2024 Spring Conference

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Breakout Session C

Thursday, May 2, 2024

Voluntary Payment and Reinsurance

Does the Legal Doctrine of Voluntary Payment Have a Place in the Reinsurance Relationship?

May 2, 2024

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What is Voluntary Payment?

"[A] common law doctrine [that] bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law."

Dillon v. U-A Columbia Cablevision,
100 N.Y.2d 525, 526 (2003)

Are there Exceptions to the Voluntary Payment Doctrine?

- Involuntary payments, e.g., under protest or subject to a reservation of rights
- Made without full knowledge of the facts (unless arising from a lack of due diligence)
- Induced by fraud of the payee

Aioi Nissay Dowa Ins. Co. v. ProSight Specialty Mgmt., 2013 WL 3111349 at *11 (S.D.N.Y. 2013);
Dillon v. U-A Columbia Cablevision, 100 N.Y.2d 525, 526 (2003);
U.S. Bank, N.A. v. Cordero, 191 A.D.3d 490, 491 (1st Dep't 2021)

Are there Exceptions to the Voluntary Payment Doctrine?

- Is the bad faith of the payee an exception?
- Bad faith exception recognized by *Metro. Prop. & Cas. Ins. Co. v. GEICO Gen'l. Ins. Co.*, 186 A.D.3d 1513 (2d Dep't 2020). However, Utica relied upon *Merchants Mut. Ins. Grp. v. Travelers Ins. Co.*, 24 A.D.3d 1179 (4th Dep't 2005), to argue there is no bad faith exception.
- Appellate Division, Fourth Department, did not recognize a bad faith exception here.

Facts Giving Rise to the Dispute in Utica Ins. Co. v. Munich Reinsurance

- Munich Re facultatively reinsured umbrella policies that Utica had issued, and which contained certain language regarding payments of expenses:

> With respect to any occurrence not covered by the policies listed in the schedule of underlying insurance … but covered by the terms and conditions of this policy … the company shall:
>
> (a) defend any suit against the insured …

- Utica paid expenses in addition to the umbrella policy limits and then billed Munich Re for its share.

Facts Giving Rise to the Dispute in Utica Ins. Co. v. Munich Reinsurance

- Munich Re paid the billings, including the portion for expenses in addition to the umbrella policy limits.
- Munich Re did not have copies of the terms & conditions of Utica's umbrella policies at the time it made its initial payments pursuant to the facultative certificates.
- Munich Re later obtained copies of the terms & conditions during an audit.

Facts Giving Rise to the Dispute in Utica Ins. Co. v. Munich Reinsurance

- Munich Re requested reimbursement for the erroneous expense payments, and Utica refused.
- In the context of dispositive motions, the trial court and appellate court both determined that the umbrella policies unambiguously did not cover expenses in the circumstances presented.
- Utica and Munich Re both also moved for summary judgment on whether Munich Re was entitled to recover the erroneous expense payments.

Court Decisions on Summary Judgment

- The trial court held Munich Re was collaterally estopped from disputing its payments were voluntary, based on prior litigation between the same parties in Federal Court concerning a different original insured. *Utica Mut. Ins. Co. v. Am. Re-Ins.*, EFCA 2013-002587, NYSCEF Doc. 749, June 28, 2022 (Justice Gilbert, NY Sup. Ct. Oneida Cty).
- The appellate court rejected the trial court's finding of collateral estoppel, but held that Munich Re's payments were voluntary, on the ground that Munich Re failed to act with due diligence prior to making the erroneous payments. The appellate court also rejected the existence of a bad faith exception as applicable here. *Utica v. Am. Re-Ins.*, CA 22-01242, NYSCEF Doc. 29, July 28, 2023 (App. Div. 4th Dep't).
- Munich Re sought, but was denied, reargument before the appellate court.

The Voluntary Payment Doctrine Has No Place in the Reinsurance Relationship – Contradicts Custom

- Duty of utmost good faith

  "uberrimae fidei and its translation, 'of the utmost good faith,' has long been used to characterize the core duty accompanying reinsurance contracts."

  In re Liquidation of Union Indem. Ins. Co., 89 N.Y.2d 94, 106 (1996)

- No duty to inquire

  "The doctrine of utmost good faith imposes no duty of inquiry upon a reinsurer."

  United Fire & Cas. Co. v. Arkwright Mut. Ins. Co.,
  53 F. Supp. 2d 632, 641 (S.D.N.Y. 1999)

- Right of offset

The Voluntary Payment Doctrine Has No Place in the Reinsurance Relationship – Practical Problems

- Facultative Reinsurance
  - Is a reinsurer now obliged to make all payments subject to a reservation of rights?
  - Will reinsurers have to make inquiry or audit prior to honoring reinsurance billings?
  - Could application of the doctrine disrupt continuity of payments?
- Treaty Reinsurance
  - All of the above even more difficult:
    - Policies not yet written
    - Losses under proportional treaties reported by bordereau; no individual loss notifications

If this issue had been decided by a panel of arbitrators, rather than judges, would the outcome have been different?

California Anti-Lapse Litigation

McHugh v. Protective Life Ins. Co., 12 Cal. 5th 213 (2021)

May 2, 2024

Shermineh C. "Shi" Jones
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Key Issue

Whether California's anti-lapse protection statutes apply to all life insurance policies in force as of the date they were enacted — regardless of when those policies had originally been issued — or only to policies that went into effect after their enactment.

The Anti-Lapse Protection Statutes

Section 10113.71 of the California Insurance Code

Grace periods not less than 60 days from premium due date; notice of termination of policy

a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period.

(b)(1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium.

(2) This subdivision shall not apply to nonrenewal.

(3) Notice shall be given to the policy owner and to the designee by first-class United States mail within 30 days after a premium is due and unpaid. However, notices made to assignees pursuant to this section may be done electronically with the consent of the assignee.

(c) For purposes of this section, a life insurance policy includes, but is not limited to, an individual life insurance policy and a group life insurance policy, except where otherwise provided.

The Anti-Lapse Protection Statutes

Section 10113.72 of the California Insurance Code

(a) An individual life insurance policy shall not be issued or delivered in this state until the applicant has been given the right to designate at least one person, in addition to the applicant, to receive notice of lapse or termination of a policy for nonpayment of premium. The insurer shall provide each applicant with a form to make the designation. That form shall provide the opportunity for the applicant to submit the name, address, and telephone number of at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy for nonpayment of premium.

(b) The insurer shall notify the policy owner annually of the right to change the written designation or designate one or more persons. The policy owner may change the designation more often if he or she chooses to do so.

(c) No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a), at the address provided by the policy owner for purposes of receiving notice of lapse or termination. Notice shall be given by first-class United States mail within 30 days after a premium is due and unpaid.

Factual Background

March 2005	William McHugh purchases $1 million 60-year term life insurance policy.
	• Policy provides for 31-day grace period before cancellation for non-payment of premium.
	• All premiums paid through January 2012.
January 1, 2013	California's new anti-lapse statute takes effect.
January 9, 2013	Premium due for that year – McHugh fails to pay.
February 9, 2013	The policy's 31-day grace period expires without McHugh paying the premium due.
February 18, 2013	Insurer extends time for McHugh to pay until March 12, 2013.
March 12, 2013	The period expires without McHugh paying the premium due. Insurer terminates policy for non-payment of premium without complying with the new statutory requirements.

Trial Court Proceedings

Jury Verdict for the Insurer

- Plaintiffs argued that Sections 10113.71 and 10113.72, which came into effect on January 1, 2013, applied to policies issued before this effective date, and that Protective Life failed to comply with the statutes' requirements before it terminated McHugh's policy.
- Protective Life argued the statutes did not apply to policies issued before January 1, 2013, relying, in part on purported agency interpretations of the statutes.
- The trial court rejected Protective Life's argument, concluding that the statutes applied to McHugh's policy.

Jury finds for Protective Life concluding that:

(1) Protective Life and McHugh entered into an insurance contract;

(2) McHugh failed to do all, or substantially all, of what the contract required him to do, but he was excused from doing so;

(3) all conditions required for Protective Life's performance occurred and were not excused;

(4) Protective Life did something the contract prohibited; but

(5) plaintiffs were not harmed by Protective Life's failure.

McHugh's policy is governed by the regulations in effect when it was issued in 2005, and the subsequently enacted sections 101

McHugh v. Protective Life Ins. **(2019) 40 Cal.App.5th 1166, 253 Cal.Rptr.3d 780**

Intermediate Appellate Decision

Trial Court Ruling Affirmed

- Plaintiffs argue that the trial court erred by declining to decide as a matter of law whether Protective Life had complied with Sections 10113.71 and 10113.72, and instead permitting the jury to decide that issue.

- Protective Life requested the Court of Appeal affirm the judgment on the additional ground that Insurance Code sections 10113.71 and 10113.72 do not apply retroactively to McHugh's policy, and the trial court erred as a matter of law when it ruled otherwise in denying the directed verdict motion.

- The Court of Appeal affirmed the judgment on this additional ground.

"McHugh's policy is governed by the regulations in effect when it was issued in 2005, and the subsequently enacted sections 10113.71 and 10113.72 are not incorporated into the policy."

McHugh, *supra*, 40 Cal.App.5th at p. 1177, 253 Cal.Rptr.3d 780.

California Supreme Court Decision

The Anti-Lapse Statutes Apply to All Policy Inforce on the Date of Enactment (Regardless of when they were issued)

- As with any question of statutory construction, our core task here is to determine and give effect to the Legislature's underlying purpose in enacting the statutes at issue.
- The Court considered the following canon of statutory construction : "[A] statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application."
- "Consistent with the presumption's underlying logic, our cases defining 'retroactivity' have principally focused on whether the statutory change in question *significantly* alters settled expectations: by changing the legal consequences of past events, or vitiating substantial rights established by prior law."
- "The key is the nature of the new law's impact — whether it works a substantial change in the contracting parties' rights or obligations."
- Finding: "The grace period and notice obligations added by sections 10113.71 and 10113.72 do not impact a life insurer's liability for past, preenactment defaults. Nothing in these sections compels insurers to reinstate any policy cancelled preenactment less than 60 days after a missed premium payment. Nor do the changes otherwise impinge on a contracting party's substantial rights or unfairly upset the bargain memorialized in the insurance policy, for example, by requiring an insurer to provide substantially expanded coverage without also giving it an opportunity to raise premiums. "

Covid-19: The Foxton Decision

UnipolRe v. Covéa/Markel v. Gen Re

[2024] EWHC 253 (Comm)

May 2, 2024

Daryn Rush, O'Melveny

Key Issues

[W]hether Covid-19 losses . . . arose out of and were directly occasioned by one catastrophe on the proper construction of the Reinsurances.

Covéa and Markel Tribunals: **Yes**

Key Issues

[W]hether the effect of the respective "Hours Clauses"[], which confined the right to indemnity to the "individual losses" within a set period, had the effect that the reinsurances only responded to payments in respect of the closure of the insured's premises during the stipulated period.

Covéa Tribunal: **No**
Markel Tribunal: **Yes**

Key Facts

- “Non-damage BI cover” for nurseries and childcare facilities
- March 2, 2020 – first recorded Covid-19 death in UK
- March 5, 2020 – Covid-19 made a “notifiable disease”
- March 18, 2020 – UK gov’t closure order (eff. March 20, 2020)
- June 1, 2020 – phased re-opening began
- June 23, 2020 – all restrictions lifted eff. July 4, 2020

Loss Occurrence/Event

all individual losses arising out of and directly occasioned by one catastrophe

Covéa's Case

"[O]utbreak of cases of Covid-19 in the UK in the period immediately preceding the closure of schools and nurseries on 20 March 2020 was a catastrophe"

Alternatively (post-*Stonegate*)—gov't orders or decisions constituted one catastrophe

Markel's Case

Initially—"all of the losses arise from the occurrence of cases of Covid-19 within the United Kingdom, or from any one such case"

Amended (post-*Stonegate*)—"all of the losses arise from the UK Governmen's decision on 18 March 2020 that all nurseries [] most close with effect from [] 20 March 2020"

Covéa Award

“[T]he outbreak of Covid-19 in the United Kingdom, reflected in an exponential increase in the number of infections during a period up to and including 18 March 2020, was a ‘catastrophe’ within the meaning of Condition 2(10).”

Markel Award

UK Government's March 18, 2020 Order "may be described as a catastrophe, both in general and for the purposes of this treaty"

"the order cannot be viewed separately from the pandemic which demanded (however controversial) its response"

Construction of Aggregation Clauses

Aggregating language “take[s] its meaning from the surrounding terms of the policy including the object being sought to be achieved”

“Aggregation clauses are to be construed ‘in a balanced fashion without a predisposition towards a narrow or a broad interpretation.’”

Wordings Are "Always Speaking"

"[M]arket reinsurance wordings which are used for lengthy periods against a background of developments in the relevant book of business of the reinsured are, in a sense, 'always speaking' in the manner of statutes."

Catastrophe ≠ Sudden or Violent

"I reject the [reinsurers'] argument that a catastrophe must necessarily be 'sudden' in onset, or short in duration, or that it must be 'violent.'"

“Catastrophe” - Dictionary Definitions

Definitions include concepts other than “sudden event”:

- “significant break with the position up to that point”
- “something which is seriously adverse in its nature or effects”
- “sudden or widespread or noteworthy”

Unities Test

"In ordinary speech an event is something which happens at a particular time, at a particular place, in a particular way. . . . A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word 'originating' was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate."

Axa v. Field [1996] 1 WLR 1026

- cause
- locality
- time
- intention

Unities Test

"As Sir Jeremy Cooke observed in Simmonds v Gammell [2016] EWHC 2515 (Comm), the 'unities' are merely an aid to determining whether a series of losses involve such a degree of unity as to satisfy the contractual aggregation requirement."

“Commercial and Contractual Context”

i. “must be something capable of directly causing individual losses”

ii. “must be something which, in the context of the terms of the Reinsurances . . . can fairly be regarded as a coherent, particular and readily identifiable happening, with an existence, identity and ‘catastrophic character’ which arise from more than the mere fact that it causes losses”

iii. “it ought to be possible, in a broad sense, to identify when the catastrophe comes into existence and ceases to be, even if” subject to debate

iv. “will involve an adverse change on a significant scale from that which preceded it”

Justice Foxton's Ruling (Covéa)

i. Covid-19 outbreak directly occasioned the losses

ii. outbreak "can fairly be regarded as a coherent and discrete happening, with an existence, identity and 'catastrophic character'"

iii. outbreak came into existence in relatively short period

iv. wholesale disruption of life qualifies an adverse change on significant scale

Justice Foxton's Ruling (Markel)

i. March 18, 2020 closure order directly occasioned the losses

ii. closure order and emergency of devastating pandemic can fairly be regarded as a coherent and discrete happening

iii. closure order occurred at specific time

iv. closure order and emergency resulted in "subversion of the ordinary and natural course of things" and the "grave infringement of personal liberty"


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