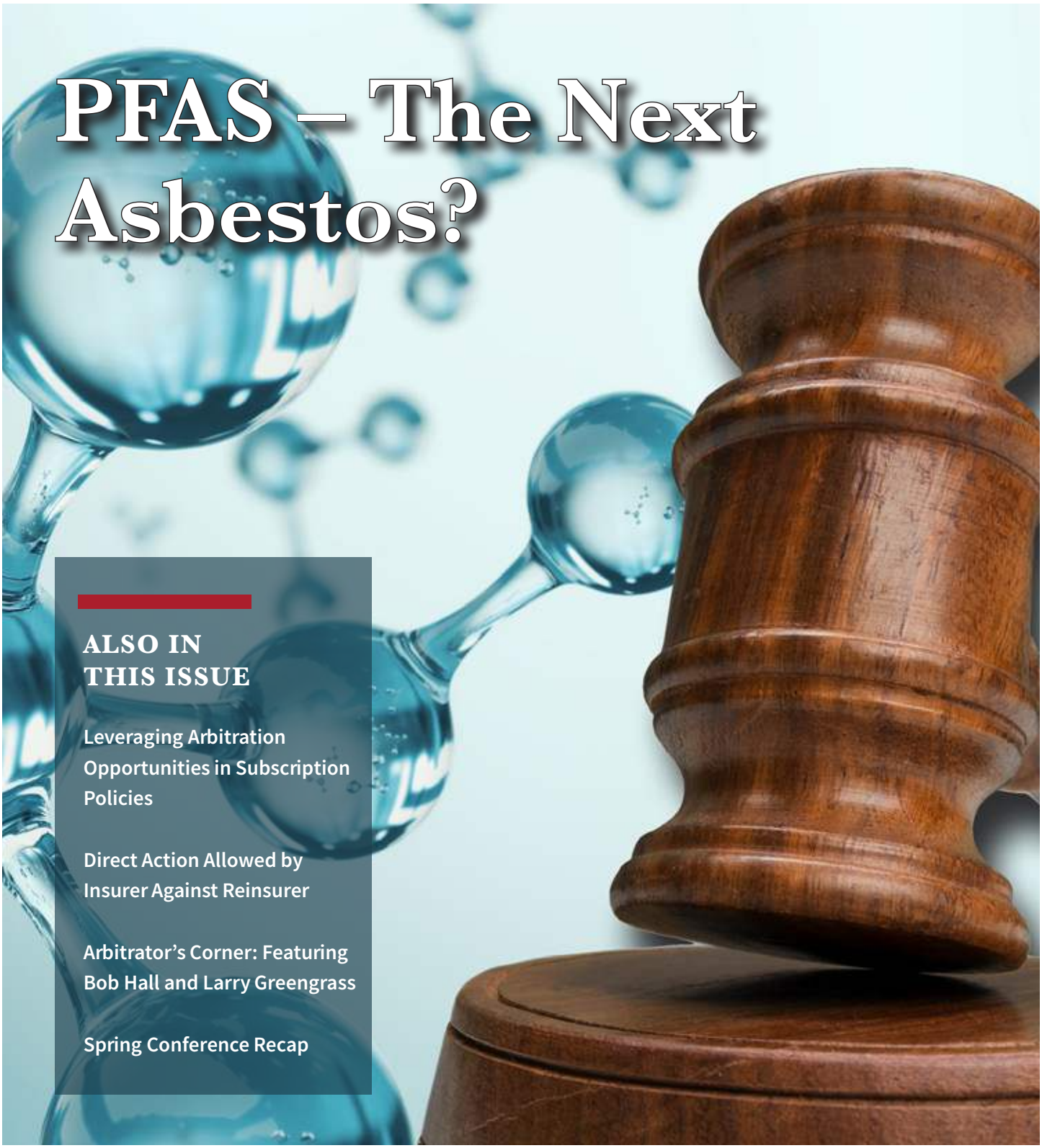
ARIAS U.S.

QUARTERLY



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EDITORIAL POLICY — ARIAS·U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include 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.

ARIAS is now back in full swing with its successful Spring Conference at the Ritz Carlton on Amelia Island, Year of the Arbitrator receptions and educational programs. By the time you read this, we will have conducted a webinar titled "What's Going On With Bad Faith?, which featured Jim Fitzgerald, Erika Lopes-McLeman, Alfonse Muglia and Jeff Rubin, updating all of us on legal developments in the law of bad faith, and held another Year of the Arbitrator reception, this time hosted by Locke Lord in Chicago. Keep your eyes peeled for more Year of the Arbitrator events.

For those of you who have questions about your membership or your certification status, please contact me. We are trying very hard to get everything and everyone up to date. We have quite a few arbitrators who have not taken the courses necessary to maintain certification, so we want to get that sorted out. The goal is to make sure you are all certified. The recertification requirements are on the ARIAS website.

For corporate members, including law firms, we are in the process of updating the corporate or law firm representatives for each of your corporations or firms. If you have questions about who is associated with your corporation or firm's membership, please contact me. We want to make sure we have the correct people as the key contacts, the right email address for renewal information, and the correct people who have memberships under your accounts.

If you are still missing CLE certificates from the Fall 2022 or Spring 2023 conferences, please let me and Jamil Rawls (info@arias-us.org) know and we will get that sorted out as well. We are working hard to get the CLE issues resolved. Both conferences have been approved for CLE credit by Illinois and those of you who file in Illinois should be able to see the credits. What you see on the Illinois website is what ARIAS was approved for so if there is an inconsistency with a certificate, the Illinois online credit shown is the one that counts.

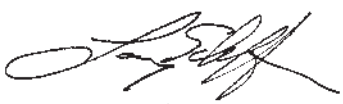
For the Fall 2023 Conference in New York City, the request for panel proposals is out. We welcome your suggestions for panels and your participation as a speaker.

This issue of the Quarterly features several articles of note and a great summary of the Spring Conference. If you missed the conference, you can still read about the great panels and events that took place. The lead article, by Frank DeMento and Bryan McCarthy from Trans Re, covers PFAS, which some consider the new asbestos. PFAS are Per- and Poly-Fluoroalkyl Substances that are used in a wide variety of manufacturing processes and are in our water, air, and bloodstream. Thanks Frank and Bryan for that sobering news. If you were at the Spring Conference, you heard an expert go into great detail about these substances.

Next, a regular contributor and a member of the editorial committee, Robert M. Hall, prepared an interesting article on "Leveraging Arbitration Opportunities in Subscription Policies." Subscription policies are quite popular and where a dispute arises it is important to know how those policies work in the arbitration context. Bob also provides us with a case note on a recent case involving a direct action allowed by an insurer against a reinsurer.

In the Arbitrator's Corner, we have another set of interviews by Alysa Wakin featuring two more ARIAS arbitrators. This article features well-known arbitrator and prolific author and expert witness, Robert M. Hall, and a slightly newer arbitrator, but equally well-known from his successful days as a practicing lawyer, Lawrence Greengrass. Both Bob and Larry reveal some new facts about themselves through Alysa's probing questions. The Year of the Arbitrator continues so if you would like to be interviewed, please contact Alysa.

We hope you enjoy this issue of the Quarterly. We continue to need more of you to contribute to future issues. The deadlines and requirements are on the ARIAS website. The 4th Quarter deadline is September 1. We welcome committee reports, original articles, and repurposed articles from ARIAS CLE programs or from company or firm publications. If you were on a panel at the Spring Conference, please turn your presentation into an article. Leverage your thought leadership and publish an article in the Quarterly. Your thought leadership is worthy of publication!



Larry P. Schiffer
Editor

PFAS – The Next Asbestos?

By Frank DeMento and Bryan McCarthy

Per- and Poly-Fluoroalkyl Substances ("PFAS') have been referred to as the "next asbestos" and continue to gain momentum as a mass tort. Estimates to remediate PFAS from drinking water in the United States are in the billions, as are estimated damages for alleged bodily injuries caused by these chemicals. This year, 2023, will be a critical year in determining whether the reality of PFAS litigation, regulation, and remediation will ultimately make it the next big mass tort. Regardless, the impact of PFAS will continue to be felt by insurance carriers and reinsurers.

PFAS is the commonly used abbreviation for organic compounds with the replacement of most or all hydrogen atoms by fluorine in the aliphatic chain structure. PFAS can be traced back to 1938. One of the earliest uses of PFAS was assisting in the development of the Manhattan Project. PFAS chemicals have a strong ability to repel oil and water and are very resistant to heat. These properties make PFAS extremely beneficial for use in many products and applications—such as fire suppression, wire insulation, surface coatings (such as 3M's Scotchgard), nonstick cookware (such as Dupont's Teflon), personal care products (such as cosmetics, shampoos, and dental floss), and even fast-food wrappers. PFAS are colloquially referred to as "forever chemicals" because they are very persistent, build up in the environment and the human body, and can last for thousands of years.

Why PFAS Is a Hot Topic Today

Today, scientists and environmental officials are finding PFAS everywhere—including in drinking water and the human body. A 2015 study conducted by the Centers for Disease Control found that 97% of Americans have PFAS chemicals in their blood.[1] Further, PFAS has been shown to remain in human blood for years. Even if an individual has not utilized a particular product containing PFAS directly, when these products ultimately end up in landfills they seep into the soil and drinking

water, creating exposure pathways for millions of people. There is also a documented correlation between increased PFAS blood levels and proximity to PFAS-producing facilities. Further, in areas where there is heavy manufacturing, airports, or U.S. Air Force bases, the numbers are exponentially higher.

Multiple studies have now directly linked PFAS to adverse health effects.

> "Multiple studies have now directly linked PFAS to adverse health effects."

To date, direct links have been found between exposure to PFAS and kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol.[2] Although the medical science is still developing, a 2022 published study by the NYU Grossman School of Medicine estimates the annual disease burden and associated economic costs of PFAS exposure in the United States to range from $5.5B to $62.6B.[3] In terms of remediation costs related to PFAS, a 2020 published study from Bluefield Research, a team of analysts and experts focused exclusively on water, wastewater, & stormwater issues, estimates that the total annual expenditure for PFAS drinking water treatment systems will increase from $333.5M in 2022 to $1.1B in 2030.[4] For some further context, the United States General Accounting Office estimates a total of over $3.2B in investigation and cleanup costs related to PFAS contamination at *Department of Defense installations alone*.[5]

Increased Regulatory Scrutiny

The increase in public awareness of the links between PFAS exposure and health hazards as well as reports of the ubiquitous presence of these compounds in drinking water have resulted in PFAS regulation becoming a priority for U.S. federal and state governments. In December of 2022, the U.S. House of Representatives passed the PFAS Act, after the U.S. Senate passed the legislation earlier in the year. The bill directs the Department of Homeland Security's Federal Emergency Management Agency to establish guidance, educational programs, and best practices to protect firefighters and other emergency response personnel from exposure to PFAS from firefighting foam and prevent the release of PFAS into the environment.[6]

Over the last several years, the United States Environmental Protection Agency ("EPA") has also been quite active in efforts to regulate PFAS more strictly in ground and drinking water. On March 14, 2023, the EPA proposed a National Primary Drinking Water Regulation for PFAS.[7] Under the proposal, the enforceable limit on the amount of PFAS that can be in public drinking water is 4 parts per trillion. This is lower than any current state limit. This proposed regulation would also supersede existing EPA Health Advisories for PFAS compounds. Prior Health Advisories were the result of newly available science indicating that adverse health effects due to PFAS are possible at lower levels of contamination than previously thought.

On September 6, 2022, the EPA also formally designated two PFAS substances as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[8] The impact of this is that the federal government may now order a potentially responsible party to clean up and remediate sites with an actual or threatened release of PFAS. Pursuant to this recent designation, the EPA may now undertake to clean up and remediate PFAS-contaminated sites directly.

Though states have responded with various types of legislation relating to PFAS, California is an example of a state that has taken a hardline approach. On September 9, 2022, California signed into law two bills that ban all PFAS in textiles and cosmetics as of 2025.

PFAS Litigation

There has already been a significant amount of litigation in both state and federal courts, and it is expected to increase in the ensuing years. PFAS lawsuits originally were brought by aggrieved plaintiffs who suffered bodily

injury or property damage and were initially focused against manufacturers of PFAS. The more recent wave of litigation has expanded to include consumer product retailers—including cosmetics and personal care product companies like L'Oréal, general product retailers like Target, and fast-food restaurants such as Burger King and Chick-Fil-A.

There are two seminal cases in the development of the current PFAS litigation landscape. The first case is a 2004 class action lawsuit captioned *Leach v. E.I. du Pont de Nemours& Co.*, No. 01-C-698 (Wood County W.Va. Cir. Ct). West Virginia and Ohio residents alleged that Dupont's PFAS manufacturing at its chemical plant in Parkersburg, West Virginia caused widespread water contamination and contributed to high rates of cancer and other health problems for the residents. This remains perhaps the most recognized lawsuit related to PFAS and is notable for several key reasons. First, it was made into the Hollywood film "Dark Waters" starring Mark Ruffalo in 2019. It was also the first time an independent scientific panel linked PFAS exposure to various severe medical conditions. As part of an agreed-upon settlement, this independent science panel (later known as the "C8 Science Panel") was tasked with observing and monitoring the health of residents as related to potential links between PFAS exposure and medical ailments. They conducted medical monitoring from 2005-2013 and ultimately found probable links between exposure to PFAS and kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol. This finding paved the way for the wave of PFAS litigation we have seen in the ensuing years.

Another key case is *Minnesota v. 3M*, No. 27-CV-10-28862 (Minn. Dist. 2010), in which Minnesota's Attorney General alleged natural resource damages because of PFAS contamination caused by 3M's manufacturing processes. The case was settled in 2018, with 3M agreeing to pay over $850M for costs associated with drinking water remediation. Perhaps even more noteworthy than the settlement itself, though, was what happened shortly thereafter. Despite reaching an agreed-upon settlement, the Attorney General decided to make public various documents that demonstrated 3M knew about but concealed the dangers of these chemicals for decades. This brought even more public awareness to the dangers of PFAS chemicals and provided plaintiff attorneys with previously undiscovered information that would aid in the prosecution of all PFAS civil claims going forward.

The table below provides an illustrative example of recent key settlements relating to PFAS.

Key PFAS Settlements

Date	Settling Party	Amount	Description
2017	DuPont	$670.7M	Settlement of Parkersburg, West Virginia bodily injury class action ("Dark Waters" case).
2018	3M	$850M	Settlement with the State of Minnesota related to natural resource damages.
2020	Wolverine Worldwide Inc.	$113M	Settlement of alleged discharge of weatherproofing waste containing PFAS into private water wells in Michigan.
2021	Saint-Gobain Performance Plastics	$30M	Settlement of drinking water pollution claims brought by residents of Bennington, Vermont.
2021	Johnson Controls	$17.5M	Settlement of environmental pollution and bodily injury claims brought by 300 homeowners in Wisconsin. This is the first settlement by a company that only utilized PFAS as a component of its own consumer product.
2021	DuPont., Chemours Corteva	$4B	Under a negotiated cost-sharing arrangement, DuPont, Chemours, and Corteva agreed to establish a $1 billion escrow account and split certain expenses not to exceed an aggregate $4 billion.

Today, the largest pending litigation related to PFAS is a Multi-District Litigation ("MDL") related to the single product, Aqueous Film Forming Foams

("AFFF"), and is venued in South Carolina Federal District Court. AFFF is a fire suppressant used to extinguish liquid chemical fires. It is often used in shipboard fire suppression systems, fire fighting vehicles, and firefighting gear and clothing. The PFAS MDL now consists of over 3,300 pending cases that are being litigated on a consolidated docket. New cases continue to be filed and incorporated into the MDL.

The cases are grouped based on the role of the defendants involved and the damages sought. The categories are: 1) Claims for property damage asserted by water providers; 2) claims for property damage asserted by property owners; 3) bodily injury claims; and 4) claims for medical monitoring for potential future injury. The first bellwether trials will involve only property damage claims asserted by the water provider plaintiffs and are set to begin in June of 2023. They will be closely monitored—as the scientific and legal issues involved will have an impact on all future cases both inside and outside the MDL including those against manufacturer and product distributor defendants.

The first bellwether trial involved only property damage claims asserted by a water provider plaintiff and was set to begin in June of 2023. The case selected for this initial bellwether trial was the City of Stuart v. 3M Co. et al. (2:18-cv-03487). The city alleged that the foam contained perfluoroalkyl and poly-fluoroalkyl substances (PFAS), which the defendants knew had been linked to many health problems, including cancer, reproductive problems, and immune system suppression.

In 2016, the Florida Department of Environmental Protection informed the City of Stuart Public Works Department that its water supply was dangerously contaminated. Specifically, Stuart's water contained PFAS chemicals above the accepted maximum safe levels for potable water. In October 2018, the City of Stuart filed a lawsuit in the U.S. District Court for the Southern District of Florida against a group of companies, including 3M Co., DuPont, Tyco Fire Products, and Chemgard. The basis for the lawsuit was the alleged contamination of Stuart's water supply.

Further testing and investigation indicated that a potential source of the PFAS contamination may have been the City of Stuart Fire Rescue station. Testing of individual supply wells in the vicinity of the Fire Station showed exceptionally high PFAS levels compared to other wells. The City of Stuart eventually concluded that the PFAS contamination in its water supply was caused by the regular use of AFFF firefighting foam during training exercises at the Fire Station.

The fate of the Stuart case would have hinged entirely on causation. Nobody disputed whether PFAS are harmful or whether the Stuart water supply is contaminated. The central question that the expert opinion testimony would have addressed was whether Stuart could show that AFFF products made by the defendants could be specifically linked to the PFAS contamination. The defense experts would have argued that there is no way to definitively prove that Stuart's water contamination came from AFFF used at the Stuart Fire Rescue station. Stuart's experts would have taken the opposite position.

However, the defendants reached a global settlement.

June 2, 2023: The Chemours Company, DuPont de Nemours, and Corteva agreed to resolve all PFAS-related drinking water claims from a defined class of public water systems that cater to the majority of the U.S. population. The companies will set up a settlement fund worth $1.185 billion.

June 5, 2023: The MDL judge granted a joint motion to delay the bellwether trial. The judge postponed the trial for 3-weeks based on representations from both sides that the parties were negotiating in good faith and had made considerable progress toward a resolution.

June 22, 2023: 3M entered into a broad class resolution to support PFAS remediation for public water suppliers (PWS) that detect PFAS at any level. The agreement includes a present value commitment of up to $10.3 billion payable over 13 years.

Provides funding for PWS across the country for PFAS treatment technologies without the need for further litigation.

Provides funding for eligible PWS that may detect PFAS in the future.

Resolves current and future drinking water claims by PWS related to PFOA, PFOS, and all other PFAS, including those that are included as a portion of the Aqueous Film Forming Foam (AFFF) multi-district litigation based in Charleston, South Carolina.

Phase 2 will feature 3 personal injury cases. The AFFF MDL class action judge instructed the parties to start the process of identifying a second bellwether pool. This pool will focus on injury claims asserting that the toxic

firefighting foam contaminated drinking water in certain areas. The parties must select the cases by July 28, 2023, and present a joint list of selected or proposed cases to the court by August 11, 2023.

Department affirmed a trial court decision supporting the application of the pollution exclusion in the PFAS context. The court found no duty to defend an insured in connection with PFAS claims at a manufacturing facility.

> "PFAS claims implicate several critical insurance coverage issues."

PFAS and Insurance Coverage

PFAS claims implicate several critical insurance coverage issues. The threshold coverage questions at issue under general liability policies include determining if the allegations against a particular insured allege an "occurrence" as defined by the relevant insurance policy. Next, it is important to determine if the allegations against a particular insured assert actionable "bodily injury" or "property damage" under the policy in question. Further, many of the PFAS lawsuits allege property contamination and/or specific medical conditions caused by PFAS exposure. These types of alleged damages may fall within a given general liability policy's definition of "property damage" or "bodily injury."

To date, several key judicial decisions have been issued regarding the applicability of various types of pollution exclusions in the PFAS context. In *Tonoga Inc. v. New Hampshire Insurance Co*., No. 532546, 2022 N.Y. App. Div. LEXIS 105 (App. Div. 3rd Dep't Jan. 6, 2022), New York's Appellate Division, Third

In *Wolverine Worldwide v. American Insurance Co.*, No. 1:19-CV-10, 2021 WL 4841167 (W.D. Mich. Oct. 18, 2021), the United States District Court for the Western District of Michigan found that in the PFAS context, the carrier's denial based upon their pollution exclusion was not appropriate. The court held that the sudden and accidental exception to the pollution exclusion precluded a denial of coverage and that under the broader duty to defend standard, the carrier had an obligation to defend its insured. In *Colony Insurance Co. v. Buckeye Fire Equipment Co.*, NO. 3:19-cv-00534-FDW-DSC, 2020 U.S. Dist. LEXIS 194709 (W.D.N.C. Oct. 20, 2020), the United States District Court for the Western District of North Carolina held that the hazardous materials exclusion at issue applied only to traditional environmental pollution, which did not include bodily injury from direct contact with a pollutant. The court therefore reasoned that the exclusion did not apply to the underlying claims in the PFAS AFFF litigation and found that the insurance company owed a duty to defend its policyholder in that litigation.

Additional coverage litigation related to PFAS is anticipated. Carriers, policyholders, and courts will need to resolve open questions of duties to indemnify for damages, trigger, and allocation under multiple policy periods and complex coverage towers, as well as the applicability of newly minted PFAS exclusions adopted by insurance carriers.

PFAs on the Horizon

This year, 2023, will be a critical year for the development of PFAS regulation, litigation, remediation strategies, and insurance coverage developments. It is anticipated that the EPA will issue its National Primary Drinking Water Regulations for PFAS later this year. Federal and State lawmakers will also grapple with the challenges of the prevalence of PFAS in the environment and its use in so many varied consumer products. As far as litigation, the first trials in phase one of the MDL are set to begin in June of 2023. These will have a major impact on the future of all PFAS litigation. Given the documented presence of PFAS in soil and groundwater throughout the United States, new remediation methods and science will likely be developed to treat contamination more effectively. Finally, the insurance coverage landscape is anticipated to develop further in 2023 including additional holdings regarding the application of various pollution exclusions in the context of PFAS litigations. It will also be worth noting if any policyholders will attempt to challenge exclusions designed exclusively and specifically for PFAS claims.[9]

NOTES

1 *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*. National Institute of Environmental Health Sciences (2023). Retrieved at https://www.niehs.nih.gov/health/topics/agents/pfc/

2 Frysh, P. *PFAS: What to Know*. WebMD (June 16,2022). Retrieved at www.webmd.com/a-to-z-guides/what-is-pfas.

3 Obsekov, V., Kahn, L.G. & Trasande, L. *Leveraging Systematic Reviews to Explore Disease Burden and Costs of Per- and Polyfluoroalkyl Substance Exposures in the United States*. Expo Health (2022). https://doi.org/10.1007/s12403-022-00496-y

4 *U.S. $6.15 Billion PFAS Remediation Forecast Underpinned by Changing Regulatory Environment*. Bluefield Research. (May 17, 2022). Retrieved at https://www.bluefieldresearch.com/ns/us6-15-billion-pfas-remediation-forecast-underpinned-by-changing-regulatory-environment/

5 U.S. Government Accountability Office. (2021, June). *Firefighting Foam Chemicals: DOD Is Investigating PFAS and Responding to Contamination, but Should Report More Cost Information* (Publication No. GAO-21-421).

6 *Congress Passes the PFAS Act to Protect Emergency Response Personnel*. National Association of Counties (December 8, 2022). Retrieved at https://www.naco.org/blog/congress-passes-pfas-act-protect-emergency-response-personnel

7 American Property Casualty Insurance Association . (2023, March 13). *EPA Proposes National Limits on PFAS in Drinking Water* [Press release].

8 United States Environmental Protection Agency. (2022, September 6). *Proposed Designation of Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances* [Press release]. https://www.epa.gov/superfund/proposed-designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos

9 DISCLAIMER

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Frank DeMento is Vice President and head of the US Custom, Latin American, and Caribbean claims units at TransRe. Prior to joining TransRe, he was Senior Counsel in the insurance and reinsurance group of Crowell and Moring LLP. He also previously served as a vice president and managed the run-off claims unit, the retroceded claims unit, and was claims counsel for XL Reinsurance America, Inc. Before that, he was a partner in the insurance and reinsurance litigation group at Mendes and Mount, LLP.

For the past seven years, he has served on the education and claims committee as well as the association governance committee of the Intermediaries & Reinsurance Underwriters Association (IRUA). He was also a member of the board of directors of ROM Reinsurance Management Co., Inc. for six years and served as its chairman. He also served as a member of the board of directors of the Association of Insurance and Reinsurance Run-off Companies for three years and served as chairman on its education committee.

Further, he has been a member of ARIAS since 2003 and is an ARIAS·certified arbitrator. Additionally, he holds the following industry designations: Associate in Reinsurance; Chartered Property Casualty Underwriter; and Certified Legacy Insurance Professional. He received his undergraduate degree from Washington and Lee University and his Juris Doctor degree from St. John's University School of Law.

Bryan McCarthy is a Senior Complex Claims Examiner at TransRe. He is a member of the U.S. Custom Claim Team in New York. Previously, Bryan worked for a commercial insurance carrier in claims management and claims adjusting roles since 2008. He has experience in managing and adjusting complex direct claim and reinsurance claim matters throughout the United States—including matters with disputed coverage, mass tort actions, Coverage B claims, Illinois BIPA claims, opioid claims, PFAS claims, commercial auto claims and environmental and toxic tort claims. Bryan earned a JD, MBA, and undergraduate degree from Seton Hall University and currently maintains a New Jersey Bar License.

Leveraging Arbitration Opportunities in Subscription Policies

By Robert M. Hall

I. Introduction

A subscription policy is an insurance policy issued on behalf of multiple insurers, none of which wish to assume the insured's entire risk. Often, they take the form of each insurer's policy tied together by a common form containing the declarations, percentage of risk assumed by each insurer, notice that the risk of each insurer is several and not joint and sometimes other clauses. The underlying policies, sometimes, are inconsistent in the use of arbitration for disputes with policyholders. The purpose of this article is to examine selected case law concerning the use of one or more companies' policies within the subscription policy containing an arbitration clause to leverage an arbitration for all the insurers participating in the subscription policy. One tool to achieve this leverage is equitable estoppel.

Appellate Court Recognition of Equitable Estoppel Generally

GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless U.S., 140 S. Ct. 1637 (2020), posed the issue of whether "the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitra-

tion agreements by nonsignatories."[1] In concluding that equitable estoppel did not so conflict, the Court confirmed that equitable estoppel applies to arbitrations under the Federal Arbitration Act.

> "In concluding that equitable estoppel did not so conflict, the Court confirmed that equitable estoppel applies to arbitrations under the Federal Arbitration Act."

A dispute over defects in a car purchased provided the factual background for *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999). The sales agreement, which had an arbitration clause, included service for the car by MS Dealer, which was not a party to the sales agreement. The car purchaser sued the parties involved in the sale plus MS Dealer. MS Dealer sought to compel arbitration and the court so ordered based on equitable estoppel:

> Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the nonsignatory. . . . Second, "application of equitable estoppel is warranted . . . when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.
>
> . . .
>
> Both of the circumstances giving rise to equitable estoppel exist here.[2]

Grigson v. Creative Artists Agency, 210 F.3d 524 (5th Cir. 2000), involved a movie distribution agreement. The issue was whether:

> [T]he district court abused its discretion by applying equitable estoppel to compel arbitration for an action centered on tortious interference with a contract with an arbitration clause, brought by signatories to the contract against non-signatories, the court holding that, because this action is intertwined with, and dependent upon, that contract, its arbitration agreement should be given effect.[3]

After analyzing the complex fact situation, the *Grigson* court ruled that the lower court did not abuse its discretion. The court added: "This conclusion is compelled by comparing the complaint (the operative facts for purposes of the motion to compel arbitration) with the distribution agreement (an exhibit to the complaint)."[4]

II. District Court Application of Equitable Estoppel to Subscription Policies

Cases Finding in Favor of Equitable Estoppel

Two non-domestic and eight domestic insurers allegedly covered hurricane damage to a government building under a surplus lines subscription policy in *City of Kenner v. Certain Underwriters at Lloyd's*, No. 21-2064 (E.D. La. Feb. 2, 2022). It appears that the common portion of the subscription policy contained an arbitration clause, but Louisiana law prohibited enforcement of arbitration clauses in insurance policies. The two non-domestic insurers relied on the Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("Convention") to supersede Louisiana law on point, but the issue remained as to the domestic insurers. The court expressed some doubt

as to whether the subscription policy was one policy or ten but ultimately concluded it was one policy. The court relied on equitable estoppel to conclude that arbitration was appropriate with all ten insurers since the plaintiff alleged interdependent and concerted misconduct by the non-domestic and domestic insurers.

Kronlage Family Ltd. Partnership v. Independent Specialty Ins. Co., No. 22-1013 (E.D. La. Jan. 17, 2023), involved a subscription policy issued by Lloyd's of London and a domestic insurer covering property alleged damage by a hurricane. The common portion of the policy noted that the insurers' liability was several and not joint. The insureds opposed the insurers' motion to compel arbitration on the bases that: (1) Louisiana law prohibits arbitration of insurance disputes: and (2) the several liability of the two insurers means that the domestic insurer has a separate policy that does not fall under the Convention and, therefore, cannot supersede Louisiana law. The court rejected the insured's arguments and ruled in favor of arbitration for both insurers. It ruled that when the plaintiff is making a single claim against both insurers, alleging substantially interdependent and concerted misconduct by both insurers, equitable estoppel applies. This is determined by examining the plaintiff's petition, which contains the operative facts.

Four domestic insurers shared the insurance risk, issuing their own polices with an "overaching Shared Limits/ Shared Capacity Dispute Protocol" in *Signal Ridge Owners Ass'n v. Landmark American Ins. Co.*, No. 3:22-CV-1385-D (N.D. Texas Feb. 17, 2023). Only one of the policies had an arbitration clause. When the insured sued for recovery of property damage from wind and hail, the insurers moved to compel arbitration. The court considered at some length the argument for and against treating the subscription policy as one policy but concluded that it was one policy, consisting of multiple parts, executed simultaneously, and pertaining to the same transaction. With respect to equitable estoppel, the court noted that the elements of the intertwined claims test were satisfied so as to require that the entire dispute be arbitrated.

Two insurers, Certain Underwriters at Lloyd's ("Lloyd's") and Independent Specialty Insurance Company ("ISIC"), shared the risk in *Bopp v. Independent Specialty Ins. Co.*, No. 23-18 (E.D. La. Feb. 23, 2023). It appears that the insurers issued a subscription policy and that Lloyd's portion of the policy included an arbitration clause. When the insured sued over a hurricane loss, the insurers sought to remove it to federal court based on the Convention. The insured objected that the Convention did not apply to ISIC as a domestic company and, in any case, the arbitration clause did not appear in ISIC's portion of the subscription policy. The court rejected the insured's argument citing *Grigson* and other decisions described *supra*. The court held that equitable estoppel is allowed when the claims against all defendants, domestic and foreign, are inextricably intertwined *i.e.* when a plaintiff has alleged interdependent and concerted misconduct on the part of all insurers.

Two of nine insurers were non-domestic insurers in *Stor-All Gentilly Woods, LLC v. Indian Harbor Insurance Co.* No. 23-334 (E.D. La. March 21, 2023). The subscription policy specifically stated that the policy should be construed as a separate contract with each insurer and the court so found. The overarching portion of the insurance policy contained an arbitration clause. The court held that equitable estoppel applied with respect to all defendant insurers because the plaintiff's complaint refers to all defendants as a collective entity and does not distinguish among the insurers in terms of the wrongful conduct alleged. *See also, Foresight Energy, LLC v. Ace American Ins. Co.*, No. 4:22-cv-00887-JAR (E.D. Mo. March 21, 2023) (the court reached a similar result based not on equitable estoppel but on § 205 of the Federal Arbitration Act, which allows removal of an action pending in state court that "relates to" an arbitration falling under the Convention).

Cases Finding Against Equitable Estoppel

Two out of ten insurers on a subscription policy were non-domestic in *Butkin Enterprises LLC v. Indian Harbor Insurance Co.*, No. 21-CV-04017 (W.D. La. March 7, 2023). The Declarations Page of the subscription policy contained a separate policy number for each insurer and stated that there was a separate contract for each insurer. The policy document contained an arbitration clause for any "difference between the Insured and the Companies." When a dispute arose over hurricane losses, the insured sued the domestic insurers. Then the insured amended its petition to add the non-domestic insurers only to later to move to dismiss the non-domestic insurers with prejudice. The dismissal was granted. The court ruled that given that claims against the non-domestic insurers were barred by res *judicata*: (1) the Convention did not apply; (2) equitable estoppel was not warranted; and (3) the domestic insur-

> "The court held that equitable estoppel applied with respect to all defendant insurers because the plaintiff's complaint refers to all defendants as a collective entity and does not distinguish among the insurers in terms of the wrongful conduct alleged."

ers were subject to a Louisiana law that prohibited arbitration of insurance disputes.

In *Realty Trust Group, Inc. v. Ace American Ins. Co.*, No. 1:07CV573-HSO-JMR (S.D. Mo. December 11, 2007), two of the multiple insurers on the subscription policy were non-domestics and had arbitration endorsements on their portions of the policy. Those two insurers were dismissed from the case and the remaining insurers sought to compel arbitration. The court declined to do on the basis that that the plaintiff failed to allege that the claims against all insurers were sufficiently intertwined or that there was a conspiracy among the insurers. *See also SFA Group, LLC v. Certain Underwriters at Lloyd's*, No, CV 16-04202-GHK (JC), 2016 WL 5842180 (C.D. Cal. Sept. 29, 2016) (the court found that insurance policies at different layers of coverage were not sufficiently intertwined with other policies containing arbitration clauses).

III. Commentary

It appears that subscription policies are used to quota share the primary insurance risk in two fact circumstances: (1) very large commercial risks; and (2) risks in locations that are highly exposed to natural catastrophes. Typically, the participating insurers bundle their individual policies, tied together with a common form containing the declarations, percentage of risk assumed, and a few other provisions such as notice that the liability of the insurers is several and not joint.

Sometimes, one or more of the insurers have an arbitration clause in their policy. Equitable estoppel is a means by which insurers, whose policies do not contain an arbitration clause, can lever their way into an arbitration of the dispute if the plaintiff alleges interdependent and concerted misconduct on the part of the insurers.

Bob 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.

Endnotes

1 140 S.Ct. 1637 at 1642.

2 177 F.3d 942 at 947, quoting *Sunkist Soft Drinks, Inc.* v. Sunkist Growers, Inc., 10 F.3d 753 at 757 (11th Cir. 1993) and *Boyd v. Homes of Legend, Inc*. 981 F. Supp. 1423 at 758 (M.D. Ala. 1997).

3 210 F.3d 524 at 525.

4 *Id.* at 529.

Direct Action Allowed by Insurer Against Reinsurer

By: Robert M. Hall[1]

Usually, reinsurers have no direct interaction or contractual relationship with insureds. For this reason, there is a large body of case law that holds that insureds have no right of "direct action" against reinsurers' duty to lack of privity.[2] However, there are instances in which a reinsurer exerts direct control of the underwriting and/or claim handling processes and there is a body of case law that allows the insured to bring a direct action against the reinsurer in such situations on various bases.[3] A recent case allowing direct action is *Midtown Hotel Group, LLC v. Selective Company of America*, No. CV-01395-OHK-JAT (D. AZ. May 23, 2023).

In this case, Hartford Steam Boiler ("Hartford") reinsured Selective Insurance Company ("Selective") for equipment breakdown at the Midtown Hotel ("Midtown"). Midtown was unhappy with the recovery offered on a flood claim and sued both Selective and Hartford. Hartford moved to dismiss Midtown's direct action based on lack of privity. The court described the fact situation as follows:

Under the reinsurance agreement, Hartford is obligated to "accept as reinsurance 100%" of the equipment breakdown liability covered by Selective's policies up to a limit of $100,000,000 per accident. When a covered equipment breakdown occurs, Selective must give Hartford notice "as soon as possible," after which Hartford is entitled to "investigate, negotiate, and enter into settlement agreements." Selective may, but is not required to, participate in the investigation, negotiation and settlement of such

claims. When Hartford settles with a claimant, Selective must directly pay the claimant the settlement amount.[4]

Citing a series of Arizona, California, and Colorado cases, the court ruled that Midtown had adequately stated a claim against Hartford: (1) for bad faith on a direct liability theory; (2) for breaching its duty of good faith and fair dealing with respect to Midtown's claim. The court explained:

> Under the circumstances alleged, to dismiss Midtown's claim against Hartford would deprive Midtown of redress against the party primarily responsible for its damages. It would allow Hartford to use its claim control rights under the reinsurance agreement as a sword against the policyholders to minimize payments while simultaneously using its contractual distance as a shield against liability for any bad faith might perpetuate. Such a disposition would not comport with the policy of deterrence underlying the development of the tort of bad faith in Arizona.[5]

Endnotes

1 Bob 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. He is also on the Editorial Board of the ARIAS Quarterly. Copyright by the author 2023.

2 *See* T. Darrington Semple and Robert M. Hall, *The Reinsurer's Liability in the Event of the Insolvency of a Ceding Insurer*, 21 Tort & Ins. L. J. 407 (1985).

3 *See* Robert M. Hall, *Direct Actions and Setoff: The Next Generation*, VIII Mealey's Reins. No. 7 at 15 (1997); Robert M. Hall, *Fronting and Direct Actions Against Reinsurers*, IXX Mealey's Reins. Rep. No. 1 at 36 (2008).

4 *Slip op*. at 8.

5 Id. at 9 – 10.

Arbitrators Bob Hall and Larry Greengrass share insights and memories

A CONVERSATION WITH BOB HALL

Prior to becoming an arbitrator, the ever-prolific Bob Hall was SVP & General Counsel for Munich Re America, and more recently a partner at DLA Piper. He is licensed to practice law in numerous jurisdictions, including the United States Supreme Court, has been involved in over 200 arbitrations, is on the ARIAS·U.S. Certified Umpire List, and has trained as a mediator.

Q: When did you first join ARIAS?

A: It was probably the latter part of the 1990s, but I don't remember the exact year.

Q: Do you remember your first ARIAS conference?

A: At this point, that has faded into the distance.

Q: Biggest challenge facing ARIAS?

A: To expand its field, and not be just a niche player, but an overall ADR facility. To be seen as the center for dispute resolution for anything related to insurance disputes is the proper goal.

Q: Greatest things ARIAS has to offer?

A: An outline of how arbitrations should go forward without being overly intrusive to people who are experts. ARIAS provides general structure,

forms, a code of ethics, educational and professional opportunities without micromanaging the process.

Q: Advice to newer arbitrators?

A: It's hard getting started. People coming in should start with their long suit and focus first on their area of expertise. Then they can broaden from there.

Q: Favorite ARIAS memory?

A: In an early meeting, they handed out t-shirts that said, 'Super Arbitrator.' Marty Haber wore his to every meeting for years.

LIGHTENING ROUND:

Q: Where do you spend most of your time?

A: The coast of Maine.

Q: Favorite hobby?

A: Cooking with my wife.

Q: Something about you that would surprise most people?

A: I was an All-State athlete in high school, on a State Champion soccer team.

Q: New York Times or Wall Street Journal?

A: Wall street journal because Times prints news that fits their narrative.

Q: Biggest grammatical pet peeve?

A: Run on sentences with multiple subordinate phrases, like British legal journals.

Q: Favorite guilty pleasure?

A: Chocolate.

Q: Your perfect meal?

A: Maine lobster.

A CONVERSATION WITH LARRY GREENGRASS

In his professional life, Larry enjoyed a long career with Mound Cotton Wollan and Greengrass law firm and is a former officer of Emerald Coast Reinsurance Co. LTD. Larry's first reinsurance arbitration was long before ARIAS. Since its formation, Larry had done countless ARIAS arbitrations largely as counsel, but more recently as a certified arbitrator and umpire. He is also certified by the Southern District of New York as a mediator and has done numerous mediations.

Q: When did you first join ARIAS?

A: It was just about from the start. I was at Mound Cotton at the time, where I spent my whole career. It had to be in the mid to late 1990s. I went to my first ARIAS conference with Gene Wollan. I knew some people, but Gene knew everyone and I just remember following Gene around.

Q: When did you become a certified arbitrator?

A: I retired at the end of 2015. About 3 or 4 years ago I decided to get certified because I missed the people and working on the substantive issues. Since then, I have been appointed as an arbitrator and also served as an umpire in more than a dozen arbitrations.

Q: What are some of the biggest challenges facing new arbitrators and what is your advice to newer arbitrators?

A: Nothing is more important than your honesty and integrity. That's how you build the right reputation. I feel like I had an advantage because I've handled arbitrations for over 40 years. I think it's harder for people coming out of companies who may know the issues but maybe haven't had the same direct experience with arbitrations as I had as counsel.

My advice to newer arbitrators is go to conferences, show up to events, and speak on Panels.

Q: Biggest challenge facing ARIAS?

A: To continue to work toward maintaining maximum credibility so everyone in the business feels confident they will get a fair hearing and the outcome won't be determined by a coin toss. None of us can look into the mind of an arbitrator, but the process needs to be perceived as fair.

Q: Greatest things ARIAS has to offer?

A: Professionalism; processes and procedures; conferences and educational seminars that are second to none for which ARIAS has every reason to be extraordinarily proud of itself.

Q: Favorite ARIAS memory?

A: When Bill Yankus dragged a United States Supreme Court Judge off the stage because it was time for the next ARIAS workshop.

LIGHTENING ROUND:

Q: Where do you spend most of your time?

A: Great Neck on Long Island, but the home I love the most is in Bridgehampton.

Q: Favorite hobby?

A: Playing any game with any of my 6 grandchildren.

Q: Something about you that would surprise most people?

A: I have perfect pitch and can sit down and play any song on piano without any music.

Q: New York Times or Wall Street Journal?

A: I read both every day.

Q: Biggest grammatical pet peeve?

A: Extra-long, run-on sentences.

Q: Favorite guilty pleasure?

A: White chocolate.

Q: Your perfect meal?

A: Anything cooked or baked by my wife, who is a culinary star.

UPCOMING EVENTS

Fall Conference

November 9-10, 2023

The Hilton in New York, NY

Determining Arbitrability when no Arbitration Agreement Exists

In 2019, a catastrophic equipment failure at the Hadjret En Nouss Power Plant located in Tipaza, Algeria owned by Shariket Karhraba Hadjret En Nouss ("SKH") caused tens of millions of dollars in alleged business interruption losses and property damages. The defective equipment was designed, manufactured, and installed by various General Electric companies ("GE"), whom allegedly held themselves out to the insured and others as capable of safely designing, manufacturing, and installing the gas turbine blade, which ultimately malfunctioned and caused the damage. SKH received partial reimbursement from its direct insurer, which in turn received partial reimbursement from its reinsurers and retrocessionaires (collectively, the "Insurance Entities"). The Insurance Entities, acting as SKH's subrogees, then filed suit against GE seeking reimbursement of losses incurred in connection with the equipment failure.

The power plant was constructed by SNC-Lavalin Constructeurs International Inc. ("SNC"), which served as the plant's operator pursuant to an operation and maintenance contract with SKH that contained an arbitration provision. (SNC also was SKH's majority owner.) SNC and GE also had services, supply, and coordination contracts containing arbitration provisions. The arbitration clause in the services contract ("Services Contract") for example, stated in part: "The Parties agree that any or all disputes arising from this Agreement or concerning it…shall be definitively resolved on the basis of the Conciliation and Arbitration Rules of the International Chamber of Commerce…." No contract existed between SKH and GE.

Upon notice of the subrogation action, GE moved to compel arbitration under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). In doing so, GE asserted that the contracts with SNC, or SNC's contract with SKH, sufficed to compel Plaintiffs to submit to arbitration based on third-party beneficiary and estoppel theories.

The court concluded that the Services Contract conferred a benefit on the Insurance Entities. Specifically, it provided a warranty that appeared to cover the gas turbine incident. The court held, therefore, that the Insurance Entities were third-party beneficiaries of the contract. The court further held that the Insurance Entities were estopped from denying enforcement of the arbitration provision in that contract because they benefited from the warranty in the same contract.

The Insurance Entities separately argued that GE could not compel arbitration because the scope of the arbitration provision between SNC and GE did not cover the current matter. The court, however, held that the arbitrators would need to decide that issue because the arbitration clause delegated the question of arbitrability to the arbitrators.

Case: *Insurers v. Gen. Elec. Int'l, Inc.*, 2023 U.S. Dist. LEXIS 68521 (N.D. Ga. Mar. 17, 2023)

Issues Discussed: Arbitrability where no arbitration agreement between the parties exists.

Court: United States District Court for the Northern District of Georgia (Atlanta Division)

Date Decided: March 27, 2023

Issue Decided: Manufacturer of defective equipment for an insured power plant could compel arbitration with subrogee insurer, reinsurers, and retrocessionaires because subrogee insurance entities were third party beneficiaries of a contract between manufacturer and entity related to the power plant insured with an arbitration clause and benefitted from a warranty in that contract.

Submitted by: Fielding E. Huseth, Raquel Macgregor Pearkes, and Elvis Mugisha of Moore & Van Allen

What is the Court Jurisdiction for Reinsurance Declaratory Judgment Action?

The defendant National Indemnity Company ("NICO") is an insurance company based in Nebraska. NICO issued liability insurance to the State of Montana ("Montana Liability Policy") and purchased reinsurance coverage for those policies from several carriers, including Skandia Insurance Company ("Skandia"). Skandia is based in Sweden and has a U.S. Branch in New York. The subject reinsurance contract (the "Agreement") was issued through a broker based in Chicago, Illinois. TIG Insurance Company ("TIG") succeeded Skandia at some point after Skandia and NICO entered into the Agreement.

Numerous asbestos claims were tendered to NICO under the Montana Liability Policy and NICO brought a declaratory judgment action against Montana in Montana State Court seeking a determination of NICO's rights/duties under the Montana Liability Policy. While in litigation with Montana, NICO sent status reports, demands and other correspondence regarding this action to TIG (at its address in New Hampshire) and its other reinsurers. The Montana suit was ultimately settled and NICO advised TIG that a reinsurance billing was forthcoming.

Before the settlement between NICO and Montana was approved, and before NICO issued its reinsurance billing to TIG, TIG filed a declaratory judgment action in the U.S. District Court for the District of New Hampshire and claimed that the settlement agreement was not covered under the Agreement. Two other reinsurers brought similar suits against NICO in other jurisdictions. Those reinsurers eventually agreed to dismiss their cases without prejudice in favor of litigation in the District of Nebraska.

NICO moved to dismiss this matter, arguing that the New Hampshire federal court lacked personal jurisdiction. In the alternative to dismissal, NICO sought to transfer the case to Nebraska.

NICO contended that it had insufficient contacts with the State of New Hampshire to support general personal jurisdiction there and its contacts with TIG in New Hampshire did not support specific personal jurisdiction. TIG, in turn, contended that specific personal jurisdiction over NICO existed based on the parties' communications and NICO's other contacts with New Hampshire. The Court applied a "relatedness" legal analysis to assess the jurisdiction question.

Because TIG's predecessor was based in Sweden with a New York branch, and the Agreement was issued through a Chicago broker to NICO, a Nebraska company, the Court found no connection to New Hampshire as to the formation of the Agreement. In addition, since neither TIG nor NICO had breached the Agreement when TIG initiated the action, there was no contact with New Hampshire regarding the future consequences (or breach) of the Agreement.

TIG argued the fact that all NICO's communications about the Montana suit were directed to TIG's New Hampshire address was sufficient basis for jurisdiction. The Court distinguished cases cited by TIG on this point and found that, overall, the applicable case-law did not support TIG's theory.

The New Hampshire Court granted NICO's motion to dismiss and, because the case was dismissed, did not address NICO's alternative request to transfer the matter to Nebraska.

Case: *TIG Insurance Company v. National Indemnity Company,* Case No 22-cv-165-SE, Opinion No. 2023 DNH 029

Issues Discussed: Court Jurisdiction for Reinsurance Declaratory Judgment Action

Court: United States District Court for the District of New Hampshire

Date Decided: March 27, 2023

Issue Decided: Where reinsurance agreement was negotiated out-of-state and cedent insurer had not yet billed in-state reinsurer, federal court lacked general or specific personal jurisdiction over the cedent insurer for reinsurer's declaratory judgment action.

Submitted by: Polly Schiavone, Vice President, Swiss Reinsurance America Holding Corp.

What is the Burden of proof and Applicability of Collateral Estoppel in a Reinsurance Dispute?

Utica Mutual Insurance Company ("Utica") issued primary and umbrella insurance policies to Burnham Corporation (the "insured"). Utica obtained reinsurance coverage from American Re-insurance Company (n/k/a Munich Reinsurance America, Inc.) ("Am Re") related to the umbrella policies. The insured was sued by individuals who were allegedly injured due to asbestos exposure. Utica paid defense costs and claims under the primary policies and, when the primary policies were allegedly exhausted, Utica paid claims under the umbrella policies. Utica sought reimbursement from Am Re for defense costs under the umbrella policies. Am Re refused to pay on the basis that Utica was not obligated to pay defense costs under the umbrella policies and that the reinsurance contracts were not triggered. The parties separately reached a settlement agreement for certain other amounts allegedly owed under the reinsurance agreements and carved out Utica's claim for interest on those amounts.

Utica commenced a lawsuit against Am Re for breach of contract. The parties filed a series of summary judgment motions. The trial court granted Am Re's motion on the ground of collateral estoppel, dismissing Utica's claims. The trial court did not reach the parties' cross motions related to Utica's claims for defense costs or the parties' cross motions on Utica's claim for lost interest. Utica appealed.

The appellate court held that the trial court erred in granting Am Re's motion based on collateral estoppel. Noting that the party seeking to invoke the doctrine of collateral estoppel bears the burden to show that the previously litigated issue was identical to that in the subsequent action and that it was decided after a full and fair opportunity to litigate, the appellate court held that Am Re failed to meet its burden because the language at issue in the case differed from the language in the documents that were the subject of the prior litigation that Am Re relied upon in its collateral estoppel argument.

Moving to the parties' cross motions regarding defense costs, the appellate court concluded that Am Re established that the umbrella policies did not cover defense costs in the underlying actions. The umbrella policies provided that, "[w]ith respect to any occurrence not covered by the policies listed in the schedule of underlying insurance or any other insurance collectible by the insured, but covered by the terms and conditions of this policy (including damages wholly or partly within the amount of the retained limit), the company shall: (a) defend any suit against the insured." (Emphasis added). Because the claims were covered by the primary policies, the appellate court concluded that the unambiguous terms of the umbrella policies established that defense costs were not covered under the umbrella policies. Therefore, Am Re was not required to reimburse Uti-

Case: *Utica Mut. Ins. Co. v Am. Re-Ins. Co.*, 211 A.D.3d 1587 (N.Y. App. Div. 2022), *amended on reargument*, 214 A.D.3d 1418 (N.Y. App. Div. 2023)

Issues Discussed: Burden of proof and applicability of collateral estoppel in reinsurance dispute; reimbursement of defense costs for amounts not owed under umbrella policies; and burden of proof on summary judgment for ceding company's interest claim.

Court: Supreme Court, Appellate Division, Fourth Department, New York

Date De Scided: December 23, 2022

Issue Decided: (1) Collateral estoppel did not apply where the party invoking collateral estoppel failed to establish that the previously litigated issue was identical to that in the subsequent action; (2) defense costs not owed under umbrella policies could not be recovered from reinsurer; and (3) summary judgment on ceding company's claim for interest could not be granted when reinsurer failed to meet its initial burden on the cross motion relating to interest.

Submitted by: Elizabeth Kniffen and Megan Shutte, Zelle LLP

ca under the reinsurance contracts for the defense costs. The appellate court modified the trial court order by granting Am Re's motion for summary judgment dismissing the complaint with respect to defense costs and denying Utica's corresponding cross motion.

On the issue of Utica's claim for lost interest, the appellate court determined that the trial court erred in granting Am Re's cross motion for summary judgment on that claim. The court found that Am Re failed to meet its initial burden on the cross motion relating to interest, and thus the burden never shifted to Utica. Under these circumstances, denial of the cross motion was "required regardless of the sufficiency of the opposing papers." The appellate court modified the trial court order by denying Am Re's cross motion and reinstating the complaint insofar as it sought loss interest.

On rehearing, the appellate court further noted that the appellate court "considered the remaining contentions raised by plaintiff and conclude that they are without merit." Utica Mut. Ins. Co. v Am. Re-Ins. Co., 214 A.D.3d 1418 (N.Y. App. Div. 2023).

Amelia Island Spring Conference Spotlights Arbitrators!

The 2023 ARIAS·U.S. Spring Conference at the beautiful Ritz-Carlton in Amelia Island, Florida is now one fully "in the books." For the first time in several years, it felt like Covid-19 was truly a thing of the past, with near-record turnout at the event and a fully "in-person" program. While the weather was less than fully cooperative, more than 220 attendees enjoyed mingling at networking receptions, lunches, and dinners, and on breaks from programming. It was great to see everyone again!

The program started with a huge welcome as Alysa Wakin, current ARIAS Chairperson, announced that Larry Schiffer had been newly appointed as Executive Director of the organization. Larry, a familiar face to nearly everyone at ARIAS, is a longstanding member of the organization and the inaugural recipient of the Dick Kennedy Award. Larry appeared to pick up right where one of his predecessors, Bill Yankus, left off – by keeping the program humming along precisely on schedule. Rightfully, he was warmly welcomed by the ARIAS community.

The program this Spring brought top speakers across the industry, a number of new faces, and a centerpiece focused on different pieces of mock arbitration. We kicked things off on Wednesday at mid-day with an excellent Keynote speech by David Altmaier, the former Florida Insurance Commissioner, who only within the last few months left his post atop the Florida insurance market. Altmaier—clearly an accomplished presenter—gave the audience an overview not only of his own path to the office (starting as a high school math teacher, surprisingly) but also of the myriad issues now facing Florida carriers and consumers. Highlighting the difficulties with the property insurance market in particular, Altmaier discussed the recently enacted tort reforms and his expectations for future developments in the industry. If not exactly uplifting, the discussion provided all attendees with a thorough overview of the situation and the circumstances that brought one and all to this point.

From there, we enjoyed an interesting and informative plenary session examining communications between attorneys within corporations, look-

A LeBoeuf reunion: Eileen Sorabella, Patricia Taylor, Patrick Gennardo, Larry Schiffer, Marc Abrams and Lisa Keenan

Mock arbitration with Patricia Taylor as the witness examined by Tina Matic

ing at which may qualify as privileged and what types of situations might be subject to greater doubt. Using an interactive polling platform, Jeff Rubin of Odyssey Re, Teresa Synder of Porter Wright, and Ellen Kennedy of United Educators treated us to a number of hypotheticals and asked audience members to indicate whether they thought the communication constituted either legal or business advice. There were some difficult calls, but the discussion certainly highlighted the differences of opinions one can encounter when it comes to communications by and between those acting in in-house counsel roles.

The afternoon program rounded out with our breakout sessions. We were delighted to bring back the Targeted Networking session put on, once again, by the Member Services Committee. Michael Robles of Crowell & Moring and Leslie Davis of Troutman Pepper, reprised their roles overseeing the organized chaos of approximately 50 arbitrators, lawyers, and company representatives getting to know one another. This breakout session has been one of the most popular across the last several conferences and is a particularly good opportunity for newer members to get to know seasoned veterans, or for those making career changes to get the word out. Well done MSC!

Other breakout sessions were equally as popular, with several featuring new members or existing members presenting at the conference for the first time. Anne Kevlin of Kevlin Mediation, and Vincent Beilman, of Wood, Smith—both first-time ARIAS attendees and new members—provided a bit of counterpoint to David Altmaier's presentation on the current situation in Florida. Vince, in private practice defending carriers and Anne with her in-house counsel experience in Florida across many years, discussed the carrier view of how we got where we are in Florida as well as their views on the impact the new tort reforms may have on Florida consumers, businesses and the courts.

David Coon of Selendy Gay and Amy Cassidy of Nicolaides, also both first-time ARIAS attendees, gave an extremely timely presentation focused on climate change, and the dozens of lawsuits filed by public and private entities seeking compensation from fossil fuel producers for allegedly intensifying greenhouse gas emissions in our atmosphere. While climate change has been an evolving topic for several years now,

Attendees enjoy the evening reception

litigation activity in this area has certainly heated up recently, with insureds making a renewed push for coverage under GL policies. The expectation is that disputes regarding parties' obligations in insurance-linked securities transactions will be heating up as well.

A breakout session focused on recent developments in life, health & long-term care insurance and reinsurance was presented by James Jorden of The Jorden Group, Martha Conlin of Troutman Pepper and first-time attendee and speaker Paige Freeman of Munich Re. Life, Health, and LTC is an area generating a high number of disputes and the interest in understanding developments with regard to these products and programs is at an all-time high for ARIAS membership.

Finally, Bruce Berman of Carlton Fields and Marc Sherman of Alvarez & Marshall presented a very thorough session covering the growing industry segment related to Representations and Warranty Insurance ("RWI"). Leading practitioners in the field, Bruce and Marc covered underwriting and claims resolution practices, and the evolution of damage assessments with respect to these products. One clear take away -- more work for arbitrators is likely to be found in connection with RWI.

Thursday kicked off with an ARI-Talk from Josh Schwartz of Chubb, who, working with the Defense Research Institute ("DRI") Center for Law & Public Policy, is spearheading an appeal to increase diversity in the arbitrator and mediator selection process. In conjunction with DRI, Josh is following a personal passion and has been working with a number of insurers over the last year to establish a baseline for the industry's current level of diversity, and to initiate a mechanism to track diversity in the selection process moving forward. What gets measured, gets done, as the saying goes, so please jump in on this effort if possible!

The highlight of the Spring Conference kicked off immediately thereafter with Neal Moglin explaining the fact pattern and format for a multi-faceted mock arbitration. Neal, a longstanding partner with Foley & Lardner in Chicago, designed an incredibly creative "Monopoly-themed" set of circumstances that permitted us to feature two full panels of arbitrators, who deliberated on different issues associated with the same matter. The first panel included ARIAS Certified Arbitrators Howard Page, Tom Forsyth, and Larry Greengrass, who heard and ruled upon cross-motions to compel argued by Tom Kinney of Troutman Pepper and Andy Meerkins of Foley & Lardner.

The ruling of the first panel on the admissibility of certain documents was subsequently ported over to a second

Marc Abrams and Alexandra Furth

panel sitting in the same arbitration, who was to ultimately rule on the merits. This panel of arbitrators included well-known ARIAS Certified Arbitrators Debra Hall, Peter Gentile, and Andrew Maneval. Party representatives—Patricia Fox of AIG and Jeff Burman of Fortitude Re—were thoroughly examined and cross-examined by Tina Matic of Foley & Lardner and Michele Jacobsen of Stroock. Suffice it to say, both Jeff and Patricia were tough nuts

Martha Conlin, Paige Freeman, Jim Jorden

Peter Rosen, Alysa Wakin, Jim Fitzgerald

to crack, and both brought an amusing and welcome flair for the dramatic to their roles!

On Friday morning, we had two incredibly interesting, if not a bit concerning, plenary panels on current hot topics in the industry. The first panel addressed PFAS, also known as "forever chemicals." Travis Kline, a toxicologist with Geosyntec, was both fascinating and funny as he reviewed the science behind PFAS for an otherwise un-scientific crowd, and explained just why cleaning it all up is and will be a very difficult process if it can be accomplished at all. Travis was followed by Frank DeMento of Transatlantic Re and Joe Sculley of Day Pitney, who reviewed the status of PFAS claims and litigation currently, and discussed some of the critical coverage issues that are quickly coming to the forefront for carriers, and soon thereafter to reinsurers.

The second plenary panel painted a rather dire picture of our emerging liability landscape and the number of "nuclear verdicts" that we are seeing across the country. Steve McCartan and Mark Behrens, both of Shook Hardy, helped to set the scene by highlighting some of the larger verdicts and documenting this troublesome trend over the last ten years. Cindy Koehler, now a full-time insurance consultant and certified arbitrator, talked about some of the reasons for these verdicts and jurors' shifting attitudes and values, while Michael Frantz of Munich Re gave the reinsurer viewpoint, stressing the importance of reinsuring carriers who were well equipped to confront these cases.

The conference ended with the mock arbitration merits panel deliberations, and a debrief session hosted by Neal Moglin on those sessions, and a plenary session on arbitrator disclosures, a continuing source of concern for many involved in the arbitration process. Led by David Ichel of X-Dispute LLC, Sylvia Kaminsky, ARIAS Certified Arbitrator, Elaine Caprio of Caprio Consulting and Cia Moss of Chaffetz Lindsey highlighted some of the tactical challenges around disclosures and used audience polling to get perspectives from counsel, parties, and arbitrators on some of the "gray" areas.

Travis Kline, Frank DeMento, Joe Sculley

The only thing missing from the Spring Conference seemed to be clear skies during cocktail hours most evenings, but that did not keep attendees and their guests from having some enjoyable time on the golf course, the tennis courts, or from drinks by the pool!

The co-chairs all want to thank the presenters at the Spring Conference for all of your time and effort in organizing such informative and entertaining discussions, with a special "shout out" to Neal Moglin and ALL the lawyers, arbitrators, and witnesses who participated in the mock arbitration sessions. These represented a ton of work, creativity, and humor that really put the show over the top this year. We had by far the largest turnout for a Spring Conference in many years, with a lot of new faces, and while much of that owes to the great networking that goes on each year, the substance and quality of the presentations help make these ARIAS events some of the best and most informative in the industry.

And finally, a huge shout out to Angela Ford Smith and Jamil Rawls of DPS for helping to organize the entire event and ensuring that everyone and everything ended up where they were supposed to go. Thank you!

Get the ARIAS 2024 Spring Conference on your calendar now for May 1-3, at the El San Juan Fairmont Hotel in Puerto Rico!

2023 Spring Conference Co-Chairs:

Michael Carolan, *Troutman Pepper*
John DeLascio, *Hinshaw & Culbertson*
Cindy Koehler, *Cindy Koehler Consulting*
Stacey Schwartz, *Swiss Re*

Attendees enjoying the refreshments

Bruce Berman and Mark Sherman

Newly Certified Arbitrators

Ronald Klein

Ronald Klein has over 40 years of insurance and reinsurance experience as a life actuary. He held the title of Head of Life Reinsurance for both AIG in New York and Zurich Insurance Group in Zurich. Before that Klein was the Global Head of Life Pricing for Swiss Re in London.

While focusing on the US life re/insurance arena, Klein has a strong international perspective that spans the life and non-life markets. He has drafted, edited and/or reviewed hundreds of reinsurance treaties, his greatest area of expertise. At Swiss Re, Klein co-developed and holds a patent for the VITA Mortality Bond (US20060026092A1).

Klein co-chairs the highly successful ReFocus Conference and served as a Board Member for the Society of Actuaries. Even though a qualified actuary, Klein considers marketing as his main strength, and he maintains a strong network of high-level insurance executives. Klein is proud to be a newly certified ARIAS Arbitrator.

Howard Page

Prior to setting up his consultancy and arbitration practice in June 2020, Howard Page spent over 25 years managing assumed reinsurance claims. Page was previously the Vice President of Assumed Claims at Resolute Management Services Ltd (formerly Equitas). Prior to this, Howard was Head of Claims at the Excess Insurance Company Ltd.

During his career, Page has managed portfolios stretching from the 1950s through to the early 2000s, totaling billions of dollars in liabilities and involving reinsurance programs for almost every significant US carrier. Howard has wide-ranging experience in US Casualty reinsurance but is also familiar with Property, Aviation, and Marine claims.

Page has extensive experience dealing with complex reinsurance claims and disputes, directly managing more than forty arbitrations and litigations during his career.

Since June 2020 Page has served as arbitrator in nine arbitrations and provided consultancy, audit, and expert services to clients in the US.

Andreas Stahl

Andreas Stahl is a lawyer and Head of Complex Clams at Allianz Reinsurance Munich with global responsibility for assumed and ceded reinsurance claims, arbitrations, and litigation across all lines of business. Before joining Allianz, he was the General Counsel for Hannover Re in London for 12 Years where he also handled direct coverage claims for multinationals and claims from Delegated Authorities. During his 25 years in the industry, he has arbitrated and litigated 100 plus insurance and reinsurance disputes as in-house counsel in all geographical territories with a heavy emphasis on the London Market and the US. Stahl also has extensive experience with all questions concern-

ing Run-Off and MGA business and is the author of the book "English Law of Reinsurance". He has been a Panel Member of ARIAS UK since 2006.

William Wellnitz

William Wellnitz is a retired senior officer of Transamerica Reinsurance which, at the time of his retirement in 2008, was a division of AEGON USA. Bill's early career focused primarily on financial and corporate actuarial concerns of his life and health insurance company employers. The majority of his career was spent in the life reinsurance industry working for Transamerica Reinsurance.

Bill's responsibilities at Transamerica Reinsurance spanned pricing, product development, valuation, planning and forecasting, capital management, and the development and implementation of multiple life reinsurance securitization programs. Bill was actively involved in the reinsurance sections of the Society of Actuaries, Academy of Actuaries, and the ACLI.

In 1996 Bill earned an MBA degree from Duke University. Prior to his retirement, Bill was a Fellow in the Society of Actuaries and a Member of the American Academy of Actuaries. Bill is looking forward to providing arbitration services through his company WR Wellnitz Arbitration Services, L.L.C.

Newly Certified Umpires:

Jonathan Bank

In his more than 40 years of corporate and private practice, Jonathan Bank has been involved in all phases of insurance and reinsurance transactions. He has worked on numerous insurance insolvencies, including the representation of liquidators/provisional liquidators in many of the largest domestic & foreign insurance insolvencies/restructurings. He has been involved in numerous arbitrations/litigations as counsel involving assumption reinsurance, cut-through endorsements, follow-the-fortunes, bad faith, and issues regarding occurrences and transfer of risk.

Bank was the Senior Vice President of both Tawa Associates Ltd, a company formed to acquire, restructure, and manage insurance companies in run-off & its subsidiary, CX Reinsurance Co Ltd. Prior to that, Bank was the Insurance Practice Leader of PricewaterhouseCoopers' US insurance/reinsurance regulatory and restructuring practice. Previously he was the General Counsel of Argonaut Insurance Company.

Bank has spoken at many conferences/seminars, including those sponsored by the RAA, the Guernsey Captive Forum, the IRU, the Excess/Surplus Lines Claims Association, and he organized/chaired/co-chaired the first two Mealey's Insurance Insolvency and Reinsurance Roundtable conferences as well as Mealey's Run Off Conference, Mealey's Corporate Counsel Conference and Mealey's Global Reinsurance Forum. He co-chaired the Educational Session of the 2007 AIRROC/Cavell Commutations Event.

Jonathan testified before the Finance and Insurance Committee of the California Assembly on Reinsurance and has served as an arbitrator and umpire in reinsurance arbitrations. He is a Certified Arbitrator of ARIAS-US and a panel member of the American Arbitration Association.

He is a past member of the Board of Directors of Platinum Underwriters Holdings, Ltd. and Security Capital Assurance, Ltd (now Syncora Holdings, Ltd) and is currently on the Board of PXRE Reinsurance Company.

David Raim

David Raim has been involved with reinsurance matters for over 40 years and has handled hundreds of reinsurance arbitrations as counsel, many of which went to a hearing. He started his legal career as an associate at LeBoeuf, Lamb, Leiby & MacRae and has also worked at Hughes Hubbard and Reed and Chadbourne & Parke LLP. He joined Chadbourne as a partner on January 1, 1989, and founded the reinsurance arbitration practice at the firm. He also has written and spoken extensively on reinsurance and arbitration issues.

Over the years, Raim has handled arbitrations in many different areas including property and casualty, life and health, catastrophe, finite risk, retrocessional issues, rescission, surety, APH, and workers' compensation claims.

In 2015, he became the General Counsel of one of his long-standing clients, Alabama Life Reinsurance Company. Effective January 1, 2019, he retired from Norton Rose Fulbright (with which Chadbourne & Parke had merged). His work as an arbitrator will be done through Raim RE, LLC.

ARIAS Celebrates
THE YEAR OF THE ARBITRATOR
July 13, 2023 at Locke Lord, Chicago

Andrea Kerstein, Locke Lord, Randi Ellias, Aon, Ernesto Palomo, Locke Lord, Marty Cillick, Zurich (background, Steve Schwartz and Ira Belcove)

ARIAS Chair, Alysa Wakin, Odyssey Re, hosts Nick DiGiovanni and Julie Young from Locke Lord LLP

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