. As articulated by one court: "the governments seek damages for their own aggregate economic injuries caused by the opioid epidemic and *not* for any particular opioid-related bodily injury sustained by a citizen as a direct result of [the defendant's] alleged failures."[2]

The purpose of this article is to present selected case law on the insurer's duty to defend under these circumstances.

II. Cases Finding a Duty to Defend

Cincinnati Insurance Co. v. H.D. Smith LLC, 829 F. 3d 771 (7th Cir. 2016), involved a suit by West Virginia against a distributor of opioids and other drugs in such quantities that it knew or should have known that the drugs would be used for illicit and destructive purposes. The suit sought reimbursement for the cost of caring for drug-addicted citizens who suffered drug-related injuries and could not pay for their own care. Interpreting Illinois law, the court initially observed that insurance policies are to be construed in favor of insureds and that the issue for duty to defend is potential coverage. The court next observed that a policy that pays losses "because of" bodily injury is broader than a policy that pays losses "for bodily injury." The court found that there was a duty to defend because the damages alleged by West Virginia appears to be "because of" bodily injury to its citizens.

> "As articulated by one court: 'the governments seek damages for their own aggregate economic injuries caused by the opioid epidemic and not for any particular opioid-related bodily injury sustained by a citizen as a direct result of [the defendant's] alleged failures.'[3]"

A distributor of opioids brought a motion for partial summary judgment on the duty of a CGL insurer to provide a defense in *Giant Eagle, Inc. v. American Guarantee & Liability Ins. Co.*, 499 F. Supp. 3d 147 (W.D. Pa. 2020). The primary policy contained the coverage language quoted above. Each of the underlying lawsuits alleged that the defendants failed to design and operate systems that would identify and halt suspicious orders, thereby contributing to an illegal secondary market in opioids. Citing to *H.D. Smith*, the court found that the insurer owed the distributer a defense:

> The plaintiffs in the [underlying] lawsuits seek to recover damages for losses, . . . that they allegedly sustained treating and addressing bodily injuries such as opioid abuse, addiction, overdose and death . . . all allege that these injuries resulted from [the distributor's] allegedly wrongful conduct in distributing and dispensing prescription opioids. Despite the fact that the plaintiffs . . . do not allege that *they* suffered bodily injury or property damage, they do seek damages *because* of bodily injury.[3]

AIU Insurance Co. v. McKesson Corp., No. 20-cv-07469-JSC (N.D. Cal. 2022), involved cross motions for partial summary judgment on duty to defend for the distribution of opioids. The court noted that to prevail on duty to defend, the insured merely had to show a potential of coverage while the insurer had to show the absence of such potential. The court found that the distributers properly alleged both bodily injury to individuals as well as damages to government entities for care, loss of services or death because of bodily injury. The court found nothing in the policy language that limited coverage to claims asserted by the person suffering the bodily injury. However, the court denied the distributor's motion on duty to defend because it found the actions of the distributor were not an "occurrence" i.e. were not unexpected, unforeseen or an accident.

III. Cases Finding No Duty to Defend

Insurers filed a declaratory judgment action seeking a ruling of no duty to defend or cover claims against an opioid distributor in *Westfield National Ins. Co. v. Quest Pharmaceuticals, Inc.*, 57 F. 4th 558 (6th Cir. 2022). The distributor argued that the suits by governmental entities were "because of bodily injury" and, therefore, were covered by the CGL. The court, however, interpreted Kentucky caselaw as mandating a more restrictive application of the "because of" language than was the case in *H. D. Smith*. The court found that the damages sought were detached from any particular bodily injury. In addition, it cited the *Acuity* decision, in concluding that the distributor was not entitled to a defense by the insurers.

In *Travelers Property and Casualty Co. of America v. Anda, Inc.*, 658 App'x 955 (11th Cir 2016), West Virginia sued a wholesale pharmaceutical distributor for damages resulting from amounts the state had been forced to expend on law enforcement, police operations, hospitals and emergency rooms and jails and prisons. It alleged that the defendant had flooded the state knowingly or negligently with commonly abused drugs. The insurers sought a ruling of no duty to defend or cover the losses. The court never reached the issue of coverage through the "because of bodily injury" issue as it held that the relevant claims were within a products liability exclusion.

> "The court never reached the issue of coverage through the 'because of bodily injury' issue as it held that the relevant claims were within a products liability exclusion."

Acuity v. Masters Pharmacy, 2022 Ohio 3092 (2022), again involved an opioid distributor seeking a defense from its insurer. The court declined to so rule:

> [The distributor] asks us to interpret "damages because of bodily injury" so expansively as to include any suit in which the damage sought merely related to bodily injury, regardless of whether the claims are in fact tied to any particular bodily injury sustained by a person.[4]
>
> [T]he governments' claims in the underlying suits do not seek damages for bodily injury sustained by themselves. Nor do they seek damages for bodily injury on behalf of their injured citizens.[5]
>
> We . . . conclude that the phrase "damages because of bodily injury" in the policies before us requires more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought.[6]

> “Clearly, a judicial finding of a duty to defend government opioid-related lawsuits stops well short of a finding of coverage.”

Ace American Ins. Co. v. Rite Aid Corp., 270 A. 3d 239 (Del. 2022), is case in which the distributor sought partial summary judgment seeking a defense by the insurer. The court ruled for the insurer:

> There must be more than some linkage between the personal injury and damages to recover “because of” personal injury; namely, bodily injury to the plaintiff, and damages sought because of that specific bodily injury. The . . . Policy does not provide coverage unless it is connected to the personal injury, independently proven and shown to be caused by the insured.[7]

i.e. the court is simply applying the facts to the insurers’ policy language. The reasoning of the courts finding no duty to defend is sometimes less than transparent, the best articulations thus far being in *Acuity* and *American Ins. Co*. cases *i.e.* there is a limit to coverage of the extended ripple effect of bodily injury.

It is easy to conjure hypotheticals such as an inadequately tested “wonder drug” causing unanticipated and widespread bodily injury resulting in a public health crisis. As a policy matter, is it proper to transfer the cost of a public health crisis to insurers? Should insurers be willing to assume such risk?

IV. Commentary

Clearly, a judicial finding of a duty to defend government opioid-related lawsuits stops well short of a finding of coverage. Nonetheless, these cases indicate a significant judicial split among circuits and states which may, ultimately, reach the US Supreme Court.

The courts finding a duty to defend seem to apply a mechanical approach

NOTES

1 *See e.g. Giant Eagle, Inc. v. American Guarantee & Liability Ins. Co*., 499 F. Supp 3d 147 at 153 (W.D. Pa. 2020).

2 *Acuity v. Masters Pharmacy*, 2022 Ohio 3092, par. 23 (2022) (emphasis in the original).

3 499 F. Supp. 3d 147 at 166 (emphasis in the original).

4 2022 Ohio 3092 par. 27.

5 *Id*. at par. 37.

6 *Id*. at par. 36.

7 270 A. 3d 239 at 250 - 1

Robert M. Hall spent twenty years as in-house counsel for various insurers and reinsurers, most recently as senior vice president and general counsel of a major reinsurer. He is a former partner of a leading law firm and currently is an ARIAS-certified arbitrator and umpire, an expert witness and a frequent author whose articles can be found on his website: robertmhalladr.com.

What You Need to Know About the Illinois Biometric Information Privacy Act ("BIPA")

By Frank DeMento and Michael Kurtis

Illinois' BIPA[1] is demonstrating that even in the context of cutting-edge biometric data privacy, "everything old is new again." While public awareness and concern regarding the safety and privacy of biometric and other electronic data is arguably at an all-time high in 2023, one of the most impactful and fast-developing areas of information privacy litigation relates to BIPA—a statute that was enacted back in 2008.

As the strictest consumer biometric privacy law currently in force in the US, BIPA presents a number of challenges for both carriers and insureds. It applies not only to companies incorporated in Illinois, but to all companies that do business in Illinois or that transact with Illinois residents. The increase in settlement values, the changes in coverage and a recent verdict in the first BIPA claim to go to trial all serve as reminders that insureds and carriers must have BIPA compliance plans in place, and clarity around BIPA claim coverage within their insurance program.

For arbitrators, increased litigation related to BIPA will lend itself to more opportunities for all parties to reach negotiated or arbitrated resolution rather than engaging in protracted, expensive, and challenging (at least from the defense standpoint) litigation.

A Brief History of BIPA

The story of BIPA and how it came to be regarded as the strictest and perhaps most impactful biometric privacy law in the United States is an interesting one. In 2008, BIPA provided a comprehensive set of rules for private entities that collect biometric data (anything related to a 'biometric identifier' such as retina or iris or hand scans, fingerprints, voiceprints or facial geometry). BIPA ensured any entity collecting biometric data from consumers: 1) obtain appropriate consent to do so; 2) securely stores the biometric identifiers: and, 3) destroys the biometric identifiers in a timely manner. To date it is the only statute of its kind that provides a private right of action to any individual who is aggrieved by a violation.

In 2015, the first class-action suits were filed alleging the unlawful collection and use of the biometric identifiers of Illinois residents.

In 2019, a customer of Six Flags challenged the practice of collecting fingerprints at parks when issuing season passes. In *Rosenbach v. Six Flags Entm't Corp*., 2019 IL 123186 (Ill. 2019), the Illinois Supreme Court held that a plaintiff need not show actual harm to have standing to bring a suit under BIPA. A mere violation of a plaintiff's rights under the statute is sufficient. Since this decision, BIPA class-action filings have become more and more frequent.

The Costs of Violating BIPA

To date, hundreds of BIPA class action lawsuits have been filed, typically where employers use fingerprints or facial scans for employees 'clocking in." Suppliers of the equipment that use biometric identifiers for timekeeping purposes have also been named as direct defendants in several cases. Companies that collect and utilize biometric information from customers have also been sued. Numerous big tech companies, including TikTok, Google, and Facebook have all settled claims related to BIPA violations, where biometric data has been (allegedly unlawfully) gathered from users and then shared with other users or other companies.

BIPA lawsuits include specific causes of action for every alleged section of the statute that has been violated. Most frequently, these violations relate to the informed consent and/or data retention sections of the statute. The facts vary:

- In a pending lawsuit against Party City, a former employee alleges the improper collection and use of fingerprint data. Despite mandating that all employees submit fingerprint information to "clock in," the claim alleges Party City did not properly inform employees about the details of the process, did not provide a publicly available data retention schedule, and failed to obtain written releases from employees. Similar employee fingerprint lawsuits have been filed against Medieval Times and Ritz-Carlton Hotels.
- In a pending class-action case against WalMart, customers allege the improper use of cameras and advanced video surveillance systems to track and log their movements.
- Former and current employees of Compass Group USA allege the improper collection of their fingerprints, not to "clock in" but to access "smart" vending machines at their offices.

Violating BIPA can be expensive, with statutory damages of at least $1,000 per violation, increasing to $5,000 for violations deemed intentional or reckless. Multiply these statutory amounts by the number of plaintiffs in a given class action and it is easy to see how significant the claim can become. Note: BIPA allows for recovery of reasonable plaintiff attorney fees and costs and it expressly states that expert witness fees and litigation expenses are included. This makes BIPA claims attractive for plaintiff attorneys.

> "BIPA lawsuits include specific causes of action for every alleged section of the statute that has been violated."

BIPA lawsuits are also costly and complex to defend, as a technical violation is sufficient for plaintiffs to prevail. The Illinois Supreme Court has just defined the relevant statute of limitations for BIPA claims to be five years, without exception (the longest possible period) *Tims v. Black Horse Carriers Inc.*, No. 127801, (Ill. 2023).

As a result, the cost to settle BIPA claims is very significant. It will rise further as a result of the first BIPA case to go to verdict. In October 2022, the jury in *Rogers v. BNSF Ry. Co.*, No. 19-cv-03083 (N.D. Ill., Oct. 2022), found a BIPA violation involving proper consent and awarded a verdict of $228 million for a class of 45,000 truckers. Plaintiff truckers accused BNSF of failing to obtain proper written consent before requiring drivers use a fingerprint system to regulate access to railyards for pickups/drop-offs.

Most recently, the Supreme Court of Illinois held on February 17, 2023, in *Cothron v. White Castle System, Inc.*, No. 128004, (Ill. 2023), that a BIPA claim accrues each time personal information is collected or disclosed, rather than accruing only once at the time the personal information is initially gathered. The holding greatly expands the amount of potential BIPA violations that may be asserted in a given lawsuit, and therefore expands the potential damage amounts recoverable by plaintiffs.

Insurance Coverage Issues Regarding BIPA Claims

Although potential coverage for BIPA claims can be found in cyber and employment practices liability policies, most disputes so far relate to general liability policies, because they have the broadest duty to provide a full and complete defense to insureds. A BIPA violation related to the publication of private biometric information is arguably the publication, oral or written, of material that violates a person's right of privacy (under Coverage B).

The Illinois Supreme Court recently ruled in favor of policyholders. In *W. Bend Mut. Ins. Co. v. Krishna Schaumberg Tan, Inc.*, No. 125978, (Ill. 2021), a class of customers purchased memberships from Krishna that allowed for access to L.A. Tan salons. The membership required that customers provide their fingerprints, allegedly in violation of BIPA. The court held that an insurer had a duty to defend its policyholder for alleged violations of BIPA under a liability policy. Further, the court held that the publication requirement to trigger potential personal and advertising injury coverage can be met even if the biometric information is only shared with one party (as opposed to being published to the public at large).

Liability carriers have argued (mostly without success) that despite a potential trigger under the insuring agreement of Coverage B, certain exclusions apply to otherwise preclude coverage for BIPA claims. These exclusions are Violation of Statute exclusions, Employment Related Practices exclusions, and Access or Disclosure exclusions. The Illinois Supreme Court in *W. Bend Mut. Ins. Co.* expressly rejected the application of a Violation of Statute exclusion in the context of BIPA. It has not affirmatively ruled on the application of an Access or Disclosure exclusion or an Employment Practices exclusion but, in another case involving employees required to "clock in" using fingerprints, the Northern District of Illinois in *Am. Family Mut. Ins. Co. v. Caremel, Inc.*, No. 1:20-cv-00637 (N.D. Ill. Jan. 7, 2022) held that language of an Access or Disclosure exclusion was not broad enough to unambiguously include "biometric information." Illinois courts are split on the application of the Employment Practices Liability exclusion in the BIPA context, so a denial based on this exclusion presents risks for carriers because there no guidance on this from the Illinois Supreme Court.

Ongoing Challenges and Potential Courses of Action

BIPA claims will continue to present challenges to insureds, insurance carriers, and reinsurers going forward, with little likelihood of legislative or judicial relief. We therefore recommend that insurance carriers and insureds consider the following:

- If the intent is to exclude BIPA claims, a specific and dedicated BIPA exclusion is better than relying on existing Access or Disclosure and Violation of Statute exclusions.
- To ensure consistency of response, carriers should consider centralizing all BIPA claims within a specific claim team and/or retain expert coordinating coverage counsel.
- Proactive, early conversations between insureds, carriers and brokers will facilitate everyone being on the same page regarding expectations of coverage. This discussion can center on the risks of BIPA claims for the insured (doing business in Illinois is enough to be subject to BIPA), as well as the intent of the insurance pro-

gram relating to BIPA coverage (does the insured have a relevant cyber policy or is the expectation that BIPA will be covered under the general liability policy?). This discussion may reduce uncertainty and discord when BIPA claims are filed, and reduce possible coverage disagreements between insureds and carriers.

For arbitrators, it is worth noting that BIPA claims are continuing to develop unfavorably for defendants and now that the Illinois Supreme Court has interpreted the statute of limitations as broadly as possible there will likely be a further increase in BIPA litigation. Given that even before the *BNSF* case, most of these lawsuits resulted in mediated or arbitrated resolution, there will be an even stronger market for mediators and arbitrators to assist with resolution of these claims. Arbitrators and mediators that are not only fluent in the liability and damages issues related to BIPA—but also the coverage issues implicated by these claims. Understanding some of the unique nuances and challenges imposed by this statute will make potential mediators and arbitrators even more valuable in assisting plaintiffs, defendants, carriers, and reinsurers with resolving these matters.

Endnotes

1 The material contained in this article has been prepared by members of the Transatlantic Reinsurance Company ("TransRe") claims team and is the opinion of the authors, and not necessarily that of TransRe. It does not, and is not intended to, constitute legal advice and is for general informational purposes only. Readers should contact their attorney to obtain advice with respect to any particular legal matter. No reader should act or refrain from acting on the basis of information in this article without first seeking legal advice from counsel in the relevant jurisdiction. Only your individual attorney can provide assurances that the information contained herein – and your interpretation of it – is applicable or appropriate to your situation. All information is provided in good faith, however TransRe makes no representation or warranty of any kind, express or implied, regarding the accuracy, adequacy, validity, reliability, or completeness of the information provided.

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Michael Kurtis is an Assistant Vice President and Complex Claims Manager at TransRe. Prior to joining TransRe, Mike was a Vice President with Maiden Re in Mount Laurel, NJ, where he focuses on management and development of the Claims Client Services Unit, claims administration, analytics and claims processes to ensure efficient and effective claims operations, compliance and client service. Prior to joining Maiden Re, Mike spent 17 years as outside counsel, representing insurance and reinsurance clients in litigation and arbitration, as well as in transactional and regulatory matters. Mike is involved in numerous industry organizations and sits on the Board of Editors of an industry publication. He received his Juris Doctor from Brooklyn Law School and a BA in Psychology from Villanova University.

May an Injunction Issue Compelling an MGA to Remit Premiums Pending Arbitration?

The plaintiff, Clear Blue, is an insurance company that entered into a contract with the defendant, Amigo, to be Clear Blue's managing general agent. Under the contract, Amigo was responsible for selling policies, collecting premiums from policyholders, placing the premiums in a trust account, and remitting the entrusted premiums at Clear Blue's direction. The contract required the parties to resolve any dispute in an ARIAS arbitration, except that either party could seek "interim, preliminary or injunctive relief that is necessary to protect the rights and property of that Party, pending an arbitration award by the arbitrators."

In its motion for a temporary restraining order and/or preliminary injunction in the Western District of North Carolina, Clear Blue alleged that Amigo was obliged to immediately remit approximately $2.8 million of premiums that it had not yet remitted. Amigo argued, among other things, that Clear Blue (a) had to arbitrate the issue rather than seek relief from the court and (b) in any event could not meet the standard for preliminary injunctive relief because Clear Blue was merely seeking money damages.

The court did not explicitly address Amigo's challenge concerning the parties' contractual carve-out for seeking injunctive relief outside the arbitration process. Instead, the court proceeded to analyze the merits of the requested relief under the four-part test for preliminary injunctions: the plaintiff must establish: "(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Clear Blue Ins., Co. v. Amigo MGA, LLC*, No. 3:20-cv-312-GCM, 2020 WL 9810106, at *1 (W.D.N.C. June 19, 2020) (quoting *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345 (4th Cir. 2009) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008))).

First, the court concluded that Clear Blue was likely to succeed on the merits because the premiums are "owned by Plaintiff." Second, the court concluded that Clear Blue was likely to suffer irreparable harm absent the grant of a preliminary injunction in part because the premiums were Clear Blue's property. Third, the court found that the equities tipped in favor of Clear Blue because its potential loss of property would be "permanent." Fourth, the court determined that the public interest weighed in favor of preventing the loss of assets.

The court granted the preliminary injunction and ordered Amigo to transmit all policyholder-paid premiums collected on Clear Blue's behalf.

Case: *Clear Blue Insurance, Co. v. Amigo MGA, LLC,* No. 3:20-cv-312-GCM, 2020 WL 9810106 (W.D.N.C.)

Issues Discussed: Injunctive Relief

Court: United States District Court for the Western District of North Carolina (Charlotte Division)

Date Decided: June 19, 2020

Issue Decided: Whether the plaintiff, an insurance company, was entitled to a preliminary injunction – pending arbitration – to require the defendant, an insurance agent, to immediately remit policyholder-paid premiums that the defendant collected on the plaintiff's behalf.

Submitted by: Fielding E. Huseth, Moore & Van Allen (the author and his firm represented the plaintiff)

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