Saul Ewing LLP

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Reinsurance REDUX

The redux on developments in the law of reinsurance

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Southern District of New York Denies Reinsurer's Motion to Stay Disqualification of Counsel in Pending Arbitration Where Counsel Reviewed 182 Pages of Private Panel Communications

In a case presenting *sui generis* facts about counsel reviewing private e-mail correspondence between arbitration panel members, the Southern District of New York refused to grant a reinsurer's motion to stay disqualification of its selected counsel in the pending arbitration despite arguments that the decision would result in severe hardship. *Northwestern Nat'l Ins. v. INSCO, Ltd.*, No. 11 Civ. 1124 (SAS), 2011 WL 6074205 (S.D.N.Y. Dec. 6, 2011). **PAGE 2**

Illinois Federal Court Dismisses Party's Amended Complaint Following Seventh Circuit Ruling on Related Arbitration Issues

Following the Seventh Circuit's decision on related issues, the Northern District of Illinois granted an insurer's motion to dismiss a reinsurer's amended complaint finding claims sounding in fraud and unjust enrichment were aimed at securing the arbitration decision itself, thus, by extension, the sole viable claim remaining was a Rule 60 "reconsideration" claim, but such a claim was untimely. *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, No. 09-cv-3959 (N.D. Ill. Nov. 15, 2011). **PAGE 3**

2011 Redux Year in Review

The *Reinsurance Redux* debuted in March 2011 as a monthly publication of the Insurance Practice. Take a look back at the top ten categories of cases featured in the 2011 issues of the *Reinsurance Redux*. **PAGE 4**

Southern District of New York Denies Reinsurer's Motion to Stay Disqualification of Counsel in Pending Arbitration Where Counsel Reviewed 182 Pages of Private Panel Communications

Northwestern National Insurance Co. v. INSCO, Ltd., NO. 11 Civ. 1124, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011).

The October 2011 issue of *The Reinsurance Redux* [http://www.saul.com/media/site_files/2643_pdf_3069.pdf] featured the Southern District of New York's decision to grant Northwestern National Insurance Company's ("NNIC") motion to disqualify Insco, Ltd.'s ("Insco") counsel in a pending arbitration stemming from disputed liabilities under a reinsurance agreement between the two parties. *Northwestern National Insurance Co. v. INSCO, Ltd.*, NO. 11 Civ. 1124, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011). The agreement at issue included an arbitration provision requiring each party to select an arbitrator. A third impartial umpire was also selected by lottery. Citing concern that certain e-mail correspondence between panel members revealed bias and partiality by NNIC's party appointed arbitrator, Insco's party appointed arbitrator shared with Insco's counsel 182 pages of intrapanel e-mail correspondence. Insco's attorneys reviewed the e-mails and on February 15, 2011 demanded immediate resignation of the entire panel. Insco's party appointed arbitrator was the only arbitrator that resigned. Insco appointed a replacement arbitrator. On June 20, 2011, the panel issued an Interim Order noting that the disclosure of intra-panel communications was "highly inappropriate" but it would nevertheless decide the case on the merits.

On July 21, 2011, NNIC moved the Southern District of New York to disqualify Insco's counsel from further representing Insco in the underlying arbitration proceedings. NNIC's motion was premised on Insco's counsel's actions in obtaining and reviewing the intrapanel communications, and for their failure, for months, to disclose fully the documentation that they had received from their party appointed arbitrator. On October 3, 2011, the court held that (1) the question of attorney disqualification was properly decided by the court, not by the Panel, and (2) Insco's attorneys' actions warranted disqualification (the "Opinion"). On October 31, Insco moved the court for a stay of the Opinion pending appeal to the Second Circuit U.S. Court of Appeals. Insco claimed that the Opinion was likely to be reversed and that attorney disqualification was an unduly burdensome remedy that would result in irreparable injury.

In addressing the motion to stay, the court first noted "it is beyond question that a district court has the power to grant a stay of its own order pending the determination of an appeal therefrom." The court then applied the circuit's four factor test in determining whether to grant the stay: (1) whether the stay applicant made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties; and (4) where the public interest lies. The burden is on the party seeking the stay. The court found that the balance of the factors did not support a stay.

The majority of the decision examines the first prong of the test, which the court determined weighed against the grant of a stay. The court dismissed Insco's contention that a lack of subject matter jurisdiction weighed in favor of the reinsurer succeeding on the merits of its appeal. While the Federal Arbitration Act alone would not confer jurisdiction, the court's assertion of diversity jurisdiction to consider a motion to disqualify counsel in an arbitration was found to be proper under 28 U.S.C. § 1332 (a)(2). Insco also argued that it was likely to succeed on the merits due to the "new and unprecedented involvement in a private arbitration by a federal district court." The court rejected Insco's characterization of the Opinion as raising a host of novel legal issues regarding the permissible scope of ex parte communications in arbitrations and the legal and ethical obligations of lawyers and arbitrators. The court interpreted Insco's motion as simply questioning the judiciary's inherent power to disqualify an attorney in a pending arbitration. Thus, on the facts of the case, it was within the court's discretion to disqualify counsel.

Turning to the second prong, the court acknowledged that Insco would be irreparably harmed by being forced to proceed in the arbitration without the counsel of its choice. Nevertheless, if Insco's counsel were permitted to continue representing the reinsurer, the court's sanction would be effectively nullified. Such a result – illusory relief – weighed against the granting of a stay in this instance.

As for the third and fourth prongs, the court found that they both weighed against granting Insco's request for a stay. NNIC would be prejudiced if Insco's counsel were permitted to continue the representation. If Insco's motion were granted, NNIC would be forced to make a lose-lose decision to either stay the arbitration that it had initiated or participate in a proceeding tainted by the very counsel it sought to disqualify. Finally, the public interest factors also did not support the

grant of a stay. The court noted that the public interest factor must address the consequences of the court's order beyond the hardship that the order may impose on the parties before the court. The court found that Insco's motion erroneously focused on the alleged negative precedent that would flow from the Opinion, rather than addressing the public consequences. In other words, Insco's posited public consequences – that the Opinion will limit other parties' abilities in the future to be represented by counsel of their choice and the chilling effect on future arbitrations – were more properly addressed at the first prong of the stay test. In any event, the court found that the Opinion's holding was much narrower than Insco contended. The Opinion was limited to the unique factual scenario where a party obtains panel emails that the panel asserted were for the use of panel members only.

REDUX IN CONTEXT:

- Issues of attorney disqualification are substantive matters for the courts, not arbitration panels, to decide, notwithstanding a pending arbitration proceeding.
- While there is always a strong public interest in quickly and finally disposing of arbitration proceedings, where a matter presents such egregiously unique facts as the ones at bar and a risk of trial taint is evident, a district court will assert its inherent power to order an attorney disqualification.

Illinois Federal Court Dismisses Party's Amended Complaint Following Seventh Circuit Ruling on Related Arbitration Issues

Trustmark Ins. Co. v. John Hancock Life Ins. Co., No. 09-cv-3959 (N.D. Ill. Nov. 15, 2011).

Following the Seventh Circuit's decision in *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869 (7th Cir. 2011), which affirmed the district court's finding that John Hancock's selected arbitrator was not disinterested, and a decision the U.S. Supreme Court subsequently declined to hear, Trustmark filed a second amended complaint against John Hancock alleging fraud, unjust enrichment, a claim for an "independent action" under Fed. R. Civ. P. Rule 60 and a request to vacate a June 2004 order confirming an arbitration award. Trustmark's principal allegations were that John Hancock presented a false case to the arbitration panel in order to secure a final award requiring Trustmark to pay claims on retrocessional personal accident business that it denies reinsuring in the first place.

In granting John Hancock's motion to dismiss, the court held that the claims sounding in fraud and unjust enrichment must be dismissed at the outset because those claims were aimed at securing the arbitration decision and, by extension, the judicial certification order. Thus, according to the court, the "sole viable claim" was the Rule 60 "reconsideration" claim, but the court held that the claim was untimely under Rule 60(b)(3) because it was brought more than a year after the order in issue was entered in 2004. Finally, the court opined that even assuming Rule 60(d)(1) relief was available, it would be improper in this case because independent actions under this rule are to be entertained only to prevent a "grave miscarriage of justice," and since the arbitration panel can properly hear these issues, this standard was not met.

REDUX IN CONTEXT

- Arbitrators are entitled to decide for themselves procedural questions that arise on the way to a final disposition.

2011 *Redux* Year in Review

The *Reinsurance Redux* debuted in March 2011 as a monthly publication of the Insurance Practice. Below is a summary of the top ten categories of cases featured in the 2011 issues of the *Reinsurance Redux*.

1. REINSURANCE CONTRACT INTERPRETATION

- Judgment granted for reinsurer because no cut-through provision in reinsurance agreement

  Canal Insurance Co. v. Montello, Inc., No. 10-CV-411-JHP-TLW, 2011 WL 4452465 (N.D. Okla. Sept. 26, 2011).

- Federal appeals court affirms finding that reinsurance agreement included follow the settlements provision

  Employers Reinsurance Co. v. Massachusetts Mutual Life Ins., No. 10-3099, 2011 WL 3903244 (8th Cir. Sept. 7, 2011).

- Reinsurer cannot bring unjust enrichment claim against reinsured where there is valid contract between parties

  Lexington Insurance Co. v. Tokio Marine & Nichido Fire Insurance Co. Ltd., No. 11 Civ. 391 (DAB), 2011 WL 3962641 (S.D.N.Y. Sept. 7, 2011).

- Notice provision condition precedent to coverage but summary judgment denied because lack of notice did not prejudice reinsurer

  Pac. Emp'rs Ins. Co. v. Global Reinsurance Corp. of Am., Civil Action No. 09-6055, 2011 WL 2003359 (E.D. Pa. May 23, 2011).

- Reinsurer dismissed for lack of personal jurisdiction where only contact with state was cedent's relocation to state twenty years after reinsurance contract entered

  Pac. Emp'rs Ins. Co. v. AXA Belg. S.A., No. 09-5211, 2011 LEXIS 46481 (E.D. Pa. Apr. 27, 2011).

- Reinsurer not prejudiced by settlement of lawsuit between insured and third-party tortfeasor because settlement consistent with policy exclusion & subrogation clause

  Acstar Ins. Co. v. Clean Harbors, Inc., No. 3:09cv1261 (SRU), 2011 WL 830553 (D. Conn. Mar. 2, 2011).

- "Loss run" reports by reinsurer to retrocessionaire may constitute adequate notice of claims

  Lexington Ins. Co. v. United Health Grp., Civil Action No. 09cv10504-NG, 2011 WL 573609 (D. Mass. Feb. 15, 2011).

- No personal jurisdiction over Finnish reinsurer that had a reinsurance agreement with a Massachusetts insurer that was not its agent

  Neles-Jamesbury, Inc. v. Pohjola Ins. Co., Ltd., No. 4:10-cv-40055-FDS (D. Mass. Dec. 7, 2010).

2. REINSURER SOLVENCY

- Delaware Chancery Court holds Delaware law permits enforcement of arbitration clause in reinsurance agreement against receiver

  In the Matter of the Rehabilitation of Manhattan Re-Insurance Co., 2011 WL 4553482 (Del. Ch. Oct. 4, 2011).

- Liquidator's objection to reinsurer's request for setoff of obligations against insurer in liquidation denied

  Republic Western Insurance Co. v. Reliance Insurance Co., In Liquidation, No. 12 REL 2009 (Pa. Cmwlth. Ct. June 29, 2011).

- Commonwealth Court of Pennsylvania affirms liquidator's determination that captive insurer's claim is that of reinsurance rather than insurance

  Michael F. Consedine, Acting Insurance Commissioner of the Commonwealth of Pennsylvania v. Reliance Insurance Co., No. 269 MD 2001 (Pa. Cmwlth. Ct. Apr. 28, 2011).

- Rhode Island Voluntary Restructuring of Solvent Insurers Act Held Constitutional

  In re GTE Reinsurance Co. Ltd., No. PB 10-3777, 2011 WL 1618317 (R.I. Super. Ct. Apr. 25, 2011).

3. REINSURER CONDUCT

- Reinsurance intermediary required to remit $4 million in commissions after intermediary was terminated.

  Royal Palm Ins. Co. v. Guy Carpenter & Co., Inc., No. 10-2814-cv, 2011 WL 2112099 (2d Cir. May 27, 2011).

- $11 Million awarded for reinsurer's bad faith conduct

  Seven Provinces. Trenwick Am. Reinsurance Corp. v. IRC, Inc., No. 07cv12160-NG, 2011 LEXIS 54857 (D. Mass. May 23, 2011).

- Retrocessionaire acted in "extreme bad faith" in denying existence of reinsurance agreement when ample evidence existed and double damages awarded

  Trenwick America Reins. Corp. v. IRC, Inc. et al., Civ. Action No. 07cv12160-NG, 2011 WL 570016 (D. Mass. Feb. 16, 2011).

4. ARBITRATOR/COUNSEL DISQUALIFICATION

- Umpire questionnaires approved 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).

- Arbitrator chosen in accordance with procedures could not be disqualified

  IRB-Brasil Resseguros S.A. v. Nat'l Indemnity Co., No. 11-CV-1965 (S.D.N.Y. Oct. 5, 2011).

- Counsel for reinsurer disqualified in pending arbitration for obtaining arbitration panel communications

  Northwestern National Insurance Co. v. INSCO, Ltd., No. 11 Civ. 1124, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011).

- Court declined to appoint umpire and ordered umpire selection process continue in accordance with parties' agreement

  Liberty Mutual Insurance Company v. Nationwide Mutual Insurance Company, et al., No. 11-cv-10651 (D. Mass. July 6, 2011).

- Disqualification of counsel inappropriate even though counsel for respondent previously represented petitioner

  Emp'rs Ins. Co. of Wausau v. Munich Reinsurance Am., Inc., No. 10 Civ. 3558 (PKC), 2011 LEXIS 52048 (S.D.N.Y. May 13, 2011).

- Cedent's petition to appoint replacement arbitrator because defendant reinsurer had already selected replacement denied

  Nw. Nat'l Ins. Co. v. Insco, Ltd., No. 11 Civ. 1124 (SAS), 2011 WL 1833303 (S.D.N.Y. May 12, 2011).

- Arbitrator's service on subsequent panel did not amount to a disqualifying "interest"

  Trustmark Insurance Co. v. John Hancock Life Insurance Co., No. 09-3682 (7th Cir. Jan. 31, 2011).

- Arbitrator's temporary unavailability not grounds to start arbitration anew

  Insurance Co. of North America v. Public Service Mutual Insurance Co., 609 F.3d 122 (2d Cir. 2010).

5. ARBITRATION COMPELLED

- United States Supreme Court holds court must compel arbitration of arbitrable claims even if doing so leads to piecemeal litigation

  KPMG LLP v. Cocchi, 2011 WL 5299457 (U.S. Nov. 7, 2011).

- Federal jurisdiction exists over "Freestanding" FAA petition if underlying dispute arises out of federal law

  Cmty State Bank v. Strong, No. 06-11582, 2011 WL 3715769 (11th Cir. Aug. 25, 2011).

- Supreme Court holds Federal Arbitration Act preempts conflicting state laws

  AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 WL 1561956 (U.S. Apr. 27, 2011).

6. DISCOVERY OF REINSURANCE INFORMATION

- 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).

- Insureds' Motion to Compel Discovery of Reinsurance Information Between Insurer & Reinsured Denied

  Louisiana Generating, L.L.C. v. Illinois Union Ins. Co., 10–516–RET–SCR, slip op., 2011 WL 3475526 (M.D. La. Aug. 9, 2011).

7. ROLE OF COURT VS. ARBITRATOR

- New Jersey federal court holds reinsurer is limited to relief sought in complaint: request for appointment of umpire and not relief relating to ancillary arbitrations

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

- Question of whether an "Act as One Party" provision precluded an arbitration from proceeding without one of the parties to a reinsurance agreement is for arbitration panel and not court to decide

  Munich Reinsurance Am., Inc v. Nat'l Cas. Co., No. 10 civ. 5782 (SHS), 2011 LEXIS 44759 (S.D.N.Y. Apr. 26, 2011).

- Court lacked authority to terminate proceedings because arbitrator "findings" not same as "award"

  Fastuca v. L.W. Molnar & Assocs., et al., No. 7 WAP 2009, 2001 Pa. LEXIS 97 (Pa. Jan. 18, 2011).

8. ARBITRATION AWARD VACATED

- Arbitration award vacated because arbitrator failed to disclose "social relationship" with counsel for litigant

  Karlseng v. Cooke, No. 05-09-01002-CV, 2011 WL 2536504 (Tex. Ct. App. June 28, 2011).

- Arbitration award vacated where prevailing party intentionally included costs and fees from a previous settlement that were not supposed to be included

  Va. Sur. Co., Inc. v. Certain Underwriters at Lloyd's London, No. 1-10-1753, 2011 WL 2586357 (Ill. App. Ct. Apr. 20, 2011).

- Arbitrators exceeded their authority in awarding a remedy not requested by either party

  PMA Capital Insurance Co. v. Platinum Underwriters Bermuda, Ltd., 2010 WL 4409655 (3d Cir. Nov. 8, 2010).

9. ATTORNEYS' FEES GRANTED

- Attorney's fees arbitration award upheld where both parties "acquiesced" to such fees

  Bear Stearns v. International Capital & Management Co., 650125/11 (N.Y. Sup. Ct., June 27, 2011).

- Arbitrator's award of attorneys' fees "sanction" per reinsurance contract upheld

  Gen. Sec. Nat'l Ins. Co. v. Aequicap Program Adm'rs., No. 10 CV 8682 (NRB), 2011 LEXIS 49518 (S.D.N.Y. Apr. 29, 2011).

10. ARBITRATION AWARD AFFIRMED

- District court confirms arbitration award despite panel's refusal to hear certain evidence

  James B. Fellus v. Sterne, Agee & Leach, Inc., No. 10-CV-8881(SAS) (S.D.N.Y. 2011).

- Arbitration award reinstated because arbitrators sufficiently explained basis for ruling and thus provided reasoned award

  Cat Charter LLC v. Schurtenberger, No. 10-11674, 2011 WL 2693967 (11th Cir. July 13, 2011).

- Arbitration panel not required to issue a "reasoned" award

  R&Q Reinsurance Co. v. American Motorist Insurance. Co. & Lumbermens Mutual Casualty Co., 2010 WL 4052178 (N.D. Ill. Oct. 14, 2010).

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