

Reinsurance

REDUX

The redux on developments in the law of reinsurance

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Reinsurance Redux Newsletter

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Indiana Federal Court Allows Production of Reinsurance Communications but not Reinsurance Agreements in Coverage Dispute

The Southern District of Indiana granted an insured's motion to compel discovery of certain policy-specific reinsurance information and communication pertaining to policies at issue because such information can lead to the discovery of admissible evidence about the insurer's own definition of claims under its insurance agreements, but denied production of the reinsurance agreement itself. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Company, et al.*, No. 11-cv-15, 2011 U.S. Dist. LEXIS 122149 (S.D. Ind. Oct. 21, 2011). **PAGE 2**

New Jersey Federal Court Holds Reinsurer is Limited to Relief Sought in Complaint: Request for Appointment of Umpire

The District of New Jersey held that because the action was commenced specifically to appoint an umpire in an arbitration, and reinsurer did not seek relief relating to the ancillary arbitrations in its pleadings, the court would not grant relief related to ancillary proceedings as part of the instant action. *Everest Reinsurance Company v. Century Indemnity Company*, No. 11-cv-02789, 2011 U.S. Dist. LEXIS 125312 (D.N.J. Oct. 31, 2011). **PAGE 2**

Southern District of New York Approves Umpire Questionnaires but Refuses to Disqualify Arbitrators and Consolidate Proceedings in Reinsurance Dispute

In granting in part and denying in part parties' cross-petitions for relief, the Southern District of New York held: (1) an arbitration panel is the appropriate entity to determine consolidation of related arbitration proceedings; (2) umpire candidates were required to submit conflict and background questionnaires because the parties had orally agreed to such a measure earlier in the dispute; (3) to deny a reinsurer its right to the party-appointed arbitrator of its choice would deprive it of a basic expectation in entering into the arbitration agreement; and (4) to the extent a party is calling into question the impartiality of an arbitrator, such an attack is precluded until after an arbitration award has been issued. *IRB-Brasil Resseguros S.A. v. Nat'l Indemnity Co.*, No. 11-CV-1965, 2011 U.S. Dist. LEXIS 136640 (S.D.N.Y. Nov. 29, 2011). **PAGE 3**

Indiana federal court allows production of reinsurance communications but not reinsurance agreements in coverage dispute

National Union Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Company, et al., No. 11-cv-15, 2011 U.S. Dist. LEXIS 122149 (S.D. Ind. Oct. 21, 2011).

Plaintiff/Counterclaim Defendant National Union Fire Insurance Company of Pittsburgh, Pa., and Additional Counterclaim Defendant Lexington Insurance Company (collectively, "National Union"), sold to Defendants/Counterclaimants Mead Johnson & Company and Mead Johnson Nutrition Company (collectively, "Mead Johnson"), insurance policies providing, among other things, coverage for advertising-related injury. The underlying claims at issue in the case related to whether, under certain insurance policies, Mead Johnson was entitled to receive reimbursement for defense and indemnity costs incurred with respect to litigation brought against it by a competitor and consumers for allegedly disparaging advertisements.

On Mead Johnson's motion to compel production of, among other things, certain communications, information and reinsurance agreements insurer had with its reinsurer, and on National Union's opposition and motion for protective order, the court held that the reinsurance agreement itself is not likely admissible and discoverable. Certain policy-specific information and communications found within the reinsurance files, however, could lead to admissible evidence

about the insurer's own definition of claims which fall under its insurance agreements, and are therefore discoverable.

The court also ordered production of certain of the insurers' manuals or marketing materials applicable to the types of coverage and claims at issue, information concerning National Union's hiring of a certain law firm and information reflecting payment of advertising coverage for claims brought by an insured's consumer. The court sustained National Union's objection to producing information regarding relevant reserves.

REDUX IN CONTEXT

- Certain policy-specific information and communications found within the reinsurance files relating to claims have been held to be discoverable.
- Whether, in coverage litigation, an insurer's reinsurance agreement will be discoverable will depend on the facts and circumstances of the case.

New Jersey federal court holds reinsurer is limited to relief sought in complaint: request for appointment of umpire

Everest Reinsurance Company v. Century Indemnity Company, No. 11-cv-02789, 2011 U.S. Dist. LEXIS 125312 (D.N.J. Oct. 31, 2011).

Everest Reinsurance Company ("Everest") and Century Indemnity Company ("Century") entered into a Reinsurance Treaty in 1978 through which Everest agreed to reinsure certain liabilities insured by Century. The parties each agreed to submit disputes arising under the Treaty to arbitration before a panel consisting of two party-appointed arbitrators and a neutral umpire.

The underlying dispute arises from Century's reinsurance claims against Everest for payments relating to certain asbestos claims (the

"Formosa Arbitration"). Following Century's demand for arbitration, and pursuant to the terms of the Treaty, the parties appointed their respective arbitrators. They were unable, however, to agree upon an umpire. Thereafter, Everest commenced an action in the district court seeking appointment of an umpire or, alternatively, to compel Century to participate in a neutral umpire selection process.

Thereafter, as part of a global agreement involving this and two other ancillary pending arbitrations, the parties agreed to select an umpire

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through the ARIAS selection process. Using this process, the parties selected an umpire for the Formosa Arbitration. The parties also disagreed as to the appointment of an umpire in a fourth arbitration. Everest became concerned that Century was seeking to consolidate one of the ancillary arbitrations with the fourth arbitration which already had a panel selected and was not part of the global agreement. Everest, therefore, moved to enforce the global agreement.

The court held that the matter before it was specific to the appointment of an umpire in the Formosa Arbitration. Because Everest did not seek relief relating to the ancillary arbitration proceedings in its pleadings, the court would not grant such relief now. The court also

denied as moot the motion insofar as Everest sought relief pertaining to the Formosa Arbitration because when Century agreed to participate in the ARIAS selection process, Everest obtained by settlement the relief it sought through judicial intervention.

REDUX IN CONTEXT

- In performing its gatekeeping function, courts will not grant relief not specifically plead in initial pleadings;
- Courts will not permit parties to an arbitration agreement to circumvent the terms of such agreement through judicial intervention.

Southern District of New York approves umpire questionnaires but refuses to disqualify arbitrators and consolidate proceedings in reinsurance dispute

IRB-Brasil Resseguros S.A. v. Nat'l Indemnity Co., No. 11-CV-1965, 2011 U.S. Dist. LEXIS 136640 (S.D.N.Y. Nov. 29, 2011).

This is an update from the November *Redux*. As reported, this dispute concerns three arbitration proceedings National Indemnity Company ("NIC") instituted against IRB-Brasil Resseguros S.A. ("IRB") regarding reinsurance policies NIC issued to IRB: Arbitration 1, in London, and Arbitrations 2 and 3, in New York. In Arbitration 1, the arbitrators, whom the parties selected pursuant to the reinsurance agreement central to that dispute, quickly determined that they lacked jurisdiction and dismissed the arbitration. NIC then commenced Arbitration 3, which involved the same policy at issue in Arbitration 1, in New York. Meanwhile, in Arbitration 2, IRB selected James White as its party-appointed arbitrator and NIC appointed James Dowd as its arbitrator; although the parties nominated neutrals, final selection was postponed pending settlement negotiations. Ultimately, Arbitration 2 was not settled and no umpire was selected.

Shortly thereafter, IRB appointed James White as its arbitrator in Arbitration 3; NIC followed by selecting Jonathan Rosen – who was one of the arbitrators IRB nominated as an umpire in Arbitration 2 – as its arbitrator. IRB objected to the Rosen selection on this basis, and filed a petition in the Southern District of New York seeking to

disqualify Rosen and to consolidate Arbitrations 2 and 3. NIC cross-petitioned, seeking a court-appointed umpire for Arbitration 3. By Memorandum and Order, the court denied the petitions on October 5, 2011.

Shortly after the court's Order, the parties became involved in another dispute involving Arbitration 2. Two of the four umpire candidates (one for each party) were effectively stricken by the parties. Thus, William Trutt (IRB's nominee) and Dan Schmidt (NIC's nominee) remained. Over NIC's objection and its request that Trutt complete a background and conflict questionnaire, IRB requested the two party-selected arbitrators (Dowd and White) draw lots to select the umpire. Two days later, with the umpire dispute still pending, at NIC's request, Dowd resigned as NIC's arbitrator. Minutes later, NIC nominated Rosen in Dowd's place, thereby making Rosen NIC's party-appointed arbitrator in Arbitrations 2 and 3.

IRB petitioned the court to (1) prohibit NIC from changing its Arbitration 2 appointee to Rosen, or alternatively, to permit IRB to select NIC's arbitrator; (2) prohibit NIC from placing conditions on the drawing of lots in Arbitration 2 and to order the drawing of lots in

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Arbitration 2; and (3) to stay Arbitration 3 pending a decision in the Arbitration 2 consolidation. NIC cross-petitioned to disqualify Trutt as an umpire candidate in Arbitration 2, or in the alternative, to require that Trutt complete an umpire questionnaire.

The court granted IRB's petition to stay Arbitration 3, reasoning that the Arbitration 2 panel is the appropriate entity to decide on consolidation of Arbitrations 2 and 3. The court also granted NIC's cross-petition to require the Arbitration 2 umpire candidates to submit questionnaires because the parties had orally agreed to such a measure earlier on in the dispute. The court, however, denied the parties' remaining requests, reasoning that to deny NIC its right to the party-appointed arbitrator of its choice – in this case, Rosen – would deprive it of a basic expectation in entering into the arbitration agreement. With respect to NIC's request to disqualify Trutt, the court held that to the extent it is calling into question the impartiality of an

arbitrator, such an attack is precluded until after an arbitration award has been issued.

REDUX IN CONTEXT:

- Procedural matters, such as whether to consolidate two arbitrations, are matters best left to the arbitrators, not courts, to decide;
- To deny a party its right to appoint an arbitrator of its choice would deprive it of a basic expectation in entering into the arbitration agreement; and
- An attack on the partiality of an arbitrator is typically precluded until after an arbitration award has been issued.

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